No. 124940

IN THE
SUPREME COURT OF ILLINOIS

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

BRIEF OF AMICUS CURIAE CENTER ON WRONGFUL CONVICTIONS IN SUPPORT OF PETITIONER-APPELLANT

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POINTS AND AUTHORITIES

STATEMENT OF INTEREST OF *AMICUS CURIAE*

The Center on Wrongful Convictions ("Center") operates under the auspices of the Bluhm Legal Clinic at Northwestern University Pritzker School of Law. Dedicated to identifying and rectifying wrongful convictions, the Center represents clients with credible claims of actual innocence. This representation includes direct appeals, state post-conviction proceedings, federal habeas proceedings, and clemency petitions. The Center also researches systemic problems in the criminal justice system, advocates for legal reform, and seeks to raise public awareness of the causes and societal costs of wrongful convictions.

Since its founding after the 1998 National Conference on Wrongful Convictions and the Death Penalty, the Center has been instrumental in the exoneration of over forty innocent men and women in Illinois and around the country. Many of these exonerations followed or resulted from post-conviction petitions advancing claims of factual innocence. The Center currently represents numerous additional individuals who are raising claims in pending post-conviction proceedings brought under the Post-Conviction Hearing Act, several of whom pleaded guilty during their original hearings.

Over the past twenty years, the Center has become aware of the daunting procedural and substantive obstacles faced by prisoners with legitimate claims of innocence. In order to avoid the ultimate injustice of an innocent person remaining behind bars where there is potential for exoneration, the Center believes that any person who can raise a credible claim of actual innocence should be permitted to do so, regardless of whether or not they pleaded guilty. That is why we believe this Court

should resolve a conflict between the Fourth District Appellate Court's opinion in this case—barring defendants who have pleaded guilty from filing post-conviction petitions based on newly developed evidence of actual innocence—with the First District Appellate Court's decision in *Shaw* which allows those who pleaded guilty to purse their actual innocence. The Center has been directly involved in several exonerations where one or more of the defendants has pleaded guilty, including the defendants known as the Dixmoor Five (Shainne Sharp, Robert Taylor, Robert Veal, James Harden, and Jonathan Barr). *See* Joshua A. Tepfer et al., *Convenient Scapegoats: Juvenile Confessions and Exculpatory DNA in Cook County, Illinois*, 18 Cardozo J.L. & Gender 631, 645 (2012).

The Center also has extensive experience in litigating post-conviction innocence claims and believes that its perspective will be helpful to this Court's resolution of the conflicting case law. In particular, the Center can provide this Court information about the larger context of false guilty pleas, why they occur, why they are likely to recur, and why requiring that defendants move to vacate their guilty pleas on the ground that they were not knowing or voluntary—a requirement imposed by the Fourth District in *Reed*—is a needless obstacle that will condemn many innocent people to serve out their terms without any hope of proving their innocence.

INTRODUCTION

"We believe that no person convicted of a crime should be deprived of life or liberty given compelling evidence of *actual innocence*," wrote this Court in its landmark decision in *People v. Washington.* 171 Ill. 2d 475, 489 (1996) (emphasis added). The idea of an innocent person trapped in prison was so "conscience shocking" to this Court that it created a special remedy, rooted in the substantive and procedural due process clauses of

the Illinois Constitution, to enable a defendant to raise "a free-standing claim of actual innocence" based on evidence that was "new, material, non-cumulative" and "of such a conclusive character" that "it would probably change the result on retrial." *Id.* at 479, 488–89. The facts of *Washington* involved a defendant who had been convicted at trial so the Court did not have the occasion to address whether defendants who pleaded guilty should be able to avail themselves of this remedy.

In this case, the Fourth District held that the petitioner, who had pleaded guilty, was barred from filing a post-conviction petition based on newly developed evidence of actual innocence because he had failed to challenge the knowing and voluntary nature of his guilty plea. *People v. Reed*, 2019 IL App (4th) 170090. The appellate court's opinion is at odds with *People v. Shaw*, 2019 IL App (1st) 152994, a well-reasoned recent First District opinion that gives proper respect to the bedrock principle of *Washington*—that no innocent person with newly developed evidence of actual innocence should be forced to languish in prison. *Reed* is also at odds with legislative intent of the Post-Conviction Hearing Act and is in direct conflict with Illinois' post-conviction forensic testing statute, which was amended in 2014 to allow defendants who pleaded guilty to file a motion for DNA testing.

In the twenty-three years since *Washington* was decided, much has changed in our criminal justice system. Fewer defendants go to trial today than they did in the 1980s and 1990s. According to national data, nearly 20% of defendants went to trial thirty years ago as compared to fewer than 3% today. National Association of Criminal Defense Lawyers, The Trial Penalty: The Sixth Amendment Right to Trial on the Verge of Extinction and How to Save It (2018). There are many reasons for this, but changes in sentencing

regimes which limit the discretion of judges and require them to impose mandatory minimum sentences and other sentencing enhancements make the risk of losing at trial too high for many defendants in cases where the defendants are charged with serious crimes. In less serious felonies, the expanded use of pre-trial detention also impacts a defendant's plea decision. As the length of time in custody approaches the maximum sentence that defendants may face if convicted, the pressure to plead guilty in order to get out of jail increases.

Finally, these same pressures also influence innocent defendants to plead guilty. As of 2018, 11% of innocent individuals who were exonerated by DNA evidence had pleaded guilty. National Association of Criminal Defense Lawyers, The Trial Penalty: The Sixth Amendment Right to Trial on the Verge of Extinction and How to Save It (2018). A 2015 report issued by the National Registry of Exonerations found that 15% of those who have been exonerated entered guilty pleas. National Registry of Exonerations, Innocents Who Plead Guilty (2015). If this court affirms the Fourth District, actually innocent individuals will be greatly prejudiced by being unable to raise innocence claims regardless of new exculpatory evidence. This Court overturn *Reed* and reaffirm the bedrock principle of *Washington*—that the incarceration of the actually innocent is constitutionally intolerable—in the context of defendants who have pleaded guilty.

ARGUMENT

I. THIS COURT'S JURISPRUDENCE, THE ILLINOIS LEGISLATURE, AND THE ILLINOIS CONSTITUTION SUPPORT THE PROPOSITION THAT AN INDIVIDUAL WHO HAS PLEADED GUILTY MAY BRING A "FREE-STANDING" CLAIM OF ACTUAL INNOCENCE UNDER THE POST-CONVICTION HEARING ACT.

A. This Court's Decision in *People v. Washington* and the Illinois Constitution Support the Proposition That an Individual Who Has Pleaded Guilty May Bring A "Free-Standing" Claim of Actual Innocence Under the Post-Conviction Hearing Act.

In *People v. Washington*, this Court held that an inmate may raise a "free-standing" claim of innocence based on newly discovered evidence under the Post-Conviction Hearing Act. 171 Ill. 2d 475, 476 (2019). *Washington* concerned an inmate who raised his claim of actual innocence following his conviction at trial. *Id*. The holding in *Washington* followed from the Court's inquiry into whether additional due process should "be afforded in Illinois when newly discovered evidence indicates that *a convicted person* is actually innocent." *Id.* at 476 (emphasis added). The Court answered this question with a resounding "yes," stating that to deny an actually innocent person who has developed new evidence of actual innocence the opportunity for post-conviction relief would violate the due process clause of the Illinois Constitution. As a matter of procedural due process, such a bar would be "fundamentally unfair," and as a matter of substantive due process, it would be "conscience-shocking." *Id*. at 488–89. Accordingly, the Court held "as a matter of Illinois constitutional jurisprudence that a claim of newly discovered evidence showing a defendant to be actually innocent of the crime for which he was convicted is cognizable as a matter of due process." *Id*. at 489.

The reasoning which led to the result in *Washington* should apply with equal force whether an actually innocent person pleaded guilty or was convicted after trial.

Both those who are wrongfully convicted after a trial and those who are wrongfully convicted after a plea suffer the same injury—the deprivation of their life and liberty. Both are forced to spend time in prison for crimes they did not commit. It would be unfair and conscience-shocking to allow one set of actually innocent defendants a route to freedom but to leave another set—those who pleaded guilty—languishing in prison with no legal recourse. Therefore, this Court should hold that barring an individual who pleaded guilty from bringing a "free-standing" claim of innocence under the Post-Conviction Hearing Act similarly violates procedural and substantive due process.

The First District's opinion in *People v. Shaw* properly adheres to the *Washington* Court's bedrock principle that "no person convicted of a crime should be deprived of life or liberty given compelling evidence of actual innocence." *Id.* It appropriately limits relief by requiring that: (1) the newly discovered evidence was discovered after the entry of the plea and, in the exercise of reasonable diligence, could not have been discovered prior to the entry of the plea; and (2) the newly discovered evidence is of such weight and quality that, under the facts and circumstances of that particular case, the interest of justice requires the applicant's guilty plea to be vacated. *People v. Shaw*, 2019 IL App (1st) 152994 ¶56. Trial courts should have no difficulty in applying these standards and can use them to cull out non-meritorious innocence claims from defendants who entered guilty pleas.

B. The Illinois Legislature Supports the Proposition That an Individual Who Has Pleaded Guilty May Bring A "Free-Standing" Claim of Actual Innocence Under the Post-Conviction Hearing Act.

Under the Post-Conviction Hearing Act, "any person imprisoned in the penitentiary may institute a proceeding under this Article." 725 ILCS 5/122-1(a). As a

threshold matter, therefore, since a person may be imprisoned as a result of a conviction arising out of a guilty plea, the plain language of the statute unambiguously resembles the legislature's intent to afford such persons post-conviction relief. Additionally, 725 ILCS 5/116-3 governs post-judgement motions for fingerprint, Integrated Ballistic Identification System, or forensic DNA testing. In 2014, the legislature made numerous amendments to the statute to broaden its applicability to include individuals that have pleaded guilty. 2013 Ill. SB 2995. Thus, under 725 ILCS 5/116-3, which is currently titled "Motion for fingerprint, Integrated Ballistic Identification System, or forensic testing not available at trial or guilty plea regarding actual innocence," a defendant who has pleaded guilty may make a motion in court for fingerprint, Integrated Ballistic Identification System, or DNA testing. By amending 725 ILCS 5/116-3 to its current form, it is clear that the Illinois Legislature supports the proposition that a defendant, after pleading guilty, may seek post-conviction relief based on a "free-standing" claim of innocence. Otherwise, a defendant could obtain forensic test results—sometimes at great expense—that prove his innocence but be barred from using this newly discovered evidence to obtain post-conviction relief. Such a result would be absurd.

II. INNOCENT PEOPLE ARE INCREASINGLY LIKELY TO PLEAD GUILTY DUE TO CHANGES IN SENTENCING SCHEMES, AND THEY WOULD BE UNDULY PREJUDICED UNDER THE STANDARD PROPOSED BY THE FOURTH DISTRICT.

Individuals plead guilty for many reasons besides actual guilt. Over time, increased sentences and longer periods of pretrial incarceration have led to greater numbers of individuals taking guilty pleas instead of going to trial. Some of those who have pleaded guilty are actually innocent. If this court follows the Fourth District, these

actually innocent individuals will be greatly prejudiced by being unable to raise innocence claims regardless of new exculpatory evidence.

A. The Existence of *Alford* Pleas Is Evidence That Some Defendants Plead Guilty for Reasons Other Than Actual Guilt.

The very existence of *Alford* pleas demonstrates that some defendants plead guilty for reasons other than actual guilt. *North Carolina v. Alford*, 400 U.S. 25, 27 (1970). In the *Alford* line of cases, courts have recognized that defendants may wish to plead guilty after considering the evidence put forth against them while still asserting that they did not commit a crime. *McCoy v. U.S.*, 363 F.2d 306 (D.C. Cir. 1966). In *Alford,* the Court held that a defendant "may *voluntarily, knowingly, and understandingly* consent to the imposition of a prison sentence even if he is unwilling or unable to admit his participation in the acts constituting the crime." *Alford*, 400 U.S. at 37 (emphasis added).

If this Court were to uphold the decision of the Fourth District, that would mean that defendants who had legally asserted their innocence in an *Alford* plea would never be able to raise claims of actual innocence despite new evidence coming to light unless they contested the knowing and voluntary nature of their pleas. But such a motion would be futile; *Alford* pleas are, by their very nature, made knowingly and voluntarily. This leads to an absurd result under the Fourth District's holding, in which a defendant who has continually asserted his innocence is barred from raising a claim of actual innocence even when new evidence comes to light.

One of the first DNA exonerations in the United States—the case of David Vasquez—involved an *Alford* plea. To avoid a death sentence, Vasquez, an intellectually disabled man with an I.Q. of less than 70 who had confessed to the murder and rape of an Arlington, Virginia woman in 1984, agreed to plead guilty to second-degree murder and

burglary and received a twenty-year sentence. *David Vasquez*, National Registry of Exonerations, https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3705 (last visited Feb. 22, 2020). While Vasquez was imprisoned, a serial rapist and murderer who had the same *modus operandi* as that used in the murder pled to by Vasquez, was apprehended, convicted, and sentenced to death for a series of murders and rapes in Virginia. *Id.* Under Virginia law, Vasquez's Alford plea prevented him from seeking post-conviction relief to vacate his guilty plea. *Id.* His only remedy was to seek a gubernatorial pardon which he finally received in 1989. *Id.*[1]

Recently, *Alford* pleas have been used as a bargaining method by prosecutors when new evidence comes to light that a defendant is innocent. Sydney Schneider, *Comment: When Innocent Defendants Falsely Confess: Analyzing the Ramifications of Entering Alford Pleas in the Context of the Burgeoning Innocence Movement*, 103 J. Crim. L. & Criminology 279, 296 (2013). In those cases, prosecutors will offer a release

[1] Vasquez was fortunate. Because the clemency process is a political process, other exonerated defendants who have claimed actual innocence have struggled to receive pardons. In Illinois, for example, Randy Steidl, a former death row inmate who was exonerated in 2004, has still not received a pardon. His previous applications were either denied or not ruled upon by Governors Ryan, Blagojevich, Quinn and Rauner, see e.g., *Our Opinion: How Long Must Steidl Wait For a Pardon From Illinois*, State Journal Register, Jan. 22, 2015, https://www.sj-r.com/article/20150122/OPINION/150129793, and his current application is pending before Governor Pritzker.

from jail in exchange for a defendant's *Alford* plea. *Id.* Many defendants are reluctant to proceed with a second trial and thus accept the plea. *Id.*

For example, Illinois resident Anthony Murray was released in 2012 after serving fourteen years of a sentence based on ineffective assistance of counsel. John J. Hanlon, *Rejecting the Innocent*, Chi. Tribune, Nov. 14, 2013, https://www.chicagotribune.com/opinion/ct-xpm-2013-11-14-chi-20131114-hanlon-briefs-story.html. Prosecutors offered him release upon acceptance of an *Alford* plea. *Id.* Murray accepted the deal; however, if this Court upholds the standard set forth by the Fourth District, Murray will not be able to pursue a claim of actual innocence even if new compelling evidence indicating his innocence continues to come to light.

Although *Alford* pleas underscore the fact that some defendants who plead guilty may not, in fact, be guilty, these pleas make up only a small portion of guilty pleas. Moreover, some prosecutors do not offer defendants *Alford* pleas and some judges refuse to accept such pleas. Schneider, *Comment: When Innocent Defendants Falsely Confess*, 103 J. Crim. L. & Criminology at 283 (in 2004, 6.5% of inmates in state correctional facilities had entered *Alford* pleas).The far more common reason that innocent defendants may plead guilty is to avoid long prison sentences, sentences that are routinely handed out in an era where judges have been stripped of their discretion in imposing sentences.

B. Changes in Sentencing Laws Over Time Have Led to Harsher Penalties and Therefore Increased Incentives for Innocent Defendants to Plead Guilty.

Changes in sentencing laws such as the Illinois Truth-In-Sentencing Law, assorted sentence enhancements, and mandatory minimums limit the discretion that judges have in issuing sentences. The certainty of receiving a long incarcerative sentence under these newer sentencing regimes may lead innocent individuals to forego a trial and

plead guilty to lesser offenses. Simply put, as the court in *Shaw* recognized, when the plea terms are good enough, "it is rational to refuse to roll the dice, regardless of whether one believes the evidence establishes guilt beyond a reasonable doubt, and regardless of whether one is factually innocent." *People v. Shaw*, 2019 IL App (1st) 152994 ¶39 (quoting *Rhoades v. State*, 880 N.W.2d 431, 436–38 (Iowa 2016)). Over 50% of people in a study that simulated decision making processes of an innocent defendant would plead guilty in exchange for a lighter penalty. Lucian E. Dervan & Vanessa A. Edkins, *The Innocent Defendant's Dilemma: An Innovative Empirical Study of Plea Bargaining's Innocence Problem,* 103 J. Crim. L. & Criminology 1 (2013).

Illinois's "Truth-in-Sentencing Law" has led to individuals serving longer sentences than they ever have before. The Truth-in-Sentencing Law requires that defendants convicted of murder must serve 100% of their sentence, and defendants convicted of many violent crimes must serve at least 85% of their sentence. David E. Olsen Et Al., The Impact of Illinois' Truth-in-Sentencing Law on Sentence Lengths, Time to Serve and Disciplinary Incidents of Convicted Murderers and Sex Offenders (2009). Prior to the passage of the Truth-in-Sentencing Law in Illinois, defendants who were convicted of serious crimes, including murder, were entitled to day-for-day good time, a sentencing credit which could cut their sentences in half. *Id*. Indeed, across the U.S., defendants who were convicted and sentenced before "truth-in-sentencing" served less than 40% of their sentenced time on average. *Id.* Because the same offenses today carry longer prison terms than they did prior to truth-in-sentencing laws and a much greater certainty of receiving a harsh sentence, defendants have greater incentives to plead guilty in order to avoid serving long sentences.

Other legislative changes, including automatic transfer of juveniles to criminal court, gun and gang sentence enhancements, and mandatory minimum sentences in Illinois have also led to longer sentences for defendants and increased the certainty of a severe sentence. Take the example of a sixteen-year-old male who is charged with a first-degree murder today in connection with a shooting. Because he was sixteen at the time of his offense, his case is automatically transferred to the criminal court. 705 ILCS 405/5-130. Once in criminal court, he knows what sentence he is facing if convicted. If he is the shooter, he is looking at a minimum of twenty years in prison and a maximum of sixty years for the murder plus a mandatory twenty-five-year enhancement for firing a gun in the commission of the crime. 730 ILCS 5/5-8-1. These sentences are mandatory, and under "truth-in-sentencing," he must serve every day of that sentence. Thus, the defendant knows prior to trial that even if he is given the minimum twenty-year base sentence for murder, he must spend the next forty-five years of his life in prison. The certainty of such sentences is a powerful incentive for individuals to plead guilty to lesser offenses or to plea bargains that enable them to get out from under the sentencing enhancements.

C. Lengthy Periods of Pretrial Incarceration Also Incentivize Innocent Defendants to Plead Guilty.

Nationwide, pretrial incarceration has increased over time. In the 1990s, approximately half of jail populations were individuals who were held pretrial, whereas that segment composes nearly two-thirds of the jail population today. Léon Digard & Elizabeth Swavola, Vera Institute, Justice Denied: The Harmful and Lasting Effects of Pretrial Incarceration (2019). Pretrial incarceration greatly impacts defendants' rates of guilty pleas; when individuals are released before trial, rates of guilty pleas drop by over

10%. Will Dobbie, Jacob Goldin, & Crystal S. Yang, *The Effects of Pretrial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges*, 108 Am. L. Rev. 201 (2018). The longer an individual is held pretrial, the worse his outcomes at trial are, and the greater the pressure to take a plea deal. Lengthier periods of pre-trial detention can fracture family relationships and cause economic hardship to both the detainee and his family.

Illinois has recently conducted extensive bail reform in order to limit the number of individuals held pretrial. However, prior to those bail reform efforts, many individuals were being held for long periods of time in jail without the ability to pay their bail. When presented with the choice to take a shorter plea deal or continue remaining incarcerated for an uncertain amount of time, individuals will often be motivated by the certainty of a shorter sentence to plead guilty regardless of innocence. This may be especially true for defendants charged with less serious offenses. As the amount of time they spend in jail before trial approaches the amount of time they would likely receive if convicted, the pressure to plead guilty just to get out of jail grows. This may explain why over 40% of the exonerees who pleaded guilty in the National Registry of Exonerations entered guilty pleas to drug offenses. Olsen Et Al., The Impact of Illinois' Truth-in-Sentencing Law.

D. Individuals Who Lose at Trial Face Much Higher Sentences Than Those Who Take Guilty Pleas.

Individuals are also incentivized to plead guilty because they face much less prison time by taking a deal than they do if they were to be found guilty at trial. On average, the time served after a guilty plea is less than a third of what a defendant would serve were he to be found guilty at trial. This trial "tax" also acts as a powerful incentive for defendants to give up their constitutional right to a fair trial. National Association of

Criminal Defense Lawyers, The Trial Penalty: The Sixth Amendment Right to Trial on the Verge of Extinction and How to Save It (2018). If individuals are worried about the strength of the evidence against them, a low sentence on a plea deal is often preferable to the possibility of an extremely long sentence due to mandatory minimums and sentence enhancements were they to be found guilty at trial.

E. Evidence of Actual Innocence May Not Develop Until After Trial—Sometimes Years After Trial—Incentivizing Innocent Defendants to Plead Guilty Because of The Perceived Strength of Evidence Against Them at the Time of Trial.

One of the lessons from the Innocence Movement is that it takes time for newly developed evidence of actual innocence to surface or to be discovered. In 2018, the average exoneree served nearly eleven years before being released. The National Registry of Exonerations, Exonerations in 2018 (2019). Indeed, many forms of exculpatory evidence such as recanted witness statements generally do not surface until long after trial. Witnesses who are fearful of perjury prosecutions or co-defendants who are fearful of losing favorable plea bargains of their own are unwilling to recant prior to trial. In particular, incentivized witnesses—those who testify in order to get reduced sentences--frequently recant their testimony years after their testimony. Shawn Armbrust, *Reevaluating Recanting Witnesses: Why the Red-Headed Stepchild of New Evidence Deserves Another Look*, 28 B.C. Third World Law J. 75, 94 (2008). In 2013, nearly a quarter of cases on the National Registry of Exonerations involved a witness recantation. The National Registry of Exonerations, Witness Recantation Study: Preliminary Findings (2013). Over half of child sex abuse exonerations involved a witness recantation. *Id.*

Nearly three-quarters of cases that involved recantations on the National Registry of Exonerations also involved official misconduct. *Id.* For example, witness recantations

are common in situations where witnesses were coerced by police to give false statements implicating others. Armbrust, *Reevaluating Recanting Witnesses* at 96. Under the Fourth District's holding, defendants who have pleaded guilty after police officers testified falsely in their cases or fabricated cases against them would be denied relief. In Illinois alone, for example, seventy-five people were exonerated after being framed by police officers. Matt Masterson, *12 Men Have Convictions Tossed in Latest Mass Incarceration Tied to Ex-Chicago Sergeant*, WWTV, Feb. 11, 2020. Several of these defendants chose to plead guilty to other offenses because they knew that officers were prepared to lie under oath and realized that going to trial was futile. The National Registry of Exonerations, Exonerations in 2018, 10 (2019).

Here, the co-defendant, Mr. Callaway, came forward with evidence alleging Mr. Reed's innocence after both he and Mr. Reed had been sentenced. When making his calculation about whether or not to take a plea deal, Mr. Reed had no way of knowing that Mr. Calloway would eventually come forward in an attempt to clear him.

By following the Fourth District's rule, this court would unfairly prejudice defendants who weighed the evidence against them and decided to plead guilty in cases where exculpatory evidence could not have been available at the time of trial but came to light only after they pleaded guilty.

III. INNOCENT INDIVIDUALS EXONERATED THROUGH THE ASSISTANCE OF THE CENTER ON WRONGFUL CONVICTIONS WOULD BE FORCED TO REMAINED INCARCERATED UNDER THE STANDARD PROPOSED BY THE DISTRICT IN REED.

A. The "Dixmoor Five" Case Illustrates How the Fourth District's Requirement—That Only Defendants Who Raise Challenges to the Voluntary and Knowing Nature of Their Pleas Can Seek Post-Conviction Relief—Would Pose an Unnecessary Obstacle and Keep Innocent Individuals Incarcerated.

Robert Lee Veal, Shainne Sharp, Jonathan Barr, James Harden, and Robert Taylor—collectively known as "the Dixmoor Five"—were convicted for the rape and murder of Cateresa Matthews. Joshua A. Tepfer et al., Convenient Scapegoats: Juvenile Confessions and Exculpatory DNA in Cook County, Illinois, 18 Cardozo J. L. & Gender 631, 645 (2012). After being subjected to rigorous interrogations, Veal, Taylor, and Sharp confessed to participating in the crime. *Id.* at 638–41. Based on their confessions, the Cook County State's Attorney's Office decided to prosecute the Dixmoor Five despite the fact that sperm recovered from Matthew's body did not match any of the defendants' DNA profiles. *Id.* at 641–42. Veal and Sharp pleaded guilty to first degree murder in exchange for shorter sentences of twenty years in prison. *Id.* at 643. Taylor, Harden and Barr were convicted by trial: Taylor and Harden were sentenced to prison for eighty years while Barr was sentenced to prison for eighty-five years. *Id.* at 645.

In 2011, with the assistance of a collective group of pro bono attorneys including the Center on Wrongful Convictions, the Cook County Circuit Court ordered new DNA testing. This testing produced evidence that linked an adult sexual predator named Willie Randolph to the crime. *Id.* at 647–48. Randolph had no known connections to any of the defendants. *Id.* at 648–50. As a result, the Cook County State's Attorney's Office moved to vacate all five defendants' convictions, including those of Veal and Sharp, the two defendants who had pleaded guilty and testified against their co-defendants. *Id.* at 654.

A deeper dive into the facts of Veal and Sharp's guilty pleas explains why it would be rational for an innocent person to plead guilty to a crime he or she did not commit. As the State was preparing to go to trial, it recognized that its cases against James Harden, the supposed ringleader, and his brother, Jonathan Barr, were weak. *Id.* at

643. Neither teen had confessed, and there were no eyewitnesses or forensic evidence linking them to the crime. *Id.* Rather than risk letting Harden and his brother get away with murder, they offered Veal, a learning disabled and mentally challenged teenager, and Sharp sweetheart deals. *Id.* If Veal and Sharp pleaded guilty to one count of murder and agreed to testify against their co-defendants, the State would drop the sexual assault charges and recommend a minimum sentence of twenty years. *Id.* At the time of their arrests, Illinois law allowed inmates to earn a day of credit for each day served in prison, effectively cutting their prison terms in half. *Id.* at 643. Because both Veal and Sharp had already served two years in jail awaiting trial, the boys would only have to serve less than eight years. *Id.* If they went to trial, however, and were convicted—a near certainty given their detailed confessions—they would face possible life sentences. *Id.* Both Sharp and Veal took the deals. *Id.* They did so knowingly and voluntarily. *Id.* They did so even though they were innocent. *Id.* at 648. Their decisions were rational—the deals were simply too good for them to pass up.

According to the standard proposed by the Fourth District in *People v. Reed*, a freestanding actual innocence claim may be brought after a guilty plea but only after a defendant has challenged the knowing and voluntary nature of his or her plea. 2019 IL App (4th) 170090 ¶2. But requiring a defendant who has pleaded guilty to first challenge his plea on the grounds that it was not knowing and voluntary would place an unnecessary and irrelevant roadblock for most innocent defendants who plead guilty but later develop compelling new evidence of their actual innocence.

Such a motion might also be futile. An innocent defendant's decision to plead guilty may be both voluntary and knowing. Robert Lee Veal and Shainne Sharp knew

exactly what they were doing. Tepfer, *Convenient Scapegoats*, 18 Cardozo J. L. & Gender at 643. Filing such a motion would have placed their plea deals in jeopardy, and if by chance they prevailed, prosecutors would undoubtedly have been less likely to offer terms as good again.

Moreover, Sharp and Veal were exonerated by post-conviction DNA testing secured by their co-defendants pursuant to 725 ILCS 5/116-3. *Id.* at 646–48. Today, as a result of legislative changes, both Veal and Sharp could file their own motions for DNA testing. But under the Fourth District's decision in *Reed*, exculpatory DNA results would be of little use to them if the Fourth District's decision is affirmed. They would not be able to use conclusive evidence of their innocence—a DNA match to Willie Randolph—to file a post-conviction petition under 725 ILCS 5/122-1. Veal and Sharp, although just as innocent as their co-defendants Taylor, Harden, and Barr, would have no recourse to vacate their convictions.

CONCLUSION

For the foregoing reasons, we urge this Court to reverse the appellate court's decision.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Supreme Court Rule 341(a) and (b). The length of this brief, excluding pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a) is 19 pages.

/s/ Steven A. Drizin
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