No. 121681

IN THE
SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	) Appeal from the Appellate Court
	) of Illinois, Fourth District
Plaintiff-Appellee,	) No. 4-14-0760
	)
	) There on appeal from the
v.	) Circuit Court of the Sixth Judicial Circuit
	) Champaign County, Illinois
	) No. 12-CF-1460
	)
ANTHONY S. BROWN,	) The Honorable
	) Thomas J. Difanis,
Defendant-Appellant.	) Judge Presiding.

BRIEF OF PLAINTIFF-APPELLEE
PEOPLE OF THE STATE OF ILLINOIS

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POINTS AND AUTHORITIES

NATURE OF THE CASE

In September 2012, defendant broke into his ex-girlfriend's home, threatened her children with his .22 caliber revolver, then pointed his gun and charged at three police officers who were responding to reports of the home invasion. Defendant was charged with armed habitual criminal and home invasion with a firearm, which were subject to mandatory sentences of six to thirty years of imprisonment and twenty-one to forty-five years of imprisonment, respectively. On the eve of trial, the parties entered into a plea agreement pursuant to which (1) defendant pleaded guilty to the armed habitual criminal charge; (2) he was sentenced to eighteen years of imprisonment; and (3) the People dismissed the home invasion charge. Defendant also stated in open court that no other promises had been made to induce him to plead guilty.

A year later, defendant filed a counseled postconviction petition seeking to withdraw his guilty plea and alleging that his trial counsel had incorrectly told him that with good-time credit he would serve only fifty percent of his sentence, when in fact he is statutorily required to serve at least eighty-five percent. The trial court dismissed the petition and the appellate court affirmed because, under this Court's precedent, defendant's bare assertion that, but for counsel's error, he would have rejected the plea bargain is insufficient to allege prejudice. A question is raised on the pleadings, namely whether defendant's petition was sufficient to entitle him to an evidentiary hearing.

ISSUES PRESENTED FOR REVIEW

1. Whether a defendant is entitled to a third-stage evidentiary hearing when the trial record affirmatively rebuts his postconviction allegation that he relied on erroneous advice of his trial counsel when pleading guilty.

2. Whether the circuit court correctly dismissed defendant's petition for failure to allege prejudice where defendant offered nothing more than a bare assertion that, but for counsel's error, he would have rejected the plea bargain and insisted on going to trial.

3. Whether this Court should overturn its longstanding precedent that a defendant seeking to withdraw his guilty plea based on a claim of ineffective assistance of counsel must allege more than a bare assertion that, but for counsel's error, he would have rejected the plea bargain and insisted on going to trial.

JURISDICTION

Jurisdiction lies under Supreme Court Rules 315 and 612(b). On March 29, 2017, this Court allowed defendant's petition for leave to appeal.

STATEMENT OF FACTS[1]

A. Defendant's Armed Attack and Guilty Plea

In September 2012, defendant broke into his ex-girlfriend's home while armed with a .22 caliber revolver. C1-2. Defendant then threatened his ex-girlfriend's children and pointed his gun at her daughter's head. *Id*. When police responded to a report of the home invasion, they forced open the door and defendant ran toward them, pointing his revolver at them. R.XIII.6. The officers fired at defendant, he dropped his gun, and the police arrested him. *Id*. Defendant subsequently was charged with (1) armed habitual criminal (AHC) and (2) home invasion with a firearm. C1-2.

As the trial court informed defendant, AHC is a Class X felony subject to a mandatory minimum sentence of six years of imprisonment and a potential maximum

[1] The common law record and report of proceedings are cited as "C" and "R," respectively. Defendant's opening brief in this Court is cited as "Def. Br."

sentence of thirty years of imprisonment. R.II.3; *see also* 720 ILCS 5/24-1.7(b). The home invasion charge also is a Class X felony that, due to the mandatory fifteen-year firearm enhancement, was subject to a sentencing range of twenty-one to forty-five years of imprisonment. R.II.3; *see also* 720 ILCS 5/19-6(c).

In May 2013, the parties entered into a fully negotiated plea agreement. R.XIII.5. Under the terms of the agreement (1) defendant pleaded guilty to AHC; (2) the People recommended a sentence of eighteen years of imprisonment; and (3) the People dismissed the home invasion charge. *Id*. Defendant told the trial court that he understood the terms of the agreement and that no one had promised him anything else to plead guilty. *Id*. at 2-6. Defendant also agreed in open court that the State had multiple witnesses who would testify that defendant entered his ex-girlfriend's home armed with a .22 caliber revolver; police responded to reports of the attack and had to force entry into the home; defendant ran toward the police while pointing his revolver at them; and defendant dropped his gun and was arrested after police fired at him. *Id*. at 6-7. Defendant further agreed that he had multiple prior convictions, including domestic battery, felony trespass, unlawful use of a weapon, and possession with intent to distribute cannabis. *Id*. at 7; C1. The court accepted the plea agreement and sentenced defendant to eighteen years of imprisonment. R.XIII.7-8; C101-02.

B. Defendant's Postconviction Petition

In February 2014, defendant filed a pro se postconviction petition, alleging that his trial counsel provided ineffective assistance during the plea process. C162. The trial court appointed counsel to represent defendant and, in June 2014, counsel filed an amended postconviction petition alleging that his plea counsel had misadvised defendant

about the good-time credit he could earn against his sentence. C167. The only support for this allegation was defendant's own affidavit which stated that (1) before entering into the plea agreement, defendant's trial counsel told him that he potentially could serve only fifty percent of the eighteen-year prison sentence because he could receive day-for-day credit for good behavior; (2) after entering into the agreement and beginning his sentence, prison officials informed defendant that under Illinois law he would be required to serve at least eighty-five percent of his sentence; and (3) had defendant known this, he would not have pleaded guilty. C171-72; *see also* 730 ILCS 5/3-6-3(a)(2)(ii) (2012) (defendants convicted of AHC may receive no more than 4.5 days of good-time credit per month). Defendant neither claimed that he is innocent nor that he had any defense to the charges against him. C171-72. The trial court dismissed the petition without an evidentiary hearing. C202.

Defendant appealed, arguing that he needed only to allege that, but for counsel's incorrect advice, he would not have pleaded guilty. The appellate court affirmed, noting that this Court has made clear that such a bare assertion is insufficient to allege prejudice or entitle a defendant to an evidentiary hearing. *People v. Brown*, 2016 IL App (4th) 140760, ¶¶ 21-28.

STANDARD OF REVIEW

Whether the trial court properly dismissed a postconviction petition at the second stage is a legal question that this Court reviews de novo. *People v. Delton*, 227 Ill. 2d 247, 255 (2008).

ARGUMENT

A defendant who files a postconviction petition "is not entitled to an evidentiary hearing on his claims as a matter of right." *See, e.g., People v. Lucas*, 203 Ill. 2d 410, 418 (2002). Rather, the trial court should dismiss the petition without an evidentiary hearing where the petition is rebutted by the record or fails to allege sufficient facts to make a "substantial showing" of a constitutional violation. *See, e.g., People v. Williams*, 209 Ill. 2d 227, 233 (2004); *People v. Rissley*, 206 Ill. 2d 403, 412 (2003).

This Court should affirm the dismissal of defendant's petition for two independent reasons: (1) the record directly rebuts defendant's allegation that he pleaded guilty in reliance on incorrect legal advice; and (2) defendant's bare assertion that, but for counsel's error, he would have rejected the plea bargain and insisted on going to trial is insufficient to allege prejudice.

I. This Court Should Affirm the Dismissal of Defendant's Postconviction Petition Because the Trial Court Record Flatly Rebuts His Claim.

This Court "has consistently upheld the dismissal of a postconviction petition" without an evidentiary hearing "when the allegations are contradicted by the record from the original trial proceedings." *See, e.g., People v. Torres*, 228 Ill. 2d 382, 394 (2008). This Court should affirm the dismissal of defendant's petition because his allegation that he pleaded guilty in reliance on erroneous legal advice is contradicted by the record.

"It is well-settled that a defendant's acknowledgment in open court, at a plea hearing, that there were no agreements or promises regarding his plea serves to contradict a postconviction assertion that he pled guilty in reliance upon an alleged undisclosed promise by defense counsel regarding sentencing." *Id*. at 396-97. In *Torres*, this Court affirmed the summary dismissal of a postconviction petition and held that Torres's

allegation that he had pleaded guilty based on his counsel's erroneous advice that he would receive a twenty-year sentence (rather than the forty-five years he actually received) was "frivolous and patently without merit," given that at the plea hearing Torres had said that no promises had been made to him. *Id*. at 396-97.

This Court's opinions in *Ramirez* and *Greer* are also instructive. *See People v. Ramirez*, 162 Ill. 2d 235 (1994); *People v. Greer*, 212 Ill. 2d 192 (2004). In *Ramirez*, the defendant alleged that he pleaded guilty based on his attorney's incorrect advice that he would be sentenced to two years of probation, rather than the five-year prison sentence that prosecutors recommended and that he ultimately received. 162 Ill. 2d 237-38. This Court affirmed the dismissal of his postconviction petition because the record showed that at the plea hearing the defendant stated "that no promises or threats had been made by anyone to induce him to plead guilty." *Id*. at 243. Similarly, in *Greer*, this Court held that the petitioner's claim was patently without merit because his "acknowledgement in open court, at a plea proceeding," that no promise had been made to him other than the prosecution's agreement not to seek the death penalty "contradict[ed] his postconviction assertion that he pled guilty in reliance upon an alleged, undisclosed promise by defense counsel regarding sentencing." 212 Ill. 2d at 198, 211.

In addition, *Maury* — a case that this Court has cited twice with approval — is directly on point. *See People v. Maury*, 287 Ill. App. 3d 77 (1st Dist. 1997). Maury pleaded guilty in exchange for a thirteen-year prison sentence. *Id*. at 83. He later filed a postconviction petition alleging that he pleaded guilty based on his counsel's erroneous advice that he was eligible to receive 1.5 days of good-time credit for each day of good behavior, and thus he would serve less than fifty percent of his sentence. *Id*. at 80. The

appellate court held that Maury's claim was rebutted by the trial record, and thus affirmed the dismissal of his petition, because at the plea hearing Maury told the trial court that no one had promised him anything to enter into the plea, other than that he would receive a thirteen-year sentence. *Id*. at 83; *see also Torres*, 228 Ill. 2d at 397 (relying on *Maury*); *Greer*, 212 Ill. 2d at 211 (same).

As in the foregoing cases, here defendant's allegation that he pleaded guilty based on his counsel's erroneous advice about the amount of good-time credit he was eligible to receive is contradicted by the record. At the plea hearing, defendant was advised by the trial court, and stated that he understood (1) the charges against him; (2) the evidence the State was prepared to introduce against him; (3) the maximum and minimum sentences he could receive; and (4) that by pleading guilty he was giving up his right to trial. R.XIII.2-7. Defendant further represented to the trial court that he understood the terms of the plea agreement, namely that (1) he was pleading guilty to AHC; (2) he would be sentenced to eighteen years of imprisonment; and (3) prosecutors would dismiss the home invasion with a firearm charge. *Id*. at 5-6.

The court then asked, "Has anybody promised you anything else?" and defendant responded, "No." *Id*. at 6. There was no mention at the hearing of good-time credits or any suggestion that by pleading guilty defendant would serve anything less than eighteen years of imprisonment. *Id*. Rather, defendant expressly stated in open court his understanding that by pleading guilty he would serve eighteen years of imprisonment. *Id*. Accordingly, defendant's claim that he relied on erroneous legal advice concerning his eligibility for good-time credit and that he would serve only nine years in prison is rebutted by the record and, thus, his postconviction petition was properly dismissed.

Indeed, as this Court has noted, in the face of such a record, to accept a claim that defendant was induced to plead guilty based on undisclosed promises "would require us to characterize the court's lengthy and exhaustive admonitions as merely a perfunctory or ritualistic formality; a characterization we are unwilling to make." *People v. Jones*, 144 Ill. 2d 242, 263 (1991) (allegation that guilty plea was based on incorrect advice that judge would not impose death penalty was meritless given admonishments and defendant's representation at plea hearing that no promises had been made to him).

To be sure, this Court has held that in certain limited cases, involving "unique facts," a colloquy during the plea hearing may not automatically rebut subsequent allegations that a defendant's plea was involuntary. *See People v. Morreale*, 412 Ill. 528 (1952); *People v. Hall*, 217 Ill. 2d 324 (2005). But those cases are inapposite.

In *Hall*, this Court held that the trial court's brief admonishments were not fatal to Hall's subsequent attempt to withdraw his guilty plea because he "was not given any admonition that specifically addressed the erroneous advice of his attorney," i.e., that Hall's lack of knowledge and intent supposedly were irrelevant defenses to kidnapping. *Hall*, 217 Ill. 2d at 339-40. By contrast, here defendant received extensive admonishments that directly addressed and rebutted his claim: the trial court confirmed that defendant understood that he was agreeing to be sentenced to eighteen years of imprisonment and defendant stated that no other promises had been made to him. *Morreale* likewise is inapposite because there the Court noted the "peculiar" circumstances of the case, and held that Morreale could withdraw his plea despite the trial court's admonishments because (1) the pressure exerted by the prosecutor denied Morreale his counsel of choice; (2) the brief and hurried nature of the negotiations, in

which Morreale was represented by an inexperienced attorney not of his choice, inevitably led to his confusion; (3) the prosecutor incorrectly promised Morreale that he would not be harmed by a guilty plea. *Morreale*, 412 Ill. at 532-33. This Court has repeatedly distinguished *Morreale* based on its "unique facts," and none of those unique facts are present (or even alleged) here. *See Jones*, 144 Ill. 2d at 264-65 (distinguishing *Morreale*); *Ramirez*, 162 Ill. 2d 244-45 (same).

Lastly, this Court should reject defendant's suggestion that dismissal of his petition is unfair. *See, e.g.*, Def. Br. 10-11. As the foregoing cases show, such an argument is irrelevant to the present analysis — the only question is whether the record rebuts defendant's claim, and here it plainly does: defendant stated in open court that he was agreeing to an eighteen-year sentence and no other promises had been made to him. Holding defendant to his own words is not unfair.

Furthermore, it is worth noting that even if defendant serves every day of the eighteen-year sentence to which he expressly agreed (to say nothing of the fifteen years he might serve if he earns all available good-time credits), he will have received a very favorable sentence. The evidence defendant concedes the People would introduce at trial — including eyewitness testimony from the victims and multiple police officers — is overwhelming. In addition, as noted above, (1) AHC is a Class X felony subject to a maximum sentence of thirty years of imprisonment; and (2) home invasion is a Class X felony that, due to the fifteen-year firearm enhancement, was subject to a mandatory sentencing range of twenty-one to forty-five years of imprisonment. 720 ILCS 5/24-1.7(b); 720 ILCS 5/19-6(c). Due to the serious nature of defendant's crimes (breaking into his ex-girlfriend's home, pointing a gun at her daughter's head, then charging at

police while pointing a gun), as well as his extensive criminal history (including prior convictions for domestic battery, intent to distribute drugs, and unlawful use of a weapon), it is likely that had defendant rejected the plea deal and gone to trial he would have received much longer sentences for both charges. Indeed, the trial court stated that had defendant been convicted following a trial, "a sentence in excess of 18 years was a 100% guarantee." C202.

In sum, defendant's own words during the sentencing hearing directly rebut his allegations. Thus, this Court should affirm the dismissal of his postconviction petition.[2]

II. Alternatively, This Court Should Affirm the Dismissal of Defendant's Petition Because He Failed to Sufficiently Allege Prejudice.

This Court should affirm the dismissal of defendant's petition for the independent reason that defendant's bare assertion that but for counsel's error he would have rejected the plea deal is insufficient to allege prejudice under this Court's precedent. In addition, defendant's claim that this Court should overturn its precedent is forfeited and meritless.

A. The appellate court correctly applied this Court's precedent when it affirmed the dismissal of defendant's postconviction petition.

When, as here, a postconviction petition reaches the second stage, the trial court must test "the legal sufficiency of the defendant's allegations." *See, e.g., People v. Lucas*, 203 Ill. 2d 410, 418 (2002). If the "allegations in the postconviction petition . . .

[2] Defendant's reliance on *Whitfield* and his claim that holding him to the express terms of the plea bargain would deprive him of the "benefit of the bargain" is likewise unavailing. *See* Def. Br. 10-11. Any such argument is forfeited because defendant failed to raise it in the appellate court, *see, e.g. People v. Williams*, 235 Ill. 2d 286, 298 (2009), and it also is meritless. In *Whitfield*, this Court held that adding three years of supervised release to Whitfield's sentence without admonishing him (as required by Rule 402) denied Whitfield the benefit of his plea bargain. *Whitfield*, 217 Ill. 2d at 190-91. But defendant concedes that the trial court had no duty to inform him of his right to good-time credits, Def. Br. 11, and there is no allegation that the prosecution breached the plea agreement or added new, more onerous terms to the deal.

do not make a substantial showing of a constitutional violation," then the petition should be dismissed without an evidentiary hearing. *See, e.g., People v. Williams*, 209 Ill. 2d 227, 233 (2004). Here, the trial and appellate courts correctly concluded that defendant's petition should be dismissed without an evidentiary hearing because his allegations are insufficient to state an ineffective assistance of counsel claim.

To allege and prove that his plea was rendered involuntary due to counsel's errors, defendant must satisfy the two-part test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), demonstrating that counsel made an objectively unreasonable error that resulted in prejudice. *Hill v. Lockhart*, 474 U.S. 52, 57 (1985). As to the prejudice prong, defendant must show "that there is a reasonable probability that, but for counsel's errors, [defendant] would not have pleaded guilty and would have insisted on going to trial." *Id.* at 59; *see also People v. Hughes*, 2012 IL 112817, ¶ 63 (same). In particular, "a petitioner must convince the court that a decision to reject the plea bargain" and go to trial "would have been rational under the circumstances." *Hughes*, 2012 IL 112817, ¶ 65 (quoting *Padilla v. Kentucky*, 559 U.S. 356, 372 (2010)).

Consistent with that rule, this Court has repeatedly held that "a bare allegation that the defendant would have pleaded not guilty and insisted on a trial if counsel had not been deficient is not enough to establish prejudice." *Hughes*, 2012 IL 112817, ¶ 64; *see also People v. Hall*, 217 Ill. 2d 324, 335 (2005) (same); *People v. Rissley*, 206 Ill. 2d 403, 458 (2003) (same). Rather, "a defendant must assert either a claim of actual innocence or articulate a plausible defense that could have been raised at trial." *Hughes*, 2012 IL 112817, ¶ 64; *see also Hall*, 217 Ill. 2d at 336 (same); *Rissley*, 206 Ill. 2d at 460 (same).

In *Rissley* this Court affirmed the denial of a postconviction petition alleging that the defendant pleaded guilty due to his attorney's bad advice because the defendant "does not now allege that he is innocent, nor does he claim to have any plausible defense that he could have raised" at trial. *Rissley*, 206 Ill. 2d at 460. Similarly, in *Hughes*, this Court held that even if defense counsel were deficient for failing to advise the defendant that by pleading guilty to criminal sexual abuse he could be civilly committed under the Sexually Violent Persons Commitment Act, the defendant was not entitled to withdraw his plea because he "has not articulated any prejudice beyond stating that had he known of the possibility for civil commitment he would not have pled guilty . . . Without more than this mere assertion, defendant has not met his burden." *Hughes*, 2012 IL 112817, ¶ 66.

Here, defendant has offered only a bare allegation that had he been corrrectly informed about good-time credits, he would have rejected the plea bargain and gone to trial. C171-72. He does not allege that he is innocent, articulate a plausible defense that could have been raised at trial, or otherwise explain why it would have been rational for him to reject the very favorable plea bargain offered to him. *Id.* It is well-settled that such a bare allegation is insufficient and, therefore, the appellate court correctly affirmed the dismissal of defendant's postconviction petition. *See Hughes*, 2012 IL 112817, ¶ 64; *Hall*, 217 Ill. 2d at 335-36; *Rissley*, 206 Ill. 2d at 458-60.

Conceding that he has only ever offered a bare claim of prejudice, defendant half-heartedly contends that this case presents unique facts that distinguish it from this Court's precedent and, thus, that the appellate court erred in applying the bare allegation rule and the innocence/plausible defense standard. *See* Def. Br. 21. Defendant's conclusory assertions are meritless.

Defendant first states that his case is distinguishable because he entered into a fully negotiated plea agreement. Def. Br. 21. But this Court has applied the bare allegation rule and the innocence/plausible defense standard to fully negotiated plea deals. *Hughes*, 2012 IL 112817, ¶¶ 7, 64-66; *Hall*, 217 Ill. 2d at 327, 335-36. There is no reason to apply a different pleading or prejudice standard depending on whether a plea is fully negotiated, and defendant has waived an argument that there is by failing to develop his argument or cite any supporting authority. *See* Ill. S. Ct. R. 341(h)(7).

Defendant next argues that his case is distinguishable because his attorney's allegedly erroneous advice did not concern trial strategy. Def. Br. 21. But this Court has applied the bare allegation rule where the allegedly erroneous advice did not relate to trial strategy. *Hughes*, 2012 IL 112817, ¶¶ 43, 64-66 (affirming denial of motion alleging that counsel failed to advise defendant that pleading guilty to sex crime could subject him to involuntary commitment). Moreover, as discussed below, there is no basis to apply a lesser pleading or prejudice standard where the attorney's erroneous advice related to the defendant's eligibility for good-time credits.

Defendant also argues that his case is distinguishable because he did not confess to the police. Def. Br. 21. But this Court has applied the bare allegation rule and innocence/plausible defense standard in cases that did not involve confessions, *see, e.g.*, *Hall*, 217 Ill. 2d at 335-36, and there is no logical basis to restrict that prejudice standard to cases involving confessions nor has defendant articulated one. And in any event, although defendant did not confess to police, he did plead guilty in open court.

Further, to the extent that defendant suggests that the evidence of his guilt is weaker than evidence in other cases decided by this Court, defendant is putting the cart

before the horse — he still has never alleged, not even in his opening brief in this Court, that he is innocent, that he has a plausible defense, or that it would otherwise have been rational for him to reject this very favorable plea bargain. Thus, he has failed to meet the applicable *pleading* standard by failing to allege a necessary element of his claim. That failure formed the basis of the lower court's dismissal of his petition on the pleadings, and makes it unnecessary to examine the strength of the evidence against him.

Moreover, even putting all that aside, defendant's assertion is wrong because the evidence against him is overwhelming. Indeed, as noted above, defendant concedes that the People had numerous eyewitnesses (including several police officers) who would testify that defendant entered his ex-girlfriend's home with a revolver and threatened her children; police responded to reports of the attack and had to force entry into the home; defendant ran toward three police officers while pointing his gun at them; and defendant dropped his gun and was arrested after the officers shot at him. R.XIII.6-7. Such evidence is overwhelming. *See e.g., Lucas*, 203 Ill. 2d at 424 (affirming dismissal of petition because "the record contains overwhelming evidence of guilt, in the form of two eyewitnesses.").

Defendant's final argument is that the appellate court erred in applying the bare allegation rule and innocence/plausible defense standard at the second stage. Def. Br. 21. But this Court has employed those standards at the second stage of postconviction proceedings. *Hall*, 217 Ill. 2d at 335-36. Indeed, doing so is consistent with this Court's longstanding rule that a postconviction petitioner is entitled to an evidentiary hearing only if he alleges sufficient facts to support a substantial showing of a constitutional violation. *See, e.g., Williams*, 209 Ill. 2d at 241-42 (affirming dismissal because

supporting affidavit from one juror attesting that another juror admitted to having improper outside communications during trial "contains no information about the nature of the conversation" and "offers no evidence that the alleged conversation was prejudicial in any respect"); *People v. Delton*, 227 Ill. 2d 247, 258 (2008) (affirming summary dismissal where defendant claimed counsel failed to investigate potential eyewitnesses but did not identify anyone who saw or heard the incident).

In arguing that he is automatically entitled to an evidentiary hearing, defendant principally relies on cases decided before *Hill* and thus before the United States Supreme Court or this Court articulated the standard to plead prejudice in guilty plea cases. *See* Def. Br. 13-14 (citing *Owsley* and *Correa*). Notably, in *Coleman*, the sole post-*Hill* decision from this Court that defendant relies upon for his contention that he is entitled to an evidentiary hearing, this Court reiterated its rule that "nonfactual and nonspecific assertions which merely amount to conclusions are not sufficient to require a hearing" and affirmed the dismissal of two claims where the defendant failed to sufficiently allege that he was prejudiced by his counsel's trial errors. *Coleman*, 183 Ill. 2d at 381, 398-400, 403-407 (cited in Def. Br. 23). Evidentiary hearings are not fishing expeditions, and defendant's failure to satisfy basic pleading standards means that he is not entitled to one.

For similar reasons, defendant also is incorrect when he argues that he is entitled to a hearing because "the only way to support [his] claim was through the testimony of the attorney whose ineffectiveness was being alleged." Def. Br. 7; *see also id*. at 22-23. The dismissal of defendant's petition was unrelated to any lack of evidence regarding his trial counsel's alleged actions. Indeed, the appellate court accepted as true (as it must at the second stage of postconviction proceedings) defendant's allegation that defense

counsel misinformed him about his eligibility for good-time credits. Rather, the basis for the dismissal of defendant's petition was his failure to *allege* that he was *prejudiced* by counsel's actions — *i.e.*, defendant's failure to claim that he is "innocent," "identify a plausible defense to the charges," or otherwise explain why it would have been rational for him to reject this very favorable plea bargain. *Brown*, 2016 IL App (4th) 140760, ¶ 25. Thus, the alleged sparseness of the record and trial counsel's failure to testify at an evidentiary hearing are immaterial — defendant's claim fails because his petition (which was prepared with the assistance of appointed counsel) fails to allege any basis to believe that he is innocent, has a plausible defense, or rationally would have rejected the deal.

In sum, the appellate court correctly applied this Court's precedent when it affirmed the dismissal of defendant's postconviction petition.

B. Defendant has forfeited any argument that this Court should overturn *Hall*, *Rissley*, and *Hughes*.

Defendant implicitly argues that this Court should overturn its decisions in *Hall*, *Rissley*, and *Hughes* because the bare allegation rule and the innocence/plausible defense standard supposedly are inconsistent with United States Supreme Court precedent, could be "characterized" as "unconstitutional," and do not serve the interests of "justice," and because "[i]t is unduly burdensome to expect [defendant] to show prejudice as it is now defined." Def. Br. 21-28. But defendant has forfeited any argument that *Hall*, *Rissley*, and *Hughes* should be overturned by failing to raise it in his petition for leave to appeal (PLA). *People v. Fitzpatrick*, 2013 IL 113449, ¶ 26 ("Issues that a party fails to raise in its [PLA], even if raised in the party's appellant brief, are not properly before this Court and are forfeited.").

Defendant's PLA did not argue that this Court should overturn *Hall*, *Rissley*, and *Hughes*, let alone contend that they are contrary to United States Supreme Court authority. Rather, he argued that (1) this case is distinguishable from *Rissley* and thus the appellate court's reliance on this Court's precedent was misplaced (a claim that defendant half-heartedly repeats in his opening brief) and (2) this Court needed to "clarify" the prejudice standard due to an alleged conflict in the lower courts (an incorrect argument that defendant abandons in his opening brief). *See* Def. PLA at 9, 13, 15. Thus, defendant has forfeited any argument that this Court should overturn *Hall*, *Rissley*, and *Hughes*.

C. Defendant's argument that this Court should overturn *Hall*, *Rissley*, and *Hughes* is meritless.

Forfeiture aside, defendant's argument that this Court should overturn *Hall*, *Rissley*, and *Hughes* is meritless because he has identified no compelling reason to depart from *stare decisis*. *See* Def. Br. 17-32. The doctrine of *stare decisis* "expresses the policy of the courts to stand by precedents and not to disturb settled points." *See, e.g.*, *Williams*, 235 Ill. 2d at 294. "When a question has been deliberately examined and decided, it should be considered settled and closed to further argument." *Id.* Any departure from *stare decisis* "must be specifically justified." *People v. Manning*, 241 Ill. 2d 319, 332 (2011). Defendant must show that the governing decisions "are unworkable or badly reasoned" such that they are "likely to result in serious detriment prejudicial to public interests." *Williams*, 235 Ill. 2d at 294. Defendant does not argue that the standard this Court upheld in *Hall*, *Rissley*, and *Hughes* is an unworkable test for lower courts to apply (nor could he credibly do so) and his contention that those cases are badly reasoned is meritless.

1. This Court's precedent is based on sound reasoning that has been approved by the United States Supreme Court.

This Court "will not depart from precedent merely because it might have decided otherwise if the question were a new one." *See, e.g., Williams*, 235 Ill. 2d at 294 (internal quotations omitted). Rather, defendant must show that the Court's precedent is so "badly reasoned" that it has resulted in "serious detriment prejudicial to public interests." *Id*. Defendant does not come close to carrying that burden.

The bare allegation rule and the innocence/plausible defense standard have their genesis in the United States Supreme Court's decision *Hill v. Lockhart*, 474 U.S. 52 (1985). There, the Court stated that the prejudice standard applicable to defendants who seek to withdraw a guilty plea on the basis of ineffective assistance must "serve the fundamental interest in the finality of guilty pleas." *Id*. at 58. As the Court noted, "Every inroad on the concept of finality undermines confidence in the integrity of our procedures . . . and impairs the orderly administration of justice." *Id*. (internal quotations omitted).

The Supreme Court held that a defendant must allege and show that "but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Id*. at 59. The Supreme Court further explained that "resolution of the 'prejudice' inquiry will depend largely on whether [defendant] likely would have succeeded at trial." *Id*. Notably, in support of that point, the Supreme Court cited a federal appellate decision that affirmed the dismissal of an ineffective assistance claim because the defendant "[did] not deny" committing the charged crimes and the defense he contends he could have raised at trial was "not believable." *Evans v. Meyer*, 742 F.2d 371, 375 (7th Cir. 1984) (cited in *Hill*, 474 U.S. at 59).

Turning to the facts of the case before it, the *Hill* Court affirmed the denial of the petitioner's ineffective assistance claim because he failed to sufficiently allege that he was prejudiced by counsel's incorrect advice about his eligibility for parole. *Hill*, 474 U.S. at 60. In a subsequent decision, the Supreme Court further explained that under *Hill* "a petitioner must *convince* the court" that he would have insisted on going to trial but for counsel's error and "that a decision to reject the plea bargain would have been *rational* under the circumstances." *Padilla*, 559 U.S. at 372 (emphasis added).

As defendant correctly notes, following *Hill* and its progeny, courts across the country began to hold that defendants seeking to withdraw a guilty plea on the basis of ineffective assistance must allege that they are innocent or "articulate a plausible defense" that could have been raised at trial. Def. Br. 26. Indeed, as defendant admits, the innocence/plausible defense standard became (and remains) "the standard prerequisite to showing prejudice" in guilty plea cases. *Id.*

This Court carefully reviewed and considered many of those cases in *Rissley*. There, this Court noted that the prejudice prong of the *Hill* test "may pose a difficulty in some cases because it is by no means obvious how a court is to determine the probability that a defendant would have gone to trial" but for counsel's allegedly incorrect advice during plea negotiations. *Rissley*, 206 Ill. 2d at 458. This Court then went about developing a workable standard that could be applied by the lower courts.

Relying on a number of federal appellate court decisions, this Court agreed that a "bare allegation" that but for counsel's error the defendant would have insisted on going to trial "is not enough" because, among other reasons, such an allegation is "subjective [and] self-serving" and thus would too easily permit defendants without colorable claims

to withdraw guilty pleas. *Id*. at 458-59 (collecting cases). This Court then considered and adopted the prejudice standard used by other courts, and held that a defendant seeking to withdraw a guilty plea on a claim of ineffective assistance must allege that he is "innocent" or articulate a "plausible defense." *Id*. at 459-60 (collecting cases). Because Rissley did not allege that he was innocent and had not articulated a plausible defense, the Court affirmed the denial of his postconviction petition. *Id*. at 460. The Court also upheld and applied the bare allegation rule and the innocence/plausible defense standard in 2005 and again in 2012. *Hall*, 217 Ill. 2d at 335-36; *Hughes*, 2012 IL 112817, ¶ 64.

The Court's reasoning in those cases was sound. The bare allegation rule and innocence/plausible defense standard necessarily follow from the United States Supreme Court's holdings that (1) "resolution of the 'prejudice' inquiry will depend largely on whether [defendant] likely would have succeeded at trial," *Hill*, 474 U.S. at 58; and (2) a defendant "must convince the court that a decision to reject the plea bargain would have been rational under the circumstances," *Padilla*, 559 U.S. at 372; *see also Hughes*, 2012 IL 112817, ¶ 65 (same). Plainly, if a defendant does not even *allege* that he is innocent or has a plausible defense, the defendant is not "likely" to "have succeeded at trial" and a bare allegation that the defendant would have insisted on going to trial is not enough for a court to be "convinced" that rejecting the plea deal would have been "rational."

Thus, this Court has not engaged in "bad reasoning" as defendant must prove. Rather, this Court has carefully crafted a workable standard that (1) is easily understood and applied by lower courts; (2) is entirely consistent with United States Supreme Court authority; (3) protects the finality of guilty pleas; and (4) maintains a reasonable avenue

of relief for defendants who have colorable claims. *Hall*, *Rissley*, and *Hughes* are based on sound reasoning, and *stare decisis* demands that they be upheld.

2. Defendant's criticism of this Court's precedent is meritless.

Defendant's criticism of the bare allegation rule and the innocence/plausible defense standard is meritless. Defendant begins by asserting in conclusory fashion that this Court's precedent is inconsistent with United States Supreme Court case law and notes that an article written by a law student "characterized" this Court's rulings "as unconstitutional." Def. Br. 25, 28. But defendant and the article he relies upon are incorrect. Both ignore that, as an example of the proper "resolution of the 'prejudice' inquiry" in guilty plea cases, the United States Supreme Court in *Hill* cited a federal appellate decision that affirmed the denial of a habeas petition because the petitioner failed to allege that he was innocent and the potential defense he proposed to raise was "not believable." *Hill*, 474 U.S. at 59 (citing *Evans*, 742 F.2d at 375).

Defendant also ignores that, several years after this Court adopted the innocence/plausible defense standard, the United States Supreme Court held that it was reasonable for a state court to conclude that a defendant failed to show the necessary prejudice to withdraw his guilty plea where he did not allege that he was innocent and he had no apparent available defenses. *See Premo v. Moore*, 562 U.S. 115 (2011). Moore pleaded guilty to felony murder in exchange for a twenty-five-year prison sentence. *Id*. at 119. Moore later filed an unsuccessful postconviction petition, alleging that his counsel erred in advising him to accept the prosecution's plea offer without first moving to suppress his confession. *Id*. Moore subsequently filed a habeas corpus petition in federal court, alleging that the state courts erred in denying his ineffective assistance claim, and

the case eventually reached the United States Supreme Court. *Id*. at 120. The Supreme Court held that even if counsel should have moved to suppress Moore's confession (because such a motion likely would have been successful) it was reasonable for the state courts to conclude that Moore failed to establish that he was prejudiced — that is, he failed to establish that he would have rejected the plea bargain and insisted on going to trial but for counsel's error — because Moore did not deny that he murdered the victim and the other evidence against him was "strong" with no mention of any possible defenses. *See id*. at 129-31. That reasoning is a clear endorsement of the bare allegation rule and the innocence/plausible defense standard. Thus, defendant's conclusory assertion that this Court's precedents are inconsistent with United States Supreme Court authority or could be "characterized" as unconstitutional is meritless.

Moore also is one of many cases demonstrating that defendant is wrong to argue that "the strength of a defendant's case" is irrelevant. Def. Br. 25. While defendant is correct that even guilty defendants are entitled to the assistance of counsel under the Sixth Amendment, this is not a case about the denial of representation. *See id*. Rather, the question in cases such as this is whether the defendant has sufficiently pleaded his ineffective assistance of counsel claim, in particular whether the defendant has sufficiently alleged prejudice, and such an analysis involves consideration of the evidence against the defendant. *See, e.g.*, *Hill*, 474 U.S. at 58 ("[R]esolution of the 'prejudice' inquiry will depend largely on whether [defendant] likely would have succeeded at trial."); *Hughes*, 2012 IL 112817, ¶ 64 (same); *Hall*, 217 Ill. 2d at 336 (same). It also is worth noting that to support his observation that all defendants are entitled to counsel, defendant cites the United States Supreme Court's decision in *Kimmelman*, 477 U.S. 365,

and its progeny, *see* Def. Br. 25, but the Supreme Court has rejected an argument that *Kimmelman* supports a lesser prejudice standard in cases where a defendant seeks to withdraw his guilty plea, *see Moore*, 562 U.S. at 131 ("*Kimmelman* concerned a conviction following a bench trial, so it did not establish, much less clearly establish, the appropriate standard for prejudice in cases involving plea bargains.").

The United States Supreme Court's recent decision, *Lee v. United States*, — U.S. —, 2017 WL 2694701 (U.S. June 23, 2017), which was announced after defendant's brief was filed, is not to the contrary. There, Lee's attorney incorrectly advised him several times that he would not be deported if he pleaded guilty. *Id*. at *4. Upon learning that he was subject to deportation, Lee sought to withdraw his guilty plea. *Id*. Lee did not allege that he had any defense to the drug charges against him, but it was undisputed that "deportation was the determinative issue in Lee's decision whether to accept the plea deal." *Id*. at *7-9. Indeed, Lee claimed that his only concern was avoiding deportation and that, therefore, he was prejudiced by counsel's erroneous advice, because (1) he had lived in the United States for the last thirty-five years; (2) he had no ties to South Korea; (3) he was the only family member who could care for his elderly parents in Tennessee; and (4) he had established two thriving businesses in Tennessee. *Id*. at *3, 9.

The Supreme Court stated, "[a]s a general matter, it makes sense that a defendant who has no realistic defense to a charge supported by sufficient evidence will be unable to carry his burden of showing prejudice from accepting a guilty plea." *Id*. at *7. However, given the "unusual circumstances" of the case, Lee had met his burden to show prejudice because it was undisputed that deportation was the determinative issue in his decision whether to plead guilty. *Id*. at *9. As the Court noted, when deportation is the

determinative issue for a defendant, it may be logical for him to insist on trial in the hope that he gets lucky and wins (even if he has no apparent viable defense). Such a defendant has nothing to lose by rejecting a deal because a plea deal with a relatively short sentence that results in deportation is "not meaningfully different" to such a defendant than a jury verdict that results in a slightly longer sentence before deportation. *Id*. at *8-9.

Lee provides no basis to overturn this Court's precedent or to reverse the appellate court's judgment. Rather, *Lee* (1) reaffirms the bare allegation rule; and (2) creates an exception to the innocence/plausible defense standard where the bad advice relates to deportation and the defendant pleads sufficient facts to prove that deportation was the determinative factor in his decision to plead guilty. Defendant's case does not involve deportation; moreover, he has provided only a bare allegation that, but for counsel's error, he would not have pleaded guilty. This is insufficient to allege prejudice.

Defendant also argues that this Court's standards create "a nearly insurmountable obstacle" and are "unduly burdensome." Def. Br. 7, 28. Notably, both this Court and the United States Supreme Court have acknowledged that showing prejudice is difficult, and frequently have explained that it must be so to protect finality and the interests of justice. *See, e.g., Moore*, 562 U.S. at 115 ("Surmounting *Strickland's* high bar is never an easy task"); *Hughes*, 2012 IL 112817, ¶ 63 (same). The United States Supreme Court has emphasized that there must be a "*most substantial burden* on the claimant to show ineffective assistance" because the "stability and certainty" that the plea process brings to the judicial system "must not be undermined by the prospect of collateral challenges." *Moore*, 562 U.S. at 132 (emphasis added). As the Supreme Court explained, "[p]rosecutors must have assurance that a plea will not be undone years later." *Id.* at 125.

"The prospect that a plea deal will afterwards be unraveled . . . could lead prosecutors to forgo plea bargains that would benefit defendants, a result favorable to no one." *Id*.

Indeed, a too-lenient prejudice standard poses a significant risk to the criminal justice system. When a defendant pleads guilty, a pending criminal investigation typically will be stopped, which may forever prevent the prosecution from obtaining valuable evidence that may be needed if the defendant later seeks to withdraw his guilty plea. And even if an investigation was completed before the guilty plea, evidence that was collected may be lost and witnesses may die or disappear by the time a defendant seeks to withdraw his plea. *See, e.g., id*. at 132 (noting need for a "most substantial burden" on defendants to protect against possibility of evidence and witnesses disappearing or never being collected due to plea bargain). An overly lenient standard also could create a perverse incentive for defendants to enter into blind plea agreements in the hope that the judge will impose a favorable sentence and then seek to withdraw the plea if the sentence proves unsatisfactory.

Furthermore, defendant is objectively incorrect when he suggests that the bare allegation rule and the innocence/plausible defense standard are "impossible" to meet or "unduly burdensome." *Hall* held that the prejudice standard was met, and the defendant was entitled to a hearing, where his petition alleged that he did not know a child was in the car he stole, because that was sufficient to constitute a claim of innocence and a plausible defense to the kidnapping charge to which he had pleaded guilty. *Hall*, 217 Ill. 2d at 336. Similarly, in *Clark* the appellate court found that the defendant had sufficiently alleged a "plausible insanity defense," and thus was entitled to an evidentiary hearing, because he submitted an affidavit from his girlfriend stating that when Clark

committed his crimes he was not taking his medication and was hearing voices telling him to stab someone. *Clark*, 2011 IL App (2d) 100188, ¶¶ 28-30 (cited in Def. Br. 20).

That defendant, and the counsel who have represented him in these postconviction proceedings, have failed to assert that he is innocent or articulate a potential defense is not because the bare allegation rule and innocence/plausible defense standard are insurmountable burdens for all defendants. Rather, it is because the evidence against this defendant, including the testimony of multiple eyewitnesses, overwhelmingly proves his guilt.

Finally, defendant also suggests, without any clear explanation, that a different prejudice standard should apply when defense counsel's allegedly incorrect advice relates to eligibility for good-time credits. Defendant fails to articulate any precise standard that would be workable, easily understood and applied by the lower courts, and protect the judicial system's vital interest in the finality of guilty pleas. In fact, it is especially important to maintain the bare allegation rule and the innocence/plausible defense standard when the alleged error relates to advice about good-time credits because it is so easy for a defendant to misrepresent conversations he supposedly had with counsel off the record regarding sentencing.

As noted above, *supra* at 23-24, after defendant filed his opening brief in this Court, the United States Supreme Court issued its opinion in *Lee*, which (1) reaffirms the bare allegation rule; and (2) creates an exception to the innocence/plausible defense standard in cases where defense counsel's bad advice relates to deportation and the defendant alleges facts sufficient to show that the likelihood of deportation was the determinative factor in his decision to plead guilty. *Lee*, — U.S. —, 2017 WL 2694701.

Lee does not support defendant's argument that this Court should craft an exception to the applicable pleading or prejudice standards in cases involving good-time credits.

Incorrectly telling a defendant whose primary desire is to avoid deportation that he will not be deported if he pleads guilty is fundamentally different than misadvising a defendant about his eligibility for good-time credits. As the Supreme Court noted, in cases such as *Lee*, defense counsel's incorrect advice causes the defendant to plead guilty in complete ignorance of an *automatic* and "dire" consequence, one that understandably will often be the "determinative" issue for him — in Lee's case, he would be separated from his family, friends, and professional interests in the United States where he has lived for decades and deported to a country to which he has no connection. By contrast, here it is undisputed that defendant was fully informed of the most severe consequence he faced if he pleaded guilty — he told the trial court that he understood that he was agreeing to be sentenced to eighteen years in prison. To the extent this defendant was incorrectly informed, it was about his *contingent* ability to serve potentially *less* than the bargained-for eighteen years *if* his behavior were sufficient to earn good-time credits. Failing to correctly inform a defendant that he is certain to face an additional, more onerous consequence than his prison sentence (deportation) is far different than incorrectly advising a defendant of his contingent ability to potentially reduce the time he agreed to serve through good-time credits. Indeed, that difference is reflected in the fact that a trial court is statutorily required to inform a defendant that pleading guilty could lead to deportation, but is not required to inform him of his eligibility for good-time credits. *See* 720 ILCS 5/113-8 (trial court must admonish defendant about deportation

consequences of pleading guilty); Def. Br. 11 (conceding court is not required to admonish defendant regarding good-time credits).

Most importantly, *Lee* is grounded on the fact that Lee had nothing to lose by going to trial, even if he had no viable defense and trial was a "Hail Mary," because pleading guilty (which automatically led to his deportation) was not "meaningfully different" to Lee given his personal circumstances than losing at trial (which also would automatically lead to his deportation). *Lee*, — U.S. —, 2017 WL 2694701, at *8-9. As the Court explained, because pleading guilty and losing at trial were "similarly dire" outcomes to Lee in that they both resulted in deportation, it would be rational for him to insist on trial in the hope that he would get lucky and win (thus avoiding deportation), even though his chances of winning were "improbable." *Id*. But here, where the only issue is the amount of available good-time credits, defendant has *everything* to lose by rejecting a favorable deal and going to trial. As noted, the evidence of defendant's guilt is overwhelming and, as the trial court said, if defendant were convicted following a trial "a sentence in excess of 18 years was a 100% guarantee." *Supra* at 9-10; C202. Indeed, as noted, on the home invasion with a firearm charge defendant faced a mandatory minimum of twenty-one years of imprisonment (to say nothing of the AHC charge) and, given the very serious nature of defendant's crimes and his extensive criminal history, he would be extremely lucky not to get significantly more than that. *Supra* at 9-10. It is difficult to envision what facts a defendant could ever allege in such circumstances to show that, but for incorrect advice about good-time credits, it would have been rational for him to reject a favorable plea bargain and take his chances at trial even though he had no viable defense, it was a "100% guarantee" that he would receive a longer sentence if

convicted, and he would have to serve eighty-five percent of any sentence imposed whether he pleaded guilty or not.

In any event, *Lee* plainly upholds the bare allegation rule and it is undisputed that defendant has provided nothing more than a bare allegation that, but for counsel's alleged error, he would have rejected the very favorable plea deal offered to him. Thus, even under the most generous reading of *Lee*, the appellate court's judgment should be affirmed.

3. The overwhelming weight of authority from other jurisdictions supports this Court's precedent.

That the overwhelming weight of the authority from other jurisdictions supports this Court's precedent is an additional reason to reject defendant's contention that this Court should overturn *Hall, Rissley*, and *Hughes*.

As defendant concedes, a review of case law from other jurisdiction demonstrates that alleging innocence or a plausible defense is "the standard prerequisite to showing prejudice" in guilty plea cases. Def. Br. 26. Indeed, courts across the country apply the bare allegation rule and the innocence/plausible defense standard, even in cases where the alleged error related to sentencing and no evidentiary hearing was held. *See, e.g., People v. Moreno-Espada*, 666 F.3d 60, 65-66 (1st Cir. 2012) (no prejudice in miscalculating defendant's sentence); *United States v. Horne*, 987 F.2d 833, 836 (D.C. Cir. 1993) (miscalculation of applicable sentencing range not prejudicial); *Czere v. Butler*, 833 F.2d 59, 61, 64 (5th Cir. 1987) (incorrect advice that defendant would be eligible for parole in twelve years, rather than eighty, not prejudicial); *Stiger v. Commonwealth*, 381 S.W.3d 230, 237-38 (Ky. 2012) (similar); *see also, e.g., United States v. Sutton*, 794 F.2d 1415, 1422 (9th Cir. 1986); *United States v. LaBonte*, 70 F.3d 1396, 1413 (1st Cir. 1995), *rev'd*

on other grounds, 520 U.S. 751 (1997). And, as discussed above, *supra* at 21-24, on multiple occasions the United States Supreme Court has approved state and federal courts' application of the bare allegation rule and (subject to *Lee's* deportation exception) the innocence/plausible defense standard.

In the face of this overwhelming authority, defendant relies on a small handful of cases that he contends do away with the bare allegation rule and the innocence/plausible defense standard, all of which he misreads. Def. Br. 18-20, 27-31.

Three of the cases defendant relies on actually support the bare allegation rule and the innocence/plausible defense standard. *See* Def. Br. 20, 30 (citing *Clark*, *Kitchell*, and *Pridham*). In *Clark*, the Illinois appellate court expressly relied on this Court's decision in *Hall* and held that Clark adequately alleged prejudice because he provided an affidavit of a witness who would have supported a "plausible" insanity defense. *Clark*, 2011 IL App (2d) 10018, ¶¶ 9, 28-30. Defendant's second case, *Kitchell*, cites *Hall* and discusses *Clark* at length as a "similar" and "instructive" case, and thus *Kitchell* cannot be said to reject this Court's precedent. *Kitchell*, 2015 IL App (5th) 120548, ¶ 12. In defendant's third case, *Pridham*, the Kentucky Supreme Court stated that the prejudice prong must impose a "substantial burden," held that defendants must "allege specific facts" demonstrating prejudice, and cited a companion case, decided that same day, as an example of the proper application of the prejudice standard. *Pridham*, 394 S.W.3d at 880 & n.9 (citing *Stiger v. Commonwealth*, 381 S.W.3d 230 (Ky. 2012)). In turn, that companion case affirmed the dismissal of a postconviction petition alleging that the defendant's plea was rendered involuntary by defense counsel's incorrect advice about parole eligibility because the defendant "has not alleged a viable defense" that he could

have raised at trial or any other rational basis to reject the plea bargain. *Stiger*, 381 S.W.3d at 238. As the court explained, "[i]f the prejudice prong of *Strickland/Hill* were satisfied by the movant simply saying he would not have taken the deal absent the misadvice, it would be rendered essentially meaningless." *Id*. at 237, n.3.

With one exception, the remainder of the cases defendant relies on do not discuss the bare allegation rule or the innocence/plausible defense standard at all, let alone affirmatively reject them. *See* Def. Br. 18-19, 31 (citing *Stewart*, *Webb*, *Patterson*). Two of those cases — *Stewart* and *Webb* — concern the performance prong of *Strickland*, namely the scope of counsel's obligation to provide advice concerning certain collateral consequences of pleading guilty and whether the record refuted the petitioner's claim that he was not correctly advised; there is no discussion in those cases of the bare allegation rule or the innocence/plausible defense standard, let alone an assertion that those rules are inapplicable. *Stewart*, 381 Ill. App. 3d at 205; *Webb*, 334 S.W.3d at 130. To the extent that *Stewart* could be read as not applying the innocence/plausible defense standard, the Fourth District, which issued *Stewart*, has held that the opinion was "mistaken." *Brown*, 2016 IL App (4th) 140760, ¶ 25. Similarly, although the third case, *Patterson*, from a Missouri appellate court, held that the defendant adequately alleged prejudice, the decision includes no discussion of the innocence/plausible defense standard, this Court's precedent, or similar authorities. *Patterson*, 92 S.W.3d at 212.

The only case defendant cites that affirmatively held that a petitioner need not allege innocence or a plausible defense is *People v. Deltoro*, 2015 IL App (3d) 130381 (cited in Def. Br. 27-28). But Deltoro "alleged that he was not guilty of the charged offenses" and disputed the State's basis for the charged offenses; thus, any statement in

Deltoro that a defendant need not meet the innocence/plausible defense standard is dicta. *Id.* ¶¶ 4-6, 26.

Furthermore, defendant himself admits that *Deltoro* is "not precisely on point," an admission that understates how different *Deltoro* is from the present case. Def. Br. 27. *Deltoro* involved defense counsel's failure to advise his client about deportation. Similar to the Supreme Court in *Lee*, the *Deltoro* court asserted that, due to the harsh consequences that deportation often imposes, it may be rational for a defendant to reject a plea deal that leads to deportation even if he has only a small chance of winning at trial (and avoiding deportation). *Deltoro*, 2015 IL App (3d) 130381, ¶¶ 23-26. The court thus concluded that in cases involving deportation, the assertion of innocence or a plausible defense is unnecessary as long as the defendant alleges other specific facts demonstrating that he rationally would have rejected any deal that would lead to deportation. *Id*. Notably, the court held that Deltoro met that burden by alleging that (1) his friends and family all lived in the United States; (2) he had no ties to Mexico; (3) he had lived in the United States for the last thirty-five years; and (4) he was not guilty of the charged offenses. *Id*. ¶ 26.

This case, of course, does not concern deportation. Furthermore, unlike *Deltoro*, defendant's counseled petition alleged no facts explaining why it would have been rational for him to reject a favorable plea bargain and take his chances at trial. Rather, defendant has offered nothing more than a bare, self-serving assertion that he would have insisted on going to trial despite the overwhelming evidence against him and that any lengthier sentence imposed following trial would also be served at eighty-five percent. Thus, defendant's petition is deficient.

* * *

In sum, defendant falls far short of proving that this Court should overturn *Hall*, *Rissley*, and *Hughes*. The bare allegation rule and innocence/plausible defense standard are well-reasoned, consistent with the rules applied by the overwhelming majority of other jurisdictions, and easily applied by the lower courts. Those requirements protect the finality of judgments, yet still provide an opportunity for defendants with colorable claims to seek to withdraw their pleas. This Court should reaffirm its precedent and affirm the dismissal of defendant's petition.

CONCLUSION

For the foregoing reasons, respondent respectfully requests that this Court affirm the appellate court's judgment.

July 11, 2017

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RULE 341(c) CERTIFICATE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, and the certificate of service, is thirty-three pages.

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PROOF OF FILING AND SERVICE

Under penalty of law as provided in 735 ILCS 5/1-109, the undersigned certifies that the statements set forth in this instrument are true and correct, including that the foregoing **Brief of Plaintiff-Appellee People of the State of Illinois** was filed with the Clerk of the Supreme Court of Illinois, using the court's electronic filing system, and that it was served by placing a copy in an envelope with proper prepaid postage affixed and directed to the persons named below at the address indicated, and by depositing the envelope in the United States mail at 100 West Randolph Street, Chicago, Illinois 60601 on July 11, 2017.

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Additionally, upon its acceptance by the court's electronic filing system, the undersigned will mail an original and twelve copies of the brief to the Clerk of the Supreme Court of Illinois, 200 East Capitol Avenue, Springfield, Illinois, 62701.

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