No. 121681

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Respondent-Appellee, -vs- ANTHONY S. BROWN Petitioner-Appellant	))))))))))	Appeal from the Appellate Court of Illinois, No. 4-14-0760. There on appeal from the Circuit Court of the Sixth Judicial Circuit, Champaign County, Illinois, No. 12-CF1460. Honorable Thomas J. Difanis, Judge Presiding.

BRIEF AND ARGUMENT FOR PETITIONER-APPELLANT

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NATURE OF THE CASE

Anthony S. Brown, petitioner-appellant, appeals from a judgment dismissing his petition for post-conviction relief at the second-stage of proceedings.

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

ISSUE PRESENTED FOR REVIEW

Whether the prejudice standard necessary to advance post-conviction petitions to the third-stage of proceedings should be applied to Mr. Brown's case, where he entered into a fully-negotiated guilty plea based on incorrect advice from his attorney about how long he would be in prison, and the record lacked sufficient evidence to show that, but for that misadvise, he would have insisted on going to trial.

JURISDICTION

Anthony S. Brown, petitioner-appellant, appeals the second-stage dismissal of his post-conviction petition. The judgment appealed was entered on August 26, 2014. (C. 202) Notice of appeal was timely filed on August 28, 2014. (C. 207) The Second District Appellate Court rendered its decision November 10, 2016. *People v. Brown*, 2016 IL App (4th) 140760. Petition for leave to appeal was granted on March 28, 2017.

STATEMENT OF FACTS

On September 13, 2012, petitioner-appellant Anthony S. Brown was charged by information with armed habitual criminal and home invasion with a firearm stemming from a September 9 incident in Champaign. (C. 1, 2) In a hearing before Judge Thomas Difanis on May 6, 2013, Brown entered a fully negotiated guilty plea. (C. 101) Attorneys Alfred Ivy and William Laws represented him, with Laws serving as lead counsel. (C. 4, 26; V7, R3)

Mr. Brown pled guilty to the armed habitual criminal charge, having been previously convicted of possession of cannabis with intent to deliver and unlawful use of a weapon by a felon. (C. 1, 101) In exchange for the plea, he was sentenced to 18 years in prison, and the State nolle prossed the home invasion with a firearm charge. (C. 101) Before entry of the agreement, the judge admonished Brown as to the penalties he faced for the Class X felony of armed habitual criminal: a minimum sentence of six years, a maximum sentence of 30 years, three years mandatory supervised release, and up to a $25,000 fine. Brown stated that he understood those penalties and that he was going to plead guilty. (V.8, R. 3) In presenting the agreement to the judge, the State noted that Brown would have 231 days credit for time served in the county correctional center. (V.8, R. 5)

The prosecution proffered the following factual basis for the plea: On September 9, 2012, Shauntrayah Foster and Taylor Rogers called police to report that their mother's ex-boyfriend was in their house with a gun. When police arrived, they forced open the door and saw the petitioner running toward them. Three officers saw him lift a gun from his waistband and point

it at them. The officers fired at the petitioner, who dropped the gun, a .22-caliber revolver. (V.8, R. 6)

After the State concluded its factual basis, Judge Difanis asked Mr. Brown's attorney, Laws, if he believed the State had witnesses who would testify to those facts. (V.8 R.6-7) Laws said they did. The judge then asked Brown if he was pleading guilty to the charge of armed habitual criminal, and Brown said "yes." (V.8, R.7)

Sentencing immediately followed. Judge Difanis noted that the record should reflect the waiver of a pre-sentencing report. The prosecution stated Mr. Brown's previous convictions: misdemeanor possession of cannabis in 2004; misdemeanor domestic battery in 2006; domestic battery with a prior in 2006; and felony criminal trespass to a residence in 2006. Pursuant to the terms of the agreement, the judge dismissed the home invasion charge and sentenced Brown to 18 years in the Department of Corrections. (V.8, R. 7) The issue of good conduct credit was never discussed. (V.8, R. 1-9)

On May 6, 2013, the court entered an order and judgment reflecting Mr. Brown's sentence. (C. 101) On the preprinted judgment form, the judge indicated that Brown was not entitled to good conduct credit "until proof of participation and completion of a substance abuse treatment program. 730 ILCS 5/3-6-3(a)(4.5)." (C. 102) The judge did not specify the amount of good conduct credit that Brown was eligible to receive.

On May 22, Mr. Brown filed a *pro se* notice of appeal stating that his lawyers failed to provide effective assistance because they misinformed him about the good conduct sentence credit he would receive under his negotiated

plea. (C. 109) He attached a signed affidavit on which he wrote, "I, Anthony Brown, took plea at 50% not 85%. Court Failed to state 85%. Motion for Ineffective Counsel. Motion for notice of appeal. Lawyer told me 18 at 50% not 85%." (C. 110) On May 28, Judge Difanis appointed the Office of the State Appellate Defender to represent Mr. Brown on appeal. (C. 115)

Brown filed a *pro se* motion for reduction of sentence on June 7, 2013. (C.122) In support of his motion he wrote,

> Inaffective counselor, told me that my sentence was at 50% instead of 85% Told me that 85% was not in my sentence order, He also said that if open court didn't say anything about 85% don't worry about it 'cause it will be 50%. Told me that was the best deal to take 'cause its 50% not 85%. I'm willing to keep the 18 years at 50% not at 85% 'cause I was told 18 at 50% or day for day. (*Errors in original)*

(C. 123-124) Judge Difanis denied the motion on June 17, stating, "A motion for reduction of sentence is not authorized by the Supreme Court Rules in a fully negotiated plea." (C. 129) Two months later, on August 16, the Appellate Court dismissed Brown's appeal at his request. (C. 147)

Mr. Brown filed a *pro se* post-conviction petition on February 27, 2014, arguing ineffective assistance of counsel. (C. 162) Through his subsequently appointed public defender, Brown filed an amended post-conviction petition on June19. (C. 167) It stated that his trial attorneys misinformed him about the good conduct credit he would receive. He was told he would serve 50 percent of his 18-year sentence, but the statute mandated he serve 85 percent. (C. 163)

Multiple documents were attached to the amended petition, including Mr. Brown's affidavit. The following excerpt is from his affidavit:

> I met with Mr. Laws 2 times once being right before the plea. Mr. Laws told me that I would have to serve 85% if convicted of home invasion but told me that I would only have to serve 50% on a conviction for armed habitual criminal I trusted Mr. Laws to give me correct information and I relied on what he told me I believed what he told me because he showed me paperwork for the plea and it said nothing about having to do 85%. Right before the plea I wanted to confirm with Mr. Laws that I would only have to do 50% on the armed habitual criminal conviction. He said "yes" and said something like, "See- there is nothing in the paperwork about you doing 85%. Don't play with these people." (Errors in original)

Brown first learned that his lawyer incorrectly advised him about the rate of credit when he entered the DOC and was informed that he must serve 85 percent of his sentence. He attempted to contact Mr. Laws, but did not receive a response. Brown would not have accepted the plea agreement had he known he would have to serve 85 percent of his 18-year sentence rather than the 50 percent his lawyers told him. (C. 171-172)

The State filed a motion to dismiss on August 18, arguing that Mr. Brown did not demonstrate his constitutional rights had been violated as a result of the erroneous information from his attorneys, and that he had not shown ineffective assistance of counsel. (C. 197-199)

Judge Difanis dismissed Mr. Brown's post-conviction petition in a written order on August 26, 2014. (C. 202-203) He found that, under the seminal ineffective assistance of counsel case, *Strickland v. Washington*, Brown could not show prejudice resulting from his attorney's incorrect advice. Judge Difanis said:

> In his amended petition, the defendant claims that had he known that his 18 year sentence was

> subject to serving 85%, then he would have gone to trial "wherein he would have been acquitted." The factual basis for the plea involved the defendant in the residence of his ex-girlfriend while armed with a firearm. The police responded, forced entry into the home and confronted the defendant. He was armed with a firearm and pointed it at the police officers who then shot him. Even given the vagaries of the jury system, the defendant's chance of being acquitted was slim to none. However, had he been convicted, a sentence in excess of 18 years was a 100% guarantee. (C. 202)

On appeal, Mr. Brown argued that the judge should have followed the precedent established in the 2008 Fourth District case, *People v. Stewart*, 381 Ill.App.3d 200 (4th Dist. 2008), and the 2015 Fifth District case, *People v. Kitchell*, 2015 IL App (5th) 120548. Both cases involved incorrect advice from trial counsel regarding good-conduct credit which induced defendants to plead guilty. In both cases, the Appellate Court determined that the defendants had shown the requisite prejudice to advance their post-conviction petitions to an evidentiary hearing.

On November 10, 2016, the Fourth District Appellate Court affirmed the judgment in a published opinion. It stated that, under *Kitchell* and *Stewart*, Mr. Brown had shown a substantial violation of a constitutional right. *People v. Brown*, 2016 IL App (4th) 140760 ¶ 11. However, the Court determined that, under the 2003 Supreme Court case, *People v. Rissley*, 206 Ill.2d 403 (2003), Brown made no such showing. *Brown*, 2016 IL App (4th) 140760 ¶ 25. This Court granted leave to appeal on March 29, 2017.

ARGUMENT

Post-conviction petitioner Anthony Brown made a substantial showing of a constitutional violation and demonstrated prejudice where he relinquished his right to trial and entered into a fully-negotiated plea agreement based on incorrect advice from his attorney regarding his eligibility for good-conduct credit.

Since more than 96 percent of Illinois felony criminal cases are resolved through plea bargaining,[1] it is essential to the functioning of our justice system that the rights of the accused not be diluted in that context. Yet, that is exactly what happened to Mr. Brown. His constitutional rights to effective assistance of counsel and, ultimately, due process, were violated by his attorney's incorrect advice about sentencing. Based on that advice, Brown agreed to plead guilty to armed habitual criminal and a prison sentence of 18-years served at 50 percent. He later learned that, statutorily, he must serve at least 85 percent of his sentence, more than six years longer than what he was told. Through post-conviction proceedings, Brown sought to rectify the violations of his basic rights. The process failed him.

As Mr. Brown's case demonstrates, the prejudice that must be shown to be granted an evidentiary hearing creates a nearly insurmountable obstacle for certain petitioners who plead guilty. This is particularly true here, where the record was sparse and the only way to support the claim was through the testimony of the attorney whose ineffectiveness was being alleged. Under those circumstances, a post-conviction proceeding that relies on a static application of the prejudice standard ceases to be an opportunity

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[1] *Annual Report of the Illinois Courts - Statistical Summary 2015*,available at http://www.illinoiscourts.gov/SupremeCourt/AnnualReport/2015/2015_Statistical_Summary.pdf.

for redress from constitutional violations. Requiring a claim of innocence or allegation of a plausible defense in order to prove prejudice further exacerbates the futility of the process for some. Mr. Brown's constitutional rights should not become the collateral damage of an overburdened criminal justice system that depends on the finality of guilty pleas. This Court should reverse the decisions of the lower courts and remand this case to a third-stage evidentiary hearing.

According to Mr. Brown's post-conviction petition and affidavit, which must be taken as true, Attorney William Laws told him that, if convicted of home invasion with a firearm, he would be required to serve 85 percent of any sentence imposed. Laws repeatedly assured Brown that he would be required to serve less time if he pled guilty to the charge of armed habitual criminal. Under that charge, Laws said, Brown would have to serve just 50 percent of any sentence imposed. On the understanding that good-conduct credit made him eligible for parole after nine years, Brown accepted an 18-year sentence and agreed to plead guilty to the charge of armed habitual criminal. (C. 171) The prosecution dismissed the charge of home invasion with a firearm. (C. 101)

At Mr. Brown's plea hearing on May 6, 2013, the judge, prosecution and Laws made no mention of good-conduct credit. (V.8, R. 2-8) The only information in the record that references good-conduct credit is the preprinted judgment form signed by Judge Thomas Difanis. The second paragraph of the form stated, "The Defendant is entitled to 'Good Time' credit as follows:" and is followed by three options. An "X" was marked in front of

the option that reads, "None, until proof of participation and completion of substance abuse treatment program. 730 ILCS 5/3-6-3(a)(4.5)." Another "X" was marked next to the option that states, "Other time actually served in custody of 231 days." (C. 102)

When Mr. Brown entered the Department of Corrections, he was informed for the first time that the statute required him to serve 85 percent of his sentence rather than the 50 percent his attorney had advised. Instead of the nine years that Laws said he would have to serve, Brown now faced more than 15 years in prison. (C. 168) He tried to contact Laws via mail and phone, but received no response. (C. 172) On May 22, 2013, Brown filed a *pro se* notice of appeal. (C. 113,175) On the accompanying affidavit, he explained how he had been misled by Laws' incorrect advice. (C. 114, 176). On June 7, Brown filed a *pro se* Motion for Reduction of Sentence, again asserting that he pled guilty based on his attorney's erroneous advice that he would be eligible for parole after serving just nine years of his 18-year sentence. (C. 123-124, 179-180) Judge Difanis denied the motion on June 17, ruling that the Supreme Court Rules did not authorize a motion for reduction of sentence for a fully-negotiated plea. (C. 129) Two months later, on August 16, the Appellate Court dismissed Brown's direct appeal at his request. (C. 147) In his affidavit attached to his amended post-conviction petition, filed June 19, 2014, Brown stated that, had he known the truth about his sentence, he would not have agreed to the terms of the plea bargain. (C. 171) Instead, he would have gone to trial, and would have been acquitted. (C. 172)

The Post-Conviction Hearing Act provides a remedy to a criminal

defendant who can demonstrate a substantial violation of his constitutional rights at the proceedings that resulted in his conviction. 725 ILCS 5/122-1, *et seq*.(2014). There are three stages to the post-conviction process. *People v. Boclair*, 202 Ill.2d 89, 99 (2002). At the first stage, the circuit court decides whether the petition is frivolous or patently without merit. *Boclair*, 202 Ill.2d at 99; 725 ILCS 5/122-2.1(a)(2)(2014). At the second stage, the petitioner has the assistance of counsel. The judge determines whether, when liberally construing the allegations in the petition in light of the trial record, the petitioner made a substantial showing of a constitutional violation. *People v. Hall*, 217 Ill. 2d 324, 334 (2005). At the third stage, an evidentiary hearing is held, and the judge determines whether the petitioner met his burden of establishing a substantial deprivation of his constitutional rights. 725 ILCS 5/122-6 (2011); *People v. Gaultney*, 174 Ill.2d 410, 418 (1996); *People v. Myers*, 386 Ill.App.3d 860, 864 (5th Dist. 2008). Dismissal of a post-conviction petition without an evidentiary hearing is reviewed *de novo*. *Hall*, 217 Ill. 2d at 334. In applying the *de novo* standard, the reviewing court takes as true all well-pleaded facts in the petition and in the supporting affidavits. *People v. Pitsonbarger*, 205 Ill.2d 444, 467 (2002).

A plea agreement is akin to an enforceable contract. *People v. Donelson*, 2013 IL 113603 ¶ 18. When seeking relief from a guilty plea, two potential separate constitutional challenges are available: 1) that the plea was made involuntarily and without knowledge of the consequences; and 2) that the defendant did not receive the benefit of the bargain. *People v. Whitfield,* 217 Ill.2d 177, 183-84 (2005). Principles of due process apply to

both challenges. *Whitfield*, 217 Ill.2d at 185. The two aspects of a plea will be interconnected in certain instances. 217 Ill.2d at 186. Mr. Brown's case is an example of such an instance.

In *Whitfield,* the benefit of the bargain claim was premised on the due process denied as a result of the court's failure to admonish the defendant regarding mandatory supervision following imprisonment. 217 Ill.2d at 186. By adding the MSR term without admonishment, the State breached its plea agreement. 217 Ill.2d at 186. Whitfield argued he was prejudiced because he received a more onerous sentence than the one he agreed to. 217 Ill.2d at 186. This Court agreed that the defendant's guilty plea was induced by the promise of a specific sentence, which he did not receive. 217 Ill.2d at 201-02. Therefore, the defendant established the violation of his constitutional rights to due process and fundamental fairness. 217 Ill.2d at 202.

Currently, a trial judge is not required to admonish a defendant about available good-conduct credit when accepting a guilty plea. S.Ct.R. 402, 605(b). Although it was not the court which denied Brown the benefit of his bargain, the principles from *Whitfield* still apply. Brown's constitutional rights to due process were violated because of the deprivation of another fundamental constitutional right: his right to effective assistance of counsel.

When a defendant pleads guilty, several federal constitutional rights are waived including the right against self-incrimination, the right to a trial by jury, and the right to confront one's accusers. *Boykin v. Alabama*, 395 U.S. 238, 243 (1969). A defendant's Sixth Amendment right to effective assistance of counsel, however, is not among the rights waived during guilty plea

proceedings. *People v. Hughes*, 2012 IL 112817 ¶ 44 (A defendant has a right to effective assistance of counsel at all criminal proceedings including the plea bargaining process). Ineffective assistance of counsel claims are evaluated under the familiar framework set forth more than 20 years ago in *Strickland v. Washington,* 466 U.S. 668 (1984). The *Strickland* Court established the two-pronged test for ineffective assistance of counsel claims: 1) whether counsel's performance fell below an objective standard of reasonableness, and, 2) whether the defendant was prejudiced by counsel's substandard performance. 466 U.S. at 691, 694. On the second prong, "The defendant must show there was a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 466 U.S. at 634.

A year later, in *Hill v. Lockhart,* 474 U.S. 52 (1985), the Court applied the *Strickland* test for ineffective assistance of counsel to the plea bargaining process. The first prong of the test remained the same. *Hill,* 474 U.S. at 58. The second prong was refined to focus on how counsel's ineffective performance impacted the outcome of the plea process. 474 U.S. at 59. "In other words, in order to satisfy the 'prejudice' requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and insisted on going to trial." 474 U.S. at 59. The prejudice prong focuses on whether counsel's deficient performance rendered the result of the proceeding fundamentally unfair. *Lockhart v. Fretwell*, 506 U.S. 364, 372 (1993).

A. The first prong: objectively unreasonable performance of counsel

The first prong of the *Strickland-Hill* test is readily apparent in Mr. Brown's case. Even a glance at the Illinois sentencing statute regarding good-conduct credit would have revealed to his attorney that a conviction for armed habitual criminal requires a defendant to serve at least 85 percent of his sentence. 730 ILCS 5/3-6-3(a)(2)(ii)(2013); *See generally Padilla v. Kentucky,* 559 U.S. 356, 368-69 (2010)(Stating that simply reading the text of the statute would have revealed the correct deportation consequences of pleading guilty). That legislation was enacted in 2005. Public Act 94-0398. By the time Laws counseled Brown, the unambiguous statute had been in place for eight years. It is reasonable to expect that a criminal defense attorney would be familiar with the statute, or at least diligent enough to review it when the amount of good-conduct credit eligibility was a client's priority, as it was for Brown.

Multiple cases have held that the affirmative misrepresentation of parole eligibility during the plea process constitutes ineffective assistance, rendering a guilty plea unknowing and involuntary. The 1978 Third District case of *People v. Owsley*, 66 Ill.App.3d 234 (3d Dist. 1978), is factually similar to Mr. Brown's case, and is instructive. Owsley's trial attorney misrepresented the minimum time she would have to serve before becoming eligible for parole, weekend furloughs, and work release. 66 Ill.App.3d at 236. Owsley's post-conviction affidavit stated that she was aware of the inaccuracy of her attorney's advice, but was told by her attorney that there would be no advantage to bringing the matter to the attention of the trial court. 66

Ill.App.3d at 236. At the second-stage of post-conviction proceedings, the trial judge granted the State's motion to dismiss the petition. 66 Ill.App.3d at 236. The Appellate Court reversed. 66 Ill.App.3d at 239. It found that, since the misrepresentations and "alleged exercise of influence over the defendant" occurred outside the trial court and off the record, an evidentiary hearing was needed to determine whether Owsley had been misled into pleading guilty. 66 Ill.App.3d at 238. "Certainly a defendant ought not to be misled, in any way, into entering a plea of guilty. It is extremely important to a defendant to know when he or she is eligible for parole or other 'freedom-related' benefits before that defendant can decide whether to plead guilty."66 Ill.App.3d at 237.

As in *Owsley*, Mr. Laws provided Brown with incorrect information regarding parole eligibility, but Brown was not aware it was erroneous at the time. Brown's post-conviction affidavit also stated that his attorney urged him not to rock the boat, so to speak, regarding the agreement. "Don't play with these people," Laws told Brown. (C. 171) Like the petitioner in *Owsley*, Brown should have been provided the opportunity to present evidence at a third-stage hearing.

In *People v. Correa*, this Court cited *Owsley* with approval. It found that the post-conviction petitioner received "erroneous and misleading advice" about the deportation consequences of a guilty plea. *People v. Correa*, 108 Ill.2d 541, 553 (1985). That error rendered the defendant's plea involuntary, as it was not made intelligently or knowingly. *Correa*, 108 Ill.2d at 553.

In *People v. Huante*, this Court addressed the different issue of whether an attorney's *omission* of advice about deportation consequences constituted ineffective assistance and rendered a guilty plea invalid. *People v. Huante*, 143 Ill.2d 61, 68 (1991). Its holding was contrary to *Correa.* The *Huante* court determined that deportation was a collateral consequence and, thus, the defendant being informed thereof was not a "prerequisite to entry of a knowing and voluntary plea of guilty." *Huante*, 143 Ill.2d at 71. Huante's post-conviction petition had not demonstrated that his attorney's performance caused him to plead guilty unknowingly or involuntarily. 143 Ill.2d at 73-74. It also failed to show that Huante would have insisted on going to trial if he had known about the collateral consequences of pleading guilty. 143 Ill.2d at 73-74.

The 2013 United States Supreme Court case *Chaidez v. United States* implicitly abrogated *Huante. Chaidez v. United States*, 133 S. Ct. 1103, 1109, n. 8 (2013). *Chaidez* primarily addresses whether *Padilla v. Kentucky* is retroactive. *Chaidez*, 133 S.Ct. at 1107. In doing so, it added to the body of law regarding an attorney's responsibilities in advising a client about the collateral consequences of a guilty plea. 133 S. Ct. 1103.

Determining whether counsel's representation was deficient is a question of reasonableness, invariably connected to the practices and expectations of the legal community. *Hughes,* 2102 IL 112187 at ¶ 54, citing *Padilla,* 559 U.S. 356. The legal community has enumerated the practices and expectations of a lawyer during plea negotiations. Guidelines from both the National Legal Aid and Defender Association and the American Bar

Association establish that counsel is expected to be aware of and inform a defendant of the impact of good-time credit on a sentence. The NLDA guidelines established in 2006 state, "In order to develop an overall negotiation plan, counsel should be fully aware of, and make sure the client is fully aware of . . .the effect of good-time credits on the sentence of the client and the general range of sentences for similar offenses committed by defendants with similar backgrounds." National Legal Aid and Defender Association, *Performance Guidelines for Criminal Defense Representation (2006), Guideline 6.2: The Contents of Negotiation,*http://www.nlada.org/defender-standards/performance-guidelines/black-letter (last visited April 6, 2017). Similarly, the ABA's Standard 4-6.3, Plea Agreements and Other Negotiated Dispositions, states:

> (e) Defense counsel should investigate and be knowledgeable about sentencing procedures, law, and alternatives, collateral consequences and likely outcomes, and the practices of the sentencing judge, and advise the client on these topics before permitting the client to enter a negotiated disposition. Counsel should also consider and explain to the client how specific terms of an agreement are likely to be implemented.

ABA Standards for Criminal Justice Standard 14–3.2(f) (3d ed. 1999), http://www.americanbar.org/groups/criminal_justice/standards/DefenseFunctionFourthEdition.html (last visited April 6, 2017). Those standards are not compulsory, but can serve as "valuable measures of the prevailing professional norms of effective representation." *Padilla*, 559 U.S. at 367.

Here, Mr. Laws misinformed Brown that, with good-conduct credit,

Brown would have to serve only nine years of the 18-year prison sentence proposed under the plea bargain. Statutorily, however, Brown was required to serve over 15 years - more than six additional years he never agreed to. Mr. Laws' erroneous advice regarding good-conduct credit was objectively unreasonable; thus, he rendered ineffective assistance of counsel under the first prong of the *Strickland-Hill* test.

B. The second prong: prejudice incurred due to ineffective assistance

In Illinois, post-conviction petitioners alleging ineffective assistance of guilty plea counsel must go beyond what *Hill v. Lockhart* requires. *See generally* Erin A. Conway, *Ineffective Assistance of Counsel: How Illinois has used the "prejudice" prong of Strickland to lower the floor on performance when defendants plea guilty"* 105 Nw.U.L.Rev. 1707 (2011). The "bare allegation" that but not for counsel's errors the defendant would have insisted on trial is not sufficient to establish prejudice. *People v. Hall,* 217 Ill.2d 324, 335 (2005). An Illinois petitioner must also make a claim of innocence or state a plausible defense that could have been raised at trial. *Hall*, 217 Ill.2d at 335-36. *Hill* requires neither of those elements. Whether a post-conviction petitioner satisfies the second prong of the *Strickland-Hill* test depends on the facts of a particular case. *Hughes*, 2012 IL 112817 at ¶ 65.

On appeal from the dismissal of his post-conviction petition at the second stage, Mr. Brown relied on two Appellate Court cases which considered similar situations. In those cases, the petitioners also pled guilty based on their lawyers' incorrect advice about good-conduct eligibility. In each case, the Court ruled that the post-conviction petitioner was entitled to an evidentiary

hearing because of his attorney's errors.

The case of *People v. Stewart* uncannily mirrors Mr. Brown's case. *People v. Stewart,* 381 Ill.App.3d 200, 203 (4th Dist. 2008). Stewart pled guilty to aggravated discharge of a firearm in exchange for a six-year sentence and dismissal of the charge of reckless discharge of a firearm. *Stewart*, 381 Ill.App.3d at 201. He agreed to plea guilty because his lawyer told him he would be eligible for day-for-day credit and would probably need to serve just half of his sentence. 381 Ill.App.3d at 201-02. His attorney was wrong. Stewart did not discover the error until personnel at the Department of Corrections informed him that, statutorily, he must serve 85 percent of his sentence. 381 Ill.App.3d at 201.

In his post-conviction petition, he alleged ineffective assistance of counsel because his lawyer's erroneous advice induced him to accept the State's offer. In a letter attached to Stewart's petition, his trial attorney stated he was unaware his client would be required to serve 85 percent of his sentence. 381 Ill.App.3d at 201-02. The trial court dismissed the post-conviction petition, finding that Stewart failed to demonstrate a constitutional violation requiring an evidentiary hearing. 381 Ill.App.3d at 202. Stewart appealed, and the Fourth District reversed and remanded the cause. 381 Ill.App.3d at 206. It ruled that his petition had alleged a constitutional violation which warranted an evidentiary hearing under the Act. 381 Ill.App.3d at 203.

Like the post-conviction petitioner in *Stewart*, Mr. Brown pled guilty to one charge in exchange for a prison sentence and the State dismissing the

other charge. Brown also accepted a plea agreement for a specific term based on his lawyer's affirmative misrepresentations that he was eligible for day-for-day credit and would need to serve just half of his sentence. As in *Stewart,* Brown's lawyer told him he would need to serve 50 percent of his sentence. Statutorily, he was required to serve 85 percent of the time. 730 ILCS 5/3-6-3(a)(2)(ii). Brown also discovered his lawyer's mistake only upon entering the DOC. (C. 171) Stewart learned his minimum sentence was about five years. Brown faced a minimum prison term of 15 years.

In 2015, the Fifth District reached the same conclusion as the *Stewart* Court: the petition should advance to the third stage of the post-conviction process. *People v. Kitchell,* 2015 IL App (5th) 120548. Defense counsel told Kitchell that he would be eligible for good-conduct credit if he participated in various rehabilitation, educational and vocational classes while serving his sentence. ¶ 3. Kitchell participated in those classes, but did not receive the credit because he was ineligible under the pertinent statute. ¶ 3.

Kitchell filed a *pro se* petition for relief from the judgment, and the circuit court subsequently appointed an attorney to represent him. The *pro se* petition was withdrawn, and a post-conviction petition was filed instead, alleging that trial counsel provided ineffective assistance when he incorrectly informed Kitchell regarding good-conduct credit and that inaccurate advice made his plea involuntary. ¶ 4. Kitchell's affidavit, attached to his petition, stated he would not have entered into the plea agreement if his trial counsel had not erroneously informed him about good-conduct credit. ¶ 4. The court granted the State's motion to dismiss the petition. ¶ 4.

The issue on appeal was whether the court erred in granting the motion to dismiss where Kitchell alleged ineffective assistance of counsel based on incorrect advice regarding sentencing credit. ¶ 6. Citing *Strickland v. Washington*, the Appellate Court held that a challenge to a guilty plea based on allegations of ineffective assistance is subject to a two-pronged test. ¶ 8. The *Kitchell* Court also referred to the ruling in *People v. Clark*, 2011 IL App (3d) 100188, where the issue regarded an "unequivocally false misrepresentation, not mere passive conduct, sufficient to warrant a finding of ineffective assistance of counsel should the petitioner be able to prove his allegations." ¶ 12.

The Fifth District noted that Kitchell's affidavit specifically stated he would not have pled guilty but for the erroneous advice of trial counsel regarding good-conduct credit. Citing *People v. Stewart*, the Court held that because Kitchell's counsel gave him incorrect advice, and he relied on that advice, his contention was sufficient to entitle him to an evidentiary hearing. ¶ 13, quoting *Stewart,* 381 Ill.App. at 200, 206.

In Mr. Brown's case, the Fourth District Court agreed that, under *Stewart* and *Kitchell,* Brown had shown a substantial violation of a constitutional right and could have advanced to the third stage of proceedings. *People v. Brown*, 2016 IL App (4th) 140760 ¶ 11. Nevertheless, the Court denied Brown relief, relying instead upon this Court's 2003 ruling in *People v. Rissley*. *Brown*, 2016 IL App (4th) 140760 at ¶ 11. In his post-conviction petition, Rissley alleged ineffective assistance resulting from his attorney's failure to advise that he could have waived a jury trial and requested a bench

trial. *People v. Rissley*, 206 Ill.2d 403, 428 (2003). This Court ruled that Rissley failed to show prejudice. *Rissley*, 206 Ill.2d at 460. Without a claim of innocence or allegation of a plausible defense, his assertion that he would have gone to trial but not for the erroneous advice of his lawyer amounted to a "self-serving" and "bare allegation" insufficient to demonstrate prejudice. 206 Ill.2d at 459-60.

In deciding *Brown,* the Appellate Court said Brown failed to claim innocence or state a plausible defense. *People v. Brown*, 2016 Ill App (4th) 140760 ¶ 25. Brown only made a bare allegation, which was insufficient to establish prejudice under *Rissley*. The Fourth District erred in relying on *Rissley*. The cases are fundamentally incongruent. Most significantly, Rissley received an evidentiary hearing on his post-conviction petition. 206 Ill.2d at 408-09. Additionally, Rissley did not enter into a fully negotiated guilty plea. 206 Ill.2d at 428. He pled guilty based on incorrect advice regarding trial strategy, not sentencing. 206 Ill.2d at 459. Rissley confessed and made extensive statements to police. 206 Ill.2d at 422. He pled guilty without negotiation. 206 Ill.2d at 429. A sentencing hearing was conducted where at least 11 witnesses testified in aggravation and three testified in mitigation. 206 Ill.2d at 429-434. These differences illustrate why *Rissley* is inapplicable to Brown and other cases wherein defendants agreed to plea guilty based on the affirmative misrepresentations by their attorneys regarding sentencing ramifications.

Under the circumstances of Mr. Brown's case, strict reliance on *Rissley* and the prejudice standard it sets out reduces the "fundamental fairness" of

the process that the *Strickland* standards were designed to protect:

> Most important, in adjudicating a claim of actual ineffectiveness of counsel, a court should keep in mind that the principles we have stated do not establish mechanical rules. Although those principles should guide the process of decision, the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. In every case the court should be concerned with whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results. *Strickland,* 466 U.S. at 670.

Mr. Law's incorrect advice to Brown poisoned the reliability of the adversarial process in this case. They were the only parties privy to the off-record conversation regarding the amount of good-time credit for which Brown was eligible. The sparse record combined with the confidential and elusive nature of the evidence necessary to support a claim for ineffective assistance of counsel precluded Mr. Brown from advancing to an evidentiary hearing. As one legal observer wrote, showing ineffective assistance of guilty plea counsel is a difficult burden "even when counsel cooperates, and an impossible one otherwise." Joel Mallord, *Putting Plea Bargaining on the Record*, 162 U.Pa.L.Rev. 683, 693 (February 2014).

In 1970, this Court recognized the problem posed by requiring post-conviction petitioners to show prejudice due to ineffective assistance of guilty plea counsel. In the case of *People v. Williams*, 47 Ill.2d 1, 4 (1970), the only affidavit that the petitioner could have provided, other than his own, was that of his attorney who allegedly made misrepresentations to him. "The difficulty or impossibility of obtaining such an affidavit is self-apparent." *Williams,* 47

Ill.2d at 4. This Court went on to state that a dispute could not be resolved without an "evidentiary inquiry into the truth or falsity of petitioner's factual allegations." 47 Ill.2d at 4.

Multiple cases since *Williams* have reiterated the need for an evidentiary hearing where post-conviction allegations of ineffective assistance of guilty plea counsel are based on information outside the record. In *People v. Munday*, the Second District held, "Where a claim of a substantial constitutional denial is based on assertions beyond the record it is contemplated that evidence should be taken." *People v. Munday,* 153 Ill.App.3d 910, 915 (2d Dist. 1987). The case of *People v. Coleman* clarified that when post-conviction claims are based on matters outside the record, it is not the intent of the act to adjudicate those claims on the pleadings. *People v. Coleman,* 183 Ill.2d 366,382 (1998). "Rather, the function of the pleadings in a proceeding under the Act 'is to determine whether the petitioner is entitled to a hearing.'" *Coleman*, 183 Ill.2d at 382.

As interpreted by the Fourth District in Mr. Brown's case, the second-stage of a post-conviction proceeding requires nearly the same showing of prejudice as does the third stage. The very nature of the constitutional violation alleged precluded him from making an adequate demonstration of prejudice at the second stage. The record was sparse. The only information known about the offense was limited to the indictment and what the prosecution chose to include during its presentation of the factual basis of the plea.

The court failed to liberally construe Mr. Brown's allegations. His

affidavit referenced specific conversations with Mr. Laws and when they occurred. (C. 171) Nothing in the record rebuts any of Brown's assertions. In fact, his statements are supported. To reassure Brown that he would be eligible for day-for-day good conduct credit, Laws showed him the paperwork for the plea, which made no mention of having to serve 85 percent of his sentence. (C. 171) As Brown said in his affidavit, the paperwork does not state the amount of good-conduct credit for which he was eligible. (C. 101-102) Only at an evidentiary hearing could the court weigh the credibility of the witnesses and determine whether ineffective assistance rendered Brown's plea unknowing and involuntary.

At the third stage of a post-conviction proceeding, the prejudice threshold remains an almost insurmountable barrier for certain petitioners, such as Mr. Brown. The prejudice requirements promulgated under the *Strickland-Hill* standards condition relief on the possibility of success at trial. *People v. Hall*, 217 Ill.2d 324, 336 (2005). "Under Hill, the question of whether counsel's deficient representation caused the defendant to plead guilty depends in large part on predicting whether the defendant likely would have been successful at trial." *Hall*, 217 Ill.2d at 336. Determining the existence of prejudice based on the likelihood of a different outcome at trial ignores the fact that the incorrect advice denied Mr. Brown his basic constitutional right to due process. He gave up his right to go to trial because his attorney assured him he would have to serve just 50 percent of an 18-year sentence. The trial court and the prosecution said nothing to counter that understanding. Brown was blind-sided when he learned he had to serve an additional six years

longer than what his attorney told him.

Even if chances of acquittal were "slim to none," as described by Judge Difanis in his order dismissing the post-conviction petition, Mr. Brown still maintained the right to go to trial. (C. 202) "The constitutional rights of criminal defendants are granted to the innocent and guilty alike." *Lafler v. Cooper*, 566 U.S. 156, 169 (2012), citing *Kimmelman v. Morrison*, 477 U.S. 365, 379 (1986). Effective assistance of counsel is not predicated on the strength of a defendants's case. "The fact that respondent is guilty does not mean he was not entitled to by the Sixth Amendment to effective assistance or that he suffered no prejudice from his attorney's deficient performance during plea bargaining." *Lafler*, 566 U.S. at 169.

The evolution of the prejudice standard since *Hill v. Lockhart* shows an ever-increasing burden on the petitioner to the point where, now, obvious constitutional violations have become excusable. Claiming innocence or a plausible defense are not conditions precedent to show prejudice under *Hill.* In fact, no United States Supreme Court decisions mandate such claims. The requirements seem to have originated from a series of federal district court opinions. 105 Nw.U.L.Rev at 1721-24.

In 1986, the Ninth Circuit found that a defendant, who pled guilty, failed to show prejudice resulting from his attorney's concurrent representation of a co-defendant. *United States v. Sutton*,794 F.2d 1415 (9th Cir. 1986). The court ruled that counsel acted reasonably and had not rendered ineffective assistance by advising the defendant to plead guilty. "Moreover, Sutton does not maintain on appeal that he is innocent of the

charges in the indictment or that a plausible defense to those charges exist." 794 F.2d at 1422. The statement is not attributed to any source. A year later, in *Czere v. Butler*, 833 F.2d 59 (5th Cir. 1987), the Fifth Circuit held that inadequate evidence existed to show a defendant suffered prejudice due to his attorney's inaccurate advice about parole eligibility. Citing *Sutton*, the *Czere* Court found that parole had not been a major concern of the defendant and he did not maintain his innocence or provide a plausible defense to the charges. *Czere*, 833 F.2d at 64.

The innocence or plausible defense requirements were addressed again in *United States v. Horne*, 987 F.2d 833 (D.C.Cir. 1993). The court held that a defendant must show more than a "bare allegation" that he would have pleaded differently and insisted on going to trial had his guilty plea counsel not rendered ineffective assistance. Although the *Horne* court specifically declined to establish what "more" consisted of, it noted disapprovingly that Horne had not alleged innocence or a plausible defense. 987 F.2d at 836. Moreover, it found, nothing suggested Horne would have succeeded at trial, and the evidence indicated the guilty plea was the rational decision. 987 F.2d at 836.

By 1995, claiming innocence or a plausible defense appears to have become the standard prerequisite to showing prejudice resulting from ineffective assistance of guilty plea counsel. *United States v. LaBonte,* 70F.3d 1396, 1413 (1st Cir. 1995) *rev'd on other grounds* 520 U.S. 751 (1997). Citing *Horne*, the *LaBonte* Court ruled that, without a claim of innocence or articulation of a plausible defense, a defendant's self-serving statement that,

but for his counsel's inadequate advice he would have pleaded not guilty, failed to demonstrate prejudice. *LaBonte*, 70 F.3d at 1413, citing *United States v. Horne*, 987 F.2d at 835.

Twenty years later, as Mr. Brown's case illustrates, it is evident that justice is not always served when all defendants alleging ineffective assistance of guilty plea counsel must show prejudice by asserting a claim innocence or a plausible defense. The 2015 Third District case, *People v. Deltoro,* discussed the challenges of being required to demonstrate prejudice where no actual demonstrable prejudice is clear. *Deltoro* involved a first-stage post-conviction petitioner who alleged ineffective assistance because his attorney failed to advise him of deportation consequences. *People v. Deltoro*, 2015 IL App (3d) 130381.

Although not precisely on point, the decision highlights how current requirements for showing prejudice in cases alleging ineffective assistance of guilty plea counsel – claiming innocence or asserting a plausible defense – are untenable in certain cases. Where deportation could be a consequence of pleading guilty, a defendant may suffer prejudice regardless of the strength of his case. *Deltoro*, 2015 IL App (3d) 130381 ¶ 24. For example, it may be rational for such a defendant to risk a lengthy prison sentence at trial in exchange for the slight possibility of avoiding deportation. 2015 IL App (3d) 130381 ¶ 24. *Deltoro* explicitly stated that a plausible defense, while helpful, is not required to show prejudice in cases where counsel failed to advise the client of the immigration consequences of a guilty plea. 2015 IL App (3d) 130381 ¶ 24."Counsel's failure to advise his client of the risk of deportation

prejudices the defendant by depriving him of that chance. Under such circumstances, it would be inappropriate and overly burdensome to require the defendant to show that he would have succeeded at trial in order to establish prejudice." ¶ 24.

Mr. Brown's case presents a similar situation. It is unduly burdensome to expect him to show prejudice as it is now defined. His attorney's failure to correctly advise him of freedom-related sentencing consequences deprived Brown of his right to go to trial, a right he possesses regardless of his likelihood for success. A 2011 Northwestern University Law Review article, which characterized as unconstitutional the "innocence or plausible defense" elements, provides a poignant summary of the problem Mr. Brown faced. The author wrote:

> Not only does this standard do a disservice to defendants by tipping the scale too far in favor of reversal proofing guilty pleas, but it also fails to reflect the realities of what a judge is able to determine from a scant plea-proceeding record. Further, and most importantly, this standard shifts the court's focus from the fundamental fairness of the proceedings to ancillary issues of innocence that neither the *Strickland-Hill* standard nor the constitution require. 105 Nw.U.L.Rev at 1731.

Certain cases naturally lend themselves to evaluation using the innocence or plausible defense rubric. For example, in *Rissley*, after an exhaustive sentencing hearing and subsequent post-conviction evidentiary hearing, the court had ample information to determine that Rissley had not been prejudiced by his attorney's failure to correctly advise him regarding trial strategy. *Rissley*, 206 Ill.2d 403. In *Hall*, the court again considered the voluntariness of a guilty plea as it related to counsel's incorrect advice about

trial strategy. This Court found prejudice where the defendant pled guilty because his attorney failed to inform him of a plausible defense to aggravated kidnapping. *Hall*, 217 Ill.2d at 336. Other situations, however, do not fit so neatly into that framework, as is evidenced by Mr. Brown's case.

Courts have started to recognize the various situations in which a defendant's sixth amendment rights can be violated as a result of counsel's incorrect advice about the sentencing consequences of a guilty plea. The 2010 United States Supreme Court case, *Padilla v. Kentucky,* significantly altered the landscape of plea bargaining proceedings. *Padilla* held that counsel must advise clients about the potential deportation consequences of pleading guilty. *Padilla*, 559 U.S. 356, 373. Although not technically a "direct consequence" of a guilty plea, deportation is sufficiently enmeshed with criminal proceedings to require counsel to advise clients about the consequences during a guilty plea. 559 U.S. at 365-66.

In 2012, Illinois adapted the *Padilla* rationale to another situation that involved a sentencing issue not traditionally categorized as a "direct consequence" of a guilty plea. In *People v. Hughes*, this Court recognized that defense counsel has a duty to inform a defendant who pleads guilty to a sexually violent offense that he will be considered for involuntary commitment at the completion of his prison term. *People v. Hughes*, 2012 IL 112817, ¶ 71. The Court stated, "where a serious liberty interest is potentially at stake," such as deportation or commitment of sexually violent offenders, the consequence should not be categorically excluded from "a cognizable claim of ineffective assistance of counsel" and a defendant's rights under the sixth

amendment. *Hughes*, 2012 IL 112817 at ¶ 53.

In another example, also from 2012, the Kentucky Supreme Court applied *Padilla* to a case similar to Mr. Brown's. In *Commonwealth. v. Pridham*,394 S.W.3d 867 (Ky. 2012), the defendant filed a motion for relief after being sentenced to 30 years in prison for drug convictions. *Pridham*,394 S.W.3d at 871. He alleged his attorney rendered ineffective assistance because he incorrectly told Pridham he would be eligible for parole after serving 20 percent, about six years, of his sentence. 394 S.W.3d at 871-72. However, the violent offender statute under which Pridham was convicted, required him to serve 20 years before becoming eligible for parole. 394 S.W.3d at 871, 878. Pridham claimed he would not have pled guilty and would have gone to trial had he been correctly advised. 394 S.W.3d at 871.

The Kentucky Supreme Court found the incorrect advice provided in *Pridham* analogous to that provided in *Padilla. Pridham,* 394 S.W.3d at 878. The defendant in *Pridham* was granted an evidentiary hearing. At that time he would have a chance to prove that counsel misadvised him and, had it not been for that incorrect advice, there was a reasonable probability he would have insisted on trial. 394 S.W.3d at 879. In adapting the *Padilla* rationale, the *Pridham* court acknowledged that, while not as severe as deportation, a sharply extended period of parole ineligibility was serious enough that a person pleading guilty should know about it. 394 S.W.3d at 878. Parole is not technically within the sentencing court's authority, but it is "legally inseparable from the conviction and sentence over which the trial court does preside." 394 S.W.3d at 878.

The Missouri Supreme Court in 2011 held that a post-conviction petitioner was entitled to an evidentiary hearing where, similar to Mr. Brown's case, his attorney misinformed him about the percentage of his sentence he must serve before becoming eligible for parole. *Webb v. State*, 334 S.W.3d 126, 128 (Mo. 2011). The petitioner, Webb, believed his minimum prison term was 4.8 years. *Webb*, 334 S.W.3d at 129. He was actually required to serve at least 10.2 years before becoming eligible for parole. 334 S.W.3d at 129.

The lower court denied Webb an evidentiary hearing based on the fact he told the sentencing court that, other than the plea itself, no one had promised him anything in exchange for pleading guilty. 334 S.W.3d at 130. Therefore, according to the lower court, Webb's post-conviction claim was refuted by the record. 334 S.W.3d at 130. The Missouri Supreme Court ruled, "a negative response to a routine inquiry has not been considered sufficient to refute the record." 334 S.W.3d at 130. It differentiated incorrect advice from the failure to give any advice as to the effects of a plea. 334 S.W.3d at 127. It found that an attorney renders ineffective assistance where he misinforms his client about the effects of pleading guilty. Webb was entitled to an evidentiary hearing. 334 S.W.3d at 127. In reaching that conclusion, the *Webb* court cited with approval a lower Missouri court case that ruled an evidentiary hearing was required to determine whether counsel's incorrect advice counsel regarding parole eligibility had a prejudicial effect on the voluntariness of the plea. *Webb*, 334 S.W.3d at 127, citing *Patterson v. State*, 92 S.W.3d 212, 216 (Mo.App. 2002). Neither the *Pridham* court nor the *Webb* court required the

defendant to also claim innocence or a plausible defense in order to proceed to a hearing.

Like in *Prindham* and *Webb*, and as in the analogous Illinois Appellate Court cases, *People v. Stewart* and *People v. Kitchell*, this Court should grant Mr. Brown an evidentiary hearing to demonstrate the prejudice he suffered as a result of his attorney's ineffective assistance. Brown unknowingly and involuntarily entered into a guilty plea that required him to serve more than15-years in prison. He was grossly misled by his attorney, who assured Brown he would be eligible for parole after serving nine years. Being incarcerated for more than an additional six years is not inconsequential and should not be brushed off as a mere collateral consequence. His attorney's misrepresentations deprived him of his right to a trial, to confront witnesses and to be judged by a jury of his peers. Mr. Brown respectfully requests that this Court reverse the decisions of the lower courts and remand the case for a third-stage evidentiary hearing.

CONCLUSION

For the foregoing reasons, Anthony S. Brown, petitioner-appellant, respectfully requests that this Court reverse the judgments of the lower courts and remand the case for a third-stage evidentiary hearing.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I, Ann Fick, 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 33 pages.

/s/Ann Fick
ANN FICK
Assistant Appellate Defender

No. 121681

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Appellate Court of Illinois, No. 4-14-0760.
Respondent-Appellee,	)	There on appeal from the Circuit Court of the Sixth Judicial Circuit,
-vs-	)	Champaign County, Illinois, No. 12-CF1460.
ANTHONY S. BROWN	)	Honorable Thomas J. Difanis,
Petitioner-Appellant	)	Judge Presiding.

NOTICE AND PROOF OF SERVICE

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

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Julia R. Rietz, Champaign County State's Attorney, 101 E. Main St., 2nd Floor, Urbana, IL 61801-2731;

Mr. Anthony S. Brown, Register No. R57521, Shawnee Correctional Center, 6665 State Route 146 East, Vienna, IL 62995

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. An electronic copy of the Brief and Argument in the above-entitled cause was submitted to the Clerk of the above Court for filing on May 3, 2017. On that same date, we electronically served the Attorney General of Illinois, and mailed three copies to opposing counsel, one copy to Champaign County State's Attorney Office, and one copy to the petitioner-appellant in envelopes deposited in a U.S. mail box in Elgin, Illinois, with proper postage prepaid. The original and twelve copies of the Brief and Argument will be sent to the Clerk of the above Court upon receipt of the electronically submitted filed stamped motion.

/s/Kimberly Maloney
LEGAL SECRETARY
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APPENDIX TO THE BRIEF

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People v. Anthony S. Brown,
Champaign County Case No.: 12-CF1460
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October 15, 2012				
October 23, 2012				
December 18, 2012				
January 22, 2013				
March 19, 2013				
April 29, 2013				
Guilty Plea				
May 6, 2013				

Champaign 406S

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

THE PEOPLE OF THE STATE OF ILLINOIS,)
Plaintiffs,)
-vs-) No. 12-CF-1460
)
ANTHONY S. BROWN,)
Defendant.)

FILED
SIXTH JUDICIAL CIRCUIT
MAY 06 2013
CLERK OF THE CIRCUIT COURT
CHAMPAIGN COUNTY, ILLINOIS

SENTENCING ORDER

The People appear by Assistant State's Attorney, Stephanie Weber.
The Defendant appears personally and by counsel, William Laws.

The Court, by addressing the Defendant personally in open court pursuant to the provisions of the Supreme Court Rule 402, has informed the Defendant of the nature of the charge, of the possible consequences of the Court's accepting the Defendant's offer to plead guilty, and of the rights which the Defendant has and is waiving by the Defendant's offer to plead guilty. The Court finds that the Defendant understands all of the foregoing, that the Defendant understandingly, knowingly, and voluntarily waives those rights and persists in the offer to plead guilty, that there is a factual basis for the guilty plea, that the guilty plea is being made pursuant to an agreement between counsel as stated in open court, and that no force or threats have been used on the Defendant to coerce the Defendant to plead guilty. Accordingly, the Defendant's offer to plead guilty is accepted by the Court.

THE COURT FURTHER FINDS that the Defendant committed the offense of ARMED HABITUAL CRIMINAL, a class X felony, (Mandatory Supervised Release minimum 3 years) in the manner and form set forth in Count 1 of the information filed on September 13, 2012.

JUDGMENT

Judgment is entered in favor of the People and against the Defendant on the finding of guilt and for costs. The Defendant is hereby ordered to:

INCARCERATION

201	Serve a period of incarceration of 18 years in the Illinois Department of Corrections and a minimum term of Mandatory Supervised Release of 3 years.
	The Defendant is entitled to credit for 231 days previously served in the Champaign County Correctional Center.

FINANCIAL OBLIGATIONS

All financial obligations shall be paid in equal monthly installments to the Champaign County Circuit Clerk within 180 days. Any bond posted is to be applied first to any court ordered bond assignment on file and then to all restitution ordered and then to all financial obligations in this case. Any remaining bond shall be discharged to the individual who posted the bond. The Defendant shall pay all fines, fees and costs as authorized by statute.

852	Pay a Violent Crime Victims Assistance Act fee
854	Pay a genetic marker grouping analysis fee of $250.00, in accordance with 730 ILCS 5/5-4-3(j) unless the Defendant has previously done so.
802	Receive a $1,155.00 credit towards all fines for 231 days spent in custody

GENERAL OBLIGATIONS

500	Submit specimens of blood, saliva, or tissue to the Illinois Department of State Police in accordance with 730 ILCS 5/5-4-3 unless the Defendant has previously done so.

STATE AGREEMENTS

835	Count 2 is hereby dismissed.

IT IS SO ORDERED.

804 The Defendant has been advised of the rights of a Defendant under Supreme Court Rule 605 and the court finds that the Defendant understands those rights.

Appointment of Counsel to continue for 30 days for post-judgment matters, excluding post-conviction relief.

5/6/13
Date

Thomas J. Difanis
Entered

C000101

Champaign 4068

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

FILED
SIXTH JUDICIAL CIRCUIT
11 MAY 06 2013
CLERK OF THE CIRCUIT COURT
CHAMPAIGN COUNTY, ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,)
)
Vs.) Case Number: 2012-CF-001460
)
Anthony S. Brown

JUDGMENT – SENTENCE TO ILLINOIS DEPARTMENT OF CORRECTIONS

The Court FINDS THAT:

x 1. The Defendant whose date of birth is July 01, 1987 is adjudged guilty of the offenses set forth below.
___ 2. The Defendant is entitled to "Good Time" credit as follows:
x None, until proof of participation and completion of substance abuse treatment program. 730 ILCS 5/3-6-3(a)(4.5).
___ Time served on periodic imprisonment for _____ days
x Other time actually served in custody of 231 days
___ 3. The Defendant is convicted of a Class _____ offense but sentenced as a Class X offender pursuant to 730 ILCS 5/5-5-3(c)(8).
___ 4. The conduct leading to conviction for the offenses enumerated in Counts XXXX resulted in great bodily harm to the victim. (730 ILCS 5/3-6-3(a)(2)(iii)).
___ 5. The Defendant is convicted of First Degree Murder and no good time credit shall be applied (730 ILCS 5/3-6-3(a)(2)(1) or (2.2).

IT IS THEREFORE ORDERED as follows:

A. That the Defendant be and hereby is sentenced to confinement in the Illinois Department of Corrections for the term of years and months specified for each offense.

COUNT	OFFENSE	OFFENSE DATE	STATUTORY CITATION	CLASS	SENTENCE	MSR
1	Armed Habitual Criminal	September 09, 2012	720 ILCS 5/24-1.7(a)	X	18 years	3 years

B. That the sentence(s) imposed in _____ be consecutive with the sentence imposed in _____.
C. That the Defendant is ordered to pay costs of prosecution herein.
D. That the Clerk of the Court deliver a copy of this order to the Sheriff.
E. That the Sheriff take the Defendant into custody and deliver him to the Department of Corrections which shall confine said Defendant until expiration of his sentence or until he is otherwise released by operation of law.
F. OTHER: _____.

ENTERED: May 06, 2013

Thomas J. Difanis
Sixth Judicial Circuit Judge, Champaign County, Illinois

6/04

C000102

FILED
November 10, 2016
Carla Bender
4th District Appellate
Court, IL

2016 IL App (4th) 140760

NO. 4-14-0760

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Champaign County
ANTHONY S. BROWN,	)	No. 12CF1460
Defendant-Appellant.	)	
	)	Honorable
	)	Thomas J. Difanis,
	)	Judge Presiding.

JUSTICE APPLETON delivered the judgment of the court, with opinion.
Presiding Justice Knecht and Justice Pope concurred in the judgment and opinion.

OPINION

¶ 1 Defendant, Anthony S. Brown, appeals the second-stage dismissal of his amended petition for postconviction relief. We affirm the trial court's judgment because in our *de novo* review, we conclude that defendant has failed to make a substantial showing of a constitutional violation.

¶ 2 I. BACKGROUND

¶ 3 A. The Negotiated Guilty Plea

¶ 4 On May 6, 2013, defendant entered a fully negotiated plea of guilty to the charge of being an armed habitual criminal (720 ILCS 5/24-1.7(a) (West 2012)). In exchange, he received a sentence of 18 years' imprisonment, and the State nol-prossed a charge of home invasion with a firearm (720 ILCS 5/19-6(a)(3) (West 2012)).

¶ 5 B. The Amended Petition for Postconviction Relief

¶ 6 On June 19, 2014, defendant, through his appointed counsel, filed an amended petition for postconviction relief. In the amended petition, he alleged that before he pleaded guilty to being an armed habitual criminal, his trial attorney misinformed him regarding the good-conduct credit he could potentially receive, telling him the minimum time he would have to serve was 50% of his prison sentence rather than 85%. Defendant supported this allegation with his own affidavit, in which he stated as follows. Before entering into the negotiated guilty plea, he confirmed with his trial attorney that he would serve his prison sentence at 50% (meaning that he could receive day-for-day credit for good behavior and thus could be discharged after serving only nine years). He accepted the plea agreement in reliance on that advice. Later, after he was committed to the Department of Corrections (Department), he learned that, in reality, statutory law required him to serve 85% of his prison sentence. See 730 ILCS 5/3-6-3(a)(2)(ii) (West 2012). He would not have entered into the negotiated guilty plea if he had known he was required to serve at least 85% of the proposed 18-year prison sentence instead of 50% as his trial attorney had advised him.

¶ 7 On August 26, 2014, the trial court granted the State's motion for dismissal on the ground that defendant had shown no prejudice from the incorrect legal advice.

¶ 8 This appeal followed.

¶ 9 II. ANALYSIS

¶ 10 In the second stage of a postconviction proceeding, the defendant must make a substantial showing of a constitutional violation. *People v. Pendleton*, 223 Ill. 2d 458, 473

(2006). On appeal from a second-stage dismissal, we decide *de novo* whether the defendant made such a substantial showing, liberally construing the allegations of the petition (*People v. Coleman*, 183 Ill. 2d 366, 388 (1998)) and taking as true all well-pleaded facts that are not positively rebutted by the record (*Pendleton*, 223 Ill. 2d at 473).

¶ 11 If we followed two cases that defendant cites, *People v. Stewart*, 381 Ill. App. 3d 200 (2008), and *People v. Kitchell*, 2015 IL App (5th) 120548, we would find a substantial showing of a constitutional violation. The problem is, those two cases are irreconcilable with *People v. Rissley*, 206 Ill. 2d 403 (2003), binding authority that they do not mention. Given the choice between following *Stewart* and *Kitchell* on the one hand or *Rissley* on the other, we should follow *Rissley*, since it is a decision by the supreme court. See *Agricultural Transportation Ass'n v. Carpentier*, 2 Ill. 2d 19, 27 (1953) ("Where the Supreme Court has declared the law on any point, it alone can overrule and modify its previous opinion, and the lower judicial tribunals are bound by such decision and it is the duty of such lower tribunals to follow such decision in similar cases.").

¶ 12 We decline to follow *Stewart* and *Kitchell* because for purposes of ineffective assistance in the context of guilty pleas, *Rissley* requires a particular showing of prejudice that *Stewart* and *Kitchell* do not seem to require. To explain what we mean, we will take those three cases one at a time.

¶ 13 A. *Stewart*

¶ 14 In *Stewart*, the amended petition for postconviction relief alleged that the trial court had omitted to admonish the defendant, before accepting his guilty plea, that he would have to serve a minimum of 85% of his prison sentence. *Stewart*, 381 Ill. App. 3d at 201. The

State moved to dismiss the amended petition, and it appears that, in the hearing on the State's motion for dismissal, the evidence and the arguments went beyond the scope of the amended petition by addressing a new, unpleaded theory of ineffective assistance of plea counsel. *Id.* at 202. The trial court acknowledged a letter from the defendant's plea counsel advising the defendant, incorrectly, that he could receive day-for-day good-conduct credit. *Id.* It appears, though, that when granting the State's motion for dismissal, the court said nothing about ineffective assistance (perhaps regarding the issue as forfeited (725 ILCS 5/122-3 (West 2006)) but confined itself to the observation that, in a guilty-plea hearing, it was unnecessary to admonish the defendant regarding good-conduct credit. *Id.*

¶ 15 On appeal, the defendant argued that his amended petition should have been "advanced to the third stage to present evidence that he only pleaded guilty because of his attorney's explicit wrong advice and he would not have pleaded guilty had it not been for this bad information." *Id.* at 205. We responded as follows:

> "In this case, [the] defendant's *pro se* petition, the attached letter from guilty-plea counsel, the amended petition, and the arguments during the postconviction proceedings demonstrate that [the] defendant alleges that (1) guilty-plea counsel gave him erroneous advice, (2) based on that erroneous advice he decided to plead guilty, and (3) he would not have pleaded guilty had it not been for the misinformation. [The] [d]efendant's contention that counsel gave him wrong advice and he relied on that advice is sufficient under the [Post-Conviction Hearing] Act [(Act)] to entitle him to an evidentiary hearing—even though the advice involved a collateral consequence of his guilty plea." *Id.* at 206.

¶ 16 B. *Kitchell*

¶ 17 In the subsequent decision of *Kitchell*, the defendant alleged in his postconviction petition that he would not have pleaded guilty but for his attorney's erroneous advice, during the plea negotiations, that he could receive good-conduct credit for participation in various programs within the Department. *Kitchell*, 2015 IL App (5th) 120548, ¶ 4. He alleged he had taken educational and vocational classes while in prison only to find out that, contrary to what his attorney had told him, he actually was ineligible for good-conduct credits for taking such classes. *Id.*

¶ 18 On appeal from the second-stage dismissal of his postconviction petition, the defendant "contend[ed] he would not have entered into his guilty plea if he had not been erroneously informed by plea counsel that he was eligible to receive good-conduct credit." *Id.* ¶ 6. He insisted the erroneous advice amounted to ineffective assistance and that the trial court had erred by granting the State's motion to dismiss his petition. *Id.*

¶ 19 The Fifth District agreed with the defendant (*id.*), relying in part on our decision in *Stewart* (*id.* ¶ 13). The Fifth District said:

> "In the instant case, [the] defendant attached to his petition an affidavit in which he specifically averred that he would not have pleaded guilty but for the erroneous advice of plea counsel that [the] defendant was eligible to receive good-conduct credit for participation in certain Department programs. As our colleagues in the Fourth District stated, '[The] [d]efendant's contention that counsel gave him wrong advice and he relied on that advice is sufficient under the Act to entitle him to an evidentiary hearing ***.' [Citation.] Whether [the]

defendant can prove his contention will be determined at the evidentiary hearing." *Id.* (quoting *Stewart*, 381 Ill. App. 3d at 206).

¶ 20 C. *Rissley*

¶ 21 In *Rissley*, which predates *Stewart* and *Kitchell*, the defendant pleaded guilty to aggravated kidnapping and murder (*Rissley*, 206 Ill. 2d at 408), and his sentence of death ultimately was commuted to natural-life imprisonment without the possibility of parole (*id.* at 409).

¶ 22 He filed a petition for postconviction relief, which later was amended by his appointed postconviction counsel. *Id.* at 408. One of the claims in the amended petition was that plea counsel had rendered ineffective assistance by failing to advise the defendant that "the option existed for a bench trial during the guilt/innocence phase of the proceedings." *Id.* at 457.

¶ 23 The supreme court explained that when challenging a guilty plea on the ground of ineffective assistance, the defendant had to prove both elements of *Strickland v. Washington*, 466 U.S. 668 (1984), namely, deficient performance and resulting prejudice. *Rissley*, 206 Ill. 2d at 457. In the context of a guilty plea, "[c]ounsel's conduct [was] deficient under *Strickland* if the attorney failed to ensure that the defendant entered the plea voluntarily and intelligently." *Id.* To establish the other element of *Strickland*, prejudice, the defendant had to "show that there [was] a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." (Internal quotation marks omitted.) *Id.*

¶ 24 It was the second element, the element of prejudice, that the supreme court found to be unsubstantiated. *Id.* at 460. The defendant had made an adequate showing of the first element. *Id.* at 457. The supreme court was willing to assume that plea counsel had been

"deficient" in failing to "realiz[e] that the option existed for a bench trial during the guilt/innocence phase of the proceedings." *Id.* But when it came to the element of prejudice, all the defendant had presented was his "bare allegation that had counsel not been deficient during plea discussions, defendant would have pleaded differently and gone to trial." (Internal quotation marks omitted.) *Id.* at 458. Such a "subjective" and "self-serving" allegation, standing alone, simply was not good enough. (Internal quotation marks omitted.) *Id.* at 459. The defendant's naked assertion that, but for plea counsel's bad advice, he would not have pleaded guilty—"*unaccompanied by either a claim of innocence or the articulation of any plausible defense that he could have raised had he opted for a trial*"—failed to show prejudice. (Emphasis in original and internal quotation marks omitted.) *Id.* The defendant in *Rissley* never claimed he was innocent of the charges, nor had he identified a plausible defense to the charges; therefore, he had failed to establish prejudice, as required under *Strickland*. *Id.* at 460.

¶ 25 From this explication of *Rissley*, it should be apparent that *Stewart* is mistaken in its evaluation of prejudice, and the same holds true for *Kitchell*, which relied on *Stewart*. *Stewart* held: "[The] [d]efendant's contention that counsel gave him wrong advice and he relied on that advice is sufficient under the Act to entitle him to an evidentiary hearing—even though the advice involved a collateral consequence of his guilty plea." *Stewart*, 381 Ill. App. 3d at 206. *Kitchell* echoed that holding. *Kitchell*, 2015 IL App (5th) 120548, ¶ 13. Those cases assume a defendant can show prejudice simply by asserting that, but for plea counsel's bad advice, he or she would have pleaded differently and would have gone to trial. But *Rissley* is quite clear: a bare allegation to that effect will not establish prejudice. *Rissley*, 206 Ill. 2d at 458. The defendant must additionally claim he or she is innocent of the charges or must identify a

plausible defense to the charges. *Id.* at 459. Defendant in the present case has done neither, and therefore the trial court was correct to grant the State's motion for dismissal.

¶ 26 III. CONCLUSION

¶ 27 For the foregoing reasons, we affirm the trial court's judgment, and we award the State $50 in costs against defendant.

¶ 28 Affirmed.

APPEAL TO THE ILLINOIS FOURTH APPELLATE COURT

FROM THE CIRCUIT COURT OF CHAMPAIGN COUNTY, SIXTH JUDICIAL DISTRICT

PEOPLE OF THE STATE OF ILLINOIS)
)
VS)
)
Anthony S. Brown)
)

Trial Court No. 2012-CF-001460

Trial Judge Thomas J. Difanis

Notice of Appeal

An appeal is taken from the order or judgment described below:

(1) Court to which appeal is taken: Appellate Court of Illinois, Fourth Judicial Circuit

(2) Name of Appellant and address to which notices shall be sent. Use additional sheet of paper if necessary:

Name: Anthony S. Brown R57521

Address: Shawnee CC, 6665 St Rt 146 E, Vienna, IL 62995 Email Address:

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

Name: Karen Munoz

Address: Office of the State Appellate Defender
400 W Monroe St., Suite 303
Springfield, IL 62705-5240 Email Address:

(4) Date of judgment or order: August 26, 2014

(5) Offense of which convicted: Armed Habitual Criminal

(6) Sentence: Cnt I – 18 Years Illinois Department of Corrections

(7) If appeal is not from a criminal conviction, nature of order appealed from: Denial of Petition for Post-Conviction Relief

(8) If appeal is from a judgment of a circuit court holding unconstitutional a statute of the United States or of this state, a copy of the court's findings made in compliance with Rule 18 shall be appended to this Notice of Appeal.

Anthony S. Brown
Defendant-Appellant

Signed: Peter M. Blakeman IV

Clerk of the Circuit Court
Champaign County, Illinois

C0000267