No. 122307

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, -vs- TORRENCE D. DUPREE Defendant-Appellant	))))))))))	Appeal from the Appellate Court of Illinois, No. 2-14-1013. There on appeal from the Circuit Court of the Nineteenth Judicial Circuit, Lake County, Illinois, No. 10 CF 1138. Honorable Daniel B. Shanes, Judge Presiding.

BRIEF AND ARGUMENT FORDEFENDANT-APPELLANT

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POINTS AND AUTHORITIES Page

NATURE OF THE CASE

Torrence D. Dupree, petitioner-appellant, appeals from a judgment dismissing his post-conviction petition at the second stage of post-conviction proceedings.

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

ISSUE PRESENTED FOR REVIEW

Torrence Dupree filed a post-conviction petition alleging that defense counsel was ineffective for failing to call eyewitness Matt Morrison to testify at his armed robbery trial. To support his claim, Dupree attached Morrison's handwritten statements to the police and police general case reports describing identifications Morrison made to the police shortly after the offense, which indicated that Dupree was not the gunman. The appellate court affirmed the dismissal of Dupree's petition after concluding that the absence of Morrison's affidavit violated Section 122-2 of the Post-Conviction Hearing Act.

Where Section 122-2 states that a "petition shall have attached thereto affidavits, records, or other evidence supporting its allegations," is an "affidavit" the only evidence that can support a claim that counsel's failure to call a witness constituted ineffective assistance? If not, did Dupree's petition and attached documentation in this case satisfy Section 122-2 and make a substantial showing of a constitutional violation?

STATUTES AND RULES INVOLVED

§ 122-2. Contents of Petition. The petition shall identify the proceeding in which the petitioner was convicted, give the date of the rendition of the final judgment complained of, and clearly set forth the respects in which petitioner's constitutional rights were violated. The petition shall have attached thereto affidavits, records, or other evidence supporting its allegations or shall state why the same are not attached. The petition shall identify any previous proceedings that the petitioner may have taken to secure relief from his conviction. Argument and citations and discussion of authorities shall be omitted from the petition.

STATEMENT OF FACTS

Torrence Dupree was found guilty of armed and aggravated robbery based on the testimony of two eyewitnesses. Kiernan Collins, who did not identify Dupree in court, told the police only that Dupree was the person who "most resembled" the gunman when he viewed a lineup, and was only "seventy percent" sure of that choice. Steven Nowell, who only identified Dupree (by "voice") after police threats and promises of leniency, also received a very favorable plea deal in exchange for his testimony.

Dupree filed a post-conviction petition alleging that trial counsel was ineffective for failing to call Matthew Morrison, a third eyewitness and alleged victim of the same offenses. To support his claim, Dupree attached police general case reports, as well as signed and handwritten statements Morrison gave to the police. These documents demonstrated that Morrison told the police shortly after the robbery that the gunman was as tall as 6' 3" (Dupree is 5'8"); he failed to identify

Dupree in a photo lineup that contained his picture; and he identified someone who was not Dupree as the gunman in a second photo lineup. The trial court denied Dupree's post-conviction petition, and the Second District Appellate Court affirmed, finding that Dupree failed to include sufficient supporting documentation under 725 ILCS 5/122-2, because Morrison's affidavit was not included with the petition. This Court granted leave to appeal.

TRIAL

The Robbery

The State's evidence showed that there were three eyewitnesses to this alleged armed robbery: Steven Nowell, Kiernan Collins, and Matthew Morrison. It called Nowell and Collins in its case-in-chief. Kenyatta Whiteside – Nowell's girlfriend – also testified for the State.

Nowell had been charged with both aggravated robbery and robbery in relation to this case. He admitted that he agreed to testify against Dupree in exchange for a reduction of those charges to theft, as well as a sentence of probation plus 156 days in jail. He had already served 150 days at the time of his plea (R. 541-44, 600). He further admitted that he had retained some of the proceeds of the crime – Morrison's cell phone – after the alleged robbery, and that he made several calls with it (R. 584-85).

Nowell testified that on February 16, 2010, he was at Kramer's apartment, in the Grayslake Apartment complex, with Cedric, "Blue," and Dupree (R. 548, 566). Nowell, Kramer, and Blue left to get food at McDonald's, and picked up Nowell's girlfriend, Kenyatta Whiteside, on the way (R. 546, 566-67). Whiteside was pregnant with Nowell's child at the time (R. 647). Dupree and Cedric did not

accompany them (R. 570, 572). When the group returned from McDonald's, Nowell and Whiteside went to Whiteside's home at Grayslake Apartments (R. 571).

Nowell testified that he used Whiteside's phone to call Morrison to arrange a purchase of marijuana. Whiteside denied this, testifying that she and Nowell shared the same cell phone and that it had been in her pocket, so he could not have used it without her knowing (R. 548, 573, 656-59, 664). About ten minutes later, Dupree unexpectedly arrived at Whiteside's apartment and asked to use Whiteside's phone (R. 548, 574). After the call, Dupree asked Nowell if he was getting marijuana from "Matt," and left when Nowell said no (R. 549-51, 577). Nowell did not want to tell Dupree about the marijuana because he knew what Dupree was "capable of doing," and because he did not want to share (R. 552, 576). Nowell walked out of the apartment with Dupree, and watched Dupree leave the apartment complex (R. 577).

Around the same time, Kiernan Collins was with Morrison at Morrison's girlfriend's home in Wildwood, Illinois (R. 480). They left in Morrison's blue two-door Honda Civic, ostensibly to get some food (R. 482). *See* People's Exhibits ("PE") 7-9. Morrison drove to Grayslake Apartments, and told Collins he was going to meet up with a friend named Steven Nowell (R. 482). Collins figured it was a drug deal, although he did not know that ahead of time (TR. 482-83). Collins had known Morrison for about five years, but did not know that Morrison sold marijuana until that day (R. 512-14, 518).

Morrison parked in the parking lot at Grayslake Apartments, and Nowell approached the car from behind and got into the front passenger's seat (R. 484-85, 553). Collins had moved to the rear passenger's seat (R. 484, 486). Morrison drove

the car out of the parking lot (R. 486). Nowell testified that after a few minutes, Whiteside called him from her house phone to tell him that he left his money at home, but Whiteside denied it (R. 555, 579, 666). Collins testified that Nowell said he forgot something and had to go home; he saw Nowell talking on a cell phone, but never heard it ring (R. 521).

Morrison drove back to the parking lot, and Nowell got out of the car and went up to the apartment (R. 486, 555). When Nowell returned, Collins saw, from the corner of his eye, someone following Nowell (R. 488). Collins was still in the backseat of the two-door car (R. 487). Nowell said that he got into the car, and the gunman then pulled open his door (R. 555). Collins testified that the gunman pushed Nowell into the car before he got inside, and that Nowell was on his back with half of his body inside the car, and with his legs hanging outside of the car (R. 488).

It was 7:30 at night in February, and it was dark outside (R. 494). The gun was just six inches from Collins's face, and the gunman's face was between one and a half to two feet away (R. 493). The gunman was wearing a black hooded sweatshirt; the hood was up, and it came down to his eyebrows (R. 494). The hood covered the sides of his face and cheeks (R. 495). Collins got a look at the gunman's face from inside the car, but for less than a minute (R. 494, 495). He only "vaguely" saw the gunman's face (R. 537). Collins said he was avoiding looking at the gunman's face; he was looking at the passenger's seat with his head down and hands up, and his focus was primarily on the revolver, not the face (R. 494, 527-28). The gunman did not have a beard or goatee, but had something of a mustache (R. 529). Collins was "confident" the gunman was over six feet tall, and estimated that

he was 6' 1" or 6' 2" (R. 525-27, 531). Dupree is 5'7" or 5'8" tall (R. 794).

Collins said that the gunman asked Morrison where the "stuff" was, patted him and Morrison down, and told Nowell to pat him down (R. 489). Collins reached into his front pocket, took out his wallet, and gave $100 to the gunman (R. 489). Nowell testified that the gunman put the gun to his head and ordered him to go through Morrison's and Collins's pockets, and that both had their money out before he could do so (R. 556). The gunman also ordered Nowell to take the cell phones, so he took Morrison's cell phone (R. 558). Collins said that Nowell was just standing outside of the car when the gunman took their things, and that Nowell did not try to run away (R. 491, 530).

Morrison took the keys off of the console and put them in the ignition to try to drive off, which caused a "scuffle" between him and the gunman over the keys and the gear shift (R. 490, 558). Collins said that after this scuffle, the gunman reached into the backseat and grabbed Morrison's backpack (R. 490, 496). Nowell, by contrast, said that he re-entered the car because he did not want to leave Morrison with the gunman, and that he complied with the gunman's order to give him the backpack, after which Nowell got back out of the car and walked back toward Whiteside's apartment (R. 559). Morrison drove off with Collins after the gunman took the backpack (R. 559).

Nowell said that the gunman followed him back towards the apartment, but jumped into a van and drove off because Nowell did not have any keys (R. 559). Nowell said that he was "certain" he saw Dupree using his cousin's black Jeep earlier that day, but that vehicle had been repossessed nearly a month earlier (R. 570, 575, 796). Nowell thought Dupree's aunt owned a Plymouth van, and

that Cedric owned a yellow van (R. 570). He did not see the Jeep, or either van, when he came back to Morrison's car the second time (R. 582).

Nowell admitted that he possessed Morrison's stolen cell phone after the robbery (R. 584). He originally told Detective Kueber that he gave Morrison's phone to the gunman, but that was a lie (R. 586). Nowell agreed with the prosecutor's assertion that he kept the phone because the gunman "didn't have an opportunity to take [Morrison]'s phone from [his] hand" after the scuffle over Morrison's keys (R. 558). Nowell used Morrison's phone to call his girlfriend and Linda Lee after the robbery (R. 585). He claimed he no longer had the phone, and that he threw it away because it did not belong to him (R. 585). When asked why he simply did not return it to Morrison, he said he "wasn't thinking" (R. 585). Nowell also testified that he had dropped his girlfriend's phone somewhere in Morrison's car during the robbery, and that it was still there as far as he knew (R. 587, 606). However, Whiteside testified that she still had her cell phone after the alleged robbery, and that Morrison called her phone later that night (R. 668-69).

Nowell said that he identified Dupree as the gunman "by his voice," but did not see the gunman's face (R. 560). He agreed that he initially did not identify Dupree to the police, and did so only after a police interrogation (R. 587).

The prosecution did not call Morrison to testify. Officer Manges testified that Morrison had indicated that one of the suspects was as tall as 6' 3"and that no one had entered his car, but said that some of Morrison's statements "were disproved" (R. 699, 701). Although Manges had information that one of the suspects was 6'3", he did not look on the top of the car or anywhere on the higher side of the car for fingerprints (R. 700). On redirect examination, Manges testified that

Morrison said he was jumped on foot in a parking lot (R. 701). The judge admonished the jury that because Morrison did not take the stand, they could not consider the truth of Morrison's statements (R. 696-97).

Collins's and Nowell's statements to the police

Neither Collins nor Nowell went to the police right away. Collins did not want to be involved, but cooperated with police when they contacted him on February 18, 2010, two days after the incident (R. 500-501). Collins told the officers that the gunman was a black male between 20 and 25 years old with a dark complexion and a thin-to-average build (R. 502).

Detective Warner showed Collins a photo array lineup of six photos, and Collins chose photo number six – Dupree – as the person "who most resembled the gunman" (R. 504, 619). When asked if he was one hundred percent sure that Dupree was the gunman, Collins answered in the negative, indicating that he was "seventy percent sure" (R. 504, 619). On cross-examination, Collins clarified that he did not tell the police that Dupree was the gunman, just that he was the person in the lineup who "most resembled" the gunman; he also repeated that he was only seventy percent sure (R. 533). Collins never identified Dupree in court.

Nowell turned himself in to the police on February 17, 2010, the day after the robbery (R. 724). The police had been looking for him after speaking with Morrison, and had received calls from several people about Nowell, including Blue, Whiteside, and Nowell's aunt, who promised to produce him (R. 737-40). When Nowell arrived at the police station, he believed that the police wanted to see him because people in the neighborhood were saying that "he set this guy up for this robbery" (R. 740). Nowell was considered a suspect in the robbery from the very

beginning, and Detective Keuber did not believe that he was a victim of the robbery (R. 587, 738, 741).

Kueber testified that his initial strategy was to "be nice" to Nowell, but after Nowell repeatedly denied knowing who the gunman was, Kueber "switch[ed] gears and bec[a]me more of an accuser" (R. 741-42). Kueber told Nowell that the State had already charged him; that he was going to take the fall and needed to help himself; and that he was going to be the only one that goes down for this thing (R. 591, 598, 748). Kueber also told Nowell that he was getting "jammed up on this thing"; that he was the "big fish" and "needs to become the smaller fish"; and that he "needs to shine the light on somebody else" (R. 591, 748, 761).

Kueber refused to accept that Nowell did not know the gunman's identity (R. 591-92). Nowell knew from the very first time he met Kueber that the police wanted him to say that Dupree was the gunman, and testified that Kueber was convinced that Dupree was the gunman (R. 590, 602). Nowell said that when he repeatedly denied knowing the gunman's identity, Kueber kept telling him that Nowell knew it was Dupree (R. 591). Kueber initially testified that Nowell did not have to identify Dupree, but later admitted that he told Nowell that he believed the gunman was Dupree, and that he told Nowell "several times that [the gunman] was Mr. Dupree" (R. 754, 756).

Even then, although Nowell and Dupree had previously had arguments where the police were called, Nowell did not yet identify Dupree (R. 605, 748). Kueber agreed that Nowell gave multiple reasons why it could not have been Dupree, and that he told Kueber that he could not say it was Dupree because he did not want to see an innocent person locked up (R. 762). Nowell told Kueber that the

gunman was tall and that Dupree was short; the gunman was taller than six feet; and that Leon Hudson may have been the gunman, because he was tall (R. 744, 754, 758, 762). Nowell agreed that Kueber, however, had "tolerance to hear only one thing, [that] the other guy was Torrence Dupree"; he did not want to hear that it might be "anyone else" (R. 592).

After multiple denials, Kueber told Nowell he was "on the hook for this," and Nowell got upset and asked for a lawyer (R. 590, 592, 755). Kueber told Nowell that his request for a lawyer meant he could not interview him anymore, but added that Nowell would have to spend the night in jail, showed Nowell a warrant for his arrest on charges of armed robbery, aggravated robbery, and robbery, and explained how much money it would take to bond him out of jail (R. 755-756). That was the first time Kueber told Nowell that he was not going to go home that night, and the first time that Nowell realized he was not going home (R. 592-93, 755).

Kueber then told Nowell that he if cooperated, Kueber would "go to bat with him with the State's Attorney's Office," and that he would "help in the charges" (R. 756, 761). Kueber also told Nowell he could possibly get an I-bond, meaning he could get out of jail without having to pay any money (R. 766-67). Nowell withdrew his request for a lawyer because he did not want to spend the night in jail, and kept talking to Kueber (R. 593-94).

Nowell eventually said "what do I have to do," and Kueber told him he needed to tell them who the gunman was, and that he needed to help himself (R. 754). Nowell asked "who do I have to point out," and Kueber told Nowell he was a smart guy who knew how to get out of trouble (R. 757, 758). Nowell knew Kueber wanted

him to identify Dupree (R. 602). Nowell started to tell Kueber that maybe he recognized Dupree's voice, although he maintained he never saw the gunman's face (R. 594). At that point, Nowell had been in the interrogation room for around two hours. In between interviews, Nowell would sleep in the room with his arms tucked into his shirt; Kueber agreed that he was cold (R. 759). Kueber did not let Nowell call anybody, and Nowell did not receive any food until the interview was over (R. 760).

After identifying Dupree's voice, Nowell agreed that he told Kueber he was afraid for his life (R. 608), but Kueber admitted that he had provided Nowell with several "scenarios about being afraid of the other guy," hoping that Nowell would agree (R. 758). Nowell ultimately gave the police a handwritten statement identifying Dupree as the gunman, but agreed that he was not given the opportunity to give a handwritten statement when he told the police that it was not Dupree (R. 612). The State also showed the jury a 50-second clip from the end of Nowell's police interview with Kuebler, where he identified Dupree (R. 736-37).

Nowell testified that he immediately took the State's eventual plea deal, and that the deal required him to come into court to say Dupree was the gunman (R. 601-602). He knew that if he did not cooperate, he would face charges of armed robbery, aggravated robbery, and robbery, and would have to go back to jail (R. 602). In exchange for his identification testimony, Nowell received a conviction for a theft, with a sentence of probation plus six additional days in jail (he had already been in jail for 150 days awaiting trial) (R. 541-44, 600).

No physical evidence linked Dupree to the crime. State forensic experts and Officer Manges, who was a certified evidence technician, testified that they

inspected Morrison's vehicle, where they took fingerprint samples suitable for comparison, but those examinations were inconclusive when attempts were made to match them to Dupree's fingerprints (R. 674-701;717-18). The prosecution never called Morrison to testify.

Phone calls

Whiteside claimed at trial that Nowell called her after the robbery and said that Dupree had just robbed somebody (R. 654). However, Whiteside had never mentioned this statement to authorities before trial, and first told prosecutors about it the night before her testimony, after Nowell had testified (R. 633). Dupree's trial counsel did not learn of it until the morning she took the stand (R. 633). Nowell had never previously mentioned this conversation to authorities, nor when he testified, but on the morning of Whiteside's testimony, he told the prosecutor and defense counsel in the court hallway that he made this statement (R. 636).

Collins testified that he received a collect phone call from the county jail on July 23, 2010, a few weeks before the trial began on August 10 (R. 508, 510). When he heard the call was from "Torrence," he hung up, and no conversation took place (R. 511). In a Lake County Jail audio phone recording from July 15, 2010, Dupree told his cousin Leon Hudson that he found out that someone was going to testify against him in return for a plea deal, and to "let everybody know, man, I want his head on a platter" (R. 732-734, 771-82). Dupree also made a call on July 25, in which he told a woman that he called "one of the white boys," "but he didn't accept the call" (PE 25, 26; R. 782).

Nowell also claimed that in the time between the robbery (February 16) and when he turned himself in to the police (February 17), he received "more than

one" threatening call from Dupree on his "[c]ell phone" (R. 562). No phone records were presented to corroborate this claim, and Nowell had previously testified that he left the cell phone he shared with Whiteside in Morrison's car during the robbery on February 16, and that he did not know where it was (R. 587, 606, 658-59).

Defense case

The only defense witness was Leon Hudson, Dupree's cousin, who described Dupree as 5'7" or 5'8" tall, and explained that the black Jeep Liberty was repossessed on January 26, 2010, nearly a month before the alleged robbery in this case (R. 794, 796). The defense additionally presented a document Hudson received from the Consumer's Credit Union confirming that date of repossession (R. 796).

Verdict & Sentencing

The jury returned guilty verdicts on the offenses of armed robbery and aggravated robbery (two counts of each as to Matt Morrison and Kiernan Collins) (C. 140-143; R. 914). The judge imposed a 22-year sentence, and denied defense counsel's motion to reconsider sentence (R. 970, 979-80; C. 215).

DIRECT APPEAL & NEW SENTENCING HEARING

Dupree raised two issues on direct appeal: (1) that he should have been permitted to present evidence that he sent a non-threatening letter to Collins explaining his innocence to counter the State's phone evidence; and (2) that the judge's consideration of the 15-year firearm enhancement in imposing the 22-year prison sentence was error. The Second District Appellate Court rejected the first argument, but remanded for the judge to clarify whether he applied the 15-year enhancement, and if he did, to vacate the sentence and hold a new sentencing

hearing. *People v. Dupree*, 2012 IL App (2d) 101247-U. On August 24, 2012, the judge imposed a 15-year sentence (R. 993-999).

POST-CONVICTION PETITION & PROCEEDINGS

Dupree filed a *pro se* post-conviction petition on January 14, 2013 (C. 265). Private post-conviction counsel then filed an "amended petition" on April 5, 2013, followed by a "second amended" petition on July 3, 2013, and culminating in a "third amended" petition on October 1, 2013 (C. 312, 328, 349). Dupree's third amended petition argued, *inter alia*, that trial counsel was ineffective for not calling Matthew Morrison to testify (C. 354, 357, 362). In support, counsel attached over 160 pages of exhibits, which included relevant transcript pages, Morrison's three handwritten statements, and police General Case Reports ("GCRs") (R. 370-484) (double-sided).

Morrison's handwritten statements

Morrison's handwritten statements are dated February 16, 17, and 18 of 2010, and each is signed by both Morrison and the witnessing police officer (C. 429A, 430A, 432A). In his first statement, Morrison indicated that he was leaving a friend's apartment in Grayslake when two black males – one 6'3" and the other 5' 8" or 5'9" – robbed him of his cell phone, backpack, and graphing calculator in the parking lot; the bigger guy called the other one "Steve" (C. 429A-429B).

In the second statement, Morrison admitted that he knew "Steve," and went to the apartment complex to "help him out" (C. 430A). Steve came to the car, said "hold up my girl's pregnant and she's tweaking," then left the car (C. 430A). Steve walked ten feet away but then returned to the car with a gunman who robbed

them (R. 430A-431). The gunman grabbed the cell phone off of his lap and his book bag, and they struggled over the car keys (C. 431). Morrison described the gunman as around 6'3" with a goatee; he had never seen him before (C. 431).

In the third statement, Morrison mentioned his friend Kiernan Collins for the first time, and admitted that he went to the apartment complex to "help Steve out with cannabis" (R. 435). He gave an account that was similar to Collins's testimony (R. 432A-33A). Morrison said that he was about six feet tall, and that the gunman was his height or slightly taller (R. 434A). When he drove away, Morrison saw Steve and the gunman walk back towards the apartment together (R. 435).

The General Case Reports

The GCRs indicated that Morrison was the person who reported the armed robbery to the police (C. 435A), and that he repeatedly told police officers – including Det. Warner and Officer Manges – that the gunman was 6'3" (C. 435A, 436A, 438, 439). Morrison told the police that he did not mention Collins in his previous statements because Collins did not want to get "wrapped up in the investigation" (C. 438A).

When given the opportunity, Morrison "immediately" identified Nowell in a photo lineup as "the shorter guy that robbed [him]" (C. 435A). He told Detective Warner that "there was no doubt in his mind that Steven [Nowell] was involved in the armed robbery," and that as he drove away, he saw Nowell and the gunman "walking back towards Steven's apartment together, giving each other 'high fives' and talking to each other like nothing happened" (R. 436A).

Morrison believed he could identify the gunman in a lineup, so Warner

showed him a six-person color photo lineup that included Dupree's photo (C. 436A). Morrison said that "none of the photographs resembled the subject[,]" and he "did not identify anyone in that lineup" (C. 436A). Warner showed Morrison another six-person color photo lineup, and Morrison identified a person named "Terrell Christor" by circling and initialing his photo (C. 436A). Morrison indicated that "he was almost 100% sure" of this identification, and repeated that "he was sure" when Warner asked him again (C. 436A).

The circuit court grants the State's motion to dismiss

Dupree's post-conviction petition advanced to the second stage on December 20, 2013 (R. 1055). The State filed its motion to dismiss on March 3, 2014, and the court granted the motion after arguments on September 10, 2014 (C. 465, 485). The State's motion did not challenge the sufficiency of Dupree's supporting documentation, and the court did not dismiss the petition on that basis (C. 508). Instead, although the court agreed that Morrison's testimony "would have been helpful to the defense," it concluded that there was a "substantial risk" that Morrison's testimony would have corroborated Collins's and Nowell's identifications (C. 470, 508).

POST-CONVICTION APPEAL

On appeal, Dupree argued, *inter alia*, that his petition made a substantial showing that trial counsel's failure to call Morrison in a close identification case constituted ineffective assistance. *People v. Dupree*, 2017 IL App (2d) 141013-U, ¶ 53. The Second District Appellate Court did not rule on the merits of this claim in light of the attached documentation. Instead, it stated that *People v. Enis*, 194

Ill. 2d 361, 380 (2000), mandates an affidavit for this type of ineffective assistance claim, and concluded that Dupree's petition "was properly dismissed because it was not supported by an affidavit from Morrison," as required by 725 ILCS 5/122-2. *Dupree*, 2017 IL App (2d) 141013-U, ¶¶ 54-57. It rejected Dupree's argument distinguishing *Enis* by citing *People v. Spivey*, 2017 IL App (2d) 140941, ¶ 15, which similarly stated that Section 122-2 could only be satisfied by an affidavit. *Dupree*, 2017 IL App (2d) 141013-U at ¶¶ 56-57. The appellate court thus held that regardless of the "attached police reports," without an affidavit from Morrison, Dupree "failed to comply with [S]ection 122-2 of the Act." *Id.* at ¶¶ 55, 57.

This Court granted leave to appeal on September 27, 2017.

ARGUMENT

Section 122-2 of the Post-Conviction Hearing Act does not limit the supporting evidence for a post-conviction petition to a witness "affidavit." Torrence Dupree's petition, and the attached documentation of eyewitness Matthew Morrison's exculpatory statements to the police, satisfied Section 122-2 and made a substantial showing that trial counsel was ineffective for failing to call Morrison to testify.

Torrence Dupree filed a post-conviction petition alleging that trial counsel was ineffective for failing to call eyewitness and robbery victim Matthew Morrison to testify (C. 354, 357, 362). To support his claim, Dupree attached three handwritten statements Morrison gave to the police, as well as some general case reports ("GCRs"), all of which showed that Morrison identified another man – not Dupree – as the gunman, and said that the gunman was much taller than Dupree (C. 429A, 430A, 432A, 436A, 438, 438A, 439).

The circuit court denied Dupree's petition at the second stage of post-

conviction proceedings (C. 508), and the Second District Appellate Court upheld that ruling. *See People v. Dupree*, 2017 IL App (2d) 141013-U, ¶¶ 54-57. Citing *People v. Enis*, 194 Ill. 2d 361, 380 (2000), the appellate court concluded that despite the attached police documentation describing Morrison's prior statements of identification, Dupree "failed to comply with [725 ILCS 5/]122-2 of the Act" because he did not attach an affidavit from Morrison to his petition. *Id*.

The Second District's interpretation of *Enis* and the Act is directly contrary to the plain language and purpose of 725 ILCS 5/ 122-2 ("Section 122-2"), which permits petitioners to attach "records, or other evidence" to support their post-conviction claims. *See* 725 ILCS 5/122-2 (West 2013). Since Dupree's petition and supporting documentation satisfy Section 122-2 and make a substantial showing of a constitutional violation, this Court should reverse the appellate court's ruling and remand for a third-stage evidentiary hearing.

This case involves a question of statutory interpretation, which calls for *de novo* review, *People v. Fort*, 2017 IL 119445, ¶ 20, as well as the denial of a post-conviction petition without an evidentiary hearing, which also calls for *de novo* review. *People v. Cotto*, 2016 IL 119006, ¶ 24.

A. Section 122-2's plain language allows petitioners to support their claims with "records, or other evidence," in addition to "affidavits[.]" The documentation Dupree attached in this case therefore satisfied the Act, contrary to the appellate court's ruling.

The appellate court in this case found that only a witness "affidavit" would satisfy Section 122-2. *Dupree*, 2017 IL App (2d) 141013-U at ¶¶ 54-57. The meaning of Section 122-2 presents a straightforward question of statutory interpretation. The "cardinal rule" of statutory construction is to ascertain and give effect to the

legislature's intent. *Fort*, 2017 IL 118966 at ¶ 20. A statute's language is the best and most reliable indicator of the legislature's intent. *Id*. If that language is "plain and unambiguous," courts "may not read into it exceptions, limitations, or other conditions." *Id*. This Court "will not construe a statute to render any part of it superfluous or redundant." *People v. Releford*, 2017 IL 121094, ¶ 39.

Section 122-2 of the Post-Conviction Hearing Act (the "Act") states that a post-conviction petition "shall have attached thereto affidavits, *records, or other evidence* supporting its allegations or shall state why the same are not attached." 725 ILCS 5/122-2 (West 2013) (emphasis supplied). The use of "the disjunctive word 'or' " means that "any one of the three forms of proof will suffice." *People v. House*, 2013 IL App (2d) 120746, ¶ 18, *quoting People v. Rivera*, 342 Ill. App. 3d 547, 550 (2d Dist. 2003); *see In re M.M.*, 2016 IL 119932, ¶ 21 (when the words "and" and "or" are "found in a statute and their accurate reading does not render the sense dubious they should be read and interpreted as written in the statute"); *People v. Herron*, 215 Ill. 2d 167, 191, n. 3 (2005) ("The word 'or' is disjunctive. 'Or' means 'or.'"); *In re E.B.*, 231 Ill. 2d 459, 468 (2008) ("Generally, use of the disjunctive indicates alternatives ...")(citation and quotation omitted).

Section 122-2's plain language thus demonstrates the legislature's intent to allow petitioners to use affidavits, *or* records, *or* other evidence – or any combination thereof – to support their petitions. *See* 725 ILCS 5/122-2; *see also Herron*, 215 Ill. 2d at 191, n. 3 (the word "or" can mean "this or that or both"). Indeed, this Court has recognized that "the legislature contemplated a wide range of documentary evidence would satisfy Section 122-2" at the pleading stage. *People v. Allen*, 2015 IL 113135, ¶ 36 (pertaining to the first stage of post-conviction

proceedings). Accordingly, nothing in Section 122-2 indicates that only "affidavits" can support a post-conviction claim, as such an interpretation would improperly render the words "records, or other evidence" superfluous or redundant. *See* 725 ILCS 5/122-2; *Releford*, 2017 IL 121094, ¶ 39 (courts "will not construe a statute to render any part of it superfluous or redundant"); *Fort*, 2017 IL 118966 at ¶ 20 (courts may not read "exceptions, limitations, or other conditions" into "plain and unambiguous" language).

In addition to statutory language, courts can discern legislative intent by "considering 'the purpose and necessity for the law, ... and goals to be achieved.'" *Fort*, 2017 IL 118966 at ¶ 20. Reading Section 122-2 to permit supporting "affidavits, records, or other evidence" comports with the purpose of that provision: "to establish that a petition's allegations are capable of objective or independent corroboration." *See People v. Delton*, 227 Ill. 2d 247, 254 (2008)(this is "the purpose of Section 122-2"; internal quotation omitted). To that end, this Court has further required that "the affidavits and exhibits which accompany a petition must identify with reasonable certainty the sources, character, and availability of the alleged evidence supporting the petition's allegations." *Delton*, 227 Ill. 2d at 255, *citing People v. Johnson*, 154 Ill. 2d 227 (1993).

Since there are many types of sufficiently-reliable exhibits and documents that might show a post-conviction claim is capable of objective or independent corroboration, limiting Section 122-2 to permit only "affidavits"would have unjust consequences and undermine its entire purpose.[1] *See Fort*, 2017 IL 118966 at ¶¶

[1] For example, an allegation of counsel's ineffectiveness for failing to call a witness might be supported by, *inter alia*, police reports describing that witnesses' statements (as in this case), a witness's handwritten statements for

20, 35 (this Court presumes that the legislature did not intend "absurdity" or "inconvenience"; "[t]he process of statutory interpretation should not be divorced from consideration of real-world results, and in construing a statute, courts should presume that the legislature did not intend unjust consequences"); *People v. Reeves*, 412 Ill. 555, 560 (1955) ("We should not construe the statute (par. 122-2) and our own rules so strictly that a fair hearing be denied and the purposes of the act defeated"); *see also People v. Hommerson*, 2014 IL 115638, ¶ 12 (the Act's provisions should not be construed so restrictively as to "frustrate[] the legislature's intent to provide incarcerated individuals" with "a means of asserting that their convictions were the result of a substantial denial of their constitutional rights"). Limiting supporting documentation to witness affidavits, to the exclusion of all other types of evidence, would therefore contradict both the plain language and purpose of Section 122-2.

Dupree's post-conviction petition and attached documentation in this case more than satisfy Section 122-2. Dupree's petition alleged that trial counsel was ineffective for not calling Morrison – an eyewitness and alleged victim of the armed robbery – to testify on his behalf (C. 336). In support, Dupree attached to his petition three signed, handwritten statements that Morrison gave to witnessing police officers, as well as several GCRs generated by the police (C. 429A, 430A, 432A, 436A, 438, 438A, 439).

While these documents were not "affidavits," they constituted "records" or "other evidence," according to the ordinary meaning of those words. *See* 725

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the police (as in this case), certified letters, e-mails, text messages, cell phone video footage, video- or audio-recorded statements, social media posts, phone records, lab tests, photographs, and transcripts from other cases.

ILCS 5/122-2; *Allen*, 2015 IL 113135 at ¶ 36 (Section 122-2 permits "a wide range of documentary evidence"); *see also* BLACK'S LAW DICTIONARY (10th ed. 2014) (record– "[a] documentary account of past events, usu[ally] designed to memorialize those events[,]" and/or "[i]nformation that is inscribed on a tangible medium"; evidence – "[s]omething [including testimony, documents, and tangible objects] that tends to prove or disprove the existence of an alleged fact; anything presented to the senses and offered to prove the existence or nonexistence of a fact").

These attached documents directly corroborated Dupree's petition, which alleged that Morrison reported the robbery to the police the evening that it occurred, yet did not identify Dupree in a photo lineup, identified someone else in a second photo lineup, and repeatedly told the police that the gunman was as tall as 6'3," which is seven or eight inches taller than Dupree (C. 336-37).

Both the handwritten statements and GCRs indicated that Morrison was the person who reported the robbery, on the same day of the robbery (*see* C. 429A, 430A, 432A, 436A, 438, 438A, 439). The GCRs showed that Morrison repeatedly described the gunman as being as tall as 6' 3" to the police shortly after the offense, and that he made this same assertion in his handwritten statements (C. 429A, 430A, 432, 432A, 436A, 438, 439). The GCRs also demonstrated that Morrison "did not identify anyone" in a six-person color photo lineup that included Dupree's photo, because "none of the photographs resembled" the gunman (C. 436A, 438, 439). Then, in a second six-person color photo lineup, Morrison identified someone who was *not* Dupree (C. 436A) ("Terrell Christor"). Morrison reportedly stated "he was almost 100% sure" of that identification, and repeated that "he was sure" of his choice (C. 436A). Dupree's post-conviction petition thus had "attached thereto

affidavits, records, or other evidence supporting its allegations," in compliance with Section 122-2's plain language. *See* 725 ILCS 5/122-2.

The evidence here clearly "identif[ied] with reasonable certainty the sources, character and availability" of Morrison's exculpatory statements, and thus demonstrated that Dupree's petition was "capable of objective or independent corroboration." *See Delton*, 227 Ill. 2d at 255; *People v. Bates*, 324 Ill. App. 3d 812, 824 (1st Dist. 2001) (where supporting evidence "show[ed] the claims raised in the petition were not mere conjecture"). Indeed, Morrison's signed statements and the GCRs showed that Morrison's exculpatory potential testimony could be independently corroborated by Morrison himself, as well as by the police officers he spoke to – Kueber, Warner, and/or Manges. The attached documents also arguably constituted independent corroboration in and of themselves, as they were contemporaneous (or near-contemporaneous) records of Morrison's statements to the police about the gunman shortly after the robbery (C. 429A, 430A, 432A, 436A, 438, 438A, 439).

The reliability and corroborative value of this evidence is further demonstrated by the fact that it showed Morrison's prior exculpatory statements were guaranteed to be admitted at trial, although this is certainly not required by Section 122-2 or the Act. *See* Ill. Evid. R. 1101 (b)(3) (West 2013) (Illinois's Rules of Evidence "do not apply" to "postconviction hearings"); *see also Allen*, 2015 IL 113135 at ¶ 37 (supporting documentation need not be "competent, admissible evidence at the time attached to the petition").

Specifically, Morrison's description of the gunman's appearance and height (in his handwritten statements and the GCRs), as well as his lineup non-

identification of Dupree and identification of someone else (in the GCRs), are prior statements of identification, which would have been substantively admissible so long as Morrison testified and was subject to cross-examination. *See* 725 ILCS 5/115-12 ("Section 115-12"); Ill. Evid. R. 801 (d)(1)(B); *People v. Tisdel*, 201 Ill. 2d 210, 216-21 (2002) (this rule pertains to "the entire identification process[,]" which "ensure[s] that a trier of fact is fully informed concerning the reliability of a witness' identification"; it includes lineup "nonidentification[s,]" as well).

As such, in addition to telling the jury that Dupree was not the gunman and describing the gunman's height and appearance, Morrison could have also testified that *he told the police shortly after the offense* that the gunman was as tall as 6'3" (and gave a written statement saying the same); that he viewed a photo lineup containing Dupree's picture but did not identify him; and that he viewed a second photo lineup and identified someone other than Dupree. *See People v. Williams*, 193 Ill. 2d 306, 358-60 (2000) (evidence that victim previously identified someone other than the defendant is substantively admissible under Section 115-12); *People v. Lewis*, 165 Ill. 2d 305, 342 (1995) (Section 115-12 "is designed to permit the use of prior consistent out of court statements"); *People v. Shum*, 117 Ill. 2d 317, 342 (1987) ("the general rule that witnesses may not testify as to statements made out of court to corroborate their testimony given at trial does not apply to statements of identification").

And regardless of what Morrison said about the gunman's appearance or identity, the defense could have additionally (or alternatively) called Officers Kueber, Manges, and/or Wilson, each of whom authored portions of the GCRs, to describe the foregoing statements of identification that Morrison made in their presence.

See People v. Lewis, 223 Ill. 2d 393, 403 (2006) (recognizing that third parties can testify about the declarant's prior statement of identification, and can do so before the declarant takes the stand); *Williams*, 193 Ill. 2d at 358-60 (detective's testimony about victim's prior identification of someone other than the defendant was substantively admissible); *People v. Holveck*, 141 Ill. 2d 84, 104-105 (1990) (prior statements of identification can be admitted even when the witness does not make an identification in court, or is unable to).

In fact, Morrison's handwritten statements and the GCRs might also be substantively admissible in and of themselves, as prior inconsistent statements (if Morrison and/or the officers contradicted those documents on the stand), and/or recorded recollections (if these witnesses could not recall their prior statements). *See* 725 ILCS 5/115-10.1 (prior inconsistent statements are substantively admissible if, *inter alia*, "the statement is proved to have been written or signed by the witness[,]" who has personal knowledge of the event described); Ill. Evid. R. 803 (5) ("a memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection" is substantively admissible, if it was "made or adopted by the witness when the matter was fresh in the witness' memory..."); *see also Lewis*, 165 Ill. 2d at 342-44 (suggesting that a police report describing a suspect might be substantively admissible as a prior statement of identification if it was relevant to the case; but concluding that the report at issue was not relevant).

Since Dupree's petition and supporting documentation therefore satisfied Section 122-2's plain language, identified "the sources, character and availability" of supporting evidence, and established that his ineffective assistance claim was

"capable of objective or independent corroboration," it met the Act's requirements with respect to the content of the petition. *See* 725 ILCS 5/122-2; *Delton*, 227 Ill. 2d at 255.

Nevertheless, citing *People v. Enis*, 194 Ill. 2d 361, 380 (2000), the appellate court in this case held that Dupree's petition "failed to comply with Section 122-2" because it "was not supported by an affidavit from Morrison." *Dupree*, 2017 IL App (2d) 141013-U, ¶¶ 54-57, *also citing People v. Spivey*, 2017 IL App (2d) 140941, ¶ 15 (referring to *Enis* for a similar proposition). As explained, however, imposing an "affidavit" limitation on Section 122-2 is contrary to its plain language and purpose. A brief review of *Enis* and this Court's precedent shows that the *Dupree* court over-read that case and misunderstood this Court's well-established post-conviction law.

In *Enis*, the defendant's post-conviction petition alleged that defense counsel was ineffective for failing to call a witness who would have testified that the murder victim told the witness she could not identify the man who had previously sexually assaulted her. *Enis*, 194 Ill. 2d at 379-80. The only supporting documentation attached to the petition was "a copy of an unsigned, unsworn, untitled report that defendant identifie[d] as investigation notes from 'Consolidated Investigation.'" *Id*. This "investigation note" indicated that the victim told the witness she could not identify her attacker because he was wearing a mask. *Id*.

As the *Dupree* court emphasized, this Court said:

> A claim that trial counsel failed to investigate and call a witness must be supported by an affidavit from the proposed witness. *People v. Johnson*, 183 Ill.2d 176, 192 (1998)*; People v. Thompkins*, 161 Ill.2d 148, 163 (1994). In the absence of such an affidavit, a reviewing court cannot determine whether the proposed witness could have provided testimony or information favorable to the defendant, and further

> review of the claim is unnecessary. *Johnson*, 183 Ill.2d at 192; *Thompkins*, 161 Ill.2d at 163. Defendant has failed to support his claim with an appropriate affidavit from [the proposed witness].

Enis, 194 Ill. 2d at 380 (parallel citations omitted); *see Dupree*, 2017 IL App (2d) 141013-U at ¶ 54.

The *Enis* Court went on to explain that even if it considered this ambiguous "investigation note," that document failed to establish a reasonable probability that the proposed witness's testimony would have resulted in a different trial outcome. *Enis*, 194 Ill. 2d at 379-80 (it "would not have impeached or otherwise discredited the testimony of the three prosecution witnesses" who implicated the defendant in the murder, and did not "negate[] defendant's motive for murdering" the victim).

Notably, *Enis* did not mention Section 122-2, and it is unclear whether its holding was predicated on a violation of that provision, or on the issue's substantive merit (*i.e.*, counsel's failure to call the witness, even in light of the ambiguous "investigation notes," failed to make a substantial showing of a constitutional violation). *But see Spivey*, 2017 IL App (2d) 140941 at ¶ 15 ("The *Enis* court expressed two independent reasons for rejecting the defendant's ineffective-assistance -of-counsel claim, either of which would have been sufficient in itself").

Enis should not be interpreted to impose a strict limitation on Section 122-2 that conflicts with the Act's plain language and ultimate purpose, particularly where it did not even mention that statute. Rather, *Enis* is better read as an application of this Court's long-recognized requirement that a petition's supporting documentation must "identify with reasonable certainty the sources, character

and availability of the alleged evidence supporting the petition's allegations[,]" and thus show that the petitioner's claim is actually "capable of objective or independent corroboration." *Delton*, 227 Ill. 2d at 254; *see Enis*, 194 Ill. 2d at 380 (emphasizing that reviewing courts must be able to determine "whether the proposed witness could have provided testimony or information favorable to the defendant"). The attached evidence in *Enis* – a copy of unsigned, unsworn, untitled "investigation notes," evidently without even a named author, and which contained multiple layers of hearsay – certainly fails this threshold requirement. *See Enis*, 194 Ill. 2d at 379-80.

Nothing in *Enis* demonstrates that this Court intended to depart from Section 122-2's plain language by adopting an unyielding affidavit requirement for certain claims, nor has appellate counsel found any other decision from this Court that deliberately evinces or justifies such a holding. *See Fort*, 2017 IL 118966 at ¶ 20 (courts are precluded from reading "exceptions, limitations, or other conditions" into plain statutory language). To the contrary, *Enis* and other opinions that use similar affidavit language demonstrate that Illinois courts have merely applied long-standing post-conviction principles, not re-written the Act.

Enis relied on *People v. Johnson*, 183 Ill.2d 176 (1998) and *People v. Thompkins*, 161 Ill.2d 148 (1994), where this Court concluded that attaching an affidavit from someone *other than* the proposed witness is insufficient to support a claim that counsel was ineffective for not calling that witness. *See Johnson*, 183 Ill. 2d at 192 (affidavit from an alibi witness's sister was insufficient; no other evidence attached); *Thompkins*, 161 Ill.2d at 163 (petitioner's affidavit, which merely listed the names of purported alibi witnesses, was insufficient, and no

other evidence was attached); *see also People v. Harris*, 224 Ill. 2d 115, 142 (2007) (petitioner's affidavit insufficient where it said "merely what [he] wished the [proposed witnesses] would say," and no other evidence was attached; citing *Enis*); *People v. Spivey*, 2017 IL App (2d) 140941, ¶ 15 (similarly holding); *People v. Williams*, 2016 IL App (1st) 133459, ¶ 31 (same); *People v. Barr*, 200 Ill. App. 3d 1077, 1080 (5th Dist. 1990) (same); *People v. Treadway*, 245 Ill. App. 3d 1023, 1025-26 (2d Dist. 1993) (same); *see also People v. Barcik*, 365 Ill. App. 3d 183 (2d Dist. 2006) (same; limiting consideration of ineffectiveness claim to the one proposed witness whose affidavit was attached).

Neither *Johnson*, *Thompkins*, nor any of the foregoing cases clearly state or require a rule limiting Section 122-2 to "affidavits" from the proposed witness, *to the exclusion of any other supporting documentation*. Rather, since the affidavits at issue in those cases merely speculated as to what *other persons* would testify to, the court was unable to determine with any confidence whether those persons could have actually "provided any information or testimony favorable to defendant." *See e.g.*, *Harris*, 224 Ill. 2d at 142 (so holding); *Johnson*, 183 Ill. 2d at 192 (same); *Spivey*, 2017 IL App (2d) 140941, ¶ 15 (same); *see also Enis*, 194 Ill. 2d at 380 (similarly holding). Or, put another way, the attached affidavit did not "identify with reasonable certainty the sources, character and availability" of the supporting evidence. *Delton*, 227 Ill. 2d at 255; *see also Allen*, 2015 IL 113135 at ¶ 32 (as notarization relates to "evidentiary reliability," counsel's failure to notarize a purported affidavit at the second stage may warrant dismissal, although this is not fatal at the first stage), ¶ 57 (Thomas, J., dissenting) (an unsworn "affidavit"

is a "nullity," and does not establish anything "with reasonable certainty").[2]

Since no other supporting documentation was attached in the foregoing cases, dismissal was required. *See Delton*, 227 Ill. 2d at 255; *cf. People v. Harmon*, 2013 IL App (2d) 120439, ¶ 30 (transcripts sufficiently corroborated the claim, despite no affidavit, citing *Enis*); *Bates*, 324 Ill. App. 3d at 815-16 (deciding post-*Enis* that "[alt]hough defendant did not attach an affidavit," his claim was adequately supported at the second stage by an attached motion that described a witness's statement from a police report).

Other opinions that use the affidavit language at issue pertained to cases where *no documentation at all* was attached to support the post-conviction claim. *See People v. Guest*, 166 Ill. 2d 381, 402 (1995) (no supporting evidence for the ineffectiveness claim); *People v. Ford*, 368 Ill. App. 3d 562, 573 (1st Dist. 2006)(same); *People v. Arias*, 309 Ill. App. 3d 595, 597 (3d Dist. 1999)(same); *People v. Dean*, 226 Ill. App. 3d 465, 468 (1st Dist. 1992)(same); *People v. Rial*, 214 Ill. App. 3d 420, 423-24 (3d Dist. 1991)(same); *People v. Robinson*, 188 Ill. App. 3d 826, 829 (3d Dist. 1989)(same); *People v. Hanrahan*, 132 Ill. App. 3d 640, 641 (1st Dist. 1985)(same); *see also People v. Palmer*, 352 Ill. App. 3d 877, 885 (4th Dist. 2004)(absence of witness affidavit was fatal; opinion unclear as to whether attached police reports might have separately supported the claim).

Guest and these appellate court cases also do not indicate that Illinois courts have created an "affidavit" limitation on Section 122-2 for certain claims. Rather,

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[2] Some pre-*Allen* appellate courts that addressed this notarization issue referred to *Enis*'s affidavit language, but *Allen* does not. *See People v. Brown*, 2015 IL App (1st) 122940, ¶ 55; *People v. Wilborn*, 2011 IL App (1st) 092802, ¶ 71; *People v. Jones*, 399 Ill. App. 3d 341, 371-72 (1st Dist. 2010).

these holdings are consistent with this Court's long-standing rule that the absence of supporting documentation (or an explanation for its absence) justifies dismissal. *See People v. Collins*, 202 Ill. 2d 59, 66-67 (2002)(this is "fatal" to a petition); *People v. Gendron*, 41 Ill. 2d 518, 520 (1969) (holding nearly 50 years ago that "the lack of supporting documents required by section 122-2" warranted dismissal).

In short, this Court has never held that the absence of an affidavit justified dismissing a post-conviction petition that was supported by other reliable corroborating documentation, and the holdings of all of the foregoing cases can be can be explained by long-standing post-conviction law that is fully compatible with Section 122-2. Accordingly, neither *Enis* nor any other precedent should be read to arbitrarily limit compliance with Section 122-2 to "affidavits" for certain post-conviction claims, as this would contradict its plain language and purpose. *See* 725 ILCS 5/122-2 ("affidavits, records, or other evidence"); *Fort*, 2017 IL 118966 at ¶ 20 (courts may not read "exceptions, limitations, or other conditions" into plain language); *see also People v. Cherry*, 2016 IL 118728, ¶ 33 (noting that when a defendant's claim that counsel was ineffective for not calling a witness rests on evidence outside the record, he should file a post-conviction petition supported by " 'affidavits, *records or other evidence*' not contained in the record, just as the Post-Conviction Hearing Act contemplates") (emphasis supplied). Alternatively, to the extent this Court finds that *Enis* or its other precedent actually *does* impose an improper "affidavit" limitation on Section 122-2, it should overrule that holding.[3]

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[3] Notably, the affidavit language in every single case cited above – including *Johnson* and *Thompkins*, the two cases *Enis* relied upon – can be traced back to *People v. Carmickle*, 97 Ill. App. 917, 920 (3d Dist. 1981). *See Johnson*, 183 Ill. 2d at 192, *citing Barr*, 200 Ill. App. 3d at 1080 (citing *Carmickle*); *Thompkins*, 161 Ill. 2d at 163, *citing Rial*, 214 Ill. App. 3d at 423-24

Compliance with Section 122-2 does not depend on how the evidence attached to a petition is categorized, but on whether the included evidence in any particular case is sufficiently reliable to demonstrate that the petitioner's claim can be litigated in an evidentiary hearing. *See Delton*, 227 Ill. 2d at 254-55 (documentation must show a claim is "capable of ... independent corroboration"; it must identify the sources, character and availability of helpful evidence with "reasonable certainty"); *see also Enis*, 194 Ill 2d. at 380 (a petition must be dismissed if "a reviewing court cannot determine whether the proposed witness could have provided testimony or information favorable to the defendant").

While the ambiguous "investigator note" attached to the petition in *Enis* did not satisfy this test, *Enis*, 194 Ill 2d. at 380, the police documentation Dupree attached to his petition in this case did. *See* discussion *supra*, at 22-26. Since Dupree's attachments satisfied both the plain language and purpose of Section 122-2, the appellate court's finding that it was violated by the absence of an "affidavit" was mistaken, and this Court should reverse. *See Dupree*, 2017 IL App (2d) 141013-U at ¶¶ 54-57.

(citing *Carmickle*). The authority *Carmickle* relied on, however, does not impose any limitation on Section 122-2. *See People v. Stepheny*, 46 Ill. 2d 153, 157 (1970)("the proper focus of concern [at the second stage] is the sufficiency of [the petition's] allegations *and supporting documents*") (emphasis supplied); *People v. Toles*, 40 Ill. App. 3d 651, 652-53 (2d Dist. 1976)(affirming denial of a petition because the petitioner "failed to attach to his petition affidavits, *records or other evidence*")(emphasis supplied). It also bears recognizing that in *Johnson* and *Guest*, this Court additionally cited to *People v. Ashford*, 121 Ill. 2d 55, 77 (1988) as support for this affidavit language. *See Johnson*, 183 Ill. 2d at 192; *Guest*, 166 Ill. 2d at 400. However, *Ashford* is not a post-conviction case, so it necessarily does *not* interpret the Act or Section 122-2. *Ashford*, 121 Ill. 2d at 77 (suggesting that the appellant's *pro se* claims on direct appeal from his conviction should have been supported with affidavits).

B. Dupree's petition and attached documentation made a substantial showing of a constitutional violation.

The Post-Conviction Hearing Act ("the Act") provides a method by which prisoners can assert that their convictions were the result of a substantial denial of their constitutional rights. *People v. Johnson*, 2017 IL 120310, ¶ 12. At the first stage, courts decide whether the allegations in a post-conviction petition are frivolous or patently without merit. *Id*. If not (or if the petition is not docketed within 90 days), the petition advances to the second stage of post-conviction proceedings. *Allen*, 2015 IL 113135 at ¶ 21. At the second stage, the circuit court must decide whether the allegations in the defendant's petition make a substantial showing of a constitutional violation. *See People v. Domagala*, 2013 IL 113688, ¶ 48*; People v. Coleman*, 183 Ill. 2d 366, 381 (1998). If so, the petition advances to a third-stage evidentiary hearing. *Allen*, 2015 IL 113135 at ¶ 22.

The second stage tests only "the legal sufficiency of the petition"; courts may not engage in fact-finding or address issues of credibility. *Domagala*, 2013 IL 113688 at ¶ 35, *citing Coleman*, 206 Ill. 2d at 277. Instead, the petition is "liberally construed in favor of the petitioner and taken as true." *See People v. Sanders*, 2016 IL 118123, ¶ 31. The question is whether the well-pled allegations, if proved at an evidentiary hearing, would entitle defendant to relief. *Domagala*, 2013 IL 113688 at ¶ 35.

In this case, Dupree's post-conviction petition alleged that trial counsel was ineffective for failing to call Morrison to testify (C. 336-37). Criminal defendants have a fundamental right to the effective assistance of counsel under both the Federal and Illinois Constitutions. U.S. CONST., AMENDS VI, XIV; ILL. CONST. ART. I, § 8; *Strickland v. Washington*, 466 U.S. 668, 685 (1984); *People v. Hall*, 217 Ill.2d

324, 334-35 (2005). Claims of counsel's ineffectiveness are evaluated under the two-pronged *Strickland* test to determine if (1) counsel's performance was deficient, and (2) there is a reasonable probability that the result of the trial would have been different absent counsel's deficiencies. *Strickland*, 466 U.S. at 687; *People v. Houston*, 226 Ill.2d 135, 143 (2007). At the second stage of post-conviction proceedings, courts need only to decide, after assuming the truth of the petition and construing it liberally in the petitioner's favor, whether there is a "substantial showing" of ineffective assistance. *See Sanders*, 2016 IL 118123, ¶ 31; *Domagala*, 2013 IL 113688, ¶ 48.

In this case, Dupree's petition made a "substantial showing of [*Strickland*] prejudice" with respect to trial counsel's failure to call Morrison to testify. *People v. Harris*, 206 Ill. 2d 293, 307 (2002) (stating the *Strickland* prejudice standard at the second stage). Had Morrison testified, there was a reasonable probability that Dupree's trial would have had a different outcome. *See Strickland*, 466 U.S. at 687.

The State's evidence in this case was exceedingly weak. No physical evidence linked Dupree to this offense, and he did not make any inculpatory statements admitting to the offense. The State's case rested primarily on Collins and Nowell, neither of whom provided convincing identification testimony. Even the appellate prosecutor in this case agreed that Collins's identification was "less than certain," and that Nowell's "testimony was naturally suspect" (State Appellate Court Brief, [St. App. Ct. Br.] 12).

Collins testified that it was dark outside and that the gunman was wearing a hooded sweatshirt, with the hood brought down to the eyebrows, covering the

sides of the gunman's face (R. 494-95). His encounter with the gunman lasted less than a minute, during which he only "vaguely" saw the offender's face, was focused on the revolver, and was primarily looking down and avoiding eye contact (R. 494, 527-29). *See U.S. v. Brown*, 471 F.3d 802, 805 (7th Cir. 2006) ("Even under the best circumstances, the probability of erroneous identification of a stranger seen briefly is uncomfortably high").

Collins did not identify Dupree in court. And while he did choose Dupree's photo in a lineup, he explained that he never told the police he picked Dupree as the actual gunman; he only told them that Dupree was the person in the lineup who "most resembled" the gunman (R. 533). Even then, both Collins and Detective Warner testified that Collins was not one-hundred percent sure of his identification, and that he was only "seventy percent" sure, at best (R. 534; 619). On the other hand, Collins agreed that he was "confident" the gunman was over six feet tall, and estimated that he was 6' 1" or 6' 2" (R. 525-27, 531). Defense evidence proved that Dupree was significantly shorter, at just 5'7" or 5'8" (R. 794).

Nowell's identification testimony was even more problematic. The evidence showed that Nowell was one of the perpetrators of this offense, although he claimed at trial that he was a victim. Collins's testimony indicated that Nowell did not attempt to flee when he was outside of the car and the gunman was inside of the car; Nowell just stood there (R. 491, 530). Nowell also originally told the police that he gave Morrison's stolen cell phone to the gunman, but later admitted that this was a lie, and that he kept the phone and used it to make calls after the robbery (R. 558, 584). Nowell further testified that although he knew Morrison, he did not return the stolen phone, and instead threw it away (R. 584-85).

Detective Keuber explained that the police treated Nowell as a suspect in the robbery from the very beginning, and that he did not believe Nowell was a victim (R. 587, 738, 741). Nowell himself testified that the people in his neighborhood were saying that "he set this guy up for this robbery" (R. 740). Nowell even pled guilty to a crime for his conduct in this very case (R. 583-84), and admitted at trial that in exchange for identifying Dupree in court, the State reduced his charges from armed robbery to theft, with a sentence of probation and just a few days in jail (R. 601-602).

The State's own evidence therefore shows that Nowell was an accomplice in the robbery, and received a reward from the prosecution for his testimony. This Court has long held that accomplice testimony "must be cautiously scrutinized on appeal," and also that when "a witness has hopes of reward from the prosecution, his testimony should not be accepted unless it carries with it an 'absolute conviction of its truth.'" *People v. Ash*, 102 Ill.2d 485, 493-494 (1984); *see People v. McLaurin*, 184 Ill. 2d 58, 79 (1998) ("Because accomplice testimony is attended with serious infirmities, it should be accepted only with utmost caution and suspicion and have the absolute conviction of its truth"). Nowell's testimony fails this test.

Nowell's story suffered from numerous contradictions and inconsistences, particularly with respect to his girlfriend, Kenyatta Whiteside. While they both agreed that they shared Whiteside's cell phone (R. 587, 656-57), Nowell said it was an iPhone (R. 586), whereas Whiteside said it was a Samsung phone (R. 657). Nowell testified that he called Morrison on Whiteside's phone before Dupree came to her apartment, and that Morrison returned the call on the same phone (R. 573-74), but Whiteside said that the phone was in her pocket, and that Nowell never made

or received any calls on her phone at that time (R. 664-65). Additionally, while Nowell said that he left Whiteside's phone in Morrison's car after the robbery and did not know where it was (R. 586-87), Whiteside testified that she had her phone at Linda Lee's home after the alleged robbery (R. 667-69). Nowell further claimed that he received threatening calls on his "[c]ell phone" the day after the offense (before Dupree's arrest) (R. 562), but again, Nowell said he left Whiteside's cell phone in Morrison's car (R. 587, 606, 658-59).

Nowell also had a significant motive to lie about Dupree being the gunman, as he only identified Dupree (by "voice") after the police effectively told him to identify Dupree and refused to accept any other name, threatened him with incarceration if he did not make an identification, and promised him leniency if he did.

Nowell testified that during his interrogation, Detective Kueber refused to believe his repeated assertions that he did not know the gunman's identity, and told him that he was "the big fish and need[ed] to become the smaller fish"; he needed to "shine the light on somebody else"; and he would take the blame for this case unless he identified the gunman (R. 598, 748, 761). Kueber himself agreed that Nowell said he did not want to identify Dupree because "he did not want to see an innocent person locked up," and that he nonetheless rejected any of Nowell's assertions suggesting that the gunman was not Dupree (R. 762; *see* R. 596, 744, 754, 758-59) (stating that the gunman was taller than Dupree; that the gunman was "really tall" whereas Dupree was "short"; and that Hudson, being taller than Dupree, may have been the gunman).

When Nowell became upset and asked for a lawyer (R. 590, 592), Kueber

showed Nowell his arrest warrant and read the charges against him, told him he was going to have to spend the night in jail, and explained how much money he would need to get out of jail (R. 755). Kueber then told Nowell that if he made an identification, he would "help [Nowell] in the charges" and "go to bat with him with the State's Attorney's office," and suggested that Nowell could possibly get out without having to pay any money (with an I-bond) (R. 755-56, 761). Nowell withdrew his request for a lawyer and kept talking because he did not want to spend the night in jail (R. 593-94, 755). This police conduct likely violated Nowell's constitutional rights. *See Edwards v. Arizona*, 451 U.S. 477, 484-85, 487 (1981) (if a suspect requests a lawyer, he "is not subject to further interrogation by the authorities until counsel has been made available to him"); *Michigan v. Harvey*, 494 U.S. 344, 349 (1990) (any waiver given in a discussion initiated by the authorities is presumed invalid); *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980) (the prohibition against further interrogation applies not only to the asking of direct questions of the defendant, but also to any words or actions that are reasonably likely to elicit an incriminating response).

When Nowell asked Kueber "who do I have to point out," Kueber told him he was a smart guy who knew how to get out of trouble (R. 757, 758). Nowell knew that the police wanted him to identify Dupree from the beginning, and that Kueber would not accept any other identification (R. 591-92, 602). Kueber himself admitted that he told Nowell "several times" that the gunman was Dupree (R. 754, 756). It was only at the end of the interrogation, after all of the foregoing threats and promises, that Nowell suggested that he recognized the gunman's voice as belonging to Dupree (R. 594).

Nowell's reward for this identification was a very favorable plea deal, in which he promised to identify Dupree in court in exchange for a significant reduction of his charges and a sentence of probation (R. 601-602). Nowell explained at trial that if he failed to identify Dupree in court, he could lose this deal and face his original, far more serious, charges (R. 602). Nowell's conflicting and self-interested identification testimony thus did *not* "carr[y] with it an absolute conviction of its truth." *Ash*, 102 Ill.2d at 493-494 (quotation and citation omitted).

The State also presented evidence that Dupree called Kiernan Collins and Leon Hudson after his arrest, but nothing said in those calls admitted any involvement in a robbery. Rather, Collins hung up and did not speak to Dupree, and the Hudson call showed that Dupree was upset that someone had secured a plea deal to testify against him, which would be justified regardless of whether he committed the offense (R. 511,782, PE 24-25).

Since the State's identification testimony was therefore "less than certain" and "naturally suspect" (St. App. Ct. Br. 12), there was a reasonable chance that Morrison's testimony would have changed the outcome of the trial. Morrison would have testified that Dupree was not the gunman, and described the gunman's height as being up to 6' 3", which is much taller than Dupree (C. 336-37; 429A, 430A, 432, 432A, 436A, 438, 439). *See Sanders*, 2016 IL 118123, ¶ 31 (at the second stage the petition is "liberally construed in favor of the petitioner and taken as true"). As explained above, Morrison and/or the police officers would *also* have been able to testify that Morrison said the same thing to the police shortly after the robbery, particularly that Morrison did not identify Dupree in a lineup that contained his picture, and identified Terrel Christor as the gunman in a second lineup, and was

"sure" of that decision (C. 435A, 436A, 438, 439). *See* 725 ILCS 5/115-12 (prior statements of identification are substantively admissible); *see also* discussion *supra*, at 24-25.

Morrison's testimony and corroborating prior statements about the gunman's 6' 3" height were consistent with Collins's testimony that he was confident the gunman was over six feet and was as tall as 6' 1" or 6' 2" (R. 525-27, 531), as well as Nowell's original assertion to the police that the gunman was over six feet tall, and much taller than Dupree (R. 744, 754, 758, 762). Had Morrison testified, the evidence would therefore have shown that all three eyewitnesses told the police that the gunman was significantly taller than the average male (up to 6 inches), while Dupree was shorter than average, at 5' 7" or 5' 8" (R. 794). *See* Center for Disease Control, National Center for Health Statistics, Measured average height, weight, and waist circumference for adults aged 20 years and over, *available at* http://www.cdc.gov/nchs/fastats/body-measurements.htm (last checked December 18, 2017) (the average adult male's height is 5' 9").

More importantly, Morrison's testimony that Dupree was not the gunman, corroborated by proof that he did not identify Dupree to the police and chose *someone else* as the gunman in police lineups, would have been the only exculpatory evidence defense counsel presented at trial. Not only would this have been affirmative proof of Dupree's innocence, but it would have further undermined the credibility of Collins's less-than-certain identification, as well as Nowell's self-motivated identification, in the minds of the jurors. As such, Dupree's petition and supporting documentation, assuming its truth and construing it liberally in his favor, therefore makes a substantial showing that had trial counsel presented Morrison's testimony

in this close identification case, there is at least a reasonable probability that the outcome of Dupree's trial would have been different. *See Harris*, 206 Ill. 2d at 307; *People v. Manning*, 241 Ill. 2d 319, 327-28 (2011) (the prejudice prong of *Strickland* "may be satisfied if the defendant can show that counsel's deficient performance rendered the result of the trial unreliable or the proceeding fundamentally unfair[.]"), *quoting People v. Jackson*, 205 Ill. 2d 247, 259 (2001).

Dupree's petition also makes a substantial showing that trial counsel's failure to present Morrison's testimony was objectively unreasonable. Although counsel's decision regarding whether to call a particular witness is generally a matter of trial strategy, *People v. Flores*, 128 Ill. 2d 66, 85-86 (1989), and counsel's strategy and tactics are often entitled to deference, this "does not preclude inquiry as to the *reasonableness* of counsel's strategy." *People v. King*, 316 Ill. App. 3d 901, 915-16 (1st Dist. 2000) (emphasis supplied). Indeed, "a defense attorney's decisions are not immune from examination simply because they are deemed tactical." *Jones v. Calloway*, 842 F. 3d 454, 464 (7th Cir. 2016).

Any presumption that defense counsel's choice of strategy was sound is overcome if counsel's decision appears so irrational and unreasonable that no reasonably effective defense attorney, facing similar circumstances, would pursue such a strategy. *See People v. Peterson*, 2017 IL 120331, ¶ 80*, citing People v. Lewis*, 2015 IL App (1st) 122411, ¶ 85, *citing King*, 316 Ill. App. 3d at 916. "As a general matter, a defense attorney's failure to present a material exculpatory witness of which he was aware qualifies as deficient performance." *Jones*, 842 F.3d at 464; *see People v. Bryant,* 391 Ill. App. 3d 228, 238-39 (5th Dist. 2009)(same), *People v. York*, 312 Ill. App. 3d 434, 437 (2nd Dist. 2000) (same); *People v. Tate*, 305 Ill.

App. 3d 607, 612 (1st Dist. 1999)(same).

In this case, the record does not reflect any sound strategic basis for counsel's failure to call Morrison to the stand. Defense counsel's trial theory was that Dupree was misidentified, and in furtherance of that defense, counsel argued that Collins's and Nowell's identifications were not credible (R. 857-880). The only defense evidence counsel had presented, however, was that Dupree was 5' 7 or 5' 8", and that the black Jeep Nowell claimed to have seen had been repossessed a month earlier (R. 794, 796). As explained, Morrison's testimony would have provided affirmative evidence from one of the victims of the robbery that Dupree was *not* the gunman and that the gunman was as tall as 6'3", thus significantly undermining the State's weak identification witnesses. Moreover, proof of Morrison's exculpatory statements to the police would also have been admitted so long as Morrison testified, *regardless of what he said on the stand*. *See* discussion *supra* at 24-25.

As such, viewing Dupree's allegations as true and construing them liberally in his favor, *Sanders*, 2016 IL 118123 at ¶ 31, and considering that the record reveals no sound strategic basis for counsel's failure to call Morrison to testify, Dupree's petition makes a substantial showing that counsel's conduct was objectively unreasonable. *See Tate*, 305 Ill. App. 3d at 612 (remanding for an evidentiary hearing where the record did not show whether counsel's failure to call alibi witnesses was strategy or incompetence).

That said, the circuit court disagreed and speculated that trial counsel may have had a strategic basis for excluding Morrison's testimony (C. 507-509). Since this Court's review is *de novo*, no deference is due to this finding. *See Cotto*, 2016 IL 119006 at ¶ 24. It nonetheless bears recognizing the serious flaws in the circuit

court's analysis.

The circuit court believed that defense counsel may have made a strategic decision to exclude Morrison from the stand, concluding that were two "substantial risks" posed by his testimony: (1) it was "similar to that of Collins and Nowell" and would thus "tend to corroborate" their accounts, and (2) it "could provide support for Nowell's identification" because Morrison saw the gunman and Nowell walking together and exchanging high-fives after the robbery (C. 508). However, the court's conclusions about counsel's strategy were purely speculative, and regardless, no rational attorney would have excluded Morrison's exculpatory testimony due to these supposed risks.

Nothing in the record shows that trial counsel's decision to exclude Morrison's testimony was based on any particular strategy. However, "[t]he *Strickland* presumption [only] protects *actual* strategic trial judgments," meaning that it "applies only if the lawyer actually exercised judgment." *Jones*, 842 F. 3d at 464 (emphasis in original), *citing Mosley v. Atchison*, 689 F. 3d 838, 848 (7th Cir. 2012). A "court adjudicating a *Strickland* claim can't just label a decision 'strategic' and thereby immunize it from constitutional scrutiny." *Jones*, 842 F. 3d at 464.

It is therefore improper for a post-conviction court to guess or speculate about counsel's possible tactical justifications for his conduct when the record is silent on this subject. *See Jones*, 842 F. 3d at 464 (improper for Illinois post-conviction court to conclude that counsel made a strategic decision to exclude a witness who would have provided exculpatory testimony, where counsel never explained "his reason for not calling" the witness, and no state evidentiary hearing had been held); *Tate,* 305 Ill. App. 3d at 611 (although trial counsel "may have

determined that the witnesses would not testify truthfully or would not be persuasive[,]" at the second stage the appellate court could not "say as a matter of law that was counsel's reasoning"); *cf. Peterson*, 2017 IL 120331 at ¶ 81 (record sufficient to evaluate counsel's strategy where "counsel disclosed ... his strategy in calling Smith as a witness"); *Veach*, 2017 IL 120649 at ¶ 51 (same, where counsel explained why he stipulated to the disputed evidence).

Since the record in this case does not reflect trial counsel's "*actual* strategic judgment" for not presenting Morrison's exculpatory testimony, Dupree's petition presented a fact question that could only be resolved at an evidentiary hearing, where counsel can take the stand. *See People v. Makiel*, 358 Ill. App. 3d 102, 111-12 (1st Dist. 2005) ("factual disputes raised by the pleadings ... can only be resolved by an evidentiary hearing"), *citing Coleman*, 183 Ill. 2d at 380; *Tate,* 305 Ill. App. 3d at 611 (evidentiary hearing required to decide counsel's ineffectiveness because record did not show whether his failure to call an alibi witness was strategy); *see also Jones*, 842 F. 3d at 464 (recognizing that a "postconviction hearing in state court" had been necessary to ascertain counsel's "actual reason for omitting" the witness); *Peterson*, 2017 IL 120331 at ¶ 81 (if the record "is silent as to counsel's strategy," post-conviction proceedings are "better suited" to resolve an ineffective assistance claim, as "the defendant and the State would have an opportunity to develop a factual record bearing on the issue"), *citing Veach*, 2017 IL 120649 at ¶¶ 44-45; *People v. Watson*, 2012 IL App (2d) 091328, ¶ 32 ("the question of what constitutes sound trial strategy is necessarily fact-dependent").

Regardless, the circuit court's factual and legal analysis of counsel's supposed strategy was significantly flawed. As a threshold matter, the court's analysis only

considered Morrison's handwritten statements (C. 507). It did not consider the GCRs, which indicated that Morrison did not identify Dupree in a lineup, and identified someone else in a second lineup (C. 507). Morrison's testimony that Dupree was not the gunman, as well as his testimony about these lineups, would have been the most powerful exculpatory evidence the defense could have presented.[4]

Accordingly, while it is true that Morrison's testimony might have corroborated certain aspects of Collins's and Nowell's accounts (C. 508), this obviously would *not* have extended *to the identity of the gunman*, which is the central issue in this case. The only possible danger Morrison's testimony posed to Dupree's defense would be if it somehow enhanced the credibility of Collins's and Nowell's respective identifications. Of course, Morrison's account would have instead *directly contradicted and undermined* those witnesses' questionable identification testimonies, and provided the only affirmative exculpatory evidence presented at trial. Morrison's corroboration of other, non-identification details would therefore not have been a valid strategic justification for precluding his exculpatory testimony.

Moreover, the fact that Morrison saw the gunman and Nowell high-five each other in no way constitutes "additional evidence" that *Dupree* was the gunman (C. 508). Again, Morrison's testimony and corroborating prior statements would have shown that Dupree was *not* the gunman. Morrison's account would also have

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[4] The circuit court's failure to consider the GCRs may have been because they were not "affidavits," as it seemed to have applied the same flawed interpretation of *Enis* as the appellate court did in this case (C. 507) (citing *Enis* while noting that the handwritten statements are not "affidavits," and concluding that they were insufficient even if they were). That said, its written order did not expressly indicate that its ruling was based on the perceived insufficiency of any of the supporting documents.

more definitively linked Nowell to the crime, thus further diminishing his credibility. *See McLaurin*, 184 Ill. 2d at 79 ("accomplice testimony ... should be accepted only with utmost caution and suspicion and have the absolute conviction of its truth").

Additionally, although it went unmentioned by the circuit court, it bears noting that at trial, Officer Manges briefly mentioned that Morrison indicated that the gunman was 6' 3" and that he was robbed outside of his car on foot (R. 701). Manges then ambiguously said that some of Morrison's statements were "disproved," and the judge told the jury that Morrison's statements could not be considered for their truth (R. 701). This brief, vague testimony also does not indicate that counsel made a strategic decision not to call that Morrison.

Morrison's first handwritten statement did suggest he was robbed on foot in a parking lot by a 6' 3" gunman and "Steve" and then ran to his car, but his two subsequent handwritten statements were substantially similar to Collins's account of the robbery (*see* C. 429A-435). These discrepancies merely illustrate Morrison's understandable reluctance to admit to the police that he went to the apartment complex to sell Steve marijuana, and to involve Collins in the police investigation (C. 434A – admitting in his final statement: "yes I was there to help Steve out with cannabis"; 438A – telling Warner that he did not mention Collins because Collins did not want to get "wrapped up in the investigation"; R. 500-501 – Collins testifying that he did not go to the police because he did not want to be involved). The record showed that Morrison wanted the gunman to be identified and had no reason to lie, as he was a victim of the robbery and the only person who reported the crime; he went to the police the same day the robbery occurred; he cooperated with police by agreeing to several interviews, writing handwritten

statements and viewing photo lineups; and he consistently made statements indicating that Dupree was not gunman (C. 429A-434A).

In sum, Morrison's testimony and corroborating prior statements would have been the only affirmative exculpatory evidence presented at trial in a weak identification case, and the record is silent as to whether defense counsel had a sound – or any – strategic basis for not calling him to the stand. Taking Dupree's petition as true and construing it liberally in his favor, it therefore makes a substantial showing that trial counsel was ineffective for not presenting Morrison's testimony. This Court should reverse and remand for an evidentiary hearing.

CONCLUSION

Torrence Dupree's post-conviction petition alleged that trial counsel was ineffective for failing to call Matt Morrison, and included Morrison's handwritten statements and some police general case reports documenting that Morrison effectively told the police shortly after the robbery that Dupree was not the gunman. Dupree's petition thus satisfied Section 122-2's requirement that it have "attached thereto affidavits, records, or other evidence supporting its allegations," and made a substantial showing of ineffective assistance.

Torrence D. Dupree, Defendant-Appellant, therefore respectfully requests that this Court reverse the appellate court's ruling, and remand for an evidentiary hearing.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I, Christopher L. Gehrke, certify that this brief conforms to the requirements of Supreme Court Rule 341(a) and (b). The length of this brief, excluding 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 48 pages.

/s/Christopher L. Gehrke
CHRISTOPHER L. GEHRKE
Assistant Appellate Defender

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No. 2-14-1013
Order filed April 18, 2017

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. TORRENCE D. DuPREE, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Lake County. No. 10-CF-1138 Honorable Daniel B. Shanes, Judge, Presiding.

JUSTICE BIRKETT delivered the judgment of the court.
Justices Zenoff and Schostok concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly dismissed defendant's postconviction petition: appellate counsel was not ineffective for failing to contest the admission of a witness's prior consistent statements, which were admissible to rebut defendant's allegation that the witness's plea agreement, which postdated the statements, gave him a motive to testify falsely; as to his claim that trial counsel was ineffective for failing to call a witness, defendant did not comply with section 122-2.

¶ 2 Defendant, Torrence D. DuPree, appeals from an order of the circuit court of Lake County granting the State's motion to dismiss his petition under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2014)) seeking relief from his convictions of armed

robbery (720 ILCS 5/18-2(a)(1) (West 2010)) and aggravated robbery (720 ILCS 5/18-5 (West 2010)). We affirm.

¶ 3 I. BACKGROUND

¶ 4 Defendant's convictions were based on the following evidence, which was presented at a jury trial. Kiernan Collins testified that, on the evening of February 16, 2010, he was in the back seat of a two-door Honda Civic in the parking lot of an apartment complex, with Matt Morrison in the driver's seat, when Steven Nowell entered the car and sat in the passenger seat. Morrison was planning on selling drugs to Nowell. Morrison drove out of the parking lot to conduct the drug deal elsewhere, and, as he did so, Nowell said that he had forgotten something, so Morrison returned to the parking lot. Nowell left the car and then returned to the car with another man following him. The man pushed Nowell into the car and pulled out a gun. The gunman asked Morrison where the "stuff" was and patted down Morrison and Collins. At some point, Nowell exited the car, while the gunman remained in the car, kneeling on the front passenger seat and pointing the gun at Collins and Morrison. Collins testified that gun was a "[l]arge-caliber chrome pistol revolver." Collins further testified that the gunman was wearing a black hooded sweatshirt. The hood was over the gunman's head and pulled down to his eyebrows. The sides of his face were covered. The gunman's face was about a foot and a half away from Collins. Collins testified that the gunman was taller than he, maybe 6'1" or 6'2". After taking money from Collins and a backpack from Morrison, the gunman left.

¶ 5 According to Collins, he was contacted by the police two days after the robbery. Collins went to the police station and provided a description of the gunman. Collins described the gunman as a black male with a dark complexion, who was between the ages of 20 and 25. In addition, he stated that the gunman had a thin to average build and short hair. Collins was shown

a photographic lineup containing six photos, and he circled defendant's photo, stating that he was "seventy percent sure" that defendant was the gunman.

¶ 6 Collins further testified that the present trial was initially scheduled to start on July 26, 2010. On July 23, 2010, Collins received on his cell phone a collect phone call from the county jail. When he heard that the call was from "Torrence," he hung up, without speaking to the caller.

¶ 7 Nowell testified that he had been charged with armed robbery, aggravated robbery, and robbery in connection with the present offense and placed in jail. In exchange for a reduction in the charges, Nowell agreed to testify truthfully about what happened on the evening in question. Nowell testified that, on the evening of the robbery, he was at his girlfriend's apartment with two other friends, when defendant arrived. Nowell had seen defendant earlier that day driving a black Jeep, which belonged to defendant's cousin. Nowell had known defendant for about a year and a half. Defendant asked Nowell if he was "getting weed from Matt." Nowell lied and told defendant "no," and defendant left. After defendant left, Nowell went outside to meet Morrison, with whom he had made arrangements earlier in the day to buy marijuana. Nowell entered Morrison's car and they drove off. Collins was in the back seat. According to Nowell, his girlfriend called him and told him that he had forgotten his money. The men returned to the parking lot. Nowell went to the apartment to get his money. When he returned to the car, defendant also walked up to the car. Defendant pointed a revolver at Nowell's head and told Nowell that, if he did not go through the men's pockets, defendant would shoot. By the time Nowell put his hands up to go through the men's pockets, Collins and Morrison already had their money out, so defendant told Nowell to grab the men's phones. Nowell took Morrison's phone and kept it. At that point, Morrison attempted to leave, putting the car in reverse. Defendant

threw Nowell out of the car and put the car in park. Nowell, not wanting to leave Morrison, got back into the car and took Morrison's backpack. He handed the backpack to defendant, exited the car, and began walking to the apartment. Defendant followed Nowell. Nowell did not have keys to enter the building, so defendant got into a van and drove away. Defendant was wearing a black hooded sweatshirt with the hood pulled over his head. Nowell never looked at defendant's face during the robbery, but he recognized defendant's voice. Nowell had seen defendant's face 15 minutes earlier when defendant had first arrived at the apartment. Nowell turned himself in to the police the next day. Prior to turning himself in, he received several threatening calls from defendant. Defendant told Nowell what he was going to do to him if he told on defendant.

¶ 8 Nowell testified on cross-examination that, when he turned himself in, he spoke with police officer Steven Kueber. Kueber told Nowell that he was a suspect. Nowell spoke with Kueber off and on for about two hours. Nowell initially told Kueber that he did not know the identity of the gunman. Nowell testified that that was a lie. After about 20 minutes, Kueber accused Nowell of being the mastermind behind the crime, and Nowell asked for a lawyer. Kueber also told him that if he did not "give up the other guy," he would be the one "to take the fall," that he was "a big fish now, but [could] become a smaller fish," that "the light's shining on [him]," and that he needed "to make it shine on someone else." Kueber told Nowell: "I know you know it was Torrence Dupree." Kueber showed Nowell an arrest warrant, and Nowell withdrew his request for a lawyer.

¶ 9 Defense counsel asked Nowell if he knew, while he was "sitting in jail," that he faced 6 to 30 years in prison for armed robbery and that it was a nonprobationable offense. Nowell indicated that he did. Counsel pointed out that, while in jail, Nowell was facing additional

charges of aggravated robbery and robbery. Nowell agreed. Counsel then referred to an "offer" that was presented "to avoid all that." The following colloquy took place:

"Q. Okay. After how many days of jail you decide you are going to work that deal; do you know?

A. First time they came.

Q. You took it right away?

A. Yes, sir.

Q. You have been in jail about 150 days or something; right?

A. Yes, sir.

Q. You would have taken it sooner if they would have offered it to you sooner?

A. No, sir.

Q. Why not?

A. I could have beaten the case. I had nothing to do with the case.

Q. Why didn't you go to trial?

A. Because my lawyer told me I can get out earlier.

Q. So to get out earlier is better than admitting to something you didn't do. That's what you choose?

A. Yes, sir.

Q. Because it's important to get out of custody; right?

A. Yes, sir.

Q. Take responsibility even though you are innocent just to get out of that jail; right?

A. For my baby.

Q. But the deal requires that you come here today; right?

A. Yes, sir.

Q. Because if you don't come here today, if you took off, they would revoke that deal; right?

A. Yes, sir.

Q. You'd be back to where you started, armed robbery and all those other charges; right?

A. Yes.

Q. You don't want that; right?

A. No.

Q. Because you want to stay out?

A. Yes.

Q. But you had to come here and had to say [defendant] was that other guy?

A. Yes.

Q. If you say anything different what's going to happen?

A. I go back.

Q. That's right. You knew from the very first time you met Detective Kueber in that interview room it was [defendant] that they wanted you to say?

A. Yes, sir.

Q. That's what you are saying today; right?

A. Yes."

¶ 10 On redirect examination, Nowell agreed that he had spoken with Kueber for four hours and that the interview had been recorded. In the early hours of the interview, Nowell repeatedly

told Kueber that defendant was not the gunman, because he did not want to get defendant into trouble. By the end of the interview, Nowell told Kueber that defendant was the gunman. He also told Kueber that, after identifying defendant, he was afraid for his life.

¶ 11 The State sought to admit into evidence Nowell's handwritten police statement, identifying defendant as the gunman. The State argued that it was a prior consistent statement admissible as an exception to the hearsay rule because defense counsel stressed on cross-examination that Nowell was fabricating testimony based on what the State wanted him to say. Defense counsel objected, arguing that Nowell had identified defendant after a lengthy interrogation and that "[i]t was not a new statement between the arrest and plea bargain." The court agreed with the State, finding that defense counsel's questioning implied that Nowell was fabricating testimony as a result of his plea agreement with the State. The court stated that the plea negotiation "could give the witness motive to change his story or at least a version of the previous story." The court permitted the State to question Nowell about whether he made a handwritten statement on February 17, 2010, at the conclusion of his interview with Kueber, but it did not allow the entire statement into evidence. Thereafter, Nowell agreed that, in the handwritten statement, he stated that defendant was the gunman. Nowell also agreed that he wrote the statement long before he had reached any agreement with the State.

¶ 12 Kenyana Whiteside testified that she was Nowell's girlfriend and that they had a child. On the evening of February 16, 2010, she was at her apartment with Nowell. Defendant came over and asked to use her cellphone. She gave it to him and he stepped outside the door to use it. He returned about five minutes later and gave her the phone. Nowell and defendant then left together. She went to her friend Lynda's apartment, which was about a minute away. About 15 minutes later, Lynda received a phone call and handed the phone to Whiteside. Whiteside

testified that it was Nowell on the phone. Over objection, Whiteside testified that Nowell told her that defendant had just robbed somebody. The trial court found that the statement was admissible as a prior consistent statement. The court noted that prior consistent statements are admissible "under the narrow circumstances of rebutting an inference of recent fabrication or motive to lie." The court stated that there was "evidence brought out on cross that defendant [*sic*] changed his story to the police with the implication that it's because the police got him to do it, and then also, his testimony is what it is because he got the sweetheart deal to flip." The court found:

> "The evidence that the State is seeking to offer now predates literally all of those statements. Because of that, it is a prior consistent statement, because it is before the suggestion that he has a motive to lie or fabricate from the flip deal and also before he had any police interaction at all."

¶ 13 Prior to allowing Whiteside's testimony about Nowell's statement, the court had asked defense counsel if he wanted a limiting instruction and, if so, how he wanted the instruction to read. The court ordered a recess so that defense counsel could draft an instruction. Thereafter, the following transpired:

> "THE COURT: [Defense counsel], have you had a chance to think about your preference for a limiting instruction from the bench at the appropriate time?
>
> [DEFENSE COUNSEL]: I have, Judge. I think while I am going to object to this evidence coming in, preserving my record, I am going to recommend in the alternative, should you deny my objection, that that limiting instruction—
>
> THE COURT: And you handed me some language that reads along the lines of since Nowell is not on the witness stand to be cross examined, I will not allow the jury to

consider the truth of the words but I will allow this witness to testify that the words were spoken to her for the purpose of your weighing Mr. Nowell's prior statements. It is for you to determine whether the statements were made, and, if so, what weight should be given to the statements.

In determining the weight to be given to a statement, you should consider all the circumstances under which it was made.

That's the language you are proposing?

[DEFENSE COUNSEL]: Correct."

The jury was instructed in accordance with defense counsel's proposed limiting instruction.

¶ 14 Kueber testified that he interviewed Nowell. He stated that, during the first two hours of the interview, Nowell repeatedly denied that defendant was the gunman, but Nowell would hint toward a specific person who committed the robbery. For instance, Nowell described the person and stated that he had just gotten out of jail. Eventually, near the end of the interview, Nowell stated that defendant was the gunman. Kueber identified a 50-second-long video clip of the end of his interview with Nowell, where Nowell identified defendant as the gunman. Over objection, the video was played for the jury. In the video, Kueber asks defendant, "Who's the guy that pulled a gun on you and has been threatening you not to say a damn thing about what happened in that car?" Nowell asks, "For real? For real?" Then he states, "I know for a fact it was [defendant]." Nowell also states, "He's gonna get out. I should of just kept my mouth closed." He also tells Kueber, "You're gonna get me killed." He also states, "He know where we staying too."

¶ 15 Kueber also identified an audio recording of a phone call on July 15, 2010 (and a transcript thereof) between defendant and his cousin, Leon Hudson. The call was recorded by a

system at the Lake County jail and played for the jury. During the call, defendant said that he saw the person who was going to be testifying against him get out of jail in return for a deal and that Hudson should "let everybody know, man, I want his head on a platter." In another call recorded by the jail, defendant told a woman that he "called one of the white boys," "but he didn't accept the call."

¶ 16 On cross-examination, Kueber testified that, when he spoke with Nowell, Nowell indicated that he knew that Kueber believed that Nowell had set up the robbery. For the first two hours of the interview, Nowell acted as if he were the victim of the robbery. Nowell stated multiple times that he did not know who the gunman was. Nowell told him that it could not have been defendant because defendant was "long gone" before the robbery occurred and because defendant was not as tall as the gunman. Kueber agreed that he told Nowell that "he needed to help himself," that he had already been charged and would be the only one if he did not provide the name of the other offender, that he was "getting jammed up on this thing," and that he was "going to be the only one that goes down." Nowell still stated that defendant was not the gunman. Nowell told Kueber that defendant was short and the gunman was really tall. When Kueber told Nowell that he was "on the hook for this," Nowell got upset and asked for a lawyer. Kueber stood up, told Nowell that he was going to spend the night in jail, and showed him an arrest warrant for armed robbery, aggravated robbery, and robbery. Kueber told him that if he cooperated Kueber would "go to bat with him with the State's Attorney's Office." Nowell asked Kueber whom he needed to point out. Kueber told him that he needed to identify the gunman. Kueber told Nowell several times that he knew that the gunman was defendant based on his description. Nowell told him that he could not say that it was defendant, because he did not want to see an innocent person locked up. At one point, Nowell said that it could have been

defendant's cousin, because his cousin was tall. At the end of the interview, Nowell said that he did not see the gunman's face but heard the gunman's voice and it was defendant's voice.

¶ 17 Hudson testified for the defense. Hudson stated that defendant was 5'7" or 5'8," a little shorter than Hudson. He also testified that, although he had owned a black Jeep, it was not in his possession on the day of the incident, as it had been repossessed on January 26.

¶ 18 The jury found defendant guilty of two counts of armed robbery and two counts of aggravated robbery.

¶ 19 On September 23, 2010, defendant filed a motion for judgment notwithstanding the verdict or, in the alternative, for a new trial. Defendant contended, *inter alia*, that the trial court erred in admitting the video clip of Kueber's interview of Nowell and Whiteside's statement that Nowell told her that defendant robbed someone. In support, defendant argued:

> "The video was especially prejudicial as it included a reference by Nowell that he feared the Defendant would kill him should he identify Defendant as a suspect. The State played the video to the jury multiple times and argued that it was evidence of Defendant attempting to intimidate or threaten a witness. Said evidence was highly prejudicial and had no bearing on the issues before the jury."

With respect to Whiteside's statement, defendant argued:

> "The testimony was only disclosed to Defendant on the final day of testimony, after Nowell and various witnesses had testified. The evidence was hearsay and should not have been allowed."

¶ 20 Following arguments, the trial court denied defendant's posttrial motion. Thereafter, the court sentenced defendant to 22 years in prison. Defendant's subsequent motion for reconsideration of his sentence was denied, and defendant appealed.

¶ 21 Defendant raised two issues on appeal: (1) whether the trial court abused its discretion by refusing to allow into evidence a letter written by defendant to Nowell; and (2) whether the trial court erroneously added a 15-year sentencing enhancement. *People v. DuPree*, 2012 IL App (2d) 101247-U, ¶ 1. We affirmed defendant's convictions but, because it was unclear whether the trial court added the enhancement (which the State conceded should not have been added), we remanded for the court to clarify its sentence. *Id.* ¶¶ 42-48.

¶ 22 On August 24, 2012, the State indicated that it and defendant had negotiated a 15-year sentence, and the trial court imposed that sentence.

¶ 23 On January 14, 2013, defendant filed a *pro se* postconviction petition. Private postconviction counsel filed an amended petition on April 5, 2013, a second amended petition on July 3, 2013, and finally a third amended petition on October 1, 2013. In his third amended petition, defendant argued, *inter alia*, that he was denied his right to a fair trial when the State was allowed to introduce into evidence Nowell's prior consistent statements, specifically, Nowell's testimony that he made a statement to the police identifying defendant, the video recording of Nowell identifying defendant during his police interview, and Whiteside's testimony about what Nowell told her. Defendant argued that prior consistent statements are admissible to rebut suggestions that a witness had recently fabricated the testimony or had a motive to lie but only where the statements were made before the motive arose. According to defendant, Nowell's motive to testify falsely "was present immediately after Nowell participated in the armed robbery," as he was "motivated to cover-up his participation in the crime." He also argued that, Nowell's "motivation to testify falsely arose during a long and coercive custodial interrogation" and that "Nowell was motivated to appease the police interrogator." Defendant

argued generally that, although this issue was not raised on direct appeal, it is not forfeited, because appellate counsel was ineffective for failing to raise it.

¶ 24 Defendant also argued in his third amended petition that trial counsel was ineffective for failing to present exculpatory testimony from Morrison. According to the petition, Morrison reported the robbery to the police the day after the incident, failed to identify defendant in a photo lineup, identified someone else in the lineup, and indicated that the gunman was much taller than defendant. In support, defendant attached three statements written by Morrison at the Grayslake police department on February 16, 17, and 18, 2010, and three Grayslake police department case reports. According to defendant, there was no reasonable strategic purpose in counsel's failing to call Morrison.

¶ 25 On March 4, 2013, the State filed its motion to dismiss defendant's petition. The trial court granted the State's motion in a written order on September 10, 2014. Defendant timely appealed.

¶ 26 II. ANALYSIS

¶ 27 Defendant argues that the trial court erred in dismissing his postconviction petition, because it made a substantial showing of the following constitutional violations: (1) ineffective assistance of appellate counsel for failing to challenge the admission of Nowell's prior consistent statements; and (2) ineffective assistance of trial counsel for failing to call Morrison as a witness.

¶ 28 The Act allows criminal defendants to assert that their convictions or sentences resulted from substantial denials of their federal or state constitutional rights. 725 ILCS 5/122-1 *et seq.* (West 2014); *People v. Hodges*, 234 Ill. 2d 1, 9 (2009). A postconviction proceeding has three stages. At the first stage, the defendant files a petition and the trial court determines whether it is frivolous or patently without merit. *People v. Gaultney*, 174 Ill. 2d 410, 418 (1996). If the trial

court does not dismiss the petition at the first stage, it is then docketed for further consideration. *Id.*

¶ 29 At the second stage, the trial court may appoint counsel for the defendant. 725 ILCS 5/122-4 (West 2014). After counsel has made any necessary amendments to the petition, the State may move to dismiss it. 725 ILCS 5/122-5 (West 2014). At the second stage, all well-pleaded facts not positively rebutted by the trial record are taken as true. *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006). The relevant question raised during a second-stage postconviction proceeding is whether the petition's allegations, supported by the trial record and accompanying affidavits, demonstrate a substantial showing of a constitutional deprivation, which requires an evidentiary hearing. *People v. Coleman*, 183 Ill. 2d 366, 381 (1998). If the petition is not dismissed at the second stage, it advances to the third stage and an evidentiary hearing is held. *Pendleton*, 223 Ill. 2d at 472-473. Here, the petition was dismissed at the second stage. We review a second-stage dismissal *de novo*. *Id.*

¶ 30 Defendant first argues that his postconviction petition made a substantial showing that appellate counsel was ineffective for failing to challenge the admission of three prior consistent statements on appeal: (1) Nowell's testimony that he made a handwritten statement to the police, identifying defendant as the gunman; (2) Nowell's verbal statement to the police (via video) identifying defendant as the gunman; and (3) Whiteside's testimony that Nowell called her very shortly after the robbery and told her that defendant had just robbed somebody.

¶ 31 In assessing claims of ineffective assistance of appellate counsel, a court follows the two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). To succeed on a claim of ineffective assistance of appellate counsel, a petitioner must show that the failure to raise a particular issue was objectively unreasonable and that, absent this failure, his conviction would

have been reversed. *People v. Williams*, 209 Ill. 2d 227, 243 (2004). "Appellate counsel is not obligated to brief every conceivable issue on appeal, and it is not incompetence of counsel to refrain from raising issues which, in his or her judgment, are without merit, unless counsel's appraisal of the merits is patently wrong." *People v. Easley*, 192 Ill. 2d 307, 329 (2000). Thus, a petitioner has not suffered prejudice from appellate counsel's decision not to raise certain issues on appeal unless such issues were meritorious. *Id.*

¶ 32 We note that, although defendant objected at trial to the admission of Nowell's testimony that he identified defendant in a handwritten police statement and to the admission of Nowell's video statement identifying defendant, he did not raise those issues in his posttrial motion. Defendant concedes that he did not raise the issue as to the handwritten statement, but he claims that he did raise the issue as to Nowell's video statement. We disagree. A review of the posttrial motion shows that, although defendant argued that the video statement was improperly admitted, he argued only that it was "highly prejudicial and had no bearing on the issues before the jury"; he made no argument that the video statement was an inadmissible prior consistent statement. Given defendant's failure to raise the issues in his posttrial motion, they are forfeited. See *People v. Naylor*, 229 Ill. 2d 584, 592 (2008). Thus, had appellate counsel raised the issues with respect to those two statements on direct appeal, counsel would have had to establish plain error. (We note that the issue as to the admissibility of Whiteside's testimony regarding Nowell's statement was properly preserved.)

¶ 33 Plain error is a limited and narrow exception to the general forfeiture rule. *People v. Hampton*, 149 Ill. 2d 71, 100 (1992). To obtain such relief, a defendant must show that a clear or obvious error occurred. *People v. Hillier*, 237 Ill. 2d 539, 545 (2010). If a court determines that no error occurred, it need not apply any further plain-error analysis. *People v. Moreira*, 378 Ill.

App. 3d 120, 131 (2007). Only if an error occurred must a court determine if: (1) the evidence was so closely balanced that the error alone threatened to tip the scales of justice against the defendant, irrespective of the seriousness of the error; or (2) the error was so serious that it affected the fairness of the trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence. *Naylor*, 229 Ill. 2d at 593. The present case involves the first prong, because claims that prior consistent statements were used improperly to bolster a witness's credibility do not implicate a substantial right. *People v Keene*, 169 Ill. 2d 1, 18-19 (1995). A defendant bears the burden of persuasion under either prong. *People v. Thompson*, 238 Ill. 2d 598, 613 (2010).

¶ 34 It is with the above principles in mind that we consider whether defendant made a substantial showing that, absent appellate counsel's failure to raise the issue of the admissibility of Nowell's prior consistent statements, we would have reversed.

¶ 35 To succeed on appeal, appellate counsel would have had to first establish that an error occurred, *i.e.*, that the trial court abused its discretion in admitting Nowell's prior consistent statements. See *People v. Short*, 2014 IL App (1st) 121262, ¶ 102 (we review the trial court's evidentiary rulings for an abuse of discretion). The threshold for finding an abuse of discretion is high and will not be overcome unless the trial court's ruling was arbitrary, fanciful, or unreasonable, or no reasonable person would have taken the view adopted by the trial court. *People v. Donoho*, 204 Ill. 2d 159, 186 (2003). Under the abuse-of-discretion standard, reasonable minds can disagree about whether certain evidence is admissible without requiring a reversal of a trial court's ruling. *Id.*

¶ 36 Generally, statements made by a witness before trial are inadmissible for the purpose of corroborating the witness's trial testimony or rehabilitating a witness. *People v. Cuadrado*, 214

Ill. 2d 79, 90 (2005). "This is because the trier of fact is likely to unfairly enhance a witness's credibility simply because the statement has been repeated." *People v. McWhite*, 399 Ill. App. 3d 637, 641 (2010). However, there are two exceptions to this rule. Illinois Rule of Evidence Rule 613(c) (eff. Jan. 1, 2011), which governs prior consistent statements of a witness, provides as follows:

> "A prior statement that is consistent with the declarant-witness's testimony is admissible, for rehabilitation purposes only and not substantively as a hearsay exception or exclusion, when the declarant testifies at the trial or hearing and is available to the opposing party for examination concerning the statement, and the statement is offered to rebut an express or implied charge that:
>
> (i) the witness acted from an improper influence or motive to testify falsely, if that influence or motive did not exist when the statement was made; or
>
> (ii) the witness's testimony was recently fabricated, if the statement was made before the alleged fabrication occurred."

The party seeking to introduce the prior consistent statement has the burden of establishing that the statement predates the alleged recent fabrication or predates the existence of the motive to testify falsely. *Short*, 2014 IL App (1st) 121262, ¶ 102.

¶ 37 Defendant argues that Nowell's three prior consistent statements were inadmissible because the statements did not predate Nowell's motive to testify falsely. According to defendant, Nowell had a motive to testify falsely immediately after the robbery and when he was interrogated by the police, in order to shift blame to someone else and obtain leniency. In response, the State argues that Nowell's statements were admissible to rebut defense counsel's separate allegation that Nowell had a motive to testify falsely in order to get the benefit of the

plea agreement. The State asserts that defendant's argument ignores the differences between Nowell's alleged motives to testify falsely.

¶ 38 In support of its argument, the State relies on *People v. Antczak*, 251 Ill. App. 3d 709 (1993). In *Antczak*, we considered whether a prior consistent statement could be admitted to rebut a charge of recent fabrication, where it could not be admitted to rebut a separate charge of motive to testify falsely, because it was made after the motive to falsify arose. *Id.* at 714-15. We concluded that "charges of recent fabrication" and "charges of motive to falsify" are technically "separate exceptions" to the rule against prior consistent statements and that, where a witness faces separate charges of both recent fabrication and motive to falsify, a prior consistent statement can be admitted to rebut a recent fabrication, even if a motive to falsify existed when the statement was made. *Id.* at 716. According to the State, under *Antczak*, notwithstanding any motive on the part of Nowell to placate Kueber during the interrogation, the prior consistent statements were admissible to rebut the separate charge that Nowell's trial testimony was fabricated because of the plea agreement reached before trial.

¶ 39 Defendant responds that *Antczak* does not support the State's argument, because he made no claim that Nowell's testimony was recently fabricated. We disagree. During defense counsel's cross-examination of Nowell, defense counsel implied that the plea agreement entered into shortly before trial was the motivation for Nowell's testimony. The trial court specifically noted as much when considering the argument with respect to Whiteside's testimony. The court stated that there was "evidence brought out on cross that defendant [*sic*] changed his story to the police with the implication that it's because the police got him to do it, and then also, his testimony is what it is because he got the sweetheart deal to flip." The court found that the prior

consistent statements were admissible "under the narrow circumstances of rebutting an inference of recent fabrication or motive to lie."

¶ 40 The court's conclusion finds support in *People v. Richardson*, 348 Ill. App. 3d 796 (2004). In *Richardson*, the defendant was on trial for murder. A witness, Parker, testified that he saw the defendant shoot the victim on November 5, 1996. *Id.* at 800. Parker was arrested on November 9, 1996, and denied any involvement in the shooting. *Id.* On November 10, 1996, Parker identified the defendant as the shooter. *Id.* On cross-examination, Parker testified that, while in police custody, he had been handcuffed to a wall, was not permitted to use the bathroom, and was not allowed to make any calls. *Id.* at 801. Eventually, he was allowed to speak to his mother and thereafter agreed to speak to the police. *Id.* Parker testified that he was charged with first-degree murder but later entered into a plea agreement where he would be sentenced to four years for conspiracy to commit first-degree murder, in exchange for his testimony against the defendant. *Id.* The State argued that, in light of the testimony regarding the plea agreement, it should be permitted to use Parker's prior consistent statement to rebut the defendant's allegation of recent fabrication. *Id.* The defendant denied that he made any such allegation, pointing out that Parker told the same story prior to entering the plea agreement. *Id.* The trial court ruled that the plea agreement created the inference that Parker changed his testimony and permitted the State to use the prior consistent statement. *Id.* The defendant appealed.

¶ 41 On appeal, the defendant argued that the trial court erred in allowing the State to use Parker's November 10 statement, because when he gave the statement "Parker was prompted to lie about the shooter's identity in order to alleviate his treatment by the police and thus his motive to lie was present prior to his making the *** statement." *Id.* at 802. The court, relying

on *Antczak*, found that it was the "charge-of-recent-fabrication exception" that applied. *Id.* The court stated:

> "In his cross-examination of Mr. Parker, defense counsel touched on the circumstances surrounding Mr. Parker's initial denial of any involvement in the shooting and his subsequent naming of the defendant as the shooter. However, defense counsel extensively cross-examined Mr. Parker as to his plea agreement with the State. There is no dispute that the plea agreement was entered into subsequent to Mr. Parker's November 10, 1996, statement.
>
> Thus, regardless of any motive to lie, the defendant's November 10, 1996, statement was admissible to rehabilitate Mr. Parker's testimony that the defendant was the shooter against any charge that he fabricated his story in exchange for the plea agreement." *Id.* at 803-04.

¶ 42 Nevertheless, defendant argues that Nowell's prior consistent statements to the police were not admissible to rebut a motive to testify falsely based on the plea agreement, because, according to defendant, there had been a suggestion of leniency and plea bargaining by Kueber when Nowell made his statements. See Michael H. Graham, Graham's Handbook of Illinois Evidence § 801.12, at 800-01 (10th ed. 2010) ("On balance, it appears that a statement to a police officer or a government attorney will be admitted as a prior consistent statement to rebut an implied or express charge of improper motive or influence arising from plea bargaining when made under circumstances indicating that neither a suggestion of a plea bargain or leniency nor a threat by the police existed at the time of the making of the prior consistent statement.").

¶ 43 We reject defendant's argument. We find *People v. Lambert*, 288 Ill App. 3d 450 (1997), instructive. In *Lambert*, a State's eyewitness, Flores, testified during the defendant's murder trial

that he had given a written statement to the police concerning the murder. *Id.* at 452. Flores also testified that, in exchange for his trial testimony, the State had agreed to reduce the charges against him and sentence him to probation. *Id.* Defense counsel cross-examined Flores concerning his expectations of leniency for his involvement in the victim's death, in light of a plea agreement. *Id.* at 456. The officer who took the statement testified that no deal had been made in exchange for the statement when it was given. *Id.* at 457. The State was allowed to read Flores's statement to the jury. *Id.* at 452.

¶ 44 On appeal, we found that Flores's statement was not admissible under the recent-fabrication exception, because defense counsel's examination did not raise such a charge. *Id.* at 455. Nevertheless, we found that the statement was properly admitted under the improper-motive exception. *Id.* We framed the issue as whether Flores's alleged motive to testify falsely, *i.e.*, expectations of leniency in light of a plea agreement, existed when he made the statement. *Id.* at 456. We found that it did not. *Id.* We noted that Flores specifically denied that there were any agreements with the police or the State's Attorney's office prior to his making the statement. *Id.* at 457. We also noted that the officer who took the statement also denied that any deals had been made in exchange for the statement. *Id.*

¶ 45 Here, although Kueber testified that he told defendant that he would "help him in the charges" and that he would "go to bat with him with the State's Attorney's Office," no deals had been made. Nowell's testimony makes clear that, when he made the statements, he had no intention of entering into a plea agreement. Nowell testified that he agreed to the plea offer only after he had been in jail for about 150 days. When asked whether he would have taken the offer sooner had it been made sooner, he testified that he would not have, because he "could have beaten the case." He testified that the only reason he took the plea offer was to get out of

custody. He knew that, in order to stay out of custody, he had to testify against defendant; otherwise, he would be taken back to jail. Given this testimony, we cannot say that the trial court abused its discretion in ruling that the statements were admissible to rebut defense counsel's separate implication that Nowell was motivated to fabricate his testimony as a result of his recent plea agreement with the State.

¶ 46 Defendant's reliance on *People v. Wiggins*, 2015 Il App (1st) 133033, and *People v. Matthews*, 2012 IL App (1st) 102540, does not warrant a different conclusion, because neither case concerned whether the witness was motivated to testify falsely by a plea agreement entered into well after the statement had been given. For instance, in *Wiggins*, a key witness, Clark, testified that he saw the defendant pull out a gun and start shooting and that he did not hear "Swift" say anything to the defendant before the shooting. *Id.* ¶ 16. Clark admitted that, at the police station, he signed a written statement asserting that he heard Swift tell the defendant to " 'handle this.' " *Id.* The trial court allowed the State to read the entirety of Clark's written statement to the jury because of the " 'inconsistency.' " *Id.* However, the majority of the statement was consistent with the trial testimony the witness had just given.

¶ 47 On appeal, the court found that the trial court abused its discretion when it permitted the State to read the entirety of the statement to the jury, given that the majority of the statement was consistent with Clark's trial testimony. *Id.* at 36. The court rejected the dissent's conclusion that the statement was properly admitted as a prior consistent statement to rebut a charge that the statement had been recently fabricated. The court found that neither the State nor the trial court advanced such a theory. The court further found that the statement could not be admitted to rebut an allegation that Clark had a motive to testify falsely. Clark had testified that he had signed the written statement identifying the defendant as the shooter only after he was taken to

the police station, kept in a small windowless room for several hours, and told that another person had identified him in connection with the shooting. *Id.* ¶ 38. The court found that, since Clark "signed the statement after the motive to lie arose, the narrow exception" to the rule against prior consistent statements was not met. *Id.* ¶ 40.

¶ 48 In *Matthews*, the evidence established that the defendant killed the victim, leaving his body in his bedroom, and that, later, she and her friend, Dillon, stole the victim's TV. *Matthews*, 2012 IL App (1st) 102540, ¶¶ 3-9. The victim's body was discovered, and Dillon was arrested for theft. *Id.* ¶ 6. In a police statement, Dillon stated that the defendant claimed to have killed the victim. *Id.* Dillon remained in custody for the weekend and testified before the grand jury on the following Monday. *Id.* At trial, Dillon testified that, while on the way to the victim's apartment to steal the TV, the defendant told her that she killed the victim. *Id.* ¶ 7. The defendant's mother testified that Dillon told her that she was told that, if she did not give a statement against the defendant, she would be charged with the murder and that the reason she was released without being charged with a crime was that she agreed to testify before the grand jury. *Id.* ¶ 8.

¶ 49 On appeal, the defendant argued that Dillon's written statement and her grand jury testimony were improperly admitted. *Id.* ¶ 23. The court agreed. The court rejected the State's argument that, because the statements were used to rebut an allegation that Dillon had a motive to testify falsely, they were properly admitted as prior consistent statements. *Id.* ¶ 25. The court stated:

> "The State, however, ignores the other critical component of the exception—that the statements must have been made before the motive to fabricate arose. Instead, the statements used here were made after any purported coercion took place, not before." *Id.*

¶ 50 Here, unlike in *Wiggins* and *Matthews*, the statements at issue were made before the alleged motive to fabricate, *i.e.*, the plea agreement, arose. Defense counsel questioned Nowell about the plea agreement, emphasizing that Nowell was required to testify against defendant in order to get released from jail. The clear implication was that Nowell was testifying falsely as a result of the plea agreement.

¶ 51 Based on the foregoing, we cannot say that no reasonable person would have taken the view adopted by the trial court, and thus we find no abuse of discretion in the admission of the prior consistent statements. Given this conclusion, we find that, had appellate counsel raised the issues on direct appeal, the result would not have been different.

¶ 52 Defendant also argues that, even if Whiteside's testimony was properly admitted, the limiting instruction given by the court when Whiteside testified was improper. However, we note that the instruction was actually written and approved by defense counsel. Thus, any alleged error on this basis was invited and, had counsel raised the issue on appeal, it would not have been considered. See *In re Detention of Swope*, 213 Ill. 2d 210, 217 (2004) ("[A] party cannot complain of error which that party induced the court to make or to which that party consented. The rationale behind this well-established rule is that it would be manifestly unfair to allow a party a second trial upon the basis of error which that party injected into the proceedings.").

¶ 53 Defendant's second argument is that he made a substantial showing that trial counsel was ineffective for failing to call Morrison as a witness. According to the petition, Morrison reported the robbery to the police the day after the incident, failed to identify defendant in a photo lineup, identified someone else in the lineup, and indicated that the gunman was much taller than defendant.

¶ 54 This claim was properly dismissed because it was not supported by an affidavit from Morrison. Section 122-2 of the Act provides that "[t]he petition shall have attached thereto affidavits, records, or other evidence supporting its allegations or shall state why the same are not attached." 725 ILCS 5/122-2 (West 2014). In *People v. Enis*, 194 Ill. 2d 361, 380 (2000), our supreme court stated that "[a postconviction] claim that trial counsel failed to investigate and call a witness must be supported by an affidavit from the proposed witness." The court explained that, "[i]n the absence of such an affidavit, a reviewing court cannot determine whether the proposed witness could have provided testimony or information favorable to the defendant, and further review of the claim is unnecessary." *Id.*

¶ 55 Defendant argues that *Enis* is "easily distinguished," because in that case the attached " 'investigation notes' " did not sufficiently corroborate the defendant's claim and, moreover, the court specifically noted that there was no reasonable probability of a different outcome because the evidence of the defendant's guilt was overwhelming. According to defendant, here the attached police reports support his claim and the evidence is not similarly overwhelming.

¶ 56 Defendant's attempts to distinguish *Enis* are unpersuasive. Very recently, this court found that, notwithstanding the *Enis* court's rejection of the defendant's ineffective-assistance claim on the merits, the court made clear that "in the absence of the requisite affidavit, the defendant's claim would not have survived review even if otherwise meritorious." *People v. Spivey*, 2017 IL App (2d) 140941, ¶ 15.

¶ 57 In *Spivey*, the defendant filed a *pro se* postconviction petition alleging that his counsel was ineffective for failing to investigate a potential witness, Fleming. *Id.* ¶ 10. The defendant submitted an unnotarized declaration stating that, after his *pro se* motion for a new trial was denied, he learned from his brother that Fleming had been trying to contact the defendant's

lawyer to recant his testimony. *Id.* He also alleged that another witness would have testified that the defendant was not with Fleming and another individual who had been charged along with the defendant. *Id.* The petition was advanced to the second stage and counsel was appointed. *Id.* ¶ 11. The trial court granted the State's motion to dismiss and the defendant appealed. *Id.* On appeal, we held that, because the defendant did not attach affidavits from the witnesses or explain their absence, as required by section 122-2 of the Act, dismissal was proper under *Enis*, and we rejected the defendant's argument that we should consider his claim on the merits. *Id.* ¶¶ 15-17. Here, as in *Spivey*, defendant failed to comply with section 122-2 of the Act. Accordingly, this claim was properly dismissed.

¶ 58 III. CONCLUSION

¶ 59 For the reasons stated, we affirm the order of the circuit court of Lake County granting the State's motion to dismiss defendant's postconviction petition. As part of our judgment, we grant the State's request that defendant be assessed $50 as costs for this appeal. 55 ILCS 5/4-2002(a) (West 2014); see also *People v. Nicholls*, 71 Ill. 2d 166, 178 (1978).

¶ 60 Affirmed.

STATE OF ILLINOIS)
) SS
COUNTY OF LAKE)

IN THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT, LAKE COUNTY, ILLINOIS

FILED
OCT 07 2014
Keith Brin
CIRCUIT CLERK

THE PEOPLE OF THE STATE OF ILLINOIS)
)
VS.) GEN. NO. 10CF1138
Torrence D. Dupree)

NOTICE OF APPEAL

An Appeal is taken from the Order described below.

(1) Court to which Appeal is taken: Appellate Court - Second District

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

Name: Torrence D. Dupree M06790

Address: c/o Shawnee Correctional Center 6665 State Route 146 East Vienna, IL 62995

(3) Name and address of Appellant's attorney on appeal.

Name: Mr. Thomas A. Lilien Deputy Appellate Defender

Address: One Douglas Ave, 2nd Floor, Elgin, IL 60120

If Appellant is indigent and has no attorney, does he want one appointed? Yes

(4) Date of Judgment Order: October 7, 2014

(5) Offense of which convicted: Armed Robbery

(6) Sentence: Fifteen (15) years in the Department of Corrections

(7) If appeal is not from a conviction, nature of Order appealed from: State's motion to dismiss defendant's post-conviction petition heard and granted

(Signed) _____
(May be signed by appellant, attorney for appellant, or Clerk of the Circuit Court)

171-89 Rev 2/01

C: 00514

No. 122307

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Appellate Court of Illinois, No. 2-14-1013.
Plaintiff-Appellee,	)	There on appeal from the Circuit Court of the Nineteenth Judicial
-vs-	)	Circuit, Lake County, Illinois, No. 10 CF 1138.
TORRENCE D. DUPREE	)	Honorable Daniel B. Shanes,
Defendant-Appellant	)	Judge Presiding.

NOTICE AND PROOF OF SERVICE

Lisa Madigan, Attorney General, 100 W. Randolph St., Chicago, IL 60601, mglick@atg.state.il.us, cc: twhatley-conner@atg.state.il.us, jescobar@atg.state.il.us, lbendik@atg.state.il.us;

Mr. Lawrence Bauer, Deputy Director, State's Attorney Appellate Prosecutor, 2032 Larkin Avenue, Elgin, IL 60123, 2nddistrict.eserve@ilsaap.org;

Michael G. Nerheim, Lake County State's Attorney, 18 N. County St., 4th Floor, Waukegan, IL 60085, StatesAttorney@lakecountyil.gov;

Mr. Torrence D. Dupree, Prentice Place, 255 W. 112th Pl., Chicago, IL 60628

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 January 24, 2018, 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.

/s/Moses Kim
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