2011 IL App (2d) 091230-U
No. 2-09-1230
Order filed October 17, 2011

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of McHenry County.
Plaintiff-Appellee,	)	
v.	)	No. 05-CF-724
JOSE RODRIGUEZ-TELLEZ,	)	Honorable Sharon L. Prather,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE BOWMAN delivered the judgment of the court.
Presiding Justice Jorgensen and Justice McLaren concurred in the judgment.

ORDER

Held: Where defendant's allegation of ineffective assistance of trial counsel impliedly raised the issue of appellate counsel's ineffectiveness, trial court improperly dismissed his *pro se* postconviction petition on grounds of *res judicata*. Therefore, the matter is remanded to circuit court for second stage postconviction proceedings.

¶ 1 Defendant, Jose Rodriguez-Tellez,[1] argues on appeal that his *pro se* postconviction petition filed pursuant to the Post-Conviction Hearing Act (725 ILCS 5/122—1(a) (West 2010) was

[1] The record indicates that defendant's birth name was Homero Tellez-Sanchez. Because he was indicted under Jose Rodriguez-Tellez and is referred to by that name throughout the record, we refer to defendant using that name instead of his birth name.

erroneously dismissed on grounds that *res judicata* barred his claims. We reverse and remand with instructions.

¶ 2 I. BACKGROUND

¶ 3 We briefly summarize the proceedings and evidence adduced at defendant's trial. In defendant's postconviction petition, he raises issues pertaining to *voir dire* proceedings. During questioning of the jurors, the State asked the following question to Juror Rosa[2]:

> "Q. Let's take an example. If the Judge tells you that I have to prove to you the elements of the crime, in this case first degree murder, and let's say the elements of that crime are A, B and C, but you have a question about D, but D is not something that I am required to prove to you, would you be able to set aside your question about D if I have proven to you A, B and C, the elements of the crime, beyond a reasonable doubt and vote guilty?[3]
>
> A. Would I have a problem with that did you say?
>
> Q. Right.
>
> A. No.
>
> * * *

[2] The jurors were not numbered and therefore we use first names only to maintain jurors' anonymity.

[3] This question or a very similar version was also posed to Jurors Alan, Sandra, Diana, Roberta, Michael, Margaret, Robert, Deane, Joseph, Gloria, and Patricia.

Q. Do you believe that it's possible for a person to be able to recognize another person but not be able to give a description of that person? Let me give you an example.[4]

[Defense Counsel]: Judge, I object to the prosecutor testifying. She can ask the question, but I object to any testimony. She is giving an opinion.

* * *

THE COURT: Overruled.

Q. Say hypothetically that you have a cousin you haven't seen in a couple of years and somebody says, oh, what's your cousin look like. And you're like I don't know. She has brown hair and she's five two.

And even though you may have difficulty describing what your cousin looks like to another person, you would still recognize your cousin when you saw him, wouldn't you?

A. I would believe so.

Q. I mean, it's your cousin, right?

A. Right.

Q. Okay. So do you understand and accept that there is a difference between being able to describe someone and being able to recognize someone?

A. Yes."

¶ 4 Additionally, the jurors were asked by the State whether they believed that it was possible that a witness might lie in court despite being under oath and might have reason to lie under oath in order to protect someone.

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[4] This line of questioning was also posed to Jurors Sandra, Michael, Robert, Deane, and Joseph.

¶ 5 Defendant's trial adduced the following facts. On March 4, 2004, Jose Medina, a 33-year-old man, was found shot to death in his retail store in Harvard. Medina's two-year-old child, Alan, was inside the store at the time of the shooting but was not physically harmed. On August 11, 2005, after a lengthy investigation, defendant was indicted by the grand jury for first-degree murder, endangering the life of a child (720 ILC 5/12-21.6 (West 2004)), and various counts of armed robbery and burglary. Defendant was also indicted for aggravated vehicular hijacking (720 ILCS 5/18-4(a)(4) (West 2004)), for events which occurred on February 24, 2004. In July 2005, defendant was arrested in Minnesota, having fled Harvard after the murder, and he was extradited back to Illinois. On September 19, 2006, defendant's trial proceeded on one count of first-degree murder and one count of endangering the life of a child; the State nol-prossed the remaining counts.

¶ 6 At trial, Maria Hilda-Rivera, Medina's girlfriend and mother of Alan, testified that she found Alan crying inside the store and Medina dead on the floor. She went to the store after Medina did not answer her phone calls.

¶ 7 Valente Tellez, defendant's brother, testified that he was visiting defendant in the hospital a few weeks after the murder when an investigator came to interview defendant about Medina's murder. After the investigator left, defendant told Valente to dispose of some Adidas shoes. A few days later, defendant asked if he got rid of the shoes, which Valente did not. Defendant told Valente to throw the shoes into a creek near County Line Road. Valente had another conversation with defendant, which took place in June 2005. Valente asked defendant why the shoes had to be thrown out, and defendant replied that it "had to be done." Valente asked if the reason had to do with the murder, and defendant admitted that he had gone to the store that night and shot Medina. He told Valente that a "little kid" was in the store at the time of the shooting. Defendant told Valente that he had gone to the store after leaving a party, that he acted alone, and that he had "unloaded the

whole gun" during the shooting. Valente knew that defendant had a broken right hand at the time of the murder and was right handed but believed that defendant's fingers were free to move around in the type of cast he had. Defendant also stated that he wanted to leave Harvard because "he didn't want to be blamed for nothing that had to do with the cowboy store," and because he was having problems with his girlfriend. Defendant left Harvard about one week later and did not tell the family where he was going.

¶ 8 Dr. James Knavel, defendant's treating orthopedic surgeon, testified that he put a short arm cast on defendant on February 18, 2004. A short arm cast leaves the elbow free and extends past the wrist to the hand, leaving the fingers and thumb free. His notes indicated that defendant was able to "make a good fist" after the short arm cast was applied.

¶ 9 Maricela Adan, defendant's girlfriend at the time, testified that she was in Medina's store one week prior to the murder. Defendant waited for her outside. As Adan was looking at some clothing, Medina came up behind her, put his hands on her backside and stated that the clothing would look great on her. Adan pushed him away, purchased a cd and left. She did not know whether defendant saw the incident. On the night of the murder, defendant drove her to a party around 5 or 6 p.m. Defendant got a phone call that made him hyper. Defendant left the party. Adan attempted to call him several times but defendant never answered the phone. Defendant called Adan back at 9:42 p.m. and asked her why she left the party. He told her that he left to have his truck washed. In June 2005, defendant began crying and told her that he was leaving Harvard because he had done something "bad," and he knew who had killed Medina. Defendant denied that he committed the murder. On cross-examination, Adan admitted that she was under the care of a doctor for her depression and anxiety, was taking medication, and was currently undergoing voluntary inpatient treatment at Centegra Behavioral Health System.

¶ 10 A video recorded interview that defendant gave to police while in Minnesota and its corresponding transcript were admitted into evidence. In that interview, defendant admitted that he committed the carjacking and shot Medina. He said he was with Adan at a party and left the party to go talk to Medina because he saw Medina embrace his girlfriend at his store. Defendant argued with Medina and then eventually pulled out a pistol and shot Medina several times. He denied seeing anyone else in the store and denied stealing anything from the store. He went home after the shooting and later disposed of the murder weapon and another gun by wrapping the guns in a rag or t-shirt, placing them in a plastic bag, and burying the bag alongside a factory near his residence. Defendant admitted that he asked Valente to dispose of some shoes and other items following the murder.

¶ 11 Roberto Ramirez testified about the carjacking on February 24, 2004. On that day, Ramirez drove into his apartment complex parking lot and parked when a man approached his car. The carjacker fired a gun into the ground during the incident. Ramirez was 90% certain that defendant was the man who carjacked him.

¶ 12 Defendant testified that he was 18 years old at the time of the murder, that he was born in Mexico, and that he completed the third grade. He stopped going to school in Mexico in order to help his grandfather on his farm. On March 3, 2004, he went to a party with Adan. He left the party alone to take his truck to a car wash. He returned to the party to pick up Adan, but she was already gone. He then went home. At that time, he had a cast on his right arm that came down and covered his fingers. He eventually moved to Minnesota because he was having problems with Adan and some friends had a construction business there and offered him a job. He told police he committed the murder in order to protect a friend and his brother, who were under arrest in Illinois. He denied that he was actually involved or committed the murder. He admitted asking Valente to dispose of

some shoes for him after the murder but denied that it was because the shoes may have contained blood on them.

¶ 13 During closing arguments, the State made the following comments in rebuttal to defense counsel's arguments that raised questions about the State's evidence:

> "If the Judge instructs you that the State must prove the elements A, B, and C, beyond a reasonable doubt, will you be able to set aside any questions that you have about D and deliberate only on A, B and C?
>
> * * *
>
> Roberto Ramirez, the victim of the carjacking, could not provide specific enough details to create a composite picture of his assailant. D.
>
> You heard from Roberto Ramirez, who two and a half years after encountering his assailant in a dark parking lot, with a gun, at one o'clock in the morning after work, told you that he was ninety percent sure that this guy was the guy.
>
> He couldn't tell them exactly where his ears were, or where his nose was, or what the shape was, or how thin it was, how thick it was. D."

¶ 14 The State made similar statements regarding other evidence that defense counsel attacked such as a fingerprint on a wine glass in the victim's refrigerator that did not match defendant's fingerprint ("There was a fingerprint on a wine glass in the victim's refrigerator. D.")

¶ 15 Following closing arguments, the jury began deliberations. The jury sent the court a note that stated it was unable to reach a decision. The jurors were brought into court, and the trial court asked what its numbers were, without identifying what each juror's vote was. The foreperson advised "nine to three." The court asked if its numbers changed during the course of deliberation, and the foreperson advised "yes." The court asked the jury if it released the jury for the night, could

they return in the morning and begin deliberating again. The foreperson responded that they were "hopelessly locked." The court asked if that was the consensus of the entire jury, and two jurors stated "no," and another juror asked to speak. The court stopped the jurors and stated the following:

> "This has been a very lengthy trial. It's been very time consuming. It is a very serious case. If we have to do it again, the next jury is going to be faced with the same problems that you are having.
>
> I would like you to go on to continue to deliberate longer, but I'm willing to let you go for the night and come back in the morning.
>
> Will you do that?"

¶ 16 The jurors replied "yes." The foreperson replied "yes." The next day the jury returned its verdict, finding defendant guilty of first-degree murder and not guilty of the child endangerment count.

¶ 17 On October 30, 2006, defendant moved for a new trial, alleging numerous errors on the part of the trial court's evidentiary rulings and the handling of the jury regarding its question and forcing the jury to come back after deliberating for seven hours to deliberate another eight hours. The trial court denied the motion prior to sentencing.

¶ 18 The trial court held defendant's sentencing hearing on December 13, 2006. The trial court stated that it considered the testimony presented during the course of the trial, the presentence investigative report, the victim impact statements, the arguments by the parties, and the factors in both aggravation and mitigation. For the offense of first-degree murder, the trial court sentenced defendant to 35 years' imprisonment and 25 years' imprisonment for the enhancement provision, making defendant's sentence 60 years' imprisonment in total. Defendant appealed his sentence, and

we affirmed. See *People v. Rodriguez-Tellez*, No. 2-07-0048 (2008) (unpublished order under Supreme Court Rule 23).

¶ 19 On August 14, 2009, defendant filed his *pro se* postconviction petition, which alleges the following. Claim I alleges that defendant could not read or write English and that he was illiterate and indigent. Defendant claimed that "any delay for filing an untimely petition [was] not due to petitioner's culpable negligence," and that he maintained his "actual innocence." Claim II alleges that he "rec[ei]ved ineffective assistance of trial counselor (*sic*) where [trial counsel] failed to test defendant with a qualified psychologist to determine if defendant was able to understand court proceedings with an interpreter and fit to stand trial." Defendant also alleges ineffective assistance of trial counsel where counsel failed to object to the prosecutor's remarks during rebuttal arguments on the "trial court instruction on the Law." Defendant highlighted the portions of the State's comments during rebuttal which we summarized herein. Defendant also argued that his case was "tried by the State during voir dire jury selection" in violation of his constitutional rights. Claim III alleges that the trial court erred by "inadvertently directing a guilty verdict toward the defendant when the jury became dead-locked." Defendant argued that the guilty verdict may have been caused when the trial court told the jury that if they could not render a verdict the case would be retried and the next jury would face identical problems. Claim IV alleges that the State brought Maricela Adan to testify knowing that she was under the influence of prescription drugs for psychiatric conditions, which caused her to commit perjury against him. Defendant attached an affidavit to the petition but the affidavit was not notarized. Instead, the affidavit was certified pursuant to section 1-109 of the Code of Civil Procedure (735 ILCS 5/1-109 (West 2010)).

¶ 20 On October 16, 2009, the trial court issued a written order denying defendant's petition. The court stated that it reviewed the petition, its exhibits, the court file, and the appellate court's prior

decision. The court concluded that the claims raised by defendant in his petition were all issues that could have been raised on direct appeal, and therefore the claims were barred by *res judicata* and forfeiture. The court considered only defendant's claims of trial counsel's ineffectiveness and did not consider appellate counsel's ineffectiveness for failing to raise these claims in his direct appeal. The court denied the petition for being frivolous and patently without merit and unsupported by the record. Defendant moved for reconsideration, which was denied. Defendant timely appealed.

¶ 21 II. ANALYSIS

The Act provides a method by which persons under criminal sentence can assert that their convictions were the result of a substantial denial of their constitutional rights. *People v. Ligon*, 239 Ill. 2d 94, 103 (2010). A postconviction proceeding is civil in nature and is a collateral attack on the prior conviction or sentence that does not relitigate a defendant's innocence or guilt. *Id.* Any issues considered by the court on direct appeal are barred by the doctrine of *res judicata*, and issues which could have been considered on direct appeal are deemed procedurally defaulted. *Id.*

¶ 22 Proceedings under the Act are commenced by filing a petition in the circuit court in which the original proceeding took place. *Id.* The Act contemplates a three-stage process for non-death penalty cases. *Id.* At the first stage, the trial court must review the petition within 90 days of its filing to determine whether it is frivolous or patently without merit. 725 ILCS 5/122-2.1(a)(2) (West 2008). If the trial court determines that the petition is either frivolous or patently without merit, it must dismiss the petition in a written order. *Id.* If the trial court does not dismiss the petition within that 90-day period, it must docket it for further consideration. 725 ILCS 5/122-2.1(b) (West 2008). At this first stage, the trial court evaluates only the merits of the substantive claims to determine whether the petition presents a gist of a constitutional claim. *People v. Perkins*, 229 Ill. 2d 34, 41 (2008).

¶ 23 Because defendant's petition was dismissed at the first stage, we must determine whether the petition is frivolous or patently without merit. 725 ILCS 5/122—2.1(a)(2) (West 2008). A petition is considered frivolous or patently without merit when the allegations in the petition fail to present the gist of a constitutional claim. *People v. Youngblood*, 389 Ill. App. 3d 209, 214 (2009). The gist is a low threshold and may be something less than a completely pleaded or fully-stated claim but must be something more than a bare allegation of a deprivation of a constitutional right. *Id.* The petition need only present a limited amount of detail and need not set forth the claim in its entirety to constitute a "gist" of a constitutional claim. *Id.* When considering whether a petition is frivolous or patently without merit, the trial court must accept as true all well-pleaded allegations, unless the record clearly rebuts the allegations. *Id.* We review the summary dismissal of a petition *de novo*. *Id.*

¶ 24 On appeal, defendant argues that he set forth an arguable constitutional claim predicated on the State's indoctrination of the jury during *voir dire*. The State counters that defendant failed to allege ineffective assistance of *appellate* counsel in his petition, and thus the trial court was correct in determining *res judicata* and forfeiture applied to the claims actually stated in the petition, which pertained only to trial counsel's performance. The State argues that defendant's claims could have been raised on direct appeal because his claims do not depend on matters outside of the record.[5] Further, the State argues that defendant's affidavit was not notarized and for that reason alone dismissal was proper. We agree with defendant's argument that his petition impliedly raised the issue of ineffective assistance of appellate counsel where the facts supporting his claim of ineffective assistance of trial counsel also support the claim pertaining to appellate counsel.

[5] We also note that defendant's trial counsel was different from his appellate counsel.

¶ 25 The forfeiture rule applies only where it was possible to raise an issue on direct appeal. *Youngblood*, 389 Ill. App. 3d at 214. A postconviction claim that depends on matters outside the record is not ordinarily forfeited because matters outside the record may not be raised on direct appeal. *Id.* Postconviction claims will not be forfeited where the alleged forfeiture stems from the ineffectiveness of appellate counsel. *Id.* at 215. Here, defendant's claims of ineffective assistance of trial counsel were based on the record, and they were not raised on direct appeal despite appellate counsel being different from trial counsel. Thus, forfeiture applies to defendant's claims of ineffective assistance of trial counsel, and the trial court was correct in that ruling.

¶ 26 However, while we agree with the State that defendant's petition does not specifically state a claim of ineffective assistance of appellate counsel, defendant's allegations supporting his claim of trial counsel's ineffectiveness also support an appellate counsel claim. Defendant argues that *People v. Hodges*, 234 Ill. 2d 1 (2009), supports his proposition that as long as his petition alleged facts from which a claim of ineffective assistance of appellate counsel could be derived, first stage dismissal was improper. In *Hodges*, the defendant filed a *pro se* postconviction petition, alleging that his trial counsel was ineffective for failing to produce evidence that would have supported his claim of self-defense. *Id.* at 6. The trial court dismissed the petition for being frivolous and patently without merit, and the appellate court agreed. *Id.* at 8. The supreme court disagreed, finding that the defendant's allegations that the evidence would have supported his claim of self-defense also would have supported an "unreasonable belief" second-degree murder defense. *Id.* at 21. The State argued that the defendant failed to expressly allege that the evidence would have supported the second-degree murder defense and focused only on the evidence's impact on his self-defense theory. *Id.* The supreme court commented that the State's strict construction of the defendant's petition was

inconsistent with the requirement that a *pro se* petition be given liberal construction. *Id.* The court stated:

> "In the case at bar, the issue of whether defendant's *pro se* petition, which focused on self-defense, could be said to have included allegations regarding 'unreasonable belief' second degree murder - *i.e.*, imperfect self-defense - is at minimum the type of 'borderline' question which, under a liberal construction, should be answered in defendant's favor." *Id.*

The supreme court determined that the defendant's petition thus alleged an arguable factual basis and an arguable legal basis under *Strickland* that his trial counsel rendered ineffective assistance for failing to present testimony by certain witnesses who could have assisted in supporting a second-degree murder finding, even though the defendant had not articulated this reason in his petition. *Id.* at 21-22.

¶ 27 In this case, defendant pleaded facts to support his ineffective assistance of trial counsel claim, which he now argues on appeal also support a claim of ineffective assistance of appellate counsel. The State relies on *People v. Jones*, 211 Ill. 2d 140, 146-47 (2004), for its position that forfeiture applies where the defendant fails to raise a claim of ineffective assistance of appellate counsel, and *People v. Coleman*, 2011 IL App. (1st) 091005, ¶¶20-25, for its argument that we need not read into defendant's petition that which is not there. Defendant argues that unlike in *Jones*, where additional facts would have been needed to support an appellate counsel ineffective assistance claim, his petition contains the necessary facts to support the claim. Defendant argues that construing his petition liberally leads to the conclusion that not only was trial counsel ineffective for the stated reasons, appellate counsel was also ineffective for failing to raise the issues in defendant's direct appeal. We agree with defendant.

¶ 28 In *Jones*, the defendant filed a *pro se* postconviction petition arguing that she was not admonished regarding the possibility of consecutive sentencing by either the trial court or trial counsel, resulting in denial of effective assistance of counsel. *Jones*, 211 Ill. 2d at 1235. The trial court summarily dismissed the petition as being frivolous and patently without merit. *Id.* The defendant appealed, arguing for the first time that she received ineffective assistance of appellate counsel in her two prior appeals because neither counsel had argued that a retrial was barred by double jeopardy and that her conviction for armed robbery should be vacated under the one-act, one-crime rule and was a lesser-included offense of felony murder. *Id.* at 1236. The appellate court held that the newly raised claims were forfeited under section 122-3 of the Act (725 ILCS 5/122-3 (West 1998)). The supreme court affirmed, finding that any issues to be reviewed must be presented in the petition filed in the circuit court. *Id.* at 1239.

¶ 29 In *Coleman*, the defendant's petition raised ineffective assistance of trial counsel for counsel's failure to advise the defendant that he had a right to testify and for telling him that it would be a bad idea to testify because it would give the State the " 'opportunity to bring up your background' "and that it would be his word against the word of the police. *Coleman*, 2011 IL App. (1st) 091005, ¶15. The trial court dismissed the petition as being frivolous and patently without merit. *Id.*, ¶3. On appeal, appellate counsel argued that trial counsel misinformed the defendant that if he were to testify, his prior juvenile adjudications of guilt would be admissible for impeachment. *Id.*, ¶19. Appellate counsel argued that this advice was erroneous because juvenile adjudications were not admissible. *Id.*, ¶21. The appellate court found that the petition never mentioned defendant's juvenile adjudications of guilt, the record failed to support that trial counsel ever mentioned the juvenile adjudications, and the defendant did not present an affidavit suggesting that counsel ever mentioned juvenile adjudications in their conversations. *Id.*, ¶22. Instead, the court

noted that based on the allegations in the petition and the actual record, it was more likely that counsel was referring to the defendant's previous confession during an interrogation that the defendant would have to deny during cross-examination. *Id.*, ¶23. The appellate court commented that appellate counsel's interpretation of the postconviction petition was the best method to improve the defendant's chances for a remand for second-stage proceedings and was an example of zealous advocacy, but such an interpretation was not permitted under the Act. *Id.*, ¶25. Appellate counsel, according to the court, may not rewrite a *pro se* litigant's pleadings to raise an issue that was not raised by the litigant himself; rather, a successive postconviction petition is the proper method to raise new claims that were not raised earlier. *Id.*, ¶25.

¶ 30 Unlike in *Jones* and *Coleman*, there are no new facts needed to state defendant's claim of ineffective assistance of appellate counsel. The same facts supporting his claims of trial counsel's ineffectiveness support his claim as to appellate counsel, with the exception of a sentence stating that appellate counsel failed to raise these issues in his direct appeal. Given that the record is sufficient for the court to take note that these claims were not raised in the direct appeal, the omission of one or two sentences does not render the court unable to ascertain that defendant was also impliedly complaining of appellate counsel's ineffectiveness. Like in *Hodges*, liberal construction of defendant's *pro se* postconviction petition is not only required but appropriate in this case.

¶ 31 Having concluded that defendant's petition adequately raised a claim of ineffective assistance of appellate counsel, we must consider whether defendant's claims regarding appellate counsel's performance were frivolous and patently without merit. *Hodges*, 234 Ill. 2d at 21. A petition is frivolous or patently without merit only if it has no arguable basis either in law or in fact. *People v. Petrenko*, 237 Ill. 2d 490, 496 (2010). A petition lacks an arguable basis in law if it is based on an indisputedly meritless legal theory, such as one that is completely contradicted by the

record. *Id.* A petition lacks an arguable basis in fact if it is based upon a fanciful factual allegation, such as one that is clearly baseless, fantastic, or delusional. *Id.* Here, defendant argues that appellate counsel should have raised the jury indoctrination issue on direct appeal, especially where the *voir dire* questioning errors were compounded during the State's rebuttal argument and the trial court's comments to the deadlocked jury's questions.

¶ 32 Ineffective assistance of counsel claims are governed by the two-prong standard set forth by *Strickland v. Washington*, 466 U.S. 668 (1984). To prevail on an ineffective assistance of counsel claim, a defendant must show both that counsel's performance was deficient and that the deficient performance prejudiced the defendant, meaning that but for counsel's error, there was a reasonable probability that the outcome of the proceeding would have been different. *Petrenko*, 237 Ill. 2d at 496. The *Strickland* standard also applies to claims of ineffective assistance of appellate counsel. *Id.* A defendant raising such a claim must show both that appellate counsel's performance was deficient and that but for counsel's errors, there was a reasonable probability that the appeal would have been successful. *Id.* at 497. At the first stage of proceedings under the Act, a petition alleging ineffective assistance of appellate counsel may not be summarily dismissed if: (1) it is arguable that counsel's performance fell below an objective standard of reasonableness; and (2) it is arguable that the defendant was prejudiced. *Id.*

¶ 33 The question before us is whether defendant's ineffective assistance of appellate counsel claim has no arguable basis either in law or in fact, or stated otherwise, whether it is based on either an indisputably meritless legal theory or baseless factual allegation. *Petrenko*, 237 Ill. 2d at 499. We begin by considering the legal basis for defendant's claim. Defendant argues that the State improperly asked potential jurors in ways that advanced its theories of the case. Defendant argues that the State asked questions about one's ability to recognize a person without being able to

describe a person, anticipating defendant's mistaken identity defense, which attacked Roberto Ramirez's identification of him but inability to describe him as the person who carjacked him. Defendant also argues that the State asked the venire whether it believed it was possible that a witness might lie in court in order to protect someone because the State anticipated Adan denying her previous statements that implicated defendant in the crime. The purpose of *voir dire* is to ensure the selection of an impartial jury. *People v. Lanter*, 230 Ill. App. 3d 72, 75 (1992). *Voir dire* is not to be used as a means to indoctrinate a jury or impaneling one with a predisposition of any sort. *Id.* The trial court has the primary responsibility for initiating and conducting the *voir dire* examination, and the manner and scope of *voir dire* rests within the court's discretion. *People v. Boston*, 383 Ill. App. 3d 352, 355 (2008). Typically, questions about specific defenses, including questions about beliefs concerning mistaken identity and self-defense, are excluded from *voir dire*. *Id.* at 354. *Voir dire* questions should confirm a prospective juror's ability to set aside feelings of bias and decide the case on the evidence presented and should not directly or indirectly concern matters of law or instructions. *Id.* at 354.

¶ 34 Here, defendant has an arguable legal basis for his jury indoctrination claim as the record supports that the State did ask the venire questions in anticipation of defendant's mistaken identity defense and Adan's prior statements implicating defendant. These questions suggest the State used *voir dire* to impanel jurors who were predisposed to the State's prosecutorial theories. It is also arguable that appellate counsel's performance fell below an objective standard of reasonableness, given there is a legal and factual basis supporting defendant's claim that he may not have had an impartial jury because of these errors, and that he was prejudiced by counsel's failure to raise the issues on direct appeal. We express no opinion at this stage whether defendant's ineffective assistance of appellate counsel claim will succeed on the merits because a decision on the merits is

premature at this stage. Rather, we merely find that defendant's petition should not have been summarily dismissed at the first stage. Accordingly, defendant's postconviction petition claim of ineffective assistance of appellate counsel should proceed to second-stage postconviction proceedings. See *Hodges*, 234 Ill. 2d at 23 (finding arguable basis for the defendant's postconviction petition claim as to his second-degree murder defense, which the trial court did not consider, and remanding for second-stage proceedings).

¶ 35 III. CONCLUSION

¶ 36 For the reasons stated, we reverse and remand the cause to the circuit court of McHenry County with instructions that the matter be advanced to the second stage of postconviction proceedings.

¶ 37 Reversed and remanded with instructions.