No. 129784

IN THE
SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	) Appeal from the Appellate Court of) Illinois, First District, No. 1-21-1553
Respondent-Appellee,	) There on Appeal from the Circuit) Court of Cook County, Illinois,
v.	) No. 12 CR 13176.
ANTUAN JOINER,	) The Honorable) Vincent M. Gaughan,
Defendant-Appellant.	) Judge Presiding.

REPLY BRIEF OF DEFENDANT-APPELLANT ANTUAN JOINER

DOUGLAS JOHNSON
Counsel for Defendant-Appellant
Law Offices of Kathleen Zellner, P.C.
4580 Weaver Parkway
Suite 204
Warrenville, Illinois 60563
attorneys@zellnerlawoffices.com
640-390-4555

E-FILED
2/6/2024 1:20 PM
CYNTHIA A. GRANT
SUPREME COURT CLERK

SUBMITTED - 26289801 - Douglas Johnson - 2/6/2024 1:20 PM

STANDARD OF REVIEW

The parties are in agreement that this Court's review of the issues in this case is *de novo. People v. Lander,* 215 Ill. 2d 577, 583 (2005); *People v. Brooks,* 221 Ill. 2d 381 (2006).

ARGUMENT

I. DEFENDANT'S POSTCONVICTION PETITION WAS DOCKETED ON JULY 7, 2021, BECAUSE ON THAT DATE THE PETITION WAS ENTERED INTO THE OFFICIAL DOCKET FOR FURTHER PROCEEDINGS.

The State boldly claims that the question of statutory construction presented by this appeal has already been answered by this Court in *People v. Brooks,* 221 Ill. 2d 381 (2006). This is correct. But contrary to the State's position, application of *Brooks* should cause this Court to reverse the appellate court and remand the case for further proceedings.

In *Brooks*, the Court explained that the term "docket" means "more than the mere act of receiving the petition." *Id.* at 391. There, the clerk of the court received the petition, entered the petition into the case file and set it for hearing. *Id.* This was deemed sufficient for the case to be deemed "docketed." This Court did not hold that setting the case on a particular judge's calendar or scheduling the case for a hearing was required for a case to be considered docketed. Nor did Brooks reference any docketing fee as a prerequisite to docketing. Thus, while in *Brooks*, the petition happened set for a hearing, such setting was not required.

Here, the clerk did more than receive the petition. The clerk received the petition and stamped it filed July 7, 2021. Not only that, as the State acknowledges, the clerk entered the case onto the electronic docket sheet. (St. Br. at 9). The State also concedes that the electronic docket sheets "may be relied upon as evidence of legal events," citing

SUBMITTED - 26289801 - Douglas Johnson - 2/6/2024 1:20 PM

People v. Begay, 2018 IL App (1st) 150446, ¶ 47. (St. Br. at 9). Defendant submits that these concessions establish that the petition was docketed on July 7, 2021, because entry onto the docket sheet means the case was docketed and further proceedings would ensue.

Based on nothing, the State interprets a symbol and argues "No document is associated with the July 7, 2021 electronic docket entry, as the notation that appears next to the electronic docket entry that have documents associated with them – a piece of paper and a magnifying glass – does not appear next to the July 7, 2021, electronic docket entry." (St. Br. at 9). The State apparently interprets the lack of the piece of paper and a magnifying glass as somehow negating the docketing of the petition. This interpretation finds no support in the record. There is nothing present allowing one to infer the meaning of the icon.

The State claims that Defendant's reliance on *People v. Lentz*, 2014 IL App (2d) 130332 and *People v. Begay*, 2018 IL App (1st) 150446 is misplaced and that "neither case supports a departure from *Brooks*." (St. Br. at 14). But those cases are cited because they more directly address the situation in this case. And importantly, Defendant is not seeking a departure from *Brooks*.

The State cannot distinguish *Lentz*. Instead, it writes "Defendant's reliance on *Lentz* is misplaced because its reasoning cannot be squared with *Brooks*." (St. Br. at 14). But *Lentz* has not been overruled and it governs the outcome here - an outcome completely consistent with *Brooks*. On the date the petition in *Lentz* was filed, August 27, 2012, the clerk did more than simply receive the petition. The clerk made an entry in the official record. The computerized docket reflected that on that date the post-conviction petition

SUBMITTED - 26289801 - Douglas Johnson - 2/6/2024 1:20 PM

was filed. Those actions led the *Lentz* court to reasonably conclude the petition was docketed.

Defendant cites *Lentz* because it is right on point. The fee in *Lentz* was not paid at the time of filing. That did not affect the decision as to the date of docketing. The same result should be reached here.

The State claims that *People v. Begay*, 2018 IL App (1st) 150446 supports its position. It does not. The *Begay* court did not hold that in order for a petition to be considered docketed, the clerk's office must set it for hearing. A reading of *Begay* does not reveal when that petition in that case was set for hearing.

The State argues that Defendant's construction of the Act renders the word "docketing" meaningless. (St. Br. at 16). But this is incorrect. In order for a post-conviction petition to be considered docketed, more than the clerk receiving the petition must occur. More did occur here. The clerk made an entry into the official docket. That is sufficient.

The State's reliance on *People v. Lighthart*, 2023 IL 128398 (St. Br. at 16) is misdirected. In that case, the defendant failed to file a motion to withdraw his guilty plea within 30 days after he was sentenced. *Id.* at ¶ 16. The issue was whether the deadline for filing a post-conviction petition would be governed according to the deadline applicable after a direct appeal is concluded or if the deadline is triggered by the date of conviction where no direct appeal is filed. After missing the deadline for withdrawing the guilty plea, the defendant filed a notice of appeal. However, the notice of appeal was ineffective to perfect an appeal on the merits of the motion to withdraw because of the failure of counsel

SUBMITTED - 26289801 - Douglas Johnson - 2/6/2024 1:20 PM

to file a motion to withdraw the guilty plea within 30 days of the sentence. *Id.* The appellate court did not have jurisdiction to decide the appeal from the outset.

The present case is different. The Circuit Court of Cook County had jurisdiction to rule upon the timely petition. It took the necessary steps to do so, as reflected in the record. The petition was received, filed, file stamped and entered into the court's official docket for further proceedings.

Contrary to the State's next argument, Defendant's reasonable and common sense interpretation of the Act (consistent with Illinois case law, *Lentz*, *Brooks* and *Begay*, will not lead to absurd and unintended results. (St. Br. at 17). Defendant is not suggesting that filing fees should be eliminated. In the event that a filing fee is required as a prerequisite to filing a petition, such a rule can be imposed. Similarly, a fee can be required prior to entering a case into the official record. If a fee is sought but not paid, it can be requested at any time, as was done in *Lentz*. The fact is, no Illinois case has ever held that a fee is required prior to considering a case docketed. To hold so here would result in absurd and untended results. Circuit courts could accept the petition without payment of the fee[1], enter the case into the official record, then never alert the defendant that nothing further would occur. Litigants would be left to wonder when or whether their petition would be considered. This would make an already confusing, disorganized and misleading system even worse.

At bottom, the petition was docketed on July 7, 2021 as the official docket unambiguously reflects. It was dismissed on November 1, 2021, over 90 days after it was

[1] Or advise the person filing the petition that no fee was required, as happened here.

SUBMITTED - 26289801 - Douglas Johnson - 2/6/2024 1:20 PM

filed and docketed. This case should be remanded for the court can proceed to the second stage of the Act.

II. THE PETITION IS NOT FRIVILOUS AND PATENTLY WITHOUT MERIT.

The court's dismissal was not only beyond the statutory 90-day period, but in error because the petition was not frivolous and patently without merit. Defendant raised a *Brady* violation and an actual innocence claim among others. While the State cites *People v. ex rel. Sherman v. Cryns,* 203 Ill 2d 264, 283 (2003) (St. Br. at 21) and argues those claims are waived, they are not. Indeed, in that case, this Court explained that "the rule of waiver is a limitation on the parties and not on the court" citing *Michigan Avenue National Bank,* 191 Ill.2d 493, 518 (2000). Indeed, the court addressed the allegedly waived contentions.

The State claims the appellate court correctly concluded that Defendant's counsel's failure to call Gist and Donner did not prejudice Defendant. (St. Ar. at 23). This claim ignores the state's case. The State relied on the testimony of the two victims of the shooting, both gang members whose "identifications" were anything but certain. Both had extensive criminal records as demonstrated by documentation attached to the petition. Not only that, but as laid out in the petition, one should reasonably conclude that they received leniency on their cases in return for testifying against Defendant. The weakness of the State's case is further illustrated by the lack of forensic evidence connecting Defendant to the crimes. Moreover, another individual, Matthew Smith, was forensically tied to the shootings. Against this backdrop, the addition of the testimony of Mr. Gist and Ms. Donner will far more than likely lead to a different outcome by a new fully informed finder of fact.

SUBMITTED - 26289801 - Douglas Johnson - 2/6/2024 1:20 PM

The State of course disagrees but oddly takes the position that Gist does not support Defendant's alibi. According to the State, although Gist swore he was with Defendant at the time in question such that Defendant could not have committed the crime, Gist still placed Defendant in the vicinity of the shootings. Such reasoning suggests any young black male in the area was a potential perpetrator. Despite the fact that Defendant lived in the area, the State deems Gist's description of he and Defendant's activities around the time of the shooting irrelevant and of no value to Defendant's alibi. In submitting this baseless argument, the State alleges that because Defendant was not "so far from the place where the crime was committed that he could not have participated in it," Gist offers him no support. (St. Br. at 25-26). Apparently, the State's position is that an individual establishing that he was not at the scene of the crime when it took place has no alibi. To be an actual alibi, according to the State's reasoning, the individual must be very far from the scene.

The State is incorrect. Gist's affidavit supports Defendant's alibi because it shows Defendant was with Gist at the time of the shooting and not at the scene of the shooting. The issue is whether a finder of fact could find that Gist's testimony supports Defendant's defense such that counsel should have called him to testify. In *People v. Pearson*,19 Ill.2d 609, 614 (1960), the court approvingly quoted a jury instruction which directed that "If a person on trial for a crime shows that he was in another place at the time when the act was committed, he is said to prove an alibi." *Pearson* was cited as a basis for the decision in *People v. Fritz*, 84 Ill. 2d 72, 76–77 (1981). Read together, both cases reach the logical conclusion – if a witness can testify he was with the defendant and he and the defendant

SUBMITTED - 26289801 - Douglas Johnson - 2/6/2024 1:20 PM

were not at the scene of the crime – the defendant has an alibi. Gist's testimony rebutted the State's case and defense counsel should have presented it.

The State cites *People v. Henry*, 2016 IL App (1st) 150640 but that case supports Defendant's argument. *Henry* cited *People v. Bolden*, 2014 IL App (1st) 123527, ¶ 38 wherein the court found the defendant's trial counsel ineffective for failing to call three witnesses. *Id. at* ¶ 30. One witness swore that she had been talking to the defendant inside a store at the time of the murder for which he was charged, thus, providing a complete alibi. *Id.* at ¶ 32. Witness Gist did just that in this case. CI 1712-1713. Gist's affidavit makes clear that the shooting took place well after Defendant went to the gas station. *Id* at ¶¶ 7-10. Defendant and Gist were together all day and evening. CI 1712-1713. They were together in the park when the shooting occurred and "sometime after that someone came to the park to say there had been a shooting." Id at ¶ 10. Defense counsel in *Bolden* was also ineffective for failing to call two witnesses that provided partial alibis for Defendant. *People v. Bolden*, 2014 IL App (1st) 123527, ¶¶ 33–34. Thus, even if somehow this Court decides Gist only provides a partial alibi, an interpretation Defendant vigorously denies is reasonable, trial counsel here should still be deemed ineffective.

People v. Hernandez, 2014 IL App (2d) 131082 is also distinguishable. There, the court noted "'Trial strategy includes an attorney's choice of one theory of defense over another,' and, where the alibi defense was inconsistent with defendant's statements to police, which were not suppressed, counsel was not arguably objectively unreasonable for instead pursuing an avenue that merely preserved defendant's ability to appeal the suppression ruling," citing, *People v. Cunningham*, 376 Ill.App.3d 298 (1st Dist. 2007). In the case at bar, the alibi was not inconsistent with any statements made by Defendant.

SUBMITTED - 26289801 - Douglas Johnson - 2/6/2024 1:20 PM

Gist's testimony was not inconsistent with any undisputed evidence in the case. Moreover, the proffered alibi in *Hernandez* would obviously not have changed the outcome as the State's evidence of guilt, including the defendant's confession, was overwhelming. Here, Defendant never confessed and a third party was forensically tied to the crime.

The State also argues that Donner's affidavit "falls short." (St. Br. at 26). The State dismisses Donner's proposed testimony because she did not witness the precise moment of the actual shooting. This dismissal ignores the fact that Donner saw everything that happened immediately before and immediately after the shooting, including the perpetrators. CI. 1714-1715. Donner was across the street from the shooting when two young men caught her eye. *Id* at ¶ 6. She describes their every move and how they acted so suspiciously that she watched them closely. *Id*. She watched them head through a vacant lot toward the scene of the shooting immediately before the shooting. *Id*. at ¶¶ 9-10. Just "moments" after that, she heard the shots. *Id.* at ¶ 10. Then, the two young men appeared in the same vacant lot fleeing the area. *Id*. Donner swore unequivocally that neither of the young men was Defendant. *Id*. at ¶ 5. Donner felt so certain that the police had arrested the wrong person, she met with them and told them just that. CI 1715-16. Defendant submits that Donner's evidence is extremely strong evidence of his innocence. It does not fall short.

Perhaps recognizing the powerful nature of the Gist and Donner evidence, the State resorts to the often used "trial strategy" defense. The State argues that trial counsel "reasonably elected to employ a different strategy: challenging Leon and Thomas's identifications of Defendant through cross-examination." (St. Br. at 28). The State's reliance on *People v. Brown*, 2017 IL App (1st) 150203 to support this assertion is

SUBMITTED - 26289801 - Douglas Johnson - 2/6/2024 1:20 PM

misplaced. In *Brown*, the defendant argued that his counsel was ineffective for failing to find evidence, specifically a large knife the defendant claimed was wielded by the victim. *Id*. But there was no evidence the knife actually existed. Thus, the defendant's claim was deemed "pure speculation." *Id*. That is not the situation here. Defendant is not speculating as to what Gist and Donner will say. They have provided sworn affidavits exonerating him.

People v. Williams, 2017 IL App (1st) 152021 is also easily distinguishable. There, trial counsel decided not to call defendant's sisters based on counsel's assessment of the State's witnesses, their backgrounds, and the fact that they received benefits for testifying. The court noted that it was not unreasonable trial strategy to decide not to present the alibi testimony of defendant's sisters because their close relationship to him could have resulted in their testimony carrying little weight with the jury. *Id*. That decision was correct, but the reasoning for it does not apply here. Gist and Donner were not family members of Defendant. Gist may have been a friend but nothing in the record suggests he had any continued relationship with Defendant so many years after the shooting. Donner was only familiar with Defendant's appearance because she had done his hair twists. The proposed testimony here did not come with same baggage as in *Williams*.

Even more importantly, there had been an evidentiary hearing in *Williams*. The circuit court watched and listened to the sisters testify and determined their testimony was far-fetched and incredible. *Id* at 41. The sisters were deemed evasive, inconsistent, defensive, flippant, and hostile. *Id*. Nothing in the affidavits and record suggests Gist and Donner would suffer from the same shortcomings. The cause should be advanced and ultimately, an evidentiary hearing held.

SUBMITTED - 26289801 - Douglas Johnson - 2/6/2024 1:20 PM

People v. Marshall, 375 Ill. App. 3d 670 (1st Dist. 2007) and *People v. Guest* 166 Ill.2d 381 (1995) also do not apply to the facts of this case. The testimony of the alibi witness in *Marshall* would not have furthered the defendant's case. Not only that, the testimony would have opened the door to substantial impeachment of the defendant's defense. The same danger of severe impeachment was obvious in *Guest*. Nothing like that is present here. Nothing in the record suggests Gist or Donner are subject to any impeachment. Further, an evidentiary hearing was held in *Marshall.* The court explained that "questions such as these that explore an attorney's trial strategy are best examined after an evidentiary hearing, citing *People v Gibson*, 244 Ill.App.3d 700, at 704 (Ill. App. Ct. 1993) ("once evidence is heard on the subject, the circuit court will be in a better position to determine whether a *Strickland* deprivation of counsel occurred"). Defendant agrees.

Defendant's petition asserted not only meritorious claims based on the Gist and Donner, but further established that Defendant suffered additional constitutional violations. Defense counsel failed to cross examine the Cunningham brothers as to their bias and criminal records. Documentation attached to the Petition suggested the brothers obtained leniency in return for their testimony. Those deals were not disclosed, violating *Brady*. Defendant's actual innocence claim now shows great merit. There is no physical evidence against Defendant. The forensic evidence points to an alternative suspect, Matthew Smith. Gist provides an alibi for Defendant. Donner exonerates Defendant. The trial court's dismissal of the actual innocence claim was erroneous.

To be dismissed as frivolous or patently without merit pursuant to the Post-Conviction Hearing Act, the petition must have no arguable basis either in law or in fact, which means it is based on an indisputably meritless legal theory or a fanciful factual

SUBMITTED - 26289801 - Douglas Johnson - 2/6/2024 1:20 PM

allegation; this means the legal theory is completely contradicted by the record or the factual allegations are fantastic or delusional. *People v. Munoz*, 406 Ill. App. 3d 844 (1st Dist. 2010). That simply cannot be concluded here.

SUBMITTED - 26289801 - Douglas Johnson - 2/6/2024 1:20 PM

CONCLUSION

WHEREFORE, for the reasons stated herein, Defendant-Appellant, Antuan Joiner, respectfully requests that this Court reverse the judgment of the appellate court, remand the case for further proceedings at the second stage, and grant any and all other relief deemed appropriate.

Respectfully submitted,

Antuan Joiner
Defendant-Appellant

/s/ Douglas H. Johnson

Douglas H. Johnson

Kathleen T. Zellner & Associates,
P.C. 4580 Weaver Parkway
Suite 204
Warrenville, Illinois 60515
(630) 955-1212

SUBMITTED - 26289801 - Douglas Johnson - 2/6/2024 1:20 PM

CERTIFICATE OF COMPLIANCE

I certify that this reply brief conforms to the requirements of Rules 341(a) and (b). The length of this brief excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) 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(a), is 12 pages.

Respectfully submitted,

/s/ Douglas H. Johnson

Douglas H. Johnson

Kathleen T. Zellner & Associates,
P.C. 4580 Weaver Parkway
Suite 204
Warrenville, Illinois 60515
(630) 955-1212

SUBMITTED - 26289801 - Douglas Johnson - 2/6/2024 1:20 PM

No. 129784
IN THE SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	)	**Appeal from the Appellate Court of Illinois, 1st Judicial District, 1-21-1553**
Respondent-Appellee	)	
	)	**Circuit Court of Cook County**
v.	)	**Honorable Vincent M. Gaughan**
	)	**12 CR 13176**
ANTUAN JOINER,	)	
Defendant-Appellant.	)	

NOTICE OF FILING

TO Mr. Kwame Raoul
Office of the Attorney General
500 South Second Street
Springfield, IL 62706
attorney_general@atg.state.il.us

State Attorney's Appellate Prosecutor
Richard J. Daley Center
50 West Washington, Room #309
Chicago, Illinois 60602
eserve.crminalappeals@cookcountyil.gov

Please take notice that the attached REPLY BRIEF OF DEFENDANT-APPELLANT ANTUAN JOINER was filed with the Clerk of the Illinois Supreme Court by electronic means on February 6th, 2024, a copy of which is attached hereto and served upon you.

By: /s/ Douglas H. Johnson
Douglas H. Johnson

Proof of Service

The undersigned served a copy of the foregoing Notice and attached document by electronically filing it via Legal e-File, an approved electronic filing service provider, with the Clerk of Court on February 6th, 2024, which will effectuate service upon each person to whom it directed at the email addresses indicated in this Notice.

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.

/s/ Douglas H. Johnson
Douglas H. Johnson
Kathleen T. Zellner & Associates, P.C.
4580 Weaver Parkway, Suite #204
Warrenville, IL 60555
(P): (630) 955-1212
(E): attorneys@zellnerlawoffices.com

SUBMITTED - 26289801 - Douglas Johnson - 2/6/2024 1:20 PM