

Court Rule 651(c). For the following reasons, we reverse the judgment of the circuit court of Cook County, and remand the cause for a third-stage evidentiary hearing.

¶ 3

BACKGROUND

¶ 4 The facts reproduced below are summarized from the factual background set forth in this court's November 10, 2009 order, which affirmed the defendant's conviction and sentence on direct appeal. See *People v. Evans*, No. 1-07-2888 (2009) (unpublished order under Supreme Court Rule 23). On October 15, 2003, Marcus Galloway was shot multiple times on the 4700 block of West Maypole Avenue in Chicago, Illinois. Galloway was pronounced dead on arrival at a hospital. On November 18, 2003, the defendant was arrested and charged with the first-degree murder of Galloway.

¶ 5 In May 2007, a jury trial was held during which several witnesses testified. Sheila Young testified for the State that on October 15, 2003, at about 2:30 p.m., she was selling drugs on Maypole Avenue, just west of Cicero Avenue. Minutes earlier, Young had spoken to the defendant, who was standing by a gangway of an abandoned building on the 4700 block of Maypole Avenue, on the east side of Cicero Avenue. At about 2:45 p.m., Young, while standing on Maypole Avenue on the west side of Cicero Avenue, heard four to six gunshots from the 4700 block of Maypole Avenue. As Young looked eastbound, she saw the defendant with a handgun and smoke coming out of his hand as he chased Galloway from the north to the south side of Maypole Avenue. The defendant was approximately six feet behind Galloway during the chase. An unidentified man also followed behind the defendant. Young stated that Brian Weston was also present at the scene, but did not follow the defendant as the group ran. Young testified that she was about 55 to 60 feet away when she observed the shooting, and the defendant was the only person who had a weapon in hand. Young testified that she eventually lost sight of the men

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when they ran between some parked cars on the street. Moments later, the defendant rejoined Weston on Maypole Avenue, and both men headed to Cicero Avenue towards Fulton Street. After the shooting, Young walked to the 4700 block of Maypole Avenue and observed Galloway lying face down on the ground. By that time, the three other men were no longer in sight and a crowd had gathered near Galloway. However, she did not stay at the scene to speak with the police about the crime at that time because she had drugs in her possession.

¶ 6 On cross-examination, Young stated that on October 21, 2003, she spoke with the police regarding the shooting and positively identified the defendant in a photographic array as the shooter. She stated that she had previously mentioned in a written statement to Assistant State's Attorney Kathleen Crowley (ASA Crowley) and to a grand jury that there were only three men at the crime scene because she did not know the identity of the fourth man. At the time of trial, Young was incarcerated for an unrelated drug case and had been convicted of five felonies. However, she denied that any promises were made to her in exchange for her testimony. Although Young was a drug addict on the day of the shooting, she testified that she was not under the influence of drugs at that time.

¶ 7 Christopher Glover also testified on behalf of the State. At the time of trial, Glover was incarcerated for an unrelated case and had prior drug and retail theft convictions. He testified that on October 15, 2003, prior to 3 p.m., he arrived home and parked his car directly in front of his house at 4736 West Maypole Avenue. He noticed the defendant, Galloway, Weston and a man named "Sneed" "shooting dice" on the front porch of an abandoned house located next to Glover's home. Glover noticed that Galloway had money in his hand and that the four men were "talking smack" to each other. Glover then entered his home and walked about 15 to 20 steps to the back of the house, at which time he heard a big boom. He ran to the front window of his

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home and saw Galloway running to the south side of Maypole Avenue while being chased by the defendant, who had a gun in his left hand at waist level. Glover heard multiple rapid gunshots during the chase and saw the defendant shooting at Galloway. Galloway then fell on the south side of the street, after which the defendant and Weston ran through a gangway separating the abandoned building and Glover's house. Glover saw Young at the crime scene after the shooting occurred. At the crime scene, Glover told police officers that he did not know or see anything. However, later that night at a police station, Glover identified the defendant, Weston and Galloway as three of the men who were present at the crime scene. On October 22, 2003, ASA Crowley interviewed Glover regarding the shooting. In his written statement to ASA Crowley and his testimony to the grand jury, Glover stated that he did not see a gun in the defendant's hand during the shooting. Similarly, the written statement and his grand jury testimony stated that he heard a loud boom, followed by three to four gunshots, and that the defendant ran through the gangway alone after the shooting. At trial, Glover explained that the reason he initially denied having any knowledge of the crime and denied seeing a gun in the defendant's hand was because he did not want to get involved as a witness.

¶ 8 Clarence Cage, who was incarcerated for possession of a controlled substance at the time of the defendant's trial and had prior drug convictions, testified on behalf of the State. On October 15, 2003, shortly before 3 p.m., Cage walked from his home at 4708 West Maypole Avenue to a store located on Cicero Avenue and Lake Street. Enroute to the store, Cage passed the abandoned house at 4738 West Maypole Avenue, where he saw the defendant, Galloway and Weston "shooting dice." Cage did not recall seeing a fourth man on the porch of the abandoned house. On the way home from the store, Cage again passed the abandoned home and noticed that the three men were still engaged in a dice game. When he reached home and went upstairs,

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he heard gunfire. When the gunfire ceased, Cage observed a person lying on the grass and sidewalk on the south side of Maypole Avenue. Subsequently, Cage called the police and approached the victim, whom he recognized as Galloway. Galloway had blood-stained money in his hand, which Cage retrieved for safekeeping until the police arrived because he did not want the money to be stolen. Cage accompanied Detective Bor to the police station, where he identified the defendant and Weston in a photographic array. He later made a written statement to ASA Crowley regarding the shooting, and testified before a grand jury.

¶ 9 Detective Bor testified that he was assigned to investigate Galloway's murder. He stated that the abandoned house at 4738 West Maypole Avenue had a wrought iron fence that enclosed the front yard and that, other than hopping over the fence, the only way to exit from the porch area was to go through the gate. Physical and firearm evidence were found at the abandoned house. Specifically, three nine-millimeter cartridge cases were found—one on the porch landing, another on the steps of the front porch, and the third in the front yard near the steps of the porch. He also observed two pairs of dice on the porch deck, a black jacket on the porch railing, a white tee-shirt on a side fence and a cellular telephone at the rear of the house. Blood stains were also found on the sidewalk across the street at 4727 West Maypole Avenue. He observed that parked cars lined both the north and south sides of Maypole Avenue. At the crime scene, Detective Bor interviewed Cage, who then gave him the blood-stained money he had recovered from Galloway's hand. No other money was found at the crime scene. Detective Bor performed a door-to-door canvass of the neighborhood, which yielded no additional witnesses. Later that night at the police station, Detective Bor interviewed Cage and Glover separately, and showed them each computer-generated photographs. On October 21, 2003, Young and Rashaan Smith

arrived at the police station and were separately interviewed by Detective Bor, who also showed them each computer-generated photographs for identification.

¶ 10 Forensic Investigator William Sullivan (Investigator Sullivan) testified that he and another forensic investigator photographed the crime scene, performed blood swabs, and recovered the physical evidence for inventory. Firearms evidence was found at the abandoned house location at 4738 West Maypole Avenue, but none was recovered from the street or near the blood-stained sidewalk at 4727 West Maypole Avenue. The cartridge cases recovered from the crime scene were ejected from a semiautomatic handgun, and that it was possible for cartridge cases to hit objects or "bounce off anywhere" once the gun is discharged. No bullets, weapons or fingerprints were ever recovered from the crime scene.

¶ 11 Cook County Deputy Chief Medical Examiner Dr. Mitra Kalekar (Dr. Kalekar) testified as to Galloway's autopsy. Based on the autopsy, Galloway suffered multiple gunshot wounds to his body, including his chest, thighs and left hand. One bullet in particular, which was recovered from the right side of Galloway's chest, had entered from the central chest area and traveled through his heart, right lung, diaphragm, and liver. Dr. Kalekar opined that it was possible to sustain a gunshot wound to the chest if the victim, who was being chased, had turned to look behind at his shooter. The gunshot wounds to Galloway's chest and thighs indicated that the bullets that caused those wounds had traveled from the front to the back of his body. Galloway also had abrasions on the left side of his face, which was consistent with his falling on his face after being shot. Dr. Kalekar testified that there was no evidence of close-range firing, which indicated that the shots were fired from a distance of two feet or more. Cause of death was multiple gunshot wounds and the manner of death was homicide.

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¶ 12 By stipulations, the parties agreed that the distance from a light pole on the northwest corner of Cicero Avenue at Maypole Avenue to the wrought iron gate of the abandoned house at 4738 West Maypole Avenue was approximately 274 feet. The parties also stipulated that the distance from the wrought iron gate of the abandoned house diagonally across to the sidewalk at 4727 West Maypole Avenue was approximately 155 feet.

¶ 13 The defendant elected not to testify. Following closing arguments, the jury found the defendant guilty of first-degree murder. The defendant was later sentenced to 45 years of imprisonment, which included a 20-year sentence for personally discharging the firearm that killed Galloway.

¶ 14 On November 10, 2009, this court affirmed the defendant's conviction and sentence on direct appeal. See *People v. Evans*, No. 1-07-2888 (2009) (unpublished order under Supreme Court Rule 23).

¶ 15 On April 20, 2010, the defendant filed a *pro se* postconviction petition, alleging, *inter alia*, a claim of ineffective assistance of defense trial counsel for failing to investigate and call Weston as a witness at trial. The defendant asserted that defense trial counsel knew that Weston had witnessed the underlying offense, that Weston was incarcerated at the time of trial and would have been easy to locate, and that Weston would have testified that the defendant did not shoot Galloway. On July 2, 2010, the trial court summarily dismissed the defendant's *pro se* postconviction petition as frivolous and patently without merit. With regard to the defendant's claim of ineffective assistance of counsel, the trial court found that the defendant failed to make "the requisite factual showing" by failing to submit an affidavit from any potential witnesses.

¶ 16 On August 10, 2010, the defendant mailed a motion to reconsider the court's summary dismissal of his postconviction petition (motion to reconsider), which the clerk's office received

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on August 17, 2010. Attached to the motion to reconsider was an affidavit from Weston, which the defendant stated he had been unable to attach to his original petition because "it was in the process of being drawn up and sent to him" and he was concerned that that the time for filing the petition would have expired had he waited for the affidavit to arrive first. Weston's affidavit, which was dated March 25, 2010, averred that on October 15, 2003, he, the defendant, and Galloway were playing dice on the front porch of the abandoned building. Two men wearing "hoodies" over their heads emerged from the gangway near the abandoned home and began shooting at them. The defendant and Galloway ran out of the front gate and headed eastward on Maypole Avenue, while Weston "hopped over the porch into the next yard and proceeded to run westward on Maypole Avenue." As he fled, Weston saw a black sedan speeding eastbound down an alley in the direction of the defendant and Galloway. Weston then yelled out to alert the defendant and Galloway that the black sedan was headed towards them, at which point the defendant ran westbound and Galloway collapsed on the ground. One day after the shooting, when the police questioned Weston about the incident, Weston asserted his Fifth Amendment right against self-incrimination because he feared the shooters would target him again. However, in October 2006, Weston tried to contact defense counsel and the assistant State's Attorney regarding the details of the shooting, but received no response from them.

¶ 17 On October 1, 2010, the trial court stated that it would treat the defendant's motion to reconsider and the attached affidavit of Weston as an amendment to the defendant's original *pro se* postconviction petition. The trial court then vacated its July 2, 2010 summary dismissal of the *pro se* postconviction petition, advanced the petition to the second stage of the proceedings, and appointed counsel to represent the defendant.

¶ 18 From October 28, 2010 through June 30, 2011, postconviction counsel for the defendant requested several continuances to prepare for the hearing. On April 28, 2011, postconviction counsel informed the court that he had received the trial records and had begun reviewing them. During a status hearing on August 31, 2011, postconviction counsel informed the court that he had received permission from Weston's attorney to speak to him, and requested another continuance. On October 26, 2011, postconviction counsel informed the court that the defendant had written him a letter, requesting that counsel "raise an issue of claims for potential investigation." Postconviction counsel further stated that he hoped to file "some amended petition" by the next status date on January 11, 2012.

¶ 19 On January 11, 2012, postconviction counsel informed the court that he was going to "rest on" the defendant's amended¹ postconviction petition and attached affidavit, and filed a Supreme Court Rule 651(c) certificate. The Rule 651(c) certificate stated that he had communicated with the defendant to ascertain his claims of a violation of his constitutional rights; that he had examined the trial and sentencing transcripts; that postconviction counsel had sent his investigator, Chris Young, "to verify the affidavit[] attached to the petition"; and that the defendant's amended *pro se* postconviction petition "adequately presents his issues" and thus, no supplemental petition would be presented.

¶ 20 On June 28, 2012, the State filed a motion to dismiss the defendant's amended postconviction petition (motion to dismiss). With respect to the defendant's claim that defense trial counsel was ineffective for failing to call Weston as a witness, the State argued that, because Weston's affidavit indicated that he originally did not tell the police about his knowledge of the

¹ As discussed, the defendant's motion to reconsider was considered by the court to be an amendment to his original *pro se* postconviction petition.

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shooting, "[a]bsent an affidavit from [the defendant] indicating how trial counsel became aware of Weston's potentially useful testimony, there would be no reason for counsel to investigate Weston based on his statement to the police." The State further argued that, even accepting as true Weston's statement that he tried to contact defense trial counsel and an assistant State's Attorney about the incident in October 2006, the defendant "has failed to show that contact was actually made or that information was conveyed that would have prompted trial counsel to investigate further." The State noted that Weston's affidavit also failed to indicate "whether he was available and willing to testify at [the defendant's] trial in May of 2007." The State argued that, even assuming *arguendo* that defense trial counsel was aware of Weston's potential testimony, she could have determined not to call him as a witness as a matter of sound trial strategy. Postconviction counsel filed no written response to the State's motion to dismiss.

¶ 21 On August 14, 2012, at a hearing on the State's motion to dismiss, the State argued that Weston's affidavit lacked the specificity needed to support the defendant's postconviction claim that defense trial counsel was ineffective for failing to call Weston as a witness at trial. The State further reiterated its arguments in the motion to dismiss with regard to the other claims in the defendant's amended postconviction petition. Postconviction counsel argued that Weston's affidavit was sufficient to advance the petition to the third stage of the proceedings, noting that Weston would be able to testify before the court at the third stage.

¶ 22 On September 12, 2012, the trial court granted the State's motion to dismiss, finding, *inter alia*, that the defendant failed to show that defense trial counsel failed to adequately investigate Weston because Weston had initially exercised his Fifth Amendment right against self-incrimination, and Weston's affidavit did not indicate whether he had successfully contacted the defendant's trial counsel—thus, the defendant could not establish that defense counsel should

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have inquired further into his possible testimony. The trial court further noted that, in light of Weston's initial reluctance to speak with the police and in light of his incarceration at the time of the defendant's trial, defense counsel may have decided not to call Weston as a witness as a matter of sound trial strategy. The court further found that the defendant failed to establish prejudice in support of his claim that defense counsel was ineffective for failing to call Weston as a witness at trial.

¶ 23 On September 21, 2012, the defendant filed a timely notice of appeal.²

¶ 24 ANALYSIS

¶ 25 We determine the following issues on appeal: (1) whether the defendant made a substantial showing that defense trial counsel provided ineffective assistance of counsel; and (2) whether, in the alternative, postconviction counsel provided an unreasonable level of assistance in violation of Rule 651(c).

¶ 26 We first determine whether the defendant made a substantial showing that defense trial counsel provided ineffective assistance of counsel so as to warrant advancing the petition to the third stage of the postconviction proceedings. We note that the defendant makes no arguments on appeal relating to the trial court's September 12, 2012 ruling rejecting other claims set forth in his amended postconviction petition. Thus, we find that those claims are forfeited for review on appeal. See *Sekerez v. Rush University Medical Center*, 2011 IL App (1st) 090889, ¶ 81 (failure to raise arguments or cite legal authority is a violation of Rule 341(h)(7) and results in forfeiture of the issue).

² On June 25, 2013, our supreme court issued a supervisory order directing this court to consider the September 12, 2012 judgment "on the merits notwithstanding the late filing of a motion to reconsider earlier in the case on August 17, 2010."

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¶ 27 The defendant argues that he made a substantial showing that defense trial counsel was ineffective for failing to interview Weston or to present Weston as a witness at trial. He contends that Weston's affidavit, which must be taken as true, would have supported the defense theory at trial that someone else shot Galloway and, thus, defense counsel's failure to investigate Weston and present Weston's testimony at trial constituted deficient performance. The defendant further argues that the record does not show that defense counsel's failure to investigate Weston or to call him as a witness at trial resulted from a tactical decision, where defense counsel never even interviewed Weston and thus could not have known whether Weston's potential testimony was useful. The defendant further contends that he was not required to show that Weston had successfully contacted defense counsel in order to make a substantial showing of counsel's deficient performance. He also argues that he made a substantial showing that defense counsel's deficient performance prejudiced him, where Weston would have provided exonerating evidence at trial that would have had a strong probability of changing the result.

¶ 28 The State counters that the trial court properly dismissed the defendant's amended postconviction petition at the second stage of the proceedings, where the defendant failed to establish that Weston was available to testify; that defense counsel was negligent in not investigating Weston; that the failure to present Weston as a witness was not a matter of trial strategy; or that the result of the trial would have been different had Weston testified as a witness. Specifically, the State argues that the defendant failed to establish that defense counsel's failure to investigate Weston or to present Weston as a witness was objectively unreasonable, where defense counsel had no basis to investigate potential testimony from Weston given Weston's exercise of his Fifth Amendment right against self-incrimination at the time of police questioning. The State further argues that Weston's affidavit did not establish how

he attempted to contact defense counsel, nor stated whether he was successful in making any contact with defense counsel. The State maintains that, even had defense counsel known about Weston's potential testimony, defense counsel's decision not to call him as a witness was a matter of sound trial strategy. The State further contends that the defendant failed to establish prejudice because, even had Weston testified at trial, the result of the trial would have been the same.

¶ 29 The Post-Conviction Hearing Act (the Act) (725 ILCS 5/122-1 *et seq.* (West 2010)) provides a three-step procedural mechanism by which a convicted defendant can assert that there was a substantial denial of his constitutional rights in the proceedings which resulted in his conviction. *People v. Harris*, 224 Ill. 2d 115 (2007). A postconviction proceeding is not an appeal from the judgment of conviction, but is a collateral attack on the trial court proceedings. *People v. Petrenko*, 237 Ill. 2d 490, 499 (2010). Consequently, issues that could have been raised on direct appeal but were not, are forfeited. *Id.* Under the Act, a defendant bears the burden of establishing that a substantial deprivation of his constitutional rights occurred. *People v. Waldrop*, 353 Ill. App. 3d 244, 249 (2004). At the first stage, a postconviction petition may be summarily dismissed if the claims in the petition are frivolous and patently without merit. *People v. Hodges*, 234 Ill. 2d 1, 10 (2009); see 725 ILCS 5/122-2.1(a)(2) (West 2010)). However, if the petition survives initial review, the process moves to the second stage, where the circuit court appoints counsel for the defendant when the defendant cannot afford counsel. 725 ILCS 5/122-4 (West 2010). Appointed counsel then has an opportunity to amend the defendant's *pro se* postconviction petition. See *People v. Slaughter*, 39 Ill. 2d 278, 284-85 (1968). The State may then file a motion to dismiss or an answer to the postconviction petition. 725 ILCS 5/122-5 (West 2010). At the second stage of the proceedings, if the State moves to dismiss the petition, the circuit court may hold a dismissal hearing, which is still part of the second stage. *People v.*

Wheeler, 392 Ill. App. 3d 303, 308 (2009). The circuit court must determine whether the petition and any accompanying documentation make a substantial showing of a constitutional violation. *People v. Edwards*, 197 Ill. 2d 239, 246 (2001). However, the circuit court is foreclosed from engaging in any fact-finding because all well-pleaded facts are to be taken as true at this point in the proceedings. *Wheeler*, 392 Ill. App. 3d at 308. If a substantial showing of a constitutional violation is set forth, the petition advances to the third stage for an evidentiary hearing. *Edwards*, 197 Ill. 2d at 246. 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." *People v. Domagala*, 2013 IL 113688, ¶ 35. Dismissal of the defendant's postconviction petition at the second stage of the proceedings is reviewed *de novo*. See *People v. Coleman*, 183 Ill. 2d 366, 388-89 (1998).

¶ 30 In this case, the defendant seeks a third-stage evidentiary hearing on his amended postconviction petition, arguing that he made a substantial showing that he was deprived of his right to effective assistance of counsel at trial, where defense counsel failed to investigate or interview Weston and failed to present Weston as a witness at trial. To prevail on a claim of ineffective assistance of counsel, the defendant: (1) must prove that counsel's performance fell below an objective standard of reasonableness so as to deprive him of the right to counsel under the sixth amendment (performance prong); and (2) that this substandard performance resulted in prejudice (prejudice prong). *Strickland v. Washington*, 466 U.S. 668, 687-94 (1984). To establish the performance prong, the defendant must overcome a strong presumption that, under the circumstances, the challenged action or inaction was sound trial strategy. *People v. Lopez*, 371 Ill. App. 3d 920, 929 (2007). Because effective assistance of counsel refers to competent, not perfect, representation, "matters relating to trial strategy are generally immune from claims

of ineffective assistance of counsel." *Id.* at 929. Further, in determining the adequacy of counsel's representation, "a reviewing court will not consider isolated instances of misconduct, but rather the totality of the circumstances." *Id.* To establish prejudice, the defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." *People v. King*, 316 Ill. App. 3d 901, 913 (2000). A reasonable probability is one that sufficiently undermines confidence in the outcome. *Id.* The defendant must satisfy both prongs to prevail on his claim of ineffective assistance of counsel. However, a reviewing court may analyze the facts of the case under either prong first, and if it deems that the standard for that prong is not satisfied, it need not consider the other prong. *People v. Irvine*, 379 Ill. App. 3d 116, 129-30 (2008).

¶ 31 Trial counsel has a professional duty to conduct reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. *People v. Domagala*, 2013 IL 113688, ¶ 38. This duty derives from counsel's basic function "to make the adversarial testing process work in the particular case." (Internal quotation marks omitted.) *Id.* The duty includes the obligation to independently investigate any possible defenses. *Id.* "Lack of investigation is to be judged against a standard of reasonableness given all of the circumstances, 'applying a heavy measure of deference to counsel's judgment.'" *Id.* (quoting *People v. Kokoraleis*, 159 Ill. 2d 325, 330). Thus, where the circumstances known to counsel at the time of his investigation do not reveal a sound basis for further inquiry in a particular area, it is not ineffective for the attorney to forgo additional investigation. *People v. Anderson*, 375 Ill. App. 3d 121, 145 (2007). Similarly, whether to present certain witnesses and what defense to present are matters of trial strategy for trial counsel to make after consulting with his client. *People v. Clendenin*, 238 Ill. 2d 302, 319 (2010). Moreover, whether trial counsel was ineffective for failure to investigate is

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determined by the value of the evidence that was not presented at trial and the closeness of the evidence that was presented. *People v. Makiel*, 358 Ill. App. 3d 102, 107 (2005).

¶ 32 We find that the defendant in this case, has made a substantial showing that defense counsel's failure to make any attempt to investigate or interview Weston, or to present him as a witness at trial, was objectively unreasonable so as to satisfy the performance prong of the *Strickland* standard. Taking as true the defendant's allegation that defense counsel knew that Weston had witnessed the shooting and could have testified that the defendant was not the shooter, we find that the defendant has established that defense counsel failed to adequately investigate Weston. Weston's affidavit, which accompanied the defendant's amended postconviction petition, expressly specified that he had asserted his Fifth Amendment right against self-incrimination at the time of police questioning. Thus, *initially*, there was no sound basis for defense counsel to further inquire into Weston's potential testimony, where Weston could not have been compelled to testify unless granted immunity by the State. See *People v. Ousley*, 235 Ill. 2d 299, 306 (2009) (witness asserting right under the Fifth Amendment in a criminal case may only be compelled to testify when given immunity). However, we find that the defendant has made a substantial showing that defense counsel was deficient for not interviewing Weston or investigating what he knew and for not presenting him as a witness at trial, *after* October 2006, when he became willing to testify on behalf of the defendant. In Weston's affidavit, he averred that in October 2006, three years after the shooting but before the 2007 trial, he tried to contact defense counsel and an assistant State's Attorney regarding the details of the shooting, but received no response from them. Taking as true Weston's affidavit, as we must at this stage of the proceedings, we find that Weston's statement that he had tried to contact defense counsel and an assistant State's Attorney in October 2006, made a substantial

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showing that defense counsel knew that Weston was willing to testify and could provide exonerating evidence for the defendant which was not otherwise provided at trial. Notably, the defense theory at trial was that an unknown shooter had committed the crime. Weston's testimony would have corroborated the defense theory and, thus, we find that a substantial showing has been made that it was objectively unreasonable not to present Weston's testimony. Although the trial court found that the defendant could not make a substantial showing of ineffective assistance of counsel because Weston's affidavit "does not indicate whether he successfully contacted [trial] attorney or the [a]ssistant State's Attorney," legal precedent dictates that such a level of detail is not required at this stage. We find *People v. Clark*, 2011 IL App (2d) 100188, to be instructive. In *Clark*, the defendant's postconviction petition alleged that defense counsel was ineffective for coercing him to plead guilty and for failing to investigate a known witness who was offering to present evidence that could support an insanity defense. *Clark*, 2011 IL App (2d) 100188, ¶¶ 8, 28. Attached to the petition was an affidavit from the stabbing victim (and the defendant's girlfriend) stating that she was willing to testify that the defendant was off medication and not within his right frame of mind during the attack; that she remained in contact with him by telephone calls and letters while he was in police custody and told him that she would testify on his behalf; and that she had tried to contact defense counsel several times by telephone but her calls were not returned. *Id.* ¶ 9. The *Clark* court found that the defendant made a substantial showing that defense counsel was deficient in failing to investigate the victim as a witness who could support an insanity defense. *Id.* ¶ 28. Similar to the affidavit in *Clark* which only stated in minimal details that the witness "tried to contact" defense counsel several times but her "calls were not returned," Weston's affidavit in this case,

likewise stated that he had "tried to contact" defense counsel and an assistant State's Attorney to give them his testimony about the details of the shooting, but "never got a respon[se]."

¶ 33 The State argues that even had defense counsel known about Weston's potential testimony, failing to call him as a witness at trial would be a matter of sound trial strategy. We reject this notion. First, defense counsel's failure to present Weston as a witness at trial could not have been strategic where, taking as true Weston's affidavit, defense counsel never even interviewed Weston. See *Strickland*, 466 U.S. at 690; *People v. Truly*, 230 Ill. App. 3d 948, 954-55 (1992) (counsel's decision could not be considered strategic since he failed to investigate all matters relevant to the plausible defenses of alibi, incapacity and revenge that defendant proffered to him). Second, we reject the State's argument regarding trial strategy because it essentially asks this court to speculate that Weston would not likely be considered a credible witness by the jury. By filing a motion to dismiss instead of an answer to the petition at the second stage of the postconviction proceedings, the State had neither refuted nor denied the allegations in the petition and supporting affidavit, and the Act contemplates that factual and credibility determinations are to be made at the evidentiary stage of the postconviction proceedings. See *Coleman*, 183 Ill. 2d at 390-91; *People v. Harper*, 2013 IL App (1st) 102181, ¶ 51. We find that because the State elected to file a motion to dismiss rather than an answer to the instant petition, the reliability of Weston's affidavit and any credibility determinations should not be determined at this stage of the proceedings. Therefore, we find that the defendant made a substantial showing that defense counsel was deficient in failing to investigate and interview Weston, and in failing to present Weston as a witness at trial.

¶ 34 With regard to the prejudice prong under *Strickland*, we find that the defendant made a substantial showing that he suffered prejudice. To establish prejudice, the defendant must show

that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." *King*, 316 Ill. App. 3d 901, 913 (2000). A reasonable probability is one that sufficiently undermines confidence in the outcome. *Id.* We are mindful that, at this stage of the proceedings, the defendant is only required to present a "substantial showing" of a constitutional violation, *which if proven* at an evidentiary hearing, would entitle him to relief. See *Domagala*, 2013 IL 113688, ¶ 35. The relevant inquiry is whether, taking Weston's assertions as true, the defendant made a substantial showing that a different outcome would have been reasonable. Whether or not Weston's testimony is contradicted by other testimony given at trial is a matter of resolving evidentiary conflicts, which is inappropriate at this stage of the proceedings. See *id.* ¶ 45. Such conflicts are only appropriately resolved at the third stage, where the trial court can weigh Weston's credibility and determine the weight to be given to the testimony and evidence. See *id.* Comparing Weston's testimony exonerating the defendant with Young and Glover's testimony, the trier of fact could determine Weston's testimony is entitled to more credence and weight than either of the State's eyewitnesses. If this were the case, a viable defense would be proven and there is a reasonable probability that the outcome of the defendant's trial would have been different. We reiterate that we make no ruling regarding the credibility of the statements in Weston's affidavit at this second stage of the proceedings, nor do we speculate upon the likelihood of success of the defendant's petition at the third stage. Thus, taking as true Weston's affidavit statement that the defendant was not the shooter, Weston's testimony exonerating the defendant, if proven at an evidentiary hearing, would entitle the defendant to relief. Therefore, we find that the defendant has made a substantial showing that defense counsel provided ineffective assistance. Accordingly, we hold

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that the defendant is entitled to a third-stage evidentiary hearing on his amended postconviction petition.

¶ 35 In light of our holding that the petition should advance to the third stage of the postconviction proceedings, we need not address the defendant's alternative argument that postconviction counsel provided an unreasonable level of assistance in violation of Rule 651(c).

¶ 36 For the foregoing reasons, we reverse the judgment of the circuit court of Cook County and remand the cause for a third-stage evidentiary hearing.

¶ 37 Reversed and remanded.