No. 128366

IN THE
SUPREME COURT OF ILLINOIS

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

BRIEF AND APPENDIX OF PLAINTIFF-APPELLANT PEOPLE OF THE STATE OF ILLINOIS

KWAME RAOUL
Attorney General of Illinois

JANE ELINOR NOTZ
Solicitor General

KATHERINE M. DOERSCH
Criminal Appeals Division Chief

ELDAD Z. MALAMUTH
Assistant Attorney General
100 West Randolph Street, 12th Floor
Chicago, Illinois 60601-3218
(312) 814-2235
eserve.criminalappeals@ilag.gov

Counsel for Plaintiff-Appellant
People of the State of Illinois

E-FILED
2/14/2023 1:14 PM
CYNTHIA A. GRANT
SUPREME COURT CLERK

ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

Page(s)

POINTS AND AUTHORITIES

NATURE OF THE CASE

The People appeal from the appellate court's judgment reversing the circuit court's second stage dismissal of petitioner's postconviction petition.

ISSUE PRESENTED FOR REVIEW

At petitioner's bench trial for the attempted murder of a police officer, he testified that he had been suicidal on the day of the offense and had attempted suicide months before the offense and again shortly after his arrest; his theory at trial was that he lacked the specific intent required to prove him guilty of attempted murder because when firing at the officer, he did not intend to kill the officer but instead intended to provoke the officer to shoot him. The circuit court discredited that defense and found petitioner guilty of attempted murder. On postconviction review, petitioner claimed that trial counsel was ineffective for failing to corroborate his testimony about his suicide attempts with medical records documenting the attempts. The issue presented on appeal is:

Whether the circuit court properly dismissed the postconviction petition because petitioner failed to make a substantial showing that (a) trial counsel performed deficiently by not presenting records to corroborate petitioner's testimony about his suicide attempts, and (b) there was a reasonable probability that petitioner would not have been convicted of attempted murder had counsel presented such records.

JURISDICTION

Jurisdiction lies under Supreme Court Rules 315(a) and 612(b)(2). On September 28, 2022, this Court allowed the People's petition for leave to appeal.

STATEMENT OF FACTS

I. The Circuit Court Convicted Petitioner of Attempted Murder Following a Bench Trial.

In September 2002, during a foot chase, petitioner turned and fired a single shot at Ron Rewers, the Chicago police officer who was pursuing him. Sup3R324-25, 339-40.

A grand jury later indicted petitioner on four counts of attempted murder, two counts of aggravated discharge of a firearm, and two counts of aggravated unlawful use of a weapon. C34-42.[1]

A. The Circuit Court Found Petitioner Fit to Stand Trial Following a Fitness Hearing.

Petitioner's retained counsel sought to have him evaluated for fitness to stand trial and sanity at the time of the offense on the ground that "about a month before [the charged offense] he was in a mental institution." PA4.

---

[1] "A_" refers to the appendix to this brief; "C_" to the common law record; P_" to the nonconsecutively paginated 196-page paper report of proceedings containing transcripts of the pre- and post-trial proceedings; "Sup6C_" to the sixth supplement to the common law record; "Sup2C_" and "Sup2R_" to the second supplements to the common law record and report of proceeding, respectively, which appear in the single 16-page supplement to the record; and "Sup3C_" and "Sup3R_" to the third supplements to the common law record and report of proceeding, respectively, which appear in the single 458-page supplement to the record.

The circuit court granted counsel's motion and ordered the evaluations. Sup3C38.

Dr. Roni Seltzberg, a psychiatrist with Forensic Clinical Services (FCS), evaluated petitioner and found him fit to stand trial with medication; she deferred opining on petitioner's sanity until she could obtain and review additional medical records, including from Cermak Health Services and Tinley Park Mental Health Center, where petitioner had allegedly received treatment. Sup3C40-41. Retained counsel confirmed to the court that he had supplied FCS with the necessary releases to obtain records from Tinley Park, where petitioner claimed to have received psychiatric care in July 2002, several weeks before the charged offenses. PD3-4. Counsel later informed the court that he had also provided Cermak with the releases necessary to obtain petitioner's medical records, PG3, and that he had possession of petitioner's Cermak records (which documented his post-arrest suicide attempt), PN3.

After Dr. Seltzberg reviewed the records, she evaluated petitioner again and found that he was both fit to stand trial with medication and legally sane at the time of the charged offenses. Sup3C93. With respect to sanity, Seltzberg opined that although petitioner "may have been experiencing symptoms of a depressive mood disorder, these were likely exacerbated by his voluntary ingestion of alcohol and other illicit substances."

Id. Further, there was "no indication that he would not have been capable of appreciating the criminality of his alleged conduct." *Id.*

The circuit court ordered a fitness hearing, at which Dr. Seltzberg testified that petitioner was fit to stand trial. PI6. She had twice met with petitioner to assess his fitness to stand trial, had explored his "background history" and his current functioning, and had reviewed the police reports, petitioner's criminal history, his medication profile from Cermak, and "further records." PI7, 13-14. She testified that petitioner's first psychiatric intervention in the summer of 2002 (before the charged offenses) was the result of a suicide attempt. PI11. Petitioner's sister had reported that he was "taken to [Ingalls Hospital] and transferred to Tinley Park." PI11-12. However, Tinley Park "said they had no record of this patient according to the release that was returned to us." PI11. After his arrest in this case, petitioner made another suicide attempt while in the custody of the Cook County Department of Corrections, although the records indicated that "there was no loss of consciousness" and the brain scans were "unremarkable, meaning they had no findings." PI12. Petitioner was then prescribed anti-depressants (Prozac and Sinequan). PI6, 9. PI11-12.

The circuit court found petitioner fit to stand trial with medication. PI16.

A few months after the fitness hearing, retained counsel stated in open court that petitioner and his family had been unable to secure the additional

funds that counsel had intended to use to obtain a second opinion from an independent psychiatrist. PL3. At another status hearing a few months later, retained counsel's associate stated that petitioner told counsel and Dr. Seltzberg that he fired in the air in the hopes of committing suicide and did not aim at the police officer. PQ4. The associate stated that "[t]he psychiatric records" that retained counsel had obtained from FCS supported that defense, but that counsel had been unable to retain an independent expert to review "these records" due to petitioner's inadequate funds. *Id.* Accordingly, counsel sought leave to withdraw and to have the public defender appointed. *Id.* The court appointed the public defender, PQ5, PII5; appointed counsel obtained all discovery from retained counsel and the People, PT3, PU3, PV3, and stated in open court that the public defender was in the process of finding a psychiatric expert, PU3. Petitioner's appointed counsel neither subsequently disclosed the results of a second opinion, nor stated whether one was obtained.

B. At Trial, Officers Testified that Petitioner Fired While Fleeing and Petitioner Testified That He Was Attempting to Commit Suicide.

In opening statement, trial counsel argued that petitioner had fired a single shot while "running away" from the officer and without "any sort of precision," such that there was insufficient evidence to establish his intent to kill. Sup3R315-16. Counsel pursued this theory while cross-examining the People's witnesses (by eliciting testimony relating to the trajectory of

petitioner's shot) and by presenting petitioner's testimony that he had been suicidal and fired the shot in hopes that it would lead to his own death (*i.e.*, that it would prompt the officer to return fire), not the officer's.

1. Testimony of pursuing officers

Officer Rewers testified that at 7:30 p.m. on September 18, 2002, he, Officer Catherine Figueroa, and a third officer responded to a report of a man pointing a gun at a child. Sup3R319-21. The officers drove around the area for half an hour, but were unable to find the man, who was described as a black man wearing a white t-shirt, baggy blue jeans, and a red bandanna. Sup3R321. They continued to check the area every hour or so, *id.*, until around 11 p.m., when they saw petitioner — who matched the description the man with the gun — talking to a woman. Sup3R322-23.

Rewers exited the car, identified himself as a police officer, and instructed petitioner to put his hands up. *Id.* Petitioner looked at the officers, then ran away. Sup3R324, 338. Rewers ran after him, and after about 15 strides, saw petitioner reach his hand to the small of his back and produce a handgun from beneath his shirt. Sup3R324-25, 339-40. Petitioner brought the gun around to the front of his body, where he used both hands to do something to the gun — Rewers could not tell what, because petitioner's body shielded the gun from Rewers's view — and then petitioner looked over his shoulder, pointed the gun directly back at Rewers from a distance of 10 to 12 feet, and fired one shot. Sup3R325-26, 340-42. Rewers saw the muzzle

flash, dove to the ground, and returned fire with a single shot of his own. Sup3R326-27, 329, 335-36. Rewers's shot missed, Sup3R335, 343, 345, and petitioner kept running, Sup3R342.

Figueroa corroborated Rewers's account of the chase. *See* Sup3R351-64. After the shots, Figueroa, who was directly behind Rewers, helped Rewers up and asked if he was okay. Sup3R326, 356. By that time, petitioner had run through an archway, around the back of a building, and out of sight. Sup3R327, 343. The officers reported shots fired and provided a description of petitioner; then they began searching the area. Sup3R327.

Approximately 20 to 30 minutes later, Rewers and Figueroa were called to a nearby apartment (where other officers had taken petitioner into custody) for a show up, and Rewers identified petitioner as the shooter. Sup3R345-46; *see* Sup3R328.

On cross-examination, trial counsel elicited testimony from Rewers about how petitioner had fired the gun while running, twisting his upper body halfway around and firing the gun from beneath his left arm. Sup3R341-42. Rewers also conceded that it was dark, Sup3R338, and he could not recall petitioner having a moustache or other facial hair, as a photograph showed that he had, Sup3R346-47. Additionally, trial counsel elicited testimony from Figueroa that she would have seen the muzzle flash even if the gun had been fired straight up into the air rather than at Rewers. Sup3R364-65.

2. Testimony of arresting officer

Officer George Pappone testified that he and another officer responded to the call of shots fired. Sup3R367. When they approached the area where petitioner was last seen, a bystander told them that a man matching petitioner's description had run into a nearby building. Sup3R368-69. After radioing for units to cover the back door, the officers knocked on the front door. Sup3R369. A girl opened the door and said that only she and her sister were home. Sup3R369-70. Her younger sister stood behind her. Sup3R370. Both girls seemed nervous. Sup3R369-70. The officers asked the girls to step outside, where they would be safe while officers checked whether petitioner was hiding inside, and then announced their office and loudly asked if anyone else was in the building. Sup3R370-71. Petitioner appeared from a bedroom at the top of the stairs with his shirt off and his hands up. Sup3R371-74. He was sweating heavily and, when the officers searched him, they could tell that his heart was beating rapidly. Sup3R371-72. The officers took him into custody and called Rewers and Figueroa for a show up identification. Sup3R373. In the bedroom, they found a wet red bandana on the floor and a gun inside a red slipper. Sup3R374-75.

3. Testimony of forensic investigator

The forensic investigator who processed the crime scene testified that he recovered a spent .45 round (Rewers's service weapon was a .45 handgun, Sup3R410-11), a live .25 automatic cartridge, and a discharged .25 automatic

cartridge case from the area where petitioner had fired at Rewers. Sup3R390, 394, 402. The investigator also recovered some metal shavings from the wall approximately 150 feet away, where he believed Rewers's shot had hit. Sup3R397, 399-400, 405. At the home where the officers found petitioner, the investigator recovered a .25 semi-automatic pistol from inside a red slipper in a second-floor bedroom. Sup3R390. The pistol contained one live round. Sup3R390-91.

On cross-examination, trial counsel elicited testimony that although the investigator found the spot that Rewers's bullet struck 150 feet away from where Rewers fell, Sup3R406, he did not find the bullet that was allegedly fired at Rewers, and he did not notice any bullet marks on the buildings approximately 180 feet behind where Rewers had fallen, Sup3R404, 407-08. The investigator further conceded that he did not check the roof of the buildings, where the bullet could have landed. Sup3R405-06. On re-cross examination, trial counsel elicited testimony that the search for the bullet was thorough and included the cars on the street and building walls that the bullet could have reached. Sup3R408-09.

The parties stipulated that an expert in firearm testing and analysis from the Illinois State Police Crime Lab would testify that the spent .25 cartridge recovered from the scene had been chambered in the.25 semi-automatic pistol recovered from the slipper in the apartment where petitioner was apprehended, meaning that it had been in the gun at some point, but the

expert could not determine whether the fired cartridge case was actually fired from that pistol. Sup3R412. The parties further stipulated that an expert in gunshot residue testing and analysis would testify that the gunshot residue test conducted on petitioner's hands was negative, meaning that he may have discharged a firearm with either hand, but that if he did, then the tests had either failed to detect the gunshot residue particles or the particles had been removed by activity. Sup3R413.

4. Petitioner's testimony

Petitioner testified that on the day of the offense, he had been drinking and smoking marijuana. Sup3R420. He was "feeling bad" about the death of his mother in 1992 and the death of his child's mother in 1997. *Id.* He had just purchased a .25 handgun and was feeling suicidal, but he "didn't have the courage to pull a gun on [him]self." *Id.* At around 7 or 8 p.m., he saw a police car drive by and "got the idea to point the gun at them to get them to shoot [him]." Sup3R420-21. Petitioner denied threatening any children that night, and he did not explain how he planned to initiate an encounter with police. Sup3R421.

At around 11 p.m., petitioner was standing on the street talking to Threasa, a woman with whom he was staying at the time, Sup3R428, when a police car pulled up and one of the officers got out. Sup3R421. Petitioner started to run. *Id.* The officer told him to freeze, but petitioner did not stop; instead, he "turned and fired a shot in the air" as he ran. Sup3R421.

Petitioner demonstrated for the court, holding his arm behind him at "a slightly upward angle." Sup3R422. Petitioner denied pointing his gun at the officer, although he testified that when he turned to fire the gun, he brought the gun around in "a swinging motion," during which his hand was "level" before it "went up at an angle." Sup3R422-23. He denied trying to kill the officer, as that "would have defeated [his] whole plan." Sup3R421-22. He thought the officer would shoot him, but after the officer's first shot missed, petitioner "just ran" until he got back to Threasa's home, where she lived with her two young daughters. Sup3R422, 424, 428.

Petitioner testified about two suicide attempts, one a few days after his arrest for these offenses and another sometime before his arrest. Sup3R424-26. While in jail two or three days after his arrest, petitioner tied sheets together, made a noose, and tried to hang himself. Sup3R424-25. Other inmates discovered him unconscious, and he was taken to Cermak. Sup3R425. Petitioner also tried to kill himself sometime before his arrest; in that incident, he used a knife to cut his throat several times in what a doctor at Tinley Park had called a cry for help. Sup3R425-26.

The prosecution cross-examined petitioner about the events of September 18, 2002, but asked no questions about his suicide attempts. *See* Sup3R426-34. Petitioner conceded that when he saw the police, he immediately ran rather than pointing his gun at them or shooting at them. Sup3R430-31. He agreed that he did not stop running after he fired the gun

or even turn to see what the officers would do. Sup3R433. By the time he heard the officer's shot, he had already passed under the archway and was about to round the corner. Sup3R433-34. He then ran to Threasa's apartment and hid. Sup3R432.

C. In Closing Arguments, the People and Trial Counsel Disputed Whether Petitioner's Conduct Was Consistent With a Suicide Attempt.

In closing argument, trial counsel argued that the evidence was insufficient to prove that petitioner had the specific intent to kill Officer Rewers when he fired toward him. Sup3R441. Counsel argued that petitioner was suicidal and fired with the intent only to provoke fatal return fire, not to kill Rewers. Sup3443. In support, counsel noted that petitioner had fired only one shot even though he could have fired more, and that he had fired the single shot at an upward angle rather than directly at Rewers, as shown by the evidence technician's inability to find any evidence of petitioner's bullet in the street behind the spot where Rewers fell. Sup3R442-45.

In rebuttal, the People argued that petitioner's theory was inconsistent with the fact that he ran instead of opening fire as soon as the officers arrived, that he kept running after Rewers returned fire, and that he then hid in the house, hid his gun, and removed his bandana. Sup3R447-49.

D. The Circuit Court Found Petitioner Guilty After Finding His Testimony Incredible.

At the conclusion of petitioner's bench trial, the circuit court found him guilty of attempted murder (and other charges), reasoning that petitioner turned and "point[ed] the gun directly at the officer," which "is evidence of specific intent to kill." Sup3R452. The court "d[id]n't believe [petitioner]" and had "absolutely no doubt that [he] fired a gun at Officer Rewers." Sup3R450. The court further found that petitioner's account "quite frankly doesn't make any sense" because "[i]f he wanted to commit suicide by police . . . he wouldn't be fleeing and running and ducking behind the archway." Sup3R451; *see also id.* ("Just for a whole lot of reasons, [petitioner's] story is completely unbelievable to me."). When petitioner renewed his challenge to the sufficiency of the evidence that he had the specific intent to kill Rewers when he fired his gun, Sup3C52, the circuit court denied the motion, reiterating that he "rejected [petitioner's] testimony as being incredible." PII8.

At sentencing, petitioner stated in allocution that his "witnesses weren't called and [his] personal history wasn't brought up." PII16. Trial counsel responded that there was "only one witness," whom counsel had interviewed and "at first thought . . . was a quite promising lead until [they] realized that she had given a . . . contradictory statement to the police on the night of the incident." PII17. The other witnesses whom petitioner had wanted counsel to call were all "family members and mitigation type

witnesses." *Id.* When asked if he had anything else to say, petitioner stated he did not. PII18. The circuit court sentenced petitioner to 30 years in prison, relying on his "violent criminal past," which included an armed robbery conviction. PII19-20; C83, 87; Sup3C54, 59, 68.

E. The Appellate Court Affirmed.

The appellate court affirmed petitioner's conviction on direct appeal. Sup3C225, 236.

II. The Circuit Court Dismissed the Pro Se and Supplemental Postconviction Petitions, and the Appellate Court Reversed.

A. The Circuit Court Dismissed the Pro Se Postconviction Petition.

In January 2008, petitioner filed a pro se postconviction petition, claiming that his trial counsel was ineffective for not investigating his "claims of being hospitalized for psychiatric treatment," C96, and not "subpoena[ing] medical records." C100. In support, petitioner attached a screening form from Cermak Health Services dated September 20, 2002, which noted that petitioner reported that he had been hospitalized for psychiatric treatment at Tinley Park in 2002 after he attempted to commit suicide via a "scratched throat." C103. The Cermak form also noted that petitioner had attempted suicide while in the Cook County jail's general population and had reported often having suicidal ideations. C109. Petitioner also attached a form from the Tinley Park Mental Health Center dated May 8, 2007 — *i.e.*, several years after his trial — received in response

to his March 27, 2007 release form, noting that the release form had lacked the necessary witness signature. C127; *see* C128. Finally, petitioner attached progress notes from Ingalls Hospital dated July 19, 2002, which noted that he was admitted with self-inflicted lacerations to his throat in a possible attempt "to kill himself" with a knife following an altercation with his girlfriend and was restrained for his own protection. C131, 133. The petition alleged that this evidence "corrob[or]at[ed] . . . [petitioner's] testimony that [he] was trying to commit suicide" and "was shooting slightly in the air, and not directly at the police officer." C98.

The circuit court summarily dismissed the petition, finding that petitioner's ineffective assistance of trial counsel claim was barred by waiver because petitioner could have brought it on direct appeal. Sup3C242. In the alternative, the circuit court found the claim meritless, noting that the record showed that counsel was aware of petitioner's psychiatric issues and that counsel's closing arguments detailed petitioner's "depressed, suicidal state and how it led to his actions." Sup3C244. The circuit court explained that the trial judge, following the bench trial, found that petitioner's version of events "'doesn't make any sense'" because if petitioner "wanted to commit suicide, he would not have fired the shot while running away, then duck behind an archway to hide." Sup3C245. Thus, the circuit court reasoned, "it is highly unlikely that any additional information found in Petitioner's

psychiatric medical forms would change the result." Sup3C245; *see also* Sup3R293-99.

B. The Appellate Court Reversed the First Stage Dismissal.

Petitioner appealed, and the appellate court reversed, finding that it was "at least arguable" that trial counsel's alleged failure to investigate petitioner's mental health history and "present evidence of his hospitalization and previous suicide attempt" constituted ineffective assistance of counsel. Sup6C29.

C. The Circuit Court Dismissed the Supplemental Petition Filed by Appointed Counsel.

On remand, petitioner filed a counseled supplemental petition claiming that trial counsel was ineffective for not investigating and presenting at trial evidence of "the full history of [petitioner's] suicide attempts and hospitalizations," focusing primarily on the attempted suicide two months before he shot at Officer Rewers. Sup6C14-17. Petitioner argued that had counsel done so, there was a reasonable probability that the trial judge would have acquitted him of attempted murder on one of two grounds. First, evidence corroborating petitioner's testimony that he had previously tried to kill himself might have led the trial court to credit petitioner's testimony that he shot at Rewers in an attempt to kill himself, not Rewers, and therefore acquit him on the ground that he lacked the requisite intent. Sup6C14-16. Second, the trial judge might have relied on the additional evidence that petitioner had previously tried to kill himself to acquit him on the ground

that he was insane and "lack[ed] substantial capacity to appreciate the criminality of his conduct" and therefore was incapable of forming the requisite intent. Sup6C18.

The circuit court granted the People's motion to dismiss the petition and counseled supplement. C259. In rejecting the claim that trial counsel was ineffective for failing to investigate petitioner's mental health history and present the evidence at trial, the circuit court found that petitioner "failed to establish that trial counsel's performance was deficient or that he was prejudiced." C265. The court explained that the trial judge "was aware that [petitioner's] mental health was an issue in this case," and, in addition, that petitioner's "mental health was investigated by counsel," who presented evidence of petitioner's mental state through petitioner's testimony. C265. The circuit court further found that petitioner failed to establish prejudice because, "[a]t best," further evidence of his prior suicide attempt "would have supported petitioner's testimony that he was suicidal on July 19, 2002, two months prior to firing at the police officer on September 18, 2002, but would not have established that he was suicidal on the day of the shooting." *Id.* at C265-66. Accordingly, "[a]ny corroborating evidence that he attempted suicide two months prior to the date of the crime would not outweigh the State's consistent, credible testimony from officers on the pertinent details — that petitioner, while fleeing from Officer Rewers, withdrew his handgun from his waistband and fired at or near officers." *Id.* at 266. And in rejecting

the claim that trial counsel was ineffective for failing to pursue an insanity defense, the court explained that there was "nothing to show that pursuing an insanity defense was a viable option, let alone available to him at the time of trial." *Id.*

Petitioner's appointed postconviction counsel filed a motion to reconsider, acknowledging that she had been unable to locate any additional supporting records, assuming they ever existed. Sup2R12. Tinley Park had closed in 2012, and its records were transferred to Madden Mental Health Center, which was unable to locate any records indicating petitioner was treated at Tinley Park. *Id.*; Sup2C5. Further, Ingalls Hospital informed counsel that petitioner's records from his treatment there would have been destroyed. Sup2C5. The circuit court denied the motion to reconsider. Sup2R15.

D. The Appellate Court Reversed the Second Stage Dismissal.

In a split decision, the appellate court reversed. A1. The appellate majority found that the "failure to present evidence of [petitioner's] mental health history that would only serve to bolster his defense is objectively unreasonable" and, further, that this alleged failure was prejudicial because the "medical records would create a credibility contest with Officer Rewers" regarding whether petitioner had the specific intent" to kill Rewers. A6 ¶ 27. The majority rejected the argument that petitioner failed to establish that any records of his treatment at Tinley Park even existed, reasoning that the

form that Tinley Park returned in response to the release submitted by petitioner when preparing his pro se postconviction petition did not disprove the existence of responsive documents because it indicated that the request was denied on the ground that the release lacked a witness signature rather than because there were no responsive records. A5-6 ¶¶ 22, 25; *see also* C127. Finally, the majority noted that petitioner was "not making a diminished capacity defense as he does not assert that he was unable to form the requisite intent for attempted murder"; instead, petitioner was arguing that "the intent to kill never existed," and that his "mental health history bolsters that claim." A5 ¶ 21.

The dissent would have held that petitioner could not show ineffective assistance of trial counsel because the mental health history evidence he asserted counsel should have introduced was offered in support of a diminished capacity defense, which was not permitted under longstanding Illinois precedent. A7-8 ¶¶ 34-37 (citing *People v. Johnson*, 2018 IL App (1st) 140725, *People v. Hulitt*, 361 Ill. App. 3d 634, 641 (1st Dist. 2005)).

STANDARD OF REVIEW

This Court reviews de novo whether the circuit court committed reversible error by granting the People's motion to dismiss a postconviction petition. *People v. Pingleton*, 2022 IL 127680, ¶ 28.

ARGUMENT

The circuit court properly dismissed the postconviction petition because petitioner failed to make a substantial showing that trial counsel provided ineffective assistance by not presenting additional evidence that petitioner had tried to kill himself months before he shot at Officer Rewers in September 2002 and then again after his arrest.

Counsel faced a challenging case — petitioner had been charged with attempted murder for shooting toward a police officer and would testify at trial that in fact he *did* shoot toward the officer. A pre-trial psychiatric evaluation revealed that petitioner was sane at the time of the offenses, so the only path to an acquittal would be to argue that there was reasonable doubt about whether, when petitioner shot toward the officer, he did so with the requisite intent to kill the officer. Counsel pursued this strategy by challenging the prosecution's evidence that petitioner was pointing the gun directly at the officer when he fired and by presenting petitioner's testimony to explain why he would shoot toward a police officer if he did not intend to kill the officer — because he was suicidal and hoped to provoke a fatal police response. Counsel performed reasonably by presenting evidence from multiple sources to establish that petitioner did not point the gun directly at the officer. But petitioner's conduct that night could not be reconciled with his story that he hoped police would kill him.

Further, petitioner failed to make a substantial showing that the medical records he asserts trial counsel should have obtained and presented — *i.e.*, records of his alleged treatment at Tinley Park — ever existed. To the contrary, Dr. Seltzburg's sworn testimony at the pre-trial fitness hearing established that Tinley Park had no record of petitioner receiving treatment there. And on remand from petitioner's first postconviction appeal, petitioner's postconviction counsel attempted to obtain the Tinley Park records from Madden Mental Health Center (where records were sent after Tinley Park closed), which informed counsel that they were unable to locate any record of petitioner's treatment. 2R12; Sup2C5. Trial counsel did not perform deficiently in failing to present records that petitioner cannot establish ever existed.

Nor could petitioner make a substantial showing that he was prejudiced by trial counsel's decision not to present additional evidence that petitioner had attempted suicide prior to the offenses and again after his arrest. Petitioner's testimony regarding those attempts was entirely unrebutted — indeed, the prosecution did not inquire about his suicide attempts on cross-examination — and so no corroboration was required to establish them. The question was not whether petitioner had ever been suicidal, but whether he was suicidal when he fired toward Officer Rewers and whether he shot to provoke return fire and without any intent to kill Rewers. Corroborating petitioner's testimony that he was suicidal two

months earlier or after his arrest would not have established that he was suicidal on the day of the offenses. Nor would it have addressed the fatal weakness in his defense: that his behavior throughout the encounter was wholly inconsistent with someone who was attempting to commit suicide by inducing police to shoot him. Indeed, the trial judge, the finder of fact in this case, was aware of petitioner's mental health issues through his trial testimony but simply did not believe petitioner's explanation about why he opened fire.

Finally, trial counsel's decision not to present additional evidence corroborating petitioner's testimony about his suicide attempts did not deprive petitioner of a viable insanity defense. Dr. Seltzberg had opined that petitioner was sane at the time of the offense, and thus such evidence could only be used to support a diminished capacity defense, which binding precedent held was unavailable under Illinois law.

The Circuit Court Properly Dismissed the Petition Because Petitioner Failed to Make a Substantial Showing That Trial Counsel Provided Ineffective Assistance by Not Presenting Additional Evidence of Petitioner's Prior Suicide Attempts.

To survive the People's motion to dismiss, the postconviction petition had to make a substantial showing that petitioner's constitutional right to the effective assistance of counsel was violated when trial counsel did not present additional evidence that petitioner had attempted suicide two months before he shot toward Officer Rewers in September 2002 and again after his arrest. *Pingelton*, 2022 IL 127680, ¶ 34. Accordingly, petitioner's

well-pleaded factual allegations, taken as true unless positively rebutted by the record, *People v. Sanders*, 2016 IL 118123, ¶ 42, had to make a substantial showing both that (1) counsel's performance was deficient, meaning that it fell below "an objective standard of reasonableness," and (2) petitioner was prejudiced by that deficiency, meaning that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," *Strickland v. Washington*, 466 U.S. 668, 694 (1984); *see also Pingleton*, 2022 IL 127680, ¶ 53.

The circuit court properly granted the People's motion to dismiss the postconviction petition because petitioner failed to make a substantial showing either that trial counsel performed deficiently by not presenting additional evidence of petitioner's suicide attempts or that he was prejudiced by the absence of such evidence.

A. Petitioner Did Not Make a Substantial Showing That Counsel Performed Deficiently.

An assessment of counsel's performance begins with "the strong presumption that any challenged action or inaction may have been the product of sound trial strategy." *People v. Dupree*, 2018 IL 122307, ¶ 44. In other words, "'[j]udicial scrutiny of counsel's performance must be highly deferential,' and 'a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.'" *People v. Manning*, 241 Ill. 2d 319, 334 (2011) (quoting *Strickland*, 466 U.S. at 689). Accordingly, "[m]atters of trial strategy are generally immune from

claims of ineffective assistance of counsel." *Manning*, 241 Ill. 2d at 327 (internal quotation marks omitted); *People v. Enis*, 194 Ill. 2d 361, 378 (2000) (same).

1. Counsel did not perform deficiently by not presenting additional evidence of petitioner's suicide attempts.

Petitioner's trial counsel made a reasonable strategic decision not to present additional evidence to corroborate petitioner's testimony about his suicide attempts before and after the shooting because that testimony went undisputed at trial. Accordingly, presenting additional evidence of petitioner's suicide attempts would have provided little benefit; moreover, presenting such evidence would have carried the risk of highlighting a weakness in the defense's theory that petitioner sought to commit suicide but could not bring himself to shoot himself directly.

Trial counsel faced a challenging case: petitioner had been charged with attempted murder for shooting toward Office Rewers while fleeing from police and would testify that he in fact *did* shoot toward Rewers while fleeing from police. To obtain an acquittal, counsel thus was required to persuade the trial judge to harbor a reasonable doubt that petitioner had the specific intent to kill Rewers. 720 ILCS 5/8-4(a); 720 ILCS 5/9-1(a). The fact that petitioner's bullet did not hit Rewers was not on its own likely to create such doubt.

A person is "presumed to intend the natural and probable consequences of his acts." *People v. Foster*, 168 Ill. 2d 465, 484 (1995)

(internal quotation marks omitted). Thus, "[t]he very fact of firing a gun at a person supports the conclusion that the person doing so acted with an intent to kill." *People v. Thompson*, 2020 IL App (1st) 171265, ¶ 76 (internal quotation marks omitted); *see also People v. Petermon*, 2014 IL App (1st) 113536, ¶ 39 ("[A]n intent to kill may be proven where the surrounding circumstances show that the defendant fired a gun at or towards another person with either malice or a total disregard for human life.") (cleaned up). Accordingly, factfinders routinely reject defendants' claims that they did not intend to kill the people toward whom they shot. *See, e.g.*, *Petermon*, 2014 IL App (1st) 113536, ¶¶ 4-9 (defendant guilty of attempted murder where evidence showed that he shot toward but did not hit officer); *People v. Teague*, 2013 IL App (1st) 110349, ¶¶ 10-13, 27 (same, and explaining that "[p]oor marksmanship is not a defense to attempted murder"); *People v. Green*, 339 Ill. App. 3d 443, 447, 51-52 (1st Dist. 2003) (same, despite argument that defendant could not have missed at such close range absent intent to kill); *People v. Strickland*, 254 Ill. App. 3d 798, 803, 805 (1st Dist. 1993) (same, despite defendant's testimony that he only fired "warning shot[s]").

In the difficult position of having to argue that when petitioner shot in the direction of Officer Rewers, he did so without any intent to kill, trial counsel made the reasonable strategic decision to strengthen this defense in two ways. First, counsel sought to establish through petitioner's testimony that he was suicidal and shot at Rewers in hopes of provoking a fatal

response. Second, by aggressively cross-examining the prosecution's witnesses about the trajectory of the bullet and offering petitioner's testimony that he pointed the gun upward, counsel sought to establish that petitioner was not firing at Rewers.

The second showing was important not only because it supported the defense theory that petitioner was trying to kill himself, not Rewers, but also because it provided the trial judge an independent basis to doubt whether petitioner had the specific intent to kill when he fired the gun: Even if the judge did not credit petitioner's testimony that he was attempting to commit suicide, the judge could conclude that petitioner was trying to give the pursuing officers pause so that he could escape, and not trying to kill Officer Rewers. Accordingly, trial counsel elicited testimony from Rewers that petitioner fired the gun while running, with his upper body half-turned and the gun under his left shoulder, and that it was dark (which made it both difficult for petitioner to aim and for the officer to see where the gun was pointed). Sup3R338, 341-45. Counsel also elicited testimony from Officer Figueroa that she did not see petitioner stop to fire his gun and that she would have seen a muzzle flash even if he fired straight up into the air. Sup3R364-65. And counsel elicited testimony from the forensic investigator that there was no evidence that a bullet had been fired into the walls of the buildings behind the location where Rewers fell, suggesting that the petitioner had fired the gun above Rewers's head. Sup3R404, 408-09.

Finally, counsel presented petitioner's testimony that he "turned and fired a shot in the air" while running, and that his hand was not pointed at Rewers but "went up at an angle." Sup3R421, 423.

It was important for trial counsel to provide a basis to acquit that was independent of the suicide attempt theory because that theory had a serious weakness: It was inconsistent with petitioner's conduct. Although petitioner claimed that he planned to commit suicide by provoking a police officer to shoot him, he denied that he did anything to initiate a police encounter, including that he had threatened a child, which meant that, according to petitioner's version, he did nothing to put himself in a position where he could shoot at an officer to draw fire in return. Sup3R421. And petitioner's behavior after the police arrived was similarly inconsistent with his stated plan: Petitioner testified that even though the officers told him to stop, he ran, and continued to run even after Officer Rewers shot and missed him. Sup3R421-22.

As the trial judge reasoned (and the circuit court reiterated when denying the postconviction petition), petitioner's testimony didn't "make any sense," because if petitioner "wanted to commit suicide, he would not have fired the shot while running away, then duck[ed] behind an archway to hide." Sup3C245; *see also* Sup3R451 (petitioner's testimony "quite frankly doesn't make any sense" because "[i]f he wanted to commit suicide by police . . . he wouldn't be fleeing and running and ducking behind the archway"). In other

words, if petitioner had in fact intended to commit suicide, he would not have fled and run around a corner, *preventing* the officers from shooting him. Sup3R335; Sup3R357; Sup3R421-22. Nor would petitioner have taken refuge in Threasa's apartment, or, when the officers eventually found him, come forward with the gun hidden and his hands up. Sup3R371-74. In sum, nothing about petitioner's conduct during his encounter with police suggested a suicide attempt.

Given the weakness in petitioner's defense that he was trying to commit suicide on the date of the offenses, trial counsel reasonably declined to present additional evidence to corroborate petitioner's testimony that he had attempted suicide on two other occasions. Indeed, presenting additional evidence of petitioner's suicide attempts would have offered little benefit while carrying significant risk.

For starters, there would have little benefit to presenting additional evidence that petitioner had twice previously sought to commit suicide because petitioner's testimony about those attempts went undisputed. Petitioner testified that he tried to kill himself shortly after his arrest, Sup3R424-25, and that he had tried to kill himself two months before, Sup3R425-26. The prosecution did not cross-examine petitioner about or otherwise challenge these assertions. Thus, there was no need for trial counsel to present evidence confirming petitioner's testimony about his suicide attempts. Moreover, contrary to the appellate court's view that

additional evidence relating to petitioner's mental health "would only serve to bolster his defense," A6 ¶ 27, offering additional details about the suicide attempts could have undermined the defense's theory that petitioner lacked an intent to kill when he shot toward Officer Rewers. Evidence that, two months before these offenses, petitioner had cut his own throat multiple times, and that, after his arrest, he hung himself would have called into question petitioner's testimony that he lacked "courage" to shoot himself. Sup3R420.

Given the inconsistencies between petitioner's testimony and his conduct, trial counsel did not perform deficiently by declining to present evidence corroborating petitioner's testimony about his prior suicide attempts, which did not need corroboration, and focusing instead on evidence tending to show that petitioner did not shoot at Officer Rewers and thus could not have intended to kill him. Thus, petitioner did not, and cannot, make the substantial showing necessary to depart from the general rule that decisions about what evidence to present on a defendant's behalf "are matters of trial strategy . . . generally immune from claims of ineffective assistance of counsel." *Enis*, 194 Ill. 2d at 378; *see also Dupree*, 2018 IL 122307, ¶ 48 (affirming second stage dismissal of ineffective assistance of counsel claim when alleged failure to call witness of potential but arguable value could not "overcome the presumption that counsel's decision was the product of sound trial strategy").

2. Counsel did not perform deficiently by not investigating additional evidence of petitioner's suicide attempts.

Petitioner also failed to make a substantial showing that trial counsel performed deficiently by allegedly insufficiently investigating petitioner's attempts to commit suicide, and, in particular, by not obtaining records of petitioner's alleged treatment at Tinley Park. Indeed, the record affirmatively rebutted petitioner's allegations that counsel did not adequately investigate petitioner's suicide attempts, including his allegations that counsel failed to obtain available records from Tinley Park.

At the threshold, the record showed that trial counsel had medical records describing petitioner's suicide attempts, and thus that there was nothing to investigate. Petitioner's retained counsel was aware of the medical records obtained by FCS for the pre-trial evaluations, having assisted FCS in obtaining them. PB3, PD3, PG3. Those records included the Cermak records that described petitioner's suicide attempts. PI6, 11, 14. And following the appointment of the public defender, petitioner's appointed counsel also had the Cermak records, as well as other medical records. PQ6, PT3, PU3.

As for the alleged Tinley Park records, at the pre-trial fitness hearing, Dr. Seltzberg testified that he "had sent out a release for Tinley Park records and it came back that they had no record of this patient." PI10. Trial counsel thus could have reasonably concluded that no records of petitioner's treatment at Tinley Park existed. While petitioner attached to his pro se

postconviction petition a transfer order suggesting that Tinley Park had agreed to petitioner's transfer from Ingalls Hospital, C137, there is no evidence that petitioner was in fact transferred to Tinley Park or that, if he was transferred, he received treatment there. *See also* C265 (circuit court's observation, when denying postconviction petition, that petitioner had not attached documents demonstrating "that he was actually seen at Tinley Park"). Indeed, petitioner's postconviction counsel admitted that she had been unable to locate any records indicating that petitioner had been treated at Tinley Park. Sup2R12; Sup2C5.

Meanwhile, the appellate majority was mistaken in relying on petitioner's failed attempt to secure records from Tinley Park as evidence that Tinley Park had records relating to petitioner. The majority relied on the Tinley Park form letter returning petitioner's release because it lacked a witness signature. A8-9 ¶ 22, ¶ 25 ("the letter from Tinley indicated that medical records were available but could not be released without a witness signature"); *see also* C127. But the form letter did not say that any records relating to petitioner existed, and the fact that the release was returned with the notation that it did not contain the required witness signature demonstrates only that petitioner did not complete the form properly, and not that Tinley Park had records responsive to his request. Nothing supports the majority's speculation that if Tinley Park lacked responsive records, it would have responded to the incomplete form by stating as much. On the contrary,

without a proper form, Tinley Park would have been unlikely to reveal whether any records existed because of rules restricting disclosure of confidential medical information. *See* 210 ILCS 85/6.17(d) (facility may not disclose "the nature or details of services provided to patients" except when properly authorized); 410 ILCS 50/3(d) (similar).

In sum, trial counsel had access to medical records documenting petitioner's suicide attempts, and trial counsel knew that Tinley Park had responded to Dr. Seltzberg's request for records by stating that it had no records relating to petitioner. Under these circumstances, petitioner has not established a substantial showing that counsel's pre-trial investigation into petitioner's suicide attempts, including any failure to obtain records from Tinley Park, was inadequate.

B. Petitioner Failed to Make a Substantial Showing of Prejudice by Demonstrating a Reasonable Probability That He Would Have Been Acquitted Had Counsel Presented Additional Evidence of Petitioner's Suicide Attempts.

Petitioner also cannot establish prejudice from trial counsel's decision not to present additional evidence to corroborate petitioner's testimony about his suicide attempts because such evidence would not have addressed the fatal weakness in his defense: that his conduct on the day of the shooting was wholly inconsistent with a suicide attempt. At most, additional evidence that petitioner had tried to kill himself in July 2002 and after arrest would have corroborated his uncontested testimony that he was sometimes suicidal.

But it would not have established that petitioner was suicidal on the day of the shooting, particularly given that his conduct was irreconcilable with a suicide attempt.

As the circuit court explained when denying the postconviction petition, even if the additional evidence corroborating petitioner's testimony about his prior suicide attempts had further established that he was suicidal two months prior to the shooting (or after his arrest), it would not have established that he was suicidal the day of the shooting. C265-66. Nor, as the circuit court further explained, could such corroborating evidence have outweighed the evidence at trial establishing that petitioner's actions on the day of the shooting were wholly inconsistent with someone attempting to commit suicide. *See id.* at 266. That evidence showed that petitioner did not intend for the officers to come, fled as soon as they did, and then did everything he could to avoid being shot and evade arrest. *See supra* pp. 27-28; *see also People v. Hale*, 2013 IL 113140, ¶ 24 (no prejudice when self-serving testimony was "deemed incredible" by circuit court and refuted by record).

The trial judge was "aware that [petitioner's] mental health was an issue in this case." C265. Additional evidence merely corroborating petitioner's uncontested testimony about suicide attempts would not have created a reasonable probability of a different outcome because the factfinder was already aware of the mental health issues and petitioner's behavior was

wholly inconsistent with a suicide attempt. *See Foster*, 168 Ill. 2d at 479 (second-stage dismissal of postconviction claim of ineffective assistance proper because no reasonable probability that psychiatric testimony regarding effect of diabetic condition and drinking would have made circuit court find that statements were involuntary when circuit court already aware of condition and involuntariness refuted by other conduct).

C. Petitioner Failed to Make a Substantial Showing of Ineffective Assistance by Counsel's Decision Not to Pursue a Diminished Capacity Defense.

To the extent that petitioner argued below that trial counsel erred in declining to present additional evidence about his suicide attempts to establish his diminished capacity, *see* Sup6C18 (supplemental petition, alleging that counsel should have attempted to "present evidence of mental health to negate the specific intent required to commit a particular crime"); *but see* petitioner's Answer to Petition for Leave to Appeal (disclaiming any reliance on diminished capacity defense), petitioner can establish neither deficient performance nor prejudice because, even if the evidence were available, a diminished capacity defense was not.

The diminished capacity affirmative defense permitted "'a legally sane defendant to present evidence of mental health to negate the specific intent required to commit a particular crime.'" *People v. Johnson*, 2018 IL App (1st) 140725, ¶ 63 (quoting *Metrish v. Lancaster*, 569 U.S. 351, 355 (2013)). But the diminished capacity defense ceased to be recognized in Illinois following

amendments to the insanity defense statute. *People v. Hulitt*, 361 Ill. App. 3d 634, 636, 641 (1st Dist. 2005).

In *Hulitt*, the defendant, charged with the murder of her toddler daughter, sought to call an expert to testify that she had been suffering from postpartum depression. *Id.* at 664. She "did not intend to raise an insanity defense . . . but, rather, intended to raise a reasonable doubt defense" — that is, the proposed testimony "related to defendant's state of mind at the time of the offense and was intended to show that defendant acted recklessly, in violation of the involuntary manslaughter statute (720 ILCS 5/9-3(a) (West 1998)), rather than intentionally or knowingly in violation of the first degree murder statute." *Id.* But the appellate court found that the testimony was an impermissible attempt to articulate a diminished capacity defense, which would allow "a defendant to offer evidence of her mental condition in relation to her capacity to form the *mens rea* or intent required for commission of the charged offense." *Id.* at 640.

Similarly, *Johnson* affirmed the exclusion of evidence regarding the defendant's alleged post-seizure mental state because it amounted to a "defense of diminished capacity, which does not exist in Illinois." *Johnson*, 2018 IL App (1st) 140725, ¶ 67. The defendant could not "circumvent" this rule by "instead claiming that her bizarre behavior was indicative of her lacking the mental state necessary for first degree murder." *Id.* ¶ 70.

The majority below recognized that diminished capacity "ha[d] not been recognized in Illinois for at least seven years prior to the shooting." A8 ¶ 21 (citing *Hulitt*, 361 Ill. App. 3d at 636). But the majority found that petitioner was not "making a diminished capacity defense as he does not assert that he was unable to form the requisite intent for attempted murder." A8 ¶ 21. To the extent that petitioner did attempt "to raise a diminished capacity defense 'in the guise of a reasonable doubt argument,' by arguing that, because he was suicidal, he did not intend to kill Officer Rewers," A7 ¶ 36 (Coghlan, J., dissenting), the dissenting justice correctly concluded that because petitioner's claim rested on a defense that does not exist under Illinois law, he failed to make a substantial showing of a constitutional violation, A8 ¶ 40.

Any argument that the absence of additional evidence of his mental health history deprived petitioner of the opportunity to raise a defense not recognized in Illinois law therefore is meritless.

CONCLUSION

This Court should reverse the judgment of the appellate court.

February 14, 2023

Respectfully submitted,

KWAME RAOUL
Attorney General of Illinois

JANE ELINOR NOTZ
Solicitor General

KATHERINE M. DOERSCH
Criminal Appeals Division Chief

ELDAD Z. MALAMUTH
Assistant Attorney General
100 West Randolph Street, 12th Floor
Chicago, Illinois 60601-3218
(773) 590-7973
eserve.criminalappeals@ilag.gov

Counsel for Plaintiff-Appellant
People of the State of Illinois

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 containing 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, and the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 37 pages.

/s/ Eldad Z. Malamuth
ELDAD Z. MALAMUTH
Assistant Attorney General

PROOF 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 February 14, 2023, the foregoing **Brief and Appendix of Plaintiff-Appellant People of the State of Illinois** was filed with the Clerk of the Supreme Court of Illinois using the court's electronic filing system, which served a copy to the e-mail addresses of the persons named below:

Gilbert Lenz
Assistant Appellate Defender
Office of the State Appellate Defender
203 North LaSalle, 24th Floor
Chicago, Illinois 60611
1stdistrict.eserve@osad.state.il.us

Hon. Kimberly M. Foxx
State's Attorney
Cook County State's Attorney Office
69 West Washington Street
Chicago, Illinois 60602
eserve.criminalappeals@cookcountyil.gov

/s/ Eldad Z. Malamuth
ELDAD Z. MALAMUTH
Assistant Attorney General

TABLE OF CONTENTS TO THE APPENDIX

Page

Illinois Official Reports

Appellate Court

***People v. Roland*, 2022 IL App (1st) 173013**

Appellate Court Caption	THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. FRANK ROLAND, Defendant-Appellant.
District & No.	First District, First Division No. 1-17-3013
Filed	March 7, 2022
Decision Under Review	Appeal from the Circuit Court of Cook County, No. 02-CR-2663001; the Hon. Maura Slattery-Boyle, Judge, presiding.
Judgment	Reversed and remanded.
Counsel on Appeal	James E. Chadd, Catherine K. Hart, and Gilbert C. Lenz, of State Appellate Defender's Office, of Springfield, for appellant. Kimberly M. Foxx, State's Attorney, of Chicago (Alan J. Spellberg, Janet C. Mahoney, and David B. Greenspan, Assistant State's Attorneys, of counsel), for the People.
Panel	JUSTICE WALKER delivered the judgment of the court, with opinion. Presiding Justice Hyman concurred in the judgment and opinion. Justice Coghlan dissented, with opinion.

OPINION

¶ 1 Petitioner Frank Roland appeals from the circuit court's denial of his postconviction petition at the second stage of proceedings pursuant to the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2016)). The petition alleged trial counsel was ineffective for failing to investigate his mental health history in support of his defense. The petition also claimed that newly discovered evidence previously unavailable to the defense could have corroborated Roland's trial testimony that he was trying to commit suicide when he fired a gun in the direction of police officers. The circuit court summarily dismissed the petition.

¶ 2 Roland appealed the circuit court's first stage dismissal. This court reversed and remanded for second stage proceedings. The circuit court again dismissed the ineffective assistance of counsel claim, finding that trial counsel's failure to pursue every form of documentation regarding Roland's mental health does not establish an ineffectiveness claim. Roland claims his postconviction petition makes a substantial showing that trial counsel was ineffective. We reverse the circuit court's second stage dismissal and remand for a third stage evidentiary hearing.

¶ 3 I. BACKGROUND

¶ 4 On September 18, 2002, Roland was arrested pursuant a shooting incident involving police officers. At trial, Roland testified that while he was in custody, he attempted to obtain help with his mental health for two or three days. He subsequently had an incident where he hung himself with his bedsheets and a hanging light fixture. Roland attempted to take his life before the hanging incident by cutting his own throat. On November 6, 2002, the circuit court ordered Forensic Clinical Services (FCS) to examine Roland regarding his fitness to stand trial and sanity at the time of the offense. FCS could not comply with the order because medical records were needed from Cermak Health Services, Tinley Park Mental Health Center (Tinley), and Mt. Sinai Hospital.

¶ 5 On February 4, 2003, Dr. Roni Seltzberg wrote a letter indicating she evaluated Roland on January 7, 2003, and determined Roland was fit to stand trial with medication. On the issue of Roland's sanity at the time of the commission of the offense, Dr. Seltzberg deferred the matter due to unobtainable psychiatric/medical records. FCS reported that the evaluation could not be completed until Cermak Health Services provided medical records.

¶ 6 On May 19, 2003, Dr. Seltzberg reported she performed a sanity evaluation on Roland and determined he was legally sane at the time of the offense. Dr. Seltzberg noted Roland was experiencing symptoms of a depressive mood disorder that may have been exacerbated by alcohol consumption and ingestion of other illicit substances.

¶ 7 On January 27, 2005, a bench trial was held, and Roland testified that on the day of the incident he was "drinking, smoking weed, [and] getting high." Roland felt "bad" about his mother passing away and "guilty" about the death of the mother of his children. He purchased a .25-caliber handgun to commit suicide but was unable to shoot himself. When a police car drove by, Roland decided to point the gun at the officers to get them to shoot at him. At approximately 11 p.m., Roland was speaking with Theresa on Hoyne Avenue, as an unmarked police vehicle approached Roland. An officer exited the vehicle and ordered Roland to freeze, but instead, Roland ran in the opposite direction and fired a shot in the air. Roland did not

intend to hit any officer because that "would have defeated [his] whole plan." Roland fled to Theresa's home where he was subsequently arrested.

¶ 8 Officer Ronald Rewers testified that on September 18, 2002, he was on patrol with Officers Figueroa and Delto. Officer Rewers received a call about an African American man wearing a red bandana, a white T-shirt, and blue jeans threatening a small child with a gun. The officers spotted Roland, who matched the description, near 2704 North Hoyne Avenue at 11 p.m. Officer Rewers exited the vehicle, identified himself, and asked Roland to place his hands up. Roland looked at the officers and began running west. As Roland was running, he removed a small handgun from his waist, and Officer Rewers instructed Roland to drop the weapon. While running, Roland "pointed the gun back towards [Rewers] and fired one shot." Rewers saw the muzzle flash, dropped to the ground, and returned fire. Roland was later arrested at 2634 North Hoyne Avenue. A .25-caliber handgun was found.

¶ 9 Following a bench trial, the circuit court found Roland guilty of attempted murder and sentenced him to a prison term of 30 years. On appeal, Roland argued that the trial judge erred in the finding of guilt by basing the decision on personal knowledge of handguns and misstatement of his testimony. This court affirmed Roland's conviction in *People v. Roland*, No. 1-05-1842 (2007) (unpublished order under Illinois Supreme Court Rule 23).

¶ 10 On January 23, 2008, Roland filed a *pro se* postconviction petition, alleging his trial counsel was ineffective and that his fourth and sixth amendment rights were violated. Specifically, Roland claimed that counsel failed to investigate "claims of being hospitalized for psychiatric treatment to be able to present a proper defense at trial." In his petition, Roland stated that he was admitted to Tinley and was on four different kinds of medication from September 2002 to June 2005. The State moved to dismiss the postconviction petition, and the trial court summarily dismissed the petition in a written order. The court found that Roland's claims were barred by the doctrine of waiver and his claims were frivolous and patently without merit.

¶ 11 Roland appealed the circuit court's dismissal. This court reversed that judgment and remanded for second stage proceedings in *People v. Roland*, No. 1-08-1580 (2010) (unpublished order under Illinois Supreme Court Rule 23). On remand, Roland's counsel submitted a supplemental postconviction petition alleging that trial counsel was ineffective for failing to investigate Roland's mental health issues. The State filed a motion to dismiss Roland's postconviction petition, arguing that Roland's claims were barred by waiver, he failed to meet the guidelines for newly discovered evidence, and Roland did not meet the burden of demonstrating that his trial counsel's actions were objectively unreasonable or prejudiced him in any way. In making its ruling, the trial court stated Roland "failed to establish that trial counsel's performance was deficient or that he was prejudiced." On May 25, 2017, the postconviction petition was dismissed, and Roland timely filed this appeal.

¶ 12 II. ANALYSIS

¶ 13 On appeal, Roland argues that his postconviction petition makes a substantial showing that trial counsel was ineffective for failing to investigate his mental health history in support of his defense. Roland asks that this court remand for a third stage evidentiary hearing.

¶ 14 The Act allows a person serving a criminal sentence to challenge his conviction for violations of the United States or Illinois Constitution. *People v. Tate*, 2012 IL 112214, ¶ 8. If a defendant does not file a direct appeal, the postconviction petition must be filed no later than

three years from the date of conviction, unless he alleges facts showing that the delay was not due to his culpable negligence. 725 ILCS 5/122-1(c) (West 2016). In cases not involving the death penalty, the Act provides a three stage process for adjudicating postconviction petitions. *People v. Edwards*, 197 Ill. 2d 239, 244 (2001). "A trial court's determination on a post-conviction proceeding will not be reversed unless contrary to the manifest weight of the evidence." *People v. Flores*, 153 Ill. 2d 264, 273 (1992). "Manifest error is error which is 'clearly evident, plain, and indisputable.' " *People v. Johnson*, 206 Ill. 2d 348, 360 (2002) (quoting *People v. Ruiz*, 177 Ill. 2d 368, 384-85 (1997)).

¶ 15 At the first stage, the circuit court has 90 days to review the petition and determine whether "the petition is frivolous or is patently without merit." 725 ILCS 5/122-2.1(a) (West 2016). If the circuit court does not summarily dismiss it within that period, then the petition advances to the second stage. *People v. Domagala*, 2013 IL 113688, ¶ 33.

¶ 16 At the second stage, the trial court may appoint counsel who may amend the petition to ensure the defendant's contentions are adequately presented. *People v. Pendleton*, 223 Ill. 2d 458, 472 (2006). Also, at the second stage, the State is allowed to file an answer or move to dismiss the petition. 725 ILCS 5/122-5 (West 2018). A petition may be dismissed at the second stage "only when the allegations in the petition, liberally construed in light of the trial record, fail to make a substantial showing of a constitutional violation." *People v. Hall*, 217 Ill. 2d 324, 334 (2005).

¶ 17 The question before the court is "whether the [postconviction] petition and any accompanying documentation make a substantial showing of a constitutional violation." *Edwards*, 197 Ill. 2d at 246. In making this determination, a court must take "all well-pleaded facts that are not positively rebutted by the original trial record" as true and may not engage in any fact-finding or credibility determinations. (Internal quotation marks omitted.) *Domagala*, 2013 IL 113688, ¶ 35. In determining whether a defendant has made a substantial showing of a constitutional violation, "all well-pleaded facts in the petition and affidavits are to be taken as true, but nonfactual and nonspecific assertions which merely amount to conclusions are not sufficient." *People v. Rissley*, 206 Ill. 2d 403, 412 (2003). A claim makes a "substantial showing" of a constitutional violation if its allegations would entitle the petitioner to relief if proven at an evidentiary hearing. *Id.* If a petition makes a substantial showing of a constitutional violation, the petition advances to a third stage evidentiary hearing where the circuit court, as the fact finder, will "determine witness credibility, decide the weight to be given testimony and evidence, and resolve any evidentiary conflicts." *Domagala*, 2013 IL 113688, ¶ 34. "Where the State seeks dismissal of a post-conviction petition instead of filing an answer, its motion to dismiss assumes the truth of the allegations to which it is directed and questions only their legal sufficiency." *People v. Miller*, 203 Ill. 2d 433, 437 (2002).

¶ 18 A claim that a defendant was denied effective assistance of counsel is governed by the familiar two-pronged test established in *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Brown*, 2017 IL 121681, ¶ 25. Under *Strickland*, counsel is constitutionally ineffective where representation was objectively unreasonable, and this deficient performance prejudiced the defendant. *Id.* To establish prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *People v. Hale*, 2013 IL 113140, ¶ 18 (quoting *Strickland*, at 694). A petitioner must satisfy both prongs of the *Strickland* test. *People v. Henry*, 2016 IL App (1st)

150640, ¶ 53. A failure to establish either prong is fatal to petitioner's claim. *People v. Easley*, 192 Ill. 2d 307, 318 (2000).

¶ 19 The circuit court dismissed Roland's postconviction petition at the second stage, finding Roland failed to make a substantial showing that his constitutional rights were violated in either the trial or appellate proceedings. We review a second stage dismissal *de novo. Id.* at 316.

¶ 20 Roland argues that by failing to present any evidence corroborating his suicide attempts before and after the incident, his trial counsel provided ineffective assistance. He also argues that the introduction of his medical history would have strengthened his assertion that he lacked the intent to kill Officer Rewers.

¶ 21 The State contends that Roland's argument rests on a diminished capacity defense, which has not been recognized in Illinois for at least seven years prior to the shooting. *People v. Hulitt*, 361 Ill. App. 3d 634, 641 (2005). The dissent also believes that Roland is effectively arguing diminished capacity. Diminished capacity is considered a partial defense because it is not presented as an excuse or justification for a crime but rather as an attempt to prove that the defendant, because he was incapable of forming the requisite intent of the crime charged, is innocent of that crime but likely guilty of a lesser included offense. *Id.* (citing 21 Am. Jur. 2d *Criminal Law* § 38 (1998)). To show diminished capacity, there must be evidence that at the time of the murder, the defendant did not appreciate the nature of his conduct or was incapable of conforming her conduct as a result of mental disease or defect. *Id.* Here, 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. Instead, Roland argues the intent to kill never existed and contends his mental health history bolsters that claim.

¶ 22 The State claims that Roland has failed to make a substantial showing that the medical records at issue ever actually existed. We find that the evidence Roland sought to introduce can be corroborated with the evidence attached to his petition. The form that Tinley provided Roland when he requested his medical records had a list of explanations to check off for why Tinley could not provide the medical records. One of the explanations was: "We have[ ] searched our records and are unable to locate a person with a name as it appears above." Instead of selecting this explanation, Tinley indicated they did not provide Roland's records because a witness signature was required. Tinley provided a form on which they could have indicated the medical records did not exist, but they did not do so. Therefore, we find the State's argument regarding the nonexistence of records unpersuasive.

¶ 23 The State also argues that even if the mental health records exist, Roland fails to demonstrate that it was necessary for trial counsel to obtain them to advance a "legitimate" defense. The State's argument is defeated by the finding of another panel of this court during a prior appeal of this matter. The panel found,

> "because defendant's 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, it is at least arguable that counsel's failure to investigate defendant's mental health history and to present evidence of his hospitalization and previous suicide attempt fell below an objective standard of reasonableness and prejudiced defendant." *Roland*, No. 1-08-1580.

¶ 24 Roland cites *People v. Baldwin*, 185 Ill. App. 3d 1079 (1989), to support the claim that trial counsel's failure to investigate his mental health history and present the available supporting evidence was objectively unreasonable. In *Baldwin*, the defendant appealed his conviction of

armed robbery, arguing in part that he did not receive effective assistance of counsel where defense counsel proceeded to trial before investigating defendant's mental condition and where counsel failed to obtain relevant psychiatric records until after trial. On appeal, this court found that failure to investigate defendant's records was sufficient to meet the standard for ineffective assistance of counsel. *Id* at 1090. The court held that the inadequate investigation of the defendant's records and the issue of sanity, which was prejudicial to the fitness question and the determination of a proper defense at trial, were sufficient to meet the standard for ineffective assistance of counsel. *Id.*

¶ 25 Here, the State contends the evidence at issue was not readily available like in *Baldwin*, and defense counsel in *Baldwin* was able to obtain evidence that contradicted the court's finding of fitness, unlike trial counsel in the present case. We disagree because it is clear from the record here that the evidence Roland sought to introduce was obtainable. In addition to the medical documents attached to the petition that Roland obtained while in custody, the letter from Tinley indicated that medical records were available but could not be released without a witness signature.

¶ 26 We find the supreme court's analysis in *People v. Brown*, 236 Ill. 2d 175 (2010), is instructive. In *Brown*, the defendant, armed with a butcher knife, lunged at a police officer and was shot. Defendant was convicted of attempted first degree murder of a police officer, and more than a month later, at sentencing, he reported a history of mental issues. Defendant claimed he had been depressed, previously tried to kill himself, and lunged at the officers because he wanted them to kill him. He also stated that he had been taking "psych medication" and was told that he should have a psychiatric evaluation, but counsel failed to advise the court. *Id.* at 180. Our supreme court held that the allegations arguably raised a *bona fide* doubt of the defendant's ability to understand the nature and purpose of the proceedings and assist in his defense; thus, counsel's failure to request a fitness hearing arguably fell below an objective standard of reasonableness and arguably prejudiced the defendant. *Id.* at 191.

¶ 27 Here, Roland's arguments, taken as true, satisfy the first prong of *Strickland.* Trial counsel's alleged failure to present evidence of Roland's mental health history that would only serve to bolster his defense is objectively unreasonable. See *id.* The issue remains whether Roland's allegations demonstrated prejudice. To establish prejudice, a petitioner must show a reasonable probability that "but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. Roland's proposed testimony shows a reasonable probability that the outcome of his proceeding would have been different. The State was required to show a specific intent to kill proven beyond a reasonable doubt. *People v. Homes*, 274 Ill. App. 3d 612, 622 (1995). Roland's medical records would create a credibility contest with Officer Rewers and directly contradict testimony.

¶ 28 Having satisfied both prongs of *Strickland*, Roland has made a substantial showing of a constitutional violation. Therefore, the circuit court erred in dismissing his petition, and we remand for a third stage evidentiary hearing.

¶ 29 III. CONCLUSION

¶ 30 For the foregoing reasons, the judgment of the circuit court dismissing Roland's postconviction petition is reversed, and we remand for a third stage evidentiary hearing on petitioner's claim that he received ineffective assistance of counsel.

¶ 31 Reversed and remanded.

¶ 32 JUSTICE COGHLAN, dissenting:

¶ 33 The majority concludes that "Roland's proposed testimony [regarding his mental health history] shows a reasonable probability that the outcome of his proceeding would have been different." *Supra* ¶ 27. Roland argues that the trial court "received no evidence corroborating [his] testimony that he attempted suicide both before and after this incident, which in turn would have supported his testimony that he did not intend to kill the police officer." The majority agrees, finding that "[t]he State was required to show a specific intent to kill proven beyond a reasonable doubt" and "Roland's medical records would create a credibility contest with Officer Rewers and directly contradict testimony." *Supra* ¶ 27. I disagree, on grounds that evidence of Roland's mental condition is inadmissible to show that he did not intend to kill the police officer.

¶ 34 Diminished capacity is an affirmative defense that permits " 'a legally sane defendant to present evidence of mental illness to negate the specific intent required to commit a particular crime.' " *People v. Johnson*, 2018 IL App (1st) 140725, ¶ 63 (quoting *Metrish v. Lancaster*, 569 U.S. 351 (2013)). Diminished capacity is not a recognized defense in Illinois. *People v. Hulitt*, 361 Ill. App. 3d 634, 641 (2005). More importantly, a defendant may not raise it under the guise of a reasonable doubt argument. *Id.* As we discussed in *Hulitt*,

> "[t]he doctrine of diminished capacity, also known as the doctrine of diminished or partial responsibility, allows a defendant to offer evidence of her mental condition in relation to her capacity to form the *mens rea* or intent required for commission of the charged offense. [Citation.] Similar to the insanity defense in that it calls into question the mental abnormality of a defendant, it differs in that it may be raised by a defendant who is legally sane." *Id.* at 640-41.

¶ 35 This case is analogous to *Hulitt*, where we found that the defendant's proposed mental health evidence amounted to raising a diminished capacity defense. *Id.* at 641. In *Hulitt*, the defendant was convicted of first degree murder of her daughter. *Id.* at 635. On appeal, she argued that the trial court erred in barring the testimony of a psychologist, who would have opined that while the defendant was not legally insane, she suffered from postpartum depression at the time of the offense and was " 'unable to appreciate the danger of her actions toward [her daughter].' " *Id.* at 636. This court found that the trial court

> "was entirely correct when it stated that [the psychologist's] opinion appeared to raise the specter of a defense which does not exist under Illinois law. Defendant could not raise it as an affirmative defense and, therefore, should not be permitted to raise it in the guise of a reasonable doubt argument." *Id.* at 641.

¶ 36 Despite Roland's claims to the contrary, allowing evidence regarding his mental history would constitute raising a diminished capacity defense, which is unavailable in Illinois. See *id.* Roland argues that evidence of his mental health history would have supported his defense and "counter[ed] the State's evidence of intent" where "[t]he only significant question of fact before the trial court was [his] mental state at the time he fired the gun." Essentially, Roland attempts to raise a diminished capacity defense "in the guise of a reasonable doubt argument," by arguing that, because he was suicidal, he did not intend to kill Officer Rewers. See *id.*; see also *Johnson*, 2018 IL App (1st) 140725, ¶ 62 (holding that expert testimony that defendant

was in a post-seizure state at the time of the offense was "properly excluded because it amounted to a diminished capacity defense").

¶ 37 Because diminished capacity is not a recognized defense in Illinois, evidence of Roland's mental health history is inadmissible to show he did not intend to kill Officer Rewers. It follows that Roland cannot establish prejudice by alleging counsel was ineffective for failing to present this evidence. See, *e.g.*, *People v. Turner*, 2012 IL App (2d) 100819, ¶ 61 (defendant could not establish prejudice for ineffective assistance of counsel where the "purported evidence *** would have been inadmissible hearsay at trial"); *People v. Avilas*, 2021 IL App (2d) 180542-U, ¶¶ 38, 42-43 (counsel not ineffective for failing to introduce inadmissible evidence that could not "clear the hurdle of relevance").

¶ 38 The majority relies on this court's unpublished order reversing the summary dismissal of Roland's petition at the *first stage* of postconviction proceedings, where we found that it was "at least *arguable*" that counsel's performance fell below an objective standard of reasonableness and prejudiced Roland. (Emphasis added.) *People v. Roland*, No. 1-08-1580 (2010) (unpublished order under Illinois Supreme Court Rule 23). At the first stage of postconviction proceedings, "the circuit court must independently review the petition, taking the allegations as true, and determine whether 'the petition is frivolous or is patently without merit,' " and because most petitions at this stage are drafted by defendants with little legal knowledge, the threshold for survival is low. (Internal quotation marks omitted.) *People v. Tate*, 2012 IL 112214, ¶ 9 (quoting *People v. Hodges*, 234 Ill. 2d 1, 10 (2009)). At the first stage, "a petition alleging ineffective assistance may not be summarily dismissed if (i) it is *arguable* that counsel's performance fell below an objective standard of reasonableness and (ii) it is *arguable* that the defendant was prejudiced." (Emphases added.) *Hodges*, 234 Ill. 2d at 17.

¶ 39 Here, at the second stage of postconviction proceedings, "a petitioner must meet a higher standard to survive dismissal." *People v. Johnson*, 2018 IL App (5th) 140486, ¶ 51. At the second stage, Roland bears the burden of showing that his "petition and any accompanying documentation make a 'substantial showing of a constitutional violation.' " *People v. Domagala*, 2013 IL 113688, ¶¶ 33, 35 (quoting *People v. Edwards*, 197 Ill. 2d 239, 246 (2001)). The "substantial showing" that must be made "is a measure of legal sufficiency of the petition's well-pled allegations of a constitutional violation, which if proven at an evidentiary hearing, would entitle petitioner to relief." (Emphasis omitted.) *Id.* ¶ 35.

¶ 40 The majority relies on this court's finding that Roland made an "arguable" showing of ineffective assistance of counsel at the first stage of postconviction proceedings without explaining how this amounts to a "substantial showing of a constitutional violation." Even if the medical records Roland references in his petition exist, they would not be admissible at trial because they would serve to present a diminished capacity defense. Because Roland's claims rely on a defense that "does not exist under Illinois law," he has not met his burden of making a substantial showing of a constitutional violation. See *Hulitt*, 361 Ill. App. 3d at 641; see also *People v. Frazier*, 2019 IL App (1st) 172250, ¶ 35 ("It is well-established *** that the affirmative defense of diminished capacity is not recognized in Illinois.").

¶ 41 Because a legally sane defendant may not present "evidence of mental illness to negate the specific intent required to commit a particular crime" (internal quotation marks omitted) (*Johnson*, 2018 IL App (1st) 140725, ¶ 63), Roland's proposed evidence is inadmissible to

show he did not intend to kill Officer Rewers and would not have changed the outcome of this proceeding.

¶ 42 Based on Roland's failure to make a "substantial showing of a constitutional violation," I respectfully dissent from the majority opinion, and I would affirm the circuit court's dismissal of his petition.

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CRIMINAL DIVISION

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Plaintiff-Respondent,	)	
	)	Petition for Post-Conviction Relief
v.	)	02-CR-2663001
	)	
FRANK ROLAND,	)	
	)	Honorable Maura Slattery-Boyle
Defendant-Petitioner.	)	Judge Presiding

ORDER

Petitioner, Frank Roland, seeks post-conviction relief from the judgment of conviction entered against him on May 17, 2005. Following a bench trial, petitioner was convicted of attempt first degree murder in violation of Sections 8-4 and 9-1 of the Illinois Criminal Code. 720 ILCS 5/8-4, 5/9-1 (Lexis 2002). Petitioner was subsequently sentenced to 30 years of imprisonment. As grounds for post-conviction relief, petitioner, through his *pro se* post-conviction petition and the supplemental petition filed by appointed counsel, claims: (1) ineffective assistance of trial counsel where counsel (a) failed to object to statements of the State and the trial judge, (b) failed to investigate petitioner's mental health history and (c) failed to present an insanity defense; (2) actual innocence based on newly discovered evidence; and (3) unconstitutional search and seizure. For the reasons set forth below, the State's motion to dismiss is GRANTED and this petition is DISMISSED.

BACKGROUND[1]

Petitioner's conviction stems from his arrest on September 18, 2002, for shooting at a police officer. On the night of the shooting, Chicago police officer Ronald Rewers and his partners were on patrol, dressed in plain clothes and driving an unmarked police car. At 7:30

[1] The factual background contained in this order is drawn in substantial part from the Illinois Appellate Court's opinion. *People v. Roland*, No. 1-05-1842, 373 Ill. App. 3d 1152 (1st Dist. 2007) (unpublished order under Supreme Court Rule 23).

p.m. they received a call regarding an African-American man wearing a red bandanna around his head, a white T-shirt, and blue jeans, threatening a small child with a gun. Around 11 p.m. they observed petitioner, who matched the description of the offender. Officer Rewers exited the vehicle, told petitioner of his office several times, and instructed petitioner to put his hands up. At that time defendant began running west, and as he ran he reached around his back and removed a small handgun from his waistband. He looked over his left shoulder and from a distance of 10 to 12 feet, he fired one shot in the direction of the officer. Officer Rewers saw the muzzle flash, dove to the ground, and returned fire. Defendant continued running, and Officer Rewers lost sight of him.

Officers Pappone and Vaccaro arrived on the scene at about 11 p.m. after receiving a call for assistance. When Officer Pappone arrived, he met a juvenile who informed him that the suspect had run into the building at 2634 North Hoyne. Officer Pappone knocked on the door and a 12-year old girl answered the door. She appeared nervous and looked like she was trying to hide something. Her 9-year old sister joined her at the door and also seemed nervous. Both girls claimed no adults were at home. For their safety, Officer Pappone asked them to step out of the apartment. At that time, Officer Pappone announced his office and asked if there was anyone in the building. He then saw petitioner standing at the top of the stairs, adjacent to an open door. Officers Pappone and Vaccaro took petitioner into custody. Officer Pappone then entered the bedroom from which the petitioner emerged and found a red bandanna and a red slipper containing a .22 caliber handgun.

PROCEDURAL HISTORY

A direct appeal was taken to the Illinois Appellate Court, First Judicial District, wherein petitioner contended that (1) the trial court improperly considered evidence that was outside the

record when issuing its ruling and (2) he was deprived of due process because the trial court incorrectly found that he testified to pointing at the officer and improperly relied on that erroneous finding in determining that he had the requisite intent for attempted murder. Defendant also sought correction of his mittimus to reflect credit for the correct number of days in custody prior to sentencing. On July 10, 2007, petitioner's conviction and sentence were affirmed and his mittimus was corrected. *People v. Roland*, No. 1-08-1842, 373 Ill. App. 3d 1152 (1st Dist. 2007) (unpublished order under Supreme Court Rule 23). The record does not indicate whether petitioner filed leave to appeal to the Illinois Supreme Court. The record also does not reflect whether petitioner sought further review in the United States Supreme Court.

The instant proceeding commenced in January 2008, at which time petitioner filed his initial *pro se* post-conviction petition. On March 14, 2008, the circuit court summarily dismissed the petition as frivolous and patently without merit. Petitioner appealed the dismissal, and on June 30, 2010, the appellate court reversed the summary dismissal and remanded the matter to the circuit court for second-stage proceedings. Back in the circuit court, petitioner was appointed counsel and counsel supplemented his *pro se* petition[2] on June 9, 2015. In turn, respondent filed a motion to dismiss pursuant to Section 5 of the Post-Conviction Hearing Act ("the Act"). 725 ILCS 5/122-5 (Lexis 2017). On June 14, 2016, petitioner filed a response to the motion to dismiss.

ANALYSIS

At the outset, it is universally recognized that a post-conviction proceeding is not a direct appeal, but rather is a collateral attack on a prior judgment. *People v. Barrow*, 195 Ill. 2d 506, 519 (2001). Under the Act, a petitioner enjoys no entitlement to an evidentiary hearing. *People v. Cloutier*, 191 Ill. 2d 392, 397 (2000). A hearing is required, however, when the petitioner makes

[2] Petitioner's *pro se* petition is incorporated in the supplemental petition for post-conviction relief. Supp. Pet. at 1.

a substantial showing, based on the record and supportive affidavits, that a violation of his constitutional rights occurred at trial or sentencing. *People v. Johnson,* 191 Ill. 2d 257, 268 (2000). At this stage, the trial court must assume that the allegations in affidavits or other documents are true. *People v. Ward*, 187 Ill. 2d 249, 255 (1999) (citing *People v. Caballero*, 126 Ill. 2d 248, 259 (1989)). If the petitioner makes a substantial showing of a constitutional violation, the petition is advanced to the third stage, where the court conducts an evidentiary hearing. 725 ILCS 5/122-6 (Lexis 2010); *People v. Johnson,* 191 Ill. 2d 257, 268 (2000).

A substantial showing of a constitutional violation is "a measure of legal sufficiency of the petition's well-pled allegations of a constitutional violation, which if proven at an evidentiary hearing, would entitle petitioner to relief." *People v. Domagala,* 2013 IL 113688, ¶ 35. Unsupported, conclusory allegations are not sufficient to require an evidentiary hearing under the Act. *People v. Pierce*, 48 Ill. 2d 48, 50 (1971); *People v. Maury*, 287 Ill. App. 3d 77, 80 (1st Dist. 1997) (summarily dismissing petitioner's post-conviction claims because no factual support). Post-conviction review is limited to constitutional issues that were not and could not be previously raised on direct appeal or in prior post-conviction proceedings. *People v. McNeal*, 194 Ill. 2d 135, 140 (2001); *People v. King*, 192 Ill. 2d 189, 192 (2000). Rulings on issues that were previously raised at trial or on direct appeal are *res judicata*, and issues that could have been raised, but were not, are waived. *People v. Miller*, 203 Ill. 2d 433, 437 (2002).

I. Ineffective Assistance of Trial Counsel

Petitioner contends that his trial counsel was ineffective for failing to: (a) object to statements of the trial court and the State; (b) investigate his mental health history; and (c) present readily available evidence of his suicide attempt in July 2002. In examining a claim for ineffective assistance of trial counsel, the court follows the two-pronged test of *Strickland v.*

Washington, 466 U.S. 668 (1984). Petitioner must show that counsel's representation fell below an objective standard of reasonableness, and that but for this deficiency, it is reasonably probable that the outcome at trial would have been different. *Id.* at 694. Both prongs must be satisfied to state a claim for ineffective assistance of trial counsel. *People v. Morgan*, 187 Ill. 2d 500, 530 (1999). There is a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance, *Strickland*, 466 U.S. at 689, and effective assistance means competent, not perfect, representation, *People v. Palmer*, 162 Ill. 2d 465, 476 (1994). Challenges to trial counsel's representation ordinarily are not cognizable under the Post-Conviction Hearing Act unless the claim concerns a matter outside the trial record, *People v. Britz*, 174 Ill. 2d 163, 178-79 (1996); *People v. Coleman*, 267 Ill. App. 3d 895, 898-99 (1st Dist. 1994), and "[m]atters relating to trial strategy are generally immune from claims of ineffective assistance of counsel." *People v. Lopez*, 371 Ill. App. 3d 920, 929 (1st Dist. 2007).

(a) Failure to Object to Statements of the Trial Court and the State

Petitioner alleges that defense counsel failed to object to the judge's purported own personal theory of the case. This claim has been waived. As this is a claim arising from the trial record, petitioner could have raised this on direct appeal but did not. *See Miller*, 203 Ill. 2d at 437.

Even if waiver did not apply, petitioner has not attached transcripts showing this purported failure to object. The Act requires that a petition be supported by records or other evidence supporting its allegations. *People v. Lemons*, 242 Ill. App. 3d 941 (4th Dist 1993). The failure to either include these necessary items or explain their absence is "fatal" to a petition for post-conviction relief and may alone justify the summary dismissal of the petition. *People v. Collins*, 202 Ill. 2d 59, 66 (2002). In addition, it appears that petitioner is referencing trial

counsel's failure to object to the trial court making a reasonable inference that petitioner must have triggered the gun slide before firing a weapon as evidence of intent to kill. However, the failure to object to this inference was not prejudicial to petitioner. *Strickland*, 466 U.S. at 694. This reasonable, minor inference was not a crucial component of the court's guilt determination.[3] The crux of the ruling was the officer's testimony and the incredibility of petitioner. Accordingly, petitioner has not made a substantial showing of a constitutional violation.

(b) Failure to Investigate and Present Readily Available Evidence

Petitioner claims that trial counsel was ineffective for failing to investigate his mental health history and present it at trial. This claim is meritless. Counsel only has a duty to make reasonable investigations or make reasonable decisions that makes a particular investigation unnecessary. *Strickland*, 466 U.S. at 691. A decision not to investigate must be directly assessed for reasonableness under all the circumstances, applying a heavy measure of deference to counsel's judgments. *Id.*

Petitioner asserts that had trial counsel investigated, he would have found that petitioner was hospitalized at two different facilities on July 19, 2002, including Tinley Park Mental Health Center and Ingalls Hospital, after he attempted suicide by cutting his own throat. In support, he attaches records from Ingalls Hospital dated July 19, 2002, showing that he received emergency care for a suicide attempt by cutting his neck. It also shows an Authorization for Transfer form dated July 19, 2002, showing the receiving facility as "TPMHC," which petitioner claims is Tinley Park Mental Health Center, and the receiving physician as "Dr. Chun." He argues that evidence of this suicide attempt would have corroborated his own testimony at trial that he was

[3] The court addressed this point, stating, "Even if I take that out, the defendant was fleeing from police. He turns, he looks and points the gun directly at the officer. I believe that is evidence of specific intent to kill." Tr. at A-147.

attempting to commit suicide by police officer on the day of the event, not intending to kill the officer.

Petitioner has failed to establish that trial counsel's performance was deficient or that he was prejudiced. Petitioner acknowledges that the trial court was aware that his mental health was an issue in this case. Supp. Pet. at 13. Jail records showed that petitioner attempted suicide while in jail soon after his arrest. His mental health was investigated by counsel and evidence as to his mental state was presented to the court, both through petitioner's testimony and these records. That trial counsel did not pursue every piece of documentation does not establish an ineffectiveness claim.

Moreover, while petitioner attaches documentation to his petition showing admittance to Ingalls Hospital on July 19, 2002, after a suicide attempt and that he was to be transferred to Dr. Chun at Tinley Park Mental Health Center, he has not attached additional documents showing that he was actually seen at Tinley Park. Counsel and Dr. Seltzberg made an inquiry to the facility, and the records came back stating he was never there, and petitioner acknowledges that Dr. Seltzberg testified to that effect at trial. While counsel eventually ceased investigation into the records at issue, petitioner has provided no grounds to find that counsel's decision to do so was objectively unreasonable.

Additionally, petitioner has failed to demonstrate that he was prejudiced by any failure to obtain this evidence. Petitioner's claim is predicated on the idea that this supporting documentation from Tinley Park would have corroborated his testimony at trial that he lacked the requisite criminal intent for attempt murder. However, this documentation would not have changed the outcome at trial. *See Strickland*, 466 U.S. at 694. At best, it would have supported petitioner's testimony that he was suicidal on July 19, 2002, two months prior to firing at the

police officer on September 18, 2002, but would not have established that he was suicidal on the day of the shooting. Any corroborating evidence that he attempted suicide two months prior to the date of the crime would not outweigh the State's consistent, credible testimony from officers on the pertinent details – that petitioner, while fleeing from Officer Rewers, withdrew his handgun from his waistband and fired at or near officers. Accordingly, because he cannot establish objectively unreasonable representation or resultant prejudice, petitioner has not made a substantial showing of a constitutional violation.

*(c) **Failure to Present an Insanity Defense***

Petitioner also claims that the failure to investigate petitioner's mental health history precluded him from presenting a meritorious insanity defense. This claim does not show that trial counsel's performance was objectively unreasonable or prejudicial. As alluded to above, the alleged failure of counsel to investigate is a matter of trial tactics and strategy, and the competence of counsel inquiry does not extend into those areas. *See Lopez*, 371 Ill. App. 3d at 929.

Petitioner does not offer evidence that he was indeed insane in support of this contention. There is nothing to show that pursuing an insanity defense was a viable option, let alone available to him at the time of trial. Petitioner's allegations do not overcome the strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance. *See Strickland*, 466 U.S. at 689. Petitioner's trial counsel inquired into the petitioner's mental health and presented evidence at trial that petitioner lacked the specific intent to kill, including petitioner's own testimony that the court found less credible than the testimony of the police officers. Counsel did not present an insanity defense at trial because that course of action

likely was not available to him. Accordingly, petitioner does not make a substantial showing that his constitutional rights were violated at trial.

II. Actual Innocence Based on Newly Discovered Evidence

Petitioner contends that the Tinley Park and Ingalls Hospital records referenced above constitute newly discovered evidence. He claims that the records showing he attempted suicide in July 2002 and was treated at Ingalls Hospital and was to be transferred to Tinley Park would change the result on retrial. Conviction of an innocent person violates the Illinois Constitution's due process clause. *People v. Morgan*, 212 Ill. 2d 148, 154 (2004). Accordingly, Illinois courts recognize a petitioner's right "to assert a claim of actual innocence based on newly discovered evidence." *Id.*; *People v. Washington*, 171 Ill. 2d 475, 489 (1996). To succeed on a claim of actual innocence, the petitioner must show that the new evidence provided is: (1) newly discovered; (2) material and non-cumulative; and (3) of such conclusive character that it would probably change the result on retrial. *Washington*, 212 Ill. 2d at 489.

Newly discovered evidence is evidence that was unavailable at trial and could not have been discovered sooner through due diligence. *People v. Harris*, 206 Ill. 2d 293, 301 (2002). A petitioner bears the burden of showing no lack of due diligence on his part in discovering the evidence supporting petitioner's claim. *People v. Snow*, 2012 IL App (4th) 110415, ¶ 21-22 (affirming dismissal of post-conviction petition because petitioner failed to plead and argue due diligence in his brief). "Leave of court should be granted when the petitioner's supporting documentation raises the probability that it is more likely than not that no reasonable juror would have convicted him in light of the new evidence." *People v. Edwards*, 2012 111711, ¶ 32.

Petitioner's actual innocence claim is meritless. As described above, petitioner attaches records from Ingalls Hospital dated July 19, 2002, stating that he attempted suicide by cutting his

neck and that he was to be transferred to "TPMHC" to the care of a Dr. Chun. Petitioner does not allege that this information could not have been discovered sooner through due diligence and, in any event, it indeed could have been discovered. *Snow*, 2012 IL App (4th) 110415, ¶ 21-22. This information does not constitute newly discovered evidence because it could have been discovered and presented during trial, which is further shown by the fact that petitioner testified regarding his July 2002 hospitalization at trial.

Further, this potential evidence does not show a reasonable probability that the result on retrial would be different or that "no reasonable juror would have convicted" petitioner in light of the new potential evidence. *Edwards*, 2012 111711, ¶ 32. As outlined above, petitioner has not provided additional support for his claim that would show that he was actually admitted to the Tinley Park Mental Health Center. Also, the trier of fact was presented with this information through petitioner's trial testimony and found the testimony of the police officers to be overwhelmingly convincing, outweighing petitioner's testimony with regard to his suicidal ideation during the summer of 2002. Accordingly, because petitioner has failed to satisfy the requirements of "newly discovered evidence," his claim does not make a substantial showing of a violation of his constitutional rights.

III. Unconstitutional Search and Seizure

Petitioner contends that his constitutional rights were violated when Chicago police entered the residence and seized him without a search warrant or probable cause. He argues that the court's ruling on his motion to suppress was improper. This claim is barred by waiver, as the hearing on petitioner's motion to suppress is a matter of the trial record and petitioner could have raised this issue on direct appeal but did not. *See Miller*, 203 Ill. 2d at 437. Moreover, petitioner's allegation does not include any facts that support the conclusion that his arrest was

unconstitutional. Bald, conclusory allegations, such as this, will not prevail on post-conviction review. *See Maury*, 287 Ill. App. 3d at 80 (summarily dismissing petitioner's post-conviction claims because no factual support). Accordingly, petitioner's claim of an unconstitutional arrest fails to make a substantial showing of a constitutional violation.

CONCLUSION

The court finds that petitioner has failed to make a substantial showing that his constitutional rights were violated in either the trial or appellate proceedings. Accordingly, the court GRANTS respondent's motion to dismiss and the petition for post-conviction relief is hereby DISMISSED. Petitioner's request for leave to proceed *in forma pauperis* and for appointment of counsel is likewise DENIED.

ENTERED: _____
Hon. Maura Slattery-Boyle
Circuit Court of Cook County
Criminal Division

DATED: _____

ENTERED
JUDGE STEVE G. WATKINS-2117
MAY 25 2017
DOROTHY BROWN
CLERK OF THE CIRCUIT COURT
OF COOK COUNTY, IL
DEPUTY CLERK

by cop.

And that he was mentally ill. He was fit for trial. And there was an issue of insanity. On Page 2 of my motion to reconsider, I acknowledge that your Honor, pointed out that Mr. Roland had not attached any medical -- more medical records to his petition.

He did attach some, but not others. And that furthermore I do not attach hospital records. For the record this case was five years old by the time I had gotten it because it was already -- there was an appeal.

There was a pro se petition had been filed. And it was -- back so by the time I got it, it was already five years old. Tinley Park had closed. Those records were transferred to Madden.

Madden Mental Health Center wasn't able to locate those records. I then contacted Ingalls Hospital. And they said at this point they would not have the records any longer.

So my argument would be that theoretically we still have an evidentiary hearing calling Mr. Roland without the medical records. And the second argument on Page 3 of my motion, the fact

that -- the failure to present any insanity defense.

And I would just point out that the trial judge -- it was another judge other than -- coded there -- when the defense tried to bring up that issue of insanity, the trial judge at that time said, quote, there's nothing to show that the insanity defense was a viable option let alone available to him at the time of trial.

However, at the fitness hearing the attorneys tried to question Ms. Salesburg about the insanity determination. And the Court said that we're not here for that.

THE COURT: Right.

MS. SLOCUM: So basically I would rest on these arguments and my motion to reconsider the supplemental. My response to the state's motion to dismiss and his pro se petition.

THE COURT: Okay. And in regards to the motion as well, I'll start with the second argument -- ineffective assistance of counsel as the judge correctly indicated in the transcript.

That insanity defense which is an offense that has to be affirmatively pled was never pled. And even that was never pled, the attorney --

the defense attorneys tried to get into it which was improper. That was never a viable option.

The trial judge had the opportunity to interact with Mr. Roland as well as the attorneys. That was never presented. The Court made the correct ruling in regards to defense counsel attempting to question Dr. Salesburg about that even though that it was not followed within the proper rules and procedures.

So in regard to that issue, the Court made a correct rulings. And in regards to the -- again, the additional ineffective assistance of counsel in regards to failure to investigate and present available evidence.

My understanding is this is an issue regarding -- indicating that five years. Medical records are held for ten years. I understand that it's not lack of due diligence on your part, but the hospital.

But even at the trial level, this was never presented or forwarded more timely, so that now coming up to this point that there was not a viable option that at this time Mr. Roland provided the information or was not presented. And then you were

trying to get that.

And that even though the hospital has taken over -- any hospital that is presumed taken over by another hospital is presumed to maintain records for a ten year period of time.

So I understand what you're saying. But the Court does not find that given the fact insanity was not a viable option that these issues become moot as well. Motion to reconsider is denied. And notice for appeal.

MS. SLOCUM: Yes, your Honor, could we continue this. I don't think the state needs to be here. I will be back November 13th.

THE COURT: Sure.

MS. SLOCUM: If I could file a written motion with the dates that need to be transcribed.

THE COURT: Okay. We'll do that then.

MS. SLOCUM: Thank you, your Honor.

THE COURT: Okay.

(Whereupon, the above-entitled cause was continued to 11/13/17.)

apparently. And his excuse to you is that he's suicidal by the police, which I submit is simply ridiculous. He fired at a Chicago police officer and fortunately Officer Rewers did not get hit by his bullet. I'd submit that we have met our burden, and I would ask for a finding of guilty on all counts.

MR. PFEIFER: There's one point I'd like to argue, if I may. I forgot to argue. I think it is unlikely that the officer's version is correct in that the shooter turned around while he was running, because he had to go through this archway. And I think if he is running away and turning around it would be more like he would be running into a wall. It's more like he is looking in the direction that he is running in order to make it through that archway and perhaps shot, like you said, up without even looking, Judge.

MS. WALOWSKI: Judge, he himself said on his testimony how he demonstrated to you, he said he turned around. So that goes completely against that argument, Judge.

THE COURT: Thank you. I'm making my finding that the burden of proof and the State's burden is beyond a reasonable doubt. I mean, at this point there's absolutely no doubt the defendant fired a gun at Officer

Rewers. I don't believe the defendant. It quite frankly doesn't make any sense to me. If he wanted to commit suicide by police, an unmarked car pulls up with three tact officers. He wants to guarantee all three of them shooting at him, he wouldn't be fleeing and running and ducking behind the archway. Just for a whole lot of reasons, the defendant's story is completely unbelievable to me.

The issue is whether or not the State met it's burden showing a specific intent to kill. The defendant fled when he saw the police, for whatever reason; that Officer Rewers chased him, the defendant pulled a gun from his waistband, manipulated it. I think there is a reasonable inference, based on the evidence, Officer Moran testified to a live .25 caliber cartridge casing right next to a spent .25 caliber, a spent casing.

Now, I know the officer didn't testify to this, but I think there is a reasonable inference, this is a semi automatic gun which everybody knows operated by use of a slide; that the defendant was operating the slide and that's how the .25 caliber live round ended up being ejected, and that is how the defendant knew the gun was operating and to take the effort to -- when

running from the police, to operate the slide. And even without that, even without that, maybe I'm speculating too much, I certainly think that's a reasonable inference borne by the evidence. Even if I take that out, the defendant was fleeing from the police. He turns, he looks and points the gun directly at the officer. I believe that is evidence of specific intent to kill. He fires the shot, ducks around the archway. The officer is within 10 to 12 feet of the defendant. The officer dives to the ground in response to the defendant actions, which gives the option to the defendant to stay, which is why he didn't fire a second shot.

I did believe the evidence warrants the findings of guilty of attempt murder of a police officer. That the officer -- well, the defendant, in addition to the police, testified they -- that the defendant did point the gun directly at the officer, but this was not a higher in the end as the defendant described, that he was firing at the officer, and I believe that shows a specific intent.

Therefore, finding of guilty of Count 1. I believe 2, 3 and 4, we merged.

MS. WALOWSKI: That's correct.

TO THE APPELLATE COURT OF ILLINOIS
IN THE CIRCUIT COURT OF COOK COUNTY
CRIMINAL DIVISION

PEOPLE OF THE STATE OF ILLINOIS	)	
	)	
	)	**Case No: 02CR2663001**
	)	**Post-Conviction Petition**
vs.	)	**Judge: Maura Slattery Boyle**
	)	**Attorney: APD Diane Slocum**
Frank Roland	)	

NOTICE OF APPEAL

An Appeal is taken from the order of judgment described below:

APPELLANT'S NAME: **Frank Roland, Reg. No. K-62115**
APPELLANT'S ADDRESS: **Dixon Correctional Center**
2600 N. Brinton Ave., P.O. Box 1200, Dixon, IL 61021
APPELLANT'S ATTORNEY: **Office of the State Appellate Defender**
ATTORNEY'S ADDRESS: **203 North LaSalle Street, 24th Floor, Chicago, IL 60601**
ATTORNEY'S EMAIL: **1stDistrict@osad.state.il.us**
OFFENSE: Attempt Murder
JUDGMENT: State's Motion to Dismiss Post-Conviction Petition Granted, Motion to Reconsider Denied
DATE OF JUDGMENT: May 25, 2017, October 16, 2017
SENTENCE: 30 years

APPELLANT/APPELLANT'S ATTORNEY

VERIFIED PETITION FOR REPORT OF PROCEEDINGS COMMON LAW RECORD AND FOR APPOINTMENT OF COUNSEL ON APPEAL

Under Supreme Court Rules 605-608, appellant asks the Court to order the Official Court Reporter to transcribe an original and copy of the proceedings, file the original with the Clerk and deliver a copy to the Appellant; order the Clerk to prepare the Record on appeal, and to appoint the State Appellate Defender as counsel on appeal. Appellant, being duly sworn, says that at the time of his conviction he was and is now unable to pay for the Record or to retain counsel on appeal.

FILED
JUDGE MAURA SLATTERY BOYLE
NOV 13 2017
DOROTHY BROWN
CLERK OF THE CIRCUIT COURT
OF COOK COUNTY, IL
DEPUTY CLERK

APPELLANT/APPELLANT'S ATTORNEY

ORDER

IT IS ORDERED that the State Appellate Defender be appointed as counsel on appeal and the Record and Report of Proceedings be furnished to appellant without cost, within 45 days of receipt of this Order.
Dates to be Transcribed: 10/16/17, 9/16/17, 9/1/17, 8/2/17, 6/26/17, 5/25/17, 6/14/16, 11/5/15, 6/9/15, 12/3/14, 11/3/14, 10/1/14, 8/5/14, 1/15/14, 10/20/11

DATE: November 13, 2017

ENTER: _____
JUDGE

People v. Roland, No. 2002 CR 26630 (Cook Cnty. Cir. Ct.)
Index to the Common Law Record

Common Law Record ("C")

Supplement to the Common Law Record ("Sup2C")

Supplement to Common Law Record ("Sup3C")

***People v. Roland*, No. 2002 CR 26630 (Cook County)**
Index to the Report of Proceedings

Unscanned Report of Proceedings ("P")