No. 128366

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Respondent-Appellant, -vs- FRANK ROLAND, Petitioner-Appellee.	)))))))))))	Appeal from the Appellate Court of Illinois, First Judicial District, No. 1-17-3013. There on appeal from the Circuit Court of Cook County, Illinois, No. 02 CR 26630. Honorable Maura Slattery Boyle, Judge Presiding.

BRIEF AND ARGUMENT FOR PETITIONER-APPELLEE

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ISSUE PRESENTED FOR REVIEW

Whether the appellate court was correct in finding that Frank Roland's post-conviction petition, considered solely on the pleadings at the second stage of proceedings, made a substantial showing of ineffective assistance of trial counsel for failing to present available evidence in support of Roland's defense, such that Roland's claim should advance to a third-stage evidentiary hearing.

STATEMENT OF FACTS

Introduction

The State charged Frank Roland with attempted first-degree murder and other offenses, alleging that on September 18, 2002, he fired one shot in the direction of a Chicago police officer with intent to kill. (C 34-42)

At the bench trial, it was undisputed that the officer chased Roland on foot, Roland fired one shot, the officer fired one shot in return, neither of them was hit, and Roland was arrested soon after fleeing the scene. (SUP3 R 323-27, 371, 420-23) The officer testified that Roland pointed a gun at him and fired. (SUP3 R 326) Roland testified that he was suicidal that day and fired a shot above the officer in order to draw the officer's fire, denying that he intended to kill the officer. (SUP3 R 420-23) Roland's counsel also elicited from him that he tried to hang himself in jail a few days after his arrest, and had "cut [his own] throat with a knife" at some point prior to this incident, but presented no further evidence as to these other suicide attempts. (SUP3 R 424-26) After finding Roland's testimony was not credible, the trial court found him guilty of attempted murder. (SUP3 R 450-52)

In a post-conviction petition, Roland alleged trial counsel was ineffective for failing to present evidence corroborating his testimony about his pre- and post-incident suicide attempts, and thus for failing to support his testimony that he was trying to draw the officer's fire, not kill the officer. (C 96-98; SUP6 C 4-17) Roland obtained medical records from two hospitals detailing his conduct and self-inflicted injuries on July 19, 2002, and

September 25, 2002, respectively, and attached them to his petition. (C 103-17, 127-38) These documents were not part of the trial record.

The circuit court granted the State's motion to dismiss Roland's petition at the second stage of proceedings. (C 269) With one Justice dissenting, the appellate court reversed that judgment and remanded for a third-stage evidentiary hearing. *People v. Roland*, 2022 IL App (1st) 173013, ¶¶ 27-33. This Court granted the State's petition for leave to appeal.

Pre-Trial Proceedings

Roland appeared with retained counsel on November 6, 2002. (P A 1) At counsel's request, the trial court ordered that Roland be evaluated for fitness to stand trial and for sanity at the time of the charged offense. (P A 4) On May 19, 2003, Dr. Roni Seltzberg found Roland both fit for trial and legally sane, finding "no indication that he would not have been capable of appreciating the criminality of his alleged conduct." (SUP3 C 93)

Included in the trial record, immediately following Dr. Seltzberg's letter to the court, are several "Incident Reports" from the Cook County Jail. (SUP3 C 94-102) According to these reports, Roland's cellmates, both named, found Roland "hanging from the light fixture" at 8:45 a.m. on September 25, 2002. (SUP3 C 96) After Roland's cellmates helped him down, Deputy Lewis entered and saw Roland lying on the floor "choking," with "red marks on his neck." (SUP3 C 94, 96) Lewis also saw "blood on the floor" and a "rope hanging from the light fixture." (SUP3 C 95) Lewis believed it was a "suicide attempt." (SUP3 C 94) Lieutenant Alexander also saw a "bedsheet rope tied

to [the] light fixture in the form of a noose." (SUP3 C 94) Another officer reported the next day that he heard Roland say he "attempted to hurt himself" and would "start some shit" to avoid being housed in a certain wing of the jail. (SUP3 C 102) One of Roland's cellmates told Lieutenant Alexander that Roland seemed "despondent" before this incident. (SUP3 C 97) Roland had told his cellmate that "he was responsible for his mother's death" and the death of his child's mother, and that "he had just gotten out of Tinley Park [where he] was housed ... for trying to commit suicide." (SUP3 C 97)

The trial court found Roland fit for trial after a hearing on June 17, 2003. (P I 16) At that hearing, Dr. Seltzberg agreed Roland had "attempted suicide" in the jail a few days after his arrest. (P I 12) Seltzberg also agreed Roland had been hospitalized in the summer of 2002 after a suicide attempt. (P I 11) Roland's sister told Seltzberg he had been treated at Ingalls Hospital at that time, then "transferred to Tinley Park." (P I 11-12) Seltzberg testified that Roland "may have been" at Tinley Park Hospital, but "according to the release that was returned to us," Tinley Park had no records for Roland. (P I 11)

On January 23, 2004, the court allowed Roland's retained counsel to withdraw and appointed new counsel. (P II[1] 3-5)

Bench Trial

On the date of the bench trial, January 27, 2005, the case was assigned

[1] There are two transcripts in this volume with "II" pagination: January 23, 2004, and May 17, 2005.

to a new judge. (SUP3 R 278)

Officer Rewers testified that he was a passenger in a police car with two other officers on the evening of September 18, 2002, when they received a call about a man threatening someone with a gun. (SUP3 R 306, 319-22) At about 11 p.m., Rewers saw Roland, who looked like the man described in the call, talking to a woman on the sidewalk near 2704 North Hoyne. (SUP3 R 322) After Officer Figueroa stopped the car 12-15 feet from Roland, Rewers got out and said, "[P]olice ... hands up." (SUP3 R 323) Roland looked at Rewers, then ran west through a courtyard as Rewers chased him. (SUP 3 R 323) After about 15 steps, Rewers saw Roland pull a gun from his waistband and use both hands to do something to the gun. (SUP 3 R 324-25) Roland looked over his left shoulder, then "pointed the gun back towards [Rewers] and fired one shot." (SUP3 R 325-26) Rewers testified that Roland pointed the gun "directly at" him from 10-12 feet away. (SUP3 R 326) Rewers saw the muzzle flash, dove to the ground, and fired one shot at Roland. (SUP3 R 326-27) Rewers's shot missed and the bullet hit a wall behind Roland. (SUP3 R 345) Roland ran out of sight southbound. (SUP3 R 327)

Officer Figueroa testified that she followed about 10 feet behind Rewers as he chased Roland. (SUP3 R 356) Figueroa saw Roland turn, saw his arm "come back" and "kind of extend," then saw a muzzle flash. (SUP3 R 356, 358, 363) Figueroa agreed she would have seen a muzzle flash if the gun was pointed "straight up." (SUP3 R 365) Figueroa saw Rewers fire one shot as he dove to the ground, then lost sight of Roland. (SUP3 R 357)

About 30 minutes later, other officers found Roland and a .25-caliber handgun inside the home at 2634 North Hoyne, and arrested him after Officers Rewers and Figueroa identified him. (SUP3 R 328, 357-58, 370-75)

Officer Moran testified that the .25-caliber handgun was loaded with one round when it was recovered. (SUP3 R 390-91) In the courtyard, Moran found one .45-caliber casing fired from Rewers's gun, one unfired .25-caliber bullet, and one .25-caliber casing that had been loaded into the .25-caliber handgun. (SUP3 R 390, 410-12) Moran found metal shavings on the wall of a building about 150 feet west of the .45-caliber casing, and believed that was caused by Rewers's shot. (SUP3 R 397-400) Moran also looked for the bullet fired from the .25-caliber handgun to the east of where the .25-caliber casing was found. (SUP3 R 404-09) Moran noted the first building in that line of fire was about 180 feet away, and agreed that a bullet fired "straight ahead" could have traveled 180 feet. (SUP3 R 408-09) Moran searched the courtyard, the trees, the cars, and the walls of the buildings on both sides of Hoyne, but did not find a .25-caliber bullet or evidence that it had hit anything in the area. (SUP3 R 404-09) Moran did not search the roofs of any buildings. (SUP3 R 405-06)

Roland testified that on September 18, 2002, he was "feeling bad" and "depressed" because he gave his mother "drugs and money" when she was alive, and he believed that "had something to do" with her death in 1992. (SUP3 R 420) Roland was also "feeling guilty" about the 1997 death of the mother of his child. (SUP3 R 420) Roland was "drinking, smoking weed, [and]

getting high" that day. (SUP3 R 420) Roland was also "feeling suicidal" at the time, saying he "hate[d] [him]self" and "didn't want to live." (SUP3 R 420) Roland had purchased a .25-caliber handgun that day, and put it to his temple and in his mouth, but "didn't have the guts to pull the trigger." (SUP3 R 420, 429) At about 7 p.m., Roland saw a police car drive by and "got the idea to point the gun at them to get them to shoot me." (SUP3 R 421)

At about 11 p.m., a police car pulled up as Roland was standing on Hoyne, holding the gun in his hand while talking to a woman named Threasa. (SUP3 R 421, 431) Roland "started to run." (SUP3 R 421) When an officer told him to stop, Roland "kept running," then "turned and fired a shot in the air." (SUP3 R 421) Roland demonstrated in court by extending his arm behind himself at "a slightly upward angle." (SUP3 R 422) Roland was not trying to shoot the officer because that "would have defeated [his] whole plan." (SUP3 R 422-23) But when the officer fired and missed, Roland "didn't have a plan after that" and "just ran." (SUP3 R 422, 432) Roland denied pointing the gun at or shooting at the officer, and denied intending to kill the officer. (SUP3 R 422-23) Roland ran to Threasa's home, where he was later arrested. (SUP3 R 424)

Defense counsel asked Roland how he was "feeling" while in jail after his arrest. (SUP3 R 424) Roland said he "wasn't feeling good" and tried "to get somebody to talk" to him, but no one would. (SUP3 R 424) After two or three days, Roland tried to hang himself. (SUP 3 R 424) When counsel asked how he did this, the prosecutor objected, arguing this was irrelevant because

it happened "a few days after" the charged offense. (SUP3 R 424) The court overruled the objection. (SUP3 R 424) Roland then described making a braided rope from three bed sheets, which he tied into a noose that he hung from the light fixture, after which he stood on a box and "pushed" himself off. (SUP3 R 425) Roland was found hanging from the light fixture and was taken to Cermak hospital. (SUP3 R 425)

Counsel asked Roland if he "ever tried to kill [him]self before" September 18, 2002. (SUP3 R 425) Roland said he "had an incident, the doctor at Tinley Park said [he] was crying for help, [he] had cut [his] throat with a knife in several places." (SUP3 R 425-26)

Counsel asked no further questions about either incident and called no other witnesses. (SUP3 R 426)

Defense counsel urged the court to find Roland guilty only of a lesser offense because the State failed to prove beyond a reasonable doubt that Roland intended to kill the officer. (SUP3 R 441-45) Counsel argued Roland "wanted to kill himself" that day and only intended "to draw the officer's fire." (SUP3 R 443) Counsel also noted that Roland could have fired the other bullet in the gun, but did not, and that the police found no evidence indicating Roland's shot, unlike Rewers's shot, hit anything in the line of fire if Roland had been pointing the gun at Rewers. (SUP3 R 442, 444-45)

The prosecutor said this case "boil[s] down to credibility" as to what direction Roland was pointing the gun and "why" he fired the shot. (SUP3 R 445-50) The prosecutor argued Roland's testimony about being suicidal that

day was not credible. (SUP3 R 447-48)

The court found Roland guilty of attempted first-degree murder, finding the State proved the intent element and that Roland pointed the gun "directly at" the officer from 10-12 feet away, as Officer Rewers testified. (SUP3 R 452) The court emphasized that it did not believe Roland's testimony about trying to draw the officer's fire, stating that "[i]f he wanted to commit suicide by police ... he wouldn't be fleeing." (SUP3 R 451)

Post-Trial Proceedings

On May 17, 2005, the court denied Roland's post-trial motion, repeating its finding that Roland's testimony was "incredible." (P II 8) That same day, the court sentenced Roland to 30 years in prison. (P II 21) In doing so, the judge said, "I do not know how sincere your suicide attempt was at the Cook County Jail." (P II 20)

Direct Appeal

On direct appeal, Roland argued he was denied a fair trial by the judge's reliance upon facts not in evidence and misstatements of evidence in finding him guilty. (C 195) On July 10, 2007, the appellate court affirmed Roland's conviction and sentence. (C 195)

***Pro Se* Post-Conviction Petition and First-Stage Proceedings**

On January 23, 2008, Roland filed a *pro se* post-conviction petition. (C 94) Among his claims, Roland alleged that trial counsel was ineffective for failing "to fully investigate [his] claims of being hospitalized for psychiatric treatment to be able to present a proper defense." (C 96) Roland argued that

the documents he obtained and attached to his petition showed he was hospitalized after he cut his own throat in a suicide attempt about two months prior to the charged offense. (C 98) And Roland argued that had counsel presented this evidence, it "would have provided a critical piece of corroborating evidence to [his] testimony that [he was] in fact trying to commit suicide." (C 98)

Roland attached to his petition several documents from Cermak Health Services of Cook County. (C 103-18) On a "Screening" form dated September 20, 2002, and signed by a member of the "Mental Health Staff," Roland indicated he had attempted suicide by "scratched throat" earlier in 2002 and was hospitalized at "Tinley Park." (C 103) Another document indicated Roland was hospitalized at Cermak from September 25 to September 30, 2002. (C 117) And in an "Assessment" dated December 4, 2002, a psychologist named Deckard wrote that Roland had a "hx of a serious suicide attempt in G.P. & often reports suicidal ideation." [sic] (C 109) Deckard noted Roland "has several severe hx stressors s/ as death of his mother at a young age & his girlfriend." [sic] (C 109)

Roland also attached several documents from Ingalls Hospital in Harvey, which he obtained in 2007. (C 128-38) These records indicate Roland was hospitalized there at 12:25 a.m. on July 19, 2002. (C 129) Roland was brought in after a "poss attempt w/ knife to kill himself" and had "lacerations to under chin x 3." [sic] (C 129) At 12:43 a.m., Dr. Timothy Hall wrote that Roland had been admitted due to "Aggressive/Suicidal Behavior" over the last

8-24 hours. (C 138) Dr. Hall noted police officers found Roland in his home "with a knife threatening to hurt himself," then "maced" him and put him in handcuffs. (C 138) Dr. Hall described Roland's symptoms as "Worse/ persistent" and "Severe." (C 138) A nurse named Teresa noted "several lacerations" to Roland's "neck/throat area." (C 133) At 3:30 and 5:30 a.m., Teresa noted Roland remained in "4pt hard restraint applied to extremities" for his "own protection [from] slashing @ own throat." [sic] (C 133) At 1:12 p.m., an Ingalls physician signed an "Authorization for Transfer," stating that Roland was "being admitted involuntarily" and the "Receiving Facility has agreed to accept and provide appropriate medical treatment." (C 137) The Ingalls physician noted that Dr. Chun at the receiving facility, "TPMHC," authorized Roland's transfer at 1 p.m. (C 137) Ingalls records further indicate Roland was transferred to TPMHC at 1:30 p.m. (C 129)

Finally, Roland attached a form from Tinley Park Mental Health Center dated May 8, 2007, in response to his request for his records. (C 127) A Tinley Park employee wrote on the form, "Witness Signature Required." (C 127) The employee did not check the box indicating Tinley Park had searched its records and were unable to locate any records for Roland. (C 127)

The circuit court summarily dismissed Roland's petition on March 14, 2008. (SUP3 C 246) On June 30, 2010, the appellate court reversed that judgment and remanded for second-stage proceedings on Roland's petition. (SUP6 C 23-30) The appellate court found that Roland's "medical records, documenting his previous suicide attempt and suicidal thoughts, could only

have served to corroborate his testimony at trial" that he was suicidal on September 18, 2002, that he fired his gun in an effort to draw the officer's fire, and that he did not intend to kill the officer. (SUP6 C 29)

Second-Stage Post-Conviction Proceedings

On June 9, 2015, appointed post-conviction counsel filed a supplemental petition. (SUP6 C 4) The State filed a motion to dismiss Roland's petition on November 5, 2015, and the circuit court granted that motion on May 25, 2017. (C 223, 259-69) As part of its ruling, the court noted that while Roland provided records from Ingalls Hospital showing he was treated there on July 19, 2002, "he has not attached additional documents showing that he was actually seen at Tinley Park." (C 265)

On June 26, 2017, post-conviction counsel filed a motion to reconsider. (SUP2 C 4) In her motion, counsel reported she had tried to get Roland's records from Tinley Park, but learned that facility was closed and had sent its records to Madden Hospital. (SUP2 C 5) Madden staff informed counsel they could not locate any records for Roland. (SUP2 C 5)

The court denied the motion to reconsider on October 16, 2017. (SUP2 R 15) Roland filed a notice of appeal on November 13, 2017. (C 289)

The appellate court reversed the judgment of the circuit court, finding that Roland's post-conviction pleadings made a substantial showing of ineffective assistance of trial counsel for failing to present available evidence of Roland's 2002 suicide attempts to corroborate his testimony and support his defense on the intent element of attempted murder, such that this claim

should advance to a third-stage evidentiary hearing. *People v. Roland*, 2022 IL App (1st) 173013, ¶¶ 19-30. The court agreed with its decision in Roland's prior appeal that "evidence of Roland's mental health history ... would only [have] serve[d] to bolster his defense," and thus found Roland made a substantial showing that trial counsel's failure to investigate and present such evidence was unreasonable. *Id.* ¶¶ 23, 27. And the court found that because this trial boiled down to a "credibility contest" between Roland and Rewers as to what direction Roland fired the gun, Roland made a substantial showing of a reasonable probability that the presentation of such evidence would have led to a different outcome. *Id.* ¶¶ 27-28. The court cited the records attached to Roland's petition, which Roland obtained himself from prison, indicating trial counsel also could have obtained them. *Id.* ¶¶ 22, 25.

One Justice dissented, "on grounds that evidence of Roland's mental condition is inadmissible to show that he did not intend to kill the police officer." *Roland*, 2022 IL App (1st) 173013, ¶ 33 (Coghlan, J., dissenting). The dissenting Justice would have found that "allowing evidence regarding [Roland's] mental history would constitute raising a diminished capacity defense, which is unavailable in Illinois." *Id.* ¶ 36 (Coghlan, J., dissenting). In the dissenting Justice's opinion, because such evidence was entirely inadmissible at Roland's trial, he cannot show counsel was ineffective for failing to present it. *Id.* ¶¶ 37, 40-41 (Coghlan, J., dissenting). The dissenting Justice expressed no opinion as to whether the majority's ruling was correct if diminished capacity were not at issue. *Id.* ¶¶ 32-42 (Coghlan, J., dissenting).

The majority disagreed with the dissent as to whether this case concerns "a diminished capacity defense." *Roland*, 2022 IL App (1st) 173013, ¶ 21. The majority noted that where a defendant asserts a claim of diminished capacity, he must show that "he was incapable of forming the requisite intent" for the charged offense. *Id.* The majority found that "Roland is not making a diminished capacity defense as he does not assert that he was unable to form the requisite intent for attempted murder," but instead "argues the intent to kill never existed" and that "his mental health history bolsters that claim." *Id.*

In its petition for leave to appeal, the State urged this Court to take this case, in part, to consider whether Roland's post-conviction pleadings constitute an effort to raise a prohibited defense of diminished capacity. (St PLA 1-4)

This Court allowed the State's petition for leave to appeal on September 28, 2022.

ARGUMENT

The appellate court correctly found that Frank Roland's post-conviction pleadings make a substantial showing of ineffective assistance of trial counsel, such that his claim should advance to a third-stage evidentiary hearing.

The question before this Court is a simple one: whether Frank Roland's post-conviction pleadings and attached documentation make a substantial showing that trial counsel was ineffective for failing to investigate and present evidence that would have aided his defense, such that his claim should advance to a third-stage evidentiary hearing.

At Roland's bench trial, the only question before the judge was whether the State proved beyond a reasonable doubt that Roland intended to kill the police officer when he fired the gun. That question boiled down to a straightforward credibility contest as to what direction Roland pointed the gun. The officer testified that Roland's gun was pointed at him. Roland denied shooting at the officer or intending to kill him, instead testifying that he fired above the officer. Roland also explained why he did this, testifying that he was suicidal that day and fired the gun to draw the officer's fire. No direct evidence corroborated either version of events.

Recognizing the importance to Roland's defense of corroborating his testimony that he was suicidal that day, counsel elicited from Roland that he tried to hang himself in his jail cell a few days after his arrest, that he cut his own throat some time prior to this incident, and that after both of those incidents he was treated at Cermak and Tinley Park hospitals, respectively. But counsel presented no other evidence to corroborate Roland's testimony

about being suicidal at that point in his life.

In his post-conviction petition, Roland has demonstrated that such corroborating evidence not only existed, but was readily available had counsel conducted even minimal investigation. Specifically, Roland's pleadings show counsel could have obtained records from both Ingalls and Cermak hospitals, which included names of unbiased expert witnesses who observed Roland's conduct and injuries, and who described Roland's suicidal behavior in July and September 2002 as serious.

Because this evidence would have corroborated Roland's testimony on the key questions of fact at trial, Roland's post-conviction pleadings make a substantial showing that counsel was unreasonable for failing to investigate and to present this evidence. And because the most important question of fact boiled down to a straightforward credibility contest, Roland's pleadings make a substantial showing of a reasonable probability of a different outcome, but for counsel's error. As the majority of the appellate court found, Roland's claim should advance to a third-stage evidentiary hearing. *People v. Roland*, 2022 IL App (1st) 173013, ¶¶ 19-30.

A. Post-Conviction Petitions at the Second Stage

The Post-Conviction Hearing Act sets out a three-stage process for resolving claims of constitutional violations in proceedings leading to a conviction. 725 ILCS 5/122-1, *et seq*. (2016). At the second stage, a court is presented only with a question of law: whether the petition and attached documentation make a substantial showing of a constitutional violation.

People v. Coleman, 183 Ill. 2d 366, 385 (1998); *see* 725 ILCS 5/122-2 ("The petition shall have attached thereto affidavits, records, or other evidence supporting its allegations or shall state why the same are not attached."). A petition makes a "substantial showing" of a constitutional violation if the allegations would require relief if proven at an evidentiary hearing. *People v. Rissley*, 206 Ill. 2d 403, 412 (2003).

In evaluating the pleadings, a court may not make credibility determinations and must assume the truth of the allegations in the petition and all attached documentation, unless those allegations are "affirmatively refuted by the record." *People v. Domagala*, 2013 IL 113688, ¶ 35. If the pleadings, taken as true and liberally construed in favor of the petitioner, make a substantial showing of a constitutional violation, the claim advances to a third-stage hearing to assess the credibility of the witnesses and to resolve any factual disputes. *Coleman*, 183 Ill. 2d at 380-82, 385. A second-stage dismissal of a post-conviction petition is reviewed *de novo*. *Id*. at 385.

B. Ineffective Assistance of Trial Counsel

Both the federal and Illinois constitutions guarantee criminal defendants the right to effective assistance of counsel at trial. U.S. Const. amends. VI, XIV; Ill. Const. 1970, art. I, § 8; *Strickland v. Washington*, 466 U.S. 668, 687-89 (1984). Trial counsel provides ineffective assistance when his representation falls below an objective standard of reasonableness and there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Id.* at 694.

Counsel's duty to provide constitutionally effective representation includes a "duty to conduct 'reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.'" *People v. Domagala*, 2013 IL 113688, ¶ 38 (quoting *Strickland*, 466 U.S. at 691). This duty generally requires counsel to do "some investigation" into "readily available sources of evidence" to explore possible defense strategies. *Brown v. Sternes*, 304 F.3d 677, 691-92 (7th Cir. 2002) (quotations omitted). In other words, "Attorneys have an obligation to explore all readily available sources of evidence that might benefit their clients." *Id.* at 693. And while a reviewing court must normally defer to counsel's strategic decisions, such "deference is not warranted if counsel's failure to present evidence is due to his ... failure to investigate." *People v. Harris*, 206 Ill. 2d 293, 321 (2002).

Specifically, counsel's performance may be deficient where he failed to investigate or present available evidence that would have corroborated the defendant's testimony on a crucial question of fact. *See, e.g., People v. Ramirez-Lucas*, 2017 IL App (2d) 150156, ¶ 42 (counsel may be ineffective "when he fails to present evidence of which he is aware to support an otherwise uncorroborated defense") (citing *People v. King*, 316 Ill. App. 3d 901, 913 (1st Dist. 2000) (collecting cases)); *see also People v. Hodges*, 234 Ill. 2d 1, 5-7, 21-22 (2009) (counsel may be ineffective for failing to investigate and present witnesses who would have testified to seeing decedent with a gun, corroborating defendant's testimony that he acted in self-defense).

As to prejudice, counsel's deficient performance constitutes ineffective

assistance when his error undermines confidence in the outcome. *Strickland*, 466 U.S. at 687-89. To meet this standard, a defendant need not prove he would have been acquitted, or even that he likely would have been acquitted, only that a different outcome would have been reasonably likely, absent counsel's error. *Id.* at 693-94; *see also Brown*, 304 F.3d at 698 ("*Strickland* [prejudice] does not require absolute certainty-it only requires a probability sufficient to undermine confidence that the result of the proceeding is reliable"). In other words, "[*Strickland*] prejudice may be found even when the chance that ... competent counsel would have won an acquittal is significantly less than 50 percent." *People v. Lucious*, 2016 IL App (1st) 141127, ¶ 45 (quotations omitted); *see also Stanley v. Bartley*, 465 F.3d 810, 814 (7th Cir. 2006) (*Strickland* only requires showing a "reasonable chance" of a different result, "it needn't be a 50 percent or greater chance").

At the second stage of proceedings on a post-conviction claim of ineffective assistance of trial counsel, the question is whether the pleadings and attached documentation make a substantial showing of both prongs of *Strickland* – that is, a substantial showing of deficient performance and a substantial showing of prejudice. *People v. Pingelton*, 2022 IL 127680, ¶ 33; *People v. Rouse*, 2022 IL App (1st) 210761, ¶ 24; *see also People v. Makiel*, 358 Ill. App. 3d 102, 108 (1st Dist. 2005) (where second-stage post-conviction pleadings "raise factual questions as to the nature and extent of the investigation undertaken by defense counsel prior to trial," or present "unanswered questions as to why trial counsel did not contact" certain

witnesses, defendant makes substantial showing that counsel's performance was deficient).

Roland's post-conviction pleadings make this substantial showing.

C. Roland's Post-Conviction Pleadings

In his post-conviction petition, Roland alleges trial counsel was ineffective for failing to investigate and present available evidence corroborating his testimony that he was suicidal at this point in his life in 2002, including the day of the charged offense. Such corroboration would have been crucial in this case because Roland's entire defense hinged upon his credibility as to what direction he was pointing the gun, which, in turn, hinged upon the credibility of his testimony that he was suicidal that day. Roland's pleadings demonstrate that powerful corroborating evidence was readily available. And where the trial boiled down to a classic credibility contest, Roland's pleadings make a substantial showing that a different outcome was reasonably probable had counsel investigated and presented this evidence.

1. Bench Trial

At trial, Officer Rewers testified that when he confronted Roland on September 18, 2002, Roland ran away. (SUP3 R 323) As Rewers followed, he saw Roland pull a gun and fire one shot in his direction. (SUP3 R 324-26) According to Rewers, Roland pointed the gun "directly at" him from 10-12 feet. (SUP3 R 326) The bullet did not hit Rewers. Rewers fired one shot at Roland, which missed and hit the wall of a building. Roland then ran out of

sight. (SUP3 R 327)

Roland testified that he fired a shot as the officer chased him, but denied firing at the officer, saying instead that he fired in the air above the officer. (SUP3 R 421-22) Roland explained why he did this, testifying that he was "feeling bad," "guilty," and "depressed" because of his perceived role in the deaths of his mother and girlfriend. (SUP3 R 420) Roland was "drinking, smoking weed, [and] getting high" that day. (SUP3 R 420) Roland was also "feeling suicidal" at the time, saying he "hate[d] [him]self" and "didn't want to live." (SUP3 R 420) Roland purchased a .25-caliber handgun earlier that day, and put it to his temple and in his mouth, but "didn't have the guts to pull the trigger." (SUP3 R 420, 429) At about 7 p.m., Roland saw a police car drive by and "got the idea to point the gun at them to get them to shoot [him]." (SUP3 R 421)

When an officer later confronted Roland, he fled. (SUP3 R 421) As he ran, he "turned and fired a shot in the air" with his arm at an upward angle. (SUP3 R 421-22) But when the officer fired and missed, Roland "didn't have a plan after that" and kept running. (SUP3 R 422, 432) Roland denied shooting at or intending to kill the officer. (SUP3 R 422-23)

Defense counsel then elicited from Roland that he tried to hang himself in jail two or three days after his arrest. (SUP3 R 424) The court found this testimony relevant and overruled the State's objection. (SUP3 R 424) Roland described making a rope and hanging himself in his jail cell. (SUP3 R 425) After others found him hanging from the light fixture and

helped him down, Roland was taken to Cermak Hospital. (SUP3 R 425) Counsel asked no further questions about this incident and called no witnesses from the jail or Cermak.

Counsel also asked Roland if he "ever tried to kill [him]self before" September 18, 2002. (SUP3 R 425) Roland said he "had an incident, the doctor at Tinley Park said [he] was crying for help, [he] had cut [his] throat with a knife in several places." (SUP3 R 425-26) Counsel asked no further questions about this incident, not even when it occurred, and called no witnesses to this pre-arrest suicide attempt. (SUP3 R 426)

No direct evidence corroborated either Roland or Rewers as to what direction Roland was pointing the gun. Specifically, while Officer Figueroa saw Roland "extend" his arm "back" before firing, she did not testify that Roland pointed the gun at Rewers. (SUP3 R 356, 358, 363) And if anything, the physical evidence supported Roland's testimony, given that Rewers's shot struck a building behind Roland, while a thorough police search produced no evidence that Roland's bullet hit anything in the line of fire had Roland fired the shot at Rewers. (SUP3 R 326-27, 345, 397-400, 404-09)

Counsel focused his closing argument entirely upon whether the State proved Roland acted with intent to kill. (SUP3 R 441-45) Counsel noted Roland could have fired another shot, but did not. (SUP3 R 442) Counsel also noted the absence of physical evidence indicating Roland fired a bullet in Rewers's direction. (SUP3 R 444-45) Importantly, counsel not only adopted Roland's testimony about what direction he fired the gun, but also *why* he did

so, arguing Roland "wanted to kill himself" that day and "wanted to draw the officer's fire." (SUP3 R 443)

The State acknowledged this case "boil[ed] down to [the] credibility" of Rewers and Roland as to what direction Roland pointed the gun. (SUP3 R 445) And that credibility contest, as the State also acknowledged, largely depended upon Roland's credibility as to "why" he did what he did. (SUP3 R 449-50) The State argued, in part, that Roland's claim of being suicidal that day was not credible because he continued to run after Rewers's shot missed him. (SUP3 R 445-50)

The court found Roland guilty of attempted murder, finding Rewers more credible than Roland as to what direction Roland pointed his gun. (SUP3 R 452) The court emphasized that it did not believe Roland's testimony about trying to draw the officer's fire because "[i]f he wanted to commit suicide by police ... he wouldn't be fleeing." (SUP3 R 451) The court later expressed similar doubt about "how sincere [Roland's] suicide attempt was at the Cook County Jail." (P II 20)

2. Substantial Showing of Deficient Performance

The only question before the trier of fact was whether Roland fired the gun at Officer Rewers with the intent to kill required for attempted murder. The answer depended on a classic credibility contest between Roland and Rewers. And Roland's credibility, in turn, largely depended on his testimony

that he was suicidal that day and was trying to commit "suicide by police."[2]

Given Roland's testimony and counsel's strategy, it was incumbent upon counsel to corroborate Roland's explanation for his actions, if possible. Counsel made some effort at this when he elicited testimony from Roland about his suicide attempts both before and after this incident. But counsel failed to question Roland on anything more than cursory details, failed to ensure the judge knew *when* the pre-incident suicide attempt occurred, and failed to call any other witnesses to either of Roland's other suicide attempts, leaving Roland's crucial testimony entirely uncorroborated.

As Roland's post-conviction petition demonstrates, there was much counsel could have done to support Roland's defense on the dispositive questions of fact. (C 96, 98) Acting *pro se* from prison, Roland obtained documents from both Cermak and Ingalls hospitals, describing his conduct and self-inflicted injuries, and providing the names of several witnesses. Those witnesses included experts who could have testified that Roland's suicide attempts were serious, a key point about which the trial court was plainly skeptical. *See* Ill. R. Evid. 702 (court may admit expert opinion testimony if "specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue")

Roland attached records from Cermak indicating he was hospitalized

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[2] *See, e.g.*, Kulbarsh, "The Untold Motives behind Suicide-by-Cop" (12-15% of killings by police "are provoked for the sake of suicide" and few of these incidents involve detailed planning by the suicidal individual) (available at https://www.officer.com/training-careers/article/12062592/the-untold-motives-behind-suicidebycop (last visited May 3, 2023)).

there from September 25 to 30, 2002, a week after his arrest. (C 117) Roland also obtained a written evaluation dated December 4, 2002, by a psychologist named Deckard, who found Roland had made "a serious suicide attempt" in the jail and "often" described himself as suicidal. (C 109) Deckard further found that Roland "has several severe [historical] stressors," such as the deaths of his girlfriend and his mother. (C 109)

Similarly, Roland obtained records from Ingalls Hospital concerning his admission there on July 19, 2002, about two months prior to the charged offense. (C 128-38) Those records indicated the police were called to Roland's home, where they found him "threatening to hurt himself" with a knife. (C 138) The police "maced" Roland and put him in handcuffs, after which he was taken by ambulance to Ingalls. (C 138) Staff at Ingalls, including a nurse named Teresa, noted Roland had multiple "lacerations" on his throat. (C 129, 133) Roland was treated by Dr. Hall, who admitted Roland to the hospital based on his "Aggressive/ Suicidal Behavior." (C 138) Dr. Hall described Roland's symptoms as "Worse/persistent" and "Severe." (C 138) A few hours later, Teresa noted Roland remained in "hard restraint[s]" for his "own protection [from] slashing [at his] own throat." (C 133) And finally, the records demonstrated that an Ingalls physician contacted Dr. Chun at Tinley Park Mental Health Center, who agreed to accept Roland at 1 p.m., after which Roland was "involuntarily" transported to Tinley Park. (C 129, 137)

Two appellate court panels have reviewed Roland's post-conviction pleadings, and both found the "medical records, documenting his previous

suicide attempt and suicidal thoughts, could only have served to corroborate his testimony at trial and support the defense's theory." *People v. Roland*, 2022 IL App (1st) 173013, ¶ 23 (quoting *People v. Roland*, No. 1-08-1580 (unpublished order on appeal from first-stage dismissal of post-conviction petition)). Specifically, this evidence would have corroborated Roland's testimony concerning his contemporaneous suicidal ideations and conduct, and would have lent credibility to his testimony that he was suicidal, not homicidal, on September 18, 2002, when he tried to draw Rewers's fire and commit suicide by police. It would have been particularly important for counsel to present evidence from objective expert witnesses indicating Roland's pre- and post-incident suicide attempts were "sincere," as the trial court put it, by calling Dr. Thomas from Ingalls, Psychologist Deckard from Cermak, or perhaps Dr. Chun from Tinley Park.[3]

Roland's pleadings thus make a substantial showing that counsel was

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[3] At the 2005 trial, Roland's medical records themselves would not have been admissible under the "business records exception to the hearsay rule," thus counsel would have been required to present witnesses. *See People v. Deroo*, 2022 IL 126120, ¶¶ 35-45 (prior to 2022, medical records were inadmissible in criminal cases, but amending Illinois Rule of Evidence 803(6) to now allow admission of medical records at criminal trials). This has no effect on the question before this Court, however, because a post-conviction petitioner at the second stage may rely upon records detailing witnesses' observations and opinions, like the medical records here, to make a substantial showing of a constitutional violation requiring a third-stage hearing. *See People v. Dupree*, 2018 IL 122307, ¶¶ 32, 42 (second-stage petitioner may rely upon "any suitable evidence," such as a signed statement a witness gave to police, not just "affidavits" from witnesses describing their proposed testimony, leaving to a third-stage hearing what the witness's testimony would be). The State does not argue that the documents Roland attached to his petition are procedurally insufficient under 725 ILCS 5/122-2.

unreasonable for failing to investigate and present evidence to corroborate Roland's testimony on the crucial questions of fact before the trial court. *Roland*, 2022 IL App (1st) 173013, ¶ 27; *see, e.g., People v. Harris*, 206 Ill. 2d 293, 323 (2002) (substantial showing of ineffective assistance at sentencing, where counsel "never investigated" defendant's mental-health problems, which "may have explained ... defendant's actions at the time of the crime"); *People v. Skinner*, 220 Ill. App. 3d 479, 483, 485-86 (1st Dist. 1991) (substantial showing of ineffective assistance where unrebutted pleadings indicated counsel failed to investigate and present available witnesses to corroborate defendant's testimony and contradict police testimony on key question of fact).

3. Substantial Showing of Prejudice

Because this case boiled down to a pure credibility contest between Rewers and Roland as to what direction Roland was pointing the gun, Roland's pleadings also make a substantial showing of a reasonable probability of a different outcome had counsel presented at least some of this corroborating evidence. *Roland*, 2022 IL App (1st) 173013, ¶ 27. The State agrees it would have been "difficult" for Officer Rewers "to see where the gun was pointed," given his testimony that both he and Roland were running and he dove to the ground when Roland turned while holding the gun. (St Br 26; SUP3 R 326-27) Roland, of course, denied firing the gun at Rewers and instead said he fired in the air. (SUP3 R 421-23) Nothing corroborated Rewers's testimony that Roland pointed the gun directly at him, while the

absence of physical evidence of Roland's gunshot in the alleged line of fire only supported his testimony. (St Br 26; SUP3 R 356-58, 363-65, 397-409)

As this Court recently found under similar circumstances, this is "a classic case of closely balanced evidence." *People v. Moore*, 2020 IL 124538, ¶ 52. In *Moore*, a police officer testified to seeing the defendant make a motion toward the console of his car and to hearing the defendant admit he put a gun in the console. *Id.* ¶ 49. The State offered no evidence corroborating the officer. The defendant denied reaching toward the console and denied admitting the gun was his. *Id.* ¶ 51. And the defendant's passenger testified that while the car belonged to the defendant, the gun belonged to her. *Id.* This Court noted that the trier of fact was "faced with two plausible versions of events that depended on witness credibility," and had to decide who to believe. *Id.* ¶ 52. Under those circumstances, trial counsel's unreasonable failure to bar overly prejudicial evidence about the defendant "made [the officer's] version more plausible and tipped the scales against [the] defendant." *Id.; see also People v. Sebby*, 2017 IL 119445, ¶¶ 61-63 (evidence "closely balanced" under first prong of plain-error doctrine, where defendant's version of events was not contradicted by objective evidence, and thus was not "fanciful," leaving trier of fact to decide credibility contest between police and defense witnesses); *People v. White*, 2011 IL 109689, ¶ 133 (prejudice standards for ineffective assistance and first-prong plain error are "similar").

Just as the *Moore* defendant met the *Strickland* prejudice standard on direct appeal, Roland's pleadings make a substantial showing of *Strickland*

prejudice. Both Rewers and Roland testified to versions of events that were neither corroborated nor refuted by other evidence, and the case thus hinged on their credibility. Like counsel in *Moore*, counsel's unreasonable failure in this case to present available evidence corroborating Roland's testimony that he was suicidal at that time in his life tipped the scales against Roland, as demonstrated by the trial court's discounting of his testimony on that point. (SUP3 R 451; P II 20); *see Harris*, 206 Ill. 2d at 323-24 (where trial court's findings were seemingly "influenced by" the absence of evidence counsel failed to present, finding *Strickland* prejudice because this Court could not say the evidence attached to defendant's post-conviction petition "could not have altered" the outcome).

Because Roland's post-conviction petition makes a substantial showing that trial counsel was unreasonable for failing to present available evidence corroborating his testimony on the crucial question of fact, and a substantial showing of a reasonable probability of a different outcome but for counsel's error, this Court should affirm the judgment of the appellate court and remand to the circuit court for a third-stage evidentiary hearing.

D. Response to the State's Argument in this Court

1. Deficient Performance

In this Court, the State agrees Roland's defense depended upon "persuad[ing] the trial judge to harbor a reasonable doubt that [he] had the specific intent to kill [Officer] Rewers." (St Br 24) The State notes that the mere fact Roland's "bullet did not hit Rewers was not on its own likely to

create such doubt," and thus implicitly agrees it was incumbent upon counsel to present additional evidence to raise a reasonable doubt as to intent, if such evidence was available. (St Br 24) And the State agrees that trial counsel's strategy to raise a reasonable doubt as to the intent element included an effort to convince the trier of fact Roland was suicidal that day and was trying to draw the officer's fire. (St Br 20, 25-26)

At the same time, however, the State claims Roland's trial counsel could not have been unreasonable for failing "to present additional evidence to corroborate [Roland's] testimony about his suicide attempts before and after" this incident. (St Br 24) The State argues – as a matter of law at the second stage – that the record refutes Roland's claim because it establishes "counsel made a reasonable strategic decision not to present" this evidence. (St Br 24) Specifically, the State asserts counsel strategically chose not to present corroborating evidence because Roland's testimony about his other suicide attempts was "undisputed," and thus corroboration would have "provided little benefit," while raising the risk of "highlighting a weakness in the defense's theory that [Roland] sought to commit suicide but could not bring himself to shoot himself directly." (St Br 24)

The record, however, does not establish counsel made a "strategic decision" not to present any evidence to corroborate Roland's testimony about his other suicide attempts. On the contrary, while the record and pleadings show counsel was, or should have been, aware Roland had been hospitalized for suicide attempts both before and after this incident, (C 103-18, 128-38;

SUP3 C 94-102; P I 11-12; SUP3 R 424-26), what the record does *not* establish is that counsel investigated this evidence and chose not to use it, either for the State's speculative reasons or for any other reason. That is, the record does not refute Roland's pleadings. *See People v. Domagala*, 2013 IL 113688, ¶¶ 35, 38 (counsel has duty to conduct a reasonable investigation or make a reasonable decision obviating need for that investigation). Rather, the record presents unanswered questions of fact as to whether counsel investigated this evidence and chose not to use it, which can only be resolved at a third-stage hearing. *People v. Makiel*, 358 Ill. App. 3d 102, 108 (1st Dist. 2005). And such questions *must* be resolved at a hearing because there is no strategic decision to which to defer where the absence of certain evidence is the result of counsel's failure to investigate that evidence. *People v. Harris*, 206 Ill. 2d 293, 321 (2002); *see also People v. Cleveland*, 2012 IL App (1st) 101631, ¶ 60 (where second-stage post-conviction petition presented affidavits from alibi witnesses, deference to counsel's authority to make strategic decisions unwarranted where record revealed no "reasonable strategy" that could have included failure to call those witnesses after counsel was made aware of them).

Counsel elicited from Roland that he was suicidal on the day of this incident and had attempted suicide both before and after this incident. And counsel relied upon that testimony to argue Roland was trying to commit suicide by police that day, in order to negate the intent element. (SUP3 R 443) Thus, if counsel had been aware of the witnesses to Roland's pre- and

post-incident suicide attempts, no reasonable strategy could have included leaving Roland's testimony uncorroborated where his defense rested almost entirely on his credibility. *People v. Hodges*, 234 Ill. 2d 1, 5-7, 21-22 (2009); *People v. Ramirez-Lucas*, 2017 IL App (2d) 150156, ¶ 42.

The State argues that a decision by counsel not to offer this corroborating evidence would have been reasonable because Roland's testimony about his other suicide attempts was "undisputed." (St Br 21, 24, 28) But as the closing arguments and the trial court's findings show, Roland's credibility as to whether he was actually suicidal on September 18, 2002, *was* in dispute, and was key to deciding the credibility contest as to what direction Roland was pointing the gun. (SUP3 R 443, 447-48, 451; P II 20)

Nor would testimony from those who witnessed Roland's other suicide attempts, or from those who treated him, have been merely cumulative of Roland's own testimony. Evidence is only "considered cumulative when it adds nothing to what was already before" the trier of fact. *Ramirez-Lucas*, 2017 IL App (2d) 150156, ¶ 49 (citing *People v. Ortiz*, 235 Ill. 2d 319, 335 (2009)). Here, the question was not limited to whether Roland injured himself in July 2002 and in the jail after his arrest, it also included whether he was genuinely suicidal during those months in 2002. The witnesses revealed by Roland's medical records indicated his symptoms were severe and his suicidal behavior was genuine, and thus would have added "more details" about these other suicide attempts, including expert opinions corroborating Roland's testimony. *Ramirez-Lucas*, 2017 IL App (2d) 150156, ¶ 50; *see also People v.*

Skinner, 220 Ill. App. 3d 479, 485-86 (1st Dist. 1991) (where trial hinged on credibility contest between defendant and officer, including as to where defendant claimed to reside, defendant's post-conviction petition made substantial showing of ineffective assistance at second stage where counsel failed to call witnesses who would have corroborated defendant's testimony that he lived at a certain address). Of course this evidence would not have "established" Roland was suicidal on September 18, 2002, as the State puts it, (St Br 21-22), but it was relevant to that question because it would have a "tendency to make the existence of [a] fact that is of consequence to the determination of the action" – that is, Roland's contemporaneous suicidal ideations – "more probable or less probable than it would [have been] without the evidence." Ill. R. Evid. 401.

The State rationalizes counsel's performance by asserting he "faced a challenging case," and speculates that counsel chose not to present this corroborating evidence in favor of an alternative theory that Roland simply fired into the air, regardless of his motive. (St Br 20, 24, 26-27) Roland's response is twofold.

First, there is no question counsel had a duty to use available evidence to challenge the State's evidence as to the direction Roland fired the gun. But the question is not whether what counsel *did* was reasonable, it is whether Roland's pleadings make a substantial showing that counsel was unreasonable for something he did *not* do – use available evidence to corroborate Roland's testimony that he was suicidal at that time. *See People*

v. Jacobazzi, 398 Ill. App. 3d 890, 927 (2d Dist. 2009) ("What a defense lawyer has done to craft a defense ... does not necessarily absolve him of failing to do more.") (citing *Murray v. Carrier*, 477 U.S. 478, 496 (1986)).

And in any event, counsel never presented alternative theories to the court. As the State acknowledges, counsel adopted the strategy of raising reasonable doubt as to whether Roland acted with intent to kill through evidence that he was *both* suicidal that day *and* fired into the air in order to provoke a fatal response from the police. (St Br 25-26) The State portrays these as separate strategies, but these facts were inextricably intertwined, as counsel's closing argument indicated. (SUP3 R 441-45) And the prosecutor at trial agreed, framing the key questions of fact as what direction Roland was pointing the gun and "why he [was] doing it." (SUP3 R 445-46, 449-50)

Counsel thus never offered the alternative theory the State suggests in this Court – that there was a "basis to acquit ... independent of the suicide attempt theory," such as firing into the air "to give the pursuing officers pause so that he could escape." (St Br 26-27) But even if counsel had made this alternative argument, that would not change the fact that he expressly adopted the "suicide attempt theory." And once counsel adopted that strategy, it was incumbent upon him to present available evidence to corroborate Roland's testimony, where the case boiled down to a pure credibility contest between Roland and Rewers. *Ramirez-Lucas*, 2017 IL App (2d) 150156, ¶ 42.

The State similarly argues that counsel's hypothetical decision not to

present the evidence at issue could not have been unreasonable because Roland's conduct that day was "inconsistent" with being suicidal. (St Br 22, 24, 27, 32) According to the State, presenting evidence to corroborate Roland's testimony that he was suicidal during those weeks would have "carried the risk of highlighting [this] weakness in the defense's theory." (St Br 24) But any inconsistency between Roland's testimony and his conduct only made it *more* necessary for counsel to present available, objective evidence of Roland's other suicidal behavior at that time. Where the State argued Roland was not credible due to this perceived inconsistency, and where the judge did not believe Roland's testimony about firing into the air because it did not believe he was suicidal that day, this perceived weakness in Roland's defense was *already* highlighted. (SUP3 R 447-51; P II 20) Absent a reasonable explanation from counsel at a third-stage hearing, it was substantially unreasonable for counsel to leave Roland's testimony on this point entirely uncorroborated.

As a separate argument on the first prong of *Strickland*, the State asserts that counsel could not have been unreasonable for failing to investigate Roland's medical records from Tinley Park because it is unclear that such records ever existed. (St Br 21, 30-32) Roland's response is twofold. First, insofar as the State describes Roland's claim as being *limited* to the Tinley Park records, the State is incorrect. (St Br 21) Roland's claim is that counsel was unreasonable for failing to investigate *any* of the medical records related to his suicide attempts in July and September 2002. (C 96-98; SUP6

C 4-12) He supports that claim with documents from two hospitals, Cermak and Ingalls, that were both available and helpful. (C 103-38) Those documents alone make a substantial showing that counsel failed to investigate readily available evidence to corroborate Roland's testimony.[4]

The State is likewise incorrect when it argues "there was nothing to investigate" because Roland's two different trial attorneys "had medical records" or "had the Cermak records." (St Br 30) The pages of the record cited by the State, however, only show that counsel participated in the effort to get Roland's medical records, that Dr. Seltzberg had some information from Cermak when evaluating Roland for fitness and sanity, and that counsel had Dr. Seltzberg's "notes" and other discovery materials. (P B 3, D 3, G 3, I 6, I 11, I 14, Q 6, T 3, U 3) Nothing in the record shows counsel had, or even was aware of, the records attached to Roland's petition from Cermak *and Ingalls*, with descriptions and opinions from medical staff who treated Roland after his July and September 2002 suicide attempts.

And in any event, Roland's claim is not limited to counsel's failure to *investigate*, it also includes counsel's failure to *present* these witnesses. If the

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[4] The appellate court found that Tinley Park's response to Roland's *pro se* request for records did not establish that such records never existed because the facility did not check the box indicating no such records exist. (C 127; St Br 30-32); *Roland*, 2022 IL App (1st) 173013, ¶ 22. This is true, but the question may be moot because post-conviction counsel learned in 2017 that any records Tinley Park may have had no longer existed. (SUP2 C 5) The State, however, is incorrect in claiming "there is no evidence that [Roland] was in fact transferred to Tinley Park." (St Br 31) Ingalls records demonstrate that Dr. Chun at Tinley Park agreed to receive Roland there, and that Roland was transferred from Ingalls to Tinley Park at 1:30 p.m. on July 19, 2002. (C 129, 137)

State is correct that counsel was aware of all the records attached to Roland's petition, then his pleadings make a substantial showing that counsel was unreasonable for failing to present these known, available witnesses. *Ramirez-Lucas*, 2017 IL App (2d) 150156, ¶ 42; *Cleveland*, 2012 IL App (1st) 101631, ¶ 60.

2. Prejudice

As to *Strickland* prejudice, the State argues there was no reasonable probability of a different outcome at trial because Roland's conduct was "wholly inconsistent" and "irreconcilable" with his testimony that he was trying to commit suicide-by-police, and because the evidence of his other suicide attempts "would not have established" he was suicidal on September 18, 2002, only that he was "sometimes suicidal." (St Br 32-33) This overstates Roland's burden of pleading in this proceeding. Roland's attached documentation cannot, and need not, *establish* he was suicidal on the date of the incident. But this evidence satisfies Roland's burden of pleading because it would have corroborated his testimony that he was suicidal that day and would have provided an explanation for the seemingly inexplicable act of firing a gun in the air above a police officer. *Cf., People v. Villarreal*, 198 Ill. 2d 209, 232-33 (2001) (where defendant's actions are "otherwise inexplicable," State may offer evidence of motive to explain actions to trier of fact, even highly prejudicial evidence like defendant's gang membership).

The State also assumes too much about what conduct from a person experiencing suicidal ideations is "consistent" with those thoughts. (St Br 29,

32-33) At trial, the State argued, and the court agreed, that someone who was trying to draw the officer's fire would not have continued running after the officer's first shot missed. (SUP3 R 447-51) It also could not have escaped the court's attention that while Roland testified that he tried to kill himself both before and after this incident, he did not actually do so. Because it was foreseeable that the judge would have doubts about whether Roland was "sincere" in his claims of being suicidal at that time, (P II 20), and that the judge would find these doubts significant in deciding the credibility contest, counsel had a duty to present available evidence addressing that very question. As the State appears to agree, (St Br 29), the records attached to Roland's petition show there were available witnesses to his conduct in July 2002 and in the jail after his arrest, including medical experts who described his symptoms as severe and his suicidal conduct as serious. Such information would have been useful to the trier of fact in weighing Roland's credibility. *See, e.g.,* Barber, *et al.*, "Aborted Suicide Attempts: A New Classification of Suicidal Behavior," *American Journal of Psychiatry* 155:3 (March 1998), 385-86 (about "10% of those who attempt suicide eventually die by suicide" and "aborted attempts ... are associated with high suicidal intent"); Harvard School of Public Health, "Duration of Suicidal Crises" (citing studies indicating "acute period of heightened risk for suicidal behavior" often lasts only minutes, but may last for weeks or months) (available at https://www.hsph.harvard.edu/means-matter/means-matter/duration/ (last visited April 24, 2023)).

While there may have been an arguable inconsistency between Roland's conduct and testimony, that inconsistency does not establish there was no reasonable probability of a different outcome had counsel investigated and presented this evidence. And it certainly does not establish that as a *matter of law* on the pleadings. That is why this case is nothing like *Foster*. *See* (St Br 33-34) (citing *People v. Foster*, 168 Ill. 2d 465, 476-79 (1995) (where voluntariness of defendant's confession was at issue, no *Strickland* prejudice from counsel's failure to present expert opinion that defendant was "significantly impaired" at time of confession, where 1) expert evaluated years after trial, 2) mere impairment, without more, does not render confession involuntary, and 3) "overwhelming" evidence showed defendant was "coherent" and understood his rights at time of confession). And if anything, the State's reliance upon *Hale* only shows why counsel's failure to corroborate Roland's testimony was prejudicial. *See* (St Br 33) (citing *People v. Hale*, 2013 IL 113140, ¶¶ 22-26 (after *evidentiary hearing*, and where defendant did not argue on appeal that counsel was ineffective for failing to present evidence at that hearing, no *Strickland* prejudice where nothing corroborated defendant's hearing testimony, and his prior statements contradicted that testimony).

Contrary to the State's claims, where the proposed evidence would have corroborated and explained Roland's testimony on one of the most important questions of fact before the court, and where the trial boiled down to a pure credibility contest between Roland and the officer, Roland's post-

conviction pleadings make a substantial showing of a reasonable probability of a different outcome, but for counsel's error.

E. "Diminished Capacity"

Finally, this case has nothing to do with Roland's capacity to understand what he was doing – neither legal insanity nor "diminished capacity." When a defendant proves by clear and convincing evidence that "at the time of his [criminal] conduct" he "lack[ed] substantial capacity to appreciate the criminality of his conduct," he was legally insane and thus not guilty of the charged offense. 720 ILCS 5/6-2 (2022); *see People v. Grant*, 71 Ill. 2d 551, 558-59 (1978) ("insanity," like "involuntary conduct," concerns defendant's ability "to control or prevent his conduct"). By contrast, a defendant who was "legally sane" at the time of the offense raises a "diminished capacity" defense when he argues that a mental impairment prevented him from forming the mental state necessary for the charged offense. *People v. Johnson*, 2018 IL App (1st) 140725, ¶¶ 63-64 (citing *People v. Hulitt*, 361 Ill. App. 3d 634, 640-41 (1st Dist. 2005); Black's Law Dictionary 199 (7th ed. 1999)). In Illinois, a defendant may raise an insanity defense, but may not argue diminished capacity. *Johnson*, 2018 IL App (1st) 140725, ¶ 63 (citing *Hulitt*, 361 Ill. App. 3d at 636).

There is no issue concerning Roland's insanity or diminished capacity before this Court. Instead, this appeal concerns whether trial counsel was ineffective for failing to present available evidence corroborating Roland's trial testimony. In that testimony, Roland never said or implied he was

incapable of forming an intent to commit a crime on September 18, 2002. Rather, he said the exact opposite. Roland denied firing at, or intending to kill, the officer, and instead testified that he knew exactly what he was doing that day: he fired in the air in order to draw the officer's fire and commit suicide by police. (SUP3 R 420-23) As the appellate court correctly found, Roland's defense was not that he could not have formed an intent to kill, it was that he had no such intent. *Roland*, 2022 IL App (1st) 173013, ¶ 21.

Neither at trial, nor at any point prior to its brief in the appellate court in this appeal, did the State argue that evidence concerning Roland's other suicide attempts could only have been relevant to a prohibited diminished capacity defense. (St PLA 1) And in this Court, the State appears to agree this appeal has nothing to do with diminished capacity, only arguing that "[t]o the extent" post-conviction counsel's argument in the *circuit court* implicitly concerned diminished capacity, that claim was meritless because there is no such defense. (St Br 34) There is, however, no "extent" to which Roland's defense has ever depended upon "diminished capacity." Neither Roland nor his counsel has ever made such an argument, either explicitly or implicitly.

The only reason the parties are discussing "diminished capacity" in this Court is the opinion of the dissenting Justice below, agreeing with the State that evidence of other suicide attempts could *only* have been relevant to that prohibited defense. (St PLA 1-4); *Roland*, 2022 IL App (1st) 173013, ¶ 36 (Coghlan, J., dissenting). The dissenting Justice would have found that

Roland's current claim is entirely barred for that reason.

In this Court, the State agrees with the dissenting Justice below only "[t]o the extent" that Roland's defense at trial constituted a diminished capacity defense. (St Br 36) But at no point does the State argue that Roland's defense at trial *actually was* diminished capacity. On the contrary, the State implicitly abandons its theory below, and the reasoning of the dissenting Justice, when it argues counsel made a reasonable strategic decision to "strengthen" Roland's defense by presenting evidence that he was "suicidal." (St Br 25-26) The State does not argue in this Court that the evidence attached to Roland's petition would have been *inadmissible*, only that it was reasonable for counsel not to present it. (St Br 24)

This is because the dissenting Justice below was incorrect. The dissenting Justice would adopt a bright-line rule that *any* evidence related to a defendant's mental health is *per se* inadmissible to support his defense on the mental-state element of the charged offense. This appears to be based on a misreading and misapplication of a single line from *Johnson*, indicating that "a legally sane defendant may not present 'evidence of *mental illness* to negate the specific intent required to commit a particular crime.'" *Roland*, 2022 IL App (1st) 173013, ¶ 41 (Coghlan, J., dissenting) (quoting *Johnson*, 2018 IL App (1st) 140725, ¶ 63) (emphasis added).

Roland's proposed evidence would not have been an effort to prove he had a "mental illness." As that phrase from *Johnson* implies, what a legally sane defendant may not do is present such evidence in support of an

argument that he was *incapable* of forming the *mens rea* of the charged offense. That was the holding in *Johnson* and *Hulitt*.

But evidence related to a defendant's mental health may be relevant to matters other than legal sanity or capacity. It may consist of testimony from medical providers about what they *observed*, like the defendant's conduct and injuries. It may consist of opinion testimony, not about whether the defendant was capable of forming an intent to kill, but about whether a defendant's contemporaneous suicide attempts were "serious" or "sincere." Ill. R. Evid. 702. Such evidence was relevant to Roland's defense because it tended to make it more likely that he was genuinely suicidal on September 18, 2002, which was a crucial question of fact before the court. *See, e.g., People v. Harris*, 206 Ill. 2d 293, 323 (2002) (mental-health evidence would have been relevant to "explain[ing]" defendant's "actions," and was admissible for purpose unrelated to defendant's capacity); *Brown v. Sternes*, 304 F.3d 677, 692 (7th Cir. 2002) (counsel must investigate available medical records if they would support any "possible defense," including those unrelated to defendant's capacity); *see also* (Answer to St PLA 3-8).

As the State's brief implies, no question concerning "diminished capacity" is before this Court. (St Br 34-36)

F. Conclusion

At Frank Roland's bench trial, the only question in dispute was whether the State proved beyond a reasonable doubt that he had a specific intent to kill when he fired his gun. The answer to that question of law

depended upon a question of fact as to what direction Roland was pointing the gun. That question boiled down to a pure credibility contest between Roland and the officer, where neither version of events was corroborated or refuted by other evidence. Roland's credibility on that question, however, depended greatly upon his explanation for his conduct – that he fired the gun above the officer to draw his fire and commit suicide by police.

Recognizing the need to corroborate Roland's explanation, trial counsel elicited brief, incomplete testimony from Roland about two other suicide attempts in the weeks before and the days after this incident. The court found this relevant and admissible. But the court found Roland guilty, largely because it found his testimony about being suicidal not credible.

Roland's post-conviction pleadings show it is reasonably probable the court's credibility findings were the result of counsel's failure to present available, objective witnesses from multiple facilities who observed and treated Roland after he cut his throat in July 2002 and after he hanged himself in his jail cell days after his arrest. Those witnesses included medical experts who would have testified that Roland's suicidal symptoms and conduct were both severe and serious, addressing the trial court's concerns about the "sincerity" of Roland's suicide attempts. Nothing in the record, however, indicates trial counsel was aware of these witnesses, much less that he investigated them and made a reasonable strategic decision not to present them.

Roland's post-conviction pleadings thus make a substantial showing of

ineffective assistance of trial counsel. This Court should affirm the judgment of the appellate court and remand to the circuit court for a third-stage evidentiary hearing on Roland's claim.

CONCLUSION

For the foregoing reasons, Frank Roland, Petitioner-Appellee, respectfully requests that this Court affirm the judgment of the appellate court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342, is 45 pages.

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IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Respondent-Appellant, -vs- FRANK ROLAND, Petitioner-Appellee.	))))))))))	Appeal from the Appellate Court of Illinois, No. 1-17-3013. There on appeal from the Circuit Court of Cook County, Illinois , No. 02 CR 26630. Honorable Maura Slattery Boyle, Judge Presiding.

NOTICE AND PROOF OF SERVICE

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Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. On May 4, 2023, the Brief and Argument for Petitioner-Appellee was filed with the Clerk of the Supreme Court of Illinois using the court's electronic filing system in the above-entitled cause. Upon acceptance of the filing from this Court, persons named above with identified email addresses will be served using the court's electronic filing system and one copy is being mailed to the petitioner-appellee in an envelope deposited in a U.S. mailbox in Chicago, Illinois, with proper postage prepaid. Additionally, upon its acceptance by the court's electronic filing system, the undersigned will send 13 copies of the Brief and Argument to the Clerk of the above Court.

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