2017 IL App (2d) 140354-U
No. 2-14-0354
Order filed March 16, 2017

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. JASON J. DRIVER, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Stephenson County. No. 04-CF-289 Honorable James M. Hauser, Judge, Presiding.

JUSTICE JORGENSEN delivered the judgment of the court.
Justices Hutchinson and Zenoff concurred in the judgment.

ORDER

¶ 1 *Held*: (1) The trial court properly dismissed defendant's section 2-1401 petition, in which he asserted that his sentence was void for having been made subject to the truth-in-sentencing statute: under Castleberry, the alleged statutory violation did not make the sentence void; (2) the trial court erred in dismissing defendant's postconviction petition: defendant made a substantial showing that the State used perjury, as he was not required to provide an affidavit from the alleged perjurer; he also made a substantial showing that trial counsel was ineffective in countering the State's identification evidence, particularly DNA, and that appellate counsel was ineffective for failing to argue trial counsel's ineffectiveness; thus, we remanded the cause for further proceedings on the petition.

¶ 2 Defendant, Jason J. Driver, appeals from the trial court's dismissal of his petition under section 2-1401 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1401 (West 2008)) and

from the court's second-stage dismissal of his petition under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq*. (West 2008)). In his section 2-1401 petition, defendant asserted that his sentence for armed robbery (720 ILCS 5/18-2(a)(1) (West 2004)) was void to the extent that the court ordered that he serve it under the truth-in-sentencing provision. 730 ILCS 5/3-6-3(a)(2)(iii) (West 2004). In his postconviction petition, he asserted (1) that the State had knowingly used perjured testimony from an identification witness and (2) that trial and appellate counsel had been ineffective in handling certain issues related to identification evidence. We first hold that defendant's sentence was not void, so that the court did not err in denying him relief under section 2-1401. We then hold that defendant made the necessary showing as to his claims that the State knowingly used perjured testimony and that appellate counsel was ineffective for not raising trial counsel's handling of identification evidence. We therefore affirm the dismissal of the section 2-1401 petition, reverse the dismissal of the postconviction petition, and remand the matter for further proceedings under the Act.

¶ 3 I. BACKGROUND

¶ 4 Defendant was charged with armed robbery and attempted murder (720 ILCS 5/8-4(a), 9-1(a)(1) (West 2004)). Defendant had a jury trial alongside his codefendant, Edmond Ellis, who faced the same charges.

¶ 5 The evidence established that all the relevant acts took place within a few blocks of the site of the robbery: the Oky-Doky convenience store (sometimes also called the "Short Stop") at 906 South Galena Avenue in Freeport. The store was at the southeast corner of Galena and Chicago Avenue. September 17, 2004, the day of the robbery, was mild--70 degrees at 7 p.m. by one report.

¶ 6 Defendant has suggested that the testimony of a State occurrence witness—his aunt, Gloria Driver (Driver)—was procured by bribery. Driver testified that she lived on Prospect Terrace (which intersects Galena near the Oky-Doky.) On the afternoon of September 17, 2004, she and her son and James Horton took a walk to a nearby gas station to get change. Her route took her along Galena, on the side of the street opposite the Oky-Doky. As she passed, she noticed four "guys" in the parking lot, near a gray car. Defendant was also in the lot; Driver saw that he was wearing a "black sweater" with the hood up. She yelled at him to come over, and he looked over but did not answer. On cross-examination, she agreed that defendant "scrunched his face up" when she called to him. She also agreed that she had seen defendant walk into the Oky-Doky, although she said that her focus had been on the gray car and a man in braids who got into it. After seeing defendant, she continued on to the gas station.

¶ 7 Driver was in the cashier's area of the gas station when Horton came in, telling everyone that a man had been shot. She went outside to look and saw people running toward the Oky-Doky. She followed, walking. When she reached the Oky-Doky, she saw Bud (Bader-Aldin Alkabalny[1]), a friend of hers, lying on a stretcher.

¶ 8 She continued on to the house of defendant's mother, which was nearby. From there, she and defendant's mother walked about a block and a half to the south, where they joined a crowd that had gathered near a building on Carroll. She remained there for about an hour and a half; she was there to see the police removing defendant and Ellis (whom she also knew) from the building.

[1] The victim's name was spelled several ways in the record, including "Alkablany." We have used what appears to be the most prevalent spelling in the record and the more common spelling of the family name.

¶ 9 On further direct examination, Driver testified that she had gone perhaps three times to the office of an assistant State's Attorney to talk to him about this case. He had shown her a police report and told her to tell the truth.

¶ 10 On cross-examination, she agreed that, on the afternoon of September 20, 2004, she had met with a Detective Stovall and another police officer at her house on Prospect. The questioning then produced the following exchange:

"Q. [Counsel for Ellis] Did anyone offer you anything to testify today?

A. [Driver] No.

* * *

Q. Are you—are you certain of that?

A. He said a remark on Prospect about payment arrangement, but—

Q. Slow down and go back again. What—what happened?

A. On Prospect I just said—it was a statement made.

Q. Okay. Let's clarify that statement, if we can, Gloria. What is that statement?

A. But it had nothing to do with today.

Q. Well, who offered you something? What did they offer you? What for?

A. I wasn't offered anything.

Q. Okay. What—what are you talking about then?

A. Well, he said I heard that you was at the scene.

Q. Okay. When you say he said I heard you were at the scene—

A. Stovall. Mr. Stovall.

Q. Detective Stovall said that? He said when he heard when you were at the scene what?

A. And then I was just kidding. I said it ain't like I'm getting paid. I was playing. He said that could be arranged.

Q. He said—

A. Some—something like that.

Q. Detective Stovall said about you getting paid that that could be arranged.

A. Yeah. But I was just—I didn't mean it when I said that."

On redirect, the following exchange occurred:

"Q. [The State] You—want to cover one thing. You did talk to me in my office three times. That's right, right?

A. Yes.

Q. And you actually did get something, because today when you were up there it was over lunch, and we did give you coffee and something to eat, didn't we?

A. Yes.

Q. But we didn't really exchange that. We didn't say we'll give you this if you'll testify, did we?

A. It was referring to Prospect Street.

Q. All right.

A. On Prospect.

Q. And you never got any money for any of that.

A. No.

Q. And you've never mentioned that to me whenever I've talked to you, have you?

A. No.

Q. It's really hard to testify against your nephew, isn't it?

A. Yeah."

¶ 11 Alkabalny and Hyder Al-Azzawi, an acquaintance of Alkabalny's and a customer at the time of the robbery, testified for the State. They agreed in their testimony that Alkabalny, Al-Azzawi, and a second customer were in the store when two black men came in, both of them with hoods up. Their testimony also agreed that one of the men took out a gun, shot at the ceiling, and took money from a cash register. That man then shot Alkabalny at close range before leaving the store.

¶ 12 Al-Azzawi described the robbers as wearing black or dark blue jackets with the hoods up; both had covered their faces as well. He could not remember what the shooter had on his face, but he was sure that the other man had something pink over his face. He thought that the shooter addressed Alkabalny as "Bud." After the robbers left, Al-Azzawi called 911 before helping Alkabalny to get outside.

¶ 13 Alkabalny said that the shooter was wearing a "kinda blue hoodie," while the other robber was wearing a black hoodie. Both had what he thought might have been pink bandanas over their faces. Alkabalny recognized both as customers and made in-court identifications of Ellis as the gunman and defendant as the other robber. He remembered Ellis coming to the store two days before the robbery and was able to recall the transaction in detail. He thought that defendant was a regular customer, but he could not say anything more specific. The night of the robbery, the police came to him while he was in the hospital and showed him a photo lineup. He identified Ellis as the shooter and defendant as the second robber.

¶ 14 Other witnesses described the police and an ambulance arriving at the Oky-Doky within a minute or two of the shooting, at about 6 p.m. A paramedic testified that he was dispatched to

the Oky-Doky at 5:59 p.m. He arrived only a minute later, but still after police officers had arrived. One of the first officers on the scene got a basic description of the suspects. At the time, Alkabalny described both robbers as wearing black hoodies. The police made a sweep through the store and found no one unexpected.

¶ 15 A bicycle officer rode from the scene in the direction suggested by the witnesses. He quickly encountered a woman who said that two people wearing hoodies with the hoods up had run by on the sidewalk, moving fast. She thought that about 10 minutes had passed since she had seen them. Her observations led the officer to turn at the next corner.

¶ 16 The officer encountered more witnesses who had seen two hooded men running by; three people had seen the men run down the street, cross at the end of the block, and run into the yard at 1121 S. Carroll. None of them could see what happened once the two entered the yard. They each thought that the officer had arrived 5 to 10 minutes behind the running men.

¶ 17 Within 5 to 10 minutes of the report of the robbery, the police had surrounded the building at 1121 S. Carroll. This building was an up-down duplex; the upstairs was 1121½ S. Carroll. The front entrance to the upper floor was through a door that led to an interior stairway. The back door of 1121½ S. Carroll opened onto a second-floor deck that had stairs leading to the ground. The two levels had no interior interconnection. An upper-floor bedroom had a door that opened onto the stairs to the attic.

¶ 18 Shortly after the police arrived, a young black girl came out of the back door of 1121½ S. Carroll. She was obviously upset, and the police had to coax her the rest of the way down the stairs. This was a daughter of Towana Williams (then Dickens). Somewhat later, perhaps 10 to 20 minutes after the girl came out, Williams and her 13- or 14-year-old son briefly stepped outside through the back door. About 30 minutes in, Williams and her son left the building by

the front door. The police allowed the two to leave unsearched. At roughly the same time those two were leaving by the front door, defendant and Ellis came out of the back door and were immediately arrested.

¶ 19 The police quickly conducted a sweep through 1121½ S. Carroll, finding no one inside. They then obtained a warrant and searched the house thoroughly. The kitchen showed signs of meal preparation. A canister containing oatmeal yielded a .25-caliber semiautomatic handgun and a box of .25-caliber Winchester ammunition. The tray holding the ammunition bore Ellis's fingerprints. Five .25-caliber Winchester cartridge casings were sitting in a teacup.

¶ 20 The search of the attic first yielded a black hoodie. When the police lifted some loose floorboards and insulation, they discovered two pieces of pink sheeting with raw edges and a bluish hoodie with a light-colored interior.

¶ 21 They found a pink flat sheet from which pieces were missing in a bedroom along with what appeared to be the rest of the sheet set. A state police trace-materials analyst testified that the two pink cloths from the attic had been cut and ripped from the flat sheet, but that another section of the sheet was missing.

¶ 22 The police did not find any cash in the apartment.

¶ 23 The pieces of pink sheeting (State's exhibits 12 and 13), the black hoodie (State's exhibit 14), and the blue hoodie (State's exhibit 18) were subjected to DNA testing. Cynthia Torrisi of the Illinois State Police Crime Lab in Rockford testified about the processing of these exhibits. She examined both pieces of sheeting under lighting that would make stains from body fluids more apparent—this revealed multiple areas of staining. However, a test specifically for the presence of saliva was inconclusive. Torrisi cut spots that were candidates for DNA testing from the sheeting and packaged those samples for further testing. Gunshot residue testing was

planned for the hoodies, so Torrisi simply clipped out the hoodies' tags for DNA testing. Torrisi gave the samples she prepared the same exhibit number as the source, but added a letter for additional identification. For instance, a stained area cut from State's exhibit 12 became State's exhibit 12-A.

¶ 24 Laurie Lee, a forensic scientist in the biology and DNA section of the Rockford forensic science laboratory, testified about the DNA testing procedure and the results. Overall, the results were inconclusive, except that the blue sweatshirt yielded DNA that was a strong match with Ellis's.

¶ 25 Lee gave the results by State's exhibit number, and the State did not link each exhibit number to a description of the piece of evidence during her testimony. For instance, when asked for the results for "12-A," she stated, "A female human DNA profile was identified that did not match the DNA profile of Edmond Ellis or Jason Driver." We will organize and restate the evidence to make its objective strengths and weaknesses more apparent. However, we note that the degree of intelligibility of the testimony is pertinent to defendant's underlying claim that trial counsel was ineffective in handling this evidence. Thus, to some extent, we have deliberately imposed clarity where it does not exist in the raw testimony.

¶ 26 The results of interest here are those for the second piece of sheeting, "13-A"; the black hoodie, "14-B"; and the blue hoodie, "18-B." Lee testified to the following results for the second piece of sheeting:

> "A. [Lee] A mixture of human DNA profiles was identified that was interpreted as mixture of at least three people, Jason Driver, Edmond Ellis, and at least one other individual cannot be excluded from having contributed to this mixed DNA profile.
>
> Q. [The State] *** [A]re there any statistics related to that?

* * *

A. *** [T]his profile would be expected to occur in approximately one in three blacks ***.

*** [O]ne in four whites, or one in six Hispanic unrelated individuals at the D-5, D-13, and D-21 loci."

¶ 27 The results from the black hoodie were similar: "A mixture of DNA profiles was identified that was interpreted as a mixture of at least three people. Jason Driver and at least two other individuals cannot be excluded *** from having contributed to this mixed profile." The State did not ask for the "statistics related to that" until after Lee discussed the results for the other hoodie. Lee responded: "Approximately one in four black, one in six white, or one in five Hispanic unrelated individuals cannot be excluded as having contributed to this mixed human DNA profile at the THO-1 and TPOX loci."

¶ 28 The results for the blue hoodie were more conclusive: "[A m]ixture of DNA human profiles was identified that was interpreted as a mixture of two people. One human DNA matched the DNA profile of Edmond Ellis and did not match the DNA profile of Jason Driver." Asked about the "statistics related to" the match with Ellis's DNA, Lee stated:

"This profile would be expected to occur in one in 97 million black, one in 260 million white, or one in 53 million Hispanic unrelated individuals at the D-3, BWA, FGA, D-8, D-21, D-5, and D-13 loci."

The State asked Lee to explain what it meant that a profile was "expected to occur in approximately one in 97 million blacks." She responded, "It means that it's a random match probability that it's the chance that a random person would have the same DNA profile as the evidence."

¶ 29 Defense counsel for Ellis cross-examined Lee at some length. Part of that cross-examination was clarifying: he had Lee establish that the results did not indicate the race or ethnicity of the donors. Further, although Ellis's attorney struggled with the statistical concepts, he had Lee explain concretely what it meant to not exclude one in four blacks:

"Q. [Counsel for Ellis] *** Now the statistics one in four means that there—it would be a very common occurrence, correct?

A. [Lee] Correct.

Q. And if I were to count the number of African-Americans in this courtroom, fifteen, at least three would have similar characteristics.

A. At least three probably couldn't be excluded.

Q. Couldn't be excluded.

All right. And because the random match probability that you use isn't specific to a grouping based on a number, right?

A. I don't understand the question.

Q. Well, we'll get to that later, but it—you admit at least three of the African-Americans, the blacks, in this courtroom couldn't be excluded.

A. Statistically that's likely."

¶ 30 Defense counsel for defendant cross-examined Lee immediately thereafter. The following passage illustrates the struggle both defense counsel and Lee had as they attempted to explicate this evidence:

"Q. [Defense counsel] ***

So when you're saying [defendant] can't be excluded—or is there a way of saying that he's the only person to be included and excluding everybody else? Using DNA.

A. [Lee] Can you repeat that?

Q. All right. Your analysis of 14-B says it's a mixture of at least three people. One of those people and Jason Driver cannot be excluded.

A. Correct.

Q. Do you have a—does DNA allow for, to a reasonable degree of scientific certainty, to only include Jason Driver or anybody and excluding everybody else in the world?

A. I would have to look at their profile to see whether they can be excluded or not.

Q. Okay. And from the sample that you did with 14-B, would you be able to get a large enough sample?

A. I don't understand the question.

Q. Okay. You did your sample of 14-B. Is that correct?

A. Correct.

Q. Okay. Does 14-B include—is there enough DNA or whatever it is you need to sample to get a profile for Jason Driver? For anybody else.

A. I already have the profile, so I can compare them to anybody else's DNA profile that I have.

Q. Okay. So—but you said you need a profile in order to only include one person and exclude everybody else.

A. I can't exclude—what I'm saying is I can't exclude anybody that I don't have their DNA profile to compare to.

Q. Okay. Now I understand."

¶ 31 Michael Kopina, an Illinois State Police Crime Lab supervisor, testified to performing gunshot residue tests on samples taken from the cuffs of the hoodies. The results from the blue hoodie (which likely showed traces of Ellis's DNA) suggested that it had been near a gun that was fired. Those from the other hoodie, the black one, were less conclusive. The samples from the black hoodie contained particles "consistent" with gunshot residue. (Some particles are classified as "unique," meaning they have a composition not seen except in gunshot residue. Other particles are merely "consistent.") When Kopina tested the samples from the blue hoodie, he found no particles in the sample from the right cuff. However, the sample from the left cuff had unique and consistent particles of primer gunshot residue. Officers searching the Oky-Doky found two .25-caliber Winchester cartridge casings. Ballistics testing showed that markings on these casings were consistent with their use in the gun from 1121½ S. Carroll.

¶ 32 Barry Barnes, the surgeon who treated Alkabalny in the emergency room, testified for the State. In the course of treating Alkabalny, he found that a bullet had passed through Alkabalny's right lung, causing major bleeding into the chest cavity, before lodging near the spine. Counsel for Ellis started to question Barnes about a drug screen conducted on Alkabalny, but the State objected. Questioning of Barnes conducted with the jury not present elicited the following testimony:

> "Q. [Defense counsel] What substances were those [that were not prescribed, but were detected in the screen]?
>
> A. THC, marijuana, and amphetamine.
>
> Q. ***
>
> And the combination of those two substances, *** would they have altered Bud's sense of conscienceness [*sic*]?

A. Oh, I'd say they could have.

Q. *** But you don't know if definitely they did or did not?

A. I didn't perceive it.

***

A. He answered every question I asked him appropriately.

Q. ***

What about *** the THC, marijuana, and amphetamines working in combination with the morphine? Would that have altered Bud's sense of consciousness?

A. Certainly could have.

Q. Okay. Do you know if it did or not?

A. To my knowledge, no, it didn't.

***

A. He answered everything appropriately."

Defense counsel and counsel for Ellis jointly asked the court to allow the jury to hear this evidence, but the court rejected this request.

¶ 33 Williams testified as a defense alibi witness. On the day of the robbery, she was living with her five children (aged 14, 12, 11, 10, and 3) at 1121½ S. Carroll. That afternoon, she, Ellis, whom she was "seeing," and her three-year-old child had gone to the courthouse to appear in a minor matter. She left for home at about 2 p.m., but did not proceed in the fastest way she could. Ellis traveled separately.

¶ 34 When Williams got home, defendant and Ellis were sitting in the front bedroom drinking and listening to music. She put her child in another bedroom and went to the back of the apartment where she started doing chores: cleaning, cooking, and getting chicken ready for Ellis

to cook. After her return, neither defendant nor Ellis left the apartment, although they did move around in it. Williams also testified that the children used the attic as a clubhouse, but that she had never seen defendant or Ellis there.

¶ 35 At about 5 p.m., Williams's pastor and his wife stopped by to pick up one of her sons. That son was not yet home from school, so the couple waited. One of Williams's sons and an older daughter came home while two more of her children were outside. Williams was tracking who was in the duplex by listening to sounds of the door to the upper level and stairs. At some point, one of the children told her that the police were outside; a little later, a child said that the police had the house surrounded. She stepped outside, and the police shouted something. The shouting scared her, so she went back inside. Defendant and Ellis then used the back door to exit the building. They went out with their hands up. Williams then left the building through the front door, also with her hands up.

¶ 36 On cross-examination, Williams said that neither Ellis nor defendant had a key to the apartment, but that Ellis stayed about three nights a week. She agreed that the bedroom—the room in which defendant and Ellis had spent the most time that day—was the room that was farthest from the kitchen. Although she believed that she could tell when someone came or left the apartment, she did not know when her daughter—the one whom others described as having been coaxed down the stairs—had exited the building. She did not know whether defendant and Ellis had dark sweatshirts.

¶ 37 The defendants also called several police officers before they rested. Closing arguments centered on the certainty of the identification. However, the defendants did not seek to have the jury given the pattern jury instruction relating to the circumstances of identification (Illinois Pattern Jury Instructions, Criminal, No. 3.15 (4th ed. 2000)).

¶ 38 In closing, the State focused on the identification evidence, taking special note of the testimony of Alkabalny, and, to an even greater degree, Driver:

> "Gloria Driver testified the first or second day of this trial. ***. *** I think the evidence would show this is the last place in the world that she wanted to be. ***
>
> *I think she's probably *** one of the biggest witnesses in this case, 'cause she directly contradicts* [*sic*] *someone who she's known since he was *** a baby or whatever.* *** She said she saw him, she's known him his life [*sic*], and he—she yelled at him. *** [That's] by a witness that you would not necessarily expect *** to be favorable to the State because it's her relative." (Emphasis added.)

The State also commented on Driver's credibility and some evident difficulty she had in answering questions:

> "I'll stand by her testimony. I mean it's easy to say, [w]ell, don't believe her 'cause she's a little slow. Well, she knows [defendant]. She knows who he was."

The State reminded the jury of the evidence strongly linking Ellis to the blue sweatshirt. It portrayed the mixed DNA profile derived from the black sweatshirt as favorable to its case:

> "[As to] the other sweatshirt, the black one, there was [a] three or more person stain on the tag. Remember the tags weren't handled by anybody or touched by anybody, according to the evidence. *** A three-person stain on the tag from this sweatshirt from which Jason Driver cannot be excluded, and the statistics on that were one in three blacks would expect to have the profile.
>
> *** [Counsel for Ellis indicated that s]ix people[[2]] could have that profile. But the only difference between those five or six people is none of them were in the house

[2] This is apparently a reference to the questions that Ellis's counsel put to Lee to explicate

> where the sweatshirt was found, and *** none of them were identified by [Alkabalny] as being a person in that store. This is way too coincidental ***, but that may put a little different light on the statistics."

Neither defense counsel objected to this.

¶ 39 Counsel for defendant delivered the first of the defense closing arguments. He suggested that the quality of Driver's perception and recollection was poor, and that the person she had called out to as defendant had reacted by making an odd face because he was not defendant. Counsel took a similar approach with many of the other occurrence witnesses, with much of his argument going through the witnesses one by one, suggesting flaws in their testimony. He suggested that the DNA evidence relevant to defendant might be explained by the persistence of DNA despite washing:

> "I asked [Torrisi], Can DNA stay on a piece of clothing *** through the cycle in a *** washing machine? She said yes.
>
> *** How many times does [a piece of clothing] get washed? Wear it once. Maybe you get a hundred things of DNA on there. Wash it, wash it in the washing machine, maybe ninety-nine of them come off. Wear it again. Now you got a hundred one things of DNA on there. Wash it, ninety-nine of them *** come off. Get the point? It just keeps accumulating.
>
> Just because you got a sweatshirt that has DNA on it, doesn't mean you committed some sort of offense."

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the statistics associated with the DNA mixture, asking for the likelihood that people in the courtroom would not be excluded from having contributed to the mixture.

¶ 40 Counsel for Ellis pointed out the unlikeliness of Alkabalny's being able to identify two men he knew only slightly when both of them had masks on and hoods up, and the fact that the police did not recover any of the cash taken in the robbery. His argument about the DNA evidence was limited to suggesting that the technician should have tried to test more loci. The State successfully objected to this line of argument.

¶ 41 In rebuttal, the State implied that the court had given its imprimatur to the opinions of the expert witnesses when it allowed them to give those opinions:

> "We had experts that came up, *** they told you their qualifications. *** [T]hey're trained to give opinions.
>
> Were their opinions excluded by the Court? No. Were *** their opinions given to you? Yes."

¶ 42 The jury found Ellis guilty of both armed robbery and attempted murder. However, it found defendant guilty of armed robbery but not of attempted murder. Defendant filed a generic motion for a new trial, which the court denied.

¶ 43 At sentencing, the State argued that the court should find that the robbery resulted in great bodily harm to Alkabalny, thus requiring defendant to serve his sentence pursuant to the truth-in-sentencing provision. See 730 ILCS 5/3-6-3(a)(2)(iii) (West 2004) (a person convicted of armed robbery where the conduct leading to the conviction resulted in great bodily harm must serve his or her sentence at 85%). At the time of the sentencing, the State was unable to find authority discussing whether that provision applied to a defendant accountable for the harm but who did not cause the harm directly. It argued that accountability should be sufficient for truth-in-sentencing to apply.

¶ 44 Defendant argued that the court could not find him accountable for shooting Alkabalny when the jury had rejected his responsibility by rendering a not-guilty verdict on the attempted-murder count.

¶ 45 On April 29, 2005, the court sentenced defendant to 20 years' imprisonment. The following colloquy then occurred:

"THE COURT: I don't know if it's day-for-day. I can make a finding of fact that Mr. Ellis shot and almost killed the victim of their armed robbery ***.

If the law of the State of Illinois is he gets day-for-day, then he gets day-for-day. If the law of the State of Illinois is he does it at eighty-five percent, he does it at eighty-five percent.

* * *

[Defense counsel]: How would we find out if it's day-for-day or if it's eighty-five percent, Judge?

[The State]: ***

[W]hat we would suggest, not to anybody's surprise, would be put eighty-five percent on and they appeal it and then—

THE COURT: ***

I'll rule that it's eighty-five percent. You can take it up on appeal. *** And if it's day-for-day, he gets the benefit.

But there's no question there was serious bodily injury in the case, so under the theory of accountability he's responsible ***."

¶ 46 Defendant filed a direct appeal in which he asserted only that he had received ineffective assistance of counsel on a motion to quash his arrest and suppress evidence on the basis that no

probable cause had existed for his arrest or the search warrant. We affirmed the conviction. *People v. Driver*, Nos. 2-05-0452 & 2-05-0453 cons. (2007) (unpublished order under Supreme Court Rule 23).

¶ 47 On March 24, 2008, defendant filed a postconviction petition alleging, among other things, that Driver "may or may not" have been paid by the police for her testimony. Attached to his petition was his own affidavit in which he averred that Driver had told him in a phone call that Stovall had given her $100 for her testimony. Defendant also asserted that Driver had admitted to lying about seeing him on the afternoon of the robbery; he said that she had admitted that she had seen him only in the morning, but that the State's Attorney had told her to lie. He averred that he had attempted to find Driver to get her affidavit, but had been unable to find her. He argued not that the State had been wrong to use Driver's perjured testimony, but that trial counsel had been ineffective for failing to move to strike Driver's testimony and that appellate counsel had been ineffective for failing to so argue.

¶ 48 On June 23, 2008, the court ruled that *res judicata* barred all of defendant's claims except that for ineffective assistance of appellate counsel. It further ruled that appellate counsel's judgment was not "patently erroneous." It therefore dismissed his petition. Defendant appealed.

¶ 49 We vacated the dismissal, holding that defendant had adequately stated a claim that the State had knowingly used perjured testimony. We held that the evidence was not so strong that different testimony or none from Driver could not have changed the result. *People v. Driver*, No. 2-08-0798 (2010) (unpublished order under Supreme Court Rule 23).

¶ 50 On January 23, 2009, defendant filed a petition for postjudgment relief pursuant to section 2-1401 of the Code. He asserted that, because the jury, by finding him not guilty of attempted murder, had found that he was not accountable for the harm suffered by Alkabalny,

the truth-in-sentencing statute was inapplicable, and his sentence was therefore void. The State moved to dismiss the petition as untimely, the court granted the motion, and defendant appealed. We vacated, holding that a petition challenging a judgment as void is not subject to dismissal on the grounds of untimeliness. *People v. Driver*, No. 2-09-0769 (2010) (unpublished order under Supreme Court Rule 23). In other words, we vacated on the basis that a voidness claim as such is not subject to any limitations period.

¶ 51 On remand of the postconviction petition, the court appointed counsel for defendant, but defendant proceeded *pro se* when he and counsel could not agree on whether the petition should include additional claims. Thus, when defendant filed an amended postconviction petition, he did so without the assistance of counsel. His amended petition had four numbered claims, only two of which, claims two and four, are directly relevant in this appeal.

¶ 52 Claim two incorporated, among other things, defendant's original claim that Driver was paid for her testimony. That claim was supported by defendant's affidavit. He averred that he had spoken to Driver after the trial and that she had told him that Stovall had paid her $100 for her testimony. Further, he had "made [e]very effort" to contact Driver from prison to seek an affidavit, but "to no avail," so that he required "the assistance of the court."

¶ 53 Claim four was a claim of ineffective assistance of trial and appellate counsel. Defendant alleged 11 ways trial counsel failed, in each instance also claiming that appellate counsel was ineffective for failing to raise the ineffectiveness of trial counsel. He also listed seven failures that he stated were appellate counsel's alone. We outline the portions of that claim that are at issue in this appeal.

¶ 54 First, he asserted that trial counsel acted unreasonably when he acquiesced to the State's request for a 120-day continuance that did not count against the speedy trial deadlines. Such

continuances are permissible to allow the State time to obtain DNA testing results, but only when the State has been diligent in seeking testing. 725 ILCS 5/103-5(c) (West 2004). Defendant argued that the State had presented insufficient evidence of the steps it took to ensure prompt testing, that some evidence suggested needless delay by the State, and that counsel could have used this evidence to have the court deny the continuance.

¶ 55 Second, defendant asserted that trial counsel should have objected to the admission of the DNA testing results on the basis that it was confusing, unfairly prejudicial, and too nonspecific to be relevant.

¶ 56 Third, he asserted that trial counsel should have requested Illinois Pattern Jury Instructions, Criminal, No. 3.15 (4th ed. 2000), concerning witness identifications. He argued that this instruction would have helped the jury understand the weaknesses in the direct identification.

¶ 57 Four, he asserted that appellate counsel was ineffective for failing to argue that the court had erred when it sustained the State's objection to the admission of evidence that Alkabalny had illegal drugs in his system at the time of the robbery. We note that trial counsel did not raise this issue in his posttrial motion.

¶ 58 The State moved to dismiss on the basis that most issues were "waived" because defendant had failed to raise them on appeal. To the extent that defendant claimed ineffective assistance of trial counsel, it argued that that issue had been addressed on appeal. It asserted that defendant's claim that appellate counsel was ineffective was insufficient.

¶ 59 The State filed an affidavit from Driver in which she averred that she told the truth in her trial testimony and had never told defendant that anyone had paid her to give false testimony.

Further, members of defendant's family had contacted her to ask her to recant her testimony, but she had refused.

¶ 60 Defendant filed a motion for summary judgment as to his section 2-1401 petition. The State responded and filed a cross-motion for summary judgment, arguing that truth-in-sentencing applies when a defendant is accountable for the bodily harm caused by a codefendant. We note that the trial judge was no longer at that court, so that a different judge handled these proceedings.

¶ 61 On March 18, 2014, the court entered an order dismissing the postconviction petition. It ruled that, except for defendant's claim of ineffective assistance of appellate counsel and the claim relating to Driver's testimony, defendant could have raised all his claims on direct appeal; he had thus forfeited all his claims but those two. Concerning the claim of ineffective assistance of appellate counsel, the court held that counsel's assessments of the merits of the various possible issues was not patently wrong, so that the first prong—objectively unreasonable assistance—of *Strickland v. Washington*, 466 U.S. 668, 687, 688 (1984), was not satisfied. As to the claim relating to Driver's testimony, it ruled that defendant's evidence was hearsay and thus not competent. It further ruled that both the record and Driver's affidavit contradicted his claim. The same order also granted the State's motion for summary judgment on defendant's section 2-1401 petition. The court held that, at the time of trial, it had found defendant to be accountable for Ellis's shooting Alkabalny. Defendant timely appealed this order.

¶ 62 II. ANALYSIS

¶ 63 On appeal, defendant raises two issues that relate to his postconviction petition and one that relates to his section 2-1401 petition. Concerning the postconviction petition, he asserts first that he showed that appellate counsel was ineffective, primarily for failing to assert the

ineffectiveness of trial counsel. He next asserts that, when the court dismissed his claim relating to Driver's testimony, it erred in rejecting his affidavit, in considering Driver's affidavit, and in how it considered the trial record. As to the dismissal of the section 2-1401 petition, defendant asserts that his acquittal of attempted murder precluded deeming him accountable for the harm to Alkabalny and thus precludes a sentence served under the truth-in-sentencing provision.

¶ 64 We first address the dismissal of defendant's section 2-1401 petition. We start by recalling the basis for our initial remand in this matter. The trial court initially dismissed this petition as untimely. We vacated, citing *Sarkissian v. Chicago Board of Education*, 201 Ill. 2d 95, 104 (2002), for the proposition that, when a section 2-1401 petition challenges a judgment as void, the two-year limitations period of section 2-1401(c) (735 ILCS 5/2-1401(c) (West 2008)) is inapplicable, as are the requirements that the petitioner must allege a meritorious defense to the original action and that the petition was brought with due diligence. *Driver,* No. 2-09-0769, slip order at 3-4. We further held that the *merits* of the voidness claim were not relevant to the *timeliness* of the petition. *Driver*, No. 2-09-0769, slip order at 4. Underlying the holding in *Sarkissian*, and thus underlying our holding as well, is the principle that no time limit exists for the vacatur of a void judgment. *Sarkissian*, 201 Ill. 2d at 103. Thus, although an *allegation* of voidness defeats a motion to dismiss for untimeliness, relief is then available only for judgments that are *in fact* void.

¶ 65 Defendant's sentence was not void. His claim was based on the theory that, because the court either did not or could not deem him accountable for the harm to Alkabalny, the court *lacked the power* to require that he serve his sentence at 85%. That theory found support in the "void sentence" rule of *People v. Arna*, 168 Ill. 2d 107, 113 (1995), which was premised on the idea that any sentence not authorized by statute was void, and so subject to vacatur at any time.

But defendant is unfortunate in his timing. In *People v. Castleberry*, 2015 IL 116916, ¶¶ 9-19, the supreme court abrogated the rule in *Arna*. Further, in *People v. Price*, 2016 IL 118613, ¶¶ 25-28, the supreme court held that the rule in *Castleberry*, and not the rule in *Arna*, applies to the collateral review of older sentences such as this one.

¶ 66 We turn next to the dismissal of defendant's postconviction petition. We will first address his claim relating to Driver's allegedly perjured testimony before considering the ineffective assistance-of-counsel claims.

¶ 67 The court dismissed defendant's petition at the "second stage." When a petition is not subject to dismissal under section 122-2.1(a)(2) of the Act (725 ILCS 5/122-2.1(a)(2) (West 2008)) as frivolous and patently without merit—first-stage dismissal—it is then subject to dismissal on the State's motion (725 ILCS 5/122-5 (West 2008))—second-stage dismissal. In deciding the State's motion to dismiss a postconviction petition, the court must take as true all well-pleaded facts—provided, however, that the allegations are not contradicted by the record of the original proceedings. *People v. Coleman*, 183 Ill. 2d 366, 380-81, 382 (1998). To avoid second-stage dismissal and to be entitled to an evidentiary hearing, a defendant must make a substantial showing of a violation of his or her constitutional rights. *Coleman*, 183 Ill. 2d at 381. "[T]he sufficiency of the allegations contained in a post-conviction petition merits treatment as a legal inquiry requiring plenary appellate review"; in other words, our review is *de novo*. *Coleman*, 183 Ill. 2d at 388.

¶ 68 Here and in the trial court, the State has argued that defendant's perjured-testimony claim was subject to dismissal for failure to meet the requirement of section 122-2 of the Act (725 ILCS 5/122-2 (West 2008)): that the "petition *** have attached thereto affidavits, records, or other evidence supporting its allegations or *** state why the same are not attached." "[T]he

purpose of section 122-2 is to show a defendant's postconviction allegations are capable of objective or independent corroboration." *People v. Hall*, 217 Ill. 2d 324, 333 (2005). We deem that defendant adequately explained the absence of Driver's affidavit. Illinois law has always recognized that some affidavits are not readily obtainable and that, in such cases, the nature of the claim provides adequate explanation for their unavailability. The law most clearly establishes this where a defendant claims that he or she received incorrect advice from defense counsel. *Hall*, 217 Ill. 2d at 333-34; *People v. Williams*, 47 Ill. 2d 1, 4 (1970). If we cannot expect defense counsels to give affidavits of their own malpractice, *a fortiori* we cannot expect witnesses to give affidavits of their own perjury.

¶ 69 We further note that, to some extent, defendant's claim is supported by the record. Driver testified at trial that Stovall had suggested that money might be available for her testimony. This testimony suggests that defendant's claim is capable of substantiation. To be sure, Driver also testified that Stovall was joking. Nevertheless, Driver's unusual testimony clearly separates this case from one in which all the defendant has to go on is his or her own insistence that the State must have bribed a witness.

¶ 70 The State responds with three arguments. One, defendant's affidavit was hearsay, and thus inadmissible as substantive evidence in support of the petition. Two, Driver's affidavit both contradicts defendant's claim of her recantation of her testimony and shows that she was not, as defendant averred, unavailable. Three, the record contradicts defendant's claim. We find these arguments unpersuasive; we address them in turn.

¶ 71 One, we have, with an exception we discuss below, deemed defendant's affidavit to be sufficient without treating it as substantive evidence. The Act requires that a defendant submit evidence such as affidavits to support his claim or adequately explain why that evidence is

unavailable. Defendant's affidavit explained that he had attempted to obtain the proper substantive affidavit, but had failed. However, as noted, we deem that the substance of the claim effectively explains the absence of an affidavit from Driver.

¶ 72 Two, we do not consider Driver's affidavit for purposes of deciding the sufficiency of defendant's petition. As noted above, the *Coleman* court made clear that, when it considers a motion to dismiss a postconviction petition, the court does *not* weigh the evidence.

¶ 73 Three, we cannot agree with the State that the claim is—in the relevant sense—inconsistent with the trial record. If "consistent" means "consistent with the evidence presented," then a claim of knowing use of perjured testimony or other false evidence would be doomed from the start, leaving a defendant with no recourse for what might be an exceptionally serious due-process violation. That is not the law: the supreme court has held that, at the dismissal stage, the court must take as true properly pleaded claims of perjury. *People v. Lucas*, 203 Ill. 2d 410, 421-22 (2002). There is no inconsistency in this. A suggestion that a witness was lying does not contradict the trial record; what contradicts the trial record is a claim that a witness said something that he or she did not.

¶ 74 Indeed, despite the State's argument, the closer question here is whether defendant's petition adds anything to what was addressed at trial. Defendant first raised the matter of Stovall offering a bribe to Driver in his cross-examination of Driver: Driver described the odd exchange with Stovall, but insisted that it was a joke. Thus, the bribery claim was addressed at trial to some extent. In his affidavit, defendant added that Driver recanted her testimony after trial. Notably, on this point defendant's affidavit is not hearsay. " 'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Ill. R. Evid. 801(c) (eff. Oct. 15, 2011). Although defendant's

affidavit is hearsay as to the truth of the matter that Driver lied at trial, it is nonhearsay as to the mere claim that Driver recanted. That recantation matters, as we discussed when defendant's petition was first before us. *Driver*, No. 2-08-0798, slip order at 10-14. Here, we will simply point to the State's comment in closing that Driver was "one of the biggest witnesses in this case." Defendant's claim is thus material and new.

¶ 75 We now turn to the matter of defendant's claims that appellate counsel was ineffective, primarily for failing to raise the ineffectiveness of trial counsel. We thus must consider first whether defendant made a substantial showing trial counsel was ineffective; if so, we then consider whether he made such a showing that appellate counsel was ineffective for failing to raise trial counsel's ineffectiveness.

¶ 76 To state a claim of ineffective assistance of counsel, a defendant must satisfy both prongs of the standard stated in *Strickland*, 466 U.S. at 687. Specifically, a defendant must show (1) that counsel's performance was deficient, and (2) that the deficient performance prejudiced him or her in that reasonable probability exists that, but for counsel's deficient performance, the proceeding would have had a different result. *Strickland*, 466 U.S. at 687, 694. "In demonstrating, under the first *Strickland* prong, that his counsel's performance was deficient, a defendant must overcome a strong presumption that, under the circumstances, counsel's conduct might be considered sound trial strategy." *People v. Houston*, 226 Ill. 2d 135, 144 (2007). A claim of ineffective assistance of appellate counsel likewise requires a defendant to satisfy both prongs of the *Strickland* test. "Appellate counsel is not obligated to raise every conceivable issue on appeal, but rather is expected to exercise professional judgment to select from the many potential claims of error that might be asserted on appeal. [Citation.]" (Internal quotation marks omitted.) *People v. English*, 2013 IL 112890, ¶ 33.

¶ 77 Defendant asserts that trial counsel was ineffective for failing to oppose the State's motion for an additional 120 days to complete DNA testing. We hold that defendant has not shown that counsel's choice was outside the presumption of sound trial strategy. This claim is nothing but hindsight: we lack the evidence to conclude that this choice was inconsistent with an aggressive challenge to the State's identity evidence. As we will next discuss, the actual results favored the State barely if at all. Defendant has not told us what he told trial counsel. For all we know, counsel had reason to hope that testing would produce profiles that might imply a different perpetrator. However, if that was counsel's strategy, counsel needed to be prepared to highlight the weaknesses of ambiguous results. That did not occur.

¶ 78 Defendant asserts that trial counsel should have objected to the admission of the DNA testing results. We agree that defendant has made a substantial showing here. As our quotations from the trial record show, the State put forward confusing and equivocal DNA evidence as supporting its case, and counsel failed to challenge the evidence in any meaningful way.

¶ 79 Defendant argues that counsel should have challenged the results' admission by quoting *People v. Schulz*, 154 Ill. App. 3d 358, 365-66 (1987), for the proposition that evidence " 'only tend[ing] to put defendant in an extremely large category [as] possible donors' " should be excluded. We agree, although we think that a slightly different analysis makes defendant's point more clearly. The rule in *Schulz* exemplifies the broader rule that a court should exclude evidence when its prejudicial effect substantially outweighs its probative value (*People v. Walker*, 211 Ill. 2d 317, 337 (2004)). Here, the prejudicial effect was substantial: the State used the evidence to argue that it was "way too coincidental" that DNA that defendant could have contributed was found in the house with defendant. It then used the court's admission of the forensic evidence to vouch for that evidence's value. However, the probative value was low to

nil. Moreover, it was much lower than either defense lawyer brought out. Lee testified that the DNA on the black hoodie's tag and on the second piece of sheeting was a mixture derived from at least three individuals, but the other evidence strongly indicated no more than two robbers. Thus, one or more profiles had no tie to the robbery. If one or more contributions to the profile were the result of irrelevant contact, then the part of the profile consistent with defendant's DNA might also have been the result of irrelevant contact. The State made no effort to exclude that possibility. It did not, for instance, establish if DNA from residents in the duplex could have fully accounted for the mixed profiles. Given that failure of exclusion, the probative value of the DNA mixture evidence was slight at best. Had counsel sought exclusion of the evidence, it might well have been an abuse of discretion to admit it. Further, counsel utterly failed to mitigate the harm from the evidence's admission. His closing argument about "things of DNA" in the washing machine could not have been persuasive.

¶ 80 Next, although defendant argues that appellate counsel was ineffective for failing to raise the court's refusal to admit evidence that a drug screen showed the presence of "THC, marijuana, and amphetamine" in Alkabalny's "system," it was trial counsel who did not raise the matter in the posttrial motion, and thus failed to preserve the issue. *People v. Enoch*, 122 Ill. 2d 176, 190 (1988). Defendant's failure to argue this as a failure by trial counsel appears to us to be essentially a bookkeeping error in an otherwise well-structured petition, and we will disregard it. As we now explain, trial counsel likely would have prevailed on this point, so the failure to raise the matter in the posttrial motion was likely unreasonable. The supreme court held in *People v. Strother*, 53 Ill. 2d 95, 99 (1972), that evidence of addiction and continued drug use is relevant to a witness's credibility and that the jury may draw its own inferences as to the significance of that use. Although *Strother* is an older case, Illinois courts have continued to recognize that drug use

is a proper matter for impeachment of a witness. See, *e.g.*, *People v. Mercado*, 244 Ill. App. 3d 1040, 1050-51 (1993). We acknowledge that this authority pertains mostly to addiction specifically, of which there is no specific evidence here. However, one can reasonably infer some level of ongoing drug use from the presence of *both* THC and amphetamine. Thus, as an attempt to admit this evidence had a strong basis in law, trial counsel had every reason to raise the exclusion in the posttrial motion.

¶ 81 Finally, defendant argues that trial counsel was ineffective for failing to seek inclusion of the pattern jury instruction on identification (Illinois Pattern Jury Instructions, Criminal, No. 3.15 (4th ed. 2000)). Defendant has made a substantial showing here as well. The absence of the instructions deemphasized the potential identification problems that were at the heart of defendant's theory of the case. The relevant pattern instruction states:

> "When you weigh the identification testimony of a witness, you should consider all the facts and circumstances in evidence, including, but not limited to, the following:
>
> [1] The opportunity the witness had to view the offender at the time of the offense.
>
> [or]
>
> [2] The witness's degree of attention at the time of the offense.
>
> [or]
>
> [3] The witness's earlier description of the offender.
>
> [or]
>
> [4] The level of certainty shown by the witness when confronting the defendant.
>
> [or]

[5] The length of time between the offense and the identification confrontation."

Illinois Pattern Jury Instructions, Criminal, No. 3.15 (4th ed. 2000)

Here, the first two parts of the instruction were undeniably relevant. Moreover, the instruction was needed in a strategy that emphasized weaknesses in the identification evidence: hearing the instruction from the court would have tended to put the court's weight behind counsel's arguments.

¶ 82 Having concluded that defendant made a sufficient showing that trial counsel made unreasonable and unstrategic choices in his representation of defendant, we must address whether he made that showing of prejudice. The record permits the conclusion that a reasonable probability exists that, had counsel not made unreasonable choices, the proceeding would have had a different result.

¶ 83 When we reversed the first-stage dismissal of defendant's original petition, we addressed at length the strengths and weaknesses of the State's evidence. We concluded that the State's evidence against defendant was strong, but not overwhelming. See *Driver*, No. 2-09-0798, slip order at 12. We briefly summarize that part of our reasoning that is relevant here. The testimony tending to suggest that the robbers fled as far as the duplex was strong. Further, no real doubt existed but that someone hid the gun, ammunition, hoodies, and masks in the duplex. However, the police never found the cash the robbers took from the Oky-Doky, suggesting a gap in the chase or the search. But for the DNA evidence and the identification of defendant by Driver and Alkabalny, the simplest inference would be that an unknown second robber parted ways with Ellis near the duplex, taking the money with him. Thus, the two identifications and the DNA were the critical direct links between defendant and the robbery.

¶ 84 Neither of the two identifications was particularly strong on its own. Driver thought that she had seen defendant go into the Oky-Doky, but did not see him with another hooded man and did not notice a mask. That is inconsistent with the facts of the robbery, so the accuracy of her perceptions of the robbery was open to doubt, even leaving aside the bribery comment. Further, she evidently was not impressive as a witness; the State went so far in closing as to concede that she seemed "slow." Alkabalny's identification was plausible only if one credits him with impressive powers of observation. Although he made his observations while under extreme stress, and although the robbers' faces were obscured except for the areas around their eyes, he recognized the robbers as customers and picked out Ellis and defendant in a photo line-up. The circumstances of the identification raise the concern that he might have selected any black male customer from a line-up. Further, although he remembered a specific transaction with Ellis, his identification of defendant lacked such a basis. Without the State's overvaluing of the DNA evidence, the State would have had to ask the jury to place considerable weight on the testimony of its two flawed eyewitnesses. Had the court admitted the drug-use evidence to cast doubt on Alkabalny's sobriety, the jurors might have devalued his identification and might have been forced to weigh whether Driver's already odd testimony was reliable. We thus find a substantial showing of a reasonable probability that the jury would have acquitted defendant not only of attempted murder but of armed robbery as well.

¶ 85 The final matter we must address is whether defendant made a substantial showing that appellate counsel was ineffective for failing to raise these matters. On direct appeal, appellate counsel argued that trial counsel had failed to render effective assistance to defendant on a suppression motion. We see no strategic reason for appellate counsel's decision to restrict the appeal to that issue and to ignore trial counsel's handling of the identity evidence at the core of

the State's case. Above all, the mishandling of the DNA evidence should not have evaded a careful review. Lee's testimony was unclear, and, if considered carefully, has much less significance than one might take from the presentation at trial. Having recognized that line of attack, appellate counsel should have also recognized that raising the issues of Alkabalny's drug use and the failure to use the pattern jury instruction would have maximized the claimed prejudice.

¶ 86 Finally, a reasonable likelihood exists that a brief on these matters would have gained defendant relief. Presented with a trial in which the State lacked overwhelming evidence but was able to paint confusing and equivocal DNA evidence as strong, we could plausibly have granted relief. It is unlikely that we would have found prejudice based on the remaining portions of defendant's claim alone, but their addition to the claim could only have increased the likelihood that we would have granted relief.

¶ 87 III. CONCLUSION

¶ 88 For the reasons stated, we affirm the dismissal of the section 2-1401 petition, reverse the dismissal of the postconviction petition, and remand the matter for further proceedings under the Act. We observe that, although we have found that defendant's petition made a substantial showing to survive dismissal, we are expressing no opinion on the ultimate merits of his claims.

¶ 89 Affirmed in part and reversed in part; cause remanded.