

ARGUMENT

As explained in the People’s opening brief, the appellate court erred by ordering a new trial because defendant failed to satisfy the two-pronged test of *Strickland v. Washington*, 466 U.S. 668 (1984). First, he failed to demonstrate the prejudice that *Strickland* requires. Peo. Br. 9-16.¹ Second, he did not meet his burden of establishing that counsel’s performance was deficient. Peo. Br. 16-20.

Defendant’s contrary arguments on both prongs fail for the same reason, and one he largely sidesteps in his brief: an adverse result from DNA testing would have devastated the defense. At trial, the People offered no evidence that DNA from the victim, Aaron Ferguson, was on the gun recovered from defendant’s residence. Strategically, defense counsel relied on this omission to argue that the People’s investigation was incomplete because they failed to test the swabs of the gun and that their case failed for lack of forensic proof. Defendant’s claim that trial counsel was ineffective for failing to request the same forensic testing that he faulted the People for failing to complete — testing that could have shown that Ferguson’s DNA *was* on the gun — should fail.

¹ “Peo. Br.,” “Def. Br.,” and “A_” refer to the People’s opening brief, defendant’s appellee brief, and the appendix to the People’s opening brief, respectively.

I. Defendant Is Not Entitled to a New Trial Based on Counsel's Failure to Request DNA Testing Because He Has Not Demonstrated Prejudice.

Defendant does not dispute that he was required to show prejudice under *Strickland*. Instead, he defends the appellate majority's rationale that a reviewing court should presume, in evaluating a *Strickland* claim on direct appeal, that the results of the forensic testing that trial counsel failed to request would have been favorable.

Defendant attempts to minimize the scope of the appellate majority's new rule, claiming that "the majority found that, in unusual circumstances such as occurred in the instant case, a defendant need only demonstrate that a negative DNA test result would probably change the outcome of the trial." Def. Br. 15. But the dissenting justice properly noted that the majority adopted a broad "new test [that] allows a defendant to assume, for the purposes of establishing ineffective assistance, that any DNA tests will come out in his favor." A14 ¶ 54. The majority's holding effectively exempts any defendant who raises this type of ineffective assistance claim on direct appeal from making the affirmative showing of prejudice that *Strickland* requires, and this Court should reject it.

Without the benefit of the majority's presumption of favorable test results, defendant's claim fails. His argument turns on the premise that forensic testing would *not* have revealed Ferguson's DNA on the gun. *See, e.g.*, Def. Br. 8 ("the absence of the instant complainant's DNA from the

firearm would allow a jury to reasonably conclude that the defendant had not used the firearm”); *id.* at 9-10 (“a negative DNA result on the testing of the firearm swabs would create a reasonable probability of a different result at trial”); *id.* at 10 (“the absence of Ferguson’s DNA on the firearm would cast doubt that defendant perpetrated the armed robbery”).

Defendant does not even address the possibility that DNA testing instead would have revealed that Ferguson’s DNA *was* on the gun. As defendant acknowledges, his “best defense relies on the *absence* of DNA, rather than its *presence*,” Def. Br. 6 (emphases in original), and had counsel requested testing that confirmed the presence of Ferguson’s DNA, this “best” defense would have been unavailable.

At bottom, defendant’s argument turns on speculation about the results of hypothetical testing. And the law is clear that a defendant cannot demonstrate prejudice through speculation. Defendant attempts to distinguish each of the People’s cited cases but ignores the fundamental principle on which their holdings are based. *Compare* Peo. Br. 10-11 (citing broad array of cases underscoring need to show actual prejudice) *with* Def. Br. 12-13 (noting that some cases involved defendants who claimed that ineffective assistance impacted their decisions to plead guilty and citing *People v. Hale*, 2013 IL 113140; *People v. Bew*, 228 Ill. 2d 122 (2008); and *People v. Palmer*, 162 Ill. 2d 465 (1994)), *and* Def. Br. 13-14 (claiming that some cases are inapposite because they found no prejudice due to

“overwhelming” evidence of guilt and citing *People v. Patterson*, 2014 IL 115102, and *People v. Gordon*, 2016 IL App (1st) 134004).

When evaluating claims challenging trial counsel’s failure to request forensic testing, courts have consistently applied this principle that a defendant cannot rely on speculation. See *People v. Olinger*, 176 Ill. 2d 326, 363 (1997) (where defendant claimed counsel was ineffective for failing to pursue theory that fingerprints recovered from murder scene belonged to alternate perpetrator, claim failed because exculpatory results were premised on “pure speculation”); *People v. Scott*, 2011 IL App (1st) 100122, ¶ 31 (where defendant claimed counsel was ineffective for failing to request DNA testing, “[w]ithout test results, we cannot say whether a reasonable probability exists that the result of defendant’s trial would have been different such that defendant was prejudiced”). Although defendant argues that *Olinger* and *Scott* are factually distinguishable, see Def. Br. 7-8, in both cases the courts held that a defendant cannot show *Strickland* prejudice by assuming that the results of hypothetical testing would be exculpatory. Accordingly, the majority’s holding here contradicted those cases.

Notably, defendant has cited no case in which a court has found *Strickland* prejudice based on speculation that the results of forensic testing would have been favorable. Defendant relies on *People v. Johnson*, 401 Ill. App. 3d 685, 695-96 (2d Dist. 2010), which considered whether trial counsel was ineffective for failing to use evidence disclosed in discovery that

fingerprints recovered from the crime scene did not match petitioner's fingerprints. *See* Def. Br. 11. Thus, the appellate court's determination that Johnson had adequately alleged *Strickland* prejudice rested on the results of completed — and not merely hypothetical — forensic analysis. Defendant also cites precedent suggesting that he would be entitled to postconviction DNA testing because the results would be “materially relevant.” *See* Def. Br. 6 (citing *People v. Smith*, 2014 IL App (1st) 113265 (reversing trial court's denial of motion for testing under 725 ILCS 5/116-3)). But the question here is whether defendant has demonstrated *Strickland* prejudice, not whether he is entitled to testing that would help him meet that burden.

Defendant errs to the extent he suggests that he has shown prejudice because, had the testing found none of Ferguson's DNA on the gun, there is a chance he would have been convicted only of the lesser offense of aggravated robbery. *See* Def. Br. 10-11. This theory of prejudice turns similarly on defendant's impermissible speculation that testing would have revealed that Ferguson's DNA was not present. Furthermore, the lack of testing did not preclude defendant from arguing that if he committed the robbery, he used the BB gun rather than the firearm. Defendant argued at trial that the firearm recovered from the residence did not resemble the firearm visible on surveillance video, but stressed that this alleged discrepancy demonstrated he could not have been the robber at all, and not merely that he could have

been the robber using a BB gun. The lack of forensic testing appears to have played no role in counsel's reasonable all-or-nothing strategy.

Because, on this record, defendant has failed to demonstrate prejudice, the appellate court erred in granting him a new trial. *See People v. Gayden*, 2020 IL 123505, ¶¶ 36, 50 (affirming conviction where record on appeal did not establish *Strickland* prejudice). The proper forum for defendant's claim that counsel's failure to request DNA testing was prejudicial is a postconviction proceeding. *See People v. Tate*, 2012 IL 112214, ¶¶ 14-15 (claims based on evidence counsel failed to present are properly pursued through a postconviction petition); *see also* 725 ILCS 5/116-3(c) (providing means for defendant to seek postconviction DNA testing where evidence is "materially relevant" to establishing innocence).

II. Defendant Also Failed to Meet His Burden of Showing that Counsel's Performance Was Deficient.

As explained in the People's opening brief, defendant has also failed to demonstrate deficient performance, as required to prevail on his ineffective assistance claim. Peo. Br. 16-20. This Court need not reach the performance prong because defendant failed to show prejudice. But if this Court were persuaded by defendant's argument on the prejudice prong, it should address whether defendant met his additional burden of showing that

counsel performed deficiently before it affirms the appellate court's judgment granting a new trial.²

Because defense counsel could reasonably decline to request testing that risked bolstering the People's case and undermining the defense, he did not perform deficiently. Defendant stresses that after the deliberating jury asked why there was no DNA testing, defendant became "adamant that the DNA swabs should be tested." Def. Br. 18. But defense counsel's performance is not to be judged with the benefit of hindsight. "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689. The jury's note, and defendant's subsequent insistence that testing should be completed, should not determine the reasonableness of counsel's pretrial investigation.

Moreover, the jury's note does not demonstrate that trial counsel's performance was deficient, even in hindsight. To the contrary, the note reflects that counsel's strategy of faulting the People for failing to test the swabs of the gun was effective and factored into the jury's deliberations.

² As the People conceded in their opening brief, this argument on *Strickland*'s performance prong was not preserved below, but this Court can and should overlook the forfeiture. See Peo. Br. 19-20; see also Def. Br. 20 (addressing performance because "this Court is not bound by a party's concession and may affirm the circuit court's judgment on any basis found in the record").

Given that counsel's clear strategy as reflected in his cross-examination and closing argument was to rely, to defendant's advantage, on the lack of forensic testing, defense counsel reasonably avoided undermining that strategy by seeking forensic testing on behalf of the defense.

And because defendant failed to meet his burden of showing deficient performance, as well as his burden of showing prejudice, the appellate court's judgment ordering a new trial should be reversed.

CONCLUSION

This Court should reverse the appellate court's judgment and remand the case for consideration of the remaining issues that defendant raised on appeal.

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Respectfully submitted,

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RULE 341(c) CERTIFICATE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(c) certificate of compliance, and the certificate of service, is 8 pages.

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CERTIFICATE OF FILING AND SERVICE

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 April 26, 2021, the foregoing **Reply Brief of Plaintiff-Appellant People of the State of Illinois** was (1) filed with the Clerk of the Supreme Court of Illinois, using the court's electronic filing system; and (2) served on below-named counsel by transmitting a copy from my e-mail address to the following e-mail addresses:

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