FOURTH DIVISION
MAY 10, 2012

No. 1-10-2100

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 90 CR 24789
	)	
ROBERT ORNELAS,	)	Honorable
	)	Nicholas R. Ford,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE PUCINSKI delivered the judgment of the court.
Presiding Justice Lavin and Justice Fitzgerald Smith concurred in the judgment.

O R D E R

HELD: Circuit court's denial of petitioner's post-conviction petition following an evidentiary hearing upheld where petitioner failed to show that he received ineffective assistance of both trial and appellate counsel.

¶1 Petitioner, Robert Ornelas, appeals the circuit court's denial of his petition for post-conviction relief filed pursuant to the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq*. (West 2006)). On appeal, he disputes the circuit court's denial of his petition after presiding over

a third-stage evidentiary hearing, arguing that he showed that he was denied his constitutional right to effective assistance of both trial and appellate counsel and that the circuit court's ruling was manifestly erroneous. For the reasons contained herein, we affirm the judgment of the circuit court.

¶2 BACKGROUND

¶3 On November 11, 1990, Jay Mosqueda and Robert Cheeks were shot and killed. Petitioner was subsequently charged with first-degree murder in connection with the crime. Following a bench trial, petitioner was convicted of first degree murder and sentenced to natural life imprisonment. This court affirmed petitioner's conviction on direct appeal. *People v. Ornelas*, 295 Ill. App. 3d 1037 (1998). Although the facts of the offense were fully set forth in our prior disposition, a recitation of the relevant factual and procedural background is necessary to fully understand and consider the allegations raised in petitioner's instant appeal.

¶4 Arrest

¶5 Petitioner was arrested on November 15, 1990, in Frankfort, Illinois, along with three other men when an Illinois State Trooper responded to a call regarding a fight in progress at a local White Hen. Two of the men were found to be in possession of narcotics and all appeared to be under the influence of drugs. Petitioner was not found with contraband on his person, but he was arrested along with the other men. After the men were taken into police custody, one of them informed an investigating officer that petitioner had been involved in a recent shooting. In response to questioning about his involvement in a shooting, petitioner admitted to shooting Mosqueda and Cheeks, but alleged that he had done so in self-defense.

¶6 Pre-Trial Proceedings

¶7 Petitioner, with the assistance of trial counsel Phil Mullane, filed pre-trial motions to quash his arrest and suppress his inculpatory statements. In the motion to suppress, petitioner argued that suppression of his statements was warranted because he was under the influence of narcotics at the time he made his statements and did not have the capacity to waive his *Miranda* rights or give a voluntary statement. The motion also contained an allegation that petitioner's statements were involuntary because they were obtained as a result of physical, psychological and mental coercion. The State requested clarification on petitioner's claim of physical coercion and trial counsel orally amended the motion to include the allegation that petitioner had been slapped and punched. The trial court presided over a hearing on petitioner's pre-trial motions.

¶8 At the hearing, Illinois State Trooper Kim Hoffman-Davis testified that on November 15, 1990, at approximately 8:20 a.m., she was stopped at a gas station in Tinley Park, Illinois, when a citizen approached her and informed her that a fight was in progress at the local White Hen store. When Trooper Hoffman-Davis arrived at the White Hen, she saw four men in the parking lot. They were not fighting at the time, but she approached the men and asked them to provide identification. Three of the men provided her their identification, but petitioner did not. Initially, petitioner identified himself as "Ornelas." Later, however, petitioner informed Trooper Hoffman-Davis that his name was "Rudy Ramos."

¶9 Illinois State Trooper Charles Arceneux arrived at the White Hen approximately two to three minutes after Trooper Hoffman-Davis arrived on scene. He testified that petitioner and the other three men appeared to be under the influence of narcotics. Trooper Arceneux explained that in response to questioning, the men would stare and were unable to respond coherently.

Because the smell of alcohol was not present, Trooper Arceneux believed that the men had ingested a substance other than alcohol.

¶10 When the men were asked to empty their pockets, they produced a pair of brass knuckles, 21 hits of LSD and a vial of PCP. None of these items were produced by petitioner. Frankfort police subsequently arrived on the scene.

¶11 Frankfort Police Officer Piscia testified that he arrived at the White Hen in response to a radio call to assist the State Troopers in transporting the men to the police station. Officer Piscia explained that he was called because Frankfort police cars, unlike State police cars, were equipped with safety cages. In describing the behavior of the four men, Officer Piscia indicated that their emotions would vary from lethargic to excited. He personally transported two of the men to the police station. One of the men claimed to be the devil, then claimed to be Jesus Christ and proceeded to forgive Officer Piscia for his sins. Officer Piscia, however, was not able to recall which of the men made these pronouncements.

¶12 After arriving at the police station, petitioner fashioned a cross on his cell door and began screaming. Trooper Hoffman-Davis indicated that petitioner identified himself as Jesus Christ and also as Joe Montana.

¶13 Peter Hwang, Special Agent for the Illinois State Police, testified that on November 15, 1990, he reported to the Frankfort police station to commence a narcotics investigation. After conversing with Trooper Hoffman-Davis, Agent Hwang spoke to each of the four men individually. Agent Hwang testified that when he spoke to William Ludke, one of the men arrested with petitioner, Ludke informed him that petitioner's real name was Bobby Ornelas, not

Rudy Ramos. Ludke also informed Agent Hwang that petitioner had committed a double homicide on the south side of Chicago two nights earlier. He stated that petitioner shot two people with a shotgun after petitioner had been denied admittance to a nearby party. Agent Hwang indicated that Ludke appeared to be under the influence of "something" at the time this conversation took place, but that he was able to understand everything Hwang said to him.

¶14 After this conversation occurred, Agent Hwang placed a call to the Chicago Police Department, Area 2 Violent Crimes. During the call, Agent Hwang was informed that Chicago Police had been looking for petitioner because he was a suspect in a recent double homicide. Agent Hwang was informed that detectives from Area 2 would be arriving to talk to petitioner. At approximately 11 a.m., after making this phone call, Agent Hwang went to converse with petitioner, who was handcuffed to the wall of an interview room. Petitioner appeared to be "a little confused" and under the influence of narcotics, but was able to confirm that he was Ornelas, not Rudy Ramos. Agent Hwang then informed petitioner that he was going to transport him to the Illinois State Police station in Joliet and that detectives from the Chicago Police Department would be coming there to talk to him.

¶15 At approximately 3 p.m., Chicago Police Detectives Yucaitis and Brownfield arrived at the Illinois State Police District 5 Headquarters to talk to petitioner. After this conversation, Agent Hwang accompanied Detectives Yucaitis and Brownfield to the Will County Jail to interview Luedke. Luedke provided them with a written waiver of his *Miranda* rights as well as a written statement. After speaking with Luedke, the police returned to Romeoville to speak to petitioner. They orally informed petitioner of his *Miranda* rights and petitioner subsequently

confessed to the murder of Cheeks and Mosqueda. Petitioner explained that he was a member of the Vice Lords street gang and that the victims were members of the King Cobra street gang and that he fired two shots at the automobile in which the victims were sitting. Petitioner indicated that he fired the shotgun in self-defense.

¶16 At the conclusion of the live testimony, defense counsel argued that petitioner was under the influence of narcotics at the time he made his inculpatory statement and did not have the capacity to waive his *Miranda* rights or provide a voluntary statement. The trial court denied petitioner's motion to quash his arrest as well as his motion to suppress his statement. With respect to the motion to suppress, the court ruled that suppression was not warranted because petitioner was coherent at the time he made the statement and that petitioner's statement was voluntary.

¶17 After the trial court denied petitioner's pretrial motions, he elected to waive his right to a jury trial and proceeded by way of a bench trial.

¶18 Trial

¶19 At trial, Scott Byron testified that he attended a party on November 11, 1990, that was located in the area of 104th Street and Calhoun. Sometime between 11 and 11:30 p.m., Byron heard a noise that sounded like a gun shot.

¶20 Dion Castillo attended the same party. She testified that did not see petitioner at the party or observe petitioner fire a shotgun. Castillo, however, acknowledged that she had previously spoken to a detective investigating a double homicide and had told him that petitioner had attempted to gain entry to the party and that he had fired his gun before he left the area. Castillo

clarified that she did not have first hand knowledge of these events; rather the information she relayed to the detective came from a third party.

¶21 Chicago Police Officer John Boitch testified that at approximately midnight on the night in question, he responded to a call regarding a vehicle theft. As he was responding to this call, Officer Boitch received another dispatch that about two potential gunshot victims who were in a car approximately one and one-half blocks from the first location. He responded to the scene within two minutes of receiving the call and observed an automobile leaning against a fence. The vehicle had a shattered window and a peeled steering column. There were no keys in the ignition but it appeared that the car's transmission had been set to drive. Officer Boitch also observed two bodies in the car. The victims were later identified as Jay Mosqueda and Robert Cheeks. One of the victims had been shot in the face and the other had been shot in the chest. Two spent shotgun shells were on the ground.

¶22 Doctor Mitra Kalelkar, a forensic pathologist employed by the Cook County Medical Examiner's Office, performed a post-mortem examination on the gunshot victims. She testified that Mosqueda had died as a result of a shotgun wound to his face and that Cheeks died from multiple gunshot wounds to his neck and shoulder.

¶23 Chicago Police Detective James Boylan was assigned to investigate the double homicide. As part of his investigation, Detective Boylan interviewed Dion Castillo who had attended a party located near 104th Street and Calhoun on the night in question. He testified that Castillo informed him that petitioner had been denied admittance to the party. Castillo further informed Detective Castillo that petitioner had a gun and that he discharged his weapon at approximately

11:45 p.m. after he had been refused entry to the party.

¶24 William Luedtke testified that on November 11, 1990, at approximately 11:30 p.m., petitioner stopped by his house and appeared nervous and edgy. The following day, petitioner told Luedtke that he had committed a double homicide the previous night. Petitioner said that he had ingested LSD and went to a party. When petitioner was denied access to the party, he "blew off a round" in the backyard and began walking home. On his walk, petitioner indicated that he encountered "two guys in a car" who "were looking for trouble" and that he shot both of the men with a shotgun. Petitioner told Luedtke that the men both appeared fearful before he shot them.

¶25 Special Agent Hwang provided testimony that was consistent with the testimony he had provided at the prior hearing on petitioner's pretrial motions. With respect to petitioner's statements, Hwang indicated that the first time that he and Detectives Brownfield and Yucaitis spoke to petitioner together on November 15, 1990, petitioner initially claimed that he had been with a woman named Dawn somewhere in Chicago Heights on the night of the double homicide. Petitioner could not recall the exact address. When Agent Hwang and the detectives returned to speak to petitioner after conversing with Luedtke, petitioner admitted to the offense. Petitioner reported that he was a member of the Vice Lords street gang and that the victims were members of the King Cobra street gang. He claimed that he fired two shots at the automobile in which the two men were sitting and that he had done so in self-defense.

¶26 Detective Mike Gerhardstein testified that in November 1990, he was working as an Assistant State's Attorney. On November 15, 1990, ASA Gerhardstein spoke with, and took a statement from, petitioner. In the statement, petitioner admitted that he was denied entrance to a

party located near 104th Street and Calhoun and that he fired his 12-gage shotgun in the backyard as he began walking away from the party. Petitioner continued walking and observed Jay Mosqueda and a "black guy" sitting in an automobile in an alley located between Bensley and Calhoun. Petitioner indicated that he knew Mosqueda because he used to beat petitioner when they were both younger. Petitioner was also aware that Mosqueda was a member of the King Cobra street gang, whereas petitioner was a Vice Lord. Petitioner and Mosqueda began yelling at each other but petitioner could not remember what either of them said. Petitioner told Gerhardstein that he thought Mosqueda and Cheeks were going to run him over with their automobile and that he fired his shotgun through the car's passenger side window and hit Mosqueda in the face. Petitioner then fired at Cheeks, ran away, destroyed the shotgun and went to hide with friends in Whiting, Indiana.

¶27 Assistant Public Defender Crystal Marchigiani testified that she interviewed Luedtke in April 1994. During the interview, Luedtke told her that in November 1990 he was confronted by police about a narcotics charge. The police told Luedtke that they could not do anything to help him with the narcotics charge and that they would charge him as an accessory after the fact to the double homicide that they were investigating if Luedtke did not cooperate and provide them with information.

¶28 Additional evidence was entered into the record by way of stipulation. The parties stipulated that Roy Medrano called 911 at approximately 12:05 a.m. on November 11, 1990, to report that his car had been stolen by two offenders who Medrano believed to be armed. It was further stipulated that no guns or knives were found in Medrano's stolen car or on the victims and

that Mosqueda and Cheeks both had prior criminal records.

¶29 The court found petitioner guilty of the first-degree murder of Mosqueda and Cheeks and sentenced him to natural life imprisonment.

¶30 Direct Appeal

¶31 Petitioner appealed his conviction and sentence. On appeal, petitioner argued that the trial court erred in denying his motion to quash his arrest because police lacked probable cause to arrest him. Petitioner further argued that the trial court also erred in failing to suppress his statements because his statements were not sufficiently attenuated from his illegal arrest. Finally, petitioner sought reversal of his conviction on the basis that the State failed to prove him guilty of first-degree murder beyond a reasonable doubt. In a written opinion, this court affirmed petitioner's conviction. In doing so, we held that even if petitioner's arrest was illegal, his statement was sufficiently attenuated from the arrest because it occurred hours later and only after petitioner learned of Luedtke's statement. Moreover, we found that the State established petitioner's guilt beyond a reasonable doubt. *People v. Ornelas*, 295 Ill. App. 3d 1037 (1998). Petitioner subsequently filed a petition for leave to appeal, which our supreme court denied. *People v. Ornelas*, 179 Ill. 2d 606 (1998).

¶32 Post-Conviction Proceedings

¶33 On April 5, 1999, petitioner, with the assistance of post-conviction counsel J. Mark Lukanich, filed a petition for post-conviction relief. In the petition, petitioner alleged that he was denied his right to effective assistance of trial counsel when counsel failed to call him as a witness to testify at his pretrial suppression hearing that his statement was the result of the

physical abuse that was inflicted on him by Detectives Yucaitis and Brownfield. Petitioner argued that trial counsel further erred in failing to interview and call as witnesses other individuals who experienced the systematic abuse known to occur at Area 2. Finally, petitioner maintained that appellate counsel also rendered ineffective assistance when he failed to raise these issues on appeal.

¶34 Petitioner subsequently filed an amended post-conviction petition on August 14, 2003. In it, petitioner advanced the same allegations regarding ineffective assistance of trial and appellate counsel. Attached to the petition were a number of exhibits including an affidavit completed by petitioner detailing the alleged physical abuse he suffered as well as different reports and proceedings regarding investigations into the Area 2 torture allegations that occurred under the tenure of Chicago Police Lieutenant Jon Burge.

¶35 In his affidavit, petitioner indicated that Detectives Yucaitis and Brownfield "choked," "slapped and punched [him] about the head and body" and demanded that petitioner admit to the murders of Mosqueda and Cheeks. Petitioner also alleged that the detectives pulled his hair, "repeatedly slapped [his] ears with their open hands," and threatened to inflict additional and more severe abuse if he did not provide them with a confession. Petitioner further averred that he became "extremely fearful of [his] safety." Although he acknowledged that he made incriminating statements, petitioner alleged that the "statements were involuntary and solely the product of the physical abuse and verbal threats [he] was subjected to by Yucaitis and Brownfield." Petitioner indicated that he informed his trial attorney of the circumstances that led to his confession and expressed his willingness to testify about the abuse inflicted on him by the

detectives but stated that his attorney told him that his testimony was not necessary and would be "save[d] for trial."

¶36 Among the additional exhibits attached to petitioner's amended post-conviction petition was a report authored by Michael Goldston (the Goldston Report) which concluded that the physical abuse of suspects by Area 2 personnel under the tenure of Chicago Police Lieutenant Jon Burge was systemic. The report identified Detective Yucaitis as a "player," because his name was referenced on multiple occasions in connection with abuse allegations. Petitioner also included a finding by the Police Board of the City of Chicago that Detective Yucaitis had been aware of abuse inflicted on Andrew Wilson, a prisoner, by Burge. Although the Board found that Yucaitis did not take part in the torture, it concluded that Yucaitis violated the Department's Rules and Regulations when he failed to prevent the abuse or obtain medical care for Wilson and suspended Yucaitis for 15 months as a result of this infraction. An affidavit completed by Lavert Jones, another prisoner, was also attached to petitioner's motion for post-conviction relief. In it, Jones averred that he also had suffered physical abuse at the hands of Detective Yucaitis.

¶37 The State filed a motion to dismiss petitioner's post-conviction petition. In its response, the State argued that petitioner's ineffective assistance of trial and appellate counsel claims were without merit. The State noted that while physical abuse had been known to occur in the past at Area 2, there was no physical or documentary evidence to support petitioner's allegation that he personally was a victim of any abuse. Given that petitioner's allegations of abuse were not corroborated, the State contended that there was no reasonable probability that the trial court would have granted petitioner's motion to suppress had counsel presented petitioner's testimony

at the suppression hearing and that trial counsel was not ineffective for electing not to do so. Moreover, the State argued that appellate counsel was not ineffective for raising this non-meritorious argument on appeal.

¶38 The State's motion to dismiss was denied and the cause subsequently proceeded to a third-stage evidentiary hearing. At the hearing, Steve Rymus testified that he has known petitioner since they both were children and that he lived across the street from him in November 1990. They were in contact on a daily basis. Sometime in the middle of November 1990, Rymus heard about the double murder of Mosqueda and Cheeks. After the murders, two police officers arrived at Rymus' house without a warrant, "grabbed" him, handcuffed him and took him to the police station located on 111th Street. At the police station, the officers placed Rymus in a small room and began asking him about the murders. He remained handcuffed and could not recall whether the officers read him his rights before they commenced questioning. Rymus was asked whether he had been at Dion Castillo's party on Calhoun Street and he confirmed that he had attended the party. Rymus was also asked whether petitioner attended the party, but denied that he had been there. The officers then began to abuse Rymus. He testified that they punched him, slapped him and squeezed his testicles. The officers indicated that they wanted Rymus to make a statement and say that petitioner was at the party and that he left the party and committed the murders. When Rymus refused to implicate petitioner, the officers continued to beat Rymus and threatened to implicate him instead if he continued to refuse to cooperate.

¶39 Rymus testified that he questioned for about 20 minutes, beaten for about 15 minutes, and was kept at the station for about eight hours. He was allowed to leave approximately 2 hours

after he was beaten. Rymus suffered bruising on his face and around his testicles but did not seek medical treatment. He admitted that he did not tell petitioner about the incident before or after petitioner was arrested for the murders but acknowledged that he visited petitioner in jail on several occasions and thought that petitioner would have likely wanted to know what had happened. The only person that Rymus initially talked to about the abuse was his mother. He subsequently told his brother what had happened. Later, he spoke to petitioner's post-conviction counsel after petitioner's mother called him and told him to do so. Although Rymus knew Phil Mullane, petitioner's trial counsel, from the neighborhood, Rymus never contacted him to tell him about what had occurred. He indicated that he was never contacted by anyone on petitioner's behalf, but stated that if he had been contacted, he would have been willing to testify on petitioner's behalf about the beating he was subjected to shortly after the murders. Although he had suffered abuse at the hands of two Chicago police officers, Rymus acknowledged that he never filed a complaint with the Chicago Police Department or filed a lawsuit.

¶40 Mary Rymus, Steve's mother, testified that she heard about the double murder when she went to church on November 11, 1990. A few days after the murder, Hobby Mongia, one of her son's friends, came to house to tell her that Steve had been taken away by the police. After making some phone calls to find out where her son was taken, Mary went to the police station at 111th Street. She was told that her son was being questioned and that she should come back to pick him up in a few hours. When Mary returned to the police station a few hours later to pick up Steve, her son's face was swollen and puffy and she saw evidence of a bruise on one of his cheeks. She also observed that Steve kept touching his crotch. Mary's son told her that police

officers had beaten him up and squeezed his testicles while they questioned him. Steve also told her that the officers were trying to get him to make a statement that implicated petitioner in the murders of Mosqueda and Cheeks. She did not take her son to receive medical treatment.

¶41 Mary acknowledged that her son had previously complained of being abused by Chicago Police Officers on one prior occasion. Seven years ago, Steve claimed an officer hit him on the head with a gun. Mary further acknowledged that she had been friends with petitioner's mother for over 50 years, but that she never spoke of her son's interrogation until recently when petitioner's mother called her to tell her to speak to petitioner's post-conviction counsel. Mary also indicated that she was familiar with the Mullane family because they lived in the neighborhood and that she knew Phil Mullane, but denied that she was aware that he had represented petitioner at trial.

¶42 Petitioner testified that he was taken into custody by Frankfort police officers on November 15, 1990, at approximately 8:30 a.m. He was questioned by Frankfort officers but did not make any statements to them and was placed in a holding cell. At approximately 1:00 p.m., petitioner met with Illinois State Police Special Agent Peter Hwang. Agent Hwang read petitioner his *Miranda* rights, but he elected not to sign the document delineating his rights or to speak to Agent Hwang. Instead, petitioner requested an attorney. At about 1:30 p.m., Agent Hwang drove petitioner to the 5th District Police Headquarters located in Joliet. While en route, Agent Hwang told petitioner that Chicago detectives were going to come and talk to him because he was wanted for questioning in a double homicide investigation. Agent Hwang told petitioner that he should claim self-defense, but petitioner refused to talk to him and made a second request

for an attorney.

¶43 When he arrived at the 5th District Headquarters, petitioner testified that he was taken to a "little room" and handcuffed to "a little hook in the wall." The room was approximately 6 feet by 10 feet and had one window with closed blinds. Approximately one hour later, at 3 p.m., Agent Hwang brought Detectives Brownfield and Yucaitis into the room. Petitioner indicated that Detective Brownfield introduced himself as an Assistant State's Attorney, but that he knew Brownfield was lying. Agent Hwang then left petitioner alone with the detectives. After Agent Hwang left, petitioner testified that he immediately "invoked [his] 5th Amendment" and "told them [he] refuse[d] to say anything without an attorney." Detective Yucaitis told petitioner that he was "not getting no attorney" and began hitting him. He backhanded petitioner and boxed his ears, which was "extremely painful." Both detectives then began cursing at petitioner and threatening him with the death penalty if he did not confess to the murders of Mosqueda and Cheeks. For approximately 15 minutes, the detectives hit petitioner on the head and kicked him in the shin and instructed petitioner to confess to the double homicide and assert self-defense. Although he had heard about the murders of Mosqueda and Cheeks, petitioner claimed he had no knowledge of the specifics of the incident. He testified that the detectives told him about the details surrounding the murders, including the fact that the victims had been shot while they were in a car. Petitioner indicated that the detectives told him to say that he had shot the victims because they had tried to run him over with the car.

¶44 When Detectives Yucaitis and Brownfield left the room, Agent Hwang returned and urged petitioner to tell them what they wanted to hear. Agent Hwang left briefly and then

returned to the interview room with both detectives. At that point, petitioner indicated that he made an alibi statement and told the detectives that he had been in the Chicago Heights area at the time of the murders. He testified that he made the statement so "they could quit jumping on [him]." Agent Hwang wrote down petitioner's statement, but did not show petitioner what he had transcribed. After petitioner made the statement, the detectives "gave a little eye look" to Agent Hwang and he left the room. Petitioner noted that Agent Hwang was never in the room when he was being abused by the detectives. As soon as Agent Hwang left, petitioner testified that the detectives started "with the lefts and rights again" and Detective Yucaitis also grabbed petitioner's testicles "like Steve Rymus." Petitioner did not make any additional statement and the two detectives left him in the room alone for several hours.

¶45 At approximately 8 p.m., Agent Hwang returned with Detectives Yucaitis and Brownfield and petitioner indicated that he was ready to provide them with a statement. When Agent Hwang left to obtain paperwork to record petitioner's statement, Detectives Yucaitis and Brownfield stepped on petitioner's feet, boxed his ears, grabbed his testicles and threatened to kill him if he did not deliver the correct statement. When Agent Hwang returned to the room, petitioner made a statement in which he admitted to shooting Mosqueda and Cheeks and claimed to have done so in self-defense. Agent Hwang made a written record of petitioner's statement, and read it back to petitioner but petitioner refused to sign the confession because it was "not a true statement at all." Petitioner did however, write his initials "R.O.", after the last sentence of the statement.

¶46 After he made his statement, petitioner testified that Detectives Brownfield and Yucaitis drove him to the Area 2 police station located on 111th Street. During the trip, the detectives

told petitioner that they were bringing him back to "[their] house" and warned him to continue to cooperate or else they would "beat [him] worse." After petitioner arrived at Area 2, he was placed in an interview room and Detective Brownfield told petitioner that he would be crippled or killed if he did not make a statement to the Assistant State's Attorney (ASA). When ASA Gerhardstein arrived to speak with petitioner he already had a statement written out. Detective Brownfield remained in the room and gave petitioner "the evil eye" as ASA Gerhardstein read the statement to him. Petitioner signed his name to the statement wherever he was told to, and explained that he did so he "wouldn't keep getting beat up by these two guys." Nothing in the statement, however, was true. Petitioner acknowledged that certain corrections to the statement were made and that he initialed the corrections, but indicated that he purposefully misspelled his name "Ornelos" at the bottom of the statement because it "was a bogus statement and none of this had happened." Misspelling his name was petitioner's way of trying to show that he did not agree with the statement. Petitioner testified that he was subsequently charged with the murder of Mosqueda and Cheeks and taken to the Cook County jail where he received a medical examination. He told the doctor about the treatment he had received from Detectives Yucaitis and Brownfield and that his testicles and ears hurt, but petitioner did not know if the doctor recorded his complaints.

¶47 Public defense attorney Phil Mullane was then appointed to represent petitioner. Petitioner indicated he had several conversations with Mullane about the circumstances surrounding his statement and told Mullane how the detectives had "hit [him] in [his] ears, how they squeezed [his] testicles, stepped on [his] feet, kicked [him] in the shin, went up side [his]

head[], top of [his] head, stuff like that." Petitioner made it clear to Mullane that he only made the statement in response to the conduct of Detectives Yucaitis and Brownfield. He also told Mullane that his friend Steve Rymus "got jumped on too" by Area 2 personnel. Mullane, in turn, advised petitioner about the Goldston Report and told him that Detective Yucaitis had been previously been implicated in torture allegations. As a result of their conversations, Mullane filed a motion to suppress petitioner's statement and they discussed the strategies that Mullane intended to pursue to suppress the statement. Specifically, petitioner indicated that Mullane informed him that he was not going to call petitioner to testify at suppression hearing about the abuse he suffered prior to making his statement. Rather, Mullane told petitioner he was going to show that petitioner was under the influence of narcotics at the time of the statement and he would let the State "bury themselves." Petitioner, however, told Mullane several times before, during, and after the suppression hearing that he wanted to testify, but Mullane wanted to "save" petitioner's testimony for trial and did not call him to testify.

¶48 When the motion to suppress was denied and cause proceeded to trial, petitioner again told Mullane on several occasions that he wanted to testify about the circumstances surrounding his statements. When the State rested its case-in-chief, petitioner reiterated his desire to testify, but Mullane told petitioner that his testimony was not needed because the State had no case. Petitioner never testified and he did not voice his objection to the trial judge or to the second and third chair defense attorneys appointed to represent him.

¶49 On cross-examination, petitioner acknowledged that his testimony at the hearing contained many details that were omitted from the affidavit he submitted in support of his post-

conviction petition. In his affidavit, petitioner did not allege that Agent Hwang advised him to say that he committed the murders in self-defense or that Detective Brownfield initially introduced himself as an ASA. The affidavit also failed to include allegations that the detectives stepped on petitioner's feet, squeezed his testicles, chipped his tooth, provided him with details of the crime, or that they ordered him to plead self-defense. When asked to explain these inconsistencies, petitioner explained his affidavit was merely a "basic summary of everything that went down," rather than a detailed account of the events that occurred. Petitioner confirmed that all of the abuse occurred at the Illinois State Police Headquarters and that he was never beaten at Area 2. Petitioner also admitted that he never informed the trial judge of the purported abuse when he made his statement in allocution prior to receiving his sentence even though he was facing the death penalty and that he thanked his attorneys for their efforts when he addressed the court.

¶50 On cross-examination, petitioner also acknowledged that he knew Jay Mosqueda and that Mosqueda was member of a rival gang. Specifically, petitioner indicated that Mosqueda was a member of the King Cobra street gang and that he had been a member of the Vice Lords street gang. Petitioner indicated, however, that he was an "inactive" member of the Vice Lords at the time of Mosqueda's murder because he was enrolled in Columbia College and was "trying to escape all that type of lifestyle."

¶51 Philip Mullane, petitioner's trial attorney, testified that he was employed by the Cook County Public Defender's Office and was the supervisor of the Murder Task Force when he began to represent petitioner in November 1990. Mullane explained that had known petitioner

since he was born because their mothers lived two doors away from each other and petitioner's older brother was best friends with Mullane's youngest brother. Given their familiarity, when Mullane's brother called him to tell him that petitioner had been arrested for a double homicide, Mullane spoke to his boss and volunteered to represent petitioner. Mullane subsequently recruited several other public defenders to assist him with petitioner's case.

¶52 In November 1990, Mullane indicated that he was aware of the allegations of abuse that were said to occur at Area 2 as well as the Goldston Report that documented investigations into Area 2 "and the group of beaters there." When Mullane commenced his representation of petitioner, he issued subpoenas to obtain any records pertaining to petitioner's arrest. In response, Mullane obtained a report completed by the Frankfort Emergency Medical Technician (EMT) that showed that petitioner was under the influence of drugs when he was arrested. The report, however, did not document the existence of any physical injuries on petitioner's person. Mullane found the report significant in that it showed him that petitioner "was not in his right mind" at the time of his arrest and initial incarceration and provided an explanation for petitioner's bizarre behavior. Mullane also received documentation of the statements that petitioner had made to Chicago detectives and ASA Gerhardstein.

¶53 Mullane indicated that he had several conversations with petitioner about the statements he made as well as the circumstances surrounding his arrest. Initially, petitioner acknowledged making the inculpatory statements, but simply shrugged his shoulders when Mullane asked him why he had done so. Petitioner also indicated that he did not have a clear memory of the events that transpired following his arrest because he had ingested PCP and "was out of it." Because he

was well aware of the investigations that had been done into the treatment of prisoners at Area 2 and had knowledge of the tactics rumored to occur there, Mullane asked petitioner about his interactions with the Area 2 detectives to whom he had confessed. Specifically, Mullane asked petitioner whether they had put a bag or typewriter cover over his head, used a cattle prod on him, or hit him with a telephone book, but petitioner denied that he had been abused in any of those ways. When Mullane asked petitioner whether the detectives hit him, petitioner replied that he had been hit on the back of his head. When Mullane asked for more details, petitioner explained that when he was left alone in the interview room for long periods of time, he would put his head down to rest and that the detectives "swatted" him on the back of the head on two occasions when they reentered the room to "wake him up" and reinitiate conversation with him.

¶54 During the time that he represented petitioner, Mullane testified that petitioner never informed him that Detective Brownfield initially introduced himself as an ASA or that either of the detectives backhanded him across the face, boxed his ears, stomped on his feet, kicked his shins, or grabbed his testicles. Petitioner also never made any complaints to Mullane about his treatment by ASA Gerhardstein and did not tell Mullane that ASA Gerhardstein had written out a statement before speaking to him. Mullane also denied that petitioner ever informed him that he had intentionally misspelled his name on the statement because it was not true or that Steve Rymus had been abused by Area 2 personnel and had been asked to incriminate petitioner.

¶55 Mullane acknowledged, however, that he had filed a number of motions on petitioner's behalf including motions to quash his arrest and suppress his statement. With respect to the motion to suppress, Mullane testified that he argued that petitioner's statement was involuntary

because he was under the influence of drugs. Mullane indicated that based on the E.M.T. reports, hospital reports and observations of the Frankfort State Police, there was "no dispute" that petitioner had been high at the time of his arrest. Mullane explained that he believed his best strategy to succeed on the motion to suppress was to argue that petitioner did not have the capability to knowingly and voluntarily waive his *Miranda* rights and make a statement given the clear evidence that he was under the influence of drugs. Mullane spoke to petitioner on a number of occasions about his theory underlying the motion to suppress and told petitioner that there was no reason for him to testify at the suppression hearing. Mullane explained that because the theory behind the motion to suppress was that petitioner was under the influence of drugs and was "out of it" at the time he was arrested and gave his statement, any coherent testimony by petitioner at the suppression hearing that demonstrated that he could recount the chronological order of the events that occurred at the time of his arrest or statement would "undercut our whole plan." Petitioner understood and agreed with Mullane's strategy and never made any demand to testify at the suppression hearing. When the motion was denied and the cause proceeded to trial, Mullane conversed with petitioner on about 20 to 30 occasions about trial strategy. Specifically, they conversed about advancing a self-defense theory because petitioner's statement indicated that he shot the victims when they attempted to run him down in a car. Based on the ruling at the suppression hearing, the statement would be entered into evidence, and Mullane believed that self-defense was the best strategy to pursue. Mullane also spoke to members of petitioner's family about a self-defense strategy. Because they would be advancing a legal defense, Mullane advised petitioner to proceed by way of a bench trial because it "easier to educate one man, a

Judge, a lawyer, than it would be 12 citizens" in a jury trial. Petitioner agreed.

¶56 Prior to trial, Mullane and his team canvassed the neighborhood where the double-murder occurred and talked to people who lived in the area to see if they had seen or heard anything at the time of the crime. He learned that petitioner's family was also doing the same thing, so he gave the family members some of his business cards and instructed them to tell any potential witnesses to call him. During the trial, Mullane was optimistic because several of the State's witnesses, including Luedtke, the State's key witness, were impeached. As a result, Mullane did not believe it was necessary for petitioner to testify and explained that to him, but reiterated that it was ultimately petitioner's decision whether or not he wanted to testify. Petitioner elected not to testify and did not voice any complaint about Mullane's representation.

¶57 On cross-examination, Mullane acknowledged that his testimony was based solely on his memory. He explained that he had created a file during the course of his representation of defendant, but indicated that the Public Defender's Office had not been able to locate petitioner's file. Mullane confirmed that it was well-known in 1990 and 1991 in the Public Defender's Office that abuse was rumored to have been systematically committed by Area 2 detectives in the 1970's and 1980's and that Detective John Yucaitis was "one [member] of the group of beaters." Because he knew of these rumors, Mullane tried to ascertain whether petitioner suffered abuse and asked him specific questions about his treatment by the Area 2 detectives. Although he asked petitioner if he had been hit, Mullane acknowledged that he did not specifically ask petitioner if the detectives had grabbed his testicles, boxed his ears or pulled his hair. Moreover, although Mullane primarily sought to suppress petitioner's statement on the basis that petitioner

was under the influence of narcotics at the time it was given, he nonetheless acknowledged that he included a claim in the motion to suppress that argued that the statement was obtained as a result of physical coercion. Mullane explained that he did so because he "felt that the 2 hits in the [back of] the head [that petitioner had reported] were sufficient to let [him] in good faith file [that claim.]"

¶58 Mullane also confirmed that when he began representing petitioner, he had issued subpoenas to obtain (Office of Professional Standards) O.P.S. files pertaining to Yucaitis and Brownfield. He explained that he did so because he was aware of the Area 2 abuse allegations and knew that specific allegations had been made against Detective Yucaitis by other defendants. In addition, it was standard operating procedure at the time to subpoena O.P.S. files when "anyone in Area 2" was involved in an investigation.

¶59 Peter Hwang testified that on November 15, 1990, he was working as a narcotics investigator for the Illinois State Police. On that date, he received a call to go to the Frankfort police station to interview four men including petitioner and William Luedtke. During his conversation with Luedtke, Agent Hwang learned that petitioner had told Luedtke that he was responsible for a recent double homicide in Chicago. Hwang then contacted the Chicago Police Department and spoke with Sergeant Cage at Area 2. Sergeant Cage confirmed that there had been a recent double homicide in Chicago and that investigators were looking for a suspect named Robert Ornelas. During his conversation with Sergeant Cage, Hwang did not learn any specifics about the double murder; rather, he simply verified that a double murder had occurred. Sergeant Cage informed Hwang that two Chicago detectives would be coming down to talk to

petitioner. Agent Hwang then transported petitioner to Illinois State Police District 5 Headquarters, which was where his office was located, placed petitioner in an interview room and waited for the detectives to arrive. The interview room had a window and faced the front desk. Hwang specified that the blinds on the window remained open at all times. During the drive over to his office, Hwang never told petitioner to plead self-defense.

¶60 Detectives Yucaitis and Brownfield arrived at approximately 3 p.m. Agent Hwang introduced himself to the detectives and brought them to the interview room where petitioner was sitting. Hwang was present when the detectives introduced themselves to petitioner and did not hear Detective Brownfield tell petitioner that he was an ASA. Because petitioner was in his custody, Hwang remained in the room with petitioner when the detectives began questioning him. Hwang never saw the detectives hit the back of petitioner's head, box petitioner's ears, strike petitioner in his jaw, step on his feet, kick petitioner's shins, hit petitioner in the ribs, pull his hair or squeeze his testicles. Moreover, Hwang never heard Detectives Yucaitis or Brownfield provide petitioner with details of the crime, threaten him to confess, or urge him to plead self-defense. During this initial encounter, petitioner provided the detectives with an alibi statement, but it was not recorded. After hearing petitioner's alibi, Agent Hwang and the detectives left petitioner in the interview room in the custody of the trooper sitting at the front desk of the police headquarters and traveled to the Will County Jail.

¶61 When they arrived at the Will County Jail, Agent Hwang and the detectives spoke to Luedtke. One of the detectives recorded Luedkte's statement and the three men returned to speak with petitioner at District 5 Headquarters. They informed petitioner that they spoke to Luedkte

and "found out what happened." They did not, however, tell the petitioner the specific details of Luedtke's statement. In response, petitioner acknowledged that he committed the double murder and indicated that he had done so in self-defense. Hwang asked petitioner to provide a written statement and petitioner assented to Hwang's request. Hwang then transcribed petitioner's statement and gave it to petitioner to read, initial and sign. Hwang indicated never left the detectives alone with petitioner prior to taking petitioner's statement and he denied that the detectives threatened or physically abused petitioner in any way. After signing his written statement, petitioner was released into the custody of Detectives Yucaitis and Brownfield.

¶62 On cross-examination, Hwang acknowledged that the events occurred approximately 18 years ago and he did not remember every detail concerning petitioner's arrest, questioning, *Miranda* rights waiver, and statement. Hwang also acknowledged that petitioner did not sign his name on the signature line provided at the end of the written statement. Instead, petitioner placed his initials directly after the last sentence of the statement.

¶63 Mike Gerhardstein testified that in November 1990 he was working as an ASA in the State's Attorney's Office felony review unit. As a member of that unit, one of Gerhardstein's responsibilities was to take statements from defendants. On November 15, 1990, Gerhardstein received a call to respond to Area 2. At that time, petitioner was in custody and was a suspect in the November 11, 1990, murder of Jay Mosqueda and Robert Cheeks. Once he arrived at Area 2, ASA Gerhardstein conversed with Detectives Yucaitis and Brownfield and reviewed documents in their possession, including the police report and the statement that petitioner had provided to Agent Hwang. ASA Gerhardstein and Detective Brownfield then went into the interview room

to converse with petitioner. At the time that he entered the interview room, ASA Gerhardstein denied that he had a pre-written statement detailing petitioner's involvement in the double murder that he wanted petitioner to sign. Instead, ASA Gerhardstein testified that he read petitioner his *Miranda* rights and that petitioner agreed to speak with him. After hearing petitioner's account of the murders, Gerhardstein left petitioner in the interview room for approximately 30 minutes while he transcribed petitioner's statement. All of the details in the written statement were provided to ASA Gerhardstein by petitioner. Gerhardstein recalled that he inquired whether petitioner had been treated well by the police and petitioner indicated that the officers had treated him well. He confirmed that Detective Brownfield was present the entire time that petitioner relayed his statement. After ASA Gerhardstein transcribed petitioner's statement, he read the statement to petitioner. Certain corrections were made, and petitioner signed the statement.

¶64 Steven Brownfield testified that in November 1990, he was a Chicago Police Detective assigned to Area 2 Violent Crimes. On November 15, 1990, Detective Brownfield and his partner, Detective John Yucaitis, received an assignment to interview petitioner, who was a person of interest in a recent double homicide. Detective Brownfield and his partner drove to Joliet where petitioner was being held, and met with Agent Hwang. When they went in to speak with petitioner, Detective Brownfield told petitioner that he and his partner were detectives from Chicago. He did not identify himself as an ASA. Detective Brownfield then read petitioner his rights and petitioner indicated that he understood those rights.

¶65 In response to questions about his whereabouts on the night of the murders, petitioner initially told them that he was partying with some girls in Chicago Heights, but he was unable to

provide any names or phone numbers of the persons with whom he was with. After hearing petitioner's alibi statement, Detective Brownfield, Detective Yucaitis, and Agent Hwang went to the Will County Jail to interview William Luedtke. When they arrived, Luedtke agreed to permit Detective Yucaitis to transcribe a written statement detailing Luedtke's knowledge of petitioner's involvement in the double murder. Detectives Brownfield and Yucaitis, Investigator Hwang, and Luedtke all signed the statement. They then returned to the Illinois State Police Headquarters to talk to petitioner once more. Detective Brownfield told petitioner that they had just spoken to Luedtke and that he had just implicated petitioner in the double murder of Cheeks and Mosqueda. In response, petitioner initially paused. He then responded that he had shot them in self-defense because they were going to run him over with a car. Agent Hwang recorded petitioner's statement. Nobody told petitioner what to say or forced petitioner to sign or initial the statement.

¶66 Detectives Brownfield and Yucaitis then took petitioner into their custody and drove him to Area 2. During the drive, neither Brownfield nor Yucaitis instructed petitioner to tell the ASA that he shot Mosqueda and Cheeks in self-defense or threatened to beat him if he failed to do so. Once they arrived back at Area 2, Detective Brownfield contacted the Cook County State's Attorney's Office Felony Review Unit and ASA Gerhardstein responded to his call. When ASA Gerhardstein arrived, Detectives Brownfield and Yucaitis apprised him of the case. Detective Brownfield then took ASA Gerhardstein to meet with petitioner and he remained in the room while petitioner made a statement to Gerhardstein. ASA Gerhardstein then prepared a written statement, which petitioner signed. Petitoner also made several corrections to the statement.

Nobody forced petitioner to sign the statement.

¶67 Detective Brownfield denied that he or his partner ever physically abused petitioner. Specifically, he denied that either one of them had punched petitioner, boxed his ears, pulled petitioner's hair, stepped on his feet, or squeezed his testicles. Detective Brownfield also denied that he or his partner ever threatened petitioner with the death penalty or instructed petitioner to claim self-defense.

¶68 On cross-examination, Detective Brownfield acknowledged that he worked with Lieutenant Jon Burge for approximately four or five months in 1986 and that Detective Yucaitis had been his partner since December 1987. During his tenure as an Area 2 Violent Crimes Detective, Brownfield denied that he had ever beaten a suspect in his custody. Moreover, Detective Brownfield never observed Detective Yucaitis beat a suspect in his custody during their partnership. Detective Brownfield acknowledged that he received a subpoena in 2004 to testify before a grand jury about the alleged systematic abuse that occurred at Area 2 and that he invoked the Fifth Amendment in response to questions posed to him before the grand jury. He indicated that he "took the Fifth *** on the advise [*sic*] of [his] attorney."

¶69 After presenting live testimony, the parties stipulated to various exhibits pertaining to prior investigations into Area 2 abuse allegations.

¶70 After reviewing the evidence, the trial court entered a detailed written order dismissing petitioner's post-conviction petition. In doing so, the court found that "petitioner's recollection of the facts regarding his conversations with his attorney and the circumstances surrounding his confession is not credible since it is not corroborated by other witnesses or evidence." In so

finding, the court noted that all of the alleged abuse occurred when petitioner was at District 5, not Area 2. Agent Hwang testified that petitioner was never left alone with either of the detectives while he was in Hwang's custody and that the conversations between petitioner and the detectives took place in an interview room with a window that faced the front desk. Moreover, although petitioner claimed that ASA Gerhardstein arrived to talk to him with a pre-written statement, the court found it significant that the statement contained details that were not present in the police report, including the name of petitioner's high school and the fact that he walked to a friend's house in Whiting, Indiana, after the shooting.

¶71 Although petitioner testified that he told his attorney that he was physically abused by Detectives Brownfield and Yucaitis, the court found Attorney Phil Mullane's evidentiary hearing testimony to be "more credible." The court further found that Mullane's trial strategy was "perfectly reasonable." Specifically, the court observed: "Mullane conceded that petitioner told him that he was hit twice in the back of the head so that he would wake up but also remembered that petitioner denied any other abuse. Because very little evidence existed which sustained an augment [*sic*] that petitioner was physically and mentally abused, it was not unreasonable for petitioner's attorney to focus more of his argument on the fact that his statements should be suppressed based on the fact that petitioner was under the influence of drugs when he made them." With respect to petitioner's allegation that Mullane should have called Steve and Mary Rymus to testify about Area 2 abuse, the court found that it was "difficult to believe petitioner's claim that he told Mullane to call either as a witness since Rymus testified that he never told petitioner that he was abused by Yucaitis or Brownfield." The court similarly rejected

defendant's contention that trial counsel should have called witnesses identified in the Goldston Report because petitioner's account of abuse differed from the type of abuse identified in the Report. Ultimately, the court concluded that petitioner "failed to identify ineffective assistance" of trial counsel. Because trial counsel was not ineffective, the court also concluded that appellate counsel was not ineffective for challenging trial counsel's representation on appeal.

¶72 This appeal followed.

¶73 ANALYSIS

¶74 On appeal, petitioner argues that the trial court's findings that his claims of physical coercion and abuse were uncorroborated and that trial counsel and appellate counsel were not ineffective were manifestly erroneous. Specifically, petitioner asserts that "[t]he trial court ignored the voluminous evidence attached to the post-conviction petition that proved Detective Yucaitis was a notorious Area 2 detective found to have taken part in the systemic abuse at Area 2." Because petitioner presented relevant evidence to support his claim of abuse, he argues that trial counsel was ineffective for failing to seek suppression of his statement on the basis of physical coercion and that appellate counsel was ineffective for failing to challenge trial counsel's representation on appeal. Accordingly, the trial court erred in dismissing his petition for post-conviction relief.

¶75 The State initially responds that petitioner has forfeited post-conviction review of his ineffective assistance of trial counsel claim because this argument could have been raised and addressed on direct appeal. On the merits, the State argues that petitioner "made only bald allegations of abuse, without any credible corroboration" and that trial counsel's decision to focus

his efforts in suppressing petitioner's statement on the basis of petitioner's well-documented intoxicated state did not amount to ineffective assistance of counsel. Because trial counsel made a reasonable strategic decision, appellate counsel's failure to challenge trial counsel's strategy on appeal was similarly not ineffective.

¶76 The Act provides a means by which a person may challenge his criminal conviction and assert that the conviction resulted from the substantial denial of his constitutional rights. 725 ILCS 5/122-1 *et seq.* (West 2006); *People v. Petrenko*, 237 Ill. 2d 490, 495-96 (2010). Accordingly, " '[t]he function of a post-conviction proceeding is not to relitigate the defendant's guilt or innocence but to determine whether he was denied constitutional rights.' " *People v. Thompkins*, 161 Ill. 2d 148, 151 (1994), quoting *People v. Shaw*, 49 Ill. 2d 309, 311 (1971). Because a post-conviction proceeding is a collateral attack on a defendant's conviction and sentence, the rules of waiver and *res judicata* apply. *People v. West*, 187 Ill. 2d 418, 425 (1999). Due to "considerations of *res judicata* and waiver, the scope of post-conviction review is limited 'to constitutional matters which have not been, and could not have been, previously adjudicated.' " *Thompkins*, 161 Ill. 2d at 151, quoting *People v. Winsett*, 153 Ill. 2d 335, 346 (1992).

¶77 The Act contemplates a three-stage process for cases that do not involve the death penalty. *People v. Jones*, 213 Ill. 2d 498, 503 (2004). Proceedings under the Act are commenced by the filing of a petition in the trial court that contains the allegations pertaining to the substantial denial of the defendant's constitutional rights. *Id.* At the first stage, the trial court must, within 90 days, review the petition and determine whether the allegations, if taken as true, demonstrate a constitutional violation or whether they are "frivolous" or "patently without

merit." 725 ILCS 5/122-2.1(a)(2) (West 2008); *People v. Perkins*, 229 Ill. 2d 34, 42 (2007). The defendant must attach affidavits, records or other allegations to support the claims contained within the petition or explain the reason for the absence of such evidence. 725 ILCS 5/122-2 (West 2008). At the first stage, the focus is on whether the petition sets forth a "gist" of a constitutional claim. *People v. Boclair*, 202 Ill. 2d 89, 99-100 (2002). If the court determines that the defendant satisfied the minimum pleading threshold, then the petition will be placed on the docket for second-stage proceedings. 725 ILCS 5/122-2.1(b) (West 2008). At the second stage, a defendant, if indigent, is entitled to counsel, and the State is permitted to file an answer or a motion to dismiss the defendant's petition for post conviction relief. 725 ILCS 5/122-2.1(b) (West 2008); *People v. Edwards*, 197 Ill. 2d 239, 245-46 (2001). During this stage, the trial court reviews the petition and any accompanying documentation supporting the allegations contained therein to determine whether the defendant made a "substantial showing" that a constitutional violation occurred. *Edwards*, 197 Ill. 2d at 246. Credibility determinations are not made at the second-stage of post-conviction review. *People v. Childress*, 191 Ill. 2d 168, 174 (2000). If the defendant fails to make a substantial showing of a constitutional violation the petition will be dismissed. *Edwards*, 197 Ill. 2d at 246. If, however, the defendant satisfies the substantial showing requirement, the petition will be advanced to the third stage of post-conviction review where the trial court will preside over an evidentiary hearing on the petition and may make fact-finding and credibility determinations. 725 ILCS 5/122-6 (West 2008); *Childress*, 191 Ill. 2d at 174. In order to make these findings, the Act provides that the circuit court "may receive proof by affidavits, depositions, oral testimony or other evidence" and "may

order the defendant brought before the court." 725 ILCS 5/122-6 (West 2008). Where, as here, the trial court presides over an evidentiary hearing involving fact-finding and credibility determinations, the trial court's ruling will not be disturbed unless its decision is manifestly erroneous. *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006); *People v. English*, 403 Ill. App. 3d 121, 129 (2010). Manifest error is error that is " 'clearly evident, plain, and indisputable.' " *People v. Johnson*, 206 Ill. 2d 348, 360, (2002), quoting *People v. Ruiz*, 177 Ill. 2d 368, 384-85 (1997).

¶78 Initially, we agree with the State that petitioner could have raised his ineffective assistance of trial counsel claim on direct appeal. As we stated above, principles of *res judicata* and forfeiture apply to post-conviction proceedings. *West*, 187 Ill. 2d at 425; *People v. Johnson*, 2011 Ill. App. (1st) 092817, ¶69. Here, allegations of Area 2 abuse were well-known at the time of petitioner's suppression hearing and trial and the exhibits attached to petitioner's exhibit pre-date his conviction. Accordingly, the evidence petitioner relies on to support his claims was available at the time of his trial and could have been raised on direct appeal. Ordinarily, in such a case, a petitioner's failure to challenge the effectiveness of trial counsel on direct appeal would result in forfeiture of this argument at the post-conviction stage. *West*, 187 Ill. 2d at 425. However, where as here, the petitioner argues that the forfeiture of his post-conviction claim resulted from the incompetence of appellate counsel, adherence to these principles will be relaxed. *People v. Blair*, 215 Ill. 2d 427, 450-51 (2005). Accordingly, we turn now to petitioner's ineffective assistance of trial counsel claim.

¶79 Every criminal defendant has a constitutional right to receive effective assistance of

counsel. U.S. Const., amends. VI, XIV; Ill. Const. 1970, art. I § 8; *Strickland v. Washington*, 466 U.S. 668, 685, 104 S.Ct. 2052, 2063, 80 L. Ed. 2d 674, 691-92 (1984). To prevail on a claim of ineffective assistance of counsel, the defendant must satisfy the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed. 2d 674 (1984) and establish that: (1) counsel's performance fell below an objective standard of reasonableness, and (2) counsel's deficient performance prejudiced defendant. *People v. Albanese*, 104 Ill. 2d 504, 525 (1984); *People v. Baines*, 399 Ill. App. 3d 881, 887 (2010). With respect to the first prong, the defendant must overcome the "strong presumption" that counsel's action or inaction was the result of sound trial strategy. *People v. Jackson*, 205 Ill. 2d 257, 259 (2001). Counsel's performance is assessed by using an objective standard of competent performance under the prevailing professional norms. *People v. Ramsey*, 239 Ill. 2d 342 (2010). To satisfy the second prong, the defendant must establish that, but for, counsel's unprofessional errors, there is a reasonable probability that the trial court proceeding would have been different. *People v. Peeples*, 205 Ill. 2d 480, 513 (2002). A reasonable probability that the trial result would have differed is "a probability sufficient to undermine confidence in the outcome-or put another way, that counsel's deficient performance rendered the result of the trial unreliable or fundamentally unfair." *People v. Evans*, 209 Ill. 2d 194, 220 (2004). A defendant must satisfy both the performance and prejudice prongs of the *Strickland* test to prevail on an ineffective assistance of counsel claim (*Evans*, 209 Ill. 2d at 220; *People v. McCarter*, 385 Ill. App. 3d 919, 935 (2008)) and claims alleging ineffective assistance of appellate counsel are determined under the same standards applicable to ineffective assistance of trial counsel claims (*People v. Pitsonbarger*, 205

Ill. 2d 444, 465 (2002); *Edwards*, 195 Ill. 2d at 163).

¶80 As a general rule, decisions that counsel makes pertaining to trial strategy following a thorough investigation of the relevant law and facts are " 'virtually unchallengeable.' " *Thompkins*, 161 Ill. 2d at 160, quoting *Strickland*, 466 U.S. at 690-91. More specifically, counsel's decision whether or not to present a particular witness falls within the realm of trial strategy, and accordingly, that decision will generally not support an ineffective assistance of counsel claim. *People v. Flores*, 128 Ill. 2d 66, 85-86 (1989); *People v. Arroyo*, 339 Ill. App. 3d 137, 155 (2003). Similarly, counsel's decision to pursue a specific defense theory also falls within the realm of trial strategy and is also generally unchallengeable. *People v. McGhee*, 2012 WL 222840 (1st) ¶36; *People v. Humphries*, 257 Ill. App. 3d 1034, 1045 (1994). Counsel, however, may be deemed ineffective in certain circumstances for failing to present exculpatory evidence of which he was aware, including failing to call witnesses whose testimony would support an otherwise uncorroborated defense. *People v. Broughton*, 344 Ill. App. 3d 232, 238 (2003).

¶81 The abuse that occurred at Area 2 in the 1970's and 1980's under the tenure of Lieutenant Jon Burge to coerce confessions is now well-known and well-documented, and our supreme court has held that the substantive use of a defendant's physically coerced statement is never harmless. *People v. Wrice*, 2012 IL 111860 (2012), ¶ 71. However, a defendant must present more than "bare allegations" of abuse to support a claim that his trial counsel was ineffective for failing to suppress the defendant's statement on the basis of police coercion. *Johnson*, 2011 IL. App. (1st) 092817, ¶ 76; see also *People v. Deloney*, 341 Ill. App. 3d 621, 629 (2003). Rather,

the defendant must provide relevant corroborating evidence of abuse to support his ineffective assistance of counsel claim. See *People v. Orange*, 168 Ill. 2d at 153-54 (1995).

¶82 Here, petitioner testified that he suffered a multitude of abuse at the hands of Detectives Brownfield and Yucaitis. Specifically, he indicated that the detectives boxed his ears, hit his head, squeezed his testicles, backhanded him and stepped on his feet. Petitioner further indicated that he relayed the details of his abuse to trial counsel Phil Mullane and expressed his desire to testify about the coercion at the hearing on his motion to suppress and at trial.

¶83 Trial counsel Mullane, in contrast, testified that petitioner did not relay these allegations of abuse to him. At the hearing, Mullane testified that he, like every other Public Defender in his office, was aware of past Area 2 abuse. Accordingly, he asked petitioner about his treatment by Area 2 Detectives Brownfield and Yucaitis. In response, petitioner shrugged. Mullane then made more specific inquiries and asked whether petitioner suffered the types of abuse that had been known to occur at Area 2. Specifically, Mullane queried whether the detectives had put a bag or typewriter cover over petitioner's head, used a cattle prod on him, or hit him with a telephone book. Petitioner denied that any such abuse had occurred and indicated that the detectives merely "swatted" him in the back of the head on two occasions to "wake him up" and reinitiate conversation with him. Petitioner's denial that he suffered substantial physical abuse was supported by documentation completed at the time of his arrest. Mullane explained that the neither petitioner's E.M.T. report nor his "bruise sheet" contained any evidence that petitioner had been physically abused.

¶84 In contrast, Mullane explained that there was evidence that petitioner was under the

influence of narcotics at the time of his arrest and confession. Although petitioner maintains on appeal that "there was no evidence to support" a claim that he was intoxicated, Mullane testified that petitioner informed him that he had ingested PCP and "was out of it" at the time of his arrest. Mullane indicated that the E.M.T report substantiated petitioner's claim and showed that petitioner was, in fact, under the influence of drugs at the time of his arrest. Moreover, the erratic behavior that petitioner exhibited, which included identifying himself as Jesus Christ and Joe Montana and absolving Frankfort police officers of their sins provided further evidence of petitioner's impaired, intoxicated state.

¶85 Mullane acknowledged that he included a brief claim in the motion to suppress that petitioner's confession was the result of physical coercion and that he subpoenaed records O.P.S. pertaining to Detective Yucaitis. Mullane explained that he believed petitioner's claim that he was "smacked" twice on the head provided a basis for the abuse allegation; however, he did not believe it to be his best tactic to pursue to prevail on the motion to suppress. Moreover, he indicated that the subpoena of O.P.S. reports was standard operating procedure when "anyone in Area 2" was involved in an investigation. When the State moved to quash the subpoena, the court reviewed the records in camera and determined that they were not relevant to petitioner's claim he had been slapped upside the head.

¶86 Based on the lack of evidence that petitioner's confession was the result of physical coercion and the multitude of evidence that petitioner's interactions with Detectives Brownfield and Yucaitis transpired when he was intoxicated, Mullane explained that he made a strategic decision to seek suppression of petitioner's statements primarily on the basis of petitioner's

impaired state and his inability to knowingly waive his *Miranda* rights.

¶87 At the evidentiary hearing, Agent Hwang and ASA Gerhardstein provided additional support to Mullane's conclusion regarding the lack of evidence available to obtain suppression of petitioner's confession on the basis of abuse. Both men testified that they neither observed any abuse take place nor observed signs of abuse on petitioner's person. Nonetheless, despite that lack of physical or testimonial evidence that petitioner was physically coerced to confess to the murders of Mosqueda and Cheeks, petitioner nonetheless argues that Mullane could have called witnesses and presented documentary evidence of other cases of coercion to establish a general pattern of police brutality at Area 2. Petitioner claims such evidence would have corroborated and strengthened his claim of abuse and that trial counsel Mullane was ineffective for failing to do so.

¶88 We disagree. For the most part, the majority of the documentary evidence that petitioner relies on involve investigations into claims of claims of abuse that occurred years before his purported abuse. Moreover, they involve different types of abuse. For example, the Goldston Report investigated incidents of abuse that occurred from May 1973 to October 1986. The specific types of abuse investigated included shockings, baggings, hangings, and use of a firearm to beat or threaten the victim. Such evidence would not have been relevant to petitioner's claims of abuse. See *People v. Patterson*, 192 Ill. 2d 93, 115 (2000) (holding that evidence of prior police brutality is irrelevant where the allegations of brutality is not strikingly similar to the defendant's claims of abuse and where the prior abuse happened years before the abuse inflicted on the defendant). Counsel cannot be deemed ineffective for failing to introduce such evidence

or for failing to call as witnesses, some of the victims identified in the Goldston Report such as Ronald Weis or Lavert Jones because they were irrelevant to petitioner's claims. *Id*. at 119. We similarly reject petitioner's argument that counsel was ineffective for failing to call Steve and Mary Rymus as witnesses. We acknowledge that the purported abuse inflicted on Steve Rymus occurred in close temporal proximity to petitioner's purported abuse and involved a similar type of abuse. However, although petitioner indicates he was aware of Rymus' victimization at the hands of Area 2 police officers and that he relayed this information to trial attorney Mullane, Rymus testified that he never told defendant or Mullane about his experience until shortly before the evidentiary hearing on petitioner's post-conviction petition. Mullane confirmed that he was unaware of Rymus' experience at Area 2 at the suppression hearing and at trial. Trial counsel cannot be ineffective for failing to call a witness of whom he was unaware.

¶89 Ultimately, based on the lack of corroborating evidence that petitioner's confession was the product of police coercion, Mullane made the tactical decision to seek suppression of the statement on the basis of petitioner's impaired state at the time of his arrest and statement. The trial court found that Mullane's strategy was "not unreasonable." Based on the record, which does not contain any meaningful relevant evidence to support petitioner's claim of abuse, we conclude that the trial court's finding that Mullane's suppression strategy was not unreasonable was not manifestly erroneous. See, *e.g*., *Orange*, 168 Ill. 2d at 145 (petitioner's post-conviction claim that counsel was ineffective for failing to seek suppression of his statement on the basis that it was a product of police brutality was without merit where there was no corroborating evidence to support the petitioner's claim); *Johnson*, 2011 IL. App. (1st) 092817, ¶76 (finding the

petitioner's claim that trial counsel was ineffective for failing to investigate and provide evidence to corroborate the petitioner's abuse was without merit where the only evidence to support the petitioner's claim was the petitioner's own "bare allegations" of abuse); *Deloney*, 341 Ill. App 3d at 628-29 (the petitioner's post-conviction claim that his statement was the product of police coercion was without merit where there were merely "bald allegations of abuse" and the documents he relied on to support his claim and show a general pattern of abuse and brutality by the police were not conclusive or relevant to the petitioner's specific abuse claims).

¶90 Even if Mullane's strategy could be deemed unreasonable and outside of the scope of professional standards, petitioner's ineffective assistance of counsel claim would nonetheless fail because he cannot establish that he was prejudiced by Mullane's strategy. To satisfy the prejudice prong of the *Strickland* test based on counsel's performance on a motion to suppress, a defendant must show that but for counsel's unreasonable strategy, the motion to suppress would have been granted and the trial result would have differed if the evidence had been suppressed. Here, given the fact that there was no meaningful corroboration of petitioner's claim of abuse, it is unlikely that a motion to suppress based on petitioner's claim of abuse would have been successful. See, *e.g.*, *Orange*, 168 Ill. 2d at 153-54 (rejecting the petitioner's ineffective assistance of counsel claim based on counsel's failure to seek suppression of his statement on the basis of physical coercion because the petitioner could not meet the prejudice prong of the *Strickland* test where there was no evidence that a motion to suppress on physical coercion grounds would have been granted).

¶91 We similarly hold that the trial court's finding that appellate counsel was not ineffective

was not manifestly erroneous. To succeed on such a claim, a defendant must show that appellate counsel's failure to raise a particular issue was objectively unreasonable and that his appeal was prejudiced by appellate counsel's omission. *People v. Williams*, 209 Ill. 2d 227, 243 (2004). Here, given petitioner's inability to meet the *Strickland* standard to establish ineffective assistance of trial counsel, his argument that appellate counsel was ineffective for failing to raise this non-meritorious issue on appeal is similarly without merit. See *People v. Lacy*, 407 Ill. App. 3d 442, 462 (2011) ("[S]ince defendant's ineffective assistance of trial counsel claim fails, so too must his claim of ineffective assistance of appellate counsel").

¶92 CONCLUSION

¶93 Accordingly, for the aforementioned reasons, we affirm the judgment of the circuit court.

¶94 Affirmed.