2016 IL App (1st) 13-2968

THIRD DIVISION
July 20, 2016

No. 1-13-2968

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	Appeal from the Circuit Court
Respondent-Appellee,	)	of Cook County, Illinois,
	)	County Department, Criminal
v.	)	Division
	)	
MENARD McAFEE,	)	No. 01 CR 7941
	)	
Petitioner-Appellant.	)	The Honorable
	)	Lawrence Edward Flood,
	)	Judge Presiding.

PRESIDING JUSTICE FITZGERALD SMITH delivered the judgment of the court.
Justices Lavin and Pucinski concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not err in dismissing the petitioner's second stage postconviction petition. The petitioner failed to make a substantial showing that: (1) he was denied a fair trial when the trial court did not include "beyond a reasonable doubt" language in the fifth verdict form asking the jury to determine whether the petitioner had personally discharged the firearm used in the crime and refused to provide the jury with an alternate not-guilty verdict form for that sentencing enhancement; (2) he was denied his constitutional right to effective representation by both trial and appellate counsels; and (3) he was denied his statutory right to reasonable assistance by postconviction counsel when counsel did not amend his *pro se* petition to include all viable claims.

¶ 2 After a jury trial in the circuit court of Cook county, the petitioner, Menard McAfee, was

convicted of first degree murder, while armed with a firearm and, as a result of a mandatory firearm enhancement (730 ILCS 5/5-8-1(d)(iii) (West 2002)), sentenced to 50 years' imprisonment. The petitioner now appeals from the second-stage dismissal of his petition for relief under the Post-Conviction Hearing Act. 725 ILCS 5/122-1 *et seq*. (West 2010). He contends that the circuit court erred in not permitting his petition to proceed to an evidentiary hearing because he made a substantial showing that his constitutional rights were violated where the trial court failed: (1) to advise the jury about the burden of proof on the issue of whether the petitioner personally discharged the firearm and (2) to provide them with an alternate not-guilty verdict form for the sentencing enhancement. The petitioner also asserts that he made a substantial showing that his trial counsel was ineffective for failing, *inter alia*: (1) to object to the aforementioned jury instruction errors; and (2) to investigate and procure an alibi witness who could have testified to the petitioner's whereabouts at the time of the crime, instead erroneously calling another "false alibi" witness, who was not with the petitioner at that time. Finally, the petitioner asserts that his post-conviction counsel provided unreasonable assistance by failing to amend his petition to include a claim of ineffective assistance of appellate counsel for appellate counsel's failure to argue on direct appeal that trial counsel was ineffective for not advising the court that the gun recovered during the petitioner's arrest, a Glock nine-millimeter, could not have fired the .38 caliber bullet retrieved from the victim's body. For the reasons that follow, we affirm.

¶ 3 I. BACKGROUND

¶ 4 The record before us reveals the following facts and procedural history. About 3 a.m. on February 18, 2001, a dispute at a Chicago lounge resulted in the shooting death of Stephan Russell (hereinafter Stephan) and shooting injury of Curtis Meeks (hereinafter Curtis). On

February 22, 2001, the petitioner was arrested for an unrelated armed robbery offense. On March 28, 2001, he was charged for his involvement in the February 18, 2001, shooting. The petitioner was charged, *inter alia*, with nine counts of first degree murder (including intentional, reckless and felony murder) (720 ILCS 5/9-1(a)(1), (a)(2), (a)(3) (West 2000)), while armed with a firearm, against Stephan, and one count of aggravated battery with a firearm (720 ILCS 5/12-4.2 (West 2000)), against Curtis.

¶ 5 The petitioner proceeded with a jury trial on March 13, 2013, at which the following evidence was adduced. Teshia Russell, Stephan's wife, first testified that she, her sister Nakia Fields (hereinafter Fields), her cousin Ieanis Shaw (hereinafter Shaw), and Ashley McFarland (hereinafter McFarland) joined Stephan and his friends Lamont Murry (hereinafter Murry), Martez Benton (hereinafter Benton) and an individual that Teshia knew only by his nickname "Black" (hereinafter Black) at a Chicago lounge. An argument began when Benton stepped on a woman's shoe on the small dance floor. When the woman summoned her friends, one of whom was a man who wore a colorful yellow sweater and gold-trimmed glasses, Teshia and Stephan grabbed Benton and led him out of the lounge to avoid a fight. The woman picked up a bottle, threw it and hit Murry. All of Russell's friends left the lounge except for Black. The women returned to the group's two cars, but the men walked back to the lounge to look for Black. When Teshia drove her car by the lounge, she saw Stephan surrounded by a group of men. Teshia told McFarland to drive, exited her car and ran to the scene. As she approached, the man in the yellow sweater pointed at Stephan. Then, a short man who wore a red shirt and a denim suit pulled a gun from his pants and pointed it at Stephan's chest. Fields and Shaw were standing near Stephan at the time. Teshia heard three or four gunshots, saw Stephan fall to the ground, and ran towards him. The crowd scattered, but Fields and Shaw remained with Stephan.

Stephan died at the hospital about an hour later. When Teshia spoke to the police, she described the man with the gun as a 22- or 23-year-old black male, about 5'5" tall. Teshia stated that none of the women in their group drank any alcohol that evening.

¶ 6 Lamont Murry testified consistently with Teshia. He added that he, Stephan, Benton and Black were at another bar for about one hour before they drove to the lounge and met Teshia and the other women. Murry described the man with the yellow sweater as tall and dark-skinned, whereas the shooter was short and dark-skinned. Murry identified the petitioner in court as the shooter. Murry testified that when he, Stephan and Benton walked back to the lounge to find Black, the petitioner was outside, approached them, pulled out a black gun, pointed it at them and asked if they had a problem with his people. Murry was about three feet away from the petitioner and looked at his face under good lighting conditions from the lounge and street lights. Murry and his group responded that there was no problem, and the petitioner spun around and put his gun back in his waistband. Then, the man with the yellow sweater exited the bar, pointed in the direction of Murry's group and said, "There go them bitch ass niggers right there." The petitioner then turned towards Murry's group and pulled out his gun. Murry ran and heard four or five gunshots. When Murry and Benton returned to the lounge, they learned that Stephan was shot.

¶ 7 Shortly after the shooting, Murry told the police that the shooter was a dark-skinned, black man, about 5'4" and 160 lbs. On February 22, 2001, Murry was summoned to the police station to view a lineup. Murry informed the police detectives that the shooter as 5'6" or 5'8" and wore a denim suit. Murry identified the petitioner as the shooter from a lineup conducted at the police station.

¶ 8 On cross-examination, Murry admitted that he had three prior felony convictions for drug

offenses. He also acknowledged that he drank about three beers at the lounge on the evening of the offense, but he could not remember if he used any narcotics that night.

¶ 9 Detective Robert Carrillo testified consistently with Murry concerning his identification of the petitioner from the lineup. On cross-examination, Detective Carrillo also acknowledged that, in the photograph taken at the police station, a ruler on the wall behind the petitioner indicated that the petitioner was about 5'11" tall, and therefore much taller than had been described to the police by numerous witnesses immediately after the offense.

¶ 10 Martez Benton testified generally consistently with Teshia and Murry. He stated that when they arrived back at the lounge to get Black, a man, he described as dark-brown skinned, with "a little curl in his little [A]fro," and wearing a denim blue jean suit approached them, pulled out a gun, pointed it at them and asked if they had a problem with "his people." After that, a taller man, with the yellow sweater and gold-trimmed glasses rushed out of the lounge door and pointed at Benton's group saying, "There go them bitch ass niggers." Benton testified that this man also held and pointed a gun at them. In addition, Benton averred that during the incident his attention was drawn, not to the man in the denim suit, but to the taller man with the yellow sweater and gold-trimmed glasses. Benton admitted, however, that when that taller man in the yellow sweater yelled, "There go them bitch ass niggers," he ran before hearing gunshots, and therefore did not see who shot at them.

¶ 11 On cross-examination, Benton acknowledged that he had five prior felony convictions for drug offense. He also admitted that he drank six beers at the lounge, but denied having used any drugs that evening.

¶ 12 Ieanis Shaw next testified that she left the lounge with her group and did not drink any

alcohol. She stated that together with Fields, she ultimately went to Benton's car, which was parked in front of the lounge. A white van was also parked in front of the lounge. At that point, Shaw saw the petitioner and about five other men exit the lounge, stand in front and point at Stephan, Murry and Benton, who were walking towards the lounge. The petitioner then grabbed Stephan by the collar, took a gun from his pocket, and pointed it at Stephan's chest. Shaw testified that she saw the petitioner fire the gun and Stephan fall face down on the ground. According to Shaw, the petitioner fired two more gunshots at Stephan. Shaw was about eight feet from the petitioner when Fields stepped between the petitioner and Stephan and pleaded with the petitioner to stop shooting. According to Shaw, the petitioner only said, "Die nigger die." The petitioner ran past Shaw in the direction of the white van, after which Shaw ran towards Stephan. Shaw acknowledged that at some point, she noticed that the white van was gone.

¶ 13 Shaw also testified that four days later, she viewed a lineup at the police station and identified the petitioner as the shooter. She also identified the white van she saw parked in front of the lounge from a photograph.

¶ 14 On cross-examination, Shaw acknowledged that there was nothing distinctive about the van she identified from the photograph at the police station. In addition, she admitted that at the scene of the crime, she told the police that the shooter was a medium-complexioned black man, about 5'3" to 5'4" tall, and wore a black denim suit, but that at the lineup, she told the detective that the shooter had been dressed in red clothing.

¶ 15 Nakia Fields next testified that Stephan was standing near a white van when the shooter came out of the lounge. Fields identified the petitioner in court as the shooter. Fields also stated that the tall man with the gold-trimmed glasses exited the lounge at the same time. The petitioner

asked that man, "Who was it?" Then, the man with the glasses pointed at Stephan and said, "That's the punk ass nigger right there." According to Fields, the petitioner then pulled out a gun from his waist and shot Stephan, who fell to the ground. The petitioner stood over Stephan ready to shoot again, when Fields jumped out of the car. She ran and stood in front of the petitioner and begged him to stop shooting. According to Shaw, the petitioner shot Stephan three times, looked up, pointed the gun, and said, "They thought we was [*sic*] some punks." He then put the gun in his waist, got in the white van and drove away. At the scene, Fields told police officers the shooter was a medium-complexion black male, about 150 to 160 pounds, and wore a grayish denim suit. Four days later, Fields viewed a police lineup and identified the petitioner as the shooter. At the lineup, she told detectives the shooter wore a gray denim suit, had a small Afro, and was about 5'6" to 5'8" tall. Fields did not drink alcohol on the evening of the shooting.

¶ 16 The surviving victim, Curtis Meeks, next testified that when he and his friends arrived at the lounge on the evening of the offense, a fight had already occurred inside and people were rushing to get out. Meeks and a friend stood outside the lounge waiting for Meeks' cousin, when they observed a stout, dark-skinned black man, between 5'3" and 5'5" tall, holding a black gun, walking up to the lounge and trying to locate someone. Meeks described the man with the gun as short, kind of stocky, and with a "fade" hairstyle (longer on the top and shorter on the sides). Meeks testified that his attention was drawn to the gun, so that he could not remember the shooter's face. Meeks testified that after he and his friend started crossing the street to avoid any trouble, Meeks heard someone say, "There he goes." Meeks started running, but was shot in the back of his left arm. Meeks caught up with his friends and was taken to a hospital, where he was treated and later released.

¶ 17 Chicago Police Officer Frank Pieri next testified regarding the circumstances of the

petitioner's arrest.[1] Office Pieri stated that on February 22, 2001, he and his partner came into contact with a white Chevrolet van. Officer Pieri observed the petitioner exit the van, walk to the sidewalk holding a gun in his hand. According to Officer Pieri, when the petitioner saw the police he threw the gun over a fence and started running down an alley. Together with his partner, Officer Pieri gave chase and apprehended the petitioner. A few minutes later, Officer Pieri returned to the fence where he recovered the gun, a black Glock pistol, and a gun magazine that the petitioner had thrown over the fence. Officer Pieri estimated that the location of the petitioner's apprehension was about 1½ miles from the scene where Stephan was shot.

¶ 18 Chicago police forensic investigator Robert Tovar (hereinafter Tovar) examined the scene of the crime (namely the area in front of the lounge) after the shooting. He testified that no fired cartridge casings were recovered at the scene. Tovar further explained that, unlike revolvers, which do not eject a casing when fired, a semi automatic Glock ejects a shell casing when fired.

[1] We note that prior to trial, the trial court granted the Sate's motion to introduce the circumstances of the petitioner's arrest at his trial, but instructed the State to refrain from asking any questions that would reveal that the petitioner was arrested during a separate and unrelated armed robbery investigation. At the hearing, defense counsel also orally moved to bar the introduction of any evidence of the "Glock" pistol recovered from the petitioner's arrest on the grounds that there was no connection between that gun and the weapon used in the shooting. Defense counsel argued that the firearm examiner had told him that the bullet in the victim's body was too deformed for comparison testing. The firearm examiner, however, was able to opine that the bullet was a .38 caliber that could have conceivably been fired from the nine-millimeter Glock. Based on this information, the trial court denied the defense counsel's motion finding that the Glock crossed the "threshold of suitability" for admission.

¶ 19 Chicago police forensic investigator John Paulson next testified that on February 22, 2001, he went to the location of the petitioner's arrest and processed the scene where the semi-automatic Glock gun was recovered. Investigator Paulson testified that the gun and the van were inventoried with the Chicago police department.

¶ 20 Illinois State Police forensic scientist Kimberly Hood Ryan testified that she performed a latent fingerprint analysis on the Glock gun, the magazine, and the bullets recovered from the petitioner during his arrest, but that she could not find any latent prints suitable for comparison.

¶ 21 Cook County assistant medical examiner, Dr. Kendall Crowns, next testified that she performed the autopsy of the victim, Stephan on February 18, 2001. Dr. Crowns testified that Stephan died as a result of multiple gunshot wounds, namely, to the chest, the back, the left buttock, and the right forearm. Dr. Crowns stated that the chest wound was consistent with a gun being placed against Stephan's chest. A medium caliber deformed lead bullet fragment was recovered from Stephan's body. According to Dr. Crowns, it could have been a .38 or .32 caliber bullet, but that the bullet also could have been fired from a nine-millimeter weapon. Dr. Crowns admitted that she could not definitively determine what type of weapon administered the wounds. Dr. Crowns opined that the manner of death was homicide.

¶ 22 For the defense, Marianne McAfee (hereinafter Marianne), the petitioner's sister, testified that she last saw the petitioner on February 17, 2001, at about 10:30 p.m. at her apartment. She explained that she observed the petitioner leave her apartment with Aretha Brown (hereinafter Brown), the mother of his child.

¶ 23 Mary Cole also testified for the petitioner. She stated that she was inside the lounge on the night of the shooting and observed two men start an argument over a girl at about 2 or 3 a.m. A little bit later, Cole saw two men continue to fight inside the lounge and observed bottles being

thrown. At some point, while still inside the club, she heard gunfire, and ducked under a table. After the gunfire ceased, Cole, worried about her family members, exited the lounge to find them. Outside, she saw about 50 to 75 people. She saw a man crossing the street first running away from the lounge, but then walking back. At that point, Cole heard about four or five more gunshots and hid behind a car. She did not recall seeing a white van. Cole then saw a man running around the corner with a silver gun in his hand. She described him as 5'6" or 5'7" tall, about 140 pounds, and with light-brown skin. Cole admitted that she never provided any statements to the police after the shooting.

¶ 24 Cole further testified that she knew the petitioner from around the neighborhood and did not see him at all that night, either inside or outside the lounge. Cole explained that she knew the petitioner's mother and his sister, Marianne. Cole saw Marianne about twice a week because their children went to the same school. Cole, who testified at this trial on March 12, 2003, explained that she was in court a couple of days ago for her husband's case and heard the petitioner's case being called. Cole approached the petitioner's counsel and offered to testify because, by coincidence, she happened to be at the lounge at the time of the shooting.

¶ 25 The defense next introduced a stipulation by the parties that, if called to testify, McFarland would have stated that she viewed a lineup which included the petitioner but was unable to recognize anyone from that lineup who was at the lounge on the night of the shooting.

¶ 26 At the close of evidence, the parties proceeded with closing arguments. The State argued, *inter alia*, that the petitioner had shown consciousness of guilt during his arrest by running away from the police and getting rid of the gun. The State also argued that the jury could infer that the gun was the murder weapon because:

> "They saw him discard this gun and the witnesses said that this is the gun that looked like the same type of gun that the [petitioner] used on February 18, 2001 *** Two of the witnesses said this gun looks exactly like the same type of gun that he used when he pulled it out and he shot Stephan Russell. What's the logical inference? This is the gun that was used to kill Stephan Russell."

¶ 27 Defense counsel argued in closing that this was a case of misidentification. Counsel pointed out that immediately after the shooting, witnesses described the shooter as being 5'3" to 5' 4" inches tall whereas the petitioner is almost 6'. In addition, counsel further brought up Marianne's testimony that the petitioner had left her apartment at 10:30 p.m. with Brown. Since two witnesses did not put the petitioner at the lounge during the shooting, and none of the witnesses put Brown in the bar at the shooting, defense counsel argued that the jury could infer that the petitioner was somewhere else with Brown on that night.

¶ 28 At the jury instruction conference, the trial court informed the parties that it would submit a fifth verdict form in addition to the guilty and not guilty verdict forms for first degree murder with a firearm against Stephan and aggravated battery with a firearm against Meeks. This form stated:

> "We, the jury, further find that the defendant, Menard MacAfee, personally discharged the firearm that caused the death of Stephan Russell."

Defense counsel objected to the form of the jury verdict and requested that if this verdict form were to be given, then an additional alternate verdict form also be provided to the jury that would permit it to find that the petitioner had not personally discharged the firearm. The trial court denied defense counsel's request and instead chose to add the word "unanimously" after the words "the jury." Therefore, the court ultimately instructed the jury in the following manner:

> "Now jurors, there is a supplement to this last verdict form. If you do find the defendant guilty of first degree murder, you will consider this additional verdict form. 'We, the jury, unanimously further find that the defendant, Menard McAfee, personally discharged the firearm that caused the death of Stephan Russell.' "

¶ 29 The jury found the petitioner guilty of first degree murder for the death of Stephan, but acquitted him of the aggravated battery with a firearm charge against Meeks. In finding the petitioner guilty of first degree murder, the jury further found that he had personally discharged the firearm that caused Stephan's death.

¶ 30 While awaiting his sentence, the petitioner filed two motions: (1) a motion for a new trial filed by his then defense counsel; and (2) a *pro se* motion for a new trial alleging ineffective assistance of trial counsel, on numerous grounds. Relevant to this appeal was the assertion that trial counsel had failed to procure key defense alibi witnesses (Brown) for the petitioner's trial. A preliminary hearing pursuant to *People v. Krankel*, 102 Ill. 2d 181 (1984) was held on the issue of whether trial counsel was ineffective for failing to call Brown as an alibi witness. At that hearing, the petitioner's trial counsel stated that he interviewed Brown and listed her as a potential witness in his supplemental answer to discovery, but that he chose not to call her on the basis of what he believed her testimony could offer. In that respect, the State introduced to the court Brown's statement to police given on February 23, 2001, and her later testimony before the grand jury, in both of which she admitted that she was at home in the early morning hours of February 18, 2001, and did not see the petitioner at all. Based on the aforementioned facts, the court found that the petitioner's trial counsel was not ineffective for choosing not to call Brown as a witness.

¶ 31 The trial court subsequently appointed the petitioner new counsel and held a formal *Krankel*

hearing on the issue of whether the petitioner had in fact wanted a bench trial but was forced to proceed with a jury trial by his trial counsel. At this hearing, the petitioner's trial counsel denied ever telling the petitioner that the trial judge would not give him a fair trial, but admitted having told the petitioner that the judge "would find him guilty in a minute."

¶ 32 The court ultimately denied both of the petitioner's posttrial motions. The petitioner was subsequently sentenced to 50 years in prison on the basis of the mandatory sentencing enhancement (730 ILCS 5/5-8-1(d)(iii) (West 2002)). The petitioner's motion to reconsider the sentence was denied.

¶ 33 The petitioner appealed his conviction and sentence, arguing, inter alia: (1) that the State had engaged in prosecutorial misconduct when it suggested in closing argument that the Glock recovered from the petitioner's arrest was the same gun used in the shooting; and (2) that the trial court had failed to make an adequate inquiry into his *pro se* posttrial motion for ineffective assistance of counsel. In affirming the petitioner's conviction, this court rejected the prosecutorial misconduct argument by finding that the gun was properly admitted under the minimum threshold of suitability standard based on the eyewitnesses' testimony about a black gun and the pathologist's testimony that the victim died of multiple gunshot wounds that could have come from a .38 or .32 caliber bullet weapon. See *People v. Menard McAfee*, No. 1-04-2037 (June 9, 2006) (unpublished order pursuant to Illinois Supreme Court Rule 23), p. 18. Accordingly, we concluded that the State properly argued the logical inference to the jury that the Glock was used during the shooting. See *McAfee*, No. 1-04-2037 (June 9, 2006) (unpublished order pursuant to Illinois Supreme Court Rule 23), p. 18. We similarly rejected the petitioner's assertion that the trial court made an inadequate inquiry into trial counsel's ineffectiveness, and held that the petitioner's claims of ineffective assistance of trial counsel

"were either without merit or related to maters of trial tactics." *McAfee*, No. 1-04-2037 (June 9, 2006) (unpublished order pursuant to Illinois Supreme Court Rule 23), p. 23.

¶ 34 On March 31, 2008, the petitioner filed a *pro se* postconviction petition alleging, *inter alia*, that his trial counsel was ineffective for failing to: (1) interview and procure Brown as an alibi witness, and instead calling Marianne, who had not been with the petitioner at the time of the shooting; and (2) to advise the trial court that the gun recovered during the petitioner's arrest could not have fired the bullet found in Stephan's body. The petitioner also asserted that the trial court erred in failing: (1) to instruct the jury that they were required to find beyond a reasonable doubt that the petitioner personally discharged a firearm that caused Stephan's death; and (2) to provide an alternate not-guilty verdict form for the discharge of firearm issue. The petitioner also alleged that his appellate counsel was ineffective for failing to raise the following issues in his appellate brief: (1) trial counsel's ineffectiveness for calling Marianne as an alibi witness; and (2) the trial court's failure both to instruct the jury on the reasonable doubt requirement as to the petitioner having personally discharged the firearm, and to provide the jury with an alternate verdict form as to this issue.

¶ 35 In support, the petitioner provided an affidavit from Brown attesting that she was with the petitioner from 10 p.m. on February 17, 2001, through 6 a.m. on February 18, 2001. In her affidavit, Brown stated that the petitioner's trial counsel never interviewed her and that both her original statement to police and her grand jury testimony about not being with the petitioner were coerced.

¶ 36 On August 21, 2008, the circuit court appointed the petitioner counsel and advanced his *pro se* motion to second-stage postconviction proceedings. Postconviction counsel then filed a certificate pursuant to Illinois Supreme Court Rule 651 (134 Ill.2d R. 651(c)), and amended the

petitioner's *pro se* petition with respect to his jury instruction claims. Specifically, postconviction counsel argued that the court's failure to provide the jury with a not-guilty verdict form for the personal discharge of a firearm finding deprived the petitioner of his constitutional right to have a jury determine a sentencing enhancement factor and was inconsistent with Illinois Pattern Jury Instructions, Criminal No. 28.05 (4th ed. Supp. 2009) (hereinafter IPI Criminal 4th No. 28.05) (Supp 2009)). Postconviction counsel similarly argued that the petitioner's constitutional rights were infringed when the court failed to advise the jury of proof beyond a reasonable doubt and the presumption of innocence as to the enhancement factor as was required under Illinois Pattern Jury Instructions, Criminal, No. 28.02 (4th ed. Supp. 2009) (hereinafter IPI Criminal 4th No. 28.02 (Supp 2009)). Counsel also argued that the addition of the word "unanimously" to the verdict form did not cure either of these errors. According to postconviction counsel, the jury could have concluded that another person fired the fatal bullet since there was evidence that multiple guns had been drawn at the scene, and this finding would not be inconsistent with the murder conviction because the petitioner may have been guilty under a theory of accountability.

¶ 37 On November 12, 2012, the State filed a motion to dismiss the petition. After a hearing on the matter, the trial court granted the motion explaining that the petitioner's claims either lacked merit or were *res judicata*. The petitioner now appeals.

¶ 38 II. ANALYSIS

¶ 39 On appeal, the petitioner makes several assertions. First, he argues that the trial court erred in dismissing his petition where he made a substantial showing that he was denied his constitutional right to a fair trial because the trial court failed to: (1) advise the jury about the burden of proof on the issue of whether he personally discharged the firearm during the

commission of the offense; and (2) to provide the jury with an alternate not-guilty verdict form for the enhancement. Second, the petitioner asserts that his appellate counsel was ineffective for failing to raise the aforementioned instructional errors on direct appeal. Third, the petitioner argues that his petition made a substantial showing that he was deprived of his constitutional right to effective representation by his trial counsel. In that respect, the petitioner contends that trial counsel failed to investigate and procure Brown as an alibi witness and instead improperly called Marianne, who was not with the petitioner when the shooting occurred. Finally, the petitioner asserts that his postconviction counsel provided unreasonable assistance by failing to amend his petition to include a claim of ineffective assistance of appellate counsel where appellate counsel failed to argue on direct appeal that trial counsel failed to advise the court that the gun recovered from the petitioner's arrest, a Glock nine-millimeter, could not have fired the .38 caliber bullet found in Stephan's body. We will address each contention in turn.

¶ 40 We begin, however, by setting forth the well-established principles regarding postconviction proceedings. The Post-Conviction Hearing Act (Act) (725 ILCS 5/122–1 *et seq*. (West 2008)) provides a means by which a criminal defendant can assert that his conviction was a result of a substantial deprivation of his constitutional rights under either the United States Constitution or the Illinois Constitutions. *People v. Tate*, 2012 IL 11214, ¶ 8; see also *People v. Hodges*, 234 Ill.2d 1, 9 (2009); *People v. Peeples*, 205 Ill. 2d 480, 509 (2002). A postconviction proceeding is not an appeal from the judgment of conviction, but is a collateral attack on the trial court proceedings. *Tate*, 2012 IL 11214, ¶ 8. Accordingly, issues raised and decided on direct appeal are barred by *res judicata*, and issues that could have been raised but were not are forfeited. *Tate*, 2012 IL 11214, ¶ 8.

¶ 41 In a noncapital case, such as this one, a postconviction proceeding consists of three stages.

Tate, 2012 IL 11214, ¶ 9. At the first stage, the circuit court must independently review the petition, taking the allegations as true, and determine whether " 'the petition is frivolous or is patently without merit.' " *Hodges*, 234 Ill.2d at 10, (quoting 725 ILCS 5/122–2.1(a)(2) (West 2006)).

¶ 42 If the circuit court does not dismiss the petition as frivolous or patently without merit, the petition advances to the second stage of postconviction proceedings. At the second stage, the circuit court must determine whether the petition and any accompanying documentation make " 'a substantial showing of a constitutional violation.' " *Tate*, 2012 IL 11214, ¶ 10 (quoting *People v. Edwards*, 197 Ill. 2d 239, 246 (2001)). In doing so, the court must not engage in fact-finding or credibility determinations, but must take as true all well-pleaded facts that are not positively rebutted by the original trial record. *People v. Domagala*, 2013 IL 11368, ¶ 35. If no substantial showing of a constitutional violation is made, the petition is dismissed. *Tate*, 2012 IL 11214, ¶ 10 (citing *Edwards*, 197 Ill. 2d at 246). If, however, a substantial showing of a constitutional violation is set forth, the petition must be advanced to the third stage for the circuit court to conduct an evidentiary hearing. *Tate*, 2012 IL 11214, ¶ 10 (citing *Edwards*, 197 Ill. 2d at 246). Our review of a circuit court dismissal of a postconviction petition at the second stage of postconviction proceedings is *de novo*. *Tate*, 2012 IL 11214, ¶ 10.

¶ 43 A. Improper Jury Instructions

¶ 44 In the present case, the petitioner first asserts that he made a substantial showing that his right to a fair trial was abridged when the trial court failed: (1) to advised the jury about the burden of proof on the issue of whether he personally discharged the firearm that killed Stephan, and (2) to provide the jury with an alternate not-guilty verdict form for the firearm discharge enhancement.

¶ 45 The State initially argues that these issues were forfeited because the petitioner failed to raise them on direct appeal. We disagree. A claim is not forfeited or otherwise procedurally barred, where, the postconviction petition alleges ineffective assistance of appellate counsel for failing to raise the claim on direct appeal. See *People v. Youngblood*, 389 Ill. App. 3d 209, 214-15 (2009) ("it is well established that a postconviction claim will not be forfeited where the alleged forfeiture stems from the incompetence of appellate counsel."); see also *People v. Blair*, 215 Ill. 2d 427, 450-51 (2005) ("It has long been held that *res judicata* and forfeiture do not apply where [*inter alia*] *** the alleged forfeiture stems from the incompetence of appellate counsel"); see also *People v. Lester*, 261 Ill. App. 3d 1075, 1078 (1994) (postconviction claim was not forfeited because collateral proceedings was the defendant's first opportunity to allege ineffective assistance of appellate counsel). Since here the petitioner alleged that appellate counsel was ineffective for failing to raise the aforementioned issues, the issues are not forfeited and we will address them in this appeal.

¶ 46 Turning to the merits, we begin by noting that a trial court's decision regarding jury instructions and verdict forms is reviewed under an abuse of discretion standard. *People v. Battle*, 393 Ill. App. 3d 302, 313 (2009) (citing *People v. Jones*, 175 Ill. 2d 126, 131-32 (1997)). "The purpose of jury instructions is to provide the jury with the correct legal principles applicable to the evidence, so that the jury may reach a correct conclusion according to the law and the evidence." *People v. Bannister*, 323 Ill. 2d 52, 81 (2008). It is sufficient if the instructions given to the jury, considered as a whole, fully and fairly announces the applicable law. *Bannister*, 323 Ill. 2d at 81.

¶ 47 1. Burden of Proof

¶ 48 The petitioner first asserts that in contravention of *Apprendi v. New Jersey*, 530 U.S. 466,

490 (2000), the trial court failed to properly instruct the jury that it was the State's burden of proof to establish that the petitioner personally discharged the firearm beyond a reasonable doubt. For the reasons that follow, we disagree.

¶ 49 We recognize that in *Apprendi*, 530 U.S. 490, the United States Supreme Court held that due process requires that any fact, other than a prior conviction, increasing the penalty for an offense beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. See also *People v. Swift*, 202 Ill. 2d 378, 383 (2002) (explaining that under *Apprendi* "due process requires that all facts necessary to establish the statutory sentencing range within which the defendant's sentence falls must be proven to a jury beyond a reasonable doubt") (citing *Apprendi*, 530 U.S. at 490).

¶ 50 In the present case, at the time of the petitioner's trial, the relevant mandatory sentencing statute provided that, "if, during the commission of [a felony offense], the person personally discharged a firearm that proximately caused great bodily harm *** or death to another person, 25 years or up to a term of natural life shall be added to the term of imprisonment imposed by the court." 730 ILCS 5/5-8-1(d) (iii) (West 2002). As such, the petitioner is correct that in order for the court to have been able to impose the sentencing enchantment, the State bore the burden of convincing the jury beyond a reasonable doubt that the petitioner personally discharged the firearm that killed Stephan, and that the jury should have thus been instructed.

¶ 51 Nevertheless, contrary to the petitioner's contention, the record before us reveals that the trial court did in fact instruct the jury as to the State's burden of proof. The transcript reveals that the jury was instructed in the following manner:

> "The defendant is presumed to be innocent of the charges against him. This presumption remains with him throughout every stage of the trial and during your deliberations on the

verdicts and is not overcome unless from all the evidence in this case you are convinced beyond a reasonable doubt that he is guilty.

The State has the burden of proving the guilt of the defendant beyond a reasonable doubt and this burden remains on the State throughout the case. The defendant is not required to prove his innocence."

¶ 52 There is nothing in the record to suggest that this general admonishment on the presumption of innocence and the burden of proof was insufficient to inform the jury that those principles also applied to the firearm enhancement. In fact, the instruction specified that the burden of proof beyond a reasonable doubt applied to all "charges" against the petitioner, and that the presumption of innocence against the petitioner remained with him through every stage of the trial, including the jury's "deliberations on the verdicts." Since the petitioner was charged with, *inter alia*, first degree murder for having "shot" and "killed" Stephan while "armed with a firearm," and the jury was given a separate verdict form asking it to explicitly and unanimously find that the petitioner "personally discharged the firearm that caused" Stephan's death, the record rebuts the petitioner's argument that the jury was inadequately instructed that the burden of proof beyond a reasonable doubt rested with the State as to both the crime and the firearm enchantment.

¶ 53 The petitioner's complaint that the fifth verdict form instructing the jury to determine that the petitioner "personally discharged the firearm that caused the death of Stephan" did not include "beyond a reasonable doubt" language is unconvincing. None of the other verdict forms, asking the jury to determine the petitioner's guilt or innocence as to the murder and aggravated battery charges included such language. Nor did they need to, in light of the general instruction clearly articulating the State's burden of proof.

¶ 54 The petitioner's assertion that the jury should have been instructed with Illinois Pattern Jury Instructions, Criminal, Nos. 28.00-29.06 (4th ed. Supp. 2009),[2] so as to include such language, also has little merit. The petitioner himself admits in his brief that this instruction "did not exist at the time of the petitioner's trial," but rather became effective in 2006, nearly three years later. Under the law at the time of the petitioner's trial, including the decision in *Apprendi*, the responsibility of determining whether the petitioner had personally discharged the firearm during the commission of the sentence needed to be alleged in the charging instrument and submitted to the jury as an aggravating factor to be proved beyond a reasonable doubt. See *Apprendi*, 530 U.S. at 490); see also 725 ILCS 5/1113(c-5); P.A. 91-953 (eff. February 23, 2001) ("[I]f an alleged fact (other than the fact of a prior conviction) is not an element of an offense but is sought to be used to increase the range of penalties for the offense beyond the statutory maximum that could otherwise be imposed for the offense, the alleged fact must be included in the charging instrument ***, submitted to a trier of fact as an aggravating factor, and proved beyond a reasonable doubt."). As such, the general burden of proof instruction placing the burden on the State and specifying that the burden remained throughout the trial, certainly conveyed the applicable law to the jury. See *People v. Anderson*, 2012 IL App (1st) 103288,

[2]These instructions require that the jury be instructed as to: (1) the enhancement factor (*i.e.*, that the petitioner personally discharged the firearm during the commission of the offense), (2) the presumption of innocence and the burden of proof for the enhancement, (3) the issues to be proved in the enchantment (including the definition of "personally discharge"), (4) a reminder to the jury of the burden of proof for the enhancement, and (5) an instruction on how to complete the separate verdict form, as well as the actual verdict form itself. See IPI, Criminal 4th Nos. 28.00-28.06, Criminal 28.00-28.06, Committee Notes (Supp. 2009).

¶ 45 (citing *LaSalle Bank, N.A. v. C/HCA Development Corp.*, 384 Ill. App. 3d 806, 818 (2008)).

¶ 55 In coming to this conclusion, we find the petitioner's reliance on *People v. Chanthaloth*, 318 Ill. App. 3d 806 (2001) and *Swift*, 202 Ill. 2d 378 unavailing. In both of those decision the courts vacated the defendants' sentences where the statutory aggravating factor (namely the "heinousness of the crime"), which increased the defendants' sentences was made by the judge and not, as is mandated by *Apprendi*, by the jury. See *Chanthaloth*, 318 Ill. App. 3d at 817 ("the trial court's determinations [as to the aggravated factor] were made by it outside the presence of the jury and after the jury had rendered its verdict."); see also *Swift*, 202 Ill. 2d at 384, 392 ("In this case defendant was sentenced to 80 years' imprisonment based on a factual finding that the crime was brutal and heinous. This finding was made by the circuit court judge, not a jury. Moreover, the burden of proof was merely a preponderance of the evidence, not proof beyond a reasonable doubt"). As already articulated above, in the present case, unlike in *Swift* and *Chanthaloth*, the aggravating factor was properly placed before the jury, and the jury, upon clear instruction from the trial court, made the factual determination regarding that aggravating factor, under a reasonable doubt burden of proof.

¶ 56 2. Trial Counsel's Ineffectiveness for failure to Object to Instruction

¶ 57 For these same reasons, we reject the petitioner's argument that he made a substantial showing that his trial counsel was ineffective for failing to object to the trial court's failure to instruct the jury on the proper burden of proof with regard to the sentencing enhancement.

¶ 58 It is axiomatic that every defendant has a constitutional right to the effective assistance of counsel. See U.S. Const., amends. VI, XIV; Ill. Const. 1970, art. I, § 8. Claims of ineffective assistance of counsel are governed by the standard set forth in *Strickland v. Washington*, 466 U.S. 668, (1984); see also *People v. Lacy*, 407 Ill. App. 3d 442, 456 (2011); see also *People v.*

Colon, 225 Ill. 2d 125, 135 (2007) (citing *People v. Albanese*, 104 Ill.2d 504 (1984) (adopting *Strickland*)). Under the two-prong test set forth in *Strickland*, a petitioner must establish both: (1) that his counsel's conduct fell below an objective standard of reasonableness under prevailing professional norms; and (2) that he was prejudiced by counsel's conduct, *i.e*., that but for counsel's deficient performance, there is a reasonable probability that the result of the proceeding would have been different. See *Lacy*, 407 Ill. App. 3d at 456; see also *People v. Ward*, 371 Ill. App. 3d 382, 434 (2007) (citing *Strickland*, 466 U.S. at 687-94); see also *Domagala*, 2013 IL 113688, ¶ 36. Failure to establish either prong of the *Strickland* test precludes a finding of ineffective assistance of counsel. See *People v. Henderson*, 2013 IL 114040, ¶ 11; see also *People v. Patterson*, 217 Ill.2d 407, 438 (2005).

¶ 59 In the present case, the petitioner has failed to make a substantial showing of either *Strickland* prong. First, with respect to counsel's performance, the petitioner fails to acknowledge that trial counsel did, in fact, object to the trial court's instructions regarding the sentencing enhancement.

¶ 60 The record reveals that during the jury instruction conference, trial counsel explicitly objected to the court's failure to adequately instruct the jury on the sentencing enchantment. Specifically, counsel objected to the trial court's decision to provide the jury with a fifth verdict form requiring them to make a factual determination as to whether the petitioner personally discharged the firearm that caused Stephan's death, without providing the jury with an alternate not-guilty form.

¶ 61 While trial counsel did not specifically object to the fact that the instruction did not contain "beyond a reasonable doubt" language, and did not ask that the jury be instructed with IPI 4th Criminal Nos. 28.01-28.06 (Supp 2009), as already discussed above, under the state of the law at

the time of the petitioner's trial, counsel had no reason to do so. Those instructions did not exist at the time of the trial. What is more, the parties had already agreed at the instruction conference that the trial court would instruct the jury that the burden of proof beyond a reasonable doubt throughout the trial rested with the State. As such, we find that the petitioner has failed to make a substantial showing that counsel's performance was objectively unreasonable. See *People v. Morgan*, 2015 IL App (1st) 131938, ¶77 (" 'Effective counsel is not required to be clairvoyant.' ") (quoting *People v. Vasser*, 331 Ill.App.3d 675, 685 (2002).

¶ 62 What is more, the petitioner has failed to make a substantial showing that there is a reasonable probability that the jury would have found that the petitioner had not personally discharged the firearm had an instruction regarding the proof beyond a reasonable doubt standard been expressly applied to the sentencing enhancement, rather than generally to all of the charges. In that respect, the petitioner asserts that the evidence presented at trial was such to permit a jury to find beyond a reasonable doubt that the petitioner was guilty of murder under a theory of accountability, but nonetheless that he did not personally discharge the firearm that killed Stephan. Specifically the petitioner relies on the fact that one of the witnesses to the shooting, Benton testified that he saw a man with gold-rimmed glasses pull out a gun immediately before the shooting, but that he did not see if the man in the denim suit, later identified as the petitioner, did the same. According to the petitioner, Benton's testimony leaves open the possibility that the petitioner did not fire the fatal shots. For the reasons that follow, we disagree.

¶ 63 First, as we already determined on direct appeal, the evidence here was not closely balanced. See *McAfee*, 1-04-2037, p. 23 (June 9, 2006) (unpublished order pursuant to Illinois Supreme Court Rule 23). According to the trial record, three of the five testifying witnesses to the shooting (Fields, Shaw and Murry) identified the petitioner as the shooter. The fourth witness

(Teshia) described the shooter, including his age, appearance and clothing, in a manner consistent with all of the other witnesses' description of the petitioner's appearance at the time of the offense. What is more, three of the eyewitnesses (Teshia, Fields, and Shaw) testified that from close proximity they observed the petitioner holding a gun and shooting Stephan multiple times. Shaw even testified she observed the petitioner grab Stephan by the collar, point the gun at his chest, and shoot repeatedly at him, yelling "Die nigger die," despite pleas from her to stop. The fourth witness (Murry), consistently testified that the petitioner brandished a gun from about three feet away, and threatened his group of friends (including Stephan), immediately before beginning to shoot at them. In addition, three of the eyewitnesses (Filed, Shaw and Murry) identified the petitioner as the shooter from a lineup only a few days after the incident.

¶ 64 Contrary to the petitioner's argument, the fact that a single eyewitnesses (Benton), who admitted that he never observed the shooting and in fact began running before he heard any gunshots, testified that he observed a second taller man, wearing a yellow sweater, and gold-rimmed glasses, also brandishing a gun immediately before the shooting, does not render the evidence in this case with respect to the personal discharge of a firearm closely balanced.

¶ 65 What is more, the petitioner's position that as a result of this evidence, the jury could have found the petitioner guilty beyond a reasonable doubt under accountability but not guilty of the sentencing enhancement, is mere speculation, where accountability was not a theory advanced at trial and the jury was never instructed on accountability. Accordingly, under the record before us, we find that the petitioner has failed in his burden of making a substantial showing of prejudice, so as to succeed under *Strickland*. *Lacy*, 407 Ill. App. 3d at 456

¶ 66 3. Appellate Counsel's Failure to Raise Issue of Trial Counsel's Ineffectiveness

¶ 67 For these same reasons, we further find that the petitioner has failed to make a substantial

showing that appellate counsel was ineffective for failing to raise the issue of trial counsel's ineffectiveness.

¶ 68 "Claims of ineffective assistance of appellate counsel are measured against the same standard as those dealing with ineffective assistance of trial counsel." *People v. Childress*, 191 Ill. 2d 168, 175 (2000). Accordingly under *Strickland*, the petitioner here was required to make a substantial showing that counsel's failure to raise the aforementioned issue on direct appeal was both: (1) objectively unreasonable and (2) that it prejudiced the petitioner. *Childress*, 191 Ill. 2d at 175 (citing *People v. West*, 187 Ill. 2d 418, 435 (1999)). It is axiomatic that "[a]ppellate counsel is not obligated to brief every conceivable issue on appeal, and it is not incompetence of counsel to refrain from raising issues which, in his or her judgment, are without merit, unless counsel's appraisal of the merits is patently wrong." *People v. Easley*, 192 Ill. 2d at 329. Accordingly, "[u]nless the underlying issue is meritorious, petitioner suffer[s] no prejudice from counsel's failure to raise [the issue] on direct appeal." *Childress*, 191 Ill. 2d at 175.

¶ 69 Since we have already found that the petitioner's claim of ineffective assistance of trial counsel is meritless, appellate counsel's failure to raise this issue on appeal could not have prejudiced the petitioner, and was also properly dismissed.

¶ 70 4. Failure to Provide an Alternate Not-Guilty Sentencing Enhancement Verdict Form

¶ 71 The petitioner next contends that his petition should have been permitted to proceed to an evidentiary hearing because he made a substantial showing that he was denied his constitutional right to a fair trial when the trial court refused to submit a not-guilty verdict form for the firearm sentencing enhancement. We disagree.

¶ 72 As already noted above, a trial court's decision regarding verdict forms is reviewed under an

abuse of discretion standard. *Battle*, 393 Ill. App. 3d at 313 (citing *Jones*, 175 Ill. 2d at 131-32). "The failure to tender a not guilty verdict form for each offense charged does not constitute a substantial defect that deprives a defendant of a fair trial." *People v. Land*, 178 Ill. App. 3d 251, 259 (1988). The fairness and integrity of the trial process are compromised only where the jury instructions effectively denied the jury the option of fully acquitting the petitioner of all charges, (*i.e.*, operated to "deny the jury the option of returning a general 'not guilty' verdict."). *People v. Durr*, 215 Ill. 2d 283, 302 (2005).

¶ 73 The record before us reveals that the jury was given five verdict forms: (1) not guilty of aggravated battery with a firearm (as to Meeks); (2) guilty of aggravated battery with a firearm (as to Meeks); (3) not guilty of first degree murder (as to Stephan); (4) guilty of first degree murder (as to Stephan); and (5) "unanimously further find that [the petitioner] personally discharged the firearm that cause the death of Stephan Russell." In instructing the jury before their deliberations, the trial court read the first four verdict form to the jury, ending with the recitation of the murder guilty verdict form. Immediately after that, the court further instructed the jury in the following manner:

> "Now, jurors, there is a supplement to this last verdict form. If you do find the petitioner guilty of first degree murder, you then will consider this additional verdict form. 'We the jury, unanimously further find that the defendant, Menard McAfee, personally discharged the firearm that caused the death of Stephan Russell,' place for the signature of the foreperson, the 11 other jurors."

¶ 74 Based on the aforementioned record, we find that the petitioner has failed to make a substantial showing that the trial court abused its discretion in providing only five verdict forms. The trial court explicitly instructed the jury to consider the fifth verdict form only if it found the

petitioner guilty of first degree murder. Once the jury found the petitioner guilty of first degree murder, it was at liberty to determine whether or not the petitioner had personally discharged the firearm that caused Stephan's death, and could have left the fifth verdict from unsigned if they found that he had not done so. See *People v. Stocks*, 95 Ill. App. 3d 62. 67-68 (1981) ("[T]he effect of a jury's return of an unsigned guilty verdict form is by law a verdict of not guilty on the charge contained therein.") Nothing in the verdict forms provided prevented the jury from being able to acquit the petitioner of all charges, since the court undeniably provided the jury with not guilty verdict form for both first degree murder and aggravated battery, and informed the jury that the fifth verdict form was only to be considered if the jury signed the guilty first degree murder verdict form. See *Durr*, 215 Ill. 2d at 302. Accordingly, we find that the trial court properly dismissed this issue.

¶ 75 5. Appellate Counsel's Failure to Raise Alternative Verdict Form Issue

¶ 76 Since we find meritless the petitioner's claim that he was prejudiced by the court's failure to provide him with an alternative not guilty sentencing enhancement verdict form, we necessarily also find that the petitioner has failed to make a substantial showing of appellate counsel's ineffectiveness for failure to raise this issue on appeal. See *Childress*, 191 Ill. 2d at 175 ("Unless the underlying issue is meritorious, petitioner suffer[s] no prejudice from counsel's failure to raise [the issue] on direct appeal.")

¶ 77 B. Trial Counsel's Failure to Investigate and Procure Correct Alibi Witness

¶ 78 The petitioner next argues that his petition should have been permitted to proceed to an evidentiary hearing where he made a substantial showing that trial counsel was ineffective for: (1) failing to interview and procure Brown, the mother of the petitioner's child, as an alibi witness even though he was aware of her existence, and (2) instead calling the petitioner's sister,

Marianne, as an alibi witness, when, in fact, she could not provide him with an alibi. We will address each in turn.

¶ 79 1. Failure to Interview and Procure Brown

¶ 80 In support of his argument that trial counsel failed to interview and procure Brown as a witness, the petitioner attached to his pleading an affidavit by Brown in which she attested that the petitioner was with her from 10 p.m. on February 17, 2001, until 6 a.m. on February 18, 2001. Brown also averred in her affidavit that defense counsel never interviewed her or called her to testify at trial even though she was willing and able to do so. In addition, Brown stated that any statement she gave to the Assistant State's Attorney (hereinafter ASA) and the grand jury prior to the petitioner's trial were "absolutely and completely false," and made as a result of "coercion and threat" by the ASA and the police. Specifically, Brown averred that she was told that if she did not sign those statements she "would be charged with a crime." Brown stated that on the date of the official *Krankel* hearing, she told the public defender appointed to represent the petitioner all of this but that he told her he would not call her to testify at that hearing.

¶ 81 The State initially responds that the petitioner's argument is barred by the doctrine of *res judicata*, since it was already considered and rejected by the trial court during the preliminary *Krankel* inquiry and subsequently by our appellate court. For the reasons that follow, we agree.

¶ 82 The purpose of a post-conviction proceeding is to permit inquiry into constitutional issues that have not been, and could not have been, previously adjudicated on direct review. P*eople v. Taylor*, 237 Ill.2d 356, 372 (2010). As already articulate above, in considering a post-conviction petition, issues in the petition that were raised and decided on direct appeal are barred from post-conviction review by *res judicata*, and issues that could have been presented on direct appeal, but were not, are waived. *Taylor*, 237 Ill. 2d at 372.

¶ 83 In the present case, the record reveals that in his *pro se* motion for a new trial, the petitioner alleged that his trial counsel was ineffective for failing to interview and call Brown to the stand. The trial court conducted a pre-*Krankel* inquiry during which trial counsel informed the court that he interviewed Brown and listed her as a potential witness in his supplemental answer to discovery. Trial counsel explained Brown's prior statements to the ASA and the grand jury as his reason for not calling her as an alibi witness. Brown's prior statements denying that she was with the petitioner at the time of the offense, were published to the court. Based on this inquiry, the trial court expressly found hat the petitioner had failed to make any showing of ineffective assistance of counsel for failing to call Brown to testify. The record further reveals that on direct appeal, the petitioner argued that the trial court erred in failing to make an adequate inquiry into trial counsel's ineffectiveness, on several grounds, including, *inter alia*, his failure to procure key defense witnesses. *McAfee*, 1-04-2037, p. 23 (June 9, 2006) (unpublished order pursuant to Illinois Supreme Court Rule 23). While we did not specify the details of what the trial court considered with respect to trial counsel's decision not to call Brown, we generally rejected the petitioner's arguments regarding counsel's ineffectiveness, finding that the trial court had conducted an adequate inquiry into the petitioner's claims regarding trial counsel's inadequate performance. *McAfee*, 1-04-2037, p. 23 (June 9, 2006) (unpublished order pursuant to Illinois Supreme Court Rule 23). In doing so, we explicitly held that all of the petitioner's ineffective assistance claims were either without merit or related to matters of trial strategy. *McAfee*, 1-04-2037, p. 23 (June 9, 2006) (unpublished order pursuant to Illinois Supreme Court Rule 23).

¶ 84 Accordingly, we now hold that any attempt by the petitioner to relitigate issues of his trial

counsel's effectiveness is now barred by *res judicata*. *Taylor*, 237 Ill. 2d at 372; see also *People v. Kimball*, 348 Ill. App. 3d 1031, 1034 (2004) (holding that a postconviction petitioner cannot avoid the procedural bar of *res judicata* by simply rephrasing issues that have already been raised or by "adding an additional allegation that is encompassed by a previously adjudicated issue.").

¶ 85 The petitioner nonetheless contends that *res judicata* does not bar his claim because his claim is based on new evidence, namely Brown's affidavit asserting that trial counsel neglected to investigate her as an alibi witness. We disagree.

¶ 86 The record before us rebuts the petitioner's assertion that Brown's affidavit provides new evidence. In her own affidavit, Brown affirmatively states that on the date of the *Krankel* hearing, on June 3, 2004, she spoke to newly appointed counsel and gave him an affidavit informing him that her prior statements to police and the grand jury were false and coerced, that trial counsel failed to interview her and that the petitioner was with her in the early hours of February 18, 2001, when the crime was committed. Based on Brown's own affidavit, all of the allegations Brown makes now were available to the petitioner prior to his direct appeal. Accordingly, to the extent that his present claim is not identical to the issues raised and decided on direct appeal, we find that the principles of forfeiture bar him from raising this claim in his post-conviction petition. See *Tate*, 2012 IL 11214, ¶ 8 (issues that could have been presented on direct appeal, but were not, are forfeited). Since all of the information was available to the petitioner at the time of his appeal, but he failed to argue the issue as such, he has forfeited the claim. See *Tate*, 2012 IL 11214, ¶ 8.

¶ 87 Moreover, even if we were to address the merits of the petitioner's claim, we would

nonetheless find that he has failed to make a substantial showing of ineffective assistance of counsel. As already noted above, under *Strickland*, the petitioner bears the burden of making a substantial showing that: (1) his counsel's conduct was deficient; and (2) that but for counsel's deficient performance, there is a reasonable probability that the result of the proceeding would have been different. See *Lacy*, 407 Ill. App. 3d at 456.

¶ 88 In the present case, the petitioner has failed to meet either prong. It is well-established that "decisions concerning whether to call certain witnesses on a defendant's behalf are matters of trial strategy, reserved to the discretion of trial counsel." *People v. Enis*, 194 Ill. 2d 361, 378 (2000). "Such decisions enjoy a strong presumption that they reflect sound trial strategy, rather than incompetence, and are, therefore, generally immune from claims of ineffective assistance of counsel." (citations omitted)). *Enis*, 194 Ill. 2d at 387. To overcome this presumption of soundness, counsel's trial strategies "must appear irrational and unreasonable in light of the circumstances that defense counsel faces at the time" such that "no reasonably effective criminal defense attorney, facing similar circumstances, would pursue such strategies." *People v. Faulkner*, 292 Ill. App. 3d 391, 394 (1997); see also *People v. Sims*, 322 Ill. App. 3d 397, 406 (2001) (same).

¶ 89 In the present case, a reasonable attorney in trial counsel's shoes would have expected Brown's testimony to be impeached both by her prior statements to the prosecutor and the police indicating that she was not with the petitioner at the time the crime was committed and by the fact that Brown and the petitioner had a relationship (*i.e.*, she was the mother of his child). With these palpable weaknesses in Brown's proposed alibi testimony, the petitioner has failed to make a substantial showing that trial counsel's failure to call Brown as a witness was anything but sound trial strategy. See *Enis*, 194 Ill. 2d at 387.

¶ 90 What is more, as already articulated in detail above, the evidence presented at the petitioner's case was not closely balanced, but rather overwhelmingly supported the State's position that the petitioner shot and killed Stephan. As such, the petitioner has failed to make a substantial showing that there is a reasonable probability that the introduction of Brown's manifestly impeachable alibi testimony could have changed the outcome of his trial. *Lacy*, 407 Ill. App. 3d at 456.

¶ 91 2. Trial Counsel's Decision to Call Marianne

¶ 92 The petitioner also asserts that he made a substantial showing that trial counsel was ineffective for calling Marianne as an alibi witness, when, in fact, she could not provide him with an alibi, since she was not with him at the time of the murder. In support of his argument, the petitioner cites to the Second Circuit's decision in *Henry v. Poole*, 409 F. 3d 48, 64-65 (2nd Cir. 2005), where the court held that trial counsel's actions plainly fell "below any acceptable level of professional competence" where counsel presented a "false alibi" defense, by eliciting the testimony from a witness that she was with the defendant on the night after the crime had actually occurred. In that case, the Second Circuit found relevant that trial counsel "adhered to the alibi defense and urged the jury to accept it throughout the trial---long after it must have been clear to the jury beyond peradventure that [the witness] provided [the defendant] with an alibi only for the night after the night of the crime." *Henry*, 409 F. 3d at 64.

¶ 93 At the outset we note that we are not bound by the decisions of federal courts other than the United States Supreme Court, but may only look to them for guidance. See *People v. Leavitt*, 2014 IL App (1st) 121323, ¶48 ("We are only obliged to follow the decisions of the Supreme Court of Illinois and of the United States Supreme Court, as both of these tribunals exercise appellate jurisdiction over the Appellate Court of Illinois" (citing *Occhino v. Illinois*

Liquor Control Comm'n, 28 Ill.App.3d 967, 971, 329 N.E.2d 353 (1975)); see also *Pielet v. Pielet*, 2012 IL 112064, ¶ 39; *Wilson v. County of Cook*, 2012 IL 112026, ¶ 30.

¶ 94 What is more, the decision in *Henry* is palpably distinguishable from the record before us. In the present case, contrary to the petitioner's assertion, the record reveals that during trial, counsel neither posited nor argued an alibi defense. Rather, from the beginning to the end of the petitioner's trial, counsel's theory was misidentification. The defense relied on the inconsistencies in the descriptions of the offender and the petitioner's actual appearance to argue that the police had arrested the wrong individual. In that respect, defense counsel relied on the testimony of Cole, who stated that she saw another person with a silver gun running past her immediately after the shooting, and McFarland's inability to identify the petitioner from a lineup. Marianne's testimony was elicited only as circumstantial evidence supporting a reasonable inference of misidentification. In that respect, defense counsel argued that since Marianne observed the petitioner leave with Brown sometime earlier on the night of the offense, no witnesses observed Brown at the scene, the petitioner, who was with Brown, must also not have been at the lounge and was therefore mistakenly identified. Under this record, we find the petitioner has failed to make a substantial showing that counsel's decision to call Marianne to the stand was somehow deficient.

¶ 95 Furthermore, even if we were to conclude that trial counsel's decision was deficient, as already articulated in more detail above, we have determined that the evidence in this case "was not closely balanced" so that there was no reasonable probability that had Marianne not been called as a witness, the petitioner would not have been found guilty. See *Lacy*, 407 Ill. App. 3d at 456.

¶ 96 Since we find not merit in the petitioner's claim of ineffective assistance of trial counsel for

calling Marianne to the stand, his assertion that appellate counsel was ineffective for failing to raise this issue on direct appeal must also fail. See *Childress*, 191 Ill. 2d at 175 ("Unless the underlying issue is meritorious, petitioner suffer[s] no prejudice from counsel's failure to raise [the issue] on direct appeal.")

¶ 97 C. Postconviction Counsel's Representation

¶ 98 On appeal, the petitioner next asserts that he was denied his statutory right to reasonable assistance of postconviction counsel. It is well-settled that "there is no constitutional right to assistance of counsel during postconviction proceedings." *People v. Cotto*, 2016 IL 119006, ¶ 29. The right to assistance of counsel in such proceedings is "a matter of legislative grace." *Cotto*, 2016 IL 119006, ¶ 29. Under the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq*. (West 2012)), petitioners are entitled to a "reasonable" level of assistance of counsel. *People v. Perkins*, 229 Ill.2d 34, 42 (2007).

¶ 99 To ensure this level of assistance, Illinois Supreme Court Rule 651(c) imposes three duties on postconviction counsel. *Perkins*, 229 Ill. 2d at 42. Pursuant to that rule, either the record or a certificate filed by the attorney must show that counsel: (1) consulted with the petitioner to ascertain his contentions of constitutional deprivations; (2) examined the record of the trial proceedings; and (3) made any amendments to the filed *pro se* petitions necessary to adequately present the petitioner's contentions. Ill. S. Ct. R. 651(c) (eff.Dec.1, 1984); see also *Perkins*, 229 Ill .2d at 42. The purpose of Rule 651(c) is to ensure that postconviction counsel shapes the petitioner's claims into a proper legal form and presents them to the court. *Perkins*, 229 Ill. 2d at 44. Substantial compliance with the rule is sufficient. *People v. Profit*, 2012 IL App (1st) 101307, ¶ 18. In addition, the filing of a Rule 651(c) certificate gives rise to a rebuttable presumption that post-conviction counsel provided reasonable assistance. *Profit*, 2012 IL App

(1st) 101307, ¶ 19. Our review of an attorney's compliance with Rule 651(c) is *de novo*. *Profit*, 2012 IL App (1st) 101307, ¶ 17.

¶ 100 In the present case, the petitioner acknowledges that postconviction counsel filed a Rule 651(c) certificate. He nonetheless contends that he was denied his statutory right to reasonable assistance when postconviction counsel failed to amend his *pro se* petition to include a supplemental claim of ineffective assistance of appellate counsel based upon trial counsel's failure, at the motion in *limine* hearing, to "adivse[] the court that [the] gun recovered from [the petitioner's] arrest *** could not have fired the .38 caliber bullet found in Stephan's body." The petitioner argues that had trial counsel informed the court at that hearing that the recovered gun was a Glock nine-millimeter, the result of the hearing would have been different, the gun would have been suppressed from the evidence, and the petitioner may not have been convicted. For the reasons that follow, we disagree.

¶ 101 First, the petitioner ignores the fact that the medical examiner who recovered the bullet from the Stephan's body testified at trial that in addition to a .32 and .38 caliber weapon, the bullet could have come from a nine-millimeter weapon. As such, the record rebuts the petitioners assertion that the outcome of the motion in *limine* hearing would have been different had trial counsel informed the court at that time that the weapon discussed was a Glock nine-millimeter, since the gun could not have been excluded as the murder weapon. Our courts have long held that in order for a weapon to be admitted into evidence it need not be established that the weapon was actually used in the crime; rather it is sufficient to establish a sufficient nexus between the weapon and the defendant (*i.e.* that the weapon was "suitable" for the crime charged). See *People v. Kraybill*, 2014 IL App (1st) 120232, ¶ 52 (For purposes of admissibility a "sufficient connection exists where the weapon is suitable for the crime charged, but it need not be shown

that it was actually used to commit the crime."); see also *People v. Babiarz*, 271 Ill. App. 3d 159 (1995) ("The weapon need only be 'suitable' for the crime; it need not be proven to have been the actual weapon used."); see also *People v. Maldonado*, 240 Ill. App. 3d 470, 479 (1992); ("A sufficient nexus exists where the weapon is suitable for the crime charged although it need not have actually been used in committing the crime).

¶ 102 Here, numerous eyewitnesses to the shooting testified that the gun recovered from the petitioner looked like the weapon that was used to shoot Stephan. Furthermore, the gun was recovered from the petitioner, as he attempted to flee and dispose the weapon after he was observed by the police in a white van that resembled the van witnesses described the shooter used to escape the scene of the crime. The gun was also recovered only a few days after the shooting and about 1 ½ miles from the scene of the crime. Since neither the pathologist nor the firearm examiner could definitively exclude the bullet recovered from the victim's body as being fired from the weapon retrieved from the petitioner, we find noting deficient in trial counsel's failure to inform the court that the weapon was a Glock nine-millimeter. See *Lacy*, 407 Ill. App. 3d at 456.

¶ 103 As to appellate counsel's failure to raise trial counsel's ineffectiveness on appeal, we reiterate that appellate counsel has no duty to raise a meritless issue on appeal. *Easley*, 192 Ill.2d at 329 ("Appellate counsel is not obligated to brief every conceivable issue on appeal, and it is not incompetence of counsel to refrain from raising issues which, in his or her judgment, are without merit, unless counsel's appraisal of the merits is patently wrong"); *Childress*, 191 Ill. 2d at 175 ("[u]nless the underlying issue is meritorious, petitioner suffer[s] no prejudice from [appellate] counsel's failure to raise [the issue] on direct appeal").

¶ 104 What is more, the petitioner here fails to acknowledge that the issue of whether the gun

should have been introduced at trial was actually raised by appellate counsel. While it is true that on direct appeal, we discussed the issue not in context of trial counsel's ineffectiveness but rather in deciding whether the State committed prosecutorial misconduct when it "introduced evidence of the gun" at trial, in our decision, we specifically found that the evidence was properly admitted. See *McAfee*, 1-04-2037, p. 14-15 (June 9, 2006) (unpublished order pursuant to Illinois Supreme Court Rule 23). Accordingly, any attempt by the petitioner to relitigate this issue by couching it in terms of trial counsel's ineffectiveness is barred by *res judicata*. See *Taylor*, 237 Ill. 2d at 372; see also *People v. Kimball*, 348 Ill. App. 3d 1031, 1034 (2004) (holding that a postconviction petitioner cannot avoid the procedural bar of *res judicata* by simply rephrasing issues that have already been raised or by "adding an additional allegation that is encompassed by a previously adjudicated issue.").

¶ 105 Accordingly, since we find no merit in petitioner's assertion that appellate counsel was ineffective, we also necessarily find that the petitioner has failed in his burden to overcome the presumption that postconviction counsel acted within the duties articulated in Supreme Court Rule 651(c). See *Perkins*, 229 Ill. 2d at 44.

¶ 106 III. CONCLUSION

¶ 107 For all of the aforementioned reasons we affirm the judgment of the circuit court.

¶ 108 Affirmed.