

No. 1-12-1069

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IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court
Plaintiff-Appellee,)	of Cook County
)	
v.)	No. 00 CR 9355
)	
IVY KELLY,)	Honorable
)	Michele M. Simmons,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE PALMER delivered the judgment of the court.
Justice Gordon and Justice Reyes concurred in the judgment.

ORDER

¶ **Held:** The judgment of the circuit court of Cook County dismissing defendant postconviction petition is reversed where defendant made a substantial showing of a constitutional violation that warranted an evidentiary hearing.

¶ Defendant, Ivy Kelly, appeals from an order of the circuit court of Cook County granting the State’s motion to dismiss his petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2006)). He seeks reversal of that order and a remand for an evidentiary hearing, contending that he made a substantial showing of violations of his constitutional rights. For the reasons that follow, we reverse and remand.

¶ The underlying facts of this case are sufficiently set forth in our order from defendant's direct appeal. See *People v. Ivy Kelly*, No. 1-03-2990 (2005) (unpublished order pursuant to Supreme Court Rule 23). Therefore, we will discuss only those facts necessary to resolve the issues defendant raises in this appeal. In summary, following a 2003 bench trial, defendant was found guilty of first degree murder and sentenced to 30 years' imprisonment. Defendant's conviction arose from the shooting death of the victim, Joseph Ward, on December 10, 1999. Defendant and the victim were close friends who also sold drugs together, along with co-offender Demetrius Hampton, Christopher Lacy (Lacy), Nicholas Lacy (Nicholas), Lawrence Scott (Lawrence) and Lenoris Echols. At trial, the State's primary evidence against defendant were the pretrial statements of Christopher Lacy and Paula Scott, in which each identified defendant as one of the two shooters. Both witnesses recanted those identifications at defendant's trial and testified that they were unsure of the identity of the shooters. Another man, Demetrius Hampton, was also charged with the victim's murder. Hampton was tried separately, convicted of murder and sentenced to 20 years' imprisonment.

¶ As relevant to this appeal, the record shows that defendant was charged by indictment with two counts of first degree murder. In its pretrial discovery response, the State indicated that one its witnesses, Christopher Lacy, was an "informant[]." The discovery answer also indicated that none of the witnesses the State intended to call had been offered "[p]romises or agreements of leniency."

¶ The record further shows that on March 27, 2000, a detective brought Scott to the police station. She viewed a lineup that included defendant and identified defendant as the person who shot the victim. Scott also gave a written statement to an Assistant State's Attorney (ASA) indicating that at 11 p.m. on December 10, 1999, she was standing outside of her home talking to

the victim when the shooting occurred. Scott saw Lacy standing across the street talking to two girls. She then saw defendant and Hampton approaching the victim. Defendant and Hampton then "both pulled out guns and started shooting at [the victim]," who was unarmed.

¶6 Scott also testified before a grand jury on March 27. Her testimony was substantially similar to her written statement except she testified that she saw defendant and Hampton approach and they "put their hands in their coat and pulled out a gun and got to shooting" at the victim. The victim ran towards the front of the house and defendant and Hampton followed him. When asked if defendant and Hampton each had a weapon or if there was one weapon between them, Scott responded "I seen one and I seen one shot. That's when I ran. I don't know about the rest." Scott then testified that she did not know if defendant and Hampton each had a weapon.

¶7 The other eyewitness, Christopher Lacy, gave a handwritten statement on March 27, 2000. Lacy indicated that at the time of the shooting he was standing near a parked car talking to two girls while the victim was across the street with Scott. Lacy saw defendant and Hampton approach and talk to the victim and Scott. A couple of minutes later, Lacy saw Hampton point a gun at the victim. The victim turned to run and "they started firing shots at him." Lacy went to a friend's house and remained there for an hour. He then returned to the crime scene after the police arrived and saw that the victim was dead.

¶8 Lacy's statement further provided that on December 11, 1999, at about 4 a.m., defendant called and asked Lacy to come to defendant's house, but Lacy refused. Later that day, Lacy received another call and went to Lenoris Echols' house, where he encountered defendant. Defendant asked Lacy what had happened, and Lacy said that the victim had been shot by two men who looked like defendant and Hampton. Defendant told Lacy that if anyone asked about the shooting, Lacy should say that he saw two tall guys. About one week later, after the victim's

funeral, Lacy returned to the scene of the shooting. Defendant also arrived at the scene and held two guns to Lacy's head and said, "If you ever tell anybody I'm gonna kill you."

¶9 Lacy testified before a grand jury on March 28, 2000. His testimony was substantially the same as his written statement in that Lacy testified that defendant and Hampton approached the victim and Scott, and that Hampton pulled a gun and fired the first shot. More shots were fired, but Lacy fled after the first shot. Lacy also corroborated his written statement as to what happened after the shooting.

¶10 At defendant's trial, defense counsel asserted during opening statements that he did not know Lacy's motives to implicate defendant but counsel observed that Lacy did not do so until he was under arrest and in police custody. Counsel also argued that Lacy was in custody at the Robbins police department when he gave the statement and that Lacy might have thought, "[g]uess what? If you are lenient on me, I have a story to tell you." Scott testified at defendant's trial that she was about to enter her house when she saw the victim and started speaking to him. Two tall men, whom Scott did not recognize, approached her and the victim. The two men started shooting as they walked past. Scott heard two shots and ran to the back of her house. Scott acknowledged giving a handwritten statement in which she identified defendant and Hampton as the two people who shot the victim. She testified, however, that she only identified defendant and Hampton because Lacy told her they were the ones who shot the victim. Scott also acknowledged that she identified defendant in a lineup but testified that she did so because the police asked her "did I know Ivory [*sic*], and I said, yeah, and I picked him out." Scott also acknowledged that she previously testified before a grand jury and that she identified defendant as one of the shooters.

¶11 Lacy testified at trial that in 1998 he pled guilty to two State charges of delivery of a

controlled substance and received two concurrent sentences of three years' imprisonment. Lacy further testified that defendant and the victim were friends but that they had a "falling out" because defendant allegedly owed the victim money for drugs. On the day of the shooting, Lacy and the victim were selling drugs together and the victim left at about 10 p.m. Lacy started talking to two women in a car. The victim returned and Lacy told the women to leave. Lacy saw defendant and Hampton approach the victim and then saw Hampton shooting at the victim. At that time, defendant was "just sort of standing there." Lacy ran to a nearby house but returned 30 minutes later. He saw Scott crying and speaking to a police officer. Lacy spoke to Scott and asked her what happened, but he did not mention that he thought defendant and Hampton were the shooters. Lacy drove to the home of Maurice Scott, where he knew defendant was at the time, to find out what had happened. Defendant, Lacy and Echols later returned to the scene and on the way there defendant started crying when Lacy told defendant that the victim had been shot. When they arrived at the scene, defendant exited the car and ran to the victim's body while Lacy left the scene.

¶12 Defendant called Lacy early the next morning and asked him to come to defendant's house. Lacy agreed to go to defendant's house but did not do so because he was "confused." Defendant called Lacy again later that day and asked to talk to Lacy about what he had seen. Lacy drove to Echols' house to meet defendant, and defendant asked Lacy what the shooters looked like. When Lacy responded that the shooters looked like defendant and Hampton, defendant told Lacy that "from hereon [*sic*] out that aint' what you saw no more. You saw two tall guys." The victim's funeral was held about a week later. Defendant and Lacy were both pallbearers at the funeral. Lacy testified that defendant and the victim had been friends "a very long time" and that they were "as close as brothers." Defendant and Lacy did not speak at the

funeral. After the funeral, Lacy went to the scene of the shooting to view a memorial. Defendant arrived at the scene shortly thereafter. Defendant pointed two guns at Lacy and said that Lacy knew more than he was admitting and that he would kill Lacy if he "ever t[old] anybody." When asked why he went to find defendant after the shooting, Lacy responded "Just - - you know, I still wasn't sure. Still today still ain't sure, you know."

¶13 Under cross-examination, in agreeing that he was not sure it was Hampton and defendant who shot the victim, Lacy testified as follows:

"Q. You saw [Hampton] shooting at [the victim]?"

A. What looked to be that, yes.

Q. Looked to be [Hampton]?"

A. Yes.

Q. You're not sure it was [Hampton]?"

A. I'm not sure.

Q. Do you know what kind of gun it was? Do you know whether it was a pistol or a rifle?"

A. It looked like a little pistol.

Q. Do you know where he pulled it out from?"

A. No.

Q. You weren't sure it was [defendant]? You weren't sure it was [Hampton]?"

A. Correct."

On redirect examination, Lacy admitted that in his previous handwritten statement and grand jury testimony, he identified defendant and Hampton as the two men he saw that night.

¶14 The victim's father, Bernard, testified that the victim had been living with him before he

was killed. Defendant came to the Bernard's house a couple of days after the shooting and asked for the "stuff" that the victim had kept in a safe. Bernard told defendant to come back later and then broke into the safe and found drugs and money. Defendant returned a couple days later and Bernard gave him the drugs and money.

¶15 Robbins police officer Manley Kirkpatrick testified that he spoke to Scott at the scene immediately after the shooting. Scott told the officer that she heard four shots and saw two males running by the side of the house.

¶16 Detective Terrance Franklin testified that on March 18, 2000, he spoke with Scott at the police station about the shooting. Scott told him that after the victim's death, defendant came to her house and told her not to talk to the police.

¶17 Defendant testified on his own behalf that the "drug ring" included Hampton, Lacy, defendant and several other men. Defendant further testified that he was with other people at Maurice Scott's house on the night of the shooting. Lacy arrived there around 11 p.m. and said "[t]hey just shot [the victim]," who was defendant's best friend. Lacy took defendant to the crime scene and defendant saw that the victim was dead. The following day, defendant called Lacy to see what happened because Lacy had been at the scene of the shooting. Lacy and defendant met at Echols' house later that evening and Lacy said he saw two men, one short and one tall, shooting at the victim. Lacy said he did not see who the men were because it was dark. Lacy never told defendant that the shooters looked like Hampton and defendant. Defendant acted as honorary pallbearer at the victim's funeral. After the funeral, defendant approached a car in which Lacy was sitting with another man who had a gun. Defendant took the gun from this man, pointed it at Lacy and demanded that Lacy tell him the identity of the shooters. Defendant also explained that prior to the shooting, Scott's daughter "called the police on [the victim]." When

defendant found out, he hit Scott's daughter and when Scott found out, she "called the police on [defendant]."

¶18 Maurice Scott testified that defendant and other people were at his house at the time of the shooting, and that he and defendant were not always in the same room.

¶19 The parties stipulated that Detective Jerome McGee interviewed Paula Scott the night of the shooting and that that she told him that "two people did the shooting, but she did not know who they were."

¶20 The trial court found defendant guilty of first degree murder and sentenced him to a term of 30 years' imprisonment.

¶21 On direct appeal, defendant argued that the State failed to prove his guilt beyond a reasonable doubt, that his trial counsel was ineffective for failing to impeach the credibility of Scott's prior written statement with her grand jury testimony, and that the judge assumed the role of prosecutor by *sua sponte* admitting as substantive evidence Scott's grand jury testimony, Lacy's handwritten statement and Lacy's grand jury testimony. Defendant also argued that the trial court erred in admitting Scott and Lacy's prior inconsistent statement as substantive evidence and that the prosecutor made improper remarks in closing arguments. This court affirmed defendant's conviction. See *People v. Kelly*, No. 1-03-2990 (2005) (unpublished order pursuant to Supreme Court Rule 23).

¶22 On September 8, 2006, defendant filed a *pro se* postconviction petition. Defendant claimed that the State violated *Brady v. Maryland*, 373 U.S. 83 (1963) when it failed to disclose that at the time Lacy gave his pretrial statements implicating defendant in the victim's death, he had been paid \$600 as a federal informant and that he had two pending federal drug cases. Defendant alleged that through newly discovered evidence he had learned that the State failed to

disclose that a deal was made with Lacy to testify falsely against defendant. Defendant claimed that he had learned through the trial of his co-defendant Hampton that Lacy had been arrested and brought to the Robbins police station on "a case" about three weeks before defendant was arrested and that it was at that time that Lacy spoke to detectives about the victim's murder.

According to defendant, Lacy also testified that at the time he implicated defendant and Hampton in the victim's murder, Lacy was a paid informant of the federal government who was facing legal problems arising out of two cocaine sales. Lacy "admitted that he wasn't out of trouble" and that he was "looking for help" at the time he spoke to the Robbins police department and implicated defendant and Hampton. Defendant further alleged that Lacy was released from custody after giving a statement to the Robbins police department. Defendant also noted that the State's other witness, Paula Scott, testified at defendant's trial that it was Lacy who told her that defendant was one of the men who shot at the victim. Therefore, defendant concluded, Lacy's credibility "was the foundation of [defendant's] conviction, and evidence of Lacy's motive or interest in falsely identifying and testifying would have cast serious doubt upon and undermined the confidence in [defendant's] guilt."

¶3 Defendant's petition also asserted a claim that his trial counsel was ineffective for failing to fully investigate Lacy's background as a federal informant and the circumstances under which he gave the statement implicating defendant in the victim's murder. Defendant further alleged that counsel was ineffective for failing to cross-examine Lacy regarding these circumstances and whether they gave him a motive to falsely testify against defendant.

¶4 Defendant attached several documents to his petition in support of his allegations. The first was defendant's verified "affidavit" attesting that the factual allegations in his petition were true. Defendant also attached excerpts of Lacy's testimony at Hampton's trial. During cross-

examination by Hampton's attorney, Lacy testified as follows:

"Q. Now, on March 17 of 2000, you were in the Robbins Police Department, right?

A. Yeah.

Q. You had been brought in on some problem there, right?

A. Yeah.

Q. And prior to being released, you asked to talk to Detective Franklin, right?

A. Not really, no. We just kind of bumped into each other and started conversating.

Q. In the Robbins Police Department, right?

A. Yeah.

Q. And you were looking - - and after talking to Franklin, then you were released and went home, right?

A. Yeah.

Q. You have had some experience with the law before, right?

A. Yeah.

Q. Back in 1997 you sold an ounce of cocaine to an undercover informant, right?

A. Yeah.

Q. And then you did it again, sold another ounce of cocaine?

A. Yeah.

Q. And then before you got arrested on that, you got arrested for two other cocaine sales, right?

A. Correct.

Q. And after you got arrested on the two other cocaine sales, then you were brought in on the federal charges for selling the two one ounce sales?

A. No.

Q. They arrested you at that time?

A. No, the[y] indicted me on the State case for the two. I sold to the police 0.8 grams, and they indicted me.

Q. Right, you got indicted on the State cases?

A. Right.

Q. About while that was pending you got arrested on the one ounce cases?

A. I pled guilty. I never was arrested on the one ounce cases.

Q. And then the federal authorities came to you?

A. While I was in Logan Correctional Center. I had already pled guilty and had went to do my time down in Logan. And while I was down in Logan doing my time, for some reason they came and got me out of jail. I didn't know why.

While I was down there, they took me to M.C.C. downtown. While I was down there, they told me that back in 1997, I had sold 2 ounces to C.I.

And then after they told me about that, then they asked me did I want to cooperate.

Q. So the federal authorities basically talked to you and told you about 'We got you on the two one-ounce sales?'

A. Yes.

Q. And they told you, this was back in June of '98 when they first talked to you?

A. Yeah.

Q. ***You talked to the federal authorities and they said, 'If you work for us and work with us, we can take care of those two one-ounce cases?'

A. Yeah.

Q. And then you signed an agreement with them in November 1998?

A. Yeah.

Q. And then you became a paid federal informant?

A. I wouldn't say paid.

Q. They gave you some money, about 600 bucks altogether?

A. Yeah.

Q. And they gave you help on your two one-ounce cases?

A. Yeah.

Q. And, in fact, you never had to face trial or sentencing or anything on those two one-ounce cases?

A. No, I never went in front of a judge.

Q. And you told us a minute ago, on the two state cases that's the one that you went to the jail?

A. I pled guilty to three years. I only ended up doing 7 months.

Q. And so you are familiar with the system?

A. Yeah.

Q. And when you were in Robbins Police Department in March of 2000, March 17, you were facing another problem. You relied on your knowledge of the system, that 'I got something to trade. I will tell you guys something, and you guys help me out with my problem,' right?

A. No.

Q. That's why you talked to Franklin on March 17th, because you knew if I do this, hey, I have had success before. I won't have any problems. They will help me,' right?

A. No. If you look, I wasn't even out of my trouble on March 17th. I didn't know how that situation was going to turn out.

Q. You were in custody and then they let you go after you talked to Franklin and told him about seeing the people who had committed this shooting right?

A. Yeah, but I had told Detective Deon Kimball before all that ever came up.

Q. You told a Detective Deon Kimball.

A. Yeah.

Q. What department is he with?

A. Robbins.

Q. You told him basically what you told this jury today?

A. Yeah.

Q. A police officer, right?

A. Correct.

Q. And you were still hoping that you wouldn't have to go to a federal penitentiary for a long time for that, weren't you?

A. Yes, indeed.

Q. Looking for whatever help you could get, right?

A. (no audible response.)

Q. Help them, and they will help you. Is that how it works?

A. Yeah, that's how it works."

¶25 On February 25, 2011, the public defender appointed to represent defendant during postconviction proceedings filed an amended postconviction petition. The amended petition asserted that trial counsel was ineffective for failing to conduct a diligent investigation of Lacy's background and for failing to impeach Lacy regarding the fact that he was under arrest when he first implicated defendant, and that appellate counsel was ineffective for failing to raise the issue on direct appeal. Finally, the amended petition stated "[t]he *pro se* petition which adequately supports [defendant's] contentions, [is] incorporated herein."

¶26 The State filed a motion to dismiss the petition, arguing that defendant's ineffective assistance of counsel claim was barred by *res judicata* because defendant raised an ineffective assistance of counsel claim on direct appeal and the "total claim of ineffective assistance" was rejected, that defense counsel's omissions were strategic and were not prejudicial, and that appellate counsel was not ineffective.

¶27 The circuit court granted the State's motion and dismissed defendant's petition. The court found that defendant's ineffective assistance claim was barred by *res judicata*, that nothing in the record indicated that defense counsel did not know that Lacy was a paid informant, and that defendant's appellate counsel was not ineffective because Hampton's trial occurred 22 months after defendant's trial and therefore appellate counsel could not have raised the issue on direct appeal. This appeal followed.

¶28 At the second stage of proceedings under the Act, the circuit court must determine whether the allegations in the petition, supported by the trial record and any accompanying affidavits, make a substantial showing of a constitutional violation. *People v. Coleman*, 183 Ill. 2d 366, 381 (1998). If a petition makes a substantial showing that the defendant was deprived of a constitutional right, the petition must be advanced to the third stage of postconviction

proceedings for an evidentiary hearing. *People v. Gaultney*, 174 Ill. 2d 249, 255 (2001). If no such showing is made, the defendant is not entitled to an evidentiary hearing and the petition may be dismissed. *People v. Johnson*, 206 Ill. 2d 348, 357 (2002). Where, as here, the State seeks dismissal of a petition instead of filing an answer, its motion to dismiss assumes the truth of the allegations to which it is directed and questions only their legal sufficiency. *People v. Ward*, 187 Ill. 2d 249, 255 (1999). All well-pled facts in the petition and in the supporting affidavits are to be taken as true. *Id.* "[F]actual disputes raised by the pleadings require a determination of the truth or falsity of the supporting affidavits or exhibits, a determination which cannot be properly made at a hearing on a motion to dismiss, but rather can only be resolved through an evidentiary hearing." *Coleman*, 183 Ill. 2d at 381. We review the circuit court's second stage dismissal of defendant's postconviction petition *de novo*. *Id.* at 378-79.

¶9 Defendant first contends that he made a substantial showing that he received ineffective assistance of trial counsel. Defendant claims that the allegations in his petition, taken as true, as well as the excerpts from Lacy's testimony at Hampton's trial, raise a question of fact as to whether Lacy identified defendant in the victim's shooting pursuant to a deal with the federal government or in hopes of avoiding prosecution or receiving leniency for having previously sold narcotics to undercover federal informants. Defendant further claims that the allegation in his petition and the documents attached thereto make a substantial showing that his trial counsel was ineffective for failing to investigate the circumstances surrounding his pretrial statements and how those circumstances might have affected Lacy's motive to identify defendant as one of the men who shot the victim or alternatively that trial counsel was ineffective by failing to effectively cross-examine Lacy in the event that counsel had this information.

¶10 The State initially responds that defendant's claim is barred by *res judicata*. Specifically,

the State asserts that defendant raised a claim of ineffective assistance of trial of counsel on direct appeal and, although that claim was based on different grounds than those supporting the ineffective assistance claim in defendant's petition, the entire ineffective assistance of counsel issue is *res judicata*. The State relies upon our supreme court's decision in *People v. Emerson*, 153 Ill. 2d 100 (1992) to support this argument.

¶1 In *Emerson*, the court considered whether *res judicata* and waiver barred the defendant's postconviction claim that he was denied effective assistance of counsel. *Id.* at 104. The defendant argued that fundamental fairness required that the court consider his claim and pointed to *the res judicata* exception for claims supported by facts that were not before the reviewing court. *Id.* The supreme court began its analysis by listing the various reasons that the defendant claimed in his petition that his trial counsel was ineffective. *Id.* at 104-05. The court noted the defendant's argument that the facts surrounding his attorney's deficiencies were outside the record on direct appeal. *Id.* For example, the defendant claimed that the best evidence in support of his ineffective assistance claim was testimony and argument from defendant's first trial, where he alleged that he had been represented by counsel whose conduct was consistent with constitutional standards. Since the testimony and argument from the first trial was not before the court on direct appeal, defendant argued that his claim fell within the *res judicata* exception for evidence not presented to the court on direct appeal. *Id.* at 105.

¶2 Our supreme court reiterated the principle that in context of postconviction proceedings, " 'issues that were previously raised at trial and on direct appeal are *res judicata*, and issues that could have been raised in the original proceedings, but were not, will be deemed waived.' " *Id.* at 106 (quoting *People v. Ruiz*, 132 Ill. 2d 1, 9 (1989)). The court then observed:

"The defendant argues that *res judicata* should not apply here because the instant

claims are distinguishable from the ones raised on appeal. However, *while his ineffectiveness claim does vary, it does so only in that it points out a few additional factors supporting his claim which could have been raised on direct appeal, and he has simply changed the phraseology of some other arguments, which were raised on direct appeal.*

'[T]he Post-Conviction Hearing Act was not intended to be used as a device to obtain another hearing upon a claim of denial of constitutional rights where there has already been a full review of the issues raised * * *. This is so, even though the present petition attempts to change the character of the questions previously advanced and decided, by describing them in different constitutional terms.' " (Emphasis added.) *Id.* at 106 (quoting *People v. Cox*, 34 Ill. 2d 66, 67-68 (1966)).

The court concluded that "[b]ecause this court previously addressed defendant's claim of ineffective assistance of counsel on direct review of his case, the subsequent addition of different allegations of incompetence does not allow the relitigation of this issue on defendant's petition for post-conviction relief." *Id.* at 107.

¶3 The State's interpretation of the holding in *Emerson* is overly broad. The State essentially interprets *Emerson* to hold that once a defendant raises an ineffective assistance of counsel claim on direct appeal on any ground, the entire issue of counsel's ineffectiveness is forever closed based upon the principle of *res judicata*. We disagree with this interpretation. Of particular importance to our conclusion is our supreme court's statement in *Emerson* that the defendant's claim varied "*only in that it points to a few additional factors *** that could have been raised on direct appeal*" and that the defendant "*simply changed the phraseology of some other*

arguments." (Emphasis added.) *Id.* at 106. In other words, some of the grounds the defendant asserted for his ineffective assistance claim could have been raised on direct appeal but were not and others were arguments that had been raised on direct appeal and were simply rephrased in a postconviction petition. This reasoning is consistent with the general principles of forfeiture and *res judicata* set forth above and with the principle that a defendant cannot obtain review of a claim he raised on direct appeal by simply recasting that claim in a postconviction petition in context of ineffective assistance of counsel. See *People v. DeSavieu*, 256 Ill.App.3d 731, 744 (1993) ("As a result of the decision in the direct appeal, we believe that the State is correct in its argument that *res judicata* bars relitigation of this issue. It has been decided on direct appeal that the defendant's waiver of the instruction was knowing and intelligent. Although now in his post-conviction petition the defendant rephrases the issue as one involving ineffective assistance of counsel based on a failure to fully advise, the decision in the direct appeal that he knowingly and intelligently waived the instruction effectively bars that claim").

¶4 Moreover, our supreme court has cited its decision in *Emerson* for the propositions that "[T]he [Act] cannot be used to obtain another hearing on a constitutional claim which has *already been given full review* by this court on direct appeal" and that "[a] post-conviction petitioner cannot avoid the bar of *res judicata* simply by rephrasing claims raised on direct appeal." (Emphasis added.) *People v. Fair*, 193 Ill. 2d 256, 267 (2000). The court in *Fair* applied *Emerson* to circumstances in which a defendant argued on direct appeal that a witnesses' testimony was unreliable and inadmissible and then attempted to argue in postconviction petition that his trial counsel was ineffective for failing to prevent that witness from testifying at trial. *Fair*, 193 Ill. 2d at 267-68. Under these circumstances, the court found the postconviction claim barred by *res judicata*. *Id.* at 268; but see *People v. Cleveland*, 342 Ill. App. 3d 912, 914-15

(2003) (rejecting the State's *res judicata* argument where the defendant's postconviction claims of ineffective assistance of counsel were "sufficiently different" from the ineffective assistance claims he raised on direct appeal).

¶5 The circumstances in this case are entirely different from those in *Emerson* and cases such as *Fair* to which *Emerson* has been applied. In this case, defendant's ineffective assistance claim is not a rephrasing of the ineffective assistance claim he raised on direct appeal, nor has defendant simply added a few additional factors to his ineffective assistance claim that could have been raised on direct appeal. On direct appeal, defendant argued that his counsel was ineffective for failing to impeach Scott's prior written statement with her grand jury testimony, which was allegedly inconsistent. The ineffective assistance claim defendant raised in his postconviction petition is based on newly discovered evidence that defendant asserted he only obtained after Lacy testified at Hampton's trial, which was 22 months after defendant's trial. This claim could not have been raised on direct appeal and requires an entirely different analysis than the claim defendant asserted on direct appeal. Therefore, defendant's claim has not and could not have been give a "full review" and we find that it is not forfeited or barred by *res judicata*. See *Fair*, 193 Ill. 2d at 267.

¶6 The State next asserts that defendant's claim is barred because he failed to comply with the affidavit requirement of section 122-2 of the Act. That section states that a postconviction petition "shall have attached thereto affidavits, records, or other evidence supporting its allegations or shall state why the same are not attached." 725 ILCS 5/122-2 (West 2006). The State acknowledges that defendant is not required to obtain an affidavit from his trial counsel asserting counsel's own ineffectiveness. See *People v. Hall*, 217 Ill. 2d 324, 333 (2005) ("Failure to attach independent corroborating documentation or explain its absence may, nonetheless, be

excused where the petition contains facts sufficient to infer that the only affidavit the defendant could have furnished, other than his own sworn statement, was that of his attorney"). The State claims that defendant "has nothing to back up" the allegations in his petition that counsel failed to investigate Lacy's background and that defendant could have at least supplied his own affidavit "explaining his inability to supplement his claim." However, our review establishes that the only affidavit defendant could have obtained to verify his claim that counsel did not investigate and discover this information was that of his attorney, which defendant is not required to do. Defendant did attach to his petition his own affidavit and transcripts of Lacy's cross-examination at Hampton's trial. Taken together, we find that these submissions along with the State's answer to discovery, which is part of the common law record, satisfied the requirements of section 122-2 of the Act. We therefore reject the State's assertion and turn to the merits of defendant's claim.

¶7 Claims of ineffective assistance of counsel are resolved under the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). In *Strickland*, the Supreme Court delineated a two-part test to use when evaluating whether a defendant was denied the effective assistance of counsel in violation of the sixth amendment. Under *Strickland*, a defendant must demonstrate that counsel's performance was deficient and that such deficient performance substantially prejudiced the defendant. *Id.* at 687. To demonstrate performance deficiency, a defendant must establish that counsel's performance fell below an objective standard of reasonableness. *People v. Edwards*, 195 Ill. 2d 142, 162 (2001). In evaluating sufficient prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. A defendant must satisfy

both prongs of this test in order to prove ineffective assistance of counsel. *Id.* at 687.

¶8 In this case, defendant has made a substantial showing that he received ineffective assistance of counsel based upon counsel's failure to fully investigate and discover information relevant to Lacy's motive to implicate defendant in the victim's death or alternatively to effectively utilize this information at trial in the event that it was made available to him. It is clear from the record that counsel was aware of some of the circumstances surrounding Lacy's statement to the police. The State disclosed that Lacy was an "informant" in its discovery answer in his petition, defendant alleged that prior to trial, his attorney informed him that Lacy was a federal informant. Further, in his opening statement, counsel argued that Lacy did not give a statement implicating defendant until several months after the victim was murdered while Lacy was in custody at the Robbins police department.

¶9 A question raised by defendant's petition is whether defense counsel was ineffective for failing to discover the other circumstances under which Lacy gave a statement implicating defendant that came to light during Lacy's testimony at Hampton's trial. That information, along with the trial record, establishes the following sequence of events. Lacy sold cocaine to an undercover federal informant on two occasions in 1997. Before he could be arrested for those sales, he was arrested and indicted by the State for two different cocaine sales. In August of 1998, Lacy pled guilty to two counts of delivery of a controlled substance and was sentenced to two concurrent terms of seven years' imprisonment. While he was in Logan Correctional Center serving his time pursuant to that plea deal, Lacy was approached by federal agents and told that he had sold cocaine to undercover federal informants on two occasions in 1997. The federal agents asked Lacy if he "want[ed] to cooperate" and essentially told him that "we got you on the two one-ounce sales" to the federal informant and that they would "take care" of those two cases

if he worked for them. Lacy signed an agreement to act as a federal informant in November 1998, he was paid \$600 for his work as an informant, and he ultimately only served seven months of his three-year State sentence. Lacy never "faced trial" or "went in front of a judge" for his two drug sales to the undercover federal informant. Lacy was out of prison when the victim was murdered on December 10, 1999, and he was subsequently arrested by the Robbins police department for a "problem." Lacy made his statements implicating defendant in the victim's death while he was in custody at the Robbins police department. At the time Lacy made those statements, he was still hoping that he would not have to go to a "federal penitentiary for a long time" for his two drug sales to the federal informant and he understood that "[h]elp them, and they will help you" was "how it works." Lacy was released from custody after he gave his statement to Detective Robbins implicating defendant in the crime. Other than the fact that Lacy pled guilty to two State drug cases and was sentenced to seven years in prison, none of the above information was ever utilized to impeach Lacy's section 115-10.1 statements at defendant's trial. See 725 ILCS 5/115–10.1 (West 2002). For the following reasons, we find that defendant's petition has made a substantial showing that his trial counsel was ineffective for failing to investigate and discover the above information or for failing to utilize the same at trial.

¶40 First, defense counsel could have discovered this information. At a minimum, this is established by the fact that Hampton's attorney was in possession of all of this damning information and was able to utilize it in cross-examining Lacy.

¶41 Second, the information was relevant to defendant's case. The State's evidence against defendant consisted solely of Lacy and Scott's prior statements implicating defendant in the victim 's murder that were admitted as substantive evidence pursuant to section 115-10.1 of the Illinois Code of Criminal Procedure of 1963 (725 ILCS 5/115–10.1 (West 2002)). At trial,

both witnesses disavowed their prior statements. At trial, Scott testified that she did not see either shooter and that she only identified defendant because Lacy told her that defendant and Hampton were the shooters. Lacy testified that he saw Hampton shoot at the victim while defendant was "just sort of standing there" and under cross-examination he testified that he was not sure if defendant and Hampton were the shooters. Other than the witnesses' pretrial statements, there was no other evidence, such as physical or ballistic evidence, linking defendant to the crime.

¶12 Given the nature of the evidence against defendant, defense counsel elected to pursue a reasonable strategy of discrediting the state's identification evidence. The information that defendant claims counsel should have discovered and utilized was critical to the theory that Lacy's identification was unreliable. This includes that fact that Lacy had an agreement with the federal government, that he was paid \$600, and that he served only seven months of his three-year State sentence. This also includes the fact that Lacy was afraid he could be prosecuted by the Federal government for two one-ounce deliveries of cocaine when he made his statement implicating defendant, the nature of the "problem" for which he was arrested for by the Robbins police department and the fact that Lacy was released after he implicated defendant. All of the above went directly to Lacy's motive to implicate defendant and raises questions of fact as to the nature of Lacy's deal with the federal government, the status of Lacy's two federal cases at the time he made his statements and Lacy's subjective belief at that time as to whether he could still face prosecution in those federal cases. See *People v. Preatty*, 256 Ill. App. 3d 579, 589 (1994) (noting that information that may tend to cast doubt on a State witness' credibility, such as pending charges that may reasonably be expected to affect the witness's motivation to testify in certain ways, tends to negate the guilt of the accused). The reliability of Lacy's pretrial identification is made all the more critical by Scott's testimony at trial that she only identified

defendant because Lacy told her that defendant and Hampton were the shooters. The parties also stipulated that on the night of the shooting, Scott told Detective McGee that she did not know who shot the victim.

¶3 Third, the record leads to the logical conclusion that counsel did not investigate and discover this information. Counsel clearly recognized the nature of the State's case against defendant and therefore how critical it was to attack the reliability of the witnesses' pretrial statements implicating defendant in the crime. Counsel even went so far in opening statements as to admit ignorance of Lacy's motive to implicate defendant and to state that Lacy was in custody when he gave the statement and that Lacy might have thought, "[g]uess what? If you are lenient on me, I have a story to tell you." Counsel nevertheless did not attempt to elicit any of the above information from Lacy during cross-examination. Counsel did not even attempt to question Lacy about the information that he already knew, including that Lacy was a federal informant and that he was in custody for a "problem" when he made his statement. As counsel stated in opening statements that he did not know Lacy's motive to implicate defendant, but then alluded to him being in custody and looking for a deal, his failure to elicit this other additional information at trial necessarily leads to the conclusion that he was not aware of it. At the very least, counsel's failure to do so justifies an evidentiary hearing to determine what his investigation did reveal.

¶4 Fourth, defendant made a substantial showing that counsel was deficient in failing to discover this information. "[A]ttorneys have an obligation to explore all readily available sources of evidence that that might benefit their client." *People v. Clark*, 2011 IL App (2d) 100188, ¶25. Illinois courts have recognized that attorneys may be found ineffective for failing to investigate evidence that could have been used to impeach the State's primary identification witness. See, e.g., *People v. Salgado*, 263 Ill. App. 3d 238, 246-47 (1994) (finding that trial counsel was

ineffective for failing to investigate evidence that could have been used to impeach the State's primary identification witness); *Clark*, 2011 IL App (2d) at ¶25 ("Failure to conduct investigation and develop a defense has been found to be ineffective assistance"). As discussed above, the evidence against defendant consisted solely of pretrial statements implicating defendant in the crime from witnesses who disavowed those statements at trial and counsel proceeded on a theory that those statements were unreliable. The allegations and documents attached to defendant's petition and the questions of fact they raise, considered together with the nature of the State's evidence against defendant, are sufficient to warrant an evidentiary hearing.

¶5 Finally, defendant made a substantial showing that he was prejudiced by counsel's deficient investigation. As noted, the State's evidence consisted solely of disavowed pretrial statements of two alleged eyewitnesses, Lacy and Scott. Therefore, the reliability of those statements, and any evidence relevant to Lacy's motive to implicate defendant, was critical to the defense theory of the case. Given how critical the reliability of the witnesses' pretrial statements was to defendant's case and given Scott's testimony that her pretrial identification of defendant was informed by Lacy, it was crucial for defense counsel to expose any motives that Lacy might have had to implicate defendant. Had counsel discovered evidence of payment and potential leniency, as well as evidence indicating Lacy might have feared being prosecuted in his federal drug cases, counsel could have used that information along with the information of which he was aware at defendant's trial. Defense counsel could have specifically used that information to impeach the reliability of Lacy's pretrial identification of defendant and thereby bolster both Lacy and Scott's trial testimony that they did not know who shot the victim. Had the trial court been presented with this information, the court might have discredited Lacy and Scott's pretrial statements. We disagree with the State's claim that this is "pure speculation." This was far from

a case of overwhelming evidence. No State witness identified this defendant as a shooter from the witness stand. The only evidence of defendant's guilt came from the section 115-10.1 statements now disavowed. The potential impeachment may well have tipped the balance in this case to a level below proof beyond a reasonable doubt. We thus find that defendant has made a substantial showing that he was prejudiced by counsel's deficient performance.

¶6 The State takes issue with the meaning of numerous statements made by Lacy during his testimony at Hampton's trial. For example, the State argues that defendant's claims that Lacy had pending drug cases and defendant's claim that Lacy identified him as part of a "deal" with the federal government are rebutted by the record. We disagree and find that, instead, the allegations and relevant portions of the record raise factual disputes that should be resolved at an evidentiary hearing. For example, the State asserts that "Lacy's informant agreement with the federal government, which resolved his two federal cases, dated back to November 1998, and the shooting here did not even take place until December 10, 1999, making it literally impossible for either the federal government or the county prosecutors to make an agreement to dispose of Lacy's federal cases in exchange for an identification on this case." At oral arguments in this case, the State reiterated that Lacy's testimony at Hampton's trial established that his federal cases were resolved by his 1998 agreement with the federal government. There are numerous problems with this assertion, all of which illustrate the need for an evidentiary hearing. Initially, there is *no information* about the nature of Lacy's informant agreement upon which we could conclude that it resolved those federal cases. Lacy only gave the somewhat vague testimony that he "never went in front of a judge" and that he was never arrested for his two drug sales to a federal informant. This does not positively rebut the assertion that those could still be brought against Lacy when he gave the statement to police. Further, Lacy's "deal" could have included

his agreement to help on future cases without knowing exactly what those cases would be. The State's argument also ignores another question of fact raised by defendant's petition, which is Lacy's subjective belief at the time he gave his statement as to whether he could still face prosecution in the federal cases. Lacy never testified that his informant agreement resolved his federal cases but, to the contrary, at Hampton's trial Lacy agreed that at the time he made the statement and was in custody at the Robbins police department, he was "still hoping that [he] wouldn't have to go to a federal penitentiary for a long time" and that "[h]elp them, and they will help you" was "how [the system] works." Finally, we note that Lacy sold narcotics to federal agents in 1997 and he gave his statements implicating defendant in 2000. The federal statute of limitations for those crimes was five years, and thus arguably Lacy still could have been prosecuted for those crimes when he gave his statement. See 18 USC§3282 (setting a five year statute of limitation for the prosecution of noncapital federal offenses). Notably, defendant's trial occurred in 2003, a point in time probably outside the federal statute of limitations and Lacy at that time no longer supported the State's case. The record is also silent as to whether Lacy's agreement with the federal government contained a tolling agreement with respect to the 1997 offenses.¹

¶47 The State also argues that the record rebuts any claim that Lacy might have identified defendant because he was facing a new criminal charge on the day he spoke to Detective Franklin. The State points to its supplemental answer to discovery in which it noted that "Christopher Lacy would state that he originally told Robbins Police about his observations regarding the shooting of [the victim] some time prior to March of 2000, however, he requested that the information he imparted be held in confidence." The State also points to Lacy's

¹ We also note that under certain circumstances such as ongoing conspiracies the statute of limitations would not have run.

testimony at Hampton's trial that he "had told Detective Kimball before all that ever came up." However, there is nothing in the record indicating when Lacy was arrested or that he was not already in custody for his State "problem" when he allegedly told Detective Kimball. Therefore, Lacy could have made these statements to Detective Kimball while he was in custody and facing potential State and federal charges. In other words, the parts of the record pointed to by the State do not positively rebut defendant's well-pled allegation that Lacy implicated him in the victim's murder in hopes of leniency on either his federal cases or his state case. This is supported by the fact that after he testified that he had previously told Detective Kimball, Lacy agreed that at that time he was "still hoping" he would not have to go to the federal penitentiary. Lastly, the mere fact that Lacy contended at Hampton's trial that he had told this to Detective Kimball does not necessarily make it true. The trier of fact would rightfully evaluate that testimony along with the rest of it if it was presented to the trier of fact as it should have been.

¶48 The record does indicate, as the State points out, that Lacy testified before a grand jury that no one had promised him anything in exchange for his testimony and that Lacy indicated in his written statement that no one made him promises or threats in order to obtain his statement. However, these statements cannot be considered in isolation and must be considered along with the allegations in defendant's petition and the documents attached thereto. Again, the trier of fact may not believe those statements if informed of the existence of the informant relationship and the threat of federal prosecution.

¶49 When considered together, we find that numerous questions of fact are raised that should be decided at an evidentiary hearing. After reviewing the entire record, we cannot conclude that there exists no reasonable likelihood that the information counsel failed to discover would not have affected the credibility assigned to Lacy and Scott's pretrial statements and ultimately the

trial court's verdict. See *Coleman*, 183 Ill. 2d at 396 ("We simply cannot speculate how the jury might have assessed the credibility of these other witnesses' testimony had the true nature of Lockett's lineup statements to police been before it").

¶50 Defendant next contends that his petition made a substantial showing that his trial counsel was ineffective for failing to elicit available impeachment evidence during his cross-examination of Lacy. This claim relates to the information of which counsel was already aware at defendant's trial. As noted, counsel was aware that Lacy was an informant and that he was in custody when he implicated defendant in the victim's murder.

¶51 The State argues that this claim is forfeited because it is based on matters in the record and therefore could have been raised on direct appeal. However, defendant alleged in his petition and in this appeal that his appellate counsel was ineffective for failing to raise the issue on direct appeal. See *People v. Smith*, 195 Ill. 2d 179, 200 (2000) (noting that a defendant can avoid the rule of forfeiture by arguing that appellate counsel was ineffective for failing to raise the issue on direct appeal). In determining whether a defendant has made a substantial showing that appellate counsel was ineffective, we turn to the two-part test articulated in *Strickland*. *People v. Haynes*, 192 Ill.2d 437, 476 (2000). First, the defendant must show that appellate counsel's failure to raise the issue complained of was objectively unreasonable. *Id.* Second, the defendant must demonstrate that appellate counsel's decision not to raise the issue prejudiced defendant. *Id.* To establish prejudice, defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

¶52 The State also asserts, as it did above, that defendant's claim is barred by *res judicata*.

We have already explained the reasons that we reject that claim and we need not reiterate them here. For those same reasons, we find that defendant's claim is not barred by *res judicata*. Thus, we consider the merits of defendant's contention.

¶53 The State claims that defense counsel's decision to not cross-examine Lacy about the circumstances surrounding his statement was a matter of trial strategy that is not subject to an ineffective assistance of counsel claim. See *Salgado*, 263 Ill. App. 3d at 247 ("Whether, and how, to cross-examine a witness is normally a matter of trial strategy, which will not by itself support a claim of ineffective assistance under *Strickland*"). The State claims that despite counsel's opening statement challenging Lacy's credibility, counsel made a strategic decision to shift the focus of his defense based upon Lacy's in-court testimony, which was favorable to defendant.

¶54 It could be argued that counsel's decision to not cross-examine Lacy about the information of which he was aware was strategic because Lacy's testimony at trial was favorable to the defense. However, it was Lacy's pretrial statements that were damaging to defendant and the reliability of those statements was a critical issue in the case. Counsel could have questioned Lacy about the information that he was already aware of to impeach those pretrial statements by explaining the context in which they were given and Lacy's motivation for making them. We find that the failure of counsel to attack the circumstances under which Lacy's pretrial statements were made cannot be justified as a matter of trial strategy and may have amounted to the equivalent of no representation given the importance to the State's case of the section 115-10.1 pretrial statements. We have already set forth the reasons why all of that information was critical to the reliability of Lacy's pretrial statements and why defendant made a substantial showing of deficient performance and prejudice based on counsel's failure to discover that information.

When all of that information is considered along with the fact that counsel could have impeached Lacy's pretrial statements and the potential effect that could have had on the trial court's judgment in this case, we cannot conclude that counsel's decision to not cross-examine Lacy about all of this information was a reasonable trial strategy or that defendant was not prejudiced by counsel's decision. See *Salgado*, 263 Ill. App. 3d at 247. (noting that while the decision as to how to cross-examine a witness is usually one of trial strategy, "the complete failure to impeach the sole eyewitness when significant impeachment is available is not trial strategy and, thus, may support an ineffective assistance claim;" see also *People v. Baines*, 399 Ill. App. 3d 881, 898 (2010) (finding defense counsel ineffective, in part, for failing to impeach the victim, who was the sole eyewitness to the crime). Instead, when all of the above is taken as a whole, we find that it was sufficient to make a substantial showing of ineffective assistance of counsel.

¶55 Defendant's final contention is that he made a substantial showing that the State violated *Brady v. Maryland*, 373 U.S. 83 (1963) when it failed to disclose that Lacy received \$600 and leniency on two federal drug cases for his work as an informant. Defendant claims that this information raises the question as to whether Lacy gave his written statement with an expectation of leniency.

¶56 We note that the *Brady* claim and the two ineffective assistance of counsel claims (failure to investigate and failure to adequately cross-examine) are inextricably intertwined. There is no evidence in the record that the matters brought forth during Lacy's cross-examination at Hampton's trial were ever disclosed to this defendant. The State claims that it is the defendant's burden to show that it was not disclosed. We will not impose this burden to prove a negative on defendant at this time in light of the fact that it was not included in the State's answer to discovery and was not brought out at trial. If the State wishes to claim that all of this information

was orally disclosed, that claim can be evaluated at the third-stage hearing. If it was not disclosed, it should have been. We have already disposed of the State's argument that there was nothing to disclose as we find based on the record that the federal cases were still potentially viable. If it was disclosed, then the failure to utilize it falls back into the area of ineffective assistance of counsel.

¶57 The State initially argues that defendant's petition failed to comply with the affidavit requirement of section 122-2 of the Act. The State claims that defendant was required to obtain an affidavit from his attorney stating that counsel was never informed of this information. Defendant responds that the State has forfeited this argument because it did not raise it in the trial court. On the other hand, we note that the State is the appellee in this case and an appellee may raise any argument in support of the trial court's judgment, even if the argument was not raised before the trial court, provided the argument has a sufficient factual basis in the record. See *People v. Pinkonsly*, 207 Ill.2d 555, 563 (2003); *People v. Rajagopal*, 381 Ill. App. 3d 326, 329 (2008).

¶58 We need not decide this issue because we find that defendant's petition satisfied the requirements of section 122-2 of the Act. The purpose of that section is to "show[] that the verified allegations are capable of objective or independent corroboration." *People v. Collins*, 202 Ill. 2d 59, 67 (2002). In this case, the State only disclosed in its initial discovery response that Lacy was an "informant." It did not disclose the fact that Lacy was paid, the agreement he had with the federal government or that, after entering that agreement, he served only seven months of his three-year State sentence for selling narcotics. The State also did not disclose the fact that the federal government had threatened Lacy with the prosecution of two narcotic sales to an undercover informant. Additionally, the State's discovery answer, Lacy's handwritten

statement, and Lacy's grand jury testimony each contain a representation that Lacy received no promises or consideration in exchange for implicating defendant. Taken together, we find this was sufficient to satisfy the requirement of section 122-2 of the Act.

¶59 The State also responds that defendant abandoned his *Brady* claim because it was not specifically included in defendant's amended petition. The State also asserts that at the hearing on the State's motion to dismiss, defendant did not present his *Brady* claim and defense counsel told the trial court that it had "addressed everything" when the court asked if it had addressed all the issues in the amended petition, even though the court had not specifically addressed the *Brady* claim.

¶60 This argument is without merit. In the amended petition, defendant specifically stated that "the *pro se* petition which adequately supports [defendant's] contentions, are incorporated herein." We find this was sufficient and that defendant did not abandon his *Brady* claim. We now consider the merits of that claim.

¶61 *Brady* claims require a showing that: (1) the undisclosed evidence is favorable to the accused because it is either exculpatory or impeaching; (2) the evidence was suppressed by the State either willfully or inadvertently; and (3) the accused was prejudiced because the evidence is material to guilt or punishment. *People v. Beaman*, 229 Ill.2d 56, 73–74 (2008).

¶62 Much of the analysis as to why defendant made such a showing is essentially already set out in our review of defendant's ineffective assistance claims. For example, we have already explained why the evidence the State allegedly did not disclose was favorable to defendant in that it could have impeached Lacy's pretrial statements. Moreover, the State's discovery answers indicate only that Lacy was an informant and that he was given no promises or agreements of leniency. We note that the State asserts that a "nine-page ATF document identifying Lacy as a

‘paid federal informant’ was tendered in the course of continuing discovery on November 11, 2002 according to a discovery receipt.” However, the citation the State provides for this assertion is to a page from the State’s motion to dismiss, which alleges the existence of such a receipt. There is no receipt in the record, however, and if one exists the State will have the opportunity to present it at an evidentiary hearing. Finally, the reason why defendant was prejudiced is already set forth in our review of the ineffective assistance of counsel claims. As we noted, the information the State did not disclose raises the question as to whether Lacy gave his pretrial statements in exchange for or in hopes of leniency and counsel could have used that information to explore this issue at trial. Counsel could have used that information to elicit other testimony from Lacy and to impeach Lacy’s pretrial statements. Finally, as noted, that impeachment becomes all the more relevant when considering Scott’s testimony that she only identified defendant because Lacy told her that defendant was the shooter and given that the only evidence against defendant was Scott and Lacy’s recanted pretrial statements.

¶63 The State’s arguments as to why defendant did not make a substantial showing of a *Brady* violation are the same as the arguments it advanced against defendant’s ineffective assistance claims. These include the State’s various assertions as to why the record rebuts defendant’s claims. We have already addressed those assertions and explained why that is not the case and why the allegations in defendant’s petition, along with the record, raise issues of fact that should be decided at an evidentiary hearing.

¶64 We stress that we are not making an ultimate determination that the State violated *Brady*. We are simply holding that, at the second stage of postconviction proceedings, the allegations in defendant’s petition, along with the material attached thereto, raise questions of fact that should be resolved at an evidentiary hearing and make a substantial showing of a violation of

defendant's constitutional rights. It is abundantly clear that the cross-examination of Lacy in this defendant's trial was woefully inadequate to the prejudice of this defendant. Whether this was the result of a failure of the State to disclose exculpatory evidence, the failure of counsel to adequately investigate, the failure of counsel to effectively cross-examine or some combination of all the above will be the subject of the third-stage evidentiary hearing we order today as well as the question of whether defendant is entitled to relief. It is clear at least that defendant has made a substantial showing that his constitutional rights have been violated.

¶65 For the reasons stated, the judgment of the circuit court of Cook County is reversed.

¶66 Reversed and remanded.