No. 124940

IN THE
SUPREME COURT OF ILLINOIS

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

BRIEF AND SUPPLEMENTAL APPENDIX OF RESPONDENT-APPELLEE PEOPLE OF THE STATE OF ILLINOIS

KWAME RAOUL
Attorney General of Illinois

JANE ELINOR NOTZ
Solicitor General

MICHAEL M. GLICK
Criminal Appeals Division Chief

ERIN M. O'CONNELL
Assistant Attorney General
100 West Randolph Street, 12th Floor
Chicago, Illinois 60601-3218
(312) 814-1235
eserve.criminalappeals@atg.state.il.us

Counsel for Respondent-Appellee
People of the State of Illinois

ORAL ARGUMENT REQUESTED

POINTS AND AUTHORITIES

NATURE OF THE CASE

Petitioner pleaded guilty to one count of armed violence and was sentenced to 15 years in prison. The circuit court granted petitioner leave to file a successive postconviction petition that claimed actual innocence and ineffective assistance of plea counsel. After holding an evidentiary hearing on the claim of innocence, the circuit court denied postconviction relief. Petitioner appealed, pursuing only his claim of innocence, and the appellate court affirmed the judgment, holding that petitioner's unchallenged guilty plea barred relief on a claim of innocence. Petitioner has appealed that holding. No question is raised on the pleadings because neither court below denied relief based on a defect in the successive postconviction petition.

ISSUES PRESENTED FOR REVIEW

1. Whether petitioner's knowing and voluntary guilty plea, made in exchange for benefits, waived not only his trial rights and his right to hold the prosecution to its burden of proof, but also his right to claim actual innocence in a postconviction petition.

2. Whether petitioner had no statutory right to pursue a claim of innocence after pleading guilty, at least where he failed to offer exculpatory forensic evidence.

3. Whether petitioner fails to satisfy the innocence standard as a matter of law because his guilty plea rebuts a claim of innocence, and he

cannot show that his witness's testimony is material, noncumulative, or conclusive where there has been no trial.

4. Whether, even if petitioner could raise a claim of innocence, the circuit court did not manifestly err in denying postconviction relief following an evidentiary hearing at which it found petitioner's witness incredible.

JURISDICTION

Appellate jurisdiction lies under Supreme Court Rules 315 and 612(b). On September 25, 2019, this Court granted leave to appeal. *People v. Reed*, 132 N.E.3d 317 (Table) (Ill. 2019).

STATEMENT OF FACTS

A. Petitioner Pleads Guilty to Armed Violence in Exchange for the Minimum Sentence and Dismissal of Other Charges.

Petitioner was charged in the Circuit Court of Macon County with one count each of armed violence, unlawful possession of a weapon by a felon, unlawful possession of a controlled substance, and unlawful possession of a controlled substance with intent to deliver. C17-20.[1] The charges were supported by a sworn statement of a Decatur police officer that he encountered petitioner and a group gathered on a porch in an area with frequent drug traffic. C22-23. Petitioner and a second man ran inside the house upon seeing the officer and were later apprehended. C22. Petitioner

[1] "C_" denotes the common law record; "Vol. [number] at R_" the reports of proceedings; "Pet. Br." petitioner's opening brief; "A_" petitioner's appendix; "SA_" the supplemental appendix to this brief; and "Am. Br." the amicus brief.

had a digital scale in his pocket. *Id.* Both a sawed-off shotgun and a baggie containing crack cocaine were found under a bed in a room where witnesses testified petitioner had been after he ran inside from the front porch. *Id.*

Petitioner agreed to plead guilty to armed violence in exchange for the minimum 15-year sentence and dismissal of the remaining charges. SA2-3.

At the change-of-plea hearing, the circuit court detailed the constitutional rights that petitioner would be waiving:

> [i]f you plead guilty, you would be giving up your right to a trial of any kind by a judge or a jury. You would be giving up the right to confront and cross-examine witnesses who would testify against you in court during your trial. By pleading guilty, you would be giving up the privilege against self-incrimination and the presumption of innocence. You would be giving up the right to subpoena witnesses to come into court to testify for you and to present any defenses you might have to this charge, and by pleading guilty, you would be giving up the right to require the [S]tate to prove you committed this offense beyond a reasonable doubt. Do you understand the rights you are giving up by pleading guilty?

SA4. Petitioner responded, "Yes." *Id.* The court asked, "Are you telling me you wish to give up your rights and plead guilty?" *Id.* He responded affirmatively. *Id.*

The prosecutor then offered the following factual basis for the charge of armed violence:

> The [S]tate would present the testimony of Officer Daniels of the Decatur Police Department. Officer Daniels would testify that he observed this defendant on September 23rd of 2014 on a porch in

> Decatur, Illinois. He observed the defendant flee upon sight of him. The defendant was running oddly. When he entered the house, he located a shotgun and cocaine. The defendant was located in a bedroom, and the shotgun had the defendant's DNA on it.

SA5. The court accepted the factual basis. *Id.*

Petitioner then confirmed that no one had forced him to plead guilty or made promises other than those described as the terms of the negotiated plea agreement. SA6. The court asked petitioner a second time, "Are you telling me you wish to continue to plead guilty this morning?" *Id.* Petitioner answered, "Yes." SA7.

The court accepted the plea and sentenced petitioner to 15 years in prison. *Id.*; *see also* C107. Petitioner neither moved to withdraw his plea nor filed a direct appeal.

B. The Circuit Court Denies Petitioner's Postconviction Claim of Innocence After an Evidentiary Hearing.

After pursuing an initial postconviction petition, *see* C116-21, petitioner moved the circuit court for leave to file a successive petition, C131-42, and the court granted his motion, C11.

The successive petition claimed, first, that petitioner was actually innocent of the charged of armed violence predicated on the knowing possession of cocaine. C135-38. Petitioner submitted a police report demonstrating that he had been arrested with Davie Callaway, C148, and an affidavit from Callaway claiming that the cocaine recovered at the time of

their arrest belonged to Callaway and petitioner was unaware of it, C146. The successive petition also claimed that trial counsel was ineffective for failing to investigate, C138-39, and that petitioner's guilty plea resulted from counsel's failure to explain that the armed violence charge was based on petitioner's unlawful possession of cocaine, C140-41.

The circuit court denied the State's motion to dismiss, C13, which argued, among other things, that by knowingly and voluntarily pleading guilty, petitioner waived a postconviction claim of innocence, C163-68. The court held an evidentiary hearing at which Callaway was the only witness. Callaway testified that, following his September 2014 arrest with petitioner, he was charged with, and later convicted of, possession of a controlled substance. SA12-13. Callaway read his affidavit aloud and confirmed that it accurately set forth his testimony. SA13-14. Petitioner's counsel asked no further questions. SA14. On cross-examination, Callaway testified that both he and petitioner, after being convicted, were housed for a time at the Danville Correctional Center. SA15. While at Danville, Callaway discussed the case with petitioner and wrote the affidavit for him. SA15-16.

The circuit court denied postconviction relief in a written order. SA18-20. The court concluded that Callaway was not credible, and thus petitioner's claim of innocence failed. SA19. With respect to petitioner's claim that plea counsel was ineffective, the court noted that petitioner offered no detail or

evidence beyond this conclusory assertion, and therefore this claim also failed. *Id.*

C. The Appellate Court Affirms, Holding that Petitioner Could Not Claim Innocence Without Challenging His Guilty Plea.

On appeal, petitioner argued only that the circuit court erred by denying his claim of innocence. A4, ¶ 1.[2] Petitioner did "not claim that his guilty plea was uninformed or involuntary" but only "that his guilty plea was false." A8, ¶ 16. The appellate court concluded that, "[b]ecause the validity of [petitioner's] guilty plea is undisputed on appeal, . . . he remains bound by his guilty plea and . . . his claim of actual innocence cannot be entertained." A4, ¶ 2.

The appellate court held that, by pleading guilty, petitioner "dispensed with evidence, inculpatory or exculpatory," and he "'waive[d] his rights to a jury trial and to proof beyond a reasonable doubt.'" A13, ¶ 24 (quoting, with alteration, *Hill v. Cowan*, 202 Ill. 2d 151, 154 (2002)) (emphasis removed). Having forgone a trial, petitioner could not hold the State to its burden of

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[2] The appellate court issued two opinions. In the first (A4-20), the court explained its disagreement with *People v. Shaw*, 2018 IL App (1st) 152994, which held that guilty-plea petitioners may claim innocence without challenging their pleas, *see* A13-19, ¶¶ 25-37. The *Shaw* decision was withdrawn, A21-23, and the Fourth District issued a modified opinion (A31-42), omitting discussion of that case. Subsequently, the First District issued a new opinion, on which petitioner relies. *See* Pet. Br. 19, 22 (citing *People v. Shaw*, 2019 IL App (1st) 152994). Because the lengthier Fourth District decision includes additional persuasive reasoning concerning the issues before this Court, and for simplicity, the People cite the unmodified opinion throughout this brief.

proof. And a postconviction claim of innocence was waived because "'[a] guilty plea waives all nonjursidictional defenses or defects,'" including those "that are constitutional in nature." A18, ¶ 37 (quoting, with alteration, *People v. Horton*, 143 Ill. 2d 11, 22 (1991)).

The appellate court further held that, as a matter of law, petitioner could not satisfy the standard for innocence that this Court set forth in *People v. Washington*, 171 Ill. 2d 475 (1996). Indeed, "applying *Washington* to a guilty-plea case is like trying to jam a square peg into a round hole," the appellate court concluded, because *Washington* asks whether new evidence is material, noncumulative, and conclusive with reference to the evidence presented at trial. A17-18, ¶ 36. That "guilty-plea cases are *inherently* incapable of meeting the *Washington* standard[ ] . . . would suggest that a defendant who validly pleaded guilty cannot raise a postconviction claim of actual innocence." A18, ¶ 36.

Finally, the appellate court noted that it would be "duplicitous" for petitioners who "knowingly and voluntarily plead guilty" to later "complain . . . that the trial court found them guilty." A19, ¶ 38. If petitioner's conviction "was a constitutional error, it was an error he himself invited by pleading guilty." *Id.* The estoppel principle underlying the invited-error doctrine was "especially strong considering that, as a result of [petitioner's] guilty plea, the State's evidence might have grown stale." *Id.*

The appellate court thus held that petitioner's claim was legally barred. It did not address whether the circuit court properly denied petitioner's claim based on its conclusion that Callaway was not a credible witness.

ARGUMENT

I. Introduction and Standards of Review

This Court should affirm the appellate court's judgment for four reasons. First, by pleading guilty, petitioner waived his right to claim innocence through a postconviction petition, and this Court should not overlook his knowing and voluntary waiver. *See infra* Section II. Second, contrary to petitioner's claim, the General Assembly has not granted him a statutory right to pursue a claim of innocence (notwithstanding his waiver). *See infra* Section III. Third, petitioner cannot, as a matter of law, satisfy the innocence test that this Court set forth in *People v. Washington*, 171 Ill. 2d 475 (1996): his guilty plea positively rebuts his claim and he cannot demonstrate that his new evidence is material, noncumulative, or conclusive where there has been no trial. *See infra* Section IV. And fourth, even if petitioner could raise a claim of innocence, the circuit court did not manifestly err in denying postconviction relief upon concluding that Calloway was not a credible witness following an evidentiary hearing. *See infra* Section V.

This Court reviews de novo the legal questions of whether petitioner waived his right to claim innocence, whether the General Assembly intended to confer upon defendants who plead guilty a statutory right to pursue a postconviction claim of innocence, and whether a petitioner who pleaded guilty can satisfy the legal standard for innocence. *See, e.g.*, *People v. Jolly*, 2014 IL 117142, ¶ 28 (legal issues are reviewed de novo). This Court reviews the circuit court's judgment denying postconviction relief following an evidentiary hearing for manifest error. *People v. Ortiz*, 235 Ill. 2d 319, 333 (2009).

II. By Knowingly and Voluntarily Pleading Guilty, Petitioner Waived Any Right to Pursue Postconviction Relief on a Claim of Innocence.

Petitioner's valid guilty plea bars postconviction relief on a claim of actual innocence, as the appellate court correctly held. Because a knowing and voluntary guilty plea waives a defendant's trial rights and any defenses related to the sufficiency of the evidence, it necessarily waives a right to claim innocence after conviction based on new evidence.[3] Moreover, this Court should decline to overlook petitioner's intentional waiver under the plain-error doctrine.

[3] Whether a guilty plea waives a right to claim innocence based on new evidence is a matter of first impression in this Court. Petitioner correctly notes, Pet. Br. 21-22, that this Court did not decide the issue in *People v. Cannon*, 46 Ill. 2d 319 (1970); indeed, the Court could not have decided the issue in *Cannon* because it did not recognize a constitutional right to claim innocence until decades later, *see Washington*, 171 Ill. 2d 475.

A. As a matter of precedent and policy, a guilty plea waives defenses related to the sufficiency of the evidence, including a postconviction claim of innocence.

By pleading guilty, petitioner relinquished the constitutional protections intended to prevent conviction of innocent people. *See Boykin v. Alabama*, 395 U.S. 238, 242-43 (1969). Before his plea was accepted, petitioner acknowledged and waived his right to a trial at which he would be presumed innocent and the State would bear the burden of proof beyond a reasonable doubt, as well as his rights to confront and cross-examine witnesses, to compulsory process, and to present a defense. He also waived his right against self-incrimination and admitted his guilt by pleading guilty. *See Boykin*, 395 U.S. at 242 ("[a] plea of guilty is more than a confession which admits that the accused did various acts; it is itself a conviction"); *People v. Salem*, 2016 IL App (3d) 120390, ¶ 45 ("a guilty plea is an admission of guilt"); *People v. Rhoades*, 323 Ill. App. 3d 644, 651 (5th Dist. 2001) ("Defendant's guilty plea was a knowing admission of guilt of the criminal acts charged and all the material facts alleged in the charging instrument.").

Having knowingly and voluntarily forgone these procedural protections to which he was entitled under the state and federal constitutions, petitioner also waived his right to later vacate his plea on the basis that new evidence demonstrated his innocence. "It is well established that a voluntary guilty plea waives all non-jurisdictional errors or irregularities, including constitutional ones." *People v. Townsell*, 209 Ill. 2d 543, 545 (2004); *see also,*

e.g., *People v. Horton*, 143 Ill. 2d 11, 22 (1991); *People v. Brown*, 41 Ill. 2d 503, 505 (1969). Instead, a defendant seeking relief from a guilty plea may claim only (1) "that the plea of guilty was not made voluntarily and with full knowledge of the consequences"; or (2) "that defendant did not receive the benefit of the bargain he made with the State when he pled guilty." *People v. Whitfield*, 217 Ill. 2d 177, 183-84 (2005).

As the appellate court correctly concluded, a claim of innocence is among the "nonjurisdictional defenses" waived by a plea. A18, ¶ 37. Because a defendant who pleads guilty has sacrificed his right to challenge the sufficiency of the State's evidence or present a defense, *Hill v. Cowan*, 202 Ill. 2d 151, 154 (2002) ("[a] guilty plea is intrinsically a relinquishment of the right" to hold the State to its burden of proof beyond a reasonable doubt), it follows that he has also waived the right to collaterally attack his conviction based on new evidence pertaining to innocence. *See People v. Tiger*, 110 N.E.3d 509, 515-16 (N.Y. 2018) ("[a] valid guilty plea relinquishes any claim that would contradict the admissions necessarily made upon entry of a voluntary plea of guilty" and "is inconsistent with a claim of factual innocence") (internal quotation marks omitted); *Woods v. State*, 379 P.3d 1134, 1141-42 (Kan. App. 2016) ("a freely and voluntarily entered guilty plea bars a collateral attack on the sufficiency of the evidence" in form of innocence claim); *Norris v. State*, 896 N.E.2d 1149, 1153 (Ind. 2008) ("with a trial court's acceptance of a defendant's guilty plea, the defendant waives the

right to present evidence regarding guilt or innocence" and may not "use post-conviction proceedings to later revisit the integrity of [his] plea in light of alleged new evidence seeking to show that [he was] in fact not guilty").

Petitioner's argument that, under *Washington*, 171 Ill. 2d at 489, it violates the Illinois Constitution for any innocent person to be incarcerated, even one who pleads guilty, *see* Pet. Br. 13-16, is misdirected, because "a constitutional right, like any other right of an accused, may be waived, and a voluntary plea of guilty waives all errors or irregularities that are not jurisdictional." *Brown*, 41 Ill. 2d at 505; *see also Hill*, 202 Ill. 2d at 158-59 ("by pleading guilty defendant waived the constitutional rights he now seeks to invoke"). The pivotal question here is not whether a constitutional right is at stake, but whether petitioner *waived* that right by pleading guilty.[4] And he did: by waiving his constitutional right to hold the State to its burden of proof, petitioner waived any right he might otherwise have under the Illinois Constitution to claim innocence based on new evidence.

Important policies underlie this waiver doctrine. Holding that a defendant who pleads guilty may later claim innocence risks undermining

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[4] The premise that it always violates the Illinois Constitution to incarcerate an innocent defendant who has voluntarily pleaded guilty appears to conflict with precedent holding that a defendant may plead guilty while maintaining his innocence. *See North Carolina v. Alford*, 400 U.S. 25, 38 (1970); *People v. Barker*, 83 Ill. 2d 319, 332-33 (1980). If this Court concludes, to the contrary, that it *does* violate the Illinois Constitution for an innocent defendant to willingly plead guilty and be convicted and punished, then this Court should proscribe circuit courts from accepting pleas from defendants who do not admit guilt.

the plea negotiation process, which, when "[p]roperly administered, . . . can benefit all concerned." *Blackledge v. Allison*, 431 U.S. 63, 71 (1977) (quoted by *People v. McCutcheon*, 68 Ill. 2d 101, 107 (1977)); *see also Corbitt v. New Jersey*, 439 U.S. 212, 222 (1978) (plea bargaining is "a process mutually beneficial to both the defendant and the State"); *Santobello v. New York*, 404 U.S. 257, 261 (1971) ("Disposition of charges after plea discussions is not only an essential part of the process but a highly desirable part for many reasons."); *People v. Pier*, 51 Ill. 2d 96, 99 (1972) ("Plea bargaining is desirable in the administration of criminal justice.").

Indeed, petitioner correctly notes that a defendant may rationally choose to plead guilty — even if he is innocent — based on a realistic assessment of the risks at trial and a desire for the benefits that attend a guilty plea. Pet. Br. 19-20. As this case illustrates, the People offer significant concessions to defendants who plead guilty; here, petitioner received the minimum sentence for armed violence and the remaining charges against him were dismissed.

The People are motivated to offer these concessions due to the certainty and finality of a guilty plea, as well as the relative efficiency of forgoing a full criminal trial. *See Blackledge*, 431 U.S. at 71. Allowing defendants who forgo a trial to later claim innocence would undermine the certainty, finality, and efficiency that motivates such concessions. *See id.* at 71-72. By entering into a plea agreement, the People sacrifice the

opportunity to present their full case and present only an abbreviated summary of their evidence to establish a factual basis for the plea. *See generally People v. Jackson*, 199 Ill. 2d 286, 298-99 (2002) ("'the quantum of proof necessary to establish a factual basis for the plea is less than that necessary to sustain a conviction after a full trial'") (quoting *Barker*, 83 Ill. 2d at 327). A convicted defendant who returns years later and claims innocence requires the State to muster that same evidence after it has potentially gone stale. *See* A19, ¶ 38 (case for applying waiver in plea context "is especially strong considering that, as a result of [petitioner's] guilty plea, the State's evidence might have grown stale").

Consequently, as a matter of both precedent and policy, this Court should hold that a defendant who pleads guilty in exchange for benefits has waived not only a trial on the merits, but also a postconviction claim of innocence.

B. This Court should not excuse petitioner's waiver.

Nor should this Court overlook a petitioner's waiver in every case in which a petitioner who pleaded guilty later claims innocence. *See* Pet. Br. 29-31. Petitioner asserts that the appellate court failed to recognize that waiver is binding on "the parties" but not "on the courts," Pet. Br. 29; argues that "because imprisoning an innocent person is conscience-shocking, courts should excuse waiver . . . [to] reach a just result," Pet. Br. 29-30 (emphasis removed); and invokes the plain-error doctrine, which permits courts to

review "issues 'fundamental to the integrity of the judicial process,'" Pet. Br. 30 (quoting *People v. Keene*, 169 Ill. 2d 1, 17 (1995)).

Petitioner's argument confuses forfeitures with intentional waivers. A court may excuse a forfeiture under Supreme Court Rule 615(a), but the same rule does not apply to a true waiver. When this Court stated that "the waiver rule is a limitation on the parties, not a limitation on the jurisdiction of the courts," *People v. Hamilton*, 179 Ill. 2d 319, 323 (1997), it was referring to forfeiture, not intentional waiver. Indeed, this Court has since explained that "courts often use the terms 'forfeit,' 'waive,' and 'procedural default' interchangeably in criminal cases," even though they carry distinct meanings. *People v. Blair*, 215 Ill. 2d 427, 443 (2005). A "forfeiture" occurs when "issues that could have been raised, but were not, and are therefore barred." *Id.* at 443-44. In contrast, a "waiver arises from an affirmative act, is consensual, and consists of an intentional relinquishment of a known right." *Gallagher v. Lenart*, 226 Ill. 2d 208, 229 (2007) (internal quotation marks and alteration removed); *see also Blair*, 215 Ill. 2d at 444 n.2 ("'Waiver' strictly means the voluntary relinquishment of a known right.").

Where a defendant has inadvertently forfeited an issue, an appellate court may excuse the forfeiture upon a showing of plain error. Ill. Sup. Ct. R. 615(a) ("Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the trial court."); *see Keene*, 169 Ill. 2d at 16-19 (considering whether to excuse forfeiture under

plain-error doctrine). But the plain-error doctrine does not apply where a defendant has intentionally waived, rather than forfeited, an issue, *see People v. Stewart*, 2018 IL App (3d) 160205, ¶ 20 ("Forfeited errors may be subject to plain-error review, but waiver forecloses review of a claim predicated upon the waived right."), including a waiver resulting from a guilty plea, *see Townsell*, 209 Ill. 2d at 547-48 (defendant who pleaded guilty could not invoke Supreme Court Rule 615(a) to overcome waiver of constitutional claim).

Indeed, the appellate court correctly noted that if petitioner's conviction "is a constitutional error . . . , it is an error he himself invited by pleading guilty." A19, ¶ 38; *see also Hill*, 202 Ill. 2d at 159 (guilty plea waiver is "analogous" to invited error). Under the invited-error doctrine, a party "may not request to proceed in one manner and then later contend . . . that the course of action was in error." *People v. Carter*, 208 Ill. 2d 309, 319 (2003). Like other intentional waivers, invited errors are not subject to review under the plain-error doctrine. *See People v. Patrick*, 233 Ill. 2d 62, 77 (2009) ("We decline to address [defendant's] plain-error claim because [defendant] invited any error[.]"); *see also, e.g.*, *People v. Ramirez*, 2013 IL App (4th) 121153, ¶ 79 ("invited errors are not subject to plain-error review"); *People v. Harding*, 2012 IL App (2d) 101011, ¶ 17 ("plain-error review is forfeited when the defendant invites the error").

Because petitioner knowingly and voluntarily waived his constitutional rights by pleading guilty, and his plea therefore invited any error in his conviction and punishment, this Court may not excuse his waiver under the plain-error doctrine. Instead, petitioner's waiver should be enforced, and this Court should affirm the appellate court's judgment.

III. The General Assembly Did Not Confer Upon Criminal Defendants a Statutory Right to Claim Innocence After Pleading Guilty, at Least Absent Exculpatory Forensic Evidence.

Notwithstanding this Court's precedent governing guilty plea waivers, petitioner maintains that he is statutorily entitled to pursue a postconviction remedy based on innocence. Pet. Br. 16-18. But this argument fails.

A prisoner who pleads guilty may file a postconviction petition, *see* 725 ILCS 5/122-1, as petitioner notes, *see* Pet. Br. 16. But whether a petition may be filed and whether the petitioner has waived a claim in the petition are separate questions. *See Brown*, 41 Ill. 2d at 505 (postconviction petitioner who pleaded guilty waived claim in petition that confession was involuntary). Guilty-plea petitioners may properly pursue postconviction claims that were not waived by the guilty plea, *see, e.g.*, *People v. Hall*, 217 Ill. 2d 324, 341 (2005) (postconviction petitioner who pleaded guilty made substantial showing that plea counsel was ineffective), or join claims of innocence with claims challenging a guilty plea as invalid, *see People v. Knight*, 405 Ill. App. 3d 461, 469-71 (3d Dist. 2010).

Petitioner also correctly notes, Pet. Br. 17, that the General Assembly has permitted petitioners who plead guilty to seek postconviction DNA, fingerprint, or ballistics testing under 725 ILCS 5/116-3, through an amendment to that provision, *see* Pub. Act No. 98-948 (eff. Aug. 15, 2014). Though petitioner neither sought postconviction forensic testing nor pursued postconviction relief based on exculpatory forensic evidence, he argues that this amendment to the forensic testing statute conveyed a legislative intent to permit *any* petitioner who pleaded guilty to obtain postconviction relief on a claim of innocence. *See* Pet. Br. 17-18.

Petitioner's argument fails for two reasons. First, the statute offers testing and no other remedy. "The statutory schemes for postconviction relief and forensic DNA testing are completely different," and testing is available even to petitioners who cannot file postconviction petitions. *People v. Schutz*, 344 Ill. App. 3d 87, 90-93 (1st Dist. 2003) (holding that petitioner who had been out of custody for 15 years could seek testing even though he could not file postconviction petition). Thus, guilty-plea petitioners may seek exculpatory testing after they have been released from custody and can no longer pursue postconviction relief. *See* 725 ILCS 5/122-1(a) (only a "person imprisoned in the penitentiary" may file postconviction petition); *People v. Carrera*, 239 Ill. 2d 241, 245 (2010) ("the words 'imprisoned in the penitentiary' prevent[ ] those who had completed their sentences from using the Act's remedial machinery solely to purge their criminal records").

Forensic testing can enable petitioners who have pleaded guilty (and waived claims of innocence) to seek exoneration through other means, such as prosecutorial agreement or executive clemency. *See* Am. Br. 15-18 (prosecutor vacated convictions of two guilty-plea defendants whose codefendants obtained postconviction DNA testing after their release from custody).

Second, even if the amendment to the testing statute could be read as opening the door to *some* petitioners who pleaded guilty to pursue claims of innocence (notwithstanding waiver), petitioner does not qualify for that remedy. The testing statute authorizes only "fingerprint, Integrated Ballistic Identification System, or forensic DNA testing," 725 ILCS 5/116-3(a), in cases in which "identity was the issue in the trial or guilty plea which resulted in [the] conviction," 725 ILCS 5/116-3(b). A petitioner who pleaded guilty must show that "the result of the testing has the scientific potential to produce new, noncumulative evidence . . . (ii) that would raise a reasonable probability that the defendant would have been acquitted if the results of the evidence to be tested had been available prior to the defendant's guilty plea and the petitioner had proceeded to trial instead of pleading guilty." 725 ILCS 5/116-3(c)(1); *see also People v. Thomas*, 2017 IL App (3d) 150542, ¶¶ 15-16 (noting that standard applicable to petitioners who plead guilty is more demanding than that applied to those convicted at trial).

Thus, even if the statutory amendment could be read to allow petitioners who pleaded guilty to pursue postconviction relief after obtaining compelling forensic evidence of innocence, that narrow remedy would not be available to petitioner, who has neither sought nor presented such forensic evidence (nor was identity at issue in his case).

IV. Petitioner Cannot Satisfy the Actual Innocence Test as a Matter of Law.

Waiver aside, as the appellate court concluded, "guilty-plea cases are *inherently* incapable of meeting the *Washington* standard," which "suggest[s] that a defendant who validly pleaded guilty cannot raise a postconviction claim of actual innocence." A18, ¶ 36 (emphasis in original). Thus, even if petitioner's claim were not waived, it would fail as a matter of law.

To obtain relief on a claim of innocence, a petitioner must offer "supporting evidence" that is "new, material, noncumulative and, most importantly, of such conclusive character as would probably change the result on retrial." *Washington*, 171 Ill. 2d at 489 (internal quotation marks removed). On the latter issue, "conclusive means [that] the evidence, when considered along with the trial evidence, would probably lead to a different result." *People v. Coleman*, 2013 IL 113307, ¶ 96. In evaluating a postconviction claim, a court takes as true the allegations of a petition and its supporting documents unless they are rebutted by the trial record. *People v. Sanders*, 2016 IL 118123, ¶ 42.

In this case, and most other cases involving guilty pleas, the claim of innocence should fail because it is positively rebutted by petitioner's plea. A voluntary guilty plea is part of the record against which a petitioner's claim of innocence must be weighed, as petitioner appears to acknowledge, *see* Pet. Br. 26 (in weighing claim of innocence, "a court can compare the evidence of actual innocence against the record of the guilty plea"), and a guilty plea is an admission of guilt, *e.g.*, *Boykin*, 395 U.S. at 242; *Rhoades*, 323 Ill. App. 3d at 651. Petitioner's plea admits that he knowingly possessed cocaine, which is uniquely within his knowledge. Although Callaway later opined that petitioner was unaware of the cocaine (as far as he knew), only petitioner could know for sure, and petitioner's admission should defeat his claim of innocence.

Nor can petitioner satisfy the other elements of *Washington*'s test. The appellate court correctly noted that "applying *Washington* to a guilty-plea case is like trying to jam a square peg into a round hole": "[i]t is impossible to consider the new evidence along with the trial evidence if, because of a guilty plea, there was no trial evidence." A17-18, ¶ 36. Petitioner asserts that *Washington* can simply be extended to guilty pleas because "a court can compare the evidence of actual innocence against . . . the factual basis for the plea" and "any evidence the State may later introduce at a third-stage evidentiary hearing." Pet. Br. 26. But by pleading guilty, petitioner induced

the People to forgo presenting their full case at a trial and thus allow their evidence to potentially become stale.

Furthermore, a court must determine whether the petition makes the necessary substantial showing *before* proceeding to an evidentiary hearing, *see Sanders*, 2016 IL 118123, ¶ 37, when it cannot rely on anything but the factual basis. As discussed, holding the People to this limited record and requiring them to try guilty-plea petitioners' guilt at third-stage hearings could undermine the plea process. Given the absence of a trial record (resulting from the petitioners' own actions), claims of innocence under *Washington* should be unavailable to petitioners who have voluntarily pleaded guilty.

But if this Court declines to recognize a categorical bar, it should articulate an appropriately stringent standard that applies to a limited class of guilty-plea petitioners. The First District, despite holding that such petitioners may claim innocence, agreed with the Fourth District below that the *Washington* standard is an imperfect fit for guilty-plea cases. *See People v. Shaw*, 2019 IL App (1st) 152994, ¶ 55. It emphasized the importance of "creat[ing] a workable standard to analyze actual innocence claims following guilty pleas in order to balance the interest in ensuring that individuals who are actually innocent are not unjustly imprisoned, with the interest in upholding the finality and solemnity of guilty pleas." *Id.*; *see also People v. Schneider*, 25 P.3d 755, 761-62 (Colo. 2001) (imposing higher burden to show

innocence for postconviction petitioners who plead guilty). The First District declined to articulate a standard, however, noting that "the creation of a new standard in Illinois should come from the Illinois Supreme Court." *Shaw*, 2019 IL App (1st) 152994, ¶ 63.

This Court has adopted liberal standards for petitioners who claim innocence following a trial. This Court made clear in *Sanders* that a claim of innocence need not be based on reliable evidence to proceed to an evidentiary hearing. 2016 IL 118123, ¶ 37. And it emphasized in *Robinson* that "the new evidence supporting an actual innocence claim need not be entirely dispositive to be likely to alter the result," and criticized lower court opinions that imposed a standard requiring "total vindication or exoneration." 2020 IL 123849, ¶¶ 55-56.

Given the differing interests at stake, this Court should adopt more stringent criteria for guilty-plea petitioners who seek to contradict their voluntary guilty pleas with claims of innocence. This Court should require that a guilty plea petitioner support his innocence claim with new *reliable* evidence, similar to the federal standard, *see Schlup v. Delo*, 513 U.S. 298, 324 (1995) (under federal standard for gateway claims of innocence, petitioner must present "new reliable evidence") (quoted in *People v. Edwards*, 2012 IL 111711, ¶ 32), and specifically forensic evidence as contemplated by 725 ILCS 5/116-3. With this reasonable limitation, petitioners who have developed evidence of innocence through postconviction

forensic testing could pursue postconviction claims of innocence without opening the door to all petitioners who have pleaded guilty. *See supra* Section III.

Petitioner's belated and vague affidavit from his codefendant is not reliable proof of innocence, particularly when weighed against his guilty plea, and therefore petitioner cannot satisfy the stringent standard that should apply to petitioners who have pleaded guilty but seek to claim innocence.

V. The Circuit Court Did Not Manifestly Err by Denying Postconviction Relief Upon Finding Petitioner's Witness Incredible.

Finally, this Court should affirm the judgment because, even assuming both that petitioner had not waived his claim of innocence and that his claim did not fail as a matter of law, the circuit court properly denied the claim after an evidentiary hearing. Though the appellate court did not reach this issue, "this [C]ourt may affirm the circuit court's judgment on any basis contained in the record." *Beacham v. Walker*, 231 Ill. 2d 51, 61 (2008).

This Court reviews a judgment denying postconviction relief following an evidentiary hearing for "manifest error," that is, "error which is clearly evident, plain, and indisputable." *Ortiz*, 235 Ill. 2d at 333 (internal quotation marks omitted). At a third-stage hearing, "it [is] up to the trial court to assess [a witness's] credibility." *People v. Carter*, 2013 IL App (2d) 110703, ¶ 87; *see also People v. Morgan*, 2015 IL App (1st) 131938, ¶ 60 ("The circuit

court, serving as the finder of fact, must determine witness credibility, weigh the testimony and evidence, and resolve any evidentiary conflicts.").

Here, the circuit court properly rejected Callaway's testimony. Callaway provided a brief affidavit claiming that the cocaine recovered when he and petitioner were arrested belonged to Callaway and that petitioner was unaware of it. Even though he testified at the hearing, Callaway simply read his affidavit aloud, confirmed that it accurately set forth his testimony, and answered no further questions on direct examination. Callaway provided no details that might lend credence to his claim; for example, he did not discuss where the cocaine was found, or provide other information that could support a plausible claim that petitioner was unaware of it. Further undermining his credibility, Callaway conceded that he had prepared his affidavit while he was imprisoned with petitioner at the Danville Correctional Center. By that time, Callaway had already been convicted of possessing a controlled substance and had little to lose by helping petitioner.

In addition, Callaway's claim that petitioner was unaware of the cocaine was contradicted not only by petitioner's guilty plea but by other evidence, even in the sparse record. A police report that petitioner submitted with his petition demonstrated that the cocaine was found under a bed next to petitioner's gun, in a room where witnesses saw petitioner run right after fleeing into the house. C22, C149-50. Other circumstantial evidence tended to confirm that petitioner was aware of the cocaine, including (1) petitioner's

suspicious behavior and flight inside the house when approached by police, C148; (2) petitioner's attempt to feign sleep when police entered the house, C148; and (3) petitioner's possession of a digital scale in his pocket, suggesting his recent involvement in drug selling, C150.

In light of this evidence and testimony, the circuit court did not manifestly err in rejecting Callaway's testimony and finding that petitioner failed to demonstrate that he was actually innocent of armed violence. And, for that reason as well, this Court should affirm.

CONCLUSION

This Court should affirm the appellate court's judgment.

July 21, 2020

Respectfully submitted,

KWAME RAOUL
Attorney General of Illinois

JANE ELINOR NOTZ
Solicitor General

MICHAEL M. GLICK
Criminal Appeals Division Chief

ERIN M. O'CONNELL
Assistant Attorney General
100 West Randolph Street, 12th Floor
Chicago, Illinois 60601-3218
Telephone: (312) 814-1235
Fax: (312) 814-1235
eserve.criminalappeals@atg.state.il.us

Counsel for Respondent-Appellee
People of the State of Illinois

RULE 341(c) CERTIFICATE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, and the certificate of service, is 26 pages.

/s Erin M. O'Connell
ERIN M. O'CONNELL
Assistant Attorney General

SUPPLEMENTAL APPENDIX

Table of Contents of Supplemental Appendix

124940

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

THE PEOPLE OF THE STATE OF ILLINOIS,	)	
vs	)	File Nos.
	)	14-CF-1205
DEMARIO D. REED,	)	14-CF-1206
	)	14-CF-903
Defendant.	)	

REPORT OF PROCEEDINGS OF PLEA OF GUILTY AND SENTENCE

BE IT REMEMBERED that the above-entitled cause came on for hearing on the 13th day of April 2015 before the Hon. Timothy J. Steadman, Circuit Judge.

APPEARANCES:

MACON COUNTY ASSISTANT STATE'S ATTORNEY

BY: PAMELA DOMASH;

MACON COUNTY ASSISTANT PUBLIC DEFENDER

BY: THOMAS WHEELER on behalf of defendant.

Reported by: Gina K. Jones, CSR #084-003651

TRANSCRIPT OF PROCEEDINGS

THE COURT: 14-CF-903, People versus Demario Reed. Cause recalled. People present by Ms. Domash. The defendant is present in custody. Mr. Wheeler is present.

They're actually three files. What's your understanding here?

MR. WHEELER: Judge, the defendant is going to offer to enter a plea of guilty to Count I of 1206, be sentenced to the Illinois Department of Corrections for a period of 15 years. He has credit for time from September 24, 2014, through today -- yesterday. The remaining charges will be dismissed.

THE COURT: Does that mean the other two charges in the other two files?

MR. WHEELER: Yes.

THE COURT: And I'm sorry. You said the plea was in 1206, Count I?

MR. WHEELER: Yes, Your Honor.

MS. DOMASH: It's 1205.

MR. WHEELER: I'm sorry. 1205. Sorry. I don't have my glasses.

THE COURT: And the mandatory assessment is 3,000. I'm sorry. There is not a mandatory assessment.

In any event, Ms. Domash, is that the agreement as you understand as well?

MS. DOMASH: It is, Your Honor.

THE COURT: Mr. Reed, you heard what your attorney said. Is that your understanding of the plea agreement?

THE DEFENDANT: Yes.

THE COURT: Let's go to 14-CF-1205. In this case, Count I charges you with the offense of armed violence. It says September 23rd, 2014, that you, while armed with a dangerous weapon, a shotgun, a Category I weapon, performed acts prohibited by Illinois law in that you knowingly possessed less than 15 grams of cocaine. Do you understand what you're charged with?

THE DEFENDANT: Yeah.

THE COURT: It's a Class X felony. That means probation is not a possible sentence. For this offense, the minimum term in the Illinois Department of Corrections is 15 years up to a maximum prison sentence which is 30 years. In addition to the prison sentence, there would also be a 3-year mandatory supervised release or parole term. Now, do you understand all the possible sentences?

THE DEFENDANT: Yes.

THE COURT: If you plead guilty, you would be giving up your right to a trial of any kind by a judge or a jury. You would be giving up the right to confront and cross-examine witnesses who would testify against you in court during your trial. By pleading guilty, you would be giving up the privilege against self-incrimination and the presumption of innocence. You would be giving up the right to subpoena witnesses to come into court to testify for you and to present any defenses you might have to this charge, and by pleading guilty, you would be giving up the right to require the state to prove you committed this offense beyond a reasonable doubt. Do you understand the rights you are giving up by pleading guilty?

THE DEFENDANT: Yes.

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

THE DEFENDANT: No.

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

THE DEFENDANT: Yes.

THE COURT: Then you need to sign your name. That means you do not want a jury trial.

Can we please have a factual basis?

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

THE COURT: All right. Is that it then?

MS. DOMASH: Yeah.

MR. WHEELER: Judge, as part of the record, I've explained to the defendant -- his concern is that it's day for day. I've told him that it is day for day.

THE COURT: It is day for day if you behave in prison. Understand?

THE DEFENDANT: Uh-huh (affirmative).

MR. WHEELER: Yes, sir.

THE COURT: Can you say yes or no?

THE DEFENDANT: Yes, yes, yes.

THE COURT: The lady has to take it down.

THE DEFENDANT: Yes.

THE COURT: Are both sides willing to proceed to immediate sentencing and waive a presentence report and

have the pretrial bond report stand as a prior history of criminality?

Ms. Domash?

MS. DOMASH: Yes, Your Honor.

THE COURT: Mr. Wheeler?

MR. WHEELER: Yes.

THE COURT: Are you in any way being forced to plead guilty?

THE DEFENDANT: No.

THE COURT: You have a plea agreement, but other than that, has anyone promised you anything else to get you to plead guilty?

THE DEFENDANT: No.

THE COURT: You're represented by your attorney, Mr. Wheeler. You've asked him questions about the case. Has your attorney answered all your questions to your satisfaction?

THE DEFENDANT: Yes.

THE COURT: Do you have any questions at all this morning regarding what you are charged with, your rights, the possible sentences, or anything else?

THE DEFENDANT: No.

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

THE DEFENDANT: Yes.

THE COURT: Show: As to Count I, armed violence, a Class X felony, the defendant is admonished as to the nature of the charge, the possible penalties, and his constitutional rights. The defendant offers to plead guilty. Jury waiver on file. The Court finds there is a factual basis. The plea is knowingly and voluntarily made. The plea is accepted. Judgment is entered. Pursuant to plea agreement, the defendant is sentenced to 15 years in the Illinois Department of Corrections with credit for time served in custody from 9-24-14 through 4-12-15 plus a 3-year parole term. On motion of the People, Counts II, III, and IV are dismissed and stricken.

I'll get to your other cases in just a moment. You are getting your agreement, but you still can appeal. In order to preserve your right to appeal, you must file within 30 days of today's date a written motion to withdraw or take back your guilty plea. The motion must be in writing. It must set forth grounds or reasons for your request. If you are unable to hire your own attorney, I would appoint an attorney to assist you in preparing this motion, and I would provide you with a copy of the transcript of the

proceedings in your case at no cost to you. If the motion to withdraw your guilty plea were to be allowed, the plea of guilty, sentence, and judgment would be vacated and a trial date would be set on the charge to which you pleaded guilty. Should that happen, the charges in this case which were dismissed and the charges in the other cases which are to be dismissed as part of the plea agreement could also be reinstated and set for trial. You should understand that in any appeal taken from the judgment entered against you today, any issue or claim of error not raised in this written motion within 30 days would be deemed waived or given up.

If you do file a motion to withdraw your guilty plea, and the motion is denied, and you still want to appeal your case, then you must file a written notice of appeal within 30 days of the date that the motion is denied. That is your right to appeal. Do you think you understand it?

THE DEFENDANT: Yeah.

THE COURT: Defendant admonished as to the right to appeal.

14-CF-903, People versus Demario Reed. Show the appearances. Pursuant to plea agreement, on motion

of the People, cause dismissed and stricken. You can save it.

THE CLERK: Okay.

THE COURT: 14-CF-1206, Demario Reed. It's the same as last.

MR. WHEELER: Thank you, Your Honor.

THE COURT: Did the state have anything else at this time?

MS. DOMASH: No, Your Honor.

THE COURT: All right. We're going to be in recess to about 9:45.

(Which were all the proceedings entered of record in the above-entitled cause this date.)

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT

MACON COUNTY, ILLINOIS

THE PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff,
-vs-
DEMARIO D. REED,
Defendant.

No. 14-CF-1205

REPORT OF PROCEEDINGS

REPORT OF PROCEEDINGS of the Post-Conviction Motion before the Honorable Jeffrey S. Geisler on the 18th day of January, 2017.

APPEARANCES:

MR. JAY SCOTT,
State's Attorney of Macon County, by
Ms. Foster, Assistant State's Attorney

Mr. Tighe, Assistant Public Defender,
For the Defendant

Michelle D. Clow
Official Court Reporter
Macon County Courts Facility
253 East Wood Street, Room 297A
Decatur, Illinois 62523

ORIGINAL

BE IT REMEMBERED AND CERTIFIED, that heretofore, on to-wit: The 18th day of January, 2017, the same being one of the regular judicial days of said court, the above-entitled cause came on for hearing, before the Honorable Jeffrey S. Geisler, Judge Presiding, whereupon, the following proceedings were had of record:

THE COURT: Mr. Tighe, I think you're on the Reed case and he is here from the Department of Corrections.

MR. TIGHE: Yes.

THE COURT: So we'll call that case next. This is 14-CF-1205, People versus Demario Reed. Show the People are present by Ms. Foster. The defendant appears in the custody of the sheriff -- in the custody of the Department of Corrections, excuse me, with his attorney, Mr. Tighe. Ms. Foster, Mr. Tighe I have reviewed the file. We were at the third stage of the post-conviction petition in this case. Then Ms. Foster, are you ready to proceed?

MS. FOSTER: Yes, Your Honor.

THE COURT: And Mr. Tighe, this is your client's petition. Are you ready to proceed?

MR. TIGHE: Yes, Your Honor.

THE COURT: Okay. You may proceed, Mr. Tighe. I have reviewed the file, including the petition that has been filed and the answer.

MR. TIGHE: Okay. I call Mr. Calloway to the stand, please. Go up there and she's going to swear you in.

DIRECT EXAMINATION

BY MR. TIGHE

(WITNESS SWORN)

THE COURT: You may proceed, Mr. Tighe.

MR. TIGHE: Thank you, Judge.

Q. Would you please state your name for the record.

A. Davie Calloway.

Q. Mr. Calloway, I want to ask you a few questions, just kind of preliminary questions. On September 23, 2014, you and Demario Reed were arrested together, correct?

A. Yes.

Q. Okay. Did you end up getting charges out of that arrest?

A. Yes.

Q. And do you remember what those charges were?

A. Possession.

Q. Okay. Possession of controlled substance?

A. Yes.

Q. Did you end up getting a prison sentence out of that?

A. Yes.

Q. And have you completed that or are you currently on parole?

A. I'm on parole.

Q. Okay. I going to show you what's already been marked as Petitioner's Exhibit 1 and ask you to take a second to look at that. Do you recognize that document?

A. Yes.

Q. Is that an affidavit that you prepared?

A. Yes.

Q. Would you please read everything that you've put on there for the record and for the Court?

A. "On September 23, 2014 at 972 West View on or about 9:00 p.m. the department police officers approached I, Davie Calloway, and Demario Reed ran inside the residence seconds later. The police officers entered the residence and began searching the house. Police officers found .4 grams of crack cocaine in a room. Demario Reed had no knowledge of the crack cocaine found in the room on September 23, 2014. The crack cocaine that was found in the room was my drugs.

I had a bad drug habit that I have been seeking to get treated. I did not come forward because I did not want to get myself in trouble. I smoked my cigars with weed and crack cocaine inside of cigar papers. I don't know anything about the gun that was found, but the .4 grams of crack cocaine that the officers found in the room were my drugs. Demario Reed did not know anything about the crack cocaine that was found in the room."

Q. Okay. Mr. Calloway, would that still be your testimony today?

A. Yes.

Q. And if you were to be called as a witness again at a trial in the future, that would still be your testimony?

A. Yes.

MR. TIGHE: I don't have any other questions of this witness, Your Honor.

THE COURT: Cross-examination.

CROSS-EXAMINATION

BY MS. FOSTER

MS. FOSTER: Thank you, Your Honor.

Q. Mr. Calloway, when you were arrested, did you stay in the Macon County jail?

A. Yes.

Q. Did you stay there until you pled guilty?

A. No. I bonded out about 30 days after I was arrested.

Q. Okay. Did you stay in Decatur or Macon County?

A. Yes. Decatur.

Q. And have you continued to have contact with Mr. Reed since you were arrested?

A. No. Not since I was arrested, but we was in Danville together.

Q. Okay. And is that when you wrote the affidavit?

A. Yes.

Q. Did Mr. Reed approach you and ask you to write that?

A. No, he didn't.

Q. So on your own, you just wrote this affidavit?

A. Yes. I was just telling them -- yes -- I was just, you know, doing it because I felt bad about it, you know what I mean, the little -- the drug problem that I had. You know, I just felt bad about him being charged with it.

Q. So you had never discussed Mr. Reed's case with him prior to completing the affidavit?

A. Discussed this case how?

Q. Did you talk with him about his case and why he

was in Danville?

A. Yes. I talked to him, but not about the case. I was telling him about what I was going to do for him.

Q. So the two of you discussed this affidavit then, correct?

A. I was just letting him know what I was doing, you know. Yes.

Q. Were you aware that Mr. Reed had also been arrested on the 23rd when you were arrested?

A. Ya.

THE COURT: Is that yes?

A. Yes. I'm sorry about that.

THE COURT: That's fine. Just for the record, if you'd say yes instead of ya so the court reporter can take that down.

A. Okay. Sorry about that.

Q. And prior to you pleading guilty?

A. Yes.

Q. Did you anyone approach you and ask you any questions about this case?

A. No. I got out of Department of Corrections, like, seven months ago, May 17.

Q. Okay. So when you wrote this affidavit, you were still in the Department of Corrections?

A. Yes.

Q. Yes?

A. I said yes.

MS. FOSTER: Okay. I have nothing further.

THE COURT: Any redirect, Mr. Tighe?

MR. TIGHE: No, Your Honor.

THE COURT: You may step down. Any further evidence, Mr. Tighe?

MR. TIGHE: No, Your Honor.

THE COURT: Ms. Foster, any evidence in behalf of State?

MS. FOSTER: No, Your Honor.

THE COURT: Mr. Tighe, I'm ready to listen to argument. Before we get into that, as I have reviewed the petition, there was three allegations and (1) was actual innocence; (2) was ineffective assistance of counsel for failure to investigate; and (3) that the defendant failed to have an informed or voluntary guilty plea. Is that the gist of the defendant's arguments on the post-conviction?

MR. TIGHE: The first two are the gist, yes, Your Honor.

THE COURT: Okay. I'm ready to listen to argument.

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

PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff

vs.

DEMARIO REED,

Defendant/Petitioner

Case No. 14-CF-1205

ORDER

1. Petitioner seeks post-conviction relief from the judgment of April 13, 2015. Petitioner pled guilty to Count I, armed violence, for a negotiated term of 15 years in the Illinois Department of Corrections.

2. Petitioner filed a Petition for Post-Conviction Relief on June 16, 2015. Judge Steadman dismissed the post-conviction petition on June 17, 2015.

3. The petitioner filed a Motion for Leave to File a Successive Post-Conviction Petition on January 20, 2016. The Motion for Leave to File a Successive Post-Conviction Petition was allowed on January 25, 2016.

4. The People of the State of Illinois filed a Motion to Dismiss the Post-Conviction Petition on June 24, 2016. Judge Steadman denied the Motion to Dismiss the Post-Conviction Petition on August 10, 2016.

5. In the successive petition, the petitioner claims as follows:
   a. Actual innocence based on the affidavit of co-defendant Davie Callaway who states the drugs were his and Demario Reed was not aware of the cocaine in the house.
   b. Ineffective assistance of counsel for failing to investigate the case further.
   c. Failure to make an informed, knowledgeable and voluntary guilty plea.

6. At the hearing on January 18, 2017, the petitioner called Davie Callaway to the stand to testify the affidavit was true and accurate and the cocaine was his and that the petitioner was not aware of the drugs.

ANALYSIS

The main gist of petitioner's argument as to actual innocence is that the co-defendant came forward to him in prison and informed him the drugs in the house were his and so this is

newly discovered evidence. The petitioner argues if he did not know of the drugs he would be innocent of the charge of armed violence.

The court does find that a co-defendant's affidavit and testimony qualifies as new evidence based on his unavailability at a trial in view of his Fifth Amendment Right against self-incrimination. People v. Edwards, 2012 IL 111711. The issue then becomes does it establish a colorable claim of actual innocence.

In examining petitioner's claim of actual innocence, this court follows the requirements laid out in People v. Washington, 171 Ill.2d 475, 489 "that the supporting evidence be new material, non-cumulative and most importantly, of such a conclusive character as would probably change the result of retrial."

The court does not consider the co-defendant coming forward to the petitioner while both were in prison and stating that the drugs were the co-defendants to be actual new evidence "that is of such a conclusive character that would probably change the result on retrial." People v. Washington, 171 Ill.2d 475. The co-defendant was listed in the discovery to the petitioner and if the petitioner claims the drugs were not his it would be logical to argue the drugs were the co-defendants.

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

As to the claim of ineffective assistance of counsel, the court reviews this in light of the two-prong test set forth in Strickland v. Washington, 466 U.S. 668, 687. In order to prevail, the petitioner must show that counsel's representation fell below an objective standard of reasonableness and the substandard representation prejudiced the defendant.

The petitioner claims that his attorney, Mr. Wheeler, should have investigated further including trying to speak to the co-defendant, Mr. Callaway. Mr. Callaway was represented by an attorney and there is no evidence in front of the court that Mr. Wheeler did not try to speak to Mr. Callaway or that his attorney would allow Mr. Wheeler to speak to Mr. Callaway.

Regarding the petitioner's other claims of ineffective assistance, these claims are not supported by any facts or supporting documentation which would form the basis of a deficient performance or that it prejudiced the defendant under the standards of Strickland v. Washington, 466 U.S. 660.

As to the petitioner's claim that he failed to make an informed, knowledgeable and voluntary guilty plea, it appears from the record of April 13, 2015, the petitioner was admonished pursuant to Supreme Court Rule 402 and the plea agreement was stated in open court and the petitioner unequivocally acknowledged his understanding. This court finds the plea was informed, knowledgeable and voluntarily made.

For the reasons as stated previously, the petitioner's Post-Conviction Petition filed pursuant to 725 ILCS 5/122 is denied.

ENTERED: January 20, 2017

Jeffrey S. Geisler
Associate Judge

CLERK DIRECTED to send a copy of the order to the defendant by certified mail within 10 days pursuant to 725 ILCS 5/122-2.1(a)(2).
CLERK DIRECTED to send a Notice to Petitioner of Adverse Judgment pursuant to Illinois Supreme Court Rule 651(b).

CERTIFICATE OF FILING AND SERVICE

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. On July 21, 2020, the foregoing **Brief and Supplemental Appendix of Respondent-Appellee People of the State of Illinois** was filed with the Clerk of the Supreme Court of Illinois, using the court's electronic filing system, which automatically served notice on the following e-mail addresses:

Alexander G. Muntges
Assistant Appellate Defender
Office of the State Appellate Defender,
First Judicial District
203 North LaSalle Street, 24th Floor
Chicago, Illinois 60601
1stdistrict.eserve@osad.state.il.us

Jay Scott
State's Attorney of Macon County
253 East Wood Street, Suite 436
Decatur, Illinois 62523
general@sa-macon-il.us

Steven Drizin
Center on Wrongful Convictions
Blumn Legal Clinic
Northwestern Pritzker School of Law
375 East Chicago Avenue
Chicago, Illinois 60611
s-drizin@law.northwestern.edu

/s/ Erin M. O'Connell
ERIN M. O'CONNELL
Assistant Attorney General