No. 124940

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, -vs- DEMARIO D. REED Defendant-Appellant	))))))))))	Appeal from the Appellate Court of Illinois, No. 4-17-0090. There on appeal from the Circuit Court of the Sixth Judicial Circuit, Macon County, Illinois, No. 14-CF-1205. Honorable Jeffrey S. Geisler, Judge Presiding.

BRIEF AND ARGUMENT FOR DEFENDANT-APPELLANT

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E-FILED
2/28/2020 1:07 PM
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POINT AND AUTHORITIES Page

NATURE OF THE CASE

Demario D. Reed appeals from a judgment that affirms the denial of his post-conviction petition by creating a categorical bar to petitioners who seek to demonstrate their actual innocence without also attacking the validity of their prior guilty pleas.

An issue is raised concerning the sufficiency of the post-conviction pleadings.

ISSUE PRESENTED FOR REVIEW

Whether the Illinois Constitution demands recognition of a claim of actual innocence based upon newly discovered evidence, and whether a petitioner who previously pleaded guilty may litigate this claim under the Post-Conviction Hearing Act without also attacking the validity of her prior plea.

STATUTES AND RULES INVOLVED

§ 122-1. Petition in the trial court. (725 ILCS 5/122-1)

(a) Any person imprisoned in the penitentiary may institute a proceeding under this Article if the person asserts that:

> (1) in the proceedings which resulted in his or her conviction there was a substantial denial of his or her rights under the Constitution of the United States or of the State of Illinois or both[.]

* * *

(c)

* * *

If a defendant does not file a direct appeal, the post-conviction petition shall be filed no later than 3 years from the date of conviction, unless the petitioner alleges facts showing that the delay was not due to his or her culpable negligence.

This limitation does not apply to a petition advancing a claim of actual innocence.

* * *

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

> (1) a prisoner shows cause by identifying an objective factor that impeded his or her ability to raise a specific claim during his or her initial post-conviction proceedings; and
>
> (2) a prisoner shows prejudice by demonstrating that the claim not raised during his or her initial post-conviction proceedings so infected the trial that the resulting conviction or sentence violated due process.

§ 5/116-3. Motion for fingerprint, Integrated Ballistic Identification System, or forensic testing not available at trial or guilty plea regarding actual innocence. (725 ILCS 5/116-3)

(a) A defendant may make a motion before the trial court that entered the judgment of conviction in his or her case for the performance of fingerprint, Integrated Ballistic Identification System, or forensic DNA testing, including comparison analysis of genetic marker groupings of the evidence collected by criminal justice agencies pursuant to the alleged offense, to those of the defendant, to those of other forensic evidence, and to those maintained under subsection (f) of Section 5-4-3 of the Unified

Code of Corrections, on evidence that was secured in relation to the trial or guilty plea which resulted in his or her conviction[.]

* * *

(b) The defendant must present a prima facie case that:

(1) identity was the issue in the trial or guilty plea which resulted in his or her conviction; and

(2) the evidence to be tested has been subject to a chain of custody sufficient to establish that it has not been substituted, tampered with, replaced, or altered in any material aspect.

(c) The trial court shall allow the testing under reasonable conditions designed to protect the State's interests in the integrity of the evidence and the testing process upon a determination that:

(1) the result of the testing has the scientific potential to produce new, noncumulative evidence

(i) materially relevant to the defendant's assertion of actual innocence when the defendant's conviction was the result of a trial, even though the results may not completely exonerate the defendant, or

(ii) that would raise a reasonable probability that the defendant would have been acquitted if the results of the evidence to be tested had been available prior to the defendant's guilty plea and the petitioner had proceeded to trial instead of pleading guilty, even though the results may not completely exonerate the defendant; and

(2) the testing requested employs a scientific method generally accepted within the relevant scientific community.

* * *

(f) When a motion is filed to vacate based on favorable post-conviction testing results, the State may, upon request, reactivate victim services for the victim of the crime during the pendency of the proceedings, and, as determined by the court after consultation with the victim or victim advocate, or both, following final adjudication of the case.

STATEMENT OF FACTS

Overview

Demario D. Reed filed a successive post-conviction petition that, among other claims, alleged his actual innocence. (R.C135-C138) He had pleaded guilty to armed violence (720 ILCS 5/33A-2(a)) for possessing cocaine while armed with a shotgun. (R.C89) He attached to his successive petition an affidavit from codefendant Davie Callaway, who averred that he, not Mr. Reed, had possessed the cocaine. (R.C146) The circuit court held a third-stage evidentiary hearing at which Callaway testified. (Vol. XIX, pp. 1-16) The court later denied Mr. Reed's petition. (R.C175-C177)

On appeal, Mr. Reed argued that the court manifestly erred by categorically rejecting Callaway's unimpeached, consistent testimony. The Fourth District did not examine the merits of this issue but instead held that Mr. Reed's claim was not cognizable under the Post-Conviction Hearing Act because, although he raised his actual innocence, he did not also attack the validity of his prior guilty plea. *People v. Reed*, 2019 IL App (4th) 170090, ¶¶ 2, 19. The Fourth District declined to follow the First District's decision, *People v. Shaw*, 2018 IL App (1st) 152994, which, in the meantime, had been withdrawn. *Reed*, 2019 IL App (4th) 170090, ¶ 16.

Mr. Reed then filed a petition for rehearing that, among other things, asked the Fourth District to allow the parties to fully brief this issue once the First District re-issued its decision in *Shaw*. See *Id.* The Fourth District denied his petition for rehearing and modified its decision by omitting its analysis of *Shaw*. See *Id.*, ¶¶ 16-17.

Guilty Plea

On April 3, 2015, Mr. Reed pleaded guilty. (Vol. VIII, p. 7) Mr. Reed had agreed to plead guilty to one count of armed violence in exchange for the minimum sentence of 15 years' imprisonment as well as the dismissal of three separate counts in this case and two other cases. (Vol. VIII, pp. 2-3) At the guilty-plea hearing, the trial court admonished Mr. Reed under Illinois Supreme Court Rule 402(a) and found that his plea was voluntary. (Vol. VIII, pp. 3-4, 6)

The State recited the following factual basis for the plea: Officer Daniels of the Decatur Police Department would testify that, on September 23, 2014, he observed Mr. Reed, who was "on a porch in Decatur, Illinois[,] *** flee upon sight of him. [Mr. Reed] was running oddly. When [Officer Daniels] entered the house, he located a shotgun and cocaine. [Mr. Reed] was located in a bedroom, and the shotgun had [his] DNA on it." (Vol. VIII, pp. 5)

The trial court accepted Mr. Reed's guilty plea and imposed the agreed-upon terms. (Vol. VIII, pp. 7-9) Mr. Reed did not file a notice of appeal.

Post-conviction Proceedings

Around June 16, 2015, Mr. Reed filed a post-conviction petition. (R.C115-C119) The petition alleged that: Mr. Reed had neither actual nor constructive possession of the shotgun or cocaine; his DNA was not on the "drug baggies"; and plea counsel both failed to file pre-trial motions and "tricked" him into pleading guilty. (R.C117) The circuit court summarily dismissed this initial petition on June 17, 2015. (R.C120-C121) Mr. Reed did not file a notice of appeal.

Around January 20, 2016, Mr. Reed filed a successive post-conviction petition. (R.C131-C156) The successive petition alleged that Mr. Reed was actually innocent

(R.C135-C138); plea counsel was ineffective (R.C138-C139); Mr. Reed had not knowingly pleaded guilty (R.C140-C141); and fundamental fairness should excuse forfeiture and waiver (R.C141-C142). Mr. Reed attached seven exhibits, including a signed jury trial waiver, docket sheet entries, his own affidavit, a summary of a lab report, a partially redacted police report by Officer Daniels, and an affidavit from Davie Callaway, his co-defendant. (R.C143-C154)

In the police report, Officer Daniels stated that, on September 23, 2014, he heard from an unidentified informant that three people were sitting on a porch selling drugs, and that one person was possibly armed with a shotgun. (R.C148) He drove to that area, recognized Mr. Reed, and watched as two of the three individuals (Mr. Reed and Davie Callaway) ran off the porch and into the house. (R.C148) Mr. Reed ran in a way that suggested he had "something fairly long concealed on the right side of his jeans." (R.C148)

Officer Daniels and other officers entered the house where Daniels saw Mr. Reed pretending to sleep on a bed in a bedroom in the southwest corner of the house. (R.C148) A search incident to arrest revealed that Mr. Reed had a scale in his pocket. (R.C150) Officer Daniels searched an unoccupied room in the northwest corner of the house. (R.C149) He noticed, among other things, a cellophane wrapper with .4 grams of suspect cocaine lying at the foot of a bed and a sawed-off shotgun under the bed. (R.C149) Callaway was also arrested. (R.C148) A search incident to arrest revealed that Callaway had approximately 1.5 grams of suspect cocaine. (R.C150)

Callaway, in a sworn affidavit, stated that he alone possessed the drugs. In particular, he averred, "The crack cocaine that was found in the room was my

drugs. I had a bad drug habit that I have been seeking to get treated. I did not come forth because I did not want to get myself in more trouble." (R.C146)

The circuit court granted Mr. Reed leave to file the successive petition and appointed counsel. (R.C11) The State filed a motion to dismiss. (R.C163-C168) On August 10, 2016, the circuit court held a hearing on the State's motion and denied it. (Vol. XV, pp. 1-9) The circuit court found, in pertinent part, that the Callaway affidavit was newly discovered evidence under *People v. Edwards*, 2012 IL 111711, and that, if believed, it would "absolve" Mr. Reed. (Vol. XV, p. 5-6)

On January 18, 2017, the circuit court held an evidentiary hearing. (Vol. XIX, pp. 1-16) Davie Callaway took the stand. (Vol. XIX, p. 3)

Callaway testified that he was arrested with Mr. Reed on September 23, 2014, and charged with possession of a controlled substance. (Vol. XIX, p. 3-4) He was convicted and sentenced to prison. (Vol. XIX, p. 3-4) At the time of the evidentiary hearing, he was on mandatory supervised release for that offense. (Vol. XIX, p. 4) He personally prepared the affidavit, which he also read aloud from the stand. (Vol. XIX, pp. 4-5) Among other things, he testified, "[T]he .4 grams of crack cocaine that the officers found in the room were my drugs. Demario Reed did not know anything about the crack cocaine that was found in the room." (Vol. XIX, p.5) He testified that if called as a witness at trial, he would testify to the same. (Vol. XIX, pp. 5)

Callaway also testified that he lost contact with Mr. Reed following their arrests. (Vol. XIX, p. 6) He saw Mr. Reed again when they were inmates at the Danville Correctional Center. (Vol. XIX, p. 6) He wrote the affidavit around that time. (Vol. XIX, p. 6) Mr. Reed did not ask him to do so. (Vol. XIX, p. 6) No one,

at any point, approached Callaway about Mr. Reed's case or petitions. (Vol. XIX, p. 7) Callaway felt guilty that his own drug addiction caused Mr. Reed to be charged with a crime he did not commit. (Vol. XIX, p. 6)

On January 20, 2017, the circuit court denied the successive petition in a written order. (R.C175-C177) It found the following.

> The main gist of petitioner's argument as to actual innocence is that the co-defendant came forward to him in prison and informed him the drugs in the house were his and so this is newly discovered evidence. The petitioner argues if he did not know of the drugs he would be innocent of the charge of armed violence.
>
> The court does find that a co-defendant's affidavit and testimony qualifies as new evidence based on his unavailability at a trial in view of his Fifth Amendment Right against self-incrimination. *People v. Edwards*, 2012 IL 111711. The issue then becomes does it establish a colorable claim of actual innocence.
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> * * *
>
> The court does not consider the co-defendant coming forward to the petitioner while both were in prison and stating that the drugs were the co-defendant's to be actual new evidence "that is of such a conclusive character that would probably change the result on retrial." *People v. Washington*, 171 Ill. 2d 475. The co-defendant was listed in the discovery to the petitioner and if the petitioner claims the drugs were not his it would be logical to argue the drugs were the codefendant's.
>
> The court also does not find the testimony of Mr. Callaway to be credible as Mr. Callaway did not come forward with this information until after he pled and he and the petitioner were in prison together. As such, the court does not find the petitioner has established a colorable claim of actual innocence.

(R.C175-C176)

On appeal, Mr. Reed acknowledged that the circuit court found that Davie Callaway was not credible, but contended that the court did not point to any

inconsistency, obfuscation, or lie Callaway had made. The court instead criticized his testimony as not being "actual new evidence" and his affidavit as having been made "after he pled [when] he and [Mr. Reed] were in prison together." (R.C176) Mr. Reed argued that, by doing so, the circuit court did not properly assess Callaway's credibility, but reflexively rejected Callaway's account because he had not come forward sooner. This was manifest error because, in Illinois, freestanding claims of actual innocence may be raised after guilty pleas, and given the nature of pleas, Callaway's account was exactly the type of evidence that a petitioner like Mr. Reed would have to prove their actual innocence.

Mr. Reed relied in part on a recent decision from the First District, *People v. Shaw*, 2018 IL App (1st) 152994, decided on September 28, 2018. The Fourth District issued its decision in *Reed* on March 27, 2019, and, in doing so, declined to follow *Shaw*. (Appendix, A-4–A-20)

On March 19, 2019, around a week before the Fourth District decided *Reed*, the First District withdrew its opinion in *Shaw* and gave notice that "a new opinion will be filed in due course." (Appendix, A-26) The First District had recently heard oral argument on "the out of state authority" cited in its decision—specifically, in paragraphs 34-52 of *Shaw*. (Appendix, A-27) And the First District had since granted the State's motion to cite additional authority—namely, the Fourth District's decision in *Reed*. (Appendix, A-28)

On April 17, 2019, Mr. Reed filed a petition for rehearing that, among other things, asked the Fourth District to allow the parties to fully brief this issue once the First District re-issued its decision in *Shaw*. (Appendix, A-22) On May 8, 2019, the Fourth District denied Mr. Reed's petition for rehearing and modified its decision

by omitting its analysis of *Shaw*. See *Reed*, 2019 IL App (4th) 170090, ¶¶ 16-17.

In its modified decision, the Fourth District held that Mr. Reed's "claim of actual innocence cannot be entertained" under the Post-Conviction Hearing Act because he did not also dispute the validity of his prior guilty plea. *Id.* at ¶ 2. In reaching this result, the appellate court primarily analyzed two decisions from this Court: *People v. Cannon*, 46 Ill. 2d 319 (1970) and *People v. Washington*, 171 Ill. 2d 475 (1996). *Id.* at ¶¶ 16-23. The appellate court "conclude[d] that the *obiter dictum* of *Cannon* is still the law" and that this Court's more recent decision in *Washington* was not applicable. See *Id.* at ¶¶ 21-24.

On June 12, 2019, Mr. Reed filed a petition for leave to appeal. On July 10, 2019, he filed a motion to cite additional authority *instanter*, citing the First District's re-issued decision in *Shaw*.

This Court granted that motion on July 16, 2019, and this Court granted leave to appeal on September 25, 2019.

INTRODUCTION

When an innocent person suffers punishment, justice demands that we act. *People v. Washington*, 171 Ill. 2d 475, 493 (1996) (McMorrow, J., specially concurring).

In Illinois, we open the courthouse doors to those seeking to demonstrate their innocence. *Washington*, 171 Ill. 2d at 485-90; 725 ILCS 5/122-1; 725 ILCS 5/116-3. We do not tie the hands of prosecutors seeking justice in the wake of a final conviction. See 98th Ill. Gen. Assem., Senate Proceedings, Apr. 9, 2014, at 214 (recording the statement of then-Senator Kwame Raoul); 725 ILCS 5/116-3 (West 2014). And we call on our judges to reach a "just result," rather than "senselessly forfeit the liberty of those whose innocence can be convincingly demonstrated." *Hux v. Raben*, 38 Ill. 2d 223, 225 (1967); *Washington*, 171 Ill. 2d at 493 (McMorrow, J., specially concurring).

Today, Demario D. Reed asks this Court to re-affirm these principles. Finality matters, but so does innocence. Indeed, in *Washington*, this Court already recognized that innocence matters most of all. *Washington*, 171 Ill. 2d at 485-90. This Court should make clear, then, that nothing has changed. A footing remains in the Illinois Constitution for recognizing claims of actual innocence based upon newly discovered evidence, and a petitioner who previously pleaded guilty may litigate this claim under the Post-Conviction Hearing Act without also attacking the validity of her prior plea.

ARGUMENT

Petitioners who pleaded guilty must, under *Washington*, be given an opportunity to demonstrate their actual innocence with evidence that is new, material, noncumulative, and of such a conclusive character that it would probably change the result at a trial.

The Post-Conviction Hearing Act ("the Act") allows a petitioner who has compelling evidence of actual innocence to litigate whether there should be a trial at which that new evidence will be heard. 725 ILCS 5/122-1; *People v. Washington*, 171 Ill. 2d 475, 485-90 (1996). This is true even if the initial proceedings that led to the petitioner's conviction were constitutionally fair in the sense that one could not argue that the court, the prosecution, or defense counsel had erred. *Washington*, 171 Ill. 2d at 488; see 725 ILCS 5/122-1. As a matter of due process under our state constitution, petitioners have a footing to assert a claim of actual innocence based upon newly discovered evidence. *Washington*, 171 Ill. 2d at 485-90.

Demario Reed pleaded guilty and later pursued his claim of actual innocence in exactly this way, even reaching the third stage of proceedings under the Act. (Vol. XIX, pp. 1-16) He did not challenge the validity of his plea at this hearing; he instead presented newly discovered evidence of his actual innocence. (Vol. XIX, pp. 1-16) But, on appeal, the Fourth District held that his actual innocence claim was not cognizable. *People v. Reed*, 2019 IL App (4th) 170090, ¶ 2. The appellate court then created a categorical bar to guilty-plea defendants like Mr. Reed who sought, under *Washington*, to demonstrate their actual innocence without challenging the validity of their guilty plea. *Reed*, 2019 IL App (4th) 170090, ¶¶ 22-27. Review of the appellate court's decision presents questions of law, subject

to *de novo* review for that reason. *People v. Caballes*, 221 Ill. 2d 282, 289 (2006).

The appellate court's decision cannot be squared with this Court's seminal decision in *Washington*, the Act, the General Assembly's amendment of section 116-3 of the Code of Criminal Procedure, or this Court's actions since *Washington*. For the reasons that follow, this Court should vacate the appellate court's decision, make clear that guilty-plea defendants like Mr. Reed may litigate their actual innocence, and then remand the matter so that Mr. Reed's arguments on appeal may finally be heard in the first instance by the appellate court.

A. The Illinois Constitution protects against the punishment of all innocent people.

1. Washington opened the courthouse doors to those seeking to demonstrate their innocence with newly discovered evidence.

This Court in *Washington* announced the fundamental directive that "no person convicted of a crime should be deprived of life or liberty given compelling evidence of actual innocence." *People v. Washington*, 171 Ill. 2d 475, 489 (1996). Critically, this Court allowed claims of actual innocence in the wake of the United States Supreme Court's decision in *Herrera*, in which the Supreme Court "rejected substantive due process as means to recognize freestanding innocence claims because of the idea that a person convicted in a constitutionally fair trial must be viewed as guilty." *Washington*, 171 Ill. 2d at 488 (discussing *Herrera v. Collins*, 506 U.S. 390, 436 (1993)).

This Court found that the Illinois Constitution demanded a different result. *Id.* at 485-90; Ill. Const. art. I, § 2. This Court acknowledged that the defendant in *Washington* had no claim regarding any errors in the "adjudicatory process"

that led to his conviction. *Id.* at 487. But this Court emphasized that if there was a persuasive claim of actual innocence, the idea that a person must be viewed as guilty because the process that led to his conviction was error-free was "effectively reduced to * * * legal fiction." *Id.* at 489. Incarcerating the innocent is both "fundamentally unfair" and "conscience shocking" and therefore triggers the operation of substantive and procedural due process. *Id.* at 487. Put another way, this Court found that the due process concerns implicated by incarcerating the innocent overwrote the "legal fiction" that current constitutional safeguards could guarantee that the person was actually guilty. *Id.* at 488.

Nothing in this central part of the *Washington* decision indicates that these due process principles do not apply with equal force to a claim of actual innocence after a voluntary and intelligent guilty plea. Nothing in this central part of *Washington* indicates that punishing an innocent person would be conscience-shocking only three percent of the time—that is, only if a trial had occurred, but not after a guilty plea. See *Id.* at 487; *Felony Dispositions and Sentences by County*, in 2015 Annual Report of the Illinois Courts Statistical Summary 61-63 (2015), http://www.illinoiscourts.gov/SupremeCourtAnnualReport/2015/2015_Statistical_Summary.pdf (totaling the number of felony convictions in 2015, the year Demario Reed pleaded guilty, at a rounded rate of 3.3 percent following a bench or jury trial and 96.7 percent following a plea of guilty). Whether following a trial or a guilty plea, the Illinois Constitution requires "additional process be afforded * * * when newly discovered evidence indicates that a convicted person is actually innocent." *Id.* at 487.

Notably, this Court has taken actions since *Washington* demonstrating

that this state constitutional right does not turn on the nature of the proceedings that led to the conviction. In *Sanders*, this Court endorsed the appellate court's analysis and decision in *People v. Knight*, 405 Ill. App. 3d 461 (3d Dist. 2010), where the appellate court allowed a guilty-plea defendant to assert a claim of actual innocence and remanded the case for an evidentiary hearing. *People v. Sanders*, 2016 IL 118123, ¶ 39-44. And, in *McDowell v. Boyd*, No. 94097 (2002), this Court issued a supervisory order directing the circuit court to conduct an evidentiary hearing on the petitioner's claim of actual innocence, which he raised after pleading guilty. *People v. McDowell*, 2017 IL App (1st) 143647-U, ¶ 9. See, *e.g.*, *In re Estate of LaPlume*, 2014 IL App (2d) 130945, ¶ 24 (explaining its citation to non-precedential decision as an example of a court's reasoning and as a reasonability check). These cases, which are discussed more fully in sub-argument B, demonstrate that this Court does not view this state constitutional right as turning on the nature of the underlying proceedings.

Finally, consistent with this Court's actions since *Washington*, the appellate court in *Shaw* recently recognized that petitioners who previously pleaded guilty need not challenge the knowing and voluntary nature of the plea, in order to litigate their innocence. *People v. Shaw*, 2019 IL App (1st) 152994, ¶ 44. The *Shaw* court noted that Illinois was not alone among the States in recognizing such claims. *Shaw*, 2019 IL App (1st) 152994, ¶¶ 29, 40 (citing *Schmidt v. State*, 909 N.W.2d 778, 795 (Iowa 2018); *Montoya v. Ulibarri*, 163 P.3d 476, 484 (2007); *People v. Schneider*, 25 P.3d 755, 760-61 (Colo. 2001) (*en banc*); *Ex parte Tuley*, 109 S.W.3d 388, 391-93 (Tex. Crim. App. 2002)). All of these cases spring from common ground: the fundamental belief that punishing an innocent person violates due process.

And, in Illinois, this due process right arises from our state constitution.

2. The General Assembly has likewise recognized the right of all petitioners —even those who previously pleaded guilty— to litigate their innocence with newly discovered evidence.

The Illinois post-conviction statutes likewise indicate that Illinois law permits petitioners who previously pleaded guilty to pursue claims of actual innocence. 725 ILCS 5/122-1(a); 725 ILCS 5/116-3(c). Other jurisdictions that have grappled with this issue have looked to statutory law to determine whether guilty-plea defendants may bring claims under those states' post-conviction statutes. See, *e.g.*, *People v. Schneider*, 25 P.3d 755, 760 (Colo. 2001) (noting that Colorado's rules of criminal procedure grant access to post-conviction proceedings to "every person" not just "individuals convicted after a trial"). In Illinois, the General Assembly has recognized the right of all petitioners—even those who previously pleaded guilty—to demonstrate their innocence with newly discovered evidence.

Consistent with *Washington*, a guilty-plea defendant who receives compelling evidence of their innocence may initiate post-conviction proceedings. 725 ILCS 5/122-1(a). The Act broadly allows a petitioner to file as long as they assert that "*in the proceedings* which resulted in his or her conviction there was a substantial denial of his or her rights under the Constitution of the United States or of the State of Illinois or both[.]" (Emphasis added.) 725 ILCS 5/122-1(a)(1). The Act does not limit post-conviction relief to those persons who have been imprisoned *after a trial*. 725 ILCS 5/122-1(a). The Act's language is broadly worded and highly inclusive, requiring only that a defendant be incarcerated before seeking to demonstrate their innocence. 725 ILCS 5/122-1.

Illinois statutory law likewise allows for "fingerprint, Integrated Ballistic Identification System, or forensic DNA testing" for defendants whose claims of actual innocence arise after a guilty plea. 725 ILCS 5/116-3(a) (West 2014). Indeed, the General Assembly amended section 116-3 to allow motions for "testing not available at trial *or guilty plea* regarding actual innocence." (Emphasis added.) 725 ILCS 5/116-3(a) (West 2014). That the General Assembly provides relief for trial and guilty-plea defendants alike gives further indication that Illinois contemplates additional processes for defendants who assert a claim of innocence. See *People v. Buffer*, 2019 IL 122327, ¶ 40 (recognizing that "legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts").

Notably, the amendment to the forensic testing statute was not a bolt from the blue. 98th Ill. Gen. Assem., Senate Proceedings, Apr. 9, 2014, at 214. As then-Senator Kwame Raoul stated, this legislation arose from negotiations between the Innocence Project, the State's Attorney's Association, and the Cook County State's Attorney's Office. 98th Ill. Gen. Assem., Senate Proceedings, Apr. 9, 2014, at 214. This Court had held that a prior version of section 116-3 precluded defendants who pleaded guilty from filing a motion for DNA testing. *People v. O'Connell*, 227 Ill. 2d 31, 37 (2007). In doing so, this Court noted that the "plain language" of this prior version precluded it from considering whether the purpose of that statute—to exonerate innocent defendants—was "best served by allowing defendants who plead guilty to seek DNA testing." *O'Connell*, 227 Ill. 2d at 38. Of course, the General Assembly was not permanently bound by *O'Connell*. Instead, the General Assembly amended section 116-3 to ensure innocent people who pleaded

guilty had an "added tool" to seek justice. See 98th Gen. Assem., House Proceedings, May 20, 2014, at 28-29 (statement of Representative Turner).

Thus, the Post-Conviction Hearing Act, section 116-3, and the legislative history of section 116-3, confirm that, whether following a trial or a guilty plea, Illinois provides a footing to demonstrate innocence through newly discovered evidence. 725 ILCS 5/122-1; 725 ILCS 5/116-3; *Washington*, 171 Ill. 2d at 489.

3. The punishment of any innocent person violates due process, and both research and experience teach us that innocent people plead guilty to offenses they did not commit.

Both this Court and the General Assembly agree on a core constitutional principle: The punishment of an innocent person violates due process. Now, this Court should also expressly recognize that some defendants plead guilty for reasons that are not related to guilt or innocence.

To see why, consider first a report by the University of Michigan, which demonstrated that, in 2016, 74 of 166 (44%) exonerees were individuals who had pleaded guilty. See National Registry of Exonerations, A Project of the University of California Irvine Newkirk Center for Science & Society, University of Michigan Law School & Michigan State University College of Law, available at: https://www.law.umich.edu/special/ exoneration/Pages/Exonerations-in-2016.aspx (visited at February 10, 2020). That almost half of recent exonerations follow guilty pleas provides further evidence that treating guilty pleas as constitutionally unassailable cannot withstand the demands of Illinois' procedural and substantive due process. *Washington*, 171 Ill. 2d at 489. See also 98th Gen. Assem., House Proceedings, May 20, 2014, at 28-29 (statement of Representative Turner noting

in 2014 that, "[n]ationwide, there have been 316 post-conviction exonerations by DNA evidence, and 30 of those exonerees had previously pled guilty").

Courts, including Illinois', have long accepted that a guilty plea may be a reasonable choice for an innocent defendant in the American justice system. Lesser charges and reduced sentences may be more valuable than a doomed assertion of innocence because an evaluation of the evidence may lead the accused to believe that she "had absolutely nothing to gain by a trial and much to gain by pleading." *North Carolina v. Alford*, 400 U.S. 25, 37 (1970); *Brady v. U.S.*, 397 U.S. 742, 752 (1970) (noting advantages of pleading guilty for defendant who sees slight possibility of acquittal as reducing defendant's exposure, beginning correctional processes immediately, and eliminating practical burdens of a trial); *People v. Jones*, 144 Ill. 2d 242, 269-70 (1970) (recognizing defendant's hope for lesser sentence influential in defendant's decision to plead guilty); *People v. Brown*, 41 Ill. 2d 503, 505-506 (1969) (finding defendant pleaded due to his fear of a severe sentence).

The First District's decision in *Shaw* recognizes this reality. *Shaw* analyzed a decision from the Iowa Supreme Court, which similarly concluded that "innocent defendants may choose to plead guilty for a variety of reasons" because, "when the deal is good enough, it is rational to refuse to roll the dice, regardless of whether one believes the evidence establishes guilt beyond a reasonable doubt, and regardless of whether one is factually innocent." *Shaw*, 2019 IL App (1st) 152994, ¶ 42 (citing *Schmidt v. State*, 909 N.W.2d 778, 787 (Iowa 2018)) (internal quotation and citation omitted)); see also, *People v. Gray*, 2016 IL App (2d) 140002, ¶¶ 27-28 (holding that, prior to a plea, the prosecution has no duty to disclose to the defense impeachment or exculpatory evidence).

The Iowa Supreme Court recognized that "'criminal cases in general, and guilty pleas in particular, are characterized by considerable uncertainty[.]'" *Schmidt*, 909 N.W.2d at 786 (quoting *State v. Carroll*, 767 N.W.2d 638, 642 (Iowa 2009)). Some of this uncertainty relates to issues bearing on guilt or innocence. *Schmidt*, 909 N.W.2d at 786-87. For example, "[p]eople have been known to confess to crimes they did not commit during police interrogations and such confessions bleed into their decisions to plead guilty." *Id.* at 787. But, not always. "The reality of plea bargaining is that '[defendants] who do take their case to trial and lose receive longer sentences than even [the legislature] or the prosecutor might think appropriate, because the longer sentences exist on the books largely for bargaining purposes.'" *Id.* at 787 (quoting Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 Stan. L. Rev. 989, 1034 (2006)). Under such circumstances, a guilty plea does not *necessarily* "weed out the innocent." *Id.* at 788. And experience confirms that. See 98th Gen. Assem., House Proceedings, May 20, 2014, at 28-29 (statement of Representative Turner).

This Court and the General Assembly have long recognized that the punishment of an innocent person violates due process. This Court should likewise recognize that some defendants plead guilty for reasons that are not related to guilt or innocence, and that even a voluntary guilty-plea proceeding may in some cases result in the punishment of an innocent person.

B. This Court should overrule *Reed*, which created a categorical bar to petitioners who seek under *Washington* to demonstrate their actual innocence but who do not also challenge the validity of their guilty pleas.

The Fourth District held that an innocent person may not even allege their

innocence if they do not also challenge the validity of their plea. *People v. Reed*, 2019 IL App (4th) 170090, ¶ 19. The appellate court declined to apply *People v. Washington*, 171 Ill. 2d 475 (1996). Instead, the court relied on *dicta* from *Cannon*, where decades earlier this Court remarked that a valid guilty plea forecloses such claims. *Reed*, 2019 IL App (4th) 170090, ¶ 19 (citing *People v. Cannon*, 46 Ill. 2d 319, 321 (1970)). An off-the-cuff remark this Court made nearly half a century ago does not control this issue.

1. This Court's dicta in Cannon does not support the Fourth District's holding in Reed.

Cannon concerned a single issue raised on appeal from the denial of a multi-issue post-conviction petition—namely, "the legality of the election of the board of supervisors of De Witt County under the one-man, one-vote principle." *People v. Cannon*, 46 Ill. 2d 319, 321 (1970). This Court held that this issue lacked merit. *Id*. This Court then went on to examine "the [other] claims advanced by the defendant in his post-conviction petition which were not argued" on appeal. *Id.* In full, this Court stated:

> We have examined the claims advanced by the defendant in his post-conviction petition which were not argued in this court. They amount basically to an unsupported assertion that the accusation against him was false and that his daughter and two of his sons were coerced by threats from their mother, the defendant's wife, to refrain from asserting the defendant's innocence. Before his plea of guilty was accepted, the defendant, represented by appointed counsel, was fully and carefully admonished by the trial judge, and in the light of that admonition, the defendant's present claim cannot be entertained.

Id. This Court did not mention whether the petitioner's claims had been brought under the federal constitution or our state constitution. Compare *Id.* at 320-21

(noting that the only claim raised on appeal was brought under both constitutions). This Court did not mention under what constitutional provision its analysis proceeded. We know only that, given the date of the decision, this Court would have decided any state constitutional claim under the Constitution of 1870, which was then in effect, and not under our current state constitution. See *Id.* at 319; *People ex rel. Hanrahan v. Caliendo*, 50 Ill. 2d 72, 76 (1971).

Against this backdrop, the First District opined in *Shaw* that *Cannon* was "too imprecise to create such a significant new rule." *Shaw*, 2019 IL App (1st) 152994, ¶ 52. Compare *People v. Barnslater*, 373 Ill. App. 3d 512, 527-29 (1st Dist. 2007) (citing *dicta* in *Cannon* as indicative of the "approach" that this Court would take if called on to decide whether a guilty-plea defendant may raise a claim of actual innocence under the Act if they do not also challenge the validity of their plea). But, below, the Fourth District concluded it was bound by this *dicta*. *Reed*, 2019 IL App (4th) 170090, ¶¶ 20.

This Court should agree with the *Shaw* court: *Cannon* does not support the Fourth District's decision to fashion *Cannon*'s *dicta* into a holding about article I, section 2 of our current state constitution. See *Shaw*, 2019 IL App (1st) 152994, ¶ 35; Ill. Const. art. I, § 2. The *Shaw* court also noted that, in declining to reach the merits of these other claims in *Cannon*, this Court pointed to the "unsupported" nature of the allegations, not just the mere existence of a prior guilty plea. *Shaw*, 2019 IL App (1st) 152994, ¶ 52. For this reason, too, *Cannon* does not express this Court's explicit intention to categorically bar actual innocence claims following guilty pleas even when presented with newly discovered evidence of the petitioner's innocence.

2. The Fourth District's narrow interpretation of Washington elevates form over substance.

The Fourth District in *Reed* unduly limited *Washington*'s holding based on an out-of-context passage. *Reed*, 2019 IL App (4th) 170090, ¶ 24. The appellate court acknowledged "'as a matter of Illinois constitutional jurisprudence that a claim of newly discovered evidence showing a defendant to be actually innocent of the crime for which he was convicted is cognizable as a matter of due process.'" *Id.* at ¶ 22 (quoting *Washington*, 171 Ill. 2d at 489). But the court concluded that, unlike a petitioner found guilty after a trial, a petitioner who previously pleaded guilty was "inherently incapable" of ever litigating their innocence. *Id.* at ¶ 24.

In *Washington*, this Court concluded its opinion by sketching the "procedural[]" and "substantive[]" litigation steps facing a petitioner who now had "a footing in the Illinois Constitution" to raise a claim of actual innocence after his conviction at a trial. *Washington*, 171 Ill. 2d at 476-77, 489. "Procedurally, such claims [were to] be resolved as any other under the Act"—that is, petitioners should raise these claims in post-conviction petitions. *Id.* Below, the Fourth District did not directly dispute this point. *Reed*, 2019 IL App (4th) 170090, ¶ 24.

The Fourth District instead focused on a single phrase in this Court's substantive guidance. This Court concluded in *Washington* that, "[s]ubstantively," a petitioner must support their claim with evidence that is "new, material, noncumulative and, most importantly, " 'of such conclusive character' " as would " 'probably change the result on retrial.' " *Washington*, 171 Ill. 2d at 489 (quoting *People v. Molstad*, 101 Ill.2d 128, 134 (1984)); see also *People v. Coleman*, 2013 IL 113307, ¶¶ 43, 96 (re-affirming this guidance where the petitioner had also

been convicted after a trial). According to the Fourth District, this reference to "retrial" was intended to limit *Washington*'s application to convictions following trials. *Reed*, 2019 IL App (4th) 170090, ¶ 24 (quoting *Coleman*, 2013 IL 113307, ¶ 91). That is, the court converted this passage in *Washington* (and *Coleman*) into a limit on the constitutional right itself, narrowing the class of innocent people who are allowed to bring these claims.

But this Court was not discussing *which* innocent people should be free from unconstitutional punishment; it was discussing *how* an innocent person should demonstrate a violation of this right after an error-free trial. Notably, not even the Fourth District's chosen citation to *Coleman* supports its radical reading. This Court in *Coleman* said, "Where a defendant makes a claim of trial error, as well as a claim of actual innocence, in a successive postconviction petition, the former claim must meet the cause-and-prejudice standard, and the latter claim *must meet the Washington standard*." *Coleman*, 2013 IL 113307, ¶ 91 (emphasis added). Below, the appellate court quoted the italicized portion as supporting a categorical bar on guilty-plea defendants raising actual innocence claims. *Reed*, 2019 IL App (4th) 170090, ¶24. A fair reading of that passage demonstrates only that this Court was discussing what must be shown by petitioners who had been convicted after a trial. *Id.* at ¶ 91. The passage is simply silent as to how a petitioner should demonstrate a violation of this right after a voluntary and knowing guilty plea.

3. Application of the Washington standard to all actual innocence claims will ensure that, even after a guilty plea, no person convicted of a crime will be deprived of life or liberty given compelling evidence of actual innocence.

The Fourth District struggled to apply the *Washington* standard. *Reed*,

2019 IL App (4th) 170090, ¶ 24. Yet, a simple extension—one that is consistent with the protection afforded under the due process clause under the Illinois Constitution—will ensure that, even after a guilty plea, no person convicted of a crime will be deprived of life or liberty given compelling evidence of actual innocence. See *Coleman*, 2013 IL 113307, ¶¶ 94-97 (re-affirming the *Washington* standard and noting that it is "extraordinarily difficult to meet").

Below, the Fourth District noted that, by pleading guilty, a petitioner would have waived the right to a trial, and thus, the petitioner could not demonstrate that any evidence would probably change the result on retrial. *Reed*, 2019 IL App (4th) 170090, ¶ 24 ("Without a trial in the first place, there could have been no retrial."). But, as *Shaw* noted, this Court in *Washington* did not distinguish between petitioners convicted after guilty pleas and those convicted after trials when it comes to due process under the Illinois Constitution. *Shaw*, 2019 IL App (1st) 152994, ¶ 45. Although this Court was not called on to address the precise issue in this case, *Washington*'s fundamental directive—that "no person convicted of a crime should be deprived of life or liberty given compelling evidence of actual innocence"—carries no less force in this context. *Washington*, 171 Ill. 2d at 489; *Shaw*, 2019 IL App (1st) 152994, ¶ 45 (holding that "such a tenet applies equally in either circumstance").

The Fourth District contended that a guilty-plea defendant could not litigate an actual innocence claim because, by pleading guilty, she "would have dispensed with [any] evidence, inculpatory or exculpatory[.]" *Id.* In the court's view, "[e]vidence, in general, would have been immaterial and superfluous." *Reed*, 2019 IL App (4th) 170090, ¶ 24. But, in courtrooms across the State, parties routinely litigate issues

that have yet to face the scrutiny of a trier of fact. See, *e.g.*, *Jones v. Pnuemo Abex LLC*, 2019 IL 123895, ¶¶ 24-26 (discussing the standards for summary judgment, directed verdicts, and judgments *n.o.v.*). And, in the context of post-conviction proceedings, a court can compare the evidence of actual innocence against the record of the guilty plea—including the factual basis for the plea which the State usually proffers under Rule 402(c) without objection from the defense—as well as any evidence the State may later introduce at a third-stage evidentiary hearing. See Ill. S. Ct. R. 402(c). See also *Talarico v. Dunlap*, 177 Ill. 2d 185, 196-200 (1997) (reviewing the record of a guilty-plea proceeding before deciding whether to apply the doctrine of collateral estoppel in a subsequent civil proceeding).

In general, the litigation of actual innocence claims requires analyzing whether the content of a petition is positively rebutted by the record and whether the allegations, taken as true, are of such conclusive character that they would probably change the result at a trial. See, *e.g.*, *People v. Sanders*, 2016 IL 118123 ¶¶ 42, 48. In this analysis, courts have compared the evidence presented at trial to the evidence and allegations in the post-conviction petition. See, *e.g.*, *Coleman*, 2013 IL 113307, ¶ 97 (noting the inquiry is whether "the new evidence places the evidence presented at trial in a different light and undercuts the court's confidence in the correctness of the guilty verdict"); *People v. Ortiz*, 235 Ill. 2d 319 (2009) (weighing the testimony of witnesses at trial against post-conviction evidence of recantations as well as testimony of other eyewitnesses which conflicted with those presented at trial); *People v. Warren*, 2016 IL App (1st) 090884-C (comparing post-conviction affidavits to testimony presented at trial). To be sure, this analysis is necessarily abridged where the parties previously stipulated to

the factual basis of a plea rather than present evidence at a trial. Still, Illinois law makes clear that for all practical purposes it is the same.

To see how, first consider *People v. Knight*, 405 Ill. App. 3d 461 (3rd Dist. 2010). There, the defendant alleged in a successive post-conviction petition that he was actually innocent and had been coerced into pleading guilty to charges of first degree murder. *Knight*, 405 Ill. App. 3d at 462-64. The circuit court dismissed the petition at the second stage of proceedings. *Id.* at 462. The Third District reversed and remanded for an evidentiary hearing, stressing that the defendant's allegations had to be taken as true unless positively rebutted by the record. *Id.* at 470.

The court acknowledged that the record was underdeveloped because of the plea. *Id.* at 471 ("At this stage of the proceedings, in part due to defendant's guilty plea, the record does not contain [evidence relevant to the petition's allegations].") Yet, it emphasized that "the guilty plea does not prohibit [defendant] from raising" his claims of actual innocence and a coerced guilty plea. *Id.* at 472. The court compared the guilty-plea proceedings to the allegations in the petition and explained that the positively-rebutted standard "refers only to the record in the proceedings from which the defendant is seeking post-conviction relief" and that the State had pointed "to nothing in the record of these proceedings to positively rebut [the affiant's] averments." *Id.* The court emphasized that the State at an evidentiary hearing would have the ability to present evidence to refute the post-conviction allegations, "as would be the purpose behind conducting such a hearing." *Id.*

This analysis makes clear that when a petitioner raises an actual innocence claim after entering a guilty plea, the court must compare the defendant's allegations

to the proceedings that led to the plea. If the defendant's allegations are unrebutted, the case must proceed to an evidentiary hearing.

This Court in *Sanders* endorsed the appellate court's analysis and decision in *Knight*. This Court recounted with approval that the court in *Knight* had

> noted that the standard at the second stage of postconviction proceedings is that all well-pleaded allegations of the petition and accompanying affidavits are taken as true unless positively rebutted by the record of the proceedings. The court further declared that the standard refers only to the record of the proceedings from which the petitioner seeks postconviction relief and not any other related proceedings. Since there was nothing in the record of petitioner's proceedings to positively rebut [the] affidavit or the allegations of the petition, the appellate court found that the petitioner was entitled to an evidentiary hearing.

People v. Sanders, 2016 IL 118123, ¶ 40. Although the allegations of actual innocence in *Sanders* followed a jury trial, this Court in discussing *Knight* never indicated that a different standard or procedure applied to guilty pleas.[1]

The First District's decision in *People v. Whirl*, 2015 IL App (1st) 111483, is in accordance with *Knight* and is similarly instructive. In *Whirl*, the defendant raised a claim of actual innocence from a guilty plea in post-conviction proceedings. *Whirl*, 2015 IL App (1st) 111483, ¶ 50. The defendant claimed that he had been tortured into giving a confession that led to his guilty plea to first degree murder. *Id.* at ¶¶ 35-43. The case advanced to an evidentiary hearing, after which the trial court dismissed the petition. On appeal, the court reversed the circuit court's determination, vacated the defendant's plea, and remanded for new proceedings.

[1] As is noted in sub-argument A, *Sanders*' analysis is consistent with this Court's action in *McDowell v. Boyd*, No. 94097 (2002). *People v. McDowell*, 2017 IL App (1st) 143647-U, ¶ 9.

The court explained that it reached its conclusion by weighing "the new evidence presented at the post-conviction hearing [...] against the State's *original evidence*," which in *Whirl* consisted of evidence of the pretrial proceedings, including a motion to suppress. *Id.* at ¶ 110 (emphasis added). As in *Knight*, the court in *Whirl* conducted its analysis solely within the confines of the post-conviction record and the proceedings leading to the guilty plea.

The *Washington* standard can be expanded and applied in a way that allows parties across the State to litigate actual innocence claims raised by guilty-plea defendants, consistent with the Illinois Constitution. In doing so, this Court ensures that, even after a guilty plea, no person convicted of a crime will be deprived of life or liberty given compelling evidence of actual innocence. See *Coleman*, 2013 IL 113307, ¶¶ 94-97.

4. In Illinois, we call on our judges to reach a just result, rather than senselessly forfeit the liberty of those whose innocence can be convincingly demonstrated.

The Fourth District suggested that allowing guilty-plea defendants to "complain" about actual innocence "would be paradoxical if not duplicitous." *Reed*, 2019 IL App (4th) 170090, ¶ 26. The appellate court concluded that the "guilty-plea waiver rule" precludes a petitioner from litigating their actual innocence unless this Court "makes an exception to the well-established doctrines of waiver and estoppel." *Id.* at ¶¶ 25-27. Yet, nowhere in the court's analysis was a discussion about what effect, if any, waiver has on the courts, as opposed to the parties. See *Id.* Under this Court's long-standing and well-settled rules, the answer is simple: none. And, because imprisoning an innocent person is conscience-shocking, courts *should* excuse waiver, *should* allow litigation to proceed under the Act, and by

doing so *should* reach a just result.

The Fourth District overlooked a basic tenet of our criminal-justice system. "The purpose of our criminal laws is to prosecute, imprison, and punish those who are guilty of having committed a criminal offense, not to senselessly forfeit the liberty of those whose innocence can be convincingly demonstrated." *Washington*, 171 Ill. 2d at 493 (McMorrow, J., specially concurring). In Illinois, a court may not insist that the petitioner has made their bed and now must lie in it. Our courts safeguard higher values: "We believe that no person convicted of a crime should be deprived of life or liberty given compelling evidence of actual innocence." *Id.* at 489.

This Court has long called on our courts to overlook waiver when necessary to reach a just result. *People v. McCarty*, 223 Ill. 2d 109, 162 (2006) (Freeman, J., concurring in part, dissenting in part) (tracing the principle that waiver is a limitation on the parties and not the court to this Court's decision in *Hux v. Raben*). See *Hux v. Raben*, 38 Ill. 2d 223, 225 (1967) (noting that "the responsibility of a reviewing court for a just result and for the maintenance of a sound and uniform body of precedent may sometimes override the considerations of waiver that stem from the adversary character of our system"). Indeed, under Supreme Court Rule 615(a), reviewing courts are empowered to take notice of issues "fundamental to the integrity of the judicial process." *People v. Keene*, 169 Ill. 2d 1, 17 (1995); Ill. S. Ct. R. 615(a).

The imprisonment and punishment of an innocent person calls into question the fundamental integrity of our judicial process. In *Washington*, this Court made precisely that point:

> [A] truly persuasive demonstration of innocence would, in hindsight, undermine the legal construct precluding a substantive due process analysis. The stronger the claim—the more likely it is that a convicted person is actually innocent—the weaker is the legal construct dictating that the person be viewed as guilty. A truly persuasive demonstration of innocence would effectively reduce the idea to legal fiction.

Washington, 171 Ill. 2d at 488 (internal quotation omitted). Today, nearly a quarter century since this Court decided *Washington*, "nothing has changed." See *Coleman*, 2013 IL 113307, ¶ 93. So this Court should again affirm that its commitment to *Washington*'s holding is "unwavering." *Id.* Punishing an innocent person remains conscience-shocking.

Our courts *should* excuse waiver and *should* allow litigation to proceed under the Act. Only by training our eyes on injustice, by keeping open our courthouse doors, and by handing petitioners the tools they need demonstrate their actual innocence will we honor *Washington*'s promise that no person convicted of a crime will be deprived of life or liberty given compelling evidence of actual innocence. A just result requires nothing less.

CONCLUSION

Today, Demario D. Reed asks this Court to make clear that nothing has changed since it decided *Washington*. A footing remains in the Illinois Constitution for recognizing claims of actual innocence based upon newly discovered evidence, and a petitioner who previously pleaded guilty may litigate this claim under the Post-Conviction Hearing Act without also attacking the validity of their prior plea.

Mr. Reed pleaded guilty and later pursued his claim of actual innocence in exactly that way, even reaching the third stage of proceedings under the Act. But, on appeal, the Fourth District declined to address his contentions and instead held that his actual innocence claim was not cognizable. For the reasons argued more fully above, this Court should overrule the appellate court's decision, make clear that guilty-plea defendants like Mr. Reed may litigate their actual innocence under the Act, and then remand the matter to the appellate court so that Mr. Reed's arguments on appeal may finally be heard.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342, is 32 pages.

/s/Alexander G. Muntges
ALEXANDER G. MUNTGES
Assistant Appellate Defender

APPENDIX TO THE BRIEF

Demario D. Reed No. 124940

E-FILED
2/28/2020 1:07 PM
Carolyn Taft Grosboll
SUPREME COURT CLERK

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IN THE CIRCUIT COURT FOR THE SIXTH JUDICIAL CIRCUIT
MACON COUNTY, ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS)
)
vs.) No. 14-CF-1205
)
DEMARIO REED)

NOTICE OF APPEAL

Joining Prior Appeal / Separate Appeal / Cross Appeal (circle one)

An appeal is taken from the order or judgment described below.

(1) Court to which appeal is taken: **Illinois Appellate Court, Fourth District**

(2) Name of appellant and address to which notices shall be sent.

Name: REED, DEMARIO D. - IDOC# S14896

Address: **3820 East Main Street, Danville, IL 61834**

(3) Name and address of appellant's attorney on appeal. **N/A**

If appellant is indigent and has no attorney, does he want one appointed? **YES**

(4) Date of judgment or order: **January 20, 2017**

(5) Offense of which convicted: **Armed Violence**

(6) Sentence: **15 years D.O.C.**

(7) If appeal is not from a conviction, nature of order appealed from: **Denial of a Post-Conviction petition after a third stage evidentiary hearing.**

(8) If the appeal is from a judgment of a circuit court holding unconstitutional a statute of the United States or of this state, a copy of the court's findings made in compliance with Rule 18 shall be appended to the notice of appeal. **N/A**

(Signed) Lois A Durbin pro

(May be signed by appellant, attorney for appellant, or clerk of circuit court.)

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FILED
March 27, 2019
Carla Bender
4th District Appellate
Court, IL

2019 IL App (4th) 170090

NO. 4-17-0090

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. DEMARIO D. REED, Defendant-Appellant.	) Appeal from the) Circuit Court of) Macon County) No. 14CF1205)) Honorable) Jeffrey S. Geisler,) Judge Presiding.

JUSTICE CAVANAGH delivered the judgment of the court, with opinion.
Justices DeArmond and Turner concurred in the judgment and opinion.

OPINION

¶ 1 After an evidentiary hearing, the Macon County circuit court denied postconviction relief to defendant, Demario D. Reed, who is serving a prison sentence of 15 years for armed violence (720 ILCS 5/33A-2(a), 33A-3(a) (West 2014)). He appeals, arguing that newly discovered evidence he presented to the court in the postconviction hearing proved, clearly and convincingly, that he actually was innocent of armed violence despite his earlier negotiated guilty plea to that offense.

¶ 2 Because the validity of defendant's guilty plea is undisputed on appeal, we hold, *de novo*, that he remains bound by his guilty plea and that his claim of actual innocence cannot be entertained. See *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006); *People v. Cannon*, 46 Ill. 2d 319, 321 (1970). Therefore, we affirm the judgment.

¶ 3 I. BACKGROUND

¶ 4 In count I of the information, the State alleged that on September 23, 2014, defendant committed armed violence in that while armed with a shotgun, he knowingly possessed cocaine (an amount less than 15 grams).

¶ 5 In April 2015, defendant appeared with appointed defense counsel, who announced:

> "MR. WHEELER: Judge, the defendant is going to offer to enter a plea of guilty to Count I of [Macon County case No. 14-CF-]120[5], be sentenced to the Illinois Department of Corrections for a period of 15 years. *** The remaining charges [(in Macon County case Nos. 14-CF-903 and 14-CF-1206)] will be dismissed.
>
> THE COURT: [Defendant], you heard what your attorney said. Is that your understanding of the plea agreement?
>
> THE DEFENDANT: Yes."

¶ 6 The circuit court then recited count I to defendant and told him the minimum and maximum punishments for armed violence. The court further admonished him:

> "THE COURT: If you plead guilty, *you would be giving up your right to a trial of any kind by a judge or a jury*. You would be giving up the right to confront and cross-examine witnesses who would testify against you in court during your trial. By pleading guilty, you would be giving up the privilege against self-incrimination and the presumption of innocence. *You would be giving up the right* to subpoena witnesses to come into court to testify for you and *to present any defenses you might have to this charge*, and by pleading guilty, *you would be giving up the right to require the* [*S*]*tate to prove you committed this offense*

beyond a reasonable doubt. Do you understand the rights you are giving up by pleading guilty?

THE DEFENDANT: Yes.

THE COURT: Do you have any questions about your rights this morning?

THE DEFENDANT: No.

THE COURT: Are you telling me you wish to give up your rights and plead guilty?

THE DEFENDANT: Yes." (Emphases added.)

At the court's request, defendant signed a jury waiver.

¶ 7 Next, the circuit court requested a factual basis. The prosecutor responded:

"MS. DOMASH: The [S]tate would present the testimony of Officer Daniels of the Decatur Police Department. Officer Daniels would testify that he observed this defendant on September 23rd of 2014 on a porch in Decatur, Illinois. He observed the defendant flee upon sight of him. The defendant was running oddly. When he entered the house, he located a shotgun and cocaine. The defendant was located in a bedroom, and the shotgun had the defendant's DNA [(deoxyribonucleic acid)] on it."

¶ 8 After the prosecutor's recitation of the factual basis, defendant confirmed to the circuit court that no one had forced him, in any way, to plead guilty and that the plea agreement was the only promise ever made to him in return for his proposed guilty plea. He also denied having any questions about his "rights, the possible sentences, or anything else." The circuit court then asked defendant a final time:

"THE COURT: Are you telling me you wish to continue to plead guilty this morning?

THE DEFENDANT: Yes."

¶ 9 Finding a factual basis for the guilty plea to count I and further finding the guilty plea to be knowing and voluntary, the circuit court accepted the guilty plea and sentenced defendant to imprisonment for the agreed-upon term of 15 years. (The parties had agreed to proceed immediately to sentencing, to waive a presentence investigation report, and to have the pretrial bond report stand as a prior history of criminality.)

¶ 10 In January 2016, with the circuit court's permission (see 725 ILCS 5/122-1(f) (West 2016)), defendant filed a successive postconviction petition, in which he claimed to be innocent of count I, armed violence, the offense to which he had entered a negotiated guilty plea. He submitted, as proof of his innocence, an affidavit by his codefendant, Davie Callaway. In the affidavit, which was dated October 15, 2015, Callaway averred that he alone was the one who had possessed the cocaine referenced in count I and that defendant had been unaware of the existence of the cocaine.

¶ 11 The State moved to dismiss the postconviction petition. One of the reasons the State gave for its motion was waiver. The State argued that by knowingly and voluntarily pleading guilty to armed violence, defendant had waived all nonjurisdictional errors, including errors of a constitutional nature.

¶ 12 The circuit court denied the State's motion for dismissal, and the petition advanced to the third stage of the postconviction proceeding, in which the parties adduced evidence for the court to weigh as the trier of fact. See *People v. Harris*, 2013 IL App (1st) 111351, ¶¶ 46-47 (describing the three stages of a postconviction proceeding).

¶ 13 On January 20, 2017, after hearing the evidence, including Callaway's testimony, the circuit court denied defendant's successive petition for postconviction relief. Although the court held that Callaway's affidavit and testimony "qualified as new evidence based on his unavailability at trial in view of his Fifth Amendment Right against self-incrimination" (see U.S. Const., amend. V; *People v. Edwards*, 2012 IL 111711, ¶ 38), the court simply did not believe Callaway. The court wrote in its judgment:

> "The court *** does not find that testimony of Mr. Callaway to be credible as Mr. Callaway did not come forward with this information until after he pled and he and the petitioner were in prison together. As such, the court does not find the petitioner has established a colorable claim of actual innocence."

¶ 14 This appeal followed.

¶ 15 II. ANALYSIS

¶ 16 On appeal, defendant does not challenge the validity of his negotiated guilty plea to armed violence; he does not claim that his guilty plea was uninformed or involuntary. Rather, he claims that his guilty plea was false. He claims he really was innocent of armed violence when he solemnly declared to the circuit court that he was guilty of that offense. He cites *People v. Shaw*, 2018 IL App (1st) 152994, ¶ 41, in which the First District held that "a freestanding actual innocence claim may be brought [in a postconviction proceeding] after a guilty plea, and that a defendant need not challenge the knowing and voluntary nature of his or her plea to bring such a claim."

¶ 17 But another division of the First District reached the opposite conclusion in *People v. Barnslater*, 373 Ill. App. 3d 512, 527 (2007). In that case, the appellate court held: "If a defendant claims that his guilty plea was coerced, then that coercion provides the necessary

constitutional deprivation for which postconviction relief would be appropriate, but not where he claims actual innocence in the face of a prior, constitutionally valid confession of guilt." *Id.* In support of that holding, *Barnslater* quoted from *Cannon*, a decision by the supreme court: " 'Before his plea of guilty was accepted, the defendant, represented by appointed counsel, was fully and carefully admonished by the trial judge, and in the light of that admonition, the defendant's present [postconviction] claim [of actual innocence] cannot be entertained.' " (Emphasis omitted.) *Id.* at 528 (quoting *Cannon*, 46 Ill. 2d at 321).

¶ 18 The quoted sentence is, in *Cannon*, an *obiter dictum*, an inessential remark on a point not argued by counsel (*Lebron v. Gottlieb Memorial Hospital*, 237 Ill. 2d 217, 236 (2010)). In his appeal to the supreme court, the only argument the defendant in *Cannon* made against the denial of his postconviction petition was that the board of supervisors of De Witt County had been elected illegally, in violation of the one-man, one-vote principle, and that, consequently, "all of the proceedings in connection with the defendant's prosecution, including the selection of grand jurors, were illegal and in violation of his rights under the constitution of the United States and of this State." *Cannon*, 46 Ill. 2d at 320.

¶ 19 After rejecting that sole argument by the defendant, the supreme court in *Cannon* added:

> "We have examined the claims advanced by the defendant in his post-conviction petition *which were not argued in this court*. They amount basically to an unsupported assertion that the accusation against him was false and that his daughter and two of his sons were coerced by threats from their mother, the defendant's wife, to refrain from asserting the defendant's innocence [to the charge of indecent liberties with a child]. Before his plea of guilty was accepted,

> the defendant, represented by appointed counsel, was fully and carefully admonished by the trial judge, and in the light of that admonition, the defendant's present claim cannot be entertained." (Emphasis added.) *Id.* at 321.

Although the quoted paragraph from *Cannon* describes the defendant's claim of actual innocence as being "unsupported," the paragraph is not, in the end, an evaluation of that claim on its evidentiary merits. Rather, the paragraph concludes that because the defendant (1) was represented by counsel in the guilty-plea hearing and (2) was fully and carefully admonished by the trial judge, his postconviction claim of actual innocence "cannot be entertained." *Id.* "[*I*]*n the light of that admonition*, the defendant's present claim [of actual innocence] cannot be entertained," as the supreme court put it. (Emphasis added.) *Id.* To "entertain" a claim means to "give attention or consideration to" the claim. New Oxford American Dictionary 567 (2001). Thus, in the final sentence of the paragraph quoted above, the supreme court declines to give attention or consideration to the defendant's claim of actual innocence not because the claim is unsupported (as the supreme court remarks earlier in the quoted paragraph) but because, while being represented by counsel and after being fully admonished, the defendant pleaded guilty to the charge of which he now, in the postconviction proceeding, claims to be actually innocent. That is what the supreme court says in *Cannon*—and when the supreme court speaks, our duty is to obey.

¶ 20 There is, however, a slight complication. Because the quoted paragraph of *Cannon* could be "sloughed off without damaging the analytical structure of the opinion" and because it is an aside on a point not argued by counsel, it is, as we said, an *obiter dictum*. (Internal quotation marks omitted.) *Exelon Corp. v. Department of Revenue*, 234 Ill. 2d 266, 277-78 (2009). "*Obiter dictum* refers to a remark or expression of opinion that a court uttered as

an aside, and is *generally* not binding authority or precedent within the *stare decisis* rule." (Emphasis added.) *Id.* at 277. The supreme court uses the qualifier "generally" because "[e]ven *obiter dict*[*a*] of a court of last resort can be tantamount to a decision and therefore binding in the absence of a contrary decision of that court." (Internal quotation marks omitted.) *Id.* at 282; see also *People v. Williams*, 204 Ill. 2d 191, 207 (2003) ("But whether we characterize that portion of [our previous decision] as judicial or *obiter dicta*, it still should have guided the appellate court in this case."); *Country Club Estates Condominium Ass'n v. Bayview Loan Servicing LLC*, 2017 IL App (1st) 162459, ¶ 20 n.2 ("[The supreme] court's discussion of prompt payment would likely be classified as [an] *obiter dictum*; nevertheless *** we are bound by it.").

¶ 21 The question, then, is whether there is a "contrary decision" of the supreme court—a decision holding that a postconviction claim of actual innocence *can* be entertained after a valid plea of guilty. *Exelon*, 234 Ill. 2d at 282. We are aware of no such decision by the supreme court. Thus, the *obiter dictum* of *Cannon* is the law. See *id.*

¶ 22 We acknowledge that in *People v. Washington*, 171 Ill. 2d 475, 489 (1996), the supreme court stated:

> "We believe that no person convicted of a crime should be deprived of life or liberty given compelling evidence of actual innocence. *** We therefore hold as a matter of Illinois constitutional jurisprudence that a claim of newly discovered evidence showing a defendant to be actually innocent of the crime for which he was convicted is cognizable as a matter of due process."

"It is fundamental, however, that the precedential scope of a decision is limited to the facts before the court." *People v. Palmer*, 104 Ill. 2d 340, 345-46 (1984). "The words of a judicial opinion do not have a vitality independent of the facts to which the opinion is addressed ***."

People v. Arndt, 49 Ill. 2d 530, 533 (1971). The facts in *Washington* were that the defendant was convicted of murder *after a trial*. *Washington*, 171 Ill. 2d at 476. Later, in a postconviction petition, he raised a claim of actual innocence. *Id.* at 478. He supported his claim with an affidavit by Jacqueline Martin, whose *in camera* testimony tended to prove that someone other than the defendant was the murderer. *Id.* at 477-78. For six years, Martin had refrained from coming forward and had hid in Mississippi out of fear of the man she now implicated. *Id.* at 478. The trial court granted the defendant a new trial "on the ground that Martin's testimony was new evidence which, if believed, would have 'had some significant impact' upon the jury." *Id.* The State appealed. *Id.* The appellate court "affirmed the grant of relief as to the newly discovered evidence claim." *Id.* at 479. The supreme court in turn affirmed the appellate court's judgment (*id.* at 490), holding, "as a matter of Illinois constitutional jurisprudence[,] that a claim of newly discovered evidence showing a defendant to be actually innocent of the crime for which he was convicted [was] cognizable [in a postconviction proceeding] as a matter of due process." *Id.* at 489.

¶ 23 But then, at the end of *Washington*, the supreme court added:

> "Procedurally, such claims should be resolved as any other claim brought under the [Post-Conviction Hearing] Act. Substantively, relief has been held to require that the supporting evidence be new, material, noncumulative[,] and, most importantly, of such a conclusive character as would probably change the result on retrial." (Internal quotation marks omitted.) *Id.*

¶ 24 Those final words of guidance in *Washington* demonstrate how closely the holding of a case can be tethered to the facts of the case. If the facts in *Washington* were changed so that, instead of a trial ending in a guilty verdict, there had been a guilty plea, it would have

made no sense to forecast the probable result of a "retrial." *Id.* Without a trial in the first place, there could have been no retrial. Nor would it have made any sense to ask whether the evidence was "new, material, [and] noncumulative." *Id.* By pleading guilty, the defendant would have dispensed with evidence, inculpatory or exculpatory; he would have "*waive*[*d*] his rights to a jury trial and to proof beyond a reasonable doubt." (Emphasis in original.) *Hill v. Cowan*, 202 Ill. 2d 151, 154 (2002). Because a guilty plea would have "release[d] the State from proving *anything* beyond a reasonable doubt" (emphasis in original) (*id.*), *no* newly discovered evidence would have been "material" (*Washington*, 171 Ill. 2d at 489). Evidence, in general, would have been immaterial and superfluous; the guilty plea would have made it so.

¶ 25 Despite those difficulties, the First District in *Shaw* applied *Washington*'s holding to a case in which, after knowingly and voluntarily *pleading guilty*, the defendant raised a postconviction claim of *actual innocence*. *Shaw*, 2018 IL App (1st) 152994, ¶ 41.

¶ 26 The defendant in *Shaw* pleaded guilty in three cases. *Id.* ¶ 9. One of the cases charged him with home invasion, and the victim in that case was M.J. *Id.* ¶ 2. Afterward, the defendant petitioned for postconviction relief, raising several claims, including a claim that he actually was innocent of the offense of home invasion against M.J. *Id.* ¶ 12. In support of his claim of actual innocence, the defendant submitted an affidavit by Andrew Coe. *Id.* ¶ 13. According to Coe's affidavit, M.J. told Coe that (1) Anthony Benjamin, instead of the defendant, was really the perpetrator of the home invasion; (2) the police had coerced M.J. to choose the defendant out of a lineup; and (3) M.J.'s family had pressured her to refrain from correcting her false implication of the defendant. *Id.*

¶ 27 The trial court in *Shaw* granted a motion by the State to dismiss the postconviction petition. *Id.* ¶ 16. The court reasoned that because the newly discovered evidence,

Coe's affidavit, offered only inadmissible hearsay, it would not "change the result of a trial" and, thus, the claim of actual innocence lacked merit. *Id.*

¶ 28 The defendant in *Shaw* appealed to the appellate court, and in his appeal he "contend[ed] only that the trial court erred by dismissing his petition where he made a substantial showing of actual innocence by attaching Coe's affidavit, which alleged that M.J. admitted to falsely identifying [the] defendant as the offender." *Id.* ¶ 17. On appeal, the defendant abandoned the other two claims in his postconviction petition, the claims that the police physically had coerced him into confessing and that defense counsel had destroyed the voluntariness of his guilty plea by pressuring him to plead guilty. *Id.* Consequently, the First District in *Shaw* took it as a given that the defendant's guilty plea to the charge of home invasion against M.J. was voluntary and valid. *Id.* ¶ 25.

¶ 29 The State argued, initially, that the First District should decline to consider the defendant's claim of actual innocence "since it [did] not involve a claim that his plea was coerced." *Id.* ¶ 24. (The State made an alternative, fallback argument that the record in its entirety tended to discredit the claim of actual innocence. *Id.*)

¶ 30 In addressing that initial argument by the State, the First District in *Shaw* began by drawing a distinction between a gateway claim of actual innocence and a freestanding claim of actual innocence. *Id.* ¶¶ 26-29. In federal *habeas corpus* cases, a gateway claim of actual innocence was one that alleged an unconstitutional trial error plus actual innocence, and the contention of actual innocence was merely a "gateway," so to speak, through which the petitioner could pass so as to raise the trial error, which otherwise would have been procedurally forfeited. *Id.* ¶ 27. By contrast, a freestanding claim of actual innocence was, as the name suggested, solely a claim of actual innocence, without any allegation of a (forfeited) trial error.

Although the First District in *Shaw* thought it was important to "carefully distinguish between" those "two forms of actual innocence claims" (*id.* ¶ 26), the distinction matters, really, only in the federal system. Our own supreme court rejects any distinction between gateway claims of actual innocence and freestanding claims of actual innocence. See *People v. Coleman*, 2013 IL 113307, ¶ 89. Under Illinois law, "the evidentiary burden for an actual-innocence claim is always the same whether or not it would be considered a freestanding or gateway claim under federal law": it "must meet the *Washington* standard." *Id.* ¶ 91.

¶ 31 As we already have explained, the *Washington* standard, by its very terms, applies only to cases in which the defendant was convicted as a result of a trial. See *id.* ¶¶ 96-97. For that reason, as *Shaw* noted, "[s]ome Illinois courts ha[d] expressed doubts as to whether a freestanding actual innocence claim [might] be brought after a valid and voluntary guilty plea." *Shaw*, 2018 IL App (1st) 152994, ¶ 33 (citing *Barnslater*, 373 Ill. App. 3d at 527, and *People v. Simmons*, 388 Ill. App. 3d 599, 614 (2009)). Even so, according to *Shaw*, "[n]o Illinois court *** ha[d] found such claims to be categorically barred." *Id.* In fact, *Shaw* found one Illinois case that positively held that the " 'defendant can raise his freestanding claim of actual innocence in postconviction proceedings[,]' and [his] 'guilty plea does not prohibit him from raising [such a] claim in postconviction proceedings.' " *Id.* (quoting *People v. Knight*, 405 Ill. App. 3d 461, 471-72 (2010)).

¶ 32 Having found no Illinois case that categorically barred a defendant from raising a postconviction claim of actual innocence after validly pleading guilty (although it seems to us that *Barnslater*, 373 Ill. App. 3d at 527, uses language that could be so interpreted), the First District in *Shaw* reviewed decisions from other states. *Shaw*, 2018 IL App (1st) 152994, ¶¶ 34-40. After discussing the foreign decisions, which came down on both sides of the question, the

First District decided, for essentially two reasons, that the defendant's claim should be cognizable: that, in a postconviction proceeding, "a freestanding actual innocence claim [might] be brought after a guilty plea" and that "a defendant [did] not [have to] challenge the knowing and voluntary nature of his or her plea to bring such a claim." *Id.* ¶ 41. First, in *Washington*, the supreme court said: " 'In terms of procedural due process, we believe that to ignore such a claim [of actual innocence] would be fundamentally unfair. [Citations.] Imprisonment of the innocent would also be so conscience shocking as to trigger operation of substantive due process.' " *Id.* (quoting *Washington*, 171 Ill. 2d at 487-88). Second, it could not be doubted that sometimes, to avoid the risk of a trial, innocent defendants pleaded guilty—and if, as the supreme court said in *Washington*, imprisoning the innocent offended due process, that would include the innocent who had pleaded guilty. *Id.* ¶ 43.

¶ 33 In *Shaw*, the First District did not mean to flatten all differences between an innocent defendant who pleaded guilty and an innocent defendant who was convicted after a trial. The First District decided that a defendant raising a postconviction claim of actual innocence after validly pleading guilty ought to shoulder a heavier burden of proof than the preponderance burden that *Washington* prescribed for defendants claiming actual innocence after being found guilty in a trial:

> "After considering the various approaches used by other jurisdictions, we conclude that, to overcome the finality of a valid guilty plea, a defendant raising a freestanding actual innocence challenge *** must present ' "a truly persuasive demonstration of innocence" ' in the form of 'compelling evidence' (*Washington*, 171 Ill. 2d at 488-89 [(quoting *Herrera v. Collins*, 506 U.S. 390, 436 (1993) (Blackmun, J., dissenting, jointed by Stevens and Souter, JJ.)]) and must establish

the elements of an actual innocence claim (see *Edwards*, 2012 IL 111711, ¶ 32) by clear and convincing evidence. This standard would raise the defendant's burden of proof from a mere preponderance that is required following a conviction after a trial." *Id.* ¶ 55.

¶ 34 Ultimately, *Shaw* affirmed the trial court's judgment because the defendant had failed to carry that heavier burden of proof. The First District stated, "Assuming that [the] defendant's proffered evidence is newly discovered, material, and not cumulative, we do not find it to be of such a conclusive character that it would probably change the result on retrial—the most important element of an actual innocence claim." *Id.* ¶ 66 (citing *Washington*, 171 Ill. 2d at 489). ("Probably" was a lighter burden of proof than "clear and convincing," but a failure to carry the lighter burden was a failure to carry the heavier burden.)

¶ 35 In our view, *Shaw* is correct in its result but not in its analysis. For three reasons, we respectfully disagree with *Shaw*'s holding that a postconviction claim of actual innocence may be brought after a valid guilty plea (*id.* ¶ 41)—although we feel the force of the reasoning that innocent defendants, even innocent defendants who pleaded guilty, should not remain imprisoned. (But, perhaps, even that reasoning could be questioned in a case where the defendant pleaded guilty in return for the dismissal of more serious charges of which the defendant was in fact guilty.)

¶ 36 First, *Shaw* ends up applying the test from *Washington*, albeit with a more demanding burden of proof, and applying *Washington* to a guilty-plea case is like trying to jam a square peg into a round hole. To illustrate what we mean, we will quote some telling excerpts from *Shaw*. For example, the First District "[a]ssum[es] that [the] defendant's proffered evidence is *** not cumulative." *Id.* ¶ 66. But "['n]oncumulative[']' means the evidence adds to what the

jury heard." *Coleman*, 2013 IL 113307, ¶ 96. It is unclear how the First District could have assumed the defendant's evidence to be noncumulative if, as a consequence of his guilty plea, no evidence had been heard by a jury. There had been no presentation of evidence; there had been no jury. Also, the First District writes, "[W]e do not find [the defendant's proffered evidence] to be of such a conclusive character that it would probably change the result on *retrial—the most important element of an actual innocence claim*." (Emphasis added.) *Shaw*, 2018 IL App (1st) 152994, ¶ 66. But this most important element of an actual innocence claim is inapplicable or unusable because there was no trial in the first place. Under the test in *Washington*, "the defendant must present new, material, noncumulative evidence that is so conclusive it would probably change the result on retrial"—and "[']conclusive[']' means [that] the evidence, *when considered along with the trial evidence*, would probably lead to a different result." (Emphasis added.) *Coleman*, 2013 IL 113307, ¶ 96. It is impossible to consider the new evidence along with the trial evidence if, because of a guilty plea, there was no trial evidence. In short, the problem is this: the supreme court dictates that all postconviction claims of actual innocence, without exception, "must meet the *Washington* standard" (*id.* ¶ 91), and guilty-plea cases are *inherently* incapable of meeting the *Washington* standard—which would suggest that a defendant who validly pleaded guilty cannot raise a postconviction claim of actual innocence, as Justice Schaefer wrote in *Cannon*. See *Cannon*, 46 Ill. 2d at 321.

¶ 37 Our second difficulty with *Shaw* is that actual innocence would be a nonjurisdictional defense to the charge and "[a] guilty plea waives all nonjurisdictional defenses or defects." *People v. Horton*, 143 Ill. 2d 11, 22 (1991). That includes nonjurisdictional defenses that are constitutional in nature. *People v. Townsell*, 209 Ill. 2d 543, 545 (2004). "If a defendant claims that his guilty plea was coerced, then that coercion provides the necessary constitutional

deprivation for which postconviction relief would be appropriate, but not where he claims actual innocence in the face of a prior, constitutionally valid confession of guilt," as the First District categorically held in *Barnslater*, 373 Ill. App. 3d at 527. In accordance with Illinois Supreme Court Rule 402(a)(4) (eff. July 1, 2012), the circuit court admonished defendant: "If you plead guilty, you would be giving up your right to a trial of any kind by a judge or a jury." If, by a postconviction claim of actual innocence, defendant now can obtain a trial, that admonition would have been false.

¶ 38 Third, defendants cannot knowingly and voluntarily plead guilty in the trial court and then turn around and complain to a reviewing court that the trial court found them guilty. That would be duplicitous. Assuming, for the sake of argument, that defendant's conviction of armed violence was a constitutional error, it was an error he himself invited by pleading guilty to armed violence. *People v. Kane*, 2013 IL App (2d) 110594, ¶ 27 ("The use of invited error as a basis for postconviction relief is clearly frivolous and patently without merit."). After being fully admonished and while represented by counsel, defendant affirmatively and voluntarily procured his own conviction by pleading guilty. He expressly consented to a procedure whereby the court would convict him of armed violence without proof. See *Hill*, 202 Ill. 2d at 154. "[U]nder the doctrine of invited error, an accused may not request to proceed in one manner and then later contend on appeal that the course of action was in error." (Internal quotation marks omitted.) *People v. Harvey*, 211 Ill. 2d 368, 385 (2004). Defendant is estopped from "us[ing] the exact ruling or action [he] procured in the trial court as a vehicle for reversal on appeal." *Id.* The case for estoppel is especially strong considering that, as a result of defendant's guilty plea, the State's evidence might have grown stale.

¶ 39 In sum, until the supreme court makes an exception to the well-established doctrines of waiver and estoppel, we must faithfully apply those doctrines. See *In re Shermaine S.*, 2015 IL App (1st) 142421, ¶ 32. Likewise, until the supreme court says otherwise, we must follow the *obiter dictum* of *Cannon*. See *Exelon*, 234 Ill. 2d at 282.

¶ 40 III. CONCLUSION

¶ 41 For the foregoing reasons, we affirm the circuit court's judgment, and we award the State $50 in costs against defendant. See 55 ILCS 5/4-2002(a) (West 2016).

¶ 42 Affirmed.

E-FILED
Transaction ID: 4-17-0090
File Date: 4/17/2019 10:52 AM
Carla Bender, Clerk of the Court
APPELLATE COURT 4TH DISTRICT

No. 4-17-0090

IN THE

APPELLATE COURT OF ILLINOIS

FOURTH JUDICIAL DISTRICT

PEOPLE OF THE STATE OF ILLINOIS, Respondent-Appellee, -vs- DEMARIO D. REED, Petitioner-Appellant.	))))))))))	Appeal from the Circuit Court of the Sixth Judicial Circuit, Macon County, Illinois No. 14-CF-1205 Honorable Jeffrey S. Geisler, Judge Presiding.

PETITION FOR REHEARING FOR PETITIONER-APPELLANT

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State Appellate Defender

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COUNSEL FOR PETITIONER-APPELLANT

ARGUMENT

While affirming the denial of Mr. Reed's successive petition, this Court analyzed and then declined to follow a vacated opinion by the First District. *People v. Reed*, 2019 IL App (4th) 170090 at ¶ 25-39; (Appendix, p. 1).

This Court issued its decision in *Reed* on March 27, 2019, and, in doing so, declined *sua sponte* to follow *People v. Shaw*, 2018 IL App (1st) 152994. *Reed*, 2019 IL App (4th) 170090, ¶¶ 1-2, 25-39. The First District decided *Shaw* on September 28, 2018. *Shaw*, 2018 IL App (1st) 152994. On March 19, 2019, before this Court decided *Reed*, the First District withdrew its opinion in *Shaw* and gave notice that "a new opinion will be filed in due course." (Appendix, p. 1) The First District had recently heard oral argument on "the out of state authority" cited in its decision—specifically, in paragraphs 34-52 of *Shaw*. (Appendix, p. 2) And the First District has since granted the State's motion to cite additional authority—namely, this Court's decision in *Reed*. (Appendix, p. 3)

In short, this Court has overlooked a procedural quirk that occurred during the ongoing litigation of a sister district. Thus, consistent with Rule 367, this Court should withdraw its current decision and, after the First District re-issues *Shaw*, grant rehearing on the issue of whether Mr. Reed may raise a freestanding claim of actual innocence under Post-Conviction Hearing Act (725 ILCS 5/122 *et seq*.).

CONCLUSION

For the foregoing reasons, Demario D. Reed, petitioner-appellant, respectfully requests that this Court should withdraw its current decision and, after the First District re-issues *Shaw*, grant rehearing on the issue of whether Mr. Reed may raise of freestanding claim of actual innocence under Post-Conviction Hearing Act (725 ILCS 5/122 *et seq*.).

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this petition conforms to the requirements of Rules 341(a) and Rule 367. The length of this petition, excluding the appendix, is 2 pages.

/s/ Alexander G. Muntges
ALEXANDER G. MUNTGES
ARDC No. 6314632
Assistant Appellate Defender

APPENDIX

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	No. 1-15-2994
	)	
GERMAINE SHAW,	)	
	)	
Defendant-Appellant.	)	

ORDER

This matter coming to be heard on Defendant-Appellant's Petition for Rehearing, this court having heard oral arguments from the parties on March 14, 2019, and this court being fully advised in the premises;

IT IS HEREBY ORDERED that this court's opinion in *People v. Shaw*, 2018 IL App (1st) 152994, filed September 28, 2018 is withdrawn, and a new opinion will be filed in due course.

Presiding Justice

Justice

Justice

Appendix, p. 1

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	
Plaintiff-Appellee,	)	
v.	)	No. 1-15-2994
GERMAINE SHAW,	)	
Defendant-Appellant.	)	

ORDER

This matter coming to be heard on Defendant-Appellant's Petition for Rehearing;

IT IS HEREBY ORDERED that this matter is set for oral argument on March 14, 2019. The parties are directed to be prepared to discuss the out of state authority cited in this court's opinion in *People v. Shaw*, 2018 IL App (1st) 152994—specifically, paragraphs 34-52.

Margaret S. McBride
Presiding Justice

ORDER ENTERED

FEB 07 2019

APPELLATE COURT FIRST DISTRICT

Appendix, a.2

No. 1-15-2994

IN THE

APPELLATE COURT OF ILLINOIS

FIRST JUDICIAL DISTRICT – FOURTH DIVISION

THE PEOPLE OF THE STATE OF ILLINOIS Respondent-Appellee, v. GERMAINE SHAW, Petitioner-Appellant.	)	Appeal from the Circuit Court of Cook County, Illinois. Cir. Ct. No. 00 CR 2316 Honorable Mary Margaret Brosnahan, Judge Presiding

ORDER

This cause coming before this Court on motion of the People of the State of Illinois, and all parties having been notified, and the Court being advised in the premises,

IT IS HEREBY ORDERED that the People's motion for leave to cite *People v. Reed*, 2019 IL App (4th) 170090, as additional authority is granted/denied.

M S McBride

Justice

ORDER ENTERED

APR 09 2019

APPELLATE COURT, FIRST DISTRICT

Justice

Justice

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April 4, 2019

THOMAS D. PALELLA, CLERK OF THE APPELLATE COURT, FIRST DISTRICT

Appendix, p. 3

No. 4-17-0090

IN THE

APPELLATE COURT OF ILLINOIS

FOURTH JUDICIAL DISTRICT

PEOPLE OF THE STATE OF ILLINOIS, Respondent-Appellee, -vs- DEMARIO D. REED, Petitioner-Appellant.	))))))))))	Appeal from the Circuit Court of the Sixth Judicial Circuit, Macon County, Illinois No. 14-CF-1205 Honorable Jeffrey S. Geisler, Judge Presiding.

NOTICE AND PROOF OF SERVICE

TO: Mr. David J. Robinson, Deputy Director, State's Attorney Appellate Prosecutor, 725 South Second Street, Springfield, IL 62704, 4thdistrict@ilsaap.org

Mr. Demario D. Reed, Register No. S14896, Danville Correctional Center, 3820 East Main Street, Danville, IL 61834

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. On April 17, 2019, the Petition for Rehearing was filed with the Clerk of the Appellate Court using the court's electronic filing system in the above-entitled cause. Upon acceptance of the filing from this Court, persons named above with identified email addresses will be served using the court's electronic filing system and one copy is being mailed to the appellant in an envelope deposited in a U.S. mail box in Chicago, Illinois, with proper postage prepaid. Additionally, upon its acceptance by the court's electronic filing system, the undersigned will send 2 copies of the Petition for Rehearing to the Clerk of the above Court.

/s/ Joseph Tucker
LEGAL SECRETARY
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Received: 05/08/2019

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT
201 W. MONROE STREET
SPRINGFIELD, IL 62704

CLERK OF THE COURT
(217) 782-2586

RESEARCH DIRECTOR
(217) 782-3528

May 8, 2019

RE: People v. Reed, Demario D.
General No.: 4-17-0090
Macon County
Case No.: 14CF1205

The court has this day entered the following order in the above referenced case:

Upon consideration of the Petition for Rehearing, the Petition for Rehearing is denied.

A modified decision, upon denial of the Petition for Rehearing is hereby filed this date and is accessible at www.illinoiscourts.gov.

If **opinion**, the following text must appear: **The Reporter of Decisions will note that this opinion is released today for publication.**

If the name of counsel in an Opinion is incorrectly listed or omitted, please inform the Reporter of Decisions at 217-557-2823.

Carla Bender
Clerk of the Appellate Court

c: Alexander Gerard Muntges
David Joseph Robinson
Linda Susan McClain
Patricia G. Mysza

2019 IL App (4th) 170090

NO. 4-17-0090

Opinion filed March 27, 2019

Modified upon denial of Rehearing May 8, 2019

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. DEMARIO D. REED, Defendant-Appellant.	) Appeal from the) Circuit Court of) Macon County) No. 14CF1205)) Honorable) Jeffrey S. Geisler,) Judge Presiding.

JUSTICE CAVANAGH delivered the judgment of the court, with opinion.
Justices DeArmond and Turner concurred in the judgment and opinion.

OPINION

¶ 1 After an evidentiary hearing, the Macon County circuit court denied postconviction relief to defendant, Demario D. Reed, who is serving a prison sentence of 15 years for armed violence (720 ILCS 5/33A-2(a), 33A-3(a) (West 2014)). He appeals, arguing that newly discovered evidence he presented to the court in the postconviction hearing proved, clearly and convincingly, that he actually was innocent of armed violence despite his earlier negotiated guilty plea to that offense.

¶ 2 Because the validity of defendant's guilty plea is undisputed on appeal, we hold, *de novo*, that he remains bound by his guilty plea and that his claim of actual innocence cannot be entertained. See *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006); *People v. Cannon*, 46 Ill. 2d 319, 321 (1970). Therefore, we deny defendant's petition for rehearing, and we affirm the judgment.

¶ 3 I. BACKGROUND

¶ 4 In count I of the information, the State alleged that on September 23, 2014, defendant committed armed violence in that while armed with a shotgun, he knowingly possessed cocaine (an amount less than 15 grams).

¶ 5 In April 2015, defendant appeared with appointed defense counsel, who announced:

> "MR. WHEELER: Judge, the defendant is going to offer to enter a plea of guilty to Count I of [Macon County case No. 14-CF-]120[5], be sentenced to the Illinois Department of Corrections for a period of 15 years. *** The remaining charges [(in Macon County case Nos. 14-CF-903 and 14-CF-1206)] will be dismissed.
>
> THE COURT: [Defendant], you heard what your attorney said. Is that your understanding of the plea agreement?
>
> THE DEFENDANT: Yes."

¶ 6 The circuit court then recited count I to defendant and told him the minimum and maximum punishments for the offense it alleged, armed violence. The court further admonished him:

> "THE COURT: If you plead guilty, *you would be giving up your right to a trial of any kind by a judge or a jury*. You would be giving up the right to confront and cross-examine witnesses who would testify against you in court during your trial. By pleading guilty, you would be giving up the privilege against self-incrimination and the presumption of innocence. *You would be giving up the right* to subpoena witnesses to come into court to testify for you and *to present*

any defenses you might have to this charge, and by pleading guilty, *you would be giving up the right to require the* [*S*]*tate to prove you committed this offense beyond a reasonable doubt*. Do you understand the rights you are giving up by pleading guilty?

THE DEFENDANT: Yes.

THE COURT: Do you have any questions about your rights this morning?

THE DEFENDANT: No.

THE COURT: Are you telling me you wish to give up your rights and plead guilty?

THE DEFENDANT: Yes." (Emphases added.)

Then, at the court's request, defendant signed a jury waiver.

¶ 7 Next, the circuit court requested a factual basis. The prosecutor responded:

"MS. DOMASH: The [S]tate would present the testimony of Officer Daniels of the Decatur Police Department. Officer Daniels would testify that he observed this defendant on September 23rd of 2014 on a porch in Decatur, Illinois. He observed the defendant flee upon sight of him. The defendant was running oddly. When he entered the house, he located a shotgun and cocaine. The defendant was located in a bedroom, and the shotgun had the defendant's DNA [(deoxyribonucleic acid)] on it."

¶ 8 After the prosecutor provided that factual basis, defendant confirmed to the circuit court that no one had forced him, in any way, to plead guilty and that the plea agreement was the only promise ever made to him in return for his proposed guilty plea. He also denied having any

questions about his "rights, the possible sentences, or anything else." The court then asked defendant a final time:

> "THE COURT: Are you telling me you wish to continue to plead guilty this morning?
>
> THE DEFENDANT: Yes."

¶ 9 Finding a factual basis for the guilty plea to count I and further finding the guilty plea to be knowing and voluntary, the circuit court accepted the guilty plea and sentenced defendant to imprisonment for the agreed-upon term of 15 years. (The parties also had agreed to proceed immediately to sentencing, to waive a presentence investigation report, and to have the pretrial bond report stand as a prior history of criminality.)

¶ 10 In January 2016, with the circuit court's permission (see 725 ILCS 5/122-1(f) (West 2016)), defendant filed a successive postconviction petition, in which he claimed to be innocent of count I, armed violence, the offense to which he had entered the negotiated guilty plea. He submitted, as proof of his innocence, an affidavit by his codefendant, Davie Callaway. In the affidavit, which was dated October 15, 2015, Callaway averred that he alone was the one who had possessed the cocaine referenced in count I and that defendant had been unaware the presence of the cocaine.

¶ 11 The State moved to dismiss the postconviction petition. One of the reasons the State gave for its motion was waiver. The State argued that by knowingly and voluntarily pleading guilty to armed violence, defendant had waived all nonjurisdictional errors, including errors of a constitutional nature.

¶ 12 The circuit court denied the State's motion for dismissal, and the petition advanced to the third stage of the postconviction proceeding, in which the parties adduced

evidence for the court to weigh as the trier of fact. See *People v. Harris*, 2013 IL App (1st) 111351, ¶¶ 46-47 (describing the three stages of a postconviction proceeding).

¶ 13 On January 20, 2017, after hearing the evidence, including Callaway's testimony, the circuit court denied defendant's successive petition for postconviction relief. Although the court held that Callaway's affidavit and testimony "qualified as new evidence based on his unavailability at trial in view of his Fifth Amendment Right against self-incrimination" (see U.S. Const., amend. V; *People v. Edwards*, 2012 IL 111711, ¶ 38), the court simply did not believe Callaway. The court wrote in its judgment:

> "The court *** does not find that testimony of Mr. Callaway to be credible as Mr. Callaway did not come forward with this information until after he pled and he and the petitioner were in prison together. As such, the court does not find the petitioner has established a colorable claim of actual innocence."

¶ 14 This appeal followed.

¶ 15 II. ANALYSIS

¶ 16 On appeal, defendant does not challenge the validity of his negotiated guilty plea to armed violence; he does not claim that his guilty plea was uninformed or involuntary. Rather, he claims that his guilty plea was false. He claims he really was innocent of armed violence when he solemnly declared to the circuit court that he was guilty of that offense. He cites *People v. Shaw*, 2018 IL App (1st) 152994, ¶ 41, in which the First District held that "a freestanding actual innocence claim may be brought [in a postconviction proceeding] after a guilty plea, and that a defendant need not challenge the knowing and voluntary nature of his or her plea to bring such a claim." On March 19, 2019, however, after defendant filed his brief, the First District

withdrew its opinion in *Shaw*, as defendant informs us in his petition for rehearing. A withdrawn opinion lacks precedential value. *People v. Jordan*, 103 Ill. 2d 192, 205 (1984).

¶ 17 That leaves only one Illinois case, *People v. Barnslater*, 373 Ill. App. 3d 512 (2007), that (albeit in *dicta*) has addressed the question of whether, in a postconviction proceeding, a defendant may raise a claim of actual innocence after being convicted on a valid, *i.e.*, knowing and voluntary, guilty plea. (Although it is true that in *People v. Knight*, 405 Ill. App. 3d 461, 471-72 (2010), the Third District allowed the defendant to raise a postconviction claim of actual innocence after pleading guilty, the defendant in that case additionally attacked the validity of his guilty plea, claiming his guilty plea had been coerced.) In *Barnslater*, the First District remarked: "If a defendant claims that his guilty plea was coerced, then that coercion provides the necessary constitutional deprivation for which postconviction relief would be appropriate, but not where he claims actual innocence in the face of a prior, constitutionally valid confession of guilt." *Barnslater*, , 373 Ill. App. 3d at 527. In support of the proposition that a valid guilty plea foreclosed a postconviction claim of actual innocence, *Barnslater* quoted from *Cannon*, a decision by the supreme court: " 'Before his plea of guilty was accepted, the defendant, represented by appointed counsel, was fully and carefully admonished by the trial judge, and in the light of that admonition, the defendant's present [postconviction] claim [of actual innocence] cannot be entertained.' " (Emphasis omitted.) *Id.* at 528 (quoting *Cannon*, 46 Ill. 2d at 321).

¶ 18 The quoted sentence is, in *Cannon*, an *obiter dictum*, an inessential remark on a point not argued by counsel (*Lebron v. Gottlieb Memorial Hospital*, 237 Ill. 2d 217, 236 (2010)). In his appeal to the supreme court, the only argument the defendant in *Cannon* made against the denial of his postconviction petition was that the board of supervisors of De Witt County had

been elected illegally, in violation of the one-man, one-vote principle, and that, consequently, "all of the proceedings in connection with the defendant's prosecution, including the selection of grand jurors, were illegal and in violation of his rights under the constitution of the United States and of this State." *Cannon*, 46 Ill. 2d at 320.

¶ 19 After rejecting that sole argument by the defendant, the supreme court in *Cannon* added:

> "We have examined the claims advanced by the defendant in his post-conviction petition *which were not argued in this court.* They amount basically to an unsupported assertion that the accusation against him was false and that his daughter and two of his sons were coerced by threats from their mother, the defendant's wife, to refrain from asserting the defendant's innocence [to the charge of indecent liberties with a child]. Before his plea of guilty was accepted, the defendant, represented by appointed counsel, was fully and carefully admonished by the trial judge, and in the light of that admonition, the defendant's present claim cannot be entertained." (Emphasis added.) *Id.* at 321.

Although the quoted paragraph from *Cannon* describes the defendant's claim of actual innocence as being "unsupported," the paragraph is not, in the end, an evaluation of that claim on its evidentiary merits. Rather, the paragraph concludes that because the defendant was (1) was represented by counsel in the guilty-plea hearing and (2) fully and carefully admonished by the trial judge, his postconviction claim of actual innocence "cannot be entertained." *Id.* "[*I*]*n the light of that admonition*, the defendant's present claim [of actual innocence] cannot be entertained," as the supreme court put it. (Emphasis added.) *Id.* To "entertain" a claim means to "give attention or consideration to" the claim. The New Oxford American Dictionary 567

(2001). Thus, in the final sentence of the paragraph quoted above, the supreme court declines to give attention or consideration to the defendant's claim of actual innocence, not because the claim is unsupported (as the supreme court remarks earlier in the quoted paragraph) but, rather, because—while being represented by counsel and after being fully admonished—the defendant pleaded guilty to the charge of which he now, in the postconviction proceeding, claims to be actually innocent. That is what the supreme court says in *Cannon*; and when the supreme court speaks, we must obey.

¶ 20 There is, however, a slight complication. Because the quoted paragraph of *Cannon* could be "sloughed off without damaging the analytical structure of the opinion" and because it is an aside on a point not argued by counsel, it is, as we said, an *obiter dictum*. (Internal quotation marks omitted.) *Exelon Corp. v. Department of Revenue*, 234 Ill. 2d 266, 277-78 (2009). "*Obiter dictum* refers to a remark or expression of opinion that a court uttered as an aside, and is *generally* not binding authority or precedent within the *stare decisis* rule." (Emphasis added.) *Id.* at 277. The supreme court uses the qualifier "generally" because "[e]ven *obiter dict*[*a*] of a court of last resort can be tantamount to a decision and therefore binding in the absence of a contrary decision of that court." (Internal quotation marks omitted.) *Id.* at 282; see also *People v. Williams*, 204 Ill. 2d 191, 207 (2003) ("But whether we characterize that portion of [our previous decision] as judicial or *obiter dicta*, it still should have guided the appellate court in this case."); *Country Club Estates Condominium Ass'n v. Bayview Loan Servicing LLC*, 2017 IL App (1st) 162459, ¶ 20 n.2 ("[The supreme] court's discussion of prompt payment would likely be classified as [an] *obiter dictum*; nevertheless *** we are bound by it.").

¶ 21 The question, then, is whether there is a "contrary decision" of the supreme court—a decision holding that a postconviction claim of actual innocence *can* be entertained

after a valid guilty plea. *Exelon*, 234 Ill. 2d at 282. We are aware of no such decision by the supreme court. Thus, we conclude that the *obiter dictum* of *Cannon* is still the law. See *id.*

¶ 22 While so concluding, we acknowledge that in *People v. Washington*, 171 Ill. 2d 475, 489 (1996), the supreme court stated:

> "We believe that no person convicted of a crime should be deprived of life or liberty given compelling evidence of actual innocence. *** We therefore hold as a matter of Illinois constitutional jurisprudence that a claim of newly discovered evidence showing a defendant to be actually innocent of the crime for which he was convicted is cognizable as a matter of due process."

"It is fundamental, however, that the precedential scope of a decision is limited to the facts before the court." *People v. Palmer*, 104 Ill. 2d 340, 345-46 (1984). "The words of a judicial opinion do not have a vitality independent of the facts to which the opinion is addressed ***." *People v. Arndt*, 49 Ill. 2d 530, 533 (1971). The facts in *Washington* were that the defendant was convicted of murder *after a trial*. *Washington*, 171 Ill. 2d at 476. Later, in a postconviction petition, he raised a claim of actual innocence. *Id.* at 478. He supported his claim with an affidavit by Jacqueline Martin, whose *in camera* testimony tended to prove that someone other than the defendant was the murderer. *Id.* at 477-78. For six years, Martin had refrained from coming forward and had hid in Mississippi out of fear of the man she now implicated. *Id.* at 478. The trial court granted the defendant a new trial "on the ground that Martin's testimony was new evidence which, if believed, would have 'had some significant impact' upon the jury." *Id.* The State appealed. *Id.* The appellate court "affirmed the grant of relief as to the newly discovered evidence claim." *Id.* at 479. The supreme court in turn affirmed the appellate court's judgment (*id.* at 490), holding, "as a matter of Illinois constitutional jurisprudence[,] that a claim of newly

discovered evidence showing a defendant to be actually innocent of the crime for which he was convicted [was] cognizable [in a postconviction proceeding] as a matter of due process." *Id.* at 489.

¶ 23 But then, at the end of *Washington*, the supreme court added:

> "Procedurally, such claims should be resolved as any other claim brought under the [Post-Conviction Hearing] Act. Substantively, relief has been held to require that the supporting evidence be new, material, noncumulative[,] and, most importantly, of such a conclusive character as would probably change the result on retrial." (Internal quotation marks omitted.) *Id.*

¶ 24 Those final words of guidance in *Washington* demonstrate how closely the holding of a case can be tethered to the facts of the case. If the facts in *Washington* were changed so that, instead of a trial ending in a guilty verdict, there had been a guilty plea, it would have made no sense to forecast the probable result of a "retrial." *Id.* Without a trial in the first place, there could have been no retrial. Nor would it have made any sense to ask whether the evidence was "new, material, [and] noncumulative." *Id.* By pleading guilty, the defendant would have dispensed with evidence, inculpatory or exculpatory; he would have "*waive*[*d*] his rights to a jury trial and to proof beyond a reasonable doubt." (Emphasis in original.) *Hill v. Cowan*, 202 Ill. 2d 151, 154 (2002). Because a guilty plea would have "release[d] the State from proving *anything* beyond a reasonable doubt" (emphasis in original) (*id.*), *no* newly discovered evidence would have been "material" (*Washington*, 171 Ill. 2d at 489). Evidence, in general, would have been immaterial and superfluous; the valid guilty plea would have made it so. In short, here is the problem with entertaining a postconviction claim of actual innocence after a knowing and voluntary guilty plea: the supreme court dictates that all postconviction claims of actual

innocence, without exception, "must meet the *Washington* standard" (*People v. Coleman*, 2013 IL 113307, ¶ 91), and guilty-plea cases, because they dispense with evidence, are *inherently* incapable of meeting the *Washington* standard—which would suggest that a defendant who validly pleaded guilty cannot raise a postconviction claim of actual innocence, as Justice Schaefer wrote in *Cannon*. See *Cannon*, 46 Ill. 2d at 321.

¶ 25 The guilty-plea waiver rule poses an equally formidable obstacle. "A guilty plea waives all nonjurisdictional defenses or defects." *People v. Horton*, 143 Ill. 2d 11, 22 (1991). That includes nonjurisdictional defenses that are constitutional in nature. *People v. Townsell*, 209 Ill. 2d 543, 545 (2004). Actual innocence was a nonjurisdictional defense to the charge, and, thus, it was a defense that the guilty plea waived. See *id.* "[A] valid guilty plea relinquishes any claim that would contradict the admissions necessarily made upon entry of a voluntary plea of guilty." (Internal quotation marks omitted.) *Class v. United States*, _____ U.S. _____, _____, 138 S. Ct. 798, 805 (2018). Otherwise, Illinois Supreme Court Rule 402(a)(4) (eff. July 1, 2012) would require the giving of an admonition that was patently untrue. In accordance with Rule 402(a)(4), the circuit court admonished defendant: "If you plead guilty, you would be giving up your right to a trial of any kind by a judge or a jury." If, by a postconviction claim of actual innocence, defendant now can obtain a trial, his guilty plea would not have waived his right to a trial, and that admonition would have been false.

¶ 26 Defendants cannot knowingly and voluntarily plead guilty in the trial court and then turn around and complain to a reviewing court that the trial court found them guilty. That would be paradoxical if not duplicitous. Assuming, for the sake of argument, that defendant's conviction of armed violence is a constitutional error because he really is innocent, it is an error he himself invited by pleading guilty to armed violence. *People v. Kane*, 2013 IL App (2d)

110594, ¶ 27 ("The use of invited error as a basis for postconviction relief is clearly frivolous and patently without merit."). After being fully admonished and while represented by counsel, defendant affirmatively and voluntarily procured his own conviction by pleading guilty. He expressly consented to a procedure whereby the court would convict him of armed violence without proof. See *Hill*, 202 Ill. 2d at 154. "[U]nder the doctrine of invited error, an accused may not request to proceed in one manner and then later contend on appeal that the course of action was in error." (Internal quotation marks omitted.) *People v. Harvey*, 211 Ill. 2d 368, 385 (2004). Defendant is estopped from "us[ing] the exact ruling or action [he] procured in the trial court as a vehicle for reversal on appeal." *Id.* The case for estoppel is especially strong considering that, as a result of defendant's guilty plea, the State's evidence might have grown stale.

¶ 27 In sum, until the supreme court makes an exception to the well-established doctrines of waiver and estoppel, we must faithfully apply those doctrines. See *In re Shermaine S.*, 2015 IL App (1st) 142421, ¶ 32. Likewise, until the supreme court says otherwise, we must follow the *obiter dictum* of *Cannon*. See *Exelon*, 234 Ill. 2d at 282.

¶ 28 III. CONCLUSION

¶ 29 For the foregoing reasons, we affirm the circuit court's judgment, and we award the State $50 in costs against defendant. See 55 ILCS 5/4-2002(a) (West 2016).

¶ 30 Affirmed.

No. 124940

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, -vs- DEMARIO D. REED Defendant-Appellant	))))))))))	Appeal from the Appellate Court of Illinois, No. 4-17-0090. There on appeal from the Circuit Court of the Sixth Judicial Circuit, Macon County, Illinois, No. 14-CF-1205. Honorable Jeffrey S. Geisler, Judge Presiding.

NOTICE AND PROOF OF SERVICE

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Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. On February 28, 2020, the Brief and Argument was filed with the Clerk of the Supreme Court of Illinois using the court's electronic filing system in the above-entitled cause. Upon acceptance of the filing from this Court, persons named above with identified email addresses will be served using the court's electronic filing system and one copy is being mailed to the defendant-appellant in an envelope deposited in a U.S. mail box in Chicago, Illinois, with proper postage prepaid. Additionally, upon its acceptance by the court's electronic filing system, the undersigned will send 13 copies of the Brief and Argument to the Clerk of the above Court.

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2/28/2020 1:07 PM
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