2022 IL App (1st) 191628-U

Nos. 1-19-1628 & 1-20-0711 cons.

Order filed June 30, 2022

Third 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. 09 CR 4986
	)	
TIMOTHY BROWN,	)	Honorable
	)	Kenneth J. Wadas,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE BURKE delivered the judgment of the court.
Justices McBride and Ellis concurred in the judgment.

ORDER

¶ 1 *Held*: We reverse and remand for further proceedings consistent with this order where (1) the court failed to conduct an adequate preliminary inquiry into defendant's claims of ineffective assistance of trial counsel; (2) defendant made a substantial showing that his trial counsel provided unreasonable assistance; (3) defendant made a substantial showing on his claim for actual innocence; and (4) further proceedings are required on defendant's claim that his sentence is unconstitutional.

¶ 2 This appeal arises following the circuit court's rejection of defendant's claims of ineffective assistance of trial counsel following a preliminary inquiry pursuant to *People v. Krankel*, 102 Ill. 2d 181 (1984), and the court's grant of the State's motion to dismiss defendant's

petition under the Post-Conviction Hearing Act (Act) (725 ILSC 5/122-1 *et seq.* (West 2020)) at the second stage of postconviction proceedings. Following a jury trial, defendant was found guilty of the first degree murder of Anthony Murdock (Anthony), then sentenced to a cumulative 64-year term of imprisonment. Following defendant's trial, he raised claims of ineffective assistance of trial counsel prompting the court to conduct a preliminary inquiry pursuant to *Krankel*. During the *Krankel* inquiry, the State questioned defense counsel regarding defendant's *pro se* claims of ineffective assistance and her strategic trial decisions. The court ultimately rejected defendant's claims of ineffective assistance. This court affirmed defendant's conviction and sentence on direct appeal over his claims, *inter alia*, that the court erred by allowing the State's adversarial participation during the preliminary *Krankel* inquiry. *People v. Brown*, 2012 IL App (1st) 102624-U (unpublished order under Supreme Court Rule 23).

¶ 3 Defendant subsequently filed a *pro se* petition pursuant to the Act alleging, *inter alia*, that his trial counsel provided ineffective assistance. The circuit court dismissed defendant's petition at the first stage of postconviction proceedings finding that his claims of ineffective assistance of trial counsel were barred by *res judicata*. On appeal from that dismissal, this court found that the allegations raised in defendant's *pro se* postconviction petition were sufficient to survive dismissal at the first stage of postconviction proceedings. *People v. Brown*, 2016 IL App (1st) 140726-U (unpublished order under Supreme Court Rule 23). This court further found that the preliminary *Krankel* inquiry conducted by the trial court following defendant's jury trial was improper based on the State's adversarial participation in the hearing following the Supreme Court's ruling in *People v. Jolly*, 2014 IL 117142. *Id.* ¶ 38. This court remanded to a different trial court judge to conduct both a new preliminary *Krankel* inquiry and to advance defendant's petition to the second stage of postconviction proceedings. *Id.* ¶¶ 44-46.

¶ 4 On remand, defendant retained private counsel to represent him. Postconviction counsel filed an amended postconviction petition on defendant's behalf. The amended petition raised claims of ineffective assistance of trial counsel based on trial counsel's failure to investigate and interview certain witnesses who would have identified defendant's co-defendant, Terrell Outlaw, as the shooter. The amended petition also contained a claim for actual innocence based on the testimony of a witness who also would have identified Outlaw as the shooter. Finally, defendant raised a claim that his sentence violated the eighth amendment of the United States Constitution (U.S. Const., amend. VIII) and the proportionate penalties clause of the Illinois Constitution (Ill. Const. 1970, art. I, § 11) where the court sentenced him to a *de facto* life sentence without adequate consideration of his youth, 18 years old at the time of the offense.

¶ 5 The circuit court first conducted a preliminary *Krankel* inquiry questioning defendant regarding his claims of ineffective assistance of trial counsel. The court first denied defendant's request for his postconviction counsel to represent him in the preliminary inquiry and rejected defendant's claims of ineffective assistance. However, the court subsequently granted defendant's *pro se* motion for reconsideration and permitted counsel to present defendant's allegations of ineffective assistance of trial counsel. After a second inquiry, the court again rejected defendant's claims of ineffective assistance. The court subsequently granted the State's motion to dismiss defendant's postconviction petition.

¶ 6 On appeal, defendant contends that the court erred in both dismissing his postconviction petition at the second stage of proceedings and in rejecting his claims of ineffective assistance of trial counsel at the preliminary *Krankel* inquiry. Defendant asserts that he is entitled to an evidentiary hearing based on the affidavits attached to his petition from proposed witnesses who his trial counsel failed to properly investigate, but who were prepared to provide eyewitness

testimony that would have exonerated him of his first degree murder conviction. Defendant further contends that the affidavit from another eyewitness to the shooting attached to his petition in support of his claim of actual innocence is newly discovered evidence that is material and not cumulative and would likely have changed the result on retrial. Finally, defendant contends that he is entitled to an evidentiary hearing on his as-applied constitutional challenge to his *de facto* life sentence. For the reasons that follow, we find that the circuit court erred in rejecting defendant's claims of ineffective assistance of trial counsel and we remand for a new preliminary inquiry pursuant to *Krankel* into defendant's allegations. We further find that the circuit court erred in granting the State's motion to dismiss defendant's postconviction petition at the second stage of proceedings, and we remand for third stage postconviction proceedings on defendant's claim that his trial counsel provided ineffective assistance and on his claim of actual innocence, and we remand for further second-stage proceedings on defendant's claim that his sentence is unconstitutional.

¶ 7 I. BACKGROUND

¶ 8 A. Jury Trial and Direct Appeal

¶ 9 A full recitation of the facts from defendant's jury trial can be found in this court's order from defendant's direct appeal. *Brown*, 2012 IL App (1st) 102624-U (unpublished order under Supreme Court Rule 23). As relevant here, the record shows that defendant was arrested with his co-defendant Outlaw in February 2009 for the first-degree murder and armed robbery of Anthony. Prior to defendant's trial, Outlaw pled guilty to reduced charges in exchange for his testimony as a State witness at defendant's trial. The evidence from defendant's jury trial showed that on

November 4, 2008, Anthony, Alan Murdock (Alan)[1], John McQuarter, Michael Jefferson, Jonathan Ray (Jonathan), and Joseph Ray (Joseph) were playing a dice game in the stairwell of an apartment building with a group of other people. Alan saw one of the men playing the dice game take a gun from his pocket and pass it around the group. Alan, Jefferson, and Jonathan testified that defendant was the last person they saw holding the gun. Defendant then left the dice game and returned 15 minutes later holding the gun to the back of Outlaw. Jonathan testified that he was able to identify both Outlaw and defendant even though they had shirts tied around their faces. The gun defendant was holding was the same one that he was holding when he left the dice game. Defendant pushed Outlaw to the side and waived the gun at the group of people playing the dice game. Defendant told everyone to not move and to give him all of their stuff.

¶ 10 At that point, Anthony and Jefferson ran out of the stairwell into the open door of a nearby apartment unit. Defendant fired the gun one time in the direction of Anthony and Jefferson as they fled. Jefferson testified that he only heard the gunshot, but did not see the shooting. Jonathan approached defendant after he fired the gun and pushed the gun down. Jonathan said to defendant, "what are you doing? These my guys."

¶ 11 Defendant then turned his attention back to the group of people. Defendant waived the gun at Alan and took money from his pockets. Alan then ran through the same apartment door as Anthony and exited out the back door of the apartment. There, he saw Anthony run down the stairs, climb the gate outside, and fall to the ground. Alan followed and climbed the gate, and Anthony got back on his feet telling Alan that he had been shot. As Alan and Anthony jogged away from the apartment building, Anthony fell face first to the ground and said: "I'm shot. I'm shot." Alan

[1]Alan is Anthony's cousin.

turned and saw defendant and Outlaw jump the gate and come toward them. Defendant was pointing the gun at Alan. Alan took Anthony's phone and then walked down the street. He looked back and saw defendant and Outlaw rummaging through Anthony's pockets. Alan told defendant and Outlaw to get away from Anthony and then ran.

¶ 12 Jonathan testified that he followed defendant and Outlaw outside and saw them going through Anthony's pockets while they were holding their guns. Jonathan went to Anthony and saw that he had been shot. Jefferson, who had been waiting in a car with McQuarter outside, found Anthony after the shooting and they drove him to the hospital.

¶ 13 Jonathan went to the hospital to check on Anthony and spoke to detectives while he was there. He testified that he did not tell the detectives at the hospital about the shooting because he wanted revenge. When a detective showed Jonathan a picture of defendant the next morning, Jonathan told him what happened and identified defendant as the shooter.

¶ 14 Three months after the shooting, Alan identified defendant in a police lineup. Alan was unsure of his identification, however, because defendant's appearance had changed in the intervening months. Alan also identified Outlaw in a lineup. Jefferson viewed a lineup, but did not identify anyone.

¶ 15 McQuarter did not witness the shooting because he was outside at the time the shooting took place. However, he testified that before the shooting, he was standing outside when he heard someone order him to turn around. McQuarter turned and saw defendant pointing a gun at his chest. Joseph, who was outside with McQuarter, pushed the gun away and asked defendant what he was doing. Defendant then entered the apartment building. McQuarter tried to call Anthony's phone to warn him that defendant was coming upstairs with a gun, but Anthony did not answer his phone. McQuarter then called Alan who told him that "they shot Tony." McQuarter acknowledged

that he also saw another person at the dice game holding a gun other than defendant. McQuarter identified defendant at a lineup as the person with a gun.

¶ 16 Joseph testified that he was also at the dice game and observed both defendant and Outlaw at the game. He saw someone passing around a handgun during the game. Joseph left and went to the store, and when he returned, he saw defendant and Outlaw running from the back of the building holding guns. They pointed their guns and said "some words" to someone and then ran into the building. Joseph followed them and heard a gunshot. When he reached the second floor, he saw his brother, Jonathan, push down the gun defendant was holding and ask defendant what he was doing. Joseph ran with Jonathan outside to the rear of the building where he observed Anthony lying on the ground and saw defendant and Outlaw going through his pockets. Joseph ran toward defendant and Outlaw, telling them to leave Anthony alone, and defendant and Outlaw fled.

¶ 17 Outlaw testified on behalf of the State that he pled guilty in exchange for reduced charges and sentences. He testified that on the night of the shooting, defendant was living with his family in the apartment building where the shooting occurred. Outlaw and defendant were playing dice when they were joined by Anthony, Alan, Jefferson, and others. While defendant was shooting dice, he gave his gun to Outlaw for safe-keeping. After they lost their money in the dice game, defendant and Outlaw went upstairs. Outlaw was still holding the gun that defendant had given to him. Defendant told Outlaw that they were going to rob the dice game, and instructed him to make sure no one came into the building. Defendant told Outlaw to go downstairs, and then defendant entered the third-floor apartment where he lived. Outlaw waited downstairs until defendant arrived with another person. Defendant was holding a gun and Outlaw was still holding the gun defendant had given him. Defendant said that he would go upstairs and tell everyone to lay down and give

him everything. He instructed Outlaw to watch the person in the car and to make sure that nobody entered the building. Defendant entered the apartment building and 10 or 20 minutes later, Outlaw heard defendant say, "get down," and then he heard a gunshot from upstairs. Outlaw ran upstairs and observed a group of people coming downstairs, including defendant with his gun.

¶ 18 Defendant and Outlaw went around to the back of the building, where Outlaw observed Anthony being carried down the stairs by another person. Defendant ran to Anthony and the person carrying him, pointed his gun at them, and said, "don't move." Outlaw did not point his gun at anyone. The person carrying Anthony ran and Anthony fell to the ground. Defendant and Outlaw went through Anthony's pockets until Jonathan came running toward them yelling. Defendant pointed his gun at Jonathan and told him to stop saying his name. Defendant's mother, who lived on the third floor of the apartment building, yelled from outside on her porch, "Timothy, what are you doing?" Defendant and Outlaw then ran around the side of the building.

¶ 19 Defendant and Outlaw later went to the home of the mother of defendant's baby. Defendant gave someone the guns to dispose of and gave money to someone to find out what was happening at the building where the shooting took place. Outlaw asked defendant about the shooting, and defendant replied that "he[2] was reaching for a gun."

¶ 20 Outlaw acknowledged that he spoke with police officers following his arrest and initially denied any knowledge of the shooting or the robbery. He later changed his story and implicated himself in the murder and named defendant as the shooter.

¶ 21 After presenting testimony from several law enforcement officers and an assistant medical examiner, the State rested its case.

[2]Defendant was presumably referring to Anthony.

¶ 22 Defendant's mother testified on his behalf that defendant was not living with her on the day of the shooting, and had not been to her home on the day of the shooting. She further testified that she did not go outside to yell at defendant on the evening of the shooting and did not see him in or outside of her apartment building at any time that day.

¶ 23 The jury found defendant guilty of the first degree murder of Anthony and guilty of personally discharging a firearm that proximately caused Anthony's death.

¶ 24 Prior to the sentencing hearing, defendant presented a *pro se* motion for new trial alleging ineffective assistance of counsel, together with an accompanying explanatory letter to the court. Defendant stated that he wanted new counsel to represent him on the posttrial motions and that he had attempted to secure new counsel. The court proceeded with defendant's sentencing hearing and imposed consecutive prison sentences of 39 and 25 years.

¶ 25 The court continued defendant's *pro se* motion to the following day. Defendant had not retained private counsel to represent him and did not ask for more time to retain counsel. Proceeding *pro se*, defendant was allowed to read his explanatory letter and present his claims of deficient representation, which included the allegation that his trial counsel failed to subpoena an exculpatory eyewitness. Defendant also argued that the evidence did not establish his guilt beyond a reasonable doubt because the State's identification testimony was doubtful and uncertain.

¶ 26 After defendant's presentation of his claims, the court asked the assistant State's Attorney (ASA) to proceed with a hearing. The ASA called defendant's trial counsel to the witness stand, allowing counsel the opportunity to reply to defendant's allegations in response to questions posed by the ASA.

¶ 27 With respect to defendant's claim that his trial counsel had failed to subpoena an exculpatory witness, the ASA asked counsel whether she was aware of that witness, as defendant's

pro se motion had not named the witness. When counsel replied that she was not sure who the witness was, the trial court asked defendant the name of that witness. Defendant replied, "His name is Pierre Rufus." Counsel testified that her investigator "tried to make contact with Pierre Rufus and he indicated he didn't want to have anything to do with it." Counsel then volunteered: "There was another witness, Jamal[3] Jackson, who was under subpoena, came to court." Jackson was "present outside the courtroom during trial. We did not call him to the stand because in my preparation of him to testify, he placed Mr. Brown at the address of the shooting within an hour to two hours prior to the shooter [*sic*]."

¶ 28 Defendant, acting *pro se*, asked his trial counsel seven questions at the hearing, none of them pertaining to Jackson or to counsel's failure to subpoena or call witnesses.

¶ 29 The court denied defendant's motion finding that he failed to satisfy the two-pronged test of *Strickland v. Washington*, 466 U.S. 668 (1984), and that the evidence of guilt was overwhelming.

¶ 30 This court affirmed defendant's convictions and sentences on direct appeal over his contentions, *inter alia*, that he received ineffective assistance of trial counsel and that the trial court erred in holding a full adversarial hearing where he was forced to represent himself on his *pro se* posttrial motion for a new trial. In so holding, this court found that the trial court conducted a proper preliminary inquiry into defendant's *pro se* posttrial motion and the State's participation did not convert the preliminary inquiry into an adversarial hearing. *Brown*, 2012 IL App (1st) 102624-U, ¶ 60 (unpublished order under Supreme Court Rule 23).

¶ 31 B. Postconviction Petition

[3]Although counsel named the witness "Jamal Jackson," counsel appeared to be referring to "Jalieel Jackson," who will be discussed in more detail below.

¶ 32 Defendant subsequently filed a *pro se* postconviction petition in November 2013. In his petition, defendant contended that his trial counsel was ineffective in failing to investigate and interview two witness who would have provided exonerating testimony. Defendant contended that his trial counsel failed to investigate Edward Ross (Edward) and Eric Ross (Eric) who lived on the second floor of the building where the dice game and shooting occurred. Defendant alleged that counsel was aware that the shooting took place on the second floor of the building and that a detective spoke to Edward on the night of the shooting. Defendant alleged that had trial counsel interviewed Edward, he would have led counsel to his son, Eric. Defendant contended that Eric would have provided testimony that would have exonerated him. Defendant attached to his petition affidavits from both Edward and Eric.

¶ 33 In his affidavit, Edward averred that he lived on the second floor of the apartment building where the shooting took place. On the night of the shooting, Edward sent his son, Eric, downstairs to buy him cigarettes. About 15 minutes later, two unknown males ran into his apartment and then he heard a gunshot. Eric returned to the apartment and Edward told him to stay inside. Edward removed the two unknown males from his apartment and then called police. The detective he spoke to told him to not worry and that he should call the police if he had any further information.

¶ 34 A few months after the shooting, Eric told Edward that defendant was arrested for the shooting. Eric further told Edward that he witnessed the shooting and that Outlaw was the actual shooter. Edward called police and told them that Eric had information about the shooting, but no one ever called him back. Edward further averred that no one came to talk to him about Eric before defendant's trial. Edward averred that he was willing to testify to the information in his affidavit.

¶ 35 In his affidavit, Eric averred that before the shooting he was at the gas station near the apartment building where he lived with his father when he observed Outlaw who he knew from

the neighborhood. Eric returned home until his mother told him to go downstairs and buy cigarettes. When Eric stepped out of his apartment into the hallway, he saw "some guys drinking and gambling in a dice game," but defendant and Outlaw were not among them. Eric went downstairs to purchase the cigarettes and then returned to the hallway to watch the dice game. About 10 minutes after he returned, Eric saw "a guy with a shirt tied around his face come up the stairs pointing a gun while holding Pierre[4] by his shirt." Eric averred that he knew "for a fact that the gun man was [Outlaw]." Eric recognized Outlaw's voice and observed that he was wearing the same clothes that he had been wearing when Eric saw him at the gas station earlier that night.

¶ 36 Eric continued that when Outlaw came up the stairs into the hallway, he told everyone to not move. Two of the men who had been playing dice got up and ran into Eric's apartment. Outlaw aimed his gun in the direction of the two fleeing men and fired one shot. Outlaw then turned and ran out of the hallway. Eric went into his apartment, but did not tell Edward about what he saw until several months later when he heard that the police had arrested defendant for the dice game shooting. Eric told Edward that he witnessed the shooting and that Outlaw was the actual shooter. Edward called the police and told them that he had information about the shooting, but no one ever called him back. Eric averred that he was never contacted by any attorney connected with defendant's trial, but he would have been willing to testify to the information contained in his affidavit if he were contacted.

¶ 37 Defendant alleged that this evidence would have rebutted the State's weak eyewitness testimony and was corroborated by the testimony of the State's witnesses that Outlaw was present at the shooting and possessed a gun. Defendant contended that Eric's testimony would have

[4]Eric did not provide a last name for "Pierre," but may have been referring to Pierre Rufus, a potential witness to the shooting who defendant alleged that trial counsel failed to call at trial.

undermined the jury's confidence in the verdict and that his trial counsel was objectively unreasonable in failing to discover this testimony through reasonable investigation.

¶ 38 Defendant next contended that he was denied the effective assistance of trial counsel where trial counsel failed to call an eyewitness to the shooting at trial. Defendant contended that Jalieel Jackson was an eyewitness to the offense and was present at the trial, but trial counsel did not call him to testify. Defendant pointed out that trial counsel testified at the preliminary *Krankel* inquiry that she did not call Jackson because he placed defendant at the location of the shooting one or two hours prior to the shooting. Defendant maintained that it was nonetheless unreasonable for trial counsel to not call Jackson because he would have supported trial counsel's trial strategy of reasonable doubt by placing the gun in someone else's hands.

¶ 39 Defendant attached to his petition an affidavit from Jackson in which Jackson averred that he had known defendant for three years at the time of the shooting. Jackson testified that he was at the dice game before the shooting and knew "most" of the people there, but not everyone. Jackson watched the dice game for a while, and then started to leave. On his way out, he saw a male with a shirt wrapped around his head coming up the stairs. The man was holding a gun in one hand and was holding "Pierre"[5] by the back of his shirt in his other hand. Jackson saw that the gunman had the word "Young" tattooed on the hand he was using to hold the gun. Jackson knew that defendant never had a tattoo on his hand. The man with the gun told everyone to not move and two guys from the dice game stood up and ran into an apartment unit. The gunman fired a shot in the direction of the fleeing men and then turned and ran out of the building.

[5]Jackson did not provide a last name for "Pierre," but may have been referring to Pierre Rufus.

¶ 40 Jackson averred that he was contacted by defendant's attorney in May 2010 and he told her what he had seen. Jackson told her that he was willing to testify on defendant's behalf. Defendant's attorney told Jackson to come to court for the trial, and told him that she was going to call him to testify, but he was never called to testify.

¶ 41 Finally, defendant alleged that he was denied his right to the effective assistance of counsel where his trial counsel failed to subpoena Rufus, who would have provided exculpatory testimony. Defendant alleged that prior to trial he informed his trial counsel that Rufus was an eyewitness to the offense and told her where to locate Rufus. Defendant acknowledged that Rufus told trial counsel that he did not "want anything to do with it," but maintained that trial counsel was nonetheless ineffective in failing to subpoena Rufus. Defendant did not attach an affidavit from Rufus to his petition.

¶ 42 The trial court dismissed defendant's petition at the first stage of postconviction proceedings in a written order. In its order, the court found that defendant's claims of ineffective assistance of trial counsel were barred by *res judicata*. The court determined that defendant was attempting to "re-litigate issues at his trial's adversarial hearing by couching his claims in different terms." The court noted that during his sentencing hearing, defendant was permitted the opportunity to present his claims for ineffective assistance of trial counsel, which were the same as the contentions defendant now raised in his petition. The court concluded that these contentions were therefore previously addressed and rejected by the court and were therefore barred by the doctrine of *res judicata*.

¶ 43 C. Postconviction Appeal

¶ 44 Defendant appealed from the circuit court's dismissal and this court reversed. *Brown*, 2016 IL App (1st) 140726-U (unpublished order under Supreme Court Rule 23). We first acknowledged

that this court had previously found on defendant's direct appeal that the trial court held a proper preliminary *Krankel* inquiry following defendant's jury trial despite the State's participation in examining defendant's trial counsel. *Id.* ¶ 38. We noted, however, that since that order was entered, the supreme court issued its ruling in *Jolly*, 2014 IL 117142. *Id.* Based on that ruling, this court determined that the State's improper adversarial participation at defendant's preliminary *Krankel* inquiry thwarted the intent of the *Krankel* decision. *Id.* ¶¶ 38-39. We determined that the appropriate remedy was to remand the matter for a new preliminary *Krankel* inquiry before a new trial court judge without the State's adversarial participation. *Id.* ¶ 39.

¶ 45 This court also determined that fundamental fairness dictated that defendant's claims of ineffective assistance could not be barred by the doctrine of *res judicata*. *Id.* ¶ 40. We observed that there was evidence in the record that trial counsel made a strategic decision to not call certain witnesses. *Id.* However, the hearing at which this trial strategy was disclosed was not conducted in accordance with the procedure outlined in *Jolly*. *Id.* ¶ 41. This court emphasized that the error here was not merely an error of reasoning or misapplication of the law, but was a procedural violation that "affected a core constitutional concern involving the right to the assistance of counsel." *Id.* ¶ 41. This court also noted that questions of trial strategy are generally reserved for second stage postconviction proceedings. *Id.* ¶ 42. Accordingly, we remanded the matter for a new preliminary *Krankel* inquiry and second stage postconviction proceedings. *Id.* ¶¶ 45-46.

¶ 46 D. New Preliminary *Krankel* Inquiry and Second Stage Postconviction Proceedings

¶ 47 On remand, the case was assigned to a new trial court judge, and defendant retained private counsel to represent him. Defendant's postconviction counsel filed a "Supplemental motion for new trial or, in the alternative, supplemental petition for post-conviction relief," and subsequently filed an amended supplemental motion and petition. In the amended petition, postconviction

counsel adopted defendant's claims of ineffective assistance of trial counsel based on counsel's failure to investigate and interview Edward and Eric and counsel's failure to call Jackson. Counsel added that the description of the shooter Jackson provided in his affidavit matched the description of Outlaw in Outlaw's presentence investigation report, including that he had the word "Young" tattooed on his hand. The amended petition also included two additional claims. First, defendant added a claim for actual innocence based on an affidavit from Rashawn Coleman. Defendant contended that Coleman could not have been discovered earlier because he had moved away from the area after the shooting and only learned later that defendant had been arrested and convicted of the shooting, which Coleman averred defendant did not commit.

¶ 48 Defendant attached to the supplemental petition an affidavit from Coleman in which he averred that he attended the dice game on the night of the shooting. There, he saw Outlaw who he knew "from around the neighborhood." Outlaw eventually lost all his money and sat on the stairs near the dice game. Outlaw pulled a gun out and set it next to him while he smoked a cigarette. After a few minutes, Outlaw passed the cigarette to Coleman, picked up the gun, and left the building. About 15 minutes later, a male came into the hallway with a shirt tied around his face holding "Pierre" by his shirt. Coleman knew that the man with the gun was Outlaw because he was holding the same gun that he had seen Outlaw with on the stairs earlier. Coleman observed that Outlaw was wearing the same clothes he had been wearing when he left the dice game. Coleman also recognized the tattoo on Outlaw's hand and his voice. Outlaw told everyone to not move and two of the men from the dice game got up and ran into a nearby apartment unit. Outlaw fired a gunshot at the fleeing men and then ran out of the building.

¶ 49 Coleman averred that he left Chicago and moved to Minneapolis, Minnesota "in the top of 09,'" and moved back to Chicago in 2010. After he moved back, he learned that defendant had

been arrested and convicted for the "dice game shooting," but he knew for a fact that defendant was not the shooter because Coleman was there and saw who did it. Coleman averred that he was willing to testify to these facts.

¶ 50 Defendant also added a claim that his sentence was unconstitutional where he was 18 years old at the time of the offense and the trial court sentenced him to a *de facto* life sentence without adequate consideration of his youth and its attendant characteristics. Defendant asserted that his sentence violated both the eighth amendment of the United States Constitution (U.S. Const., amend. VIII) and the proportionate penalties clause of the Illinois Constitution (Ill. Const. 1970, art. I, § 11). Defendant maintained that recent sentencing trends for juveniles and young adults, along with emerging science on the subject of brain development was not considered at his sentencing hearing and sought an evidentiary hearing on his petition to further explore these issues as they related to him.

¶ 51 The trial court first conducted a new preliminary *Krankel* inquiry. Defendant's postconviction counsel suggested that he should be allowed to represent defendant at the *Krankel* inquiry. The court responded that it was conducting an initial review "which is basically a dialogue between the defendant and me on whether he can sustain his threshold preliminary holding that I should have such a *Krankel* hearing." The court therefore directed defendant to present his claims of ineffective assistance of trial counsel to the circuit court *pro se*. Defendant contended that his trial counsel was ineffective in failing to discover Edward and Eric Ross who would have established that it was Outlaw, rather than defendant who was the actual shooter. Defendant asserted that counsel should have known about Edward because he was listed in the police reports. Defendant further contended that trial counsel was ineffective in failing to call Jackson who would

have identified the particular tattoos that the shooter had on his hand, which matched Outlaw's tattoos.

¶ 52 The circuit court denied defendant's motion for a full *Krankel* hearing finding that his allegations did not rise to the level "that would require a second stage hearing relating to *Krankel*."

¶ 53 Defendant filed a *pro se* motion to reconsider in which he contended that the circuit court's refusal to allow defendant's postconviction counsel to represent him at the preliminary *Krankel* inquiry violated his right to counsel.

¶ 54 The circuit court granted defendant's motion and conducted another preliminary *Krankel* inquiry. The circuit court emphasized, however, that despite permitting counsel to argue on defendant's behalf, it was still conducting a preliminary inquiry under *Krankel* and had not advanced defendant's claims to a full evidentiary hearing under *Krankel*. Postconviction counsel argued on defendant's behalf restating many of the allegations defendant raised at the previous hearing and also encouraged the court to consider the claims of ineffective assistance within the context of the broader claims brought in the postconviction petition. The court stated that it stood by its original ruling and denied the *Krankel* petition.

¶ 55 The court then proceeded to defendant's postconviction petition. The State filed a response to the petition contending that defendant's claims of ineffective assistance were barred by the "law of the case doctrine." The State contended that defendant's contention that trial counsel was ineffective in failing to interview and investigate Edward and Eric was already rejected at the preliminary *Krankel* hearing. The State maintained that this claim was therefore barred because defendant did not appeal from that ruling and did not cite to evidence outside of the record to support the claim.

¶ 56 The State also asserted that Edward's affidavit consisted mostly of inadmissible hearsay statements made by Eric. The State maintained that Eric's affidavit was rebutted by the trial witnesses who were at the scene and witnessed the shooting. Finally, the State maintained that trial counsel's decision to not call Jackson was a matter of sound trial strategy, relying on trial counsel's testimony about her decision from the first preliminary *Krankel* inquiry following defendant's jury trial.

¶ 57 With regard to defendant's claim for actual innocence based on the affidavit of Coleman, the State contended that Coleman's affidavit was merely cumulative and failed to provide " 'total vindication' " for defendant because the record rebutted Coleman's claims. The State noted that Coleman said that defendant was not present at the dice game, but Jackson's affidavit placed defendant at the scene.

¶ 58 Finally, the State contended that defendant's sentence was not unconstitutional because defendant was the shooter and was not a juvenile at the time of the offense. The State further contended that despite raising an as-applied constitutional challenge to his sentence, defendant failed to explain how his specific facts and circumstances warranted further consideration of his youth, and instead cited general case law and scientific studies.

¶ 59 The court held a hearing on the State's motion to dismiss where both the State and defendant's counsel presented argument. At the conclusion of the hearing, the court stated that it had considered all of the pleadings and found that "the State's argument is persuasive on those three issues that were raised by the defense." The court therefore granted the State's motion and dismissed defendant's petition. This appeal follows.

¶ 60 II. ANALYSIS

¶ 61 On appeal, defendant contends that he is entitled to an evidentiary hearing based on the affidavits of Edward, Eric, and Jackson. Defendant maintains that trial counsel failed to properly investigate and call these witnesses at trial where they were prepared to provide eyewitness testimony that would have exonerated him. Defendant next asserts that the circuit court erred in dismissing his postconviction petition where Coleman's affidavit represented newly discovered evidence that was not available at his trial that showed that defendant was actually innocent. Finally, defendant contends that he is entitled to an evidentiary hearing on his as-applied constitutional challenge to his sentence so that he may have an opportunity to develop the record to demonstrate how the holdings of *Miller v. Alabama*, 567 U.S. 460 (2012) and its progeny apply to his specific facts and circumstances. In the alternative, he asks us to remand this matter for an evidentiary hearing where his postconviction counsel was ineffective in failing to adequately develop the record to support this claim on appeal.

¶ 62 Defendant first contends that he is entitled to an evidentiary hearing based on the affidavits provided by Edward, Eric, and Jackson. In his briefs before this court, defendant combines his challenge to the court's ruling at the preliminary *Krankel* inquiry with his contentions to the court's ruling on the ineffective assistance of trial counsel claims in his postconviction petition. Indeed, both claims rely on the same set of facts, that trial counsel provided unreasonable assistance in failing to investigate and interview Edward and Eric and in failing to call Jackson as a witness at trial. However, although the same allegations of ineffective assistance underlie both claims, they must be addressed separately, as the circuit court did, because each claim requires a distinct standard of review. A trial court should appoint counsel and conduct a full hearing pursuant to *Krankel* if a defendant's allegations of ineffective assistance of counsel show "possible neglect" of the case. *People v. Roddis*, 2020 IL 124352, ¶ 35. On the other hand, a court should advance a

postconviction petition from the second stage to a third stage evidentiary hearing if the defendant has made a substantial showing that his trial counsel provided ineffective assistance and that counsel's performance prejudiced the defendant. See, *e.g.*, *People v. Dupree*, 2018 IL 122307, ¶¶ 44-45. Accordingly, we will first address defendant's contentions with regard to the preliminary *Krankel* inquiry.

¶ 63 A. *Krankel*

¶ 64 In *Krankel*, 102 Ill. 2d 181, the supreme court developed a common law procedure for addressing *pro se* posttrial motions alleging ineffective assistance of trial counsel. As it has developed, a *Krankel* inquiry proceeds in two stages. *People v. Downs*, 2017 IL App (2d) 121156-C, ¶ 43. In the first stage, the trial court examines the factual basis of the defendant's *pro se* claims of ineffective assistance of trial counsel. *People v. Moore*, 207 Ill. 2d 68, 77-78 (2003). If, during this preliminary inquiry, the trial court determines that the claims lack merit or pertain only to matters of trial strategy, then it need not appoint new counsel and may deny the defendant's *pro se* motion. *Id.* at 78. "However, if the allegations show possible neglect of the case, new counsel should be appointed." *Roddis*, 2020 IL 124352, ¶ 35 (citing *Moore*, 207 Ill. 2d at 78). Following the appointment of new counsel, the matter proceeds to the second stage of the *Krankel* inquiry. *Downs*, 2017 IL App. (2d) 121156-C, ¶ 43. Where the trial court properly conducts a *Krankel* inquiry and reaches a determination on the merits of the defendant's *Krankel* motion, we will reverse the trial court's ruling only if it was manifestly erroneous. *People v. Jackson*, 2020 IL 124112, ¶ 98. However, the issue of whether the circuit court properly conducted a preliminary *Krankel* inquiry presents a legal question that we review *de novo*. *Jolly*, 2014 IL 117142, ¶ 28.

¶ 65 Here, defendant does not contend that the circuit court, on remand, conducted an improper *Krankel* inquiry, but solely contends that the court's judgment was erroneous. Defendant maintains

that trial counsel provided unreasonable assistance in failing to investigate and interview Edward and Eric and in failing to call Jackson, despite his exonerating testimony. Here, it is not clear from the record what facts the trial court relied on in rejecting defendant's *Krankel* claim. After defendant presented his *pro se* contentions on remand, the court clarified that defendant's "attack" on his trial counsel was that "she should have done some investigation." The court asked whether the witnesses defendant identified were listed in the police report, and defendant responded that they were. The court then asked defendant whether the witnesses were "alibi witnesses or anything like that." Defendant responded that they were not, but that they would have provided exculpatory testimony stating that someone else committed the shooting. The court rejected defendant's *Krankel* claim stating: "In my view, your argument and allegation does not rise to a level of a situation that would require a second stage hearing relating to *Krankel*." The court later granted defendant's *pro se* motion to reconsider that ruling, and heard argument from counsel, but the court stood by its original ruling. The court emphasized that despite permitting counsel to argue on defendant's behalf, it was still conducting a preliminary inquiry under *Krankel* and had not advanced defendant's claims to a full evidentiary hearing under *Krankel*.

¶ 66 Normally, when conducting a preliminary *Krankel* inquiry, it is necessary for the trial court to not only address defendant's allegations, but also to have " 'some interchange' " with trial counsel " 'regarding the facts and circumstances surrounding the allegedly ineffective representation *** in assessing what further action, if any, is warranted on a defendant's claim.' " *People v. Ayres*, 2017 IL 120071, ¶ 12 (quoting *Jolly*, 2014 IL 117142, ¶ 30). The trial court may also make its determination based " 'on its knowledge of defense counsel's performance at trial and the insufficiency of the defendant's allegations on their face.' " *Roddis*, 2020 IL 124352, ¶ 56 (quoting *Moore*, 207 Ill 2d at 79). Here, the trial court's ruling suggests that it could only be based

on the insufficiency of defendant's allegations on their face. As noted, the trial court judge who presided over the preliminary *Krankel* inquiry on remand was not the same trial court judge who presided over defendant's jury trial and his first, improper, *Krankel* inquiry. This trial court judge did not conduct a dialogue with defendant's trial counsel in assessing defendant's claims. Although we presume that the new trial court judge thoroughly reviewed the record from defendant's jury trial, he could not have had the same intimate knowledge of defense counsel's performance as the trial court judge who provided over the trial. See *People v. Coleman*, 158 Ill. 2d 319, 351-52 (1994) (noting that the trial court was in a position to evaluate whether the defendant's trial counsel was ineffective because the trial court observed the entire trial). Furthermore, although trial counsel did testify regarding certain strategic decisions at defendant's first preliminary *Krankel* inquiry, we find that it would be inequitable for the circuit court or this court to rely on those statements in assessing defense counsel's representation where this court has found that inquiry was improperly conducted based on the State's adversarial participation. Notably, most of trial counsel's comments regarding her strategy and her decisions at trial were elicited from her responses to questions from the ASA. These facts, combined with the trial court judge's comments to defendant and his ultimate ruling, suggest that his judgment was based solely on the insufficiency of defendant's allegations on their face, *i.e.*, that the claims lacked merit or related solely to matters of trial strategy. *Moore*, 207 Ill. 2d 78.

¶ 67 Generally, allegations relating to trial strategy cannot serve as the basis of a *Krankel* claim. *People v. Jackson*, 2020 IL 124112, ¶ 106 (citing *People v. Chapman*, 194 Ill. 2d 186, 230-31 (2000); *People v. Kidd*, 175 Ill. 2d 1, 44-45 (1996)). "Whether to call certain witnesses and whether to present an alibi defense are matters of trial strategy, generally reserved to the discretion of trial counsel." *Kidd*, 175 Ill. 2d at 45. Viewed in this light, the trial court's questions to defendant in

addressing his claims of ineffective assistance show the court's analysis of whether defendant's claims related solely to matters of trial strategy. The court asked defendant whether the witnesses were listed in the police reports to determine whether trial counsel may have been aware of the witnesses. The court also asked defendant what sort of testimony the witnesses would provide, asking if they were "alibi" witnesses. However, this was the extent of the trial court's inquiry into defendant's claims either directly with defendant or with defendant's postconviction counsel after the court granted defendant's motion for reconsideration. "The operative concern for the reviewing court is whether the trial court conducted an adequate inquiry into the *** defendant's allegations of ineffective of counsel." (Internal quotation marks omitted.) *Chapman*, 194 Ill. 2d at 230 (quoting *People v. Bull*, 185 Ill. 2d 185 Ill. 2d 179, 210 (1998)). Here, we cannot say that the trial court conducted an adequate inquiry into defendant's allegations of ineffective assistance of counsel.

¶ 68 Based on the information presented, it would not be possible for the court to determine whether defendant's allegations related solely to matters of trial strategy or otherwise lacked merit. A review of the trial record shows that trial counsel's chosen defense was that the State's witnesses could not be believed because of discrepancies in their testimony and prior inconsistent statements they made to police. Counsel particularly challenged witnesses who either did not witness the shooting or who failed to identify defendant as the shooter either to police or in court. Defendant alleged that there were two witnesses, who were either known to trial counsel or that trial counsel could have discovered through reasonable investigation, who would have identified another person, defendant's co-defendant, as the shooter. This testimony clearly would have served defense counsel's strategy of discrediting the testimony of the State's witnesses, particularly their identification of defendant as the shooter.

¶ 69 Although we recognize that it is permissible for a trial court to rule on a claim of ineffective assistance of trial counsel following only a brief discussion with defendant regarding his allegations (See, *e.g.*, *Chapman*, 194 Ill. 2d at 228-29), we find that such a procedure was not appropriate here. In *Chapman*, for instance, in issuing its ruling, the trial court "extensively reviewed trial counsel's performance" and found that the evidence defendant presented would not alter the verdict in the case given the "overwhelming" evidence of guilt presented. *Id.* at 229. The circuit court in this case did neither, merely asking defendant a few questions about his claims and summarily rejecting them without further explanation.

¶ 70 The State, relying in part on trial counsel's statements from the first preliminary *Krankel* inquiry, contends that the record shows that counsel was aware of Edward and Jackson's proposed testimony, but elected to not present it. The State maintains that this decision was firmly a matter of trial strategy reserved for trial counsel, and not suitable for an attack under *Krankel*. The State further points out that trial counsel could only have learned about Eric's proposed testimony through Edward. The State then makes a somewhat convoluted argument that because counsel could only have learned about Eric's testimony through Edward, and because counsel was not deficient with regard to Edward based on her supposed knowledge of Edward's proposed testimony, that counsel was therefore not deficient with regard to her failure to interview and investigate Eric. Leaps in logic aside, the State's argument fails for the simple reason that it is not possible to discern from the evidence presented at defendant's *Krankel* hearing whether trial counsel was aware of Edward's testimony, but was not aware of Eric, or whether trial counsel was aware of both Eric and Edward's testimony, but chose to not present it for some strategic reason, or whether trial counsel simply failed to discover Edward and Eric through reasonable investigation. We do not express any opinion on whether trial counsel's actions represented

possible neglect of defendant's case, we simply find that the record is not sufficiently developed on this point to reject defendant's contentions at a preliminary *Krankel* inquiry.

¶ 71 With regard to Jackson's proposed testimony, the State again relies on trial counsel's comments from the original preliminary *Krankel* inquiry where counsel stated that she did not call Jackson, despite preparing him for trial, because he placed defendant at the scene within "an hour or two" of the shooting. Setting aside our unwillingness to rely on trial counsel's testimony from this improperly conducted preliminary *Krankel* inquiry, the potential exonerating value of Jackson's testimony would seem to outweigh any potential concern that would arise by placing defendant at the scene of the shooting hours before it took place. Notably, Jackson's affidavit attached to defendant's postconviction petition, did not mention that defendant was present at the scene. Again, we express no opinion on the ultimate consideration of whether trial counsel's failure to call Jackson represented possible neglect of defendant's case. We merely find that there was not sufficient information at the circuit court's disposal to make such a determination.

¶ 72 "We emphasize that this court is concerned not only with whether the trial court conducted an inquiry, but also whether said inquiry was *adequate*." (Emphasis in original). *People v. McLaurin*, 2012 IL App (1st) 102943, ¶ 44. Here, we cannot say that the circuit court's inquiry was adequate, and we find it did not satisfy the purpose of the *Krankel* decision. We therefore hold that the circuit court failed to conduct an adequate inquiry into defendant's claims of ineffective assistance of trial counsel. The proper remedy is to remand the matter to the circuit court to allow the circuit court to conduct the required inquiry. *Id.* We therefore remand the matter for a new preliminary inquiry under *Krankel* to determine whether new counsel should be appointed to argue defendant's claims of ineffective assistance of counsel. *People v. Mourning,* 2016 IL App (4th) 140270, ¶¶ 23-25.

¶ 73 B. Postconviction Petition

¶ 74 Having found that remand is necessary for a new preliminary *Krankel* inquiry we will next address defendant's contention that the court erred in granting the State's motion to dismiss his postconviction petition at the second stage of proceedings. The Act provides a three-stage mechanism by which a criminal defendant may assert that his conviction was the result of a substantial denial of his constitutional rights. 725 ILCS 5/122-1 (West 2020); *People v. Delton*, 227 Ill. 2d 247, 253 (2008). At the first stage of proceedings the defendant is required to set forth only the "gist" of a constitutional claim, and the circuit court may summarily dismiss the petition if it finds that the petition is frivolous or patently without merit, *i.e.*, that it has no arguable basis in law or fact. *People v. Hodges*, 234 Ill. 2d 1, 9, 16 (2009). If the circuit court does not dismiss the petition, it advances to the second stage. *People v. Domagala*, 2013 IL 113688, ¶ 33. At this stage, the circuit court must determine whether the petition and accompanying documentation make a " 'substantial showing of a constitutional violation.' " *Id.* (quoting *People v. Edwards*, 197 Ill. 2d 239, 246 (2001)). At this stage of proceedings, we accept petitioner's allegations as true unless they are affirmatively rebutted by the record. *Id.* ¶ 35. A substantial showing of a constitutional violation is "a measure of the legal sufficiency of the petition's well-pled allegations of a constitutional violation, *which if proven* at an evidentiary hearing, would entitle petitioner to relief." (Emphasis in original.) *Id.* We review *de novo* the circuit court's dismissal of a postconviction petition at the second stage of proceedings. *People v. Rivera*, 2016 IL App (1st) 132573, ¶ 19.

¶ 75 As discussed, defendant's postconviction petition raised three claims: 1. ineffective assistance of trial counsel; 2. actual innocence based on newly discovered evidence; and 3. that his sentence was unconstitutional. We will address each of these contentions in turn.

¶ 76 1. *Ineffective Assistance of Trial Counsel*

¶ 77 It is axiomatic that every defendant has a constitutional right to the effective assistance of counsel under both the United States and Illinois constitutions. U.S. Const., amends. VI, XIV; Ill. Const. 1970, art. I, § 8. Claims of ineffective assistance are analyzed under the standard set forth in *Strickland v. Washington*, 466 U.S. 668. See, *e.g.*, *Domagala*, 2013 IL 113688, ¶ 36. Under this standard, a defendant must show that his counsel's performance was deficient and that the deficient performance prejudiced defendant. *Domagala*, 2013 IL 113688, ¶ 36. "More specifically, a defendant must show that counsel's performance was objectively unreasonable under prevailing professional norms and that there is a 'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' " *Id.* (quoting *Strickland*, 466 U.S. at 694).

¶ 78 Defendant maintains that his petition sets forth sufficient allegations to satisfy both *Strickland* prongs. With respect to deficient performance, defendant contends that his trial counsel failed to investigate and interview Edward, who would have directed counsel to Eric. Eric, in turn, would have provided exonerating testimony identifying Outlaw, rather than defendant as the shooter. Defendant also contends that trial counsel provided deficient performance in failing to call Jackson as a witness, despite preparing him to testify at trial, where Jackson also would have provided testimony that Outlaw, rather than defendant, was the shooter. As to prejudice, defendant asserts that the State's case rested largely on eyewitness accounts of the shooting. Defendant maintains that the witnesses who identified him as the shooter did so tentatively and acknowledged that they had been drinking alcohol that evening. Defendant contends that if trial counsel had presented testimony from Eric and Jackson, the result of his trial would have been different.

¶ 79 We recognize that trial counsel has a professional duty to conduct "reasonable investigation or to make a reasonable decision that makes particular investigations unnecessary." (Internal quotation marks omitted.) *Domagala*, 2013 IL 113688, ¶ 38 (quoting *Strickland*, 466 U.S. at 691). "An attorney who fails to conduct reasonable investigation, fails to interview witnesses, and fails to subpoena witness cannot be found to have made decisions based on valid trial strategy." *People v. Makiel*, 358 Ill. App. 3d 102, 107 (2005) (citing *People v. Coleman*, 267 Ill. App. 3d 895, 899 (1994)). "Whether defense counsel was ineffective for failure to investigate is determined by the value of the evidence that was not presented at trial and the closeness of the evidence that was presented." *Id.* Failure to conduct investigation and develop a defense has been found to be ineffective assistance. *Id.* (citing *People v. Wright*, 111 Ill. 2d 18 (1986)).

¶ 80 We find that defendant has met his burden and should have been granted an evidentiary hearing on his claim of ineffective assistance of trial counsel. As discussed, defense counsel's strategy at trial was to discredit the State's witnesses by highlighting discrepancies in their testimony and their prior inconsistent statements they made to police. Both Jackson and Eric alleged in their affidavits that they would have testified that defendant's co-defendant, Outlaw, was the shooter, not defendant. Both witnesses would have described physical characteristics of the shooter, including his clothing, height, and distinctive hand tattoo that matched Outlaw's description, but did not match defendant's. Taking these allegations as true, as we must at the second stage of proceedings, Jackson and Eric's allegations that defendant was not the shooter is exculpatory evidence and would have corroborated defendant's theory that the State's identification witnesses were not credible. *People v. Johnson*, 2019 IL App (1st) 153204, ¶ 45. Although we recognize that allegations concerning trial strategy are generally immune from claims of ineffective assistance of counsel, " 'counsel's tactical decisions may be deemed ineffective

when they result in counsel's failure to present exculpatory evidence of which he is aware, including the failure to call witnesses whose testimony would support an otherwise uncorroborated defense.' " *Id.* ¶ 44 (quoting *People v. Ward*, 187 Ill. 2d 249, 261-62 (1999)).

¶ 81 The record does not reveal a strategic reason for counsel's decision to not investigate and present Eric's testimony or to not present Jackson's testimony despite seemingly preparing him to testify at trial. Even counsel's statements from the improper *Krankel* inquiry, which the State relies on in opposing this claim, that Jackson placed defendant at the scene an hour or two before the shooting does not explain why counsel would forgo presenting this exculpatory evidence that supported her trial strategy. As before, we express no opinion on whether counsel, in fact, rendered ineffective assistance as defendant alleges. We merely find that "[t]he record does not reflect whether counsel made a professionally reasonable tactical decision not to call the witnesses or whether, as defendant maintains, counsel failed to call them as the result of incompetence." *People v. Tate*, 305 Ill. App. 3d 607, 612 (1999).

¶ 82 Defendant has also made a substantial showing that he was prejudiced by the allegedly deficient performance. The only evidence defense counsel presented at trial was testimony from defendant's mother, who lived in the apartment building where the shooting took place, that she had not seen defendant on the night of the shooting. The only witnesses who identified defendant as the shooter were Alan, Jonathan, and Outlaw. Alan, however, only tentatively identified defendant in a lineup three months after the shooting testifying that he "wasn't too for sure" because of the way defendant looked during the lineup. Jonathan told police on the night of the shooting that he did not see the shooter. Outlaw also testified that defendant was the shooter and that he was defendant's accomplice. However, Outlaw's testimony must be viewed through the lens of his plea agreement with the State and with the caveat that accomplice testimony is

inherently suspect. *People v. Newell*, 103 Ill. 2d 465, 470 (1984) ("We have emphasized, however, that accomplice testimony 'is fraught with serious weaknesses such as the promise of leniency or immunity and malice toward the accused' [citation], and should therefore be accepted only with utmost caution and suspicion and have the absolute conviction of its truth."). Here, both Jackson and Eric's affidavits suggest that they would have offered first-hand eyewitness testimony of the incident that would have directly contradicted the testimony of the State witnesses. As such, we find defendant has made a substantial showing that he was prejudiced by counsel's allegedly deficient performance, and we find that remand for an evidentiary hearing on defendant's allegation of ineffective assistance of trial counsel is warranted.

¶ 83 2. *Actual Innocence*

¶ 84 We next address defendant's contention that the court erred in granting the State's motion to dismiss his actual innocence claim. In support of this claim, defendant presented an affidavit from Coleman who averred that defendant was not the shooter. Defendant maintains that this is newly discovered evidence because Coleman was not available as a witness at the time of trial, and did not learn that defendant had been arrested and convicted of the shooting until after defendant's trial. Defendant contends that this evidence was material and noncumulative and is of such a conclusive character that it would probably change the result on retrial.

¶ 85 To establish a claim of actual innocence in a postconviction proceeding, the evidence must be (1) newly discovered, (2) material and not cumulative, and (3) of such conclusive character that it would probably change the result on retrial. *People v. Smith*, 2021 IL App (1st) 181728, ¶ 19 (citing *People v. Edwards*, 2012 IL 111711, ¶ 32). " 'Newly discovered evidence' that would support a claim of actual innocence is evidence that was discovered after trial and that the petitioner

could not have discovered earlier through the exercise of due diligence." *Id.* (citing *People v. Robinson*, 2020 IL 123849, ¶ 47).

¶ 86 i. Newly Discovered

¶ 87 First, defendant contends that Coleman's affidavit constitutes newly discovered evidence because, in his affidavit, Coleman averred that he left Chicago after the shooting, and learned about defendant's arrest and conviction only later after he returned. The State maintains that defendant failed to meet his burden to demonstrate that Coleman's affidavit was newly discovered because defendant failed to demonstrate that he exercised due diligence in an attempt to discover Coleman's testimony before trial. However, our supreme court has recognized that evidence may be newly discovered if a witness "essentially made himself unavailable as a witness" by moving out of the State shortly after the shooting. *People v. Ortiz*, 235 Ill. 2d 319, 334 (2009); see also *People v. Fields*, 2020 IL App (1st) 151735, ¶¶ 46-47 (explaining that newly discovered evidence includes testimony from a witness who essentially made himself unavailable as a witness by moving out of state). Defendant has maintained that he was not present at the shooting, and thus would have no reason to know that Coleman witnessed the shooting unless Coleman came forward as a witness. We further observe that the State did not argue in the circuit court that Coleman's affidavit was not newly discovered, but raises the issue for the first time on appeal. In the circuit court, the State contested defendant's actual innocence claim solely on the basis that Coleman's affidavit was cumulative and did not provide "total vindication" for defendant. The State has therefore waived its challenge on the issue of whether Coleman's affidavit was newly discovered evidence. See *People v. Cruz*, 2013 IL 113399, ¶¶ 20-22. Accordingly, we find that defendant has made a substantial showing that Coleman's affidavit is newly discovered evidence.

¶ 88 ii. Material and Noncumulative

¶ 89 We next address whether Coleman's affidavit is material and noncumulative. Our supreme court has held that "[e]vidence is considered cumulative when it adds nothing to what was already before the jury." *Ortiz*, 235 Ill. 2d at 335 (citing *People v. Molstad*, 101 Ill. 2d 128, 135 (1984)). "Evidence is material if it is relevant and probative of the petitioner's innocence." *People v. Robinson*, 2020 IL 123849, ¶ 47. Here, trial counsel did not present any evidence to support defendant's claim that someone other than defendant, particularly Outlaw, was the shooter. Trial counsel only provided impeachment testimony in an attempt to discredit the State's witnesses. Coleman's affidavit would not merely have contradicted the testimony of the State's witnesses, but is instead exculpatory, in that it supports defendant's claim of actual innocence. In its brief before this court, the State does not challenge defendant's assertion that Coleman's affidavit is material and noncumulative. Accordingly, we find that defendant has made a substantial showing that Coleman's affidavit is material and noncumulative because it contains evidence that was not already heard by the jury and it is relevant and probative of defendant's innocence.

¶ 90 iii. Capable of Changing the Result on Retrial

¶ 91 Finally, we address whether Coleman's affidavit is of such conclusive character that it would probably change the result on retrial. Here, two eyewitnesses and Outlaw identified defendant as the shooter. Coleman's affidavit directly contradicts the testimony of the State witnesses and identifies Outlaw, rather than defendant, as the shooter. Where a witness's statement is both exonerating and contradicts a State witness, it can be capable of producing a different outcome on retrial. *Ortiz*, 235 Ill. 2d at 336-37.

¶ 92 The State maintains that Coleman's affidavit is not so conclusive as to probably change the result on retrial because there was sufficient evidence of defendant's guilt from other witnesses and Coleman's affidavit was merely contradictory to the evidence already presented, but was not

conclusive of defendant's innocence. The State asserts that at best Coleman's affidavit provides a basis to assert a reasonable doubt defense, but does not rise to the standard of a claim for actual innocence.

¶ 93 However, new evidence supporting an actual innocence claim does not have to be entirely dispositive. *Robinson*, 2020 IL 123849, ¶ 56. Our supreme court has routinely rejected the total vindication or exoneration standard for evidence presented in support of a claim of actual innocence. *Id.* ¶ 55 (citing *People v. Savory*, 197 Ill. 2d 203, 213 (2001)). "Rather, the conclusive-character element requires only that the petitioner present evidence that places the trial evidence in a different light and undermines the court's confidence in the judgment of guilt." *Id.* ¶ 56. That is precisely what Coleman's affidavit does in this case. As noted, at the second-stage of postconviction proceedings, all "[w]ell-pleaded factual allegations of a postconviction petition *and its supporting evidence* must be taken as true unless they are positively rebutted by the record of the original trial proceedings." (Emphasis added.) *People v. Sanders*, 2016 IL 118123, ¶ 48 (citing *Coleman*, 183 Ill. 2d at 382.) Therefore, at this stage, we must accept the allegations in Coleman's affidavit as true. Coleman's testimony would directly contradict the testimony of the State's witnesses and could exonerate defendant. *Ortiz*, 235 Ill. 2d at 337; *People v. Warren*, 2016 IL App (1st) 090884-C, ¶ 84; *People v. Adams*, 2013 IL App (1st) 111081, ¶¶ 36-37; see also *People v. Ross*, 2015 IL App (1st) 120089, ¶ 36 (where an affidavit attached to an initial petition asserting newly discovered evidence of actual innocence directly rebutted the State's evidence at trial, the affidavit was of such conclusive character that it would probably change the result on retrial). Accordingly, we find that defendant has made a substantial showing that Coleman's affidavit was of such a conclusive character that it would probably change the result on retrial. " '[T]his does not mean that [defendant] is innocent, merely that all of the facts and surrounding circumstances,

including the testimony of [defendant's witnesses], should be scrutinized more closely to determine the guilt or innocence of [defendant].' " *Ortiz*, 235 Ill. 2d at 337 (quoting *Molstad*, 101 Ill. 2d at 136). We therefore find that defendant has made a substantial showing on his claim of actual innocence sufficient to survive dismissal at the second stage of postconviction proceedings. We therefore remand for a third-stage evidentiary hearing on this claim.

¶ 94 3. *Unconstitutional Sentence*

¶ 95 Finally, we will address defendant's contentions that his sentence is unconstitutional. Defendant contends that his sentence violates both the proportionate penalties clause of the Illinois constitution and the eighth amendment of the United States Constitution where he was only 18 years old at the time of the offense and was sentenced to a *de facto* life sentence without adequate consideration of his youth and its attendant characteristics. Defendant further asserts that recent developments in the law, combined with emerging science on brain development, have prompted Illinois courts to find that *de facto* life sentences for young adult offenders are unconstitutional.

¶ 96 i. *Miller v. Alabama*

¶ 97 Defendant's claim finds its foundation in the United States Supreme Court's decision in *Miller*, 567 U.S. 460. In *Miller*, the Supreme Court held that mandatory life sentences for juveniles violate the eighth amendment's prohibition against cruel and unusual punishment. *Miller*, 567 U.S. at 489. *Miller* requires sentencing courts in homicide cases to "take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." *Id.* at 480. The Supreme Court expanded on its decision in *Miller* in *Montgomery v. Louisiana*, 577 U.S. ___, 136 S. Ct. 718 (2016). In *Montgomery*, the Court determined that *Miller* should apply retroactively and that state courts must apply *Miller* in collateral proceedings. *Id.* at ___, 136 S. Ct. at 732. The Court further found that *Miller* did not prohibit all life sentences for

juveniles, but reserved life sentences for "the rare juvenile offender whose crime reflects irreparable corruption." (Internal quotation marks omitted.) *Id.* at ___, 136 S. Ct. at 734. Throughout the decision, the court repeatedly stated that the decision in *Miller* applied only to juvenile offenders sentenced to "mandatory life without parole." *Id.* at ___, 136 S. Ct. at 726, 732, 733.

¶ 98 In *People v. Reyes*, 2016 IL 119271, our supreme court expanded the holding of *Miller*, finding that *Miller* applied to so-called "*de facto*" life sentences for juveniles. The supreme court found that such sentences violate *Miller* where the sentence is so long that it amounts to "a mandatory term of years that is the functional equivalent of life without the possibility of parole ***." *Id.* ¶ 9. Recently, in *People v. Buffer*, 2019 IL 122327, ¶ 40, our supreme court determined that a prison term of 40 years or more is considered a *de facto* life sentence. Further, in *People v. Holman*, 2017 IL 120655, ¶ 40, the supreme court applied *Miller* to discretionary life sentences finding that "[l]ife sentences, whether mandatory or discretionary, for juvenile defendants are disproportionate and violate the eighth amendment, unless the trial court considers youth and its attendant characteristics." The *Holman* court held that "a juvenile defendant may be sentenced to life imprisonment without parole, but only if the trial court determines that the defendant's conduct showed irretrievable depravity, permanent incorrigibility, or irreparable corruption beyond the possibility of rehabilitation." *Id.* ¶ 46.

¶ 99 ii. Young Adults Under Miller

¶ 100 Recently, there has been a trend in the appellate court wherein young adults seek to have their sentences invalidated on the basis of *Miller* principles. See, *e.g.*, *People v. White*, 2020 IL App (5th) 170345, *People v. Suggs*, 2020 IL App (2d) 170632, *People v. Handy*, 2019 IL App (1st) 170213, *People v. LaPointe*, 2018 IL App (2d) 160903, *People v. Pittman*, 2018 IL App (1st)

152030. Defendants in these cases generally raise challenges to their sentences under the eighth amendment, as expressly provided in *Miller*, and under the proportionate penalties clause of the Illinois Constitution. Our supreme court has recognized, however, that eighth amendment "claims for extending *Miller* to offenders 18 years of age or older have been repeatedly rejected." *People v. Harris*, 2018 IL 121932, ¶ 61 (collecting authorities). However, whether a young adult defendant has a cognizable claim under the proportionate penalties clause is less clear. Similar to the eighth amendment, the proportionate penalties clause provides that "[a]ll penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship." Ill. Const. 1970, art. I. § 11. A challenge under the proportionate penalties clause "contends that the penalty in question was not determined according to the seriousness of the offense." *People v. Sharpe*, 216 Ill. 2d 481, 487 (2005). Some decisions of this court have suggested that the proportionate penalties clause may provide greater *Miller*-based protections for young adult offenders than those afforded by the eighth amendment. See, *e.g.*, *LaPointe*, 2018 IL App (2d) 160903, ¶¶ 51-53, (noting inconsistency about whether the eighth amendment and proportionate penalties clause are co-extensive and should be interpreted in "lockstep"). Defendants in such cases argue, as defendant here, that there is little distinction between juvenile offenders just under the age of 18 and offenders who are barely older. The defendants also cite to emerging science regarding brain development suggesting that brain development does not stop in young adults until their mid-20s.

¶ 101 The supreme court opened the door for such arguments in *People v. Thompson*, 2015 IL 118151. In *Thompson*, the 19-year-old defendant shot and killed his father and a woman who was inside his father's house. *Id.* ¶ 4. After the court found the defendant guilty of two counts of first degree murder, he was sentenced to a term of natural life imprisonment. *Id.* ¶ 7. This court affirmed

the defendant's conviction and sentence on direct appeal. *Id.* ¶ 8. The defendant filed several postconviction pleadings, including a petition pursuant to section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2010)) that was the subject of the supreme court's ruling. *Id.* ¶¶ 9-14. In that petition, the defendant raised due process violations and claims of ineffective assistance of counsel. *Id.* ¶ 14. On appeal, however, the defendant abandoned those claims and instead asserted that his mandatory life sentence was unconstitutional pursuant to *Miller* under both the eighth amendment and the proportionate penalties clause. *Id.* ¶¶ 16-17. This court rejected the defendant's contentions, finding that his as-applied constitutional challenge was not properly before the court because it was raised for the first time on appeal. *Id.* ¶ 18.

¶ 102 The supreme court granted the defendant leave to appeal and agreed with the appellate court's conclusion that defendant forfeited his as-applied challenge to his sentence under *Miller* by raising it for the first time on appeal. *Id.* ¶ 39. The court noted that the defendant relied on the "evolving science" of juvenile maturity and brain development, but the defendant failed to establish how this "evolving science" applied to the circumstances of his case. *Id.* ¶ 38. The court noted that the circuit court was the appropriate tribunal for developing the factual record to adequately address defendant's claim. *Id.* The court stated, however, that the defendant was "not necessarily foreclosed" from raising his constitutional challenge in the circuit court and noted that Act (725 ILCS 5/122-1 *et seq.* (West 2016)) was "expressly designed to resolve constitutional issues." *Id.* ¶ 44. The court concluded that "we express no opinion on the merits of any future claim raised by defendant in a new proceeding." *Id.*

¶ 103 The supreme court again addressed a young adult offender's claim pursuant to *Miller* in *Harris*, 2018 IL 121932. In *Harris*, the 18-year-old defendant received a 76-year sentence for first degree murder and aggravated battery with a firearm. *Id.* ¶ 1. The defendant contended, for the

first time in his direct appeal, that his sentence violated the proportionate penalties clause. *Id.* ¶ 17. This court vacated defendant's sentence finding that " '[w]hile we do not minimize the seriousness of [defendant's] crimes, we believe that it shocks the moral sense of the community to send this young adult to prison for the remainder of his life, with no chance to rehabilitate himself into a useful member of society.' " *Id.* ¶ 18 (quoting *People v. Harris*, 2016 IL App (1st) 141744, ¶ 69, *aff'd in part, rev'd in part, Harris*, 2018 IL 121932). On appeal, the supreme court noted that the defendant was raising an as-applied challenge to his sentence. *Harris*, 2018 IL 121932, ¶ 37. The court stated that it was therefore "paramount" that the record be sufficiently developed in terms of the defendant's specific facts and circumstances. (Internal quotation marks omitted). *Id.* ¶ 39. The court noted that the defendant did not raise his as-applied challenge in the trial court and thus the trial court did not hold an evidentiary hearing where it could make findings of fact regarding the defendant's specific circumstances. *Id.* ¶ 40.

¶ 104 The court found that because the defendant was 18 years old at the time of the offense, *Miller* did not apply directly to his circumstances. *Id.* ¶ 45. As in *Thompson*, the supreme court determined that the record was not sufficiently developed to address the defendant's claim that *Miller* applied to his particular circumstances. *Id.* ¶ 46. Despite the defendant's arguments to the contrary, the supreme court found that the record was not sufficiently developed to address his as-applied challenge because the record contained "only basic information about defendant, primarily from the presentence investigation report." *Id.* The court noted that an evidentiary hearing was not held and the trial court did not make any findings of fact on the "critical facts" needed to determine whether *Miller* applied to the defendant as an adult. *Id.* The court concluded that the defendant's as-applied challenge was premature because the record did not contain evidence about how the evolving science on juvenile maturity and brain development that the Supreme Court cited in

Miller applied to the defendant's specific facts and circumstances. *Id.* The court noted, however, as it did in *Thompson*, that the defendant was "not necessarily foreclosed" from raising an as-applied challenge in another proceeding, such as in a petition under the Act. *Id.* ¶ 48.

¶ 105 Defendant here, like the defendants in *Thompson* and *Harris*, raises an as-applied challenge to his sentence. Recently, our supreme court provided guidance on how this court should resolve claims from young adult offenders that their sentences violate *Miller* principles. In *People v. House*, 2021 IL 125124, the 19-year-old defendant was found guilty of two counts of first degree murder and two counts of aggravated kidnapping, then sentenced to a mandatory natural life term for the murder convictions and 60-year terms for each aggravated kidnapping conviction to run consecutively to the life term. *Id.* ¶ 5. The defendant filed a *pro se* postconviction petition alleging, *inter alia*, a claim that his mandatory life sentence violated the proportionate penalties clause of the Illinois Constitution (Ill. Const. 1970, art. I, § 11). *Id.* ¶¶ 7-8. The circuit court summarily dismissed the petition at the first stage of postconviction proceedings, and this court reversed and remanded for second stage proceedings. *Id.* ¶ 7. On remand, the defendant's appointed counsel filed an amended petition again alleging, *inter alia*, that his sentence violated the eighth amendment and the proportionate penalties clause. *Id.* ¶ 8. The circuit court granted the State's motion to dismiss the petition at the second stage of postconviction proceedings. *Id.* ¶ 8. This court affirmed the dismissal of the defendant's postconviction petition on four of the issues raised in the petition, but vacated the defendant's sentence finding that his mandatory natural life sentence violated the Illinois proportionate penalties provision, and remanded for resentencing. *Id.* ¶ 9 (citing *People v. House*, 2015 IL App (1st) 110580 (*vacated*, *People v. House*, No. 122134 (Nov. 28, 2018) (supervisory order)). The supreme court issued a supervisory order directing the appellate court to vacate its judgment and reconsider the effect of the supreme court's decision in

Harris, 2018 IL 121932 on the issue of whether the petitioner's sentence violated the proportionate penalties clause of the Illinois Constitution. *Id.* ¶ 11.

¶ 106 On remand, both parties filed an agreed motion for summary disposition asking the appellate court to remand the case for further second-stage postconviction proceedings. *Id.* ¶ 12. The parties agreed that based on *Harris* and *Thompson*, the case should be remanded for further postconviction proceedings to give the defendant an opportunity to consult with counsel about his constitutional claims and to develop and present evidence to the trial court. *Id.* ¶¶ 12, 22. The appellate court denied the agreed motion and again vacated the defendant's sentence, finding that his mandatory natural life sentence violated the proportionate penalties clause of the Illinois Constitution. *Id.* ¶ 12.

¶ 107 On appeal, the supreme court noted that, as in *Harris*, the defendant did not provide or cite any evidence relating to how the evolving science on juvenile maturity and brain development applied to his specific facts and circumstances. *Id.* ¶ 29. The court noted that, as a result, there was no evidentiary hearing held, and the trial court did not make any factual findings "critical to determining whether the science concerning juvenile maturity and brain development applies equally to young adults, or to petitioner specifically, as he argued in the appellate court." *Id.* The *House* court therefore found that the appellate court improperly held that the defendant's sentence violated the proportionate penalties clause because there was not a developed evidentiary record on the as-applied constitutional challenge. *Id.* The court determined that the appropriate remedy was to remand the case for further second stage postconviction proceedings in order to give the defendant an opportunity to develop the record to support his as-applied constitutional challenge. *Id.* ¶ 32.

¶ 108 Notably, the circuit court in this case recognized that the record was not sufficiently developed to address defendant's constitutional claim. During postconviction counsel's argument on the State's motion to dismiss the petition, the court interrupted counsel's argument stating that in cases where a young adult defendant raises an as-applied constitutional challenge to his sentence under *Miller*, "the defense has produced case specific witnesses that relate to the individual sentencing issues where some psychologist was called to testify and they testified to their analysis of the defendant's background and things specific to that individual defendant." Postconviction counsel acknowledged the court's reservations and stated that he did not have the money required to retain a psychologist to evaluate defendant. Postconviction counsel represented that he could retain a psychologist to evaluate defendant if that is what the court desired. Instead of granting postconviction counsel the opportunity to develop the record on this matter, however, the court instead summarily granted the State's motion to dismiss making no findings under *Miller*. Under *House*, however, it is clear that the court should have provided postconviction counsel and defendant an opportunity to develop the record. We recognize that the circuit court did not have the benefit of the supreme court's decision in *House* at the time it ruled on the State's motion.

¶ 109 We observe that *House* left unanswered the question of whether *Miller* considerations or juvenile sentencing practices apply to young adults. The decision also left unanswered the question of what sort of evidence a young adult defendant should submit to support his claim. Nonetheless, the decision makes clear that young adult offenders sentenced to mandatory or discretionary life sentences or *de facto* life sentences should be afforded an opportunity to develop the record so that the trial court may make factual findings on whether the science concerning juvenile maturity and brain development applies equally to the young adult defendant. *Id.* ¶ 29. Accordingly, as in *House*,

we find that the record requires further development and we remand to the circuit court for further second-stage postconviction proceedings. *Id.* ¶ 32.

¶ 110 III. CONCLUSION

¶ 111 For the reasons stated, we find that the circuit court erred in rejecting defendant's claims of ineffective assistance of trial counsel and we remand for a new preliminary inquiry pursuant to *Krankel* into defendant's allegations. We further find that the circuit court erred in granting the State's motion to dismiss defendant's postconviction petition at the second stage of proceedings, and we remand for third stage postconviction proceedings on defendant's claim that his trial counsel provided ineffective assistance and on his claim of actual innocence, and we remand for further second-stage proceedings on defendant's claim that his sentence is unconstitutional.

¶ 112 Reversed and remanded, with directions.