No. 123505

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, -vs- LANARD GAYDEN Defendant-Appellant	)))))))))))	Appeal from the Appellate Court of Illinois, No. 1-15-0748. There on appeal from the Circuit Court of Cook County, Illinois, No. 14 CR 4685. Honorable Kenneth J. Wadas, Judge Presiding.

REPLY BRIEF FOR DEFENDANT-APPELLANT

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ARGUMENT

I. The record conclusively establishes that trial counsel was ineffective for failing to file a motion to suppress the evidence derived from the unlawful intrusion into Lanard Gayden's home.

The State contends that Mr. Gayden cannot satisfy either prong of the *Strickland* test because the record is insufficient to establish that trial counsel was deficient for failing to file a motion to suppress, or that such a motion, if filed, would have been granted. (St. Br. 6-12). This Court should reject the State's arguments for the following reasons.

A. The record conclusively establishes that the police lacked probable cause to enter Mr. Gayden's apartment.

A search is unlawful when the facts do not establish probable cause to believe a crime has occurred. *Agnello v. United States*, 269 U.S. 20, 33 (1925); U.S. Const., amend. IV. The State claims that Officer Glinski had probable cause to believe Mr. Gayden committed a crime because: (1) Officer Glinski saw the entire shotgun, which was "immediately" identifiable as contraband before Mr. Gayden shut his door; (2) Mr. Gayden attempted to "flee;" and (3) Officer Glinski "*may*" have been aware of other facts "that were not elicited at trial," such as Sierra Keys' claim that Mr. Gayden threatened her with the shotgun. (St. Br. 9-11) (emphasis added). These arguments lack merit.

First, the shotgun *was not* immediately identifiable as contraband when Officer Glinski saw it. It was a half-an-inch shorter than the law allowed. (R. P17-18); 720 ILCS 5/24-1(a)(7)(ii). The dispatch report did not include a description of its length; the officers did not testify that they knew it was illegally short when they saw it; and common sense dictates that

Officer Glinski *could not* have distinguished between an 18-inch barrel and a 17 ½-inch barrel, at a glance, without a basis for comparison, from five feet away, in the seconds before Mr. Gayden shut his door. Officer Schaefer later determined that the end of the barrel was "uneven" and "gritty to the touch," but there is no evidence Officer Glinski noticed or appreciated these characteristics in the moments before he forcibly entered Mr. Gayden's apartment. Moreover, it is not illegal to manipulate the barrel of a shotgun so long as the barrel remains 18 inches or more in length. 720 ILCS 5/24-1(a)(7)(ii).

The State's reliance on *United States v. Carmack*, 426 Fed. Appx. 378 (6th Cir. 2011), an unpublished opinion from the Sixth Circuit, is misplaced. (St. Br. 9-10). In *Carmack*, the investigating detective testified that he seized the defendant's shotgun because he was "familiar with shotguns" and could tell that the defendant's shotgun was "*extremely short* compared to a normal shotgun." *Id*. at 383 (emphasis added). There is no testimony here that the shotgun was "extremely short" when "compared to a normal shotgun," that Officer Glinski was "familiar with shotguns," or that he knew the shotgun's barrel was less than 18 inches when he entered Mr. Gayden's apartment.

Second, Officer Glinski never saw Mr. Gayden flee "into" his apartment. (St. Br. 8). The record establishes that Mr. Gayden was inside his apartment throughout the encounter. Had he been anywhere else, he would not have been "looking straight out the door" as Officer Glinski testified, (R. P13), and the shotgun would not have been found inside the apartment, "where [he] threw it . . . five or six feet" from the door. (R. P8-9, 17).

Moreover, Mr. Gayden was confronted with an unusual sight—the unexplained presence of a Chicago police officer exploring the interior hallways of his building. His decision to avoid that officer, without more, does not establish probable cause to arrest, given the well-documented history of police misconduct in Chicago. See United States Department of Justice, Civil Rights Division, and United States Attorney's Office, Northern District of Illinois, Investigation of the Chicago Police Department 23 (Jan. 13, 2017), available at https://www.justice.gov/usao-ndil/press-release/file/925976/download (last visited June 27, 2019) As the First District observed in *People v. Horton*, 2017 IL App (1st) 142019:

> We take judicial notice of the recent United States Department of Justice report finding that the Chicago police department had engaged in a "pattern or practice" of unreasonable force, and that this practice, even when citizens are physically unharmed, leads to "fear and distrust" . . . This excessive-force problem occurs most often in black and Latino neighborhoods—in fact, CPD officers use force almost 10 times more often against blacks than against whites. [Citation]. Excessive-force complaints aside, the DOJ report noted that many Chicago residents, particularly black and Latino residents, feel that CPD officers "assume that they are perpetrators of crime" and unfairly target them. [Citation].

Horton, 2017 IL App (1st) 142019, ¶ 71, judgment vacated on other grounds, 93 N.E.3d 1065 (Ill. 2017) (citations omitted). In other words, "in an environment where minorities have legitimate suspicion of how they might be treated by police, they will be more likely to try to avoid police contact—even when doing so makes them appear culpable of something else." *Id*. at ¶ 74 (citing *Com. v. Warren*, 475 Mass. 530, 539 (2016)).

In addition, it is well-established that evasive behavior alone is insufficient to establish probable cause for arrest. See *e.g.*, *People v. Moore*,

286 Ill. App. 3d 649, 654 (1st Dist. 1997); *United States v. Navedo*, 694 F.3d 463, 474 (3d Cir. 2012). As Professor LaFave explains:

> The flight of a person from the presence of police is not standing alone sufficient to establish probable cause . . . Were it otherwise, anyone who does not desire to talk to the police and who either walks or runs away from them would always be subject to legal arrest, which can hardly be countenanced under the Fourth and Fourteenth Amendments.

Wayne LaFave, Search and Seizure, § 3.6(e) (5th ed. 2012). Mr. Gayden had a lawful right to close his door upon seeing an officer in his building. And his decision to do so did not provide Officer Glinski with probable cause to believe he was committing a crime.

Third, the State's claim that the record is insufficient because Officer Glinski *may* have been investigating an allegation of aggravated assault with a deadly weapon is both waived and rebutted by the record. See *People v. Henderson*, 2013 IL 114040, ¶ 23; (St. Br. 8-12); (St. App. Br. 14-16).

The claim is waived because the State did not argue the record was insufficient in the appellate court; rather, it conceded that "[t]he officers were responding to a call of a man with a shotgun." (St. App. Br. 14). Although the State, as the prevailing party, can raise any reason or theory appearing in the record in support of the judgment below, it "cannot assert a new theory inconsistent with the position it adopted in the appellate court." See *Henderson*, 2013 IL 114040 at ¶ 23; see also *People v. Franklin*, 115 Ill. 2d 328, 336 (1987) ("The general rule that a prevailing party may raise, in support of a judgment, any reason appearing in the record does not apply when the new theory is inconsistent with the position adopted below or the party has acquiesced in contrary findings.").

Waiver notwithstanding, the State's speculation is completely untethered from the record. The officers were specifically asked, during the State's direct examination, why they went to Mr. Gayden's apartment. (R. P5-6, 16). Each testified—over trial counsel's objection—that they were responding to a report of a man with a shotgun in front of Mr. Gayden's building. (R. P5-6, 16). Neither officer mentioned the allegations involving Ms. Keys. (R. P5-20). Moreover, the arrest report, which the State cites in its brief, corroborates Officer Glinski's testimony that he was responding to a report of a "man with a gun," and establishes that Ms. Keys *did not* report the alleged assault until *after* Mr. Gayden was arrested:

> In summary A/OS were dispatched to a man with a gun call at 8952 S. Burley . . . Offender immediately threw the shotgun and attempted to slam the door in order to defeat the arrest. P.O Glinski#12086 in order to place the Offender into custody was forced to make entry into the residence by breaching the front door . . . *After* Offender was placed into custody Sierra Keys (Victim and Complainant) related to A/OS after a verbal altercation with her boyfriend (Offender), Offender retrieved a shotgun from there [*sic*] shared bedroom and began to order the Victim to pack up her belongings while holding said shotgun menacing the Victim.

(C. 8) (emphasis added).[1]

The State may wish the facts were different, but the record is fully developed and conclusively states that the officers were investigating a report

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[1] This is not the only factual misrepresentation in the State's brief. It inaccurately states that Officer Glinski "knocked on" Mr. Gayden's door before entering the apartment. (St. Br. 2). This never happened. Officer Glinski testified, multiple times, that he "*knocked in*" Mr. Gayden's door "immediately" after it was closed. (R. P8-9, 13) (emphasis added).

This misrepresentation matters because the last prong of the exigent circumstances test requires this Court to consider whether "the police entry was made peaceably, albeit nonconsensually." *People v. McNeal*, 175 Ill. 2d 335, 345 (1997); (Def. Br. 15).

of a man with a shotgun when they entered Mr. Gayden's apartment. Since possessing a shotgun is not a criminal act, the report did not give the officers probable cause to believe Mr. Gayden was committing a crime. See *People v. Aguilar*, 2013 IL 112116, ¶¶ 20-21; *D.C. v. Heller*, 554 U.S. 570, 592 (2008); *McDonald v. City of Chicago, Ill.*, 561 U.S. 742, 791 (2010); *Moore v. Madigan*, 702 F. 2d 933, 936 (7th Cir. 2012). The police lacked probable cause to enter Mr. Gayden's apartment.

B. The record conclusively establishes that Officer Glinski lacked exigent circumstances to forcibly enter Mr. Gayden's home.

The fourth amendment draws a firm line at the entrance to a home. U.S. Const., amend IV. "Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant." *Kentucky v. King*, 563 U.S. 452, 460 (2011) (citing *Payton v. New York*, 445 U.S. 573, 590 (1980). The State contends that two exigencies justified the warrantless entry that occurred here—"the 'hot pursuit' exception outlined in *United States v. Santana*, 427 U.S. 38 (1976)," and "the need to assist persons who are seriously injured or threatened with such injury." (St. Br. 8-12). Neither exception applies to these facts.[2]

Santana holds that three factors must be present for the police to conduct a warrantless entry in "hot pursuit:" (1) the police must develop probable cause to arrest the suspect while he is in a public place; (2) the

[2] Notably, the State did not argue either exception in the appellate court. Instead, it argued that "there was a likelihood that defendant would try to escape or conceal the gun if not apprehended swiftly." (St. App. Br. 16). The State has abandoned those positions here.

suspect must retreat from a public place to a private place to evade apprehension; and (3) the warrantless nonconsensual entry must be reasonable in light of all the attendant circumstances. *Santana*, 427 U.S. at 42-43; *People v. Wear*, 229 Ill. 2d 545, 572 (2008) (Burke, J., concurring, joined by Freeman and Kilbride, JJ.) (recognizing that "*Santana* did not rely solely on 'hot pursuit' to justify the warrantless entry into the home in that case but, rather, looked to the totality of the circumstances to find the warrantless arrest reasonable under the fourth amendment").

In *Santana*, the police had probable cause to arrest the defendant for possessing drugs and proceeds from a controlled drug buy. *Id*. at 40. When they went to the defendant's house, they saw her standing in her front doorway. *Santana*, 427 U.S. at 40. She was straddling the threshold such that "one step forward would have put her outside, one step backward would have put her in the vestibule of her residence." *Id*. at 40, n.1. When the officers approached and identified themselves, the defendant "retreated into the vestibule of her house." *Id*. at 40. The police gave chase, arrested her in the vestibule, and found heroin and proceeds from the controlled buy. *Id*. at 40-41. The trial court entered an order suppressing the evidence, which was affirmed on appeal. *Id*. at 41-42.

The United States Supreme Court granted *certiorari* to determine whether the warrantless entry was justified under the "hot pursuit" doctrine. *Id*. at 41-43. It began with the following findings of fact: (1) the defendant was in a public place outside her house, (2) the police had probable cause to arrest her, (3) the police were in "hot pursuit" when they followed her into the

vestibule and, (4) "[o]nce Santana saw the police, there was [. . .] a realistic expectation that any delay [in waiting for a warrant] would result in destruction of evidence." *Id*. at 43. In light of those findings, the Supreme Court held that the police acted reasonably when they entered the defendant's home without a warrant. *Id*. 42-43. None of the concerns in *Santana* are present here.

First, the State has not alleged, nor can it establish, that Mr. Gayden was in a "public place" when Officer Glinski saw him with a gun. (See St. Br. 8-9). *Santana* defines a "public place" as an area where an individual does not have an expectation of privacy. *Santana*, 427 U.S. at 42. An apartment dweller has an expectation of privacy in the apartment and the common-area hallway adjacent to the apartment door. *People v. Bonilla*, 2018 IL 122484, ¶ 32. Mr. Gayden "was standing as if looking straight out the door" of his third floor apartment in a multi-unit apartment building. (R. P8-9, 13, 17). Since he was not "exposed to public view, speech, hearing, and touch," this Court should reject the State's reliance on *Santana*, and find, consistent with *People v. Davis*, 398 Ill. App. 3d 940 (2d Dist. 2010), that Mr. Gayden was standing in a "private place." *Cf*., *Santana*, 427 U.S. at 42 ("[Santana] was not merely visible to the public but was as exposed to public view, speech, hearing, and touch as if she had been standing completely outside her house.")

In *Davis*, the police had probable cause to arrest the defendant for battery. *Davis*, 398 Ill. App. 3d at 941-42. The officers proceeded without a warrant to an apartment building where the defendant resided with his girlfriend. *Id*. at 942. One officer entered the building and was standing in

the common hallway in front of the defendant's apartment door when the defendant opened the door and, seeing that he was face-to-face with a police officer, turned and fled into the apartment. *Id*. The officer pursued the defendant through the open door and arrested him inside the dwelling, four feet from the entryway. *Id*. The apartment contained incriminating evidence which the defendant sought to suppress. *Id*. at 941-43.

The appellate court rejected the State's argument that the doctrine of hot pursuit justified the entry because the defendant "was never in public." *Id*. at 952. According to the appellate court:

> The fact that the warrantless arrest of defendant was initiated while defendant was inside his apartment rather than in public is significant because the hot-pursuit doctrine as defined in *Santana* is based on the determination that a defendant should not be able to thwart an *otherwise proper* arrest by retreating into a private residence. Warrantless arrests based on only probable cause and instituted while the defendant is in public are otherwise proper. . . In contrast, warrantless arrests based on only probable cause and instituted while the defendant is in his or her private residence are not otherwise proper. Thus, defendant's attempted retreat to the back of the apartment did not thwart an otherwise proper arrest, because the arrest of defendant would not have been proper at the time it was initiated, given that defendant was inside the apartment at that time.

Id. at 952 (emphasis in original) (citations and quotations omitted).

The appellate court went on to find:

> Even if defendant had been standing in the doorway of his apartment rather than inside it, the present case would be significantly distinguishable from *Santana*, as defendant's apartment door opened into a hallway that was accessible only to the residents and landlord of the two apartments in the building and that was not open to the public. Thus, unlike the defendant in *Santana*, if defendant stood directly in the doorway of his apartment, he would not be exposed to public view, speech, hearing, and touch as he would be if he were outside.

Id. at n.3; see also *People v. Wimbley*, 314 Ill. App. 3d 18, 28 (1st Dist. 2000) ("hot pursuit" does not apply when the police chase a defendant into an apartment after initiating contact by approaching the apartment's front door); *People v. Smock*, 2018 IL App (5th) 140449, ¶ 29 (same). Mr. Gayden was not in a "public place" when Officer Glinski saw him with a gun.

Second, Mr. Gayden did not run from the police. He shut his door. (R. P8-9, 17). "Hot pursuit" requires at least "some sort of chase." *Santana*, 427 U.S. at 43; *Wear*, 229 Ill. 2d at 568. "[T]he evidence must show that the defendant was aware that he was being pursued by the police and that the defendant retreated, or 'fled,' from a public place to a private place to escape or avoid arrest." *Wear*, 229 Ill. 2d at 582 (Burke, J., concurring, joined by Freeman and Kilbride, JJ.). Here, Officer Glinski testified that Mr. Gayden shut the door when he reached the third floor landing. (R. P6-8, 13). Unlike the officers in *Santana*, Officer Glinski did not identify himself as a police officer or explain why he was in the building. Contrast *Santana*, 427 U.S. at 41 with (R. P6-8, 13). He did not instruct Mr. Gayden to stand still, or ask permission to enter. (R. P6-8, 13). These facts provide no basis to believe Mr. Gayden knew he was the target of Officer Glinski's investigation. As far as Mr. Gayden knew, the police were investigating another resident. As discussed above, given the current climate of fear and distrust created by police misconduct in Chicago, it was reasonable, if not prudent, for Mr. Gayden to shut his door upon seeing a police officer canvassing the interior hallways of his building. There is no evidence to establish that Mr. Gayden was attempting to evade arrest when he shut his door.

Third, the attendant circumstances did not warrant an immediate entry into Mr. Gayden's home. Even if the State had not abandoned the claims it made in the appellate court, there is no basis for this Court to find that Mr. Gayden could have destroyed the gun, or fled from the apartment, while the building was surrounded. (R. P5-9, 12-16); (Def. Br. 15-18). Further, the "defense of others" exception is rebutted by the record. (See St. Br. 11-12). The State asked the officers to explain why they were on the scene. (R. P5-6, 16). Each testified, separately and under oath, that they were dispatched to investigate a report of a man with a shotgun in front of Mr. Gayden's building. (R. P5-6, 16). The arrest report, which was signed "under penalty of perjury," states that the arresting officers did not speak to Ms. Keys until "*after*" Mr. Gayden was arrested. (C. 8). The State may wish the officers had been on the scene to investigate Mr. Gayden for assault, but that is simply not what happened. Rather, the officers' unrebutted testimony, corroborated by the arrest report, is that they entered Mr. Gayden's apartment because they received a report of a man with a shotgun in front of the building. The "defense of others" exception does not apply to these facts.

Since the State offers no other justification for the warrantless entry that occurred here, this Court should find that the officers lacked probable cause and exigent circumstances to forcibly enter Mr. Gayden's apartment.

C. Trial counsel was deficient for failing to file a motion to suppress.

The State contends that, even if Mr. Gayden was prejudiced by trial counsel's failure to file a motion to suppress, Mr. Gayden cannot prove deficient performance because "nothing in the record suggests that [trial

counsel], an experienced public defender, performed deficiently by failing to investigate a potential motion to suppress." (St. Br. 7). The State claims that because trial counsel "made a motion for discovery" and received an answer containing, among other things, "documents showing the process used to seize [the] evidence," Mr. Gayden cannot overcome the presumption that trial counsel's performance was reasonable. (St. Br. 7).

This is both a misstatement of law, and a misstatement of the issue on appeal. The issue *is not* whether trial counsel was ineffective for failing to investigate the case. (Def. Br. 8-23). The issue is whether the officers' testimony at trial establishes that trial counsel was ineffective for failing to file a meritorious motion to suppress. (Def. Br. 8-23).

The law is clear, it is objectively unreasonable for trial counsel to forgo filing a motion to suppress when doing so "would have been defense counsel's strongest, and most likely wisest course of action." *People v. Little*, 322 Ill. App. 3d 607, 613 (1st Dist. 2001); see also *People v. Tayborn*, 2016 IL App (3d) 130594, ¶ 21 (trial counsel was deficient for failing to file a motion to suppress the defendant's inculpatory statement "where the statement was the strongest evidence against defendant"); *People v. Peck*, 2017 IL App (4th) 160410, ¶ 38, (same); *People v. Hill*, 2012 IL App (1st) 102028, ¶ 37 (same). Put differently, trial counsel acts unreasonably if he or she fails to file a motion to suppress which would have been meritorious, and resulted in suppressing critical evidence against the defendant. This standard *does not* hinge upon whether trial counsel requested the discovery or took time to review it. Were that the law, *Little*, *Tayborn*, *Peck*, and *Hill* would have been

decided differently, and trial counsel would be able to insulate herself from claims of ineffective assistance of counsel by filing a "demand for discovery," even if, at trial, it becomes evident that a motion to suppress would have merit. The law does not take such a dim view of trial counsel's responsibility under the sixth amendment.

Here, a motion to suppress would have been trial counsel's strongest and wisest choice. The discovery of the shotgun and, more importantly, Officer Schaefer's testimony that its barrel was a half inch too short was necessary for the State to obtain a conviction. Without that evidence, the State would have been unable to prevail at trial. A motion to suppress, if filed before or during trial, would have successful in suppressing the shotgun and the evidence derived from its discovery. This Court should conclude that trial counsel was ineffective for failing to file a motion to suppress.

II. Mr. Gayden is entitled to a decision on the merits of his claim. If the record is insufficient to determine whether the police had lawful authority to enter Mr. Gayden's apartment, this Court should either: (a) order the appellate court to retain jurisdiction and remand the matter for an evidentiary hearing, or (b) allow Mr. Gayden to raise his claim in a petition for postconviction relief.

The State contends that this Court "cannot" exercise its supervisory authority to remand the matter for an evidentiary hearing or grant Mr. Gayden leave to file a petition under the Post-Conviction Hearing Act because: (1) relief is "foreclosed" by *People v. Carrera*, 239 Ill. 2d 241 (2010); (2) Mr. Gayden has not alleged sufficient facts to entitle him to an evidentiary hearing under the Post-Conviction Hearing Act; and (3) Mr. Gayden waived an evidentiary hearing by failing to support his request in

the court below. (St. Br. 13-20). These arguments should be rejected outright.

First, *Carrera* is distinguishable because the defendant in *Carrera*, unlike Mr. Gayden, was not compelled to raise his claim of ineffective assistance of counsel on direct appeal or risk procedural default. See *Carrera*, 239 Ill. 2d at 245. The law is clear, when a claim of ineffective assistance of counsel could have been raised on direct appeal, the doctrine of procedural default prohibits the claim from being raised in a petition for postconviction relief. See *People v. Kokoraleis*, 159 Ill. 2d 325, 328 (1994). The defendant's claim in *Carrera* involved trial counsel's off-the-record advice regarding the immigration consequences of his plea. *Carrera*, 239 Ill. 2d at 244. There was no ambiguity regarding the proper procedural mechanism for the defendant to make his claim. He had to file a petition for postconviction relief.

Here, the record is sufficient to decide Mr. Gayden's claim on direct appeal. He was therefore compelled by the rules of procedural default to raise his claim on direct appeal or risk losing it altogether. See *People v. Veach*, 2016 IL App (4th) 130888, ¶ 104 (Appleton, J., dissenting) ("*Kokoraleis* and its progeny give [a defendant] no choice but to raise [a] claim of ineffective assistance [...] in his direct appeal. If [the] defendant [waits] until the postconviction proceeding, the State [will] file[] a motion for dismissal on the ground of procedural forfeiture—and rightfully so [if] the alleged acts of ineffective assistance were memorialized in the record on direct appeal"). The State turns a blind eye to this procedural straightjacket and the injustices that occur when applied to defendants, like Mr. Gayden, who complete their sentences before their appeals are decided.

For example, the State's argument that the procedure set forth in *People v. Krankel*, 102 Ill. 2d 181 (1984), provides Illinois defendants with an adequate alternative to raise their claims of ineffective assistance of counsel, (St. Br. 14), ignores the reality that few defendants will know whether trial counsel was ineffective before speaking with appellate counsel[3] (and those that do may be understandably concerned that a *Krankel* motion would sour their relationship with counsel while the trial is still proceeding). For these reasons, the procedure set forth in *Krankel* is an inadequate and undesirable substitute for a direct appeal, or a hearing under the Post-Conviction Hearing Act.

The State's alternate conclusion that Mr. Gayden could have preserved his claim by filing a parallel petition for postconviction relief is also wrong. (St. Br. 14-15). In Illinois, claims of ineffective assistance of counsel fall into one of two categories—claims that are apparent on the record, and claims that are not. *People v. Veach*, 2017 IL 120649, ¶ 46. Claims that are apparent on the record must be raised on direct appeal, or risk procedural default. *Id.* at ¶ 46. Claims that are not apparent on the record must be raised on collateral review. *Id*. These categories are mutually exclusive; meaning, a claim cannot be raised on direct appeal if it can be raised in collateral

[3] Notably, Illinois guarantees every defendant the right to appointed counsel on appeal. Consequently, every defendant who files a notice of appeal has an opportunity to speak with appointed counsel before filing a petition for postconviction relief. This, however, provides little help to defendants, like Mr. Gayden, who cannot speak to an OSAD attorney because of OSAD's backlog before completing their sentence. These indigent defendants are in a substantially worse position than defendants with longer sentences, or those who can afford private counsel.

proceedings, and vice versa. *Id*. Thus, when a defendant raises a claim of ineffective assistance of counsel on direct appeal, he is necessary arguing that the record is sufficient to adjudicate his claim, and that his claim *cannot* be raised in a petition for postconviction relief. It is unreasonable to expect that same defendant to undermine his appellate arguments by filing, *pro se*, a "fallback" petition for postconviction relief. Particularly when, as is the case here, the State *did not* claim the record was insufficient to decide the defendant's claim on appeal. (See St. App. Br. 4-16); (Part IA, above).

The better approach would be to require the appellate court to retain jurisdiction and remand the matter for an evidentiary hearing whenever the record makes a substantial showing of a constitutional violation, but the defendant has lost standing to file a petition for postconviction relief while the direct appeal was pending. See Ill. S. Ct. R. 615(b). This approach is consistent with the appellate court's decisions in *People v. Fellers*, 2016 IL App (4th) 140486, *In re Alonzo O.*, 2015 IL App (4th) 150308, ¶ 31, and *In re Ch. W.*, 399 Ill. App. 3d 825, 830 (4th Dist. 2010).

While the State claims that the *Fellers* approach is unsound because it provides defendants who have completed their terms of mandatory supervised release with greater rights than defendants who remain imprisoned, (St. Br. 18), that would only be true if the standard for obtaining remand under Rule 615(b)(2) were less stringent than the standard for an evidentiary hearing under the Post-Conviction Hearing Act. This Court should decline to make such a rule. The standards should be the same–a discharged defendant on direct appeal should be required to make a

substantial showing of a constitutional violation in order to receive an evidentiary hearing under Rule 615(b)(2). (Def. Br. 30-31). This standard would provide discharged defendants with *the same* protections an incarcerated defendant receives under the Post-Conviction Hearing Act, nothing more and nothing less.

As an alternative, this Court could expand the relief it granted in *People v. Warr*, 54 Ill. 2d 487 (1973), to allow Mr. Gayden, and other similarly-situated defendants, to "institute a proceeding in the nature of a proceeding under the Post-Conviction Hearing Act." See *id.* at 493. Either procedure would allow Mr. Gayden to get a ruling on his claim of ineffective assistance of counsel.

Second, the State has misstated the law regarding the standard for obtaining an evidentiary hearing under the Post-Conviction Hearing Act. According to the State, the defendant must "come forward with *new evidence*" to obtain a hearing under the Act. (St. Br. 16-17). This is wrong. This Court has stated, in no uncertain terms that, "if the allegations contained in the petition are based upon matters of record, no extrinsic evidence may be required." *People v. Coleman*, 183 Ill. 2d 366, 381 (1998).

Moreover, Mr. Gayden has consistently argued that the evidence produced at trial is sufficient to establish that Officer Glinski lacked probable cause and exigent circumstances to enter his apartment. (Def. App. Br. 12-25; Def. Br. 10-21). He does not believe the record needs to be further developed. It is the State who argues that the record is incomplete because the officers *might* have testified differently at an evidentiary hearing. (St. Br. 8-12). The

State's speculation is not grounds for denying Mr. Gayden a hearing on his claim.

Third, Mr. Gayden did not waive his request for an evidentiary hearing by failing to assert it below. (St. Br. 18-19). The State concedes, as it must, that Mr. Gayden requested an evidentiary hearing at every stage of the appeal—in the appellate briefs, (Def. App. Br. 28; Def. App. R. Br. 11); in the petition for rehearing, (Def. PRH 6); in the petition for leave to appeal, (Def. PLA 13); in his opening brief, (Def. Br. 35); and in this reply brief. Each request was supported by citation to Illinois Supreme Court Rule 615(b)(2). (St. Br. 18-19). The State nevertheless argues that Mr. Gayden waived his request for "alternative" relief because his demands were "vague and unsupported" below. (St. Br. 18-19).

This argument appears to rely on an unreasonable reading of the phrase "in the alternative," which is commonly used to mean "for the same reasons" or "for the reasons stated above." When Mr. Gayden wrote, "In the alternative, [the appellate court] should remand this cause for a hearing on a motion to suppress," he meant "for the same reasons reversal is warranted, this case should be remanded for an evidentiary hearing." (Def. App. Br. 28). He then cited Rule 615, which authorizes the appellate court to remand a case for an evidentiary hearing as authority for the "alternative" relief. (Def. App. Br. 28).

Notably, the State never argued that the record was insufficient to resolve Mr. Gayden's claims on appeal. (See St. App. Br. 14-16); (Part IA, above). The appellate court made that finding, *sua sponte*, in its Rule 23

order denying Mr. Gayden relief. *People v. Gayden*, 2018 IL App (1st) 150748-U, ¶ 28; (A-27). Because of this, Mr. Gayden did not have an occasion to inform the appellate court that he had completed his sentence and lacked standing to file a petition for postconviction relief before filing his petition for rehearing. It was the appellate court's order, not the State's response, that made the issue relevant for the purposes of this appeal.

In short, Mr. Gayden did not waive his request for an evidentiary hearing. He made the appropriate demand at every stage of the appeal.

This Court should reject the State's argument that it lacks authority to provide Mr. Gayden the relief he seeks. He has a constitutional right to a decision on his claims of ineffective assistance of counsel. See Ill. Const. art. I, §§ 2, 8, 12. "If the [. . .] guarantee of due process in a criminal trial is to have real significance in Illinois, it is imperative that men convicted in violation of their constitutional rights have an adequate opportunity to be heard in court." *Marino v. Ragen*, 332 U.S. 561, 570 (1947) (Rutledge, J., concurring). Mr. Gayden did not have an adequate opportunity to be heard in court. He did not waive his alternative request for an evidentiary hearing. If this Court finds that the record is insufficient to resolve Mr. Gayden's claims on direct appeal, it should instruct the appellate court to remand the matter for an evidentiary hearing, or provide Mr. Gayden with standing to file a petition for postconviction relief.

CONCLUSION

For the foregoing reasons, Lanard Gayden respectfully requests that this Court reverse the lower-court ruling, suppress the discovery of the shotgun, and remand the matter for further proceedings. Alternatively, he requests an order: (1) instructing the appellate court to retain jurisdiction and remand the matter for an evidentiary hearing, or (2) allowing him to raise his claim of ineffective assistance of counsel in a petition for postconviction relief.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I, John R. Breffeilh, certify that this reply brief conforms to the requirements of Supreme Court Rule 341(a) and (b). The length of this reply brief, excluding pages containing the Rule 341(d) cover and the Rule 341(c) certificate of compliance is 20 pages.

/s/John R. Breffeilh
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No. 123505

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, -vs- LANARD GAYDEN Defendant-Appellant	)	Appeal from the Appellate Court of Illinois, No. 1-15-0748. There on appeal from the Circuit Court of Cook County, Illinois, No. 14 CR 4685. Honorable Kenneth J. Wadas, Judge Presiding.

NOTICE AND PROOF OF SERVICE

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Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. On July 12, 2019, the Reply Brief 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 Reply Brief to the Clerk of the above Court.

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