2019 IL App (1st) 160029-U

No. 1-16-0029

Order filed June 20, 2019

Fourth Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County
	)	
v.	)	No. 90 CR 17373
	)	
SIDNEY SIMS,	)	Honorable
	)	Kenneth J. Wadas,
Defendant-Appellant.	)	Judge presiding.

JUSTICE BURKE delivered the judgment of the court.
Presiding Justice McBride concurred in the judgment.
Justice Gordon concurred in part and dissented in part.

ORDER

¶ 1 *Held*: Although the majority of defendant's claims for postconviction relief failed to demonstrate a substantial showing of constitutional violations and thus were properly dismissed by the circuit court, his claim that his trial counsel refused to allow him to have a bench trial despite his express wishes demonstrated a substantial showing of a constitutional violation such that we must reverse the court's dismissal and remand the matter for an evidentiary hearing on that claim.

¶ 2 Following a jury trial, defendant Sidney Sims was convicted of first-degree murder in the shooting death of Christopher Neuman and sentenced to 50 years' imprisonment. After exhausting his direct appeal rights, defendant filed a postconviction petition, alleging several

constitutional deprivations. After his petition was advanced to the second stage of postconviction proceedings, the State filed a motion to dismiss the petition. The circuit court granted the motion, and defendant appealed.

¶ 3 On appeal, defendant contends that he made a substantial showing that: (1) he was actually innocent where he presented newly discovered evidence demonstrating that someone else shot and killed Neuman following a dispute over drug territory; (2) although his trial counsel presented one alibi witness at trial, counsel was ineffective for failing to investigate and call additional alibi witnesses; (3) his trial counsel was ineffective for refusing to allow him to testify at trial despite his wishes; (4) his trial counsel was ineffective for refusing to allow him to have a bench trial despite his wishes; and (5) the State violated his right to due process when it knowingly used, and failed to correct, a witness's false testimony.

¶ 4 Although we find that defendant failed to make a substantial showing on the majority of his claims, we do find he made a substantial showing that his trial counsel was ineffective for refusing to allow him to have a bench trial despite his express wishes. Consequently, while we affirm the circuit court's dismissal of most of defendant's claims, we reverse the court's dismissal on this claim and remand for an evidentiary hearing on the claim.

¶ 5 I. BACKGROUND

¶ 6 A. Trial

¶ 7 Defendant had a jury trial in 1992, where the evidence established that, during the evening of June 23, 1990, Levettia Johnson and Tajegela Wilborn were together when they ran into Christopher Neuman, someone Johnson had known for approximately two months. All three then took a ride in Neuman's vehicle. At around 2:30 a.m. on June 24, 1990, they were driving down 122nd Street toward South Michigan Avenue in Chicago toward the house of Neuman's

grandmother. As they approached her house, Qinton Madison, a friend of Neuman, observed his vehicle and tried to warn him that there were three suspicious men standing outside of another vehicle by an alley. Madison was suspicious of the men because he saw the vehicle driving slowly through his neighborhood earlier in the morning, and at the time, there were five people inside the vehicle. The men outside the vehicle also raised Madison's suspicions based on the color of their clothing, the direction they wore their hats and because he knew they were not from his neighborhood. Neuman drove past Madison, parked his vehicle and went to talk to the three men. After speaking to them for a few minutes, Neuman was shot and killed.

¶ 8 Johnson identified defendant as the middle of the three men, but never saw anyone draw a firearm. According to Johnson, defendant was wearing a hat, but had "long hair" that "could have been curly" or "could have been wavy." Wilborn identified defendant as one of the three men and as someone with long, "curly" hair who she had not seen prior to that night. Wilborn observed him draw a firearm, but did not see any gunshots fired. Madison, who recognized defendant from high school, identified defendant as one of the three men, and observed him draw a firearm and shoot Neuman. According to Madison, defendant had "curly" hair going toward the back. Shortly after the shooting, Johnson identified defendant in a photo array and then a lineup as one of the three men. Wilborn identified defendant in a lineup as the man who drew a firearm. And Madison identified defendant in a photo array and then a lineup as the man who shot Neuman. Madison agreed, though, that defendant's hair did not look curly in the lineup. At the time of defendant's trial, Madison had recently pled guilty to robbery and was in the process of serving a five-year sentence for that offense. However, at trial, he denied having any agreement with the State for a better outcome in that case in exchange for his testimony.

¶ 9 The defense presented the testimony of Devone Patterson, who had been dating defendant at the time of the shooting. She testified that, at about 10:30 p.m. on June 23, 1990, she, defendant, Maggie Otis, Delmuntz Pearson, Lea Pearson, Tyrone Otis and Russell Coles were hanging out at the house of "Kevin," one of defendant's friends.[1] However, Patterson did not know Kevin's last name. She stated that, around midnight, she, defendant, Maggie and Delmuntz went to a park where they remained until 2 or 2:30 a.m. the following morning. Afterward, they went back to Kevin's house, where she and defendant remained together until about noon. Patterson, however, acknowledged that she never told the police this information. Based on this evidence, defendant argued in closing argument that he had been misidentified as the shooter.

¶ 10 The jury ultimately found defendant guilty of first-degree murder, and the trial court sentenced him to 50 years' imprisonment.

¶ 11 B. Post-Trial

¶ 12 Defendant filed a notice of appeal in July 1992 through his trial counsel who indicated that he would be representing defendant on appeal.

¶ 13 In March 1993, this court dismissed defendant's appeal for want of prosecution because the record on appeal had not been filed. In January 1996, defendant filed an unsuccessful *pro se* petition for a "supervisory order" in the circuit court, seeking to obtain the common law record, police reports, and trial transcripts. Defendant stated that he had repeatedly requested these documents from his trial counsel and the clerk of the court, but had not received any of them.

[1] Due to multiple witnesses sharing the same last name, Maggie Otis, Delmuntz Pearson, Lea Pearson and Tyrone Otis will be referred to by their first names.

Over the next four years, defendant filed multiple *pro se* documents, attempting to have his appeal reinstated, but none of them were successful.

¶ 14 Ultimately, in March 2006, defendant filed a *pro se* postconviction petition, raising several claims of alleged constitutional violations, including that newly discovered evidence showed he was actually innocent and his counsel had been ineffective for failing to perfect his direct appeal. As relevant for the instant appeal, defendant also alleged the following.

¶ 15 1. Alleged False Testimony of Qinton Madison

¶ 16 In his petition, defendant claimed that his right to due process was violated when the State failed to correct Madison's false testimony at trial. In particular, defendant asserted that Madison told him that he had been given a reduced sentence in exchange for testifying against him at trial. Defendant argued that, had the jury known of Madison's agreement, the jury would have acquitted him. In an affidavit from defendant, which was attached to the petition, he averred that Madison told him that he "received a time cut from 12 years to 5 years to testify against" him.

¶ 17 2. Ineffective Assistance – Right to Testify

¶ 18 In his petition, defendant also claimed that he wanted to testify at his trial about his whereabouts at the time of Neuman's shooting and that he knew Wilborn, which would have contradicted her trial testimony that she did not know him. According to defendant, had he been allowed to testify to his whereabouts, his defense would have been "helped," as it would have provided additional evidence that someone else murdered Neuman. Further, defendant asserted that, had he been allowed to testify about his relationship with Wilborn, his testimony would have revealed that she testified falsely. Defendant contended that, had he been able to testify in

this manner, the jury would have acquitted him. In defendant's affidavit, he averred that his trial counsel "refused to allow [him] to testify in his own behalf at trial."

¶ 19 3. Ineffective Assistance – Bench Trial

¶ 20 Additionally, in his petition, defendant claimed that, before his trial counsel selected the jurors for his jury trial, he told counsel that he "didn't want to go with a jury but a bench trial." However, according to defendant, counsel told him that he would be proceeding "with a jury trial because [defendant's] mother" was paying counsel and she wanted defendant to have a jury trial. Defendant contended that, had he been able to have a bench trial, he would have been acquitted. In defendant's affidavit, he averred that counsel "went against the wishes [of] his in that [he] thought it would be best to go with a bench trial," but "counsel refused." Defendant reiterated that, because his mother was paying his counsel and his mother wanted a jury trial, counsel went with a jury trial. In an affidavit from defendant's mother, Emily Blanton, which was attached to the petition, she averred that she retained trial counsel to represent defendant and told counsel that she did not want him to have a bench trial, as she thought defendant would have a better chance of acquittal with a jury trial.

¶ 21 The circuit court summarily dismissed the petition as frivolous and patently without merit. But on appeal, this court found counsel's failure to perfect the direct appeal was substandard and presumptively prejudicial, and we therefore remanded the matter for further proceedings consistent with the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2006)), in particular allowing defendant leave to file a late notice of appeal. *People v. Sims*, No. 1-06-2065 (2008) (unpublished order under Illinois Supreme Court Rule 23). Because of this conclusion, we did not reach any of the additional claims alleged by defendant in his petition. *Id.* Upon remand, the circuit court granted defendant leave to file a late notice of appeal,

and his postconviction petition was taken off the court's call. Thereafter, the State Appellate Defender began representing defendant in his appeal.

¶ 22 C. Direct Appeal

¶ 23 On direct appeal, defendant raised several contentions of error, including that he was denied his due process right to a speedy trial, the State made improper prejudicial remarks during closing argument, and multiple sentencing claims. In *People v. Sims*, 403 Ill. App. 3d 9 (2010), this court, however, affirmed defendant's conviction and sentence. Defendant subsequently filed a petition for leave to appeal to our supreme court, which was denied. And his postconviction matter was reinstated.

¶ 24 D. Instant Postconviction Proceedings

¶ 25 In December 2014, defendant, through the public defender's office, filed a "supplemental" postconviction petition, which "augment[ed]" defendant's *pro se* petition, raising two claims relevant in the instant appeal.

¶ 26 1. Actual Innocence

¶ 27 First, he argued that newly discovered evidence supported his actual innocence of Neuman's murder and highlighted evidence contained in the affidavits of: John Conley, a friend of Neuman; Kim Lane, a witness present at the shooting; Tiffany Thomas, an investigator in the public defender's office who interviewed Arlo Kelly, a friend of Neuman; and Monique Martin, also a friend of Neuman. Together, according to defendant, these affidavits established that Neuman's murder was the result of a gang feud over drug territory. Defendant posited that the affidavits showed Neuman was a drug dealer and had been involved in a fight with Demetrius Lloyd, a rival drug dealer, earlier in the night and the shooting, which was performed by a man

named Vernon Harrell, was the result of that feud. Defendant claimed that police reports from the murder, which were attached to his petition, supported this theory of the shooting.

¶ 28 In John Conley's affidavit, he averred that he was best friends with Neuman and knew defendant, who was a rival gang member. According to Conley, Neuman was a drug dealer, who originally had worked for Lloyd. But Neuman eventually decided to sell drugs on his own and as a result, took away many of Lloyd's customers. On the night Neuman was killed, Conley was with Neuman and two women in Neuman's vehicle. In the vehicle, Neuman told Conley that, earlier in the night, he had a "run-in" with Lloyd at Famous Lounge in Chicago due to Neuman taking away some of Lloyd's customers. Later in the night, while the two women were still in Neuman's vehicle, Neuman dropped Conley off at his house. While Conley was on his porch, he heard gunshots and heard the two women screaming. After the shooting, Conley observed people run into a gray Hyundai and recognized one of them as Lloyd's brother, Michael. Eventually, Conley helped Neuman into a vehicle and helped transport him to the hospital along with Madison, Lane, and the two women.

¶ 29 Conley further averred that, a week after the shooting, while he was at Altgeld Gardens in Chicago, he had an argument with Harrell. According to Conley, Harrell threatened to kill him and stated that he would "like I did your b*** ass homie. I killed him in his grandmother's f*** driveway." Conley "knew" that Harrell was referring to Neuman and averred that Harrell and defendant closely resembled one another. Conley added, though, that he did not observe Harrell on the street the night of Neuman's shooting or observe Harrell shoot Neuman. About one or two years after the shooting, Conley was at a block party, when Lloyd threatened to "take care" of anyone who "crossed him *** like [he] did before." It was "clear" to Conley that Lloyd was referring to Neuman. Conley asserted that he was not available to testify at defendant's trial

because he "had [his] own case" and "may have already been in prison." Conley had never been contacted by anyone on defendant's behalf before trial, and initially provided an affidavit in 2005 after he ran into defendant in prison and learned why he was there. Conley admitted, though, that he "did not read" his first affidavit "carefully" before signing it. Conley's second affidavit was dated June 2011.

¶ 30 In that 2005 affidavit, Conley identified the two women from Neuman's vehicle as Johnson and Wilborn, and averred that the night of the murder, Neuman had been in a fight with a man named "Vernon" at a lounge and then later, Conley observed Vernon shoot Neuman.

¶ 31 In Kim Lane's affidavit, he averred that, on the night of Neuman's murder, he was with Neuman, Kelly and Madison at Famous Lounge in Chicago, but heard from "probably" Kelly that earlier, Neuman and Lloyd had been in a fight. According to Lane, Neuman and Lloyd were drug dealers, and Lloyd was a gang leader. Later in the night, before the shooting, Madison had dropped Lane off at home, where he saw a gray Hyundai driving slowly in the neighborhood. That vehicle parked and some men exited. Shortly afterward, Lane observed Neuman's vehicle, but Lane went inside his house. From inside his house, Lane heard gunshots, immediately exited and saw Neuman lying on the ground. Lane helped Neuman to the hospital along with Conley and Madison. Although Lane did not recognize anyone in the gray Hyundai, he did know that someone named "Ty," who lived in the neighborhood and belonged to Lloyd's gang, had a similar vehicle. Lane asserted that he had never been contacted by anyone on defendant's behalf from 1990 to 1992. Lane's affidavit was dated June 2014.

¶ 32 In Tiffany Thomas' affidavit, she averred that she met with Arlo Kelly in a Michigan prison to discuss the murder of Neuman. According to Thomas, Kelly stated that he had been with Neuman, Lane and Madison at Famous Lounge in Chicago before the shooting, and at the

lounge, Neuman got into a fight with Lloyd. Kelly "believed" that Neuman was shot as a result of the fight with Lloyd. Kelly also stated that both Neuman and Lloyd were drug dealers, and Lloyd wanted to increase his own territory. Kelly asserted that he had never been contacted by anyone on defendant's behalf from 1990 to 1992. According to Thomas, although Kelly agreed to sign an affidavit and one was mailed to him, Kelly never returned a signed copy. Later, after Kelly was released from prison, Thomas was able to make contact with him, but Kelly was afraid to sign an affidavit due to the fear of gang retaliation. Thomas' affidavit was dated June 2014.

¶ 33 In Monique Martin's affidavit, she averred that she was close friends with Neuman and present in the area when he was shot. She also knew Neuman was a drug dealer and his former boss was angry that he started selling drugs on his own. According to Martin, she had "been told" by various gang members, current and former, that defendant did not kill Neuman, but rather it was someone who lived in Altgeld Gardens, an area where defendant did not live. In fact, during the summer of 2010, Martin was sitting on her front porch when a former member of the Gangster Disciples told her that it was a "damned shame that [defendant]" was in prison because the person "who killed [Neuman] was from the Gardens," which Martin knew to be the Altgeld Gardens. Martin's affidavit was dated October 2012.

¶ 34 Additionally, in police reports attached to defendant's petition, there were references to Neuman being killed as a result of selling drugs in the wrong territory, mentions of the Lloyd brothers being possibly involved and a notation about an earlier fight between Neuman and one of the Lloyds. There was a reference to defendant being involved, as well.

¶ 35 2. Ineffective Assistance – Alibi Witnesses

¶ 36 Second, defendant argued that his trial counsel had been ineffective for failing to interview and call multiple alibi witnesses at his trial. Defendant highlighted the affidavits of

Maggie Otis, Russell Coles, Kevin Stevenson and Delmuntz Pearson, who were the purported alibi witnesses. Defendant acknowledged that his trial counsel called Devone Patterson as an alibi witness, but posited that counsel did not prepare her to testify and nevertheless, her testimony could have been bolstered by the additional alibi witnesses. Supporting the allegations concerning Patterson, defendant highlighted an affidavit from Tiffany Thomas, the investigator in the public defender's office, who had interviewed Patterson and later, defendant included an affidavit from Patterson herself.

¶ 37 In Maggie Otis' affidavit, she averred that, in 1990, defendant was dating Patterson, her cousin, and she was dating defendant's best friend, Delmuntz. On the night of June 23, 1990, Maggie, defendant, Patterson, Delmuntz, Lia, Coles, Tyrone and Stevenson hung out at various locations, including a local park, Coles' house and Stevenson's house.[2] From the park, Maggie, Coles, Delmuntz, Patterson, defendant and Caprice Sneed went to Coles' house. According to Maggie, Coles' mother was the one who let them into the house. They hung out there until around 5 a.m. when it started to get light outside and then left for Stevenson's house. Maggie averred that, from at least 11 p.m. on June 23, 1990, to at least 5 a.m. the following day, she was with defendant. She asserted that she had never been contacted by anyone on defendant's behalf or by the police. On the day Patterson testified at defendant's trial, Maggie remembered talking to defendant's attorney briefly about whether she was with him the entire night and if she was willing to testify. Although she told defendant's lawyer that she wanted to testify, she was never called as a witness. Maggie's affidavit was dated April 2010.

[2] Based on evidence in the record, in particular an affidavit from Kevin Stevenson, Maggie's reference in her affidavit, and later Coles', Delmuntz's and defendant's references in their own affidavits, to "Kevin Stevens" is actually "Kevin Stevenson." To avoid confusion, we will refer to him by his correct last name, "Stevenson."

¶ 38 In Russell Coles' affidavit, he averred that he was friends with defendant, and on the night of June 23, 1990, he had friends over to his house because his mother was out of town and also spent time at Stevenson's house. At the houses that night were him, defendant, Patterson, Maggie, Lia, Sneed and Delmuntz. According to Coles, defendant was with him from at least 11 p.m. on June 23, 1990, to at least 5 a.m. the following day. He asserted that he had never been contacted by anyone on defendant's behalf or by the police. Coles' affidavit was dated April 2010.

¶ 39 In Kevin Stevenson's affidavit, he averred that, in June 1990, he and defendant were very close friends and hung out almost daily. At that time, Stevenson stated that defendant did not have curly hair, but rather wore his hair in braids. When defendant was arrested, Stevenson remembered thinking how could the police have arrested him "when he was with me that day." Stevenson asserted that he had never been contacted by anyone on defendant's behalf, and had he been contacted earlier, he would have "more clearly" remembered exactly what he and defendant were doing at the time of the shooting. Stevenson's affidavit was dated April 2011.

¶ 40 In Delmuntz Pearson's affidavit, he averred that he was at Kevin Stevenson's house with defendant, Stevenson, Maggie, Tyrone, Patterson and Lia. Specifically, Delmuntz stated that, from 10:30 p.m. on June 23, 1990, to 11 a.m. the following morning, he was with defendant. Delmuntz asserted that he had never been contacted by anyone on defendant's behalf. Delmuntz's affidavit was dated July 2006.

¶ 41 In Tiffany Thomas' affidavit, she averred that she interviewed Patterson about defendant's case. Patterson remarked that defendant's trial counsel "did not really prepare her to testify," never discussed her trial testimony until the trial began and never told her she needed to know the last name of "Kevin." Had counsel told Patterson that she needed to know his last

name, she would have checked and testified that it was "Stevens[on]." Thomas stated that, although she had made numerous attempts to have Patterson sign an affidavit averring to these facts, Patterson had been unwilling. Thomas' affidavit was dated October 2014. Defendant's petition, however, was later amended to include a signed affidavit from Patterson averring to the facts as Thomas had stated. Patterson's affidavit was dated February 2015.

¶ 42 In defendant's affidavit, he averred that he told his trial counsel about several witnesses who would "support [his] innocence," including Maggie, Coles, Stevenson, Patterson and Delmuntz. And according to defendant, he gave counsel information on how to contact each witness, but counsel never explained to him why he only called Patterson at trial in his defense.

¶ 43 Based on these affidavits, defendant argued that his trial counsel had been ineffective because he failed to investigate and interview Coles, Stevenson and Delmuntz. And although counsel had talked to Maggie, defendant posited that counsel did so only briefly and failed to ask her several important questions concerning his whereabouts on the night of Neuman's murder. Defendant asserted that these purported failures compounded counsel's failure to properly prepare Patterson to testify as an alibi witness at his trial. Defendant contended that counsel's performance could not be attributed to strategy, was clearly ineffective, and had these witnesses been called at trial, there was a reasonable probability that he would have been acquitted.

¶ 44 After defendant's petition was docketed, the State moved to dismiss the petition, arguing that his actual innocence claim was not based on new evidence and therefore, it failed. Regarding the claims of ineffective assistance of counsel, the State argued that they had been waived because they could have been raised on direct appeal, but regardless, his claims were insufficient to demonstrate that his trial counsel was ineffective.

¶ 45 The circuit court ultimately granted the State's motion to dismiss, finding his claims meritless. Regarding defendant's actual innocence claim, the court found that the statements made by the various witnesses in their affidavits would not have been admissible at trial because they were "speculative," "based on hearsay" and pure conjecture, and thus, insufficient for establishing an actual innocence claim. Regarding defendant's ineffective assistance of counsel claim for failing to interview and call additional alibi witnesses, the court highlighted that trial counsel had called one alibi witness at trial and found counsel's decision not to call the others a matter of trial strategy. The court did not discuss the additional claims of ineffective assistance of counsel that defendant raised in his *pro se* petition or the claim concerning Madison's alleged false testimony, also raised by defendant in his *pro se* petition. In oral argument on the State's motion, neither the State nor defense counsel discussed these claims either. It appears that, although defendant's "supplemental" petition augmented his previously filed *pro se* petition, neither defense counsel nor the State focused on the claims raised therein.

¶ 46 Defendant subsequently appealed.

¶ 47 II. ANALYSIS

¶ 48 A. Standing

¶ 49 Initially, we briefly address an issue that neither party has raised, that of defendant's standing. In defendant's brief, he notes that he has completed his sentence for Neuman's murder and was released from prison in June 2015. He also notes that his term of mandatory supervised release was scheduled to end in June 2018. We have reviewed the website of the Illinois Department of Corrections, which no longer shows defendant in its custody, and thus, we may judicially note that he has been discharged from mandatory supervised release. See *People v.*

McKinney, 399 Ill. App. 3d 77, 79 (2010) (finding that the reviewing court can take judicial notice of the Illinois Department of Corrections' website).

¶ 50 The Act provides that "[a]ny person imprisoned in the penitentiary may institute a [postconviction] proceeding." 725 ILCS 5/122-1(a) (West 2006). In *People v. Henderson*, 2011 IL App (1st) 090923, ¶¶ 10-15, this court examined that section of the Act and determined that, when a defendant timely files a postconviction petition yet completes his term of mandatory supervised release before the petition's adjudication, the defendant loses standing under the Act.

¶ 51 However, the weight of authority stands against *Henderson*'s holding. See *People v. Carrera*, 239 Ill. 2d 241, 246 (2010) (finding that " 'imprisoned in the penitentiary' has been held to include defendants who have been released from incarceration after timely filing their petition") (citing *People v. Davis*, 39 Ill. 2d 325 (1968)); *People v. McDonald*, 2018 IL App (3d) 150507, ¶ 23 (holding that "a defendant who timely files his postconviction petition while in custody is eligible for relief under the Act, regardless of whether he is released from custody in the intervening time"); *People v. Jones*, 2012 IL App (1st) 093180, ¶ 10 (holding that the Act only requires the defendant to "be serving any sentence imposed, including any period of mandatory supervised release, at the time of the initial timely filing of his petition"). And most recently, in *People v. Coe*, 2018 IL App (4th) 170359, ¶¶ 20-45, this court examined *Carrera*, *Davis*, *McDonald*, *Jones* and *Henderson*, and found that what matters for purposes of standing under the Act is the timeliness of filing the postconviction petition, not what happens subsequent to the filing. And as such, the *Coe* court agreed with *McDonald* and *Jones* over *Henderson*. *Id.* ¶ 50. Given the weight of authority, we agree with *Coe*, *McDonald* and *Jones*, and find that defendant still has standing under the Act because, although he has completed his term of mandatory supervised release, he filed his postconviction petition while in custody.

¶ 52 B. The Post-Conviction Hearing Act

¶ 53 Having concluded that defendant has standing under the Act, we now move on to the merits of his postconviction petition, where on appeal, he raises several contentions of how the circuit court improperly dismissed his petition.

¶ 54 The Act provides a three-stage process for defendants who allege that they have suffered a substantial deprivation of their constitutional rights. *People v. Cotto*, 2016 IL 119006, ¶ 26. If the defendant's petition survives review at the first stage, the defendant's petition moves to the second stage (*id.*), which is where this case remains. At the second stage, the circuit court may appoint counsel for indigent defendants (725 ILCS 5/122-4 (West 2006)), and appointed counsel may amend the defendant's *pro se* petition. *Cotto*, 2016 IL 119006, ¶ 27. Following any amendments of the petition, the State has the option to answer the petition or move to dismiss it. *People v. Dupree*, 2018 IL 122307, ¶ 28. Where the State chooses to file a motion to dismiss, the circuit court must decide whether to grant the motion or allow the petition to advance to a third-stage evidentiary hearing. *Id.* For a defendant to be entitled to an evidentiary hearing, his petition and accompanying documentation must make a substantial showing of a violation of his constitutional rights. *People v. Domagala*, 2013 IL 113688, ¶ 33.

¶ 55 A substantial showing is a measure of the legal sufficiency of the petition's well-pled allegations, which, if proven at an evidentiary hearing, would entitle the defendant to relief. *Id.* ¶ 35. All well-pled allegations that are not positively rebutted by the trial record must be accepted as true. *Id.* (citing *People v. Coleman*, 183 Ill. 2d 366, 385 (1998)). And at this stage, determining whether a "petition contains sufficient allegations of constitutional deprivations does not require the circuit court to engage in any fact-finding or credibility determinations." *Coleman*, 183 Ill. 2d at 385. Those determinations are reserved for the evidentiary stage of

postconviction proceedings. *Dupree*, 2018 IL 122307, ¶ 29. And further, when claims are based on "matters outside the record," the Act does not intend such claims to be adjudicated on the pleadings. *Coleman*, 183 Ill. 2d at 381. We review the circuit court's decision to dismiss a petition without an evidentiary hearing *de novo*. *Dupree*, 2018 IL 122307, ¶ 29.

¶ 56 C. Actual Innocence

¶ 57 Defendant first contends that he made a substantial showing of actual innocence where he presented newly discovered evidence that Vernon Harrell shot and killed Christopher Neuman following a dispute over drug territory. Defendant highlights the affidavits of John Conley, Kim Lane and Tiffany Thomas, the latter who averred to statements of Arlo Kelly.

¶ 58 To successfully make a showing on an actual innocence claim, the defendant must present evidence that is (1) new, (2) material, (3) noncumulative and (4) of such conclusive character that "it would probably change the result on retrial." *People v. Coleman*, 2013 IL 113307, ¶ 96. "New means the evidence was discovered after trial and could not have been discovered earlier through the exercise of due diligence." *Id.* "Material means the evidence is relevant and probative of the [defendant's] innocence." *Id.* "Noncumulative means the evidence adds to what the jury heard." *Id.* "And conclusive means the evidence, when considered along with the trial evidence, would probably lead to a different result." *Id.*

¶ 59 Initially, we note that, in defendant's supplemental petition, he also relied on an affidavit from Monique Martin in support of his actual innocence claim. But, on appeal, he has abandoned using her affidavit as support. Her affidavit, however, was rife with inadmissible (at trial) hearsay about what several gang members, present and former, had told her in regard to the killing of Neuman. There is an open question about whether hearsay contained in affidavits attached to a postconviction petition may be considered during postconviction proceedings in

light of our supreme court's amendment to Illinois Rule of Evidence 1101(b)(3) (eff. Apr. 8, 2013) to include "postconviction hearings" as proceedings in which the rules of evidence do not apply. Traditionally, Illinois cases have concluded that hearsay included in postconviction affidavits are insufficient to support a defendant's claims. See *People v. Salgado*, 2016 IL App (1st) 133102, ¶ 47 ("Generally, petitions supported by an affidavit containing only hearsay are insufficient to warrant postconviction relief."); *People v. Wallace*, 2015 IL App (3d) 130489, ¶¶ 25, 28 (finding that, "[g]enerally, hearsay is insufficient to support a postconviction petition, particularly when there is no explanation why an affidavit from the declarant is unavailable" and "[i]nadmissible hearsay cannot constitute substantive evidence by any definition"); *People v. Coleman*, 2012 IL App (4th) 110463, ¶¶ 54-55 (finding that, "[g]iven the purpose that an affidavit attached to a postconviction petition is supposed to serve, we conclude that this affidavit likewise should consist of factual propositions to which the affiant could testify in an evidentiary hearing," which would not include testimony "objectionable on the grounds of speculation and hearsay"). Although the *Coleman* case was decided before Rule 1101(b)(3) was amended, *Salgado* and *Wallace* were decided after the amendment.

¶ 60 Some more recent cases have discussed the implication of Rule 1101(b)(3)'s amendment. See *People v. Velasco*, 2018 IL App (1st) 161683, ¶ 119 (concluding that hearsay included in postconviction affidavits "were admissible under Rule 1101(b)(3) and must be accepted as true" during second stage proceedings); *People v. Gibson*, 2018 IL App (1st) 162177, ¶ 139 (concluding that, under Rule 1101(b)(3), "there is no general prohibition against hearsay at a 'postconviction hearing,' whether the hearing is conducted under the [Torture Inquiry and Relief Commission] Act or the Post-Conviction Hearing Act"). But we need not resolve this question

since defendant has abandoned using Martin's affidavit as support for his actual innocence claim on appeal.

¶ 61 Of the affidavits defendant does use for support on appeal, we first look at Kim Lane's, who described both Neuman and Demetrius Lloyd as drug dealers and remarked that they had been involved in a fight before Neuman was shot and killed, which was something that Lane heard from Kelly. Lane additionally asserted that he heard the gunshots that night, came out of his house and observed Neuman on the ground. Notwithstanding the fact that what Kelly told Lane was hearsay, none of the evidence contained in Lane's affidavit can be considered newly discovered. Lane was mentioned in police reports from the night of the shooting and was actually interviewed by the police, as shown in the police reports attached to defendant's petition. Moreover, the trial record shows that the State intended to call him as a witness in its case-in-chief, but he was not present when he was scheduled to testify. Lane therefore could have been discovered earlier though the exercise of due diligence and the statements contained in his affidavit could have been presented at defendant's trial. See *Velasco*, 2018 IL App (1st) 161683, ¶ 108 (evidence contained in an affidavit not newly discovered where he was present at the scene of the crime, spoke to the police afterward and testified before a grand jury).

¶ 62 In Tiffany Thomas's affidavit, she averred that she spoke to Kelly about the crime. Kelly told her that Neuman and Lloyd were both drug dealers, in a dispute over territory and had a fight earlier during the night Neuman was murdered. Notwithstanding the fact that Kelly refused to sign his own affidavit, his testimony cannot be considered newly discovered, as Kelly was also mentioned in police reports from the night of the shooting and was also interviewed by the police, as shown in the police reports attached to defendant's petition. Kelly therefore could have

been discovered earlier though the exercise of due diligence and the statements of his contained in Thomas' affidavit could have been presented at defendant's trial. See *id.*

¶ 63 The remaining affidavits are that of John Conley, who in his 2011 affidavit averred that defendant and Lloyd were in a dispute over selling drugs. Conley also stated that he observed Lloyd's brother get into the gray Hyundai after the shooting. Conley further asserted that, a week after the shooting, Harrell implicitly admitted to killing Neuman, and a year or so after the killing, Lloyd admitted his involvement in the murder. Additionally, in Conley's 2005 affidavit, he averred that he actually observed Harrell shoot Neuman. Although the State posits that Conley's affidavits do not constitute newly discovered evidence because he also was mentioned in police reports and talked to the police following the shooting, that may bear on some of his potential testimony, but Conley also averred to information he claimed to learn well after he talked to the police. The State further argues that the statements made by Harrell and Lloyd to Conley were hearsay and thus insufficient to support an actual innocence claim. Defendant, meanwhile, posits that Harrell's statement would have been admissible as an exception to the hearsay rule for statements against penal interest. See Ill. R. Evid. 804(b)(3) (eff. Jan. 1, 2011); *People v. Wright*, 2017 IL 119561, ¶ 80. And as we have noted, there is an open question about whether hearsay contained in an affidavit attached to a postconviction petition may support a defendant's postconviction claims. See Ill. R. Evid. 1101(b)(3) (eff. Apr. 8, 2013).

¶ 64 However, assuming *arguendo* that these hearsay statements were admissible as statements against penal interest or allowed to be considered in support of defendant's postconviction petition by virtue of Illinois Rule of Evidence 1101(b)(3), the statements contained in Conley's affidavit are not of such a conclusive character that they would probably change the result of a retrial. Here, Conley's assertions would have to be viewed in light of the

trial evidence, which included three witnesses, Levettia Johnson, Tajegela Wilborn and Qinton Madison, all identifying defendant as being present at the scene of the shooting. Notably, Madison identified defendant as the shooter and Wilborn observed defendant draw a firearm. Based on Conley's 2011 affidavit, he was not a witness to the shooting, but rather speculated that Harrell killed Neuman based on references by Harrell and Lloyd to killing someone. And in that affidavit, he affirmatively stated that he did not observe Harrell at the scene or observe Harrell shoot Neuman. Notably, this is in stark contrast to Conley's 2005 affidavit, where he directly stated that he observed Harrell shoot Neuman. Had Conley testified consistently with the averments in either of his affidavits, his purported testimony would not have likely led to an acquittal given the strength of Johnson, Wilborn and Madison's testimony, who all implicated defendant. Consequently, defendant has failed to make a substantial showing of actual innocence.

¶ 65 D. Ineffective Assistance of Counsel – Alibi Witnesses

¶ 66 Defendant next contends that he made a substantial showing that his trial counsel was ineffective for failing to investigate and call additional alibi witnesses in his defense, in particular Kevin Stevenson, Russell Coles and Delmuntz Pearson. Initially, we note that, in defendant's supplemental petition, he relied on affidavits from Maggie Otis, Devone Patterson and Tiffany Thomas in support of this claim. However, on appeal, he has abandoned using their affidavits as support, and we therefore will not consider them.

¶ 67 To establish that trial counsel was ineffective, the defendant must satisfy the standard articulated in *Strickland v. Washington*, 466 U.S. 668 (1984). *Domagala*, 2013 IL 113688, ¶ 36. Under this standard, he must show that his counsel's performance was deficient and the deficiency prejudiced him. *Id.* More specifically, the defendant needs to show that his counsel's

performance was “objectively unreasonable” and that “a ‘reasonable probability’ ” existed that, but for counsel’s performance, the result of his trial would have been different. *Id.* (quoting *Strickland*, 466 U.S. at 694). Both elements of the *Strickland* test must be met, and we may analyze them in any order. *People v. Kirklin*, 2015 IL App (1st) 131420, ¶ 109.

¶ 68 Generally, the decisions about which witnesses to call at trial and what evidence to present are strategic ones. *People v. Wilborn*, 2011 IL App (1st) 092802, ¶ 79. And because these decisions are matters of trial strategy, they “are generally immune from claims of ineffective assistance of counsel.” *Id.* Nevertheless, trial counsel has “a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.” *Strickland*, 466 U.S. at 691. And “strategic decisions may be made only after there has been a ‘thorough investigation of law and facts relevant to plausible options.’ ” *People v. Gibson*, 244 Ill. App. 3d 700, 703-04 (1993) (quoting *Strickland*, 466 U.S. at 690). As such, if counsel fails to interview witnesses that are known to him and who have potentially exonerating information, it may indicate that he performed inadequately. *People v. Davis*, 203 Ill. App. 3d 129, 140-41 (1990). Whether trial counsel was ineffective for failing to investigate is generally determined by comparing the strength of the trial evidence with the value of the evidence allegedly not presented at trial. *People v. Clark*, 2011 IL App (2d) 100188, ¶ 24.

¶ 69 In this case, in the affidavits of Stevenson, Coles and Delmuntz, each of them asserted that they had not been contacted by anyone on defendant’s behalf. And in defendant’s affidavit, he averred that he told trial counsel about each of them and gave counsel their contact information. Accepting these allegations as true, and assuming *arguendo* that trial counsel should have attempted to interview them, we nevertheless find that, had they testified at defendant’s trial

consistent with their affidavits, there is not a reasonable probability that defendant would have been acquitted.

¶ 70 Initially, in Stevenson's affidavit, he averred that, in June 1990, he and defendant were close friends, hung out almost daily, and defendant did not have curly hair, but rather wore his hair in braids. Stevenson further averred that, when he learned defendant had been arrested, he remembered thinking how could the police have arrested him because he "was with me that day." Notably, Stevenson cannot pinpoint a timeframe or the location where he and defendant were "that day." Stevenson's vague recollection that defendant was with him "that day" does not give defendant an ironclad alibi, especially given that the critical timeframe spanned two days, the late evening of June 23, 1990 and the morning of June 24, 1990. Had Stevenson testified at trial in this manner, his testimony would have been inconsequential to defendant's alibi defense regardless if he had testified about defendant's hair.

¶ 71 Regarding Coles' affidavit, he averred that, on the night of June 23, 1990, and the following morning, a group of friends hung out at his house and Stevenson's house. That group included defendant, Patterson, Maggie, Lia, Sneed and Delmuntz. And according to Coles, he was with defendant from at least 11 p.m. on June 23 to at least 5 a.m. the following morning. Meanwhile, in Delmuntz's affidavit, he averred that he was hanging out at Stevenson's house with defendant, Stevenson, Maggie, Tyrone, Patterson and Lia. And according to Delmuntz, he was with defendant from at least 10:30 p.m. on June 23 to 11 a.m. the following morning.

¶ 72 The statements of Coles and Delmuntz, while similar to Patterson's trial testimony of a large group hanging out the night of June 23 and the morning of June 24, are inconsistent in significant respects. Notably, at trial, Patterson testified that, around 10:30 p.m. on June 23, she was with defendant and several friends, including Maggie, Delmuntz, Lea, Tyrone and Coles, but

later left to go to a park with defendant, Maggie and Delmuntz. According to Patterson, they left that park at 2 or 2:30 a.m. the following morning. Nowhere in Coles or Delmuntz's affidavits do they mention going to a park and importantly, Patterson did not even testify that Coles came with to the park, which would completely refute his assertion that he had been with defendant the entire night and morning. Furthermore, Coles and Delmuntz's affidavits are contradictory, as Coles referenced hanging out at his house and Stevenson's, whereas Delmuntz referenced only Stevenson's house. Additionally, Delmuntz did not even mention Coles being at Stevenson's house.

¶ 73 These are critical contradictions and inconsistencies for purported alibi witnesses. When compared to the relatively consistent testimony of the State's three eyewitnesses, Levettia Johnson, Tajegela Wilborn and Qinton Madison, who all identified defendant as being involved to some degree, we cannot say that, had Coles and Delmuntz been investigated and presented as alibi witness, there is a reasonable probability that defendant would have been acquitted. In light of this, defendant was not prejudiced by his counsel's alleged failure to investigate and call these witnesses, and defendant has failed to make a substantial showing that his trial counsel was ineffective.

¶ 74 E. Ineffective Assistance of Counsel – Right to Testify

¶ 75 Defendant next contends that he made a substantial showing that his trial counsel was ineffective for refusing to allow him to testify at trial.

¶ 76 The decision of whether to testify at trial is a constitutional right that belongs to the defendant and him alone. *People v. Madej*, 177 Ill. 2d 116, 145-46 (1997). However, while the decision ultimately belongs to the defendant, it should be made in consultation with trial counsel. *People v. Smith*, 176 Ill. 2d 217, 235 (1997). When counsel advises the defendant not to testify,

that is considered a matter of trial strategy and cannot constitute ineffective assistance of counsel "unless evidence suggests that counsel refused to allow the defendant to testify." *People v. Youngblood*, 389 Ill. App. 3d 209, 217 (2009). "When a defendant's postconviction claim that his trial counsel was ineffective for refusing to allow the defendant to testify is dismissed, the reviewing court must affirm the dismissal unless, during the defendant's trial, the defendant made a 'contemporaneous assertion *** of his right to testify.' " *Id.* (quoting *People v. Brown*, 54 Ill. 2d 21, 24 (1973)).

¶ 77 Here, a thorough review of defendant's postconviction petition and affidavit fail to show an allegation that defendant made that contemporaneous assertion of his right to testify. In his petition, defendant alleges that he wanted to testify about his whereabouts at the time of Neuman's murder and that he knew one of the State's witnesses contrary to her trial testimony. And in his supporting affidavit, he averred that his trial counsel "refused to allow [him] to testify in his own behalf at trial." Despite these statements, defendant failed to allege that he expressly told his trial counsel that he wanted to testify at his own trial contemporaneously with appearance of that right. See *Brown*, 54 Ill. 2d at 24 ("Neither in the post-conviction petition in this case, with its reference to conversations which took place between the defendant and his attorney well in advance of the beginning of the trial, nor in the supporting affidavit, is there any statement that the defendant, when the time came for him to testify, told his lawyer that he wanted to do so despite advice to the contrary."). And moreover, during trial, when trial counsel informed the trial court that he was "not going to call the defendant" as a witness, defendant did not say anything. Consequently, defendant has failed to make a substantial showing that his trial counsel was ineffective for allegedly refusing to allow him to exercise his right to testify at trial.

¶ 78 F. Ineffective Assistance of Counsel – Bench Trial

¶ 79 Defendant next contends that he made a substantial showing that his trial counsel was ineffective for refusing to allow him to have a bench trial and forcing upon him a jury trial.

¶ 80 The United States and Illinois Constitutions guarantee a defendant the right to a trial by jury. *People v. Bannister*, 232 Ill. 2d 52, 65 (2008) (citing U.S. Const., amends. VI, XIV; Ill. Const. 1970, art. I, §§ 8, 13). This right also includes the right to waive a trial by jury. *Id.* The ultimate decision of whether to waive a jury trial and proceed to a bench trial belongs to the defendant. *People v. Ramey*, 152 Ill. 2d 41, 54 (1992); see also *People v. McCarter*, 385 Ill. App. 3d 919, 943 (2008) ("[T]he prerogative to choose a bench trial over a jury trial belongs to the defendant and not to his counsel."). In the context of ineffective assistance of counsel claims, Illinois courts have held that advice from counsel on whether to choose a bench or jury trial is a matter of trial strategy and is generally exempt from claims of ineffective assistance. *People v. Simon*, 2014 IL App (1st) 130567, ¶ 74; *People v. Elliott*, 299 Ill. App. 3d 766, 774 (1998).

¶ 81 However, defendant points to *People v. Barkes*, 399 Ill. App. 3d 980 (2010) and argues that, where there is evidence that trial counsel has acted improperly to override the defendant's desire for a bench trial, counsel may be deemed ineffective. In *Barkes*, the defendant claimed in his *pro se* petition and own affidavit that his trial counsel had been ineffective where he told counsel that he wanted a bench trial, but counsel refused, informing the defendant that he was " 'running the show and [defendant] was getting a jury trial.' " *Id.* at 982. The case proceeded to second stage proceedings, where the circuit court eventually dismissed the petition on the State's motion. *Id.* at 982-84. On appeal, however, this court determined that, when taking the defendant's allegations in the petition and affidavit as true that "he told counsel that he wanted a bench trial but counsel refused," he was entitled to an evidentiary hearing on his claim of ineffective assistance of counsel. *Id.* at 988.

¶ 82 In the present case, defendant claimed in his petition and through an affidavit that he wanted a bench trial and told trial counsel of this desire. However, according to defendant's petition and affidavit, counsel refused in light of defendant's mother, who was paying counsel, wanting a jury trial. These allegations were further supported to some degree by the affidavit of defendant's mother, who averred that she hired trial counsel and indicated to him that she thought defendant would fare better with a jury trial. The State, however, argues that defendant sat through his entire jury trial without ever notifying the trial court that he wanted a bench trial. While it is true that defendant made no mention of wanting a bench trial while his jury trial was ongoing, our review of the pretrial proceedings reveals only one instance where the court discussed the trial with defendant. On April 8, 1992, the court noted that defendant had been in jail for two years already and stated that it presumed he was "interested in getting this trial done." Later during defendant's same court appearance, the court informed him that "you can expect to get a trial date in early May." Although we note the absence of these discussions is likely due to the fact that the majority of pretrial reports of proceedings are not included in the record on appeal, perhaps in part because those proceedings occurred almost 30 years ago, we nevertheless cannot say that defendant's allegation is positively rebutted by the record. Therefore, we must take defendant's well-pled allegation from outside the record that he told his trial counsel that he wanted a bench trial, but counsel refused, as true. See *Domagala*, 2013 IL 113688, ¶ 35.

¶ 83 And in taking defendant's well-pled allegation as true, we find he made a substantial showing that his counsel performed inadequately by not allowing him to make the ultimate decision about whether to have a bench or jury trial. Akin to the decision in *Barkes*, where the defendant's attorney remarked that he was running the show and pressed the defendant into a

jury trial, here, based on defendant's allegation, trial counsel informed him that his mother was essentially running the show, and as such, counsel pressed defendant into a jury trial against his wishes. See *Barkes*, 399 Ill. App. 3d at 988.

¶ 84 Notably, the State's only response to the decision in *Barkes* is that it was "wrongly decided and should not be followed." Instead, the State highlights *People v. Brown*, 2013 IL App (2d) 110327, *People v. Kiefel*, 2013 IL App (3d) 110402 and *People v. Powell*, 281 Ill. App. 3d 68 (1996), to support its argument that, because defendant never expressed a desire to have a bench trial to the trial court at any time, his postconviction claim of ineffective assistance of counsel must fail. Initially, we note that, in *Brown*, 2013 IL App (2d) 110327, ¶ 18 and *Kiefel*, 2013 IL App (3d) 110402, ¶ 14, defendants argued on direct appeal that their failure to make knowing, voluntary and intelligent waivers of their right to a bench trial rendered their guilty verdicts invalid. And in both cases, the appellate court found that the trial court was not required to obtain an on-the-record waiver of a defendant's right to a bench trial. *Brown*, 2013 IL App (2d) 110327, ¶ 23; *Kiefel*, 2013 IL App (3d) 110402, ¶ 21. As this case involves second-stage postconviction proceedings and a claim of ineffective assistance of counsel, the State's reliance on *Brown* and *Kiefel* is misplaced.

¶ 85 Furthermore, we are not persuaded by the State's citation to *Powell*. There, a defendant had a jury trial after which he was found guilty of multiple counts of aggravated criminal sexual assault. *Powell*, 281 Ill. App. 3d at 69-70. The defendant filed a *pro se* posttrial motion alleging that his trial counsel was ineffective, in part, because counsel advised him against a bench trial. *Id.* at 70. The trial court held a hearing on the defendant's motion, where both he and his trial counsel testified. *Id.* at 70-71. The trial court ultimately denied the motion, finding that trial counsel had merely advised the defendant to take a jury trial, which was plainly within the realm

of reasonable trial strategy. *Id.* at 72. Moreover, the court noted that the defendant was intimately familiar with both bench and jury trials in light of his criminal background. *Id.* And lastly, the court observed that the defendant had never indicated that he wanted a bench trial before filing his posttrial motion. *Id.*

¶ 86 On appeal, this court affirmed the trial court's denial of the defendant's posttrial motion, finding that his trial counsel did not provide ineffective assistance because counsel's recommendation to have a bench trial was purely a matter of trial strategy and incapable of supporting a claim of ineffective assistance of counsel. *Id.* at 74. The appellate court did, however, discuss the timeliness the defendant's claim that he wanted a bench trial. See *id.* at 72-73. And in doing so, it concluded that, where "a defendant fails to speak out, as here, to make his desire for a bench trial known when the trial court begins the process of selecting and impaneling a jury, we will not entertain his later, after-the-fact claim that he really wanted a bench trial all along." *Id.* at 73. However, *Powell* is also a direct appeal case. *Barkes*, meanwhile, is a second-stage postconviction proceeding case, just like the present case, which therefore provides a much more analogous comparison. Additionally, in *Powell*, the trial court held a hearing on the defendant's claim regarding his bench trial, which is exactly what defendant in this case requests. As such, we are not persuaded by *Powell*, and follow *Barkes*, a case with facts nearly identical to the present case. And under *Barkes*, defendant's postconviction petition and supporting documentation have made a substantial showing that his counsel performed inadequately by not allowing him to make the ultimate decision about whether to have a bench or jury trial.

¶ 87 We further find that defendant was prejudiced by his trial counsel's alleged actions. As this court found in *Barkes*, "[w]here the defendant's ineffectiveness claim is based on counsel's refusal to allow the defendant to waive a jury trial, prejudice under *Strickland* 'is presumed if

there is a reasonable probability that the defendant would have waived a jury trial in the absence of the alleged error.' " *Id.* (quoting *McCarter*, 385 Ill. App. 3d at 943). "[T]he fact that the outcome of the case might have been the same if defendant had received a bench trial is not relevant to the question of prejudice under *Strickland*." *McCarter*, 385 Ill. App. 3d at 944. Based on defendant's petition and affidavit, there is a reasonable probability that he would have waived a jury trial had counsel not allegedly forced him into one. Consequently, defendant has made a substantial showing of both trial counsel performing deficiently and prejudice, and therefore, a substantial showing of ineffective assistance of counsel. This claim, based on matters outside of the record allegedly between defendant and his trial counsel, is the quintessential claim best left for an evidentiary hearing where factual findings and credibility determinations can be made by the circuit court. See *Dupree*, 2018 IL 122307, ¶ 29.

¶ 88 G. State's Alleged Use of False Testimony by Qinton Madison

¶ 89 Lastly, defendant contends that he made a substantial showing that the State violated his right to due process when it knowingly used, and failed to correct, Qinton Madison's false trial testimony that there was no agreement between himself and the State for testifying. According to defendant, based on the allegations in his petition and affidavit, there was, in fact, an agreement whereby Madison consented to testify against him in exchange for a reduced sentence in his robbery case.

¶ 90 A defendant's right to due process will be deemed violated if the State knowingly uses perjured testimony to obtain a criminal conviction. *People v. Page*, 193 Ill. 2d 120, 156 (2000). If the State fails to correct false testimony, that too will violate the defendant's right to due process. *Id.* at 156-57. And it does not matter if the witness's false testimony merely affects his credibility and not a substantive issue of the case. *People v. Olinger*, 176 Ill. 2d 326, 345 (1997).

¶ 91 In this case, the original trial record belies defendant's claim about any false testimony. At trial, during the State's direct examination of Madison, the State pointedly asked him whether there had been any agreements between him and the State in connection with his robbery case. And Madison responded that there had been no such agreement. As such, defendant's claim about Madison's testimony is positively rebutted by the trial record. "[W]e will not credit allegations positively rebutted by the record." *People v. Barnslater*, 373 Ill. App. 3d 512, 519 (2007). Consequently, defendant failed to make a substantial showing that the State violated his right to due process by using or failing to correct false testimony.

¶ 92 III. CONCLUSION

¶ 93 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County that dismissed defendant's postconviction claims of actual innocence, ineffective assistance of counsel for failing to investigate and call additional alibi witnesses, ineffective assistance of counsel for preventing him from testifying at trial and the State's use of perjured testimony. However, we reverse the judgment of the circuit court as it relates to the dismissal of defendant's postconviction claim of ineffective assistance of counsel for refusing to allow him to have a bench trial. And on this claim only, we find defendant is entitled to a third-stage evidentiary hearing.

¶ 94 Affirmed in part and reversed in part. Cause remanded.

¶ 95 Justice Gordon, concurring in part and dissenting in part:

¶ 96 I concur with the majority's finding that we must reverse the trial court's second-stage dismissal of defendant's postconviction petition and remand for a third-stage evidentiary hearing. However, I must dissent, in part, because I would remand based on different claims than the one identified by the majority. I would remand for a hearing on defendant's claim that his trial

counsel was ineffective for failing to investigate additional alibi witnesses and on his claim that Qinton Madison—the only witness at trial who claimed to have observed defendant actually shoot the victim—told defendant that he received a favorable plea deal in return for his testimony. However, I would not remand for a hearing on the sole claim allowed by the majority: that his counsel was ineffective for allegedly refusing to permit defendant to have a bench trial.

¶ 97 First, defendant has made a substantial showing of ineffective assistance of counsel with respect to the alibi witnesses who were not contacted by counsel, thereby entitling defendant to a third-stage evidentiary hearing on this claim.

¶ 98 "In every case the court should be concerned with whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results." *Strickland v. Washington*, 466 U.S. 668, 696 (1984). Every Illinois defendant has a constitutional right to the effective assistance of counsel under the sixth amendment to the United States Constitution and the Illinois State Constitution. U.S. Const., amends. VI, XIV; Ill. Const. 1970, art. I., § 8; *People v. Domagala*, 2013 IL 113688, ¶ 36. Claims of ineffective assistance are judged against the standard set forth in *Strickland*, 466 U.S. 668. *Domagala*, 2013 IL 113688, ¶ 36 (citing *People v. Albanese*, 104 Ill. 2d 504, 526 (1984) (adopting *Strickland* for Illinois)). To prevail on a claim of ineffective assistance, a defendant must show both: (1) that counsel's performance was deficient; and (2) that this deficient performance prejudiced defendant. *Domagala*, 2013 IL 113688, ¶ 36 (citing *Strickland*, 466 U.S. at 687).

¶ 99 To establish the first prong, that counsel's performance was deficient, a defendant must show "that counsel's performance was objectively unreasonable under prevailing professional norms." *Domagala,* 2013 IL 113688, ¶ 36. To establish the second prong, that this deficient

performance prejudiced the defendant, the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Domagala,* 2013 IL 113688, ¶ 36 (citing *Strickland*, 466 U.S. at 694). "[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 trial unreliable or fundamentally unfair." *People v. Colon*, 225 Ill. 2d 125, 135 (2007); *People v. Evans*, 209 Ill. 2d 194, 220 (2004); *People v. Pollards,* 367 Ill. App. 3d 17, 21 (2006) (a reasonable probability is a probability sufficient to undermine confidence in the outcome). While trial strategy is generally immune from second-guessing by an appellate court, the strategy must still be a reasonable one. Labeling a decision "as 'trial strategy' does not preclude inquiry as to the reasonableness of counsel's strategy." *People v. King*, 316 Ill. App. 3d 901, 915-16 (2000). We may reverse if counsel's decision was "objectively unreasonable." *King*, 316 Ill. App. 3d at 916.

¶ 100 In the case at bar, defendant has established the first prong of the *Strickland* test, that counsel's performance was objectively unreasonable under prevailing professional norms, for failing to even contact the other alibi witnesses—and the majority does not find otherwise. *Supra* ¶ 69 (the majority "[a]ccept[ed] these allegations as true, and assum[ed] *arguendo* that trial counsel should have attempted to interview them"). Defendant included with his petition the affidavits of Kevin Stevenson, Russell Cole and Delmuntz Pearson, who were all identified by defendant's girlfriend, Devone Patterson, in her trial testimony as individuals who were with her and defendant at the time of the offense. Thus, there was no question that trial counsel knew of the existence of these additional alibi witnesses who could support Patterson's testimony. The affidavits of all three of them averred that they were with defendant, as Patterson had testified at

trial, and that trial counsel never contacted them. Nothing in the record contradicts their claims that trial counsel never contacted them.

¶ 101 At trial, defendant's sole defense was one of alibi and misidentification, but counsel called only Patterson, defendant's girlfriend, to support this defense. As a result, during closing argument, the State was able to disparage this defense as merely a "lover's alibi." In the absence of the additional witnesses, who Patterson explicitly told the jury about, the jury had no basis on which to conclude that the defense was anything more than what the State had labeled it—merely a lover's alibi. The jury's verdict may have been based on a skepticism inferred from these witnesses' absence at trial. As a result, defendant has made a substantial showing of the first prong of *Strickland*, that trial counsel's performance fell below prevailing professional norms. *Domagala*, 2013 IL 113688, ¶ 36 (citing *Strickland*, 466 U.S. at 687).

¶ 102 Defendant has also made a substantial showing of the second prong: a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Domagala,* 2013 IL 113688, ¶ 36 (citing *Strickland*, 466 U.S. at 694). The majority finds that these affidavits do "not give defendant an ironclad alibi" (*supra* ¶ 70) and labels possible omissions as "contradictions and inconsistencies" (*supra* ¶ 73). I believe that the majority is applying the wrong standard. Defendant does not have to prove that his alibi was ironclad. A reasonable probability is not a certainty. "[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 trial unreliable or fundamentally unfair." *People v. Colon*, 225 Ill. 2d 125, 135 (2007); *People v. Evans*, 209 Ill. 2d 194, 220 (2004); *People v. Pollards,* 367 Ill. App. 3d 17, 21 (2006) (a reasonable probability is a probability sufficient to undermine confidence in the outcome).

¶ 103 I believe that defendant has made a substantial showing of a probability sufficient to undermine our confidence in the verdict. As I mentioned above, the jury's verdict could have been simply a referendum on the witnesses' absence, after they had had been so clearly identified by Patterson in her trial testimony. In addition, I do not find the omissions identified by the majority to be the 'smoking gun' that destroys defendant's entire alibi case. For example, the majority notes that Patterson testified at trial that they later went to a park, while Coles and Delmuntz's affidavits omit mention of a park; and Coles mentioned spending time at both his house and Stevenson's house, while Delmuntz mentioned only Stevenson's house and omitted Coles' house. *Supra* ¶¶ 72-73. I cannot find these omissions significant, particularly when compared to the damage created by the witnesses' absence at trial—once they had been specifically identified as potential witnesses in defendant's own case and did not appear to testify. Thus, I believe that defendant has made a showing of a probability sufficient to undermine our confidence in the verdict, and I would reverse and remand for a third-stage evidentiary hearing on this claim.

¶ 104 In addition, I would allow defendant at this hearing to present evidence to support his claim that the testimony by Qinton Madison was false—the sole eyewitness to testify that he observed defendant actually shoot the victim. Defendant asserted in his petition that Madison told defendant that Madison had received a reduced sentence in exchange for agreeing to testify against defendant at defendant's trial. Specifically, defendant alleged that Madison "received a time cut from 12 years to five years." On appeal, defendant asks us to take judicial notice of computerized circuit court records that show that, in November 1990, Madison was charged with armed robbery, a Class X offense, with a sentencing range of 6 to 30 years, and that on March 25, 1991, Madison pled guilty to only simple robbery and received a sentence of only five years.

As defendant argues, Madison was already a witness in defendant's case when he was charged with armed robbery, and he was the only witness to testify to observing defendant shoot the victim.

¶ 105 The majority finds that defendant failed to make a substantial showing. On the one hand, there is (1) defendant's assertion in his affidavit that Madison told him that Madison "received a time cut from 12 years to 5 years to testify against" defendant, and (2) the fact, as shown by the circuit court's records, that his charge was reduced from armed robbery to simple robbery. The State argues that there are any number of reasons why this could have happened, and that is true; but the State does not offer or apparently know the reason, and defendant is asserting that he does. The State observes that Madison denied at trial, under oath, that there was such an agreement; and both the State and the majority find his testimony dispositive. However, there is a problem with the State's argument that Madison's trial testimony is dispositive: if the alibi witnesses are telling the truth, then Madison is lying. Thus, their affidavits are also part of the substantial showing that defendant must make in order to receive an evidentiary hearing on this issue.

¶ 106 If the alibi witnesses are telling the truth, then Madison had to have testified falsely, and the question is why. Since these claims are so linked, and since I would order an evidentiary hearing on defendant's claim regarding the alibi witnesses, I would also allow defendant to substantiate, if he can, his claim that Madison testified falsely when he denied having an agreement with the State.

¶ 107 For the foregoing reasons, I would reverse and remand for a third-stage evidentiary hearing. However, I would not remand for a hearing on the issue of whether trial counsel was ineffective for allegedly refusing to allow defendant to have a bench trial. As the majority

observes, "the majority of pretrial reports of proceedings are not included in the record on appeal, perhaps in part because those proceedings occurred almost 30 years ago." *Supra* ¶ 82. As the State observes, defendant sat through the entire jury trial, without once indicating to the trial court that he wanted a bench trial. In addition, defendant's mother submitted an affidavit in which she averred: "I *** retained attorney Chester Slaughter to represent my son, Sidney Sims, *** I told attorney Chester Slaughter that I *** did not want him to go with a bench trial over a jury trial, that I thought it will be best to go with twelve people (jury), than one judge." Defendant's silence, plus his mother's affidavit averring her desire for a jury trial, support the conclusion that defendant simply acquiesced to his mother's wishes. Without more than an after-the-fact assertion by defendant, and in the face of defendant's apparent complacency during trial and his mother's stated preference for a jury, I cannot find that defendant made a substantial showing on this issue.

¶ 108 In reversing and remanding on this ground, the majority relies on *People v. Barkes*, 399 Ill. App. 3d 980, 988 (2010), a Second District case in which the appellate court did the same, with not much analysis or discussion of the facts. In our case, the majority finds: "Notably, the State's only response to the decision in *Barkes* is that it was 'wrongly decided and should not be followed.' " *Supra* ¶ 84. With all due respect to the majority, that statement is not true. The State argues that *Barkes* is distinguishable, where the *Barkes* defendant made multiple allegations against his trial attorney, including that his trial counsel said the defendant could not fire him and could not hire a new private attorney (*Barkes*, 399 Ill. App. 3d at 982-83); and where the postconviction petition included an affidavit from the private attorney who averred that the defendant had contacted him (*Barkes*, 399 Ill. App. 3d at 982-83). The State argued that, while "not directly related to the defendant's claim that his attorney would not let him waive a jury, the

attorney's letter gave some additional support to the defendant's argument that he had problems with appointed counsel." While the majority might not have found the State's attempts to distinguish *Barkes* persuasive, it is quite another matter to say that the State made no attempt.

¶ 109 Whether *Barkes* was rightly or wrongly decided, I find it distinguishable. First, in the case at bar, the mother's affidavit actually undercuts defendant's claim that his counsel was at fault. Defendant's own evidence supports the conclusion that this was a mother-son issue that was resolved by defendant's acquiescence and silence. In addition, the *Barkes* defendant had a jury trial in November 2004 and filed his postconviction petition in July 2007, less than three years later. By contrast, defendant had his jury trial in 1992 and filed his petition in 2006, 14 years later. The passage of an additional decade makes it far more difficult to disprove a defendant's assertion that he privately told his counsel that he actually wanted a bench trial. For all these reasons, I find *Barkes* distinguishable from the case at bar.

¶ 110 In sum, I would reverse and remand for a third-stage evidentiary hearing on defendant's claim of ineffective assistance of counsel for failure to contact alibi witnesses and on defendant's claim that Madison testified falsely, but not on defendant's claim that his trial counsel refused to let him have a bench trial.

¶ 111 For these reasons, I must respectfully concur in part and dissent in part.