FIRST DIVISION
January 28, 2013

No. 1-11-0341

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Respondent-Appellee,	)	Cook County.
	)	
v.	)	No. 96 CR 19080 (02)
	)	
DESHAWN GARDNER,	)	Honorable
	)	Mary Margaret Brosnahan,
Petitioner-Appellant.	)	Judge Presiding.

JUSTICE ROCHFORD delivered the judgment of the court.
Presiding Justice Hoffman and Justice Cunningham concurred in the judgment.

ORDER

¶ 1 *Held*: We reversed the second-stage dismissal of two of defendant's postconviction claims and remanded for a third-stage evidentiary hearing, where defendant made a substantial showing: (1) his trial counsel provided ineffective assistance for failing to investigate and prepare an alibi defense; and (2) the State violated his right to due process by presenting evidence that had been coerced by detectives. We affirmed the dismissal of a separate claim of ineffective assistance of counsel where defendant waived review by failing to make any argument on appeal for its reversal. We affirmed the dismissal of a claim of a *Brady* violation premised on the State's alleged failure to provide defendant with evidence of the detectives' alleged misconduct in other cases, where defendant conceded that the Illinois Supreme Court has considered and rejected this same argument.

¶ 2 Defendant, Deshawn Gardner, appeals the second-stage dismissal of his amended

supplemental postconviction petition. On appeal, defendant contends the postconviction court erred in dismissing his amended supplemental postconviction petition without an evidentiary hearing where it made a substantial showing that: (1) his trial counsel provided ineffective assistance for failing to investigate and prepare an alibi defense and for failing to prepare and present evidence regarding the *modus operandi* of Detectives Halloran and Boudreau, who were involved in this case, to coerce witnesses into giving false statements; (2) the State violated his right to due process by presenting coerced, involuntary statements of witnesses as evidence against him; and (3) the State withheld exculpatory evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). We affirm the dismissal of the *Brady* claim and the ineffective assistance claim with respect to the failure to present the *modus operandi* evidence. We reverse the dismissal of the due process claim and the ineffective assistance claim with respect to the failure to investigate and present alibi evidence, and remand for a third-stage evidentiary hearing thereon.

¶ 3 Defendant was charged with the murder of Steven Green (the victim), who died on January 24, 1994, of multiple injuries caused by blunt trauma. At the jury trial, Lance Robinson testified that at about 5 p.m. on January 23, 1994, he was present at a Black Disciples (BD) gang meeting held in apartment 1308 of the building at 4555 South Federal Street (the Building) in Chicago. Between 30 and 35 people were inside the apartment. Defendant, the highest ranking BD at the meeting, ordered the victim, who also was a BD, to stand in the middle of a circle formed by the other BDs in attendance. Defendant repeatedly asked the victim about his "work," meaning drugs. The victim denied knowing anything about the drugs, so defendant ordered the BDs to beat the victim with a wooden table leg or a baseball bat. The BDs struck the victim only at defendant's command.

¶ 4 On cross-examination, Mr. Robinson testified that one or two weeks after the victim's death, the police informed him that he could be charged as an accessory to murder. Initially, he claimed not to know anything, but after several hours of interrogation, he gave police a statement implicating defendant. He also listed nicknames of the BDs who were at the meeting and he agreed to testify before the grand jury. Police told Mr. Robinson he would be charged with perjury if his testimony at defendant's trial differed from his grand jury testimony.

¶ 5 Mr. Robinson further testified on cross-examination:

"Q. And you would tell them almost anything they wanted to hear so you would not be charged, is that right?

A. No.

Q. You'd say anything?

A. Yeah."

¶ 6 On re-direct examination, Mr. Robinson testified he was not testifying due to any threats, and that everything he had testified to was the truth.

¶ 7 Sheila Crosby testified that on January 23, 1994, she resided in apartment 1308 of the Building with her five children and her boyfriend, Eugene Bradford. On January 23, 1994, at about 5 or 6 p.m., she entered her apartment and saw a gang of men who she "suppose[d]" were members of the BDs. They forced her to stay in her bedroom, so she was unable to get a good look at the persons in her apartment. She heard a lot of mumbling, fussing, and crying, lasting for about 15 to 20 minutes. When she was allowed to leave the room, she saw that her furniture had been moved. She also saw the victim and two or three other men. The victim was "kind of hurt," but he was able

to walk out of the apartment with the other men. Before they left, a BD placed Mr. Bradford's jacket on the victim and left the victim's jacket in her apartment. No BDs came to her apartment to take any furniture. Ms. Crosby did not testify at trial that she saw defendant in her apartment.

¶ 8 Ms. Crosby testified that the following day, the police came to her apartment and discovered blood on her floors and walls. The police took her and Mr. Bradford to the police station. She did not supply the police with any names or nicknames of the people she had seen in her apartment.

¶ 9 Ms. Crosby was confronted with her grand jury testimony[1] in which she implicated defendant. At the grand jury, Ms. Crosby testified that at 5 or 6 p.m., on January 23, 1994, 25 to 30 BDs were in her apartment, including defendant, the victim, and her nephew Charles Stewart. One of the BDs forced her to stay in her bedroom, but because the door was not completely closed, she saw and heard what was happening in the living room. She heard defendant say that the victim would receive a "death violation" for stealing two ounces of cocaine. Ms. Crosby saw the victim inside a circle of BDs. He was being beaten with a baseball bat, with an old-fashioned wooden table leg that was two or three feet long with big lumps in it, and was being held in a "full nelson" as the BDs kicked and beat him with their fists. At one point, Ms. Crosby saw defendant strike the victim in the head with the table leg. Ms. Crosby testified that defendant and another member of the BDs

[1]Ms. Crosby's grand jury testimony was admitted as substantive evidence under section 115-10.1 of the Code of Criminal Procedure (Code) (725 ILCS 5/115-10.1 (West 1998)). Section 115-10.1 of the Code provides, in relevant part, that prior inconsistent statements are admissible as substantive evidence where the witness is subject to cross-examination concerning the statement and the statement was made under oath at a trial, hearing, or other proceeding; or the statement narrates, describes, or explains an event or condition of which the witness had personal knowledge, and the statement is proved to have been written or signed by the witness. 725 ILCS 5/115-10.1 (West 1998).

who was present in her apartment, J.D., were in charge of the victim's "death violation" and that defendant was the "minister of the ministers," meaning he "[laid] down laws" and was "the boss of the B.D.'s." After the beating was over, J.D. put Mr. Bradford's coat on the bloodied victim. J.D. told Ms. Crosby that Mr. Bradford would be deterred from talking about the beating, knowing that the victim's blood was now on his coat. About 15 minutes after everyone left her apartment, two BDs returned and took all of the items that had been used to beat the victim. Sometime after midnight, Troy Gardner, defendant's uncle, came to her apartment and told her that he had been sent to take her furniture and burn it because it contained the victim's blood. Ms. Crosby testified at the grand jury that her testimony was true and had not been made as the result of threats or promises.

¶ 10 At trial, Ms. Crosby testified she had been instructed as to what to say at the grand jury. She testified at trial that her grand jury testimony was a lie. She also denied telling anyone that she had been threatened by defendant the day after the beating. She then was confronted with her testimony of October 21, 1997, in the trial of Duvalle Walker where she testified that the day after the beating, a BD took her to a van in the Building's parking lot. Defendant was inside the van, and he told her that if she talked to the police, he would kill her and her five children.

¶ 11 Ms. Crosby stated at defendant's trial that she implicated defendant in her testimony at the grand jury and at Mr. Walker's trial because the police had held her "incommunicado" and apart from her family for about two days, during which "quite a few detectives" threatened to charge her as an accessory to the murder. Also, Detective McDonald threatened to take her children away from her.

¶ 12 Timothy McCoy testified under a grant of use immunity. Mr. McCoy testified he lived at the Building his entire life and he used to be a member of the BDs. Mr. McCoy left the BDs in 1990

or 1991, at age 16, after he was shot. He was not at the meeting in apartment 1308 on January 23, 1994, and did not witness the victim's beating. He knew defendant was a BD, but did not know his rank or nickname.

¶ 13 Mr. McCoy was shown a copy of a handwritten statement[2] dated March 25, 1999, implicating defendant in the victim's beating. The statement bore Mr. McCoy's signature on the bottom of each page. His signature also was on several photographs, including one of defendant, that were attached to the statement. Mr. McCoy denied making that statement and claimed the police had supplied all of the information in it and that the statement already was written when it was shown to him. Mr. McCoy testified that the police choked him in front of the Assistant State's Attorney (ASA), telling him that if he did not "agree to" the statement, they would send him to the hospital and to jail. He did not have any marks on him from the incident. Mr. McCoy identified the police officer who had choked him only as a "homicide" detective. Mr. McCoy testified he had been in the police station for two days, had not been allowed to call an attorney, was not given any food, and was handcuffed to a wall for hours. Mr. McCoy acknowledged his signature was next to several corrections throughout the statement, but stated he signed the corrections only when told to do so by the police.

¶ 14 ASA Jennifer Coleman testified that on March 24, 1999, Mr. McCoy told her that he had been treated well by the detectives and had been given food. Mr. McCoy agreed to give a statement, so she asked Detective Murray to enter the room to witness the statement. She told Mr. McCoy he could have a lawyer, but he did not want one. No one grabbed Mr. McCoy by the throat in front of

[2]Mr. McCoy's handwritten statement was admitted as substantive evidence under section 115-10.1 of the Code. 725 ILCS 5/115-10.1 (West 1998).

her and she did not supply Mr. McCoy with a fully written document. Rather, she wrote the statement in front of him as he provided answers to her questions. Mr. McCoy signed each page of the statement as well as the photographs attached to the statement. ASA Coleman read the entire statement aloud and Mr. McCoy made corrections and initialed the places where he made the changes.

¶ 15 ASA Coleman read relevant portions of the statement into the record. In his statement, Mr. McCoy stated he is a former BD and the BDs "ran" the three buildings at 4555 South Federal Street, 4500 South State, and 4525 South Federal Street, meaning that the BDs controlled all the illegal narcotics sales in the buildings. The BDs sold out of only one of the three buildings at a time, moving the operation to a different building when the police began to make a lot of arrests at a particular building. Defendant made the decisions and ran the operation, as he was a minister of the BDs and the highest ranking BD in the area. James Harris, also known as J.D., was a co-minister and reported directly to defendant.

¶ 16 On January 23, 1994, Mr. McCoy was an active BD and attended a meeting in apartment 1308 of the Building with 30 other BDs, including defendant and J.D. The meeting was held "in the early evening." The BDs formed a circle so that the leaders could stand inside and conduct the meeting. J.D. ordered several BDs to bring the victim to the meeting. A few minutes later, they returned with a man named Steve, but he was not the person J.D. and defendant wanted. Defendant then sent four men to find the victim. A few minutes later, they returned with him. When the victim arrived, J.D. told the victim to stand in the middle of the circle. J.D. questioned the victim about some missing cocaine. The victim said he did not know anything, so J.D. ordered the BDs to beat

the victim. The BDs then beat the victim with their fists all over his body and with a stick that was about three feet long, wide on one end and thinner on the other end. After several minutes, J.D. and defendant ordered the beating to stop and defendant questioned the victim about the missing cocaine, ordering the beating to resume when the victim denied knowing anything. The cycle of questioning and beating occurred off and on for about 30 minutes, after which defendant called an end to it and Mr. McCoy left the apartment. Mr. McCoy later learned that Shawndell Walker had driven the victim to the hospital and that the victim had died. He also learned that defendant was on the run from the police. Mr. McCoy affirmed in the statement that he had been treated well by the police, was given food and cigarettes, and was not threatened in any way into making this statement.

¶ 17 Nenad Markovich testified he worked for the Chicago Housing Authority police department, was assigned to the Gang Interdiction Team, and had numerous contacts with gangs and gang members. Mr. Markovich testified defendant was a BD minister and the highest ranking gang member at the Building.

¶ 18 Robert Harris testified that on January 23, 1994, he was employed as a housekeeper at Chicago Osteopathic Hospital. At about 7 p.m. on that date, he was standing on the emergency room steps of Chicago Osteopathic Hospital when he saw a dark-colored, four-door car drive up with a man in the back seat and two other men in the car. The man in the rear of the car was slumped, leaning forward, and moaning and bleeding. After Mr. Harris helped him out of the car and into a wheelchair and took him to the emergency room, the two other men drove away.

¶ 19 Dr. Thamrong Chira, a pathologist, performed an autopsy on the victim on January 24, 1994. The victim's body had multiple external injuries including abrasions, lacerations, and bruises over

his forehead, arms, and left leg. The bruising was indicative of blunt trauma that could have been caused by a stick, baseball bat, or other blunt object. His left hand had a small laceration, indicating he had attempted to defend himself with that hand. The victim's left chest cavity had about half a liter of fresh blood in it and the victim had hemorrhaging over the chest wall, a fractured left rib, and a contusion over the lungs. The victim had a broken left fibula bone. In Dr. Chira's opinion, the victim's death was a homicide arising from multiple injuries caused by blunt trauma, which made his brain swell, and caused hemorrhaging in his lung.

¶ 20 Virginia Green, the victim's wife, testified that on January 23, 1994, the victim was wearing a black leather jacket. That night, detectives came to her apartment and told her that the victim had died and was at Chicago Osteopathic Hospital. The following morning, Ms. Crosby brought the victim's jacket to her.

¶ 21 Officer James Jones testified that at about 11 a.m. on January 25, 1994, he interviewed Mrs. Green, who gave him a black leather Nike coat that was stained with blood. He sent the coat for testing and analysis.

¶ 22 Sergeant Sergio Rajkovich testified that on January 24, 1994, he and his partner, Detective McDonald, searched the Building's incinerator room and discovered a wooden table leg on top of a refrigerator. The table leg was about 36 inches long, was splintered on one end, and had red marks that looked like blood. He called evidence technicians to the scene. At 11:15 p.m. that same day, he, Detective McDonald, and Detectives Boudreau and Halloran went to apartment 1308 of the Building and met with Ms. Crosby and Mr. Bradford. The furniture in the apartment was in disarray and there were blood stains on the floor and a wall. Sergeant Rajkovich called in evidence

technicians who took photographs and blood samples. Detectives Boudreau and Halloran took Ms. Crosby and Mr. Bradford to the police station, while Sergeant Rajkovich and Detective McDonald stayed with the technicians.

¶ 23 Detective Halloran testified that in the evening of January 23, 1994, he and his partner, Detective Boudreau, told Mrs. Green that the victim had died. The following afternoon, he and several other detectives went to apartment 1308, where Ms. Crosby told them that the victim had been beaten in her apartment and that she had been present. Upon entering the apartment, Detective Halloran noticed that the furniture was in disarray and that there were blood stains on the floor and on the wall. He and Detective Boudreau accompanied Ms. Crosby to the police station, where Ms. Crosby told him that earlier on the afternoon of January 24, a BD walked her to a van in the Building parking lot. Defendant and other BDs were inside the van. Defendant told her she should not tell the police anything about what had happened to the victim or else he would kill Ms. Crosby and her five children. Detective Halloran and Ms. Crosby returned to the Building and made arrangements to have Ms. Crosby's children taken to a family member's home. Then they returned to the police station and Detectives Halloran and Boudreau spoke with Ms. Crosby off and on for about three hours. Ms. Crosby supplied them with 25 names, nicknames and possible apartments of people involved in the beating. After speaking with Ms. Crosby, Detectives Halloran and Boudreau began looking for defendant.

¶ 24 On February 1, 1994, Detective Halloran spoke with Mr. Robinson, who initially denied being present at the beating of the victim. Detective Halloran told Mr. Robinson he was a liar, and that other persons had identified him as being present. Thereafter, Mr. Robinson admitted to being

present at the beating, and he provided approximately 32 names of people who were present and participated in the beating. Mr. Robinson later testified at the grand jury. Detective Halloran never threatened Mr. Robinson.

¶ 25 Detective Craig Cegielski testified that on January 25, 1994, he searched for a 1984 dark-colored Chevrolet registered to Shawndell Walker's girlfriend, Elaine Brooks, and which he believed was the car used to take the victim to the hospital. When he found the car parked at the east curb of the Building, he noticed there were blood stains on the rear seat. Detective Cegielski obtained an arrest warrant for defendant, but learned that defendant had fled the area. On July 1, 1996, he and his partner went to an address in Hammond, Indiana, where they believed defendant was residing. There they found defendant and J.D., both of whom had shaved their heads. Defendant claimed his name was Ferris Bennet and produced an Illinois State I.D. and an Illinois driver's licence that bore his photograph and the name Ferris Bennet. Defendant initially refused to be fingerprinted, but later submitted to fingerprints and stated that he was Deshawn Gardner.

¶ 26 The parties stipulated that if called to testify, evidence technicians Kajoucas and Reynolds would testify that on January 24, 1994, they recovered a table leg in the incinerator room of the Building, and later that day recovered a White Sox jacket and a pair of shoes from Ms. Crosby's nephew, Mr. Stewart. Mr. Kajoucas would testify he recovered a rear seat of a vehicle. Evidence technicians Butler and Moran took blood standards and samples from apartment 1308 of the Building. The parties further stipulated that Theresa Fino, a qualified expert in forensic serology, would testify she examined pieces of evidence relating to the victim's homicide and the following items tested positive for the presence of human blood that was consistent with the victim's blood:

a swab of reddish substance recovered from the center area of the living room of apartment 1308; a swab of reddish-brown substance recovered from the living room floor of apartment 1308; a swab of reddish-brown substance recovered from the south wall of apartment 1308; a table leg recovered on top of the refrigerator in the dumpster area in front of the Building; a rear seat cushion recovered from a 1984 Chevy registered to Elaine Brooks; and a White Sox jacket recovered from Mr. Stewart.

¶27 The defense did not present any evidence. During closing arguments, defense counsel argued that Lance Robinson was the only witness whose trial testimony placed defendant at the scene of the crime. Defense counsel argued that Mr. Robinson's trial testimony should be disbelieved because it was the product of police coercion, specifically, that the police had threatened to charge him as an accessory to the murder unless he testified against defendant. Defense counsel argued that Ms. Crosby's grand jury testimony implicating defendant should be disbelieved because it, too, was the product of police coercion specifically, that the police had threatened to take away Ms. Crosby's children unless she testified against defendant. Defense counsel argued that Mr. McCoy's handwritten statement implicating defendant should be disbelieved because it also was made in response to police threats that they would send him to the hospital or jail unless he testified against defendant. Defense counsel further argued there were no fingerprints or other physical evidence linking defendant to the crime, and that the evidence of defendant's gang affiliation was not proof beyond a reasonable doubt that he was in the apartment at the time of the beating. In sum, defense counsel argued, "[y]ou've heard a witness who was threatened. You've heard a witness who says my guy wasn't there. You heard another one who said he wasn't there. They're all uniform on the fact that they've all [been] threatened, coerced, and intimidated and it's easy to do. That's a reasonable

doubt."

¶ 28 The jury found defendant guilty of first degree murder. Defendant filed a motion for a new trial that was denied. The trial court sentenced defendant to 85 years' imprisonment based on its finding that the crime was brutal and heinous. Defendant filed a motion to reconsider sentence that was denied on January 28, 2000.

¶ 29 On February 2, 2001, defendant filed a motion to file a late notice of appeal in the appellate court. In the motion, defendant alleged that his trial counsel believed he had filed a timely notice of appeal, but the notice never was filed. The appellate court denied defendant's motion on February 15, 2001.

¶ 30 On May 18, 2001, defendant filed a postconviction petition alleging that his notice of intent to appeal was incorrectly filed, and requesting that his appeal be reinstated. The postconviction petition was granted and the case was transferred to the appellate court.

¶ 31 In October 2002, while the appeal was pending, defendant filed a *pro se* "notice of intent to file postconviction petition and request that this court take judicial notice of adjudicative facts." Defendant contended therein that his appellate counsel had not provided him with his trial transcripts and he sought additional time in which to prepare and file a postconviction petition. On December 6, 2002, the trial court denied defendant's request for additional time to file his postconviction petition.

¶ 32 Meanwhile, on direct appeal, defendant alleged: (1) the State failed to prove him guilty beyond a reasonable doubt; (2) he was prejudiced by prosecutorial misconduct; (3) the trial court erred in admitting certain hearsay statements as substantive evidence; (4) the State violated discovery

rules and the State's gang expert should not have been allowed to offer an opinion about gang structure; and (5) his sentence was excessive and violates *Apprendi v. New Jersey*, 530 U.S. 466 (2000). See *People v. Gardner*, No. 1-01-2618 (2003) (unpublished order under Supreme Court Rule 23). The appellate court affirmed on November 13, 2003. *Id*.

¶ 33 On November 30, 2004, defendant filed a *pro se* postconviction petition alleging that his trial counsel provided ineffective assistance by failing to investigate and call as witnesses his girlfriend, Katina Edwards, and his mother, Jacqueleen Brown, who would have testified defendant was with them at Ms. Brown's apartment, over six miles away from the scene of the crime, at the time the beating of the victim occurred. In his petition, defendant alleged he informed his trial counsel that Ms. Edwards and Ms. Brown were available and willing to testify at trial. Defendant attached affidavits from Ms. Edwards and Ms. Brown to the petition. Ms. Edwards attested that on the day of the crime, January 23, 1994, she and their daughter were with defendant at Ms. Brown's apartment at 1948 East 72nd Place, and that defendant took Ms. Edwards and their daughter home "around 6'oclock that evening." Ms. Brown similarly attested that defendant, Ms. Edwards, and their daughter were at Ms. Brown's apartment on January 23, 1994. Defendant left her apartment "that Sunday, January 23, 1994, at around 6 or 6:30 that evening to take his family home." Both Ms. Edwards and Ms. Brown stated that trial counsel never questioned them about their potential alibi testimony.

¶ 34 Defendant further alleged his trial counsel was ineffective for failing to investigate, prepare and present evidence that it was the *modus operandi* of Detectives Halloran and Boudreau, who were involved in this case, to coerce witnesses into giving false statements. In support of this assertion,

defendant attached an email sent by "nodeathpenalty.org" in support of a criminal defendant in an unrelated case who allegedly was abused by Detectives John Palladino, Anthony Maslanka, and John O'Brien, all of whom worked for "the notorious Jon Burge." He also attached a 2001 Chicago Tribune article discussing allegations that Detective Boudreau, who worked for Jon Burge, physically abused suspects in order to obtain confessions; a 2002 Chicago Tribune article stating that the City of Chicago law department had recommended paying $250,000 to settle a lawsuit alleging police officers, including Detective Boudreau, had coerced a man to falsely confess to two murders (unrelated to the murder here); a 2003 Chicago Tribune article indicating that DNA testing on hair found at an unrelated sex assault and murder case in 1990 excluded the defendants there, one of whom had confessed after being interrogated by Detectives Boudreau and Halloran; and a 2002 email message from nodeathpenalty.org forwarding a Chicago Tribune article discussing a federal court opinion finding that police had routinely violated the rights of witnesses by denying them access to lawyers while holding them for long hours in small, locked interrogation rooms. Defendant provided no foundation for the admission of the emails and newspaper articles into evidence.

¶ 35 Finally, defendant alleged in his postconviction petition that the admission of Mr. McCoy's prior inconsistent statement violated defendant's right to due process, and that his sentence was unconstitutional.

¶ 36 The postconviction court docketed the petition and appointed counsel. The matter remained on the court's call for more than three years. On April 24, 2008, appointed counsel filed a supplemental postconviction petition adopting and incorporating defendant's *pro se* petition. The supplemental petition further alleged that the State violated his right to due process by using the

grand jury testimony of Ms. Crosby and the handwritten statement of Mr. McCoy, both of whom were coerced by Detectives Halloran and Boudreau.

¶ 37 In support of the allegation, defendant cited to newly discovered evidence that had emerged since his trial establishing that Detectives Halloran and Boudreau engaged in "systematic psychological and physical abuse" against other criminal suspects and witnesses to compel confessions. Specifically, defendant attached the following notarized affidavits, all of which were made in 2003 or 2004, subsequent to defendant's trial: Nicholas Escamilla, a convicted murderer, attested that in 1993, Detectives Halloran, Boudreau, O'Brien and Ryan came into his house without a warrant, arrested him, brought him to the police station, and handcuffed him to a ring on the wall for 15 hours. Mr. Escamilla stated that the detectives punched, slapped, kicked, and spit on him, and then threatened to arrest his wife and take his child away until he confessed to murder; Andre Brown attested that in September 1996, during his interrogation regarding his alleged involvement in a murder, Detectives Halloran and Boudreau threatened he would never see his family again if he did not confess; Malik Taylor attested in September 1995 that Detective Halloran was one of five interrogating detectives, one of whom struck Mr. Taylor in the face. When Mr. Taylor refused to provide incriminating statements about others, Detective Halloran threatened to charge him with the murder for failing to "help us"; and Arnold Day attested that in February 1992, he was arrested in connection with a shooting. Detective Boudreau subsequently interrogated him while Detective Foley grabbed him by the neck, choked him, and threatened to throw him out a window; Kylin Little attested that in April 1996, Detectives O'Brien, Halloran and Boudreau threatened to charge him in connection with a shooting unless he cooperated with them, and then Detective Boudreau repeatedly

struck Mr. Little on the head and chest while Detectives O'Brien and Halloran held him down until he made an incriminating statement about the suspect; Jason Miller attested that in April 1996, Detectives O'Brien and Halloran held him down while Detective Boudreau beat him in order to compel him to make an incriminating statement about a shooting suspect.

¶ 38 Defendant also attached a copy of a civil complaint filed against Detectives Boudreau, Halloran, O'Brien and Foley on July 5, 2002, seeking damages for excessive force, intentional infliction of emotional distress, failure to intervene, conspiracy to use excessive force, and civil conspiracy. In addition, defendant provided a copy of a Chicago police department report indicating that five complaints had been filed against Detective Boudreau between April 1, 1991, to December 31, 1995.

¶ 39 Finally, defendant attached a memorandum written in 1990 addressed to the "Office of Professional Standards" from "Investigator Michael Goldston" entitled "Special Project Conclusion Report." The report concludes that "personnel assigned to Area 2 engaged in methodical abuse."[3] No specific personnel are named.

¶ 40 Defendant also asserted in his supplemental postconviction petition that the State committed a violation of *Brady v. Maryland*, 373 U.S. 83 (1963), by failing to provide him with evidence reflecting a pattern and practice of misconduct by Detectives Halloran and Boudreau.

¶ 41 The State filed a motion to dismiss defendant's supplemental postconviction petition,

[3]In *People v. Orange*, 195 Ill. 2d 437 (2001), the Illinois Supreme Court discussed the Goldston report and described it as a report prepared by the City of Chicago's office of police standards in 1990 that documented the allegations of 50 different suspects concerning misconduct by Area 2 personnel from 1973 to 1986. *Id*. at 445-46. Defendant did not include this report in its entirety in his supplemental postconviction petition.

asserting that the petition was successive and that defendant did not seek, nor was he granted, leave to file the successive claim. The postconviction court denied the State's motion to dismiss and continued the matter for the State to file a supplemental motion to dismiss on substantive rather than procedural grounds.

¶ 42 In its supplemental motion to dismiss, the State argued that defendant's claim of ineffective assistance of counsel for failure to investigate and present alibi witnesses involved a matter of trial strategy, and that the affidavits of Ms. Edwards and Ms. Brown did not provide an actual alibi and did not demonstrate that trial counsel was aware of them at trial. The State further asserted that defendant's claims involving the alleged coercion of Mr. McCoy and Ms. Crosby were deficient because they were not supported with proper documentation. The State contended there were no affidavits from those witnesses, no affidavit from defendant stating he informed counsel of the coercion, and the newspaper articles attached to the petition were dated after defendant's trial, had no evidentiary value and would have been inadmissible.

¶ 43 Defendant then filed an amended supplemental postconviction petition on June 3, 2010, which again adopted and incorporated defendant's November 30, 2004, *pro se* postconviction petition. Attached to the amended supplemental postconviction petition was an affidavit from Mr. McCoy, made on May 28, 2010, in which he stated:

> "1. The police supplied all the information in my statement.
>
> 2. During my interrogation the police choked me and threatened to send me to the hospital and to jail if I didn't sign the statement.
>
> 3. Two of the officers who interrogated me were Detectives Boudreau and Halloran."

¶ 44 The postconviction court dismissed all of defendant's postconviction claims in his *pro se* petition, his supplemental petition, and his amended supplemental petition. Defendant appeals.

¶ 45 A postconviction petition is a collateral attack on a conviction and sentence, thus, postconviction proceedings involve only constitutional matters that have not been, nor could have been, previously decided. *People v. Rissley*, 206 Ill. 2d 403, 411-412 (2003). In a noncapital case, the Postconviction Hearing Act (the Act) (725 ILCS 5/122-1 *et seq*. (West 2012)) creates a three-stage procedure of postconviction relief. In the first stage, the postconviction court independently reviews the petition and determines whether it is "frivolous" or "patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2012); *People v. Hodges*, 234 Ill. 2d 1, 10 (2009). If the postconviction petition is not so summarily dismissed, it advances as here to the second stage where the State may file a motion to dismiss the petition and the court must determine whether the petition and any accompanying documents make a substantial showing of a constitutional violation. *Id*. at 10-11 n.3. At the second stage of proceedings, the court takes "all well-pleaded facts that are not positively rebutted by the trial record" as true. *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006). If the petition fails to make a substantial showing of a constitutional violation, it is dismissed; if such a showing is made, the postconviction petition advances to the third stage where the court conducts an evidentiary hearing. 725 ILCS 5/122-6 (West 2012). A second-stage dismissal of a postconviction petition is reviewed *de novo*. *People v. Coleman,* 183 Ill. 2d 366, 389 (1998).

¶ 46 I. Defendant's Postconviction Claims of Ineffective Assistance of Trial Counsel

¶ 47 First, defendant contends the postconviction court erred in dismissing his postconviction claims of ineffective assistance of counsel. The State responds by arguing that defendant's claims

of ineffective assistance of counsel are procedurally barred because they were not raised in his initial postconviction petition on May 18, 2001, but, rather, were raised for the first time in his successive petitions. The State contends defendant failed to seek or obtain leave to file his successive postconviction petitions and did not satisfy the cause-and-prejudice or actual-innocence tests necessary to allow for the filing thereof.

¶ 48 The Act contemplates the filing of only one postconviction petition. *People v. Williams*, 2012 IL App (1st) 111145, ¶ 35. However, the statutory bar to a successive postconviction petition is relaxed "when fundamental fairness so requires." *People v. Morgan*, 212 Ill. 2d 148, 153 (2004). Fundamental fairness allows defendant to file a successive postconviction petition only when the petition complies with the cause-and-prejudice test. *People v. Pitsonbarger*, 205 Ill. 2d 444, 459 (2002). Defendant shows "cause" by identifying an objective factor external to the defense that impeded his efforts to raise the claim in the earlier proceeding. *Id*. at 460. Defendant shows prejudice by demonstrating the claimed constitutional error "so infected the entire trial that the resulting conviction or sentence violates due process." *Id*. at 464. Both prongs must be met to satisfy the cause-and-prejudice test and allow for the filing of a successive postconviction petition. *People v. Edwards*, 2012 IL App (1st) 091651, ¶ 32. The General Assembly has codified the cause-and-prejudice test in section 122-1(f) of the Act, which states:

> "Only one petition may be filed by a petitioner under this Article without leave of the court. Leave of court may be granted only if a petitioner demonstrates cause for his or her failure to bring the claim in his or her initial post-conviction proceedings and prejudice results from that failure. For purposes of this subsection (f): (1) a prisoner shows cause by identifying

an objective factor that impeded his or her ability to raise a specific claim during his or her initial post-conviction proceedings; and (2) a prisoner shows prejudice by demonstrating that the claim not raised during his or her initial post-conviction proceedings so infected the trial that the resulting conviction or sentence violated due process." 725 ILCS 5/122-1(f) (West 2012).

¶ 49 In addition, the statutory bar to a successive postconviction petition is relaxed when defendant shows newly discovered evidence of actual innocence. *People v. Collier*, 387 Ill. App. 3d 630, 636 (2008). "Actual innocence claims based on newly discovered evidence are protected by the due process clause of the Illinois Constitution. [Citation.] Newly discovered evidence is 'evidence that was not available at defendant's original trial and that the defendant could not have discovered sooner through diligence.' [Citation.] The newly discovered evidence has to also be noncumulative and material. [Citation.] 'Evidence is considered cumulative when it adds nothing to what was already before the jury.' [Citation.] Further, 'it must be of such conclusive character that it would probably change the result on retrial.' [Citation.]" *People v. Williams*, 2012 IL App (1st) 111145, ¶ 36.

¶ 50 First we must determine which, if any, of defendant's various postconviction filings were successive postconviction petitions filed after the initial postconviction proceedings, and for which leave of court must be granted, and which must satisfy either the cause-and-prejudice or actual-innocence tests. In the present case, defendant filed his first postconviction petition on May 18, 2001, alleging therein that his notice of intent to appeal was incorrectly filed, and requesting that his appeal be reinstated. The appellate court recently has held that when a defendant files a

postconviction petition seeking only to reinstate the right to a direct appeal that was lost due to counsel's ineffectiveness, a subsequent postconviction petition is not considered successive under the Act. *People v. Little*, 2012 IL App (5th) 100547, ¶ 19. This is because a defendant has a right, under the Illinois constitution, to appeal a criminal conviction and a statutory right to collaterally attack his conviction with a postconviction petition and, where defendant's first petition was filed only to rescue his right of appeal, "it was not a 'true collateral attack' and should not be counted as such." *Id*. at ¶ 21.

¶ 51 Defendant next filed in October 2002 a *pro se* "notice of intent to file postconviction petition and request that this court take judicial notice of adjudicative facts." This was *not* a postconviction petition but, rather, was a notice of intent to file a postconviction petition in the future.

¶ 52 Defendant next filed a *pro se* postconviction petition on November 30, 2004, alleging ineffectiveness of his trial counsel in failing to investigate and call his mother and girlfriend as alibi witnesses, and in failing to investigate and present evidence regarding the *modus operandi* of Detectives Halloran and Boudreau to coerce witnesses into giving false statements. As the initial May 18, 2001, postconviction petition was not a true collateral attack, and as the October 2002 filing was not a postconviction petition, defendant's *pro se* postconviction petition filed on November 30, 2004, was his first opportunity to seek collateral review, and constituted his initial postconviction petition under section 122-1(f) of the Act.

¶ 53 Defendant next filed a supplemental postconviction petition on April 24, 2008, and an amended supplemental postconviction petition on June 3, 2010, both of which incorporated defendant's initial November 30, 2004, *pro se* postconviction petition, and provided new affidavits

in support of the argument that Detectives Halloran and Boudreau had coerced Ms. Crosby's and Mr. McCoy's prior statements against him. Defendant filed the supplemental and amended supplemental postconviction petitions *before* the postconviction court ruled on his November 30, 2004, *pro se* postconviction petition, thereby evincing his intent to add the new affidavits in the supplemental and amended supplemental petitions in support thereof. As such, the supplemental and amended supplemental postconviction petitions were additions to the initial November 30 petition and not separate or successive petitions. Accordingly, defendant's claims of ineffective assistance of counsel, as set forth in his November 30, 2004, *pro se* postconviction petition (and subsequently adopted and incorporated in his supplemental and amended supplemental postconviction petitions), are properly before us and defendant was not required to obtain leave of court or satisfy either the cause-and-prejudice or actual innocence tests prior to review of the order dismissing those claims.

¶ 54 The State next argues we should affirm the dismissal of defendant's ineffective assistance claim regarding counsel's alleged failure to investigate and prepare an alibi defense because he failed to support said claim with affidavits, records, or other evidence, as required by section 122-2 of the Act.

¶ 55 Section 122-1(b) of the Act requires that a postconviction petition be verified by affidavit. 725 ILCS 5/122-1(b) (West 2012). Section 122-2 of the Act further requires that the allegations in the petition be supported by affidavits, records, or other evidence, or state why they are not attached. 725 ILCS 5/122-2 (West 2012). In the present case, defendant alleged in his November 30, 2004, *pro se* postconviction petition that he informed his trial counsel that his mother and girlfriend (Ms. Brown and Ms. Edwards) were available and willing to testify to an alibi defense at trial. Defendant

attached a section 122-1(b) verification affidavit affirming that "the facts stated in the attached [postconviction petition] are true and correct in substance and in fact to the best of my knowledge and belief." Defendant also attached affidavits from Ms. Brown and Ms. Edwards, in which each attested to her ability to testify to defendant's alibi defense.

¶ 56 The State argues that defendant failed to comply with section 122-2 because he filed only his section 122-1(b) verification affidavit and not his second, section 122-2 affidavit attesting that he advised his trial counsel of the witnesses' potential testimony, or that counsel was made aware that Ms. Brown and Ms. Edwards were available and willing to testify. The State also argues that the affidavits from defendant's alleged alibi witnesses failed to independently verify defendant's claim of ineffective assistance per section 122-2. Specifically, the State argues that although both witnesses provided affidavits attesting that they were with defendant at the time of the crime and would have been willing to so testify at trial, neither witness indicated she provided trial counsel with that information. Accordingly, the State argues that defendant's postconviction petition failed to comply with the affidavit requirement of section 122-2 and, therefore, that the dismissal order should be affirmed.

¶ 57 In support, the State cites *People v. Collins*, 202 Ill. 2d 59 (2002), in which our supreme court rejected the contention that a defendant's sworn verification can serve as a substitute for the "affidavits, records, or other evidence" mandated by section 122-2 of the Act. The supreme court explained:

> "First, the Act itself clearly distinguishes between the sworn verification that defendant filed and the supporting 'affidavits, records, or other evidence' that defendant neglected to file.

> The necessity of a sworn verification is addressed in section 122-1 of the Act, which provides that a post-conviction proceeding is initiated by the filing of a petition 'verified by affidavit.' [Citation.] The necessity of attaching 'affidavits, records, or other evidence' to the petition is addressed in section 122-2, which provides that '[t]he petition shall have attached thereto affidavits, records, or other evidence *supporting its allegations* or shall state why the same are not attached.' (Emphasis added.) [Citation.] Thus, under the plain language of the Act, the sworn verification described in section 122-1 serves a purpose wholly distinct from the 'affidavits, records, or other evidence' described in section 122-2. The former, like all pleading verifications, confirms that the allegations are brought truthfully and in good faith. [Citation.] The latter, by contrast, shows that the verified allegations are capable of objective or independent corroboration. To equate the two is not only to confuse the purposes of subjective verification and independent corroboration but also to render the 'affidavits, records, or other evidence' requirement of section 122-2 meaningless surplusage. We will not adopt such a reading." *Id*. at 66-67.

¶ 58 However, our supreme court subsequently has held that *Collins* does not apply "beyond the first stage of the proceedings." *People v. Hall*, 217 Ill. 2d 324, 332 (2005). See also *People v. Clark*, 2011 IL App (2d) 100188, ¶ 33 and *People v. Barkes*, 399 Ill. App. 3d 980, 987 (2010) (holding, pursuant to *Hall*, that the affidavit requirement of section 122-2 does not apply beyond the first stage of postconviction proceedings).

¶ 59 Even if the affidavit requirement of section 122-2 did apply here at the second stage of postconviction proceedings, a defendant is not required under section 122-2 to attach his *own*

affidavit attesting to his private conversation with defense counsel in support of an ineffective assistance claim, or to provide an explanation for its absence, as such an affidavit is "not at all objective or independent." *People v. Teran*, 376 Ill. App. 3d 1, 3-4 (2007). In other words, "because no affidavit of defendant's would have provided objective or independent corroboration per section 122-2 [of defendant's ineffective assistance of counsel claim], defendant's affidavit was not necessary for that purpose." *Id*. at 4. Accordingly, under the unique facts of this case, defendant was not required to file his own second affidavit (apart from the section 122-1(b) verification affidavit) attesting to his conversation with his trial counsel regarding his proposed alibi defense in order to support his allegation of ineffective assistance of counsel.

¶ 60 With respect to the affidavits of the alibi witnesses, defendant aptly noted in his reply brief here that "given that the entire point of [defendant's] claim is that trial counsel *failed to investigate* Brown and Edwards after [defendant] told counsel about them, it is hardly surprising that their affidavits do not describe conversations with trial counsel." (Emphasis in the original.) Further, we note that defendant's verified petition stated only that *he* engaged in a conversation with defense counsel in which defendant informed counsel of Ms. Brown's and Ms. Edwards's willingness to testify to the alibi defense; the verified petition did not indicate that Ms. Brown, Ms. Edwards, or anyone other than defendant and his counsel were present during this conversation. Thus, there are no other affidavits defendant could provide to verify the fact of the conversation as set forth in the petition other than that of his defense counsel. Our supreme court has noted that the obvious difficulty of obtaining an affidavit from an attorney, whom defendant alleges was ineffective, excuses defendant from presenting such supporting documentation or an explanation for its absence.

Hall, 217 Ill. 2d at 333-34. Accordingly, defendant's failure here to file such a supporting affidavit is excused. *Id*.

¶ 61 We address the merits of defendant's ineffective assistance claims. As discussed, defendant made two claims of ineffective assistance of counsel in his November 30, 2004, *pro se* postconviction petition: (1) that his trial counsel provided ineffective assistance in failing to investigate and present an alibi defense; and (2) that his trial counsel was ineffective for failing to investigate, prepare, and present evidence that it was the *modus operandi* of Detectives Halloran and Boudreau to coerce witnesses into giving false statements.

¶ 62 We begin by analyzing whether defendant made a substantial showing that his trial counsel was ineffective for failing to investigate and present an alibi defense. To determine whether defendant was denied his right to effective assistance of counsel, we apply the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). Defendant must show first, that "counsel's representation fell below an objective standard of reasonableness" (*id*. at 688) and, second, that he was prejudiced such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id*. at 694.

¶ 63 To prevail on his claim of ineffective assistance, defendant must satisfy both prongs of the *Strickland* test. If we can dispose of defendant's ineffective assistance claim because he suffered no prejudice, we need not address whether his counsel's performance was objectively reasonable. *People v. Lacy*, 407 Ill. App. 3d 442, 457 (2011).

¶ 64 "The decisions of what witnesses to call and what evidence to present are generally unassailable matters of trial strategy that cannot form the basis of a claim of ineffective assistance

of counsel." *People v. Ward*, 371 Ill. App. 3d 382, 433 (2007). "However, these strategic decisions may be made only after there has been a 'thorough investigation of law and facts relevant to plausible options.' " *People v. Gibson*, 244 Ill. App. 3d 700, 703-04 (1993) (quoting *Strickland*, 466 U.S. at 690.)

¶ 65 Defendant here alleged in his postconviction petition that his trial counsel was ineffective for failing to conduct a thorough investigation of a potential alibi defense. Specifically, as discussed earlier, defendant pleaded that he told his trial counsel that his mother, Jacqueleen Brown, and his girlfriend, Katina Edwards, would testify he was with them at Ms. Brown's apartment, over six miles from the scene of the crime, at the time the beating of the victim occurred. In support of his postconviction petition, defendant attached affidavits from Ms. Brown and Ms. Edwards. Ms. Edwards attested she and their daughter were with defendant at Ms. Brown's apartment on January 23, 1994, and that defendant took Ms. Edwards and their daughter home "around 6'oclock that evening." Ms. Brown similarly attested that defendant, Ms. Edwards, and their daughter were at Ms. Brown's apartment on January 23, 1994. Defendant left her apartment that day "at around 6 or 6:30" in the evening "to take his family home." Ms. Edwards and Ms. Brown each stated that trial counsel did not question them about their potential testimony.

¶ 66 Taking defendant's well-pleaded facts in his petition as true (*Pendleton*, 223 Ill. 2d at 473), and as supported by the accompanying affidavits from Ms. Edwards and Ms. Brown, defendant made a substantial showing that defense counsel failed to investigate two witnesses who would have provided evidence that defendant was at Ms. Brown's apartment between 5 and 6 p.m. on January 23, 1994, which was the time and date when the victim was being beaten in Ms. Crosby's apartment.

That is, defendant made a substantial showing that counsel's representation fell below an objective standard of reasonableness in failing to investigate Ms. Edwards and Ms. Brown as alibi witnesses who would have supported his theory at trial that defendant was not present in Ms. Crosby's apartment at the time the crime was committed.

¶ 67 The State argues that Ms. Edwards's and Ms. Brown's affidavits do not necessarily provide an alibi for defendant because, even if defendant was with Ms. Edwards and/or Ms. Brown between 5 and 6 p.m. on January 23, 1994, the record establishes that the beating of the victim did not occur until *after* 6 p.m. on that date. In support, the State contends that the victim's wife, Virginia Green, testified that the victim did not leave his apartment to go to Ms. Crosby's apartment until 6 p.m. However, review of Mrs. Green's testimony reveals she actually testified as follows:

"Q. Now on January 23, 1994, a little later in the afternoon, around maybe 5:30 or so, do you remember where you were at?

A. Myself.

Q. Yes, ma'am?

A. I was in my-in our apartment.

Q. And who else was in the apartment?

A. Couple of his-about-couple of his friends.

Q. Pardon me?

A. Couple of [the victim's friends.]

Q. Okay. Do you remember their names?

A. Parnell Roberts and Kim Butler.

Q. And what were they doing in your apartment?

A. Watching football. Watching tv.

Q. And what was on that day?

A. Football.

Q. Was that the Super Bowl?

A. Yes, sir.

Q. Were you watching the game with your husband and the friends?

A. No, I wasn't. I was in the back with the kids.

Q. At the–shortly before 6 o'clock in the evening, did any one leave your apartment?

A. Well, [the victim] had left out."

Q. Okay. And did you see anyone leave with him?

A. No, I didn't.

Q. Did you even see him leave?

A. I didn't see him leave.

Q. When was it that you found out that he had left the apartment?

A. Well, right after the football game was over."

¶ 68 Mrs. Green's testimony reveals she does not know what time the victim left her apartment on the night of his beating. Thus, the only testimony in the record regarding the timing of the beating comes from Mr. Robinson, Ms. Crosby, and Mr. McCoy. Mr. Robinson testified at trial that the beating began about 5 p.m.; Ms. Crosby stated (both in her recanted statement and at trial) that it began about 5 or 6 p.m. Ms. Crosby testified the beating lasted 15 or 20 minutes. Mr. McCoy stated

in his handwritten statement that the beating began in the early evening and lasted approximately 30 minutes. As discussed, Ms. Edwards's and Ms. Brown's affidavits provide an alibi for defendant, in that they claim defendant was at Ms. Brown's apartment until 6 or 6:30 p.m., by which the point the beating already had begun according to Mr. Robinson and Ms. Crosby. Defendant has made a substantial showing that his counsel's representation was objectively unreasonable for failing to investigate said alibi evidence at trial.

¶ 69 Further, defendant made a substantial showing that he suffered prejudice. Defendant's theory at trial was that he was not present at Ms. Crosby's apartment when the victim was being beaten. The only evidence offered in support, thereof, was the trial testimony of Ms. Crosby and Mr. McCoy, both of whom were confronted with their prior statements implicating defendant. Ms. Crosby's and Mr. McCoy's trial testimony also was contradicted by Mr. Robinson, who testified at trial as to defendant orchestrating the victim's beating inside Ms. Crosby's apartment. Ms. Edwards's and Ms. Brown's affidavits would have provided alibi testimony corroborating defendant's theory of defense at trial, and contradicting the trial testimony of Mr. Robinson. In the absence of any physical evidence tying defendant to the crime scene, there is a reasonable probability that the result of the trial would have been different had the jury heard Ms. Edwards's and Ms. Brown's alibi testimony, coupled with the consistent accounts of police coercion/torture testified to by Ms. Crosby and Mr. McCoy in explanation of their prior statements implicating defendant. Ms. Edwards's and Ms. Brown's alibi testimony would have bolstered Ms. Crosby's and Mr. McCoy's recantations of their prior statements implicating defendant, and would have raised doubts about Mr. Robinson's testimony, especially since Mr. Robinson initially denied knowing anything about the beating, he

only identified defendant after being threatened that he could be charged as an accessory to the murder, and he admitted he would "say anything" to avoid being charged with the murder himself. Mr. Robinson also testified that the police threatened to charge him with perjury if his trial testimony differed from his grand jury testimony.

¶ 70 The State argues, though, that Ms. Edwards's and Ms. Brown's testimony "would likely be deemed incredible by the fact-finder, as it comes from defendant's mother and girlfriend, neither of whom came forward until defendant was convicted and sentenced to 85 years in prison." The State's credibility arguments are misplaced at this stage, as "the Act contemplates that factual and credibility determinations will be made at the evidentiary stage of the post-conviction proceeding, and not at the dismissal stage." *People v. Coleman*, 183 Ill. 2d at 390-91. Had the State wished to test Ms. Edwards's and Ms. Brown's credibility, it "should have *answered* the petition, rather than seeking to dismiss it." (Emphasis in the original.) *Id*. at 390.

¶ 71 At this point in the proceeding, all well-pleaded facts in defendant's petition and accompanying affidavits are taken as true and the postconviction court, therefore, is precluded from engaging in any fact-finding. *People v. Tate*, 305 Ill. App. 3d 607, 611 (1999). Taking defendant's well-pleaded facts in his petition and the accompanying affidavits from Ms. Edwards and Ms. Brown as true, we hold that defendant has made a substantial showing of ineffective assistance of counsel based on the failure to investigate the testimony of the alibi witnesses. We reverse the dismissal of this claim and remand for third-stage proceedings thereon, specifically, an evidentiary hearing which will allow the postconviction court to hear testimony, assess the credibility of the witnesses, and develop a complete record as to defendant's claim of ineffective assistance. Once evidence is heard

on this issue, the postconviction court will be in a better position to determine whether trial counsel knew of the alibi witnesses and their testimony and, if so, whether trial counsel made a professionally reasonable tactical decision not to call the witnesses, or whether counsel failed to interview and call them as a result of ineffectiveness.

¶ 72 Next, we address the postconviction court's dismissal of defendant's second post-conviction claim of ineffective assistance, that his trial counsel was ineffective for failing to investigate, prepare, and present evidence that it was the *modus operandi* of Detectives Halloran and Boudreau to coerce witnesses into giving false statements. Defendant has waived review by failing to make any arguments on appeal concerning the postconviction court's dismissal of this ineffective assistance of counsel claim. See Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008).

¶ 73 II. Defendant's Postconviction Due-Process Claim

¶ 74 Next, we address the postconviction court's dismissal of defendant's claim in his supplemental and amended supplemental postconviction petitions that the State violated his right to due process by using the grand jury testimony of Ms. Crosby and the handwritten statement of Mr. McCoy, both of which allegedly were coerced by Detectives Halloran and Boudreau.

¶ 75 "Due process is implicated when the government seeks a conviction through use of evidence obtained by extreme coercion or torture." *People v. Bates*, 218 Ill. App. 3d 288, 297 (1991). Defendant alleged in his supplemental postconviction petition that Detectives Halloran and Boudreau engaged in such extreme coercion and/or torture by: (1) holding Ms. Crosby in "detention incommunicado" for two days and threatening to charge her with murder and take her children away if she did not testify against defendant; and (2) threatening to send Mr. McCoy to the hospital and

to the county jail, choking him in front of ASA Coleman, and depriving him of food for two days, to secure his statement against defendant. Defendant supported his allegations with newly discovered evidence since the time of trial, specifically, numerous affidavits made in 2003 and 2004 from persons in unrelated cases who attested to similar physical and/or mental abuse committed by Detectives Halloran and Boudreau from 1992 through 1996 in pursuit of confessions and/or statements implicating others. Specifically, Nicholas Escamilla attested, similar to Ms. Crosby, that Detectives Halloran and Boudreau threatened to take his child away unless he confessed. Nicholas Escamilla, Malik Taylor, Arnold Day, Kylin Little, and Jason Miller all attested, similar to Mr. McCoy, to the use of violence by Detectives Halloran and Boudreau to secure statements.

¶ 76 The State does not dispute that defendant's allegations of coercion and/or torture committed against Ms. Crosby and Mr. McCoy by Detectives Halloran and Boudreau, supported by the affidavits of recent, similar allegations of coercion against those same officers, would constitute a substantial showing of a due process violation meriting an evidentiary hearing *if* Ms. Crosby and Mr. McCoy had identified Detectives Halloran and Boudreau as the persons who coerced and/or tortured them. The State argues, though, that neither Ms. Crosby nor Mr. McCoy ever identified either Detective Halloran or Detective Boudreau as the persons who coerced and/or tortured them and, therefore, that defendant's claim amounts to only generalized allegations of coercive activity against Detectives Halloran and Boudreau, wholly unrelated to the present case, insufficient to warrant an evidentiary hearing. See *People v. Anderson*, 375 Ill. App. 3d 121, 137-38 (2007) ("Generalized claims of misconduct, without any link to defendant's case, *i.e.*, some evidence corroborating defendant's allegations, or some similarity between the type of misconduct alleged by defendant and

that presented by the evidence of other cases of abuse, are insufficient to support a claim of coercion.").

¶ 77 The instant case involves more than generalized allegations of coercive activity against Detectives Halloran and Boudreau, as there is evidence linking those detectives to the coercion and/or torture allegedly administered to Ms. Crosby and Mr. McCoy in this case so as to secure their testimony against defendant. Specifically, Ms. Crosby testified at trial that her grand jury testimony implicating defendant had been coerced by "quite a few detectives" who had threatened to charge her as an accessory to murder unless she named defendant. Ms. Crosby only remembered the name of one of those detectives, Detective McDonald, who she said threatened to take her children away unless she testified against defendant. However, Detective Halloran testified at trial and identified himself and his partner, Detective Boudreau, as the officers who interrogated Ms. Crosby the night before and the morning of her grand jury testimony, and who obtained defendant's name from her in connection with the victim's beating and, also, obtained Ms. Crosby's statement regarding defendant's threat to kill her if she implicated him. These statements to Detectives Halloran and Boudreau, which she repeated during her grand jury testimony and in her testimony at Duvalle Walker's trial, were the same statements she disavowed at defendant's trial as the product of police coercion.

¶ 78 Mr. McCoy testified at trial that he signed and initialed his written statement implicating defendant because certain unnamed detectives threatened to otherwise send him to the hospital and to jail, and because a homicide detective choked him in front of ASA Coleman. In defendant's amended supplemental postconviction petition, he attached an affidavit from Mr. McCoy, dated May

28, 2010. In his affidavit, Mr. McCoy repeated his claim that his interrogating officers choked him and threatened to send him to the hospital and to jail if he did not sign the statement implicating defendant; Mr. McCoy, further, identified two of the interrogating officers as Detectives Halloran and Boudreau.

¶ 79 The evidence cited immediately above was sufficient, at the second stage of postconviction proceedings, to tie Detectives Halloran and Boudreau to the coercion/torture allegedly used to secure Ms. Crosby's and Mr. McCoy's statements implicating defendant and, in conjunction with the affidavits of other persons who attested to similar coercive techniques administered by those same detectives, constituted a substantial showing of a due process violation. Accordingly, we reverse the dismissal of defendant's due process claim and remand for further proceedings thereon.

¶ 80 We emphasize that we are not making a dispositive holding that Detectives Halloran and Boudreau used coercion/torture to secure Ms. Crosby's and Mr. McCoy's statements implicating defendant, or that the State's use of said statements at trial as impeachment and as substantive evidence violated defendant's right to due process. We are only holding that, based on the record before us and taking defendant's well-pleaded facts and accompanying affidavits as true, defendant has made a substantial showing of a due process violation sufficient to advance the postconviction proceedings thereon to its third stage.

¶ 81 The State argues, though, that defendant's due process claim fails to comport with the pleading requirements set forth in section 122-2 of the Act, as defendant presented no affidavits supporting his assertion that Ms. Crosby and Mr. McCoy were threatened or abused by Detectives Halloran and Boudreau. We disagree. As discussed above, the affidavit requirement of section 122-

2 does not apply beyond the first stage of postconviction proceedings. See *Clark*, 2011 IL App (2d) 100188, ¶ 33; *Barkes*, 399 Ill. App. 3d at 987. Even if the affidavit requirement did apply, section 122-2 provides that no affidavit is required where defendant states why it is not attached. 725 ILCS 5/122-2 (West 2012). Defense counsel complied with section 122-2 by explaining at a court appearance on May 13, 2010, that no affidavit from Ms. Crosby was forthcoming because she had died. Counsel subsequently attached an affidavit from Mr. McCoy to defendant's amended supplemental postconviction petition attesting to the threats and coercion used against him to secure his statement implicating defendant. As discussed above, Mr. McCoy's affidavit attached to defendant's amended supplemental postconviction petition, in conjunction with the affidavits attached to the supplemental postconviction petition from other persons who attested to similar coercive techniques administered by Detectives Halloran and Boudreau, were sufficient to satisfy the pleading requirements of section 122-2.

¶ 82 The State also alleges that defendant waived his due process claim by failing to raise it on direct appeal. See *People v. Pitsonbarger*, 205 Ill. 2d at 458 (issues raised in a postconviction petition that could have been addressed on direct appeal are waived). We disagree. Defendant's claim rests in large part upon the affidavits made by criminal defendants and witnesses in unrelated cases who attested to acts of coercion and torture committed by Detectives Halloran and Boudreau that were similar to the allegations of coercion and torture at issue here. The affidavits were not available to defendant at the time of his trial in 1999, as the earliest affidavit was signed in 2003. As such, the information contained in said affidavits regarding the allegations of torture and coercion against Detectives Halloran and Boudreau were outside the trial record upon which this court's ruling

on direct appeal was based. Because the rules of waiver are relaxed where the facts relating to defendant's claim do not appear on the face of the record, the merits of defendant's claim are properly considered. See *People v. Orange*, 168 Ill. 2d 138, 167 (1995).

¶ 83 III. Defendant's Postconviction *Brady* Claim

¶ 84 Finally, we address the dismissal of defendant's claim in his supplemental postconviction petition that the State committed a *Brady* violation by failing to provide him with evidence reflecting a pattern and practice of misconduct by Detectives Halloran and Boudreau. Defendant concedes our supreme court has rejected this same argument. See *People v. Orange*, 195 Ill. 2d 437 (2001) (holding that *Brady* does not require the prosecution to disclose information about misconduct in unrelated cases known only to individual police officers where the nexus between the other cases of alleged abuse and the defendant's case was not known until years after defendant's trial.) Accordingly, we affirm the dismissal of defendant's *Brady* claim.

¶ 85 For the foregoing reasons, we affirm the dismissal of defendant's postconviction claims that: (1) his trial counsel provided ineffective assistance by allegedly failing to investigate, prepare and present evidence regarding Detective Halloran's and Detective Boudreau's *modus operandi* of coercing witnesses into giving false statements; and (2) the State committed a *Brady* violation by failing to provide him with evidence reflecting a pattern and practice of misconduct by Detectives Halloran and Boudreau. We reverse the dismissal of defendant's postconviction claims that: (1) his trial counsel provided ineffective assistance of counsel by failing to investigate and prepare an alibi defense; and (2) the State violated his right to due process by using, as impeachment and substantive evidence, the grand jury testimony of Ms. Crosby and the handwritten statement of Mr. McCoy, both

of which allegedly were coerced by Detectives Halloran and Boudreau. We remand for third-stage proceedings thereon.

¶ 86 Affirmed in part, reversed in part, and remanded.