No. 114143

IN THE
SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Respondent, v. JAMES SNOW, Defendant-Petitioner.	)))))))))))	On Petition for Leave to Appeal from the Appellate Court of Illinois, Fourth Judicial District No. 4-11-0415 There on Appeal from the Circuit Court of the 11th Judicial Circuit, McLean County, Illinois No. 99-CF-1016 The Honorable Alesia A. McMillen, Judge Presiding.

ANSWER TO PETITION FOR LEAVE TO APPEAL

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STATEMENT OF FACTS

In 2001, petitioner James Snow was tried for the 1991 murder of a gas station attendant, William Little. *People v. Snow*, 2012 IL App (4th) 110415, ¶ 3 (Pet. App. A1). Petitioner was represented at his nine-day trial by attorneys Frank Picl and G. Patrick Riley. (*Id.* at A1-A2). Fifty-six witnesses testified at trial, including two eyewitnesses who placed petitioner at the scene of the crime. (*Id.* at A1).

One of the eyewitnesses — Danny Martinez — testified that, while he was inflating his tires at the gas station, he heard "two bangs" and then met petitioner face-to-face. (R. Vol. XXII, 158-59, 177-78). Martinez lost sight of petitioner when petitioner walked around the southeast corner of the station. (*Id.* at 162-63). Martinez then walked toward the station door until he heard a police officer — Officer Jeff Pelo — order him to stop. (*Id.* at 161, 163). Pelo asked if he had seen anything, and Martinez told him that he had seen a man "go around the corner." (*Id.* at 163). Martinez later provided a description of petitioner that police used to prepare a composite drawing. (Pet. 5).

Officer Pelo testified that he took up to three minutes to reach the scene and that he parked his car in a concealed location across the street and approached the station on foot. (*Id.* at 99-100). Pelo saw Martinez standing near the air pump and walking toward the station, but that he did not see anyone else on the lot and did not see anyone exit the station. (*Id.* at 103, 118-19). Pelo checked the station itself but found only Little's body. (*Id.* at 104). Pelo confirmed that Martinez then told him about the man he had seen leaving the station. (*Id.* at 133).

In addition to the eyewitness testimony, numerous witnesses testified to petitioner's statements and conduct tending to inculpate him in Little's murder:

- Bill Gaddis testified that he visited an apartment occupied by petitioner and several other people the day after the murder and that everyone seemed "down." (R. Vol. XXIV, 17-20). When Gaddis asked, "Who died?" someone answered, "Frankie said [petitioner] shot a boy at a gas station." (*Id.* at 20). Petitioner hung his head and did not respond. (*Id.* at 21).

- Randall Howard, petitioner's best friend, testified that he saw petitioner within two days of Little's murder and that petitioner told him, "I f***ed up. I shot this kid." (*Id.* at 49-50). Petitioner also remarked to Howard that the composite drawing of the murderer looked "just like" him. (*Id.* at 56).

- Ed Palumbo testified that, when he saw petitioner several days after the murder, petitioner asked whether Palumbo had read about petitioner in the paper and said, "Boom boom. Gun goes off. Kid dies." (R. Vol. XXIII, 121-23). Several weeks later, petitioner told Palumbo that he "took care of" the gun he had used in Little's murder. (*Id.* at 126).

- Ed Hammond and Kevin Schaal testified that petitioner confessed to Little's murder. (R. Vol. XXIV, 136; R. Vol. XXVI, 50). Schaal acknowledged that he provided information about petitioner because he was awaiting sentencing on a federal charge and his attorney told him that it would serve him to cooperate. (R. Vol. XXVI, 55-56).

- Steven Scheel testified that petitioner confessed to Little's murder. (R. Vol. XXV, 139).

- Dawn Roberts testified that petitioner once poured out beer in a toast to people who suffered, saying, "This is to Billy Little," and that petitioner asked Roberts to remove posted sketches of the murder suspect because the sketches depicted him. (R. Vol. XXVI, 33, 35-36).

- Dan Tanasz testified that, while petitioner was living in Florida after the murder, petitioner told Tanasz that he could not return to Illinois because he had been "involved in a robbery." (R. Vol. XXIV, 82).

- Ronnie Wright testified that petitioner had shown him his pretrial discovery documents and that he decided to inform police of petitioner's involvement in Little's murder because he had an altercation with petitioner while they were jailed together. (R. Vol. XXV, 176, 180, 187).

- Three witnesses who had been incarcerated with petitioner testified regarding petitioner's inculpatory statements: Bruce Roland and Jody Winkler testified that petitioner had confessed to Little's murder (R. Vol. XXV, 115; Vol. XXVI, 83-85), and Bill Moffitt testified that petitioner had mentioned Little's initials and his involvement in a robbery that "went wrong" (R. Vol. XXIV, 100-03). Roland and Moffitt denied being promised anything in exchange for their testimony (R. Vol. XXIV, 117; R. Vol. XXVI, 89-90); Winkler testified that he had asked authorities what he would receive in exchange for his cooperation (R. Vol. XXV, 127).

Finally, the State introduced extensive evidence regarding petitioner's behavior during his encounters with law enforcement after Little's murder. Several weeks after the murder, Missouri police executing a warrant for petitioner's arrest found him hiding in an attic, covered by insulation. (R. Vol. XXVII, 64, 68). Though petitioner was not under arrest for Little's murder, he asked the retrieving Illinois police officers why he was a suspect in the gas station shooting. (R. Vol. XXVI, 120). Petitioner acted "very nervous" and asked "what would happen to him if he knew something about the murder." (*Id.* at 121). During later questioning, petitioner became agitated when talking about Little's murder and asked how he could be charged with the murder "if he didn't have the gun." (*Id.* at 126, 128). When police explained the law of accountability to him, petitioner again asked "what would happen to him if he knew something" about Little's murder. (*Id.*). Finally, petitioner implicated himself in the murder by telling police that he would incriminate himself if he told the truth about his involvement. (*Id.* at 130).

When police prepared to conduct a lineup several weeks after Little's murder, petitioner told them that he would not participate, and he maintained that position even after consulting his attorney and being informed that, if necessary, he would be "cuffed to the bars

or held up by people." (R. Vol. XXX, 18-21). Petitioner relented only when police moved to physically place him in the lineup. (*Id.* at 21).

In September 1999, when Ohio police encountered petitioner, he claimed to be "David Arison" and presented police with Arison's birth certificate. (R. Vol. XXIV, 54-55, 57). Petitioner denied being "Jamie Snow," and he fled from police when they attempted to inspect his tattoos. (*Id.* at 58-60).

Although bullets were recovered from the scene, no gun was recovered, and the State did not offer any ballistic evidence at trial. (Pet. App. at A21, A27). The jury found petitioner guilty of Little's murder. (*Id.* at A2).

Post-trial Proceedings And Direct Appeal

After trial, petitioner filed a pro se motion alleging that his attorneys provided ineffective assistance, and, in April 2001, the trial court held a hearing on the motion pursuant to *People v. Krankel*, 102 Ill.2d 181 (1984). (*Id.* at A2, A13). The trial court thoroughly questioned petitioner, his two trial attorneys, and the prosecutor regarding each of petitioner's allegations, including those regarding Picl's alcohol consumption and counsel's decision not to call numerous "alleged impeachment witnesses." (*Id.* at A13). After allowing petitioner to state what testimony each of his impeachment witnesses would have offered and permitting counsel to explain their "trial strategy as to impeachment witnesses," the court determined that petitioner received effective assistance and sentenced him to natural life imprisonment. (*Id.* at A2, A13).

Petitioner raised his ineffective assistance claim again on direct appeal, but the appellate court rejected it. (*Id.* ("Those [ineffective assistance] issues were again raised on

direct appeal and addressed by this court.")). This Court denied petitioner leave to appeal. (*Id.* at A2).

Postconviction Proceedings

In 2010, petitioner filed a counseled petition for postconviction relief alleging that he is actually innocent, that the State violated *Brady v. Maryland*, 373 U.S. 83 (1963), and that he was denied the effective assistance of counsel. In support, petitioner submitted the following documents:

- an affidavit from Officer Pelo stating that he did not see anyone leave the gas station after he obtained sight of the station door (R. Vol. X, C2674);
- an affidavit from a defense investigator stating that Scheel had recanted his trial testimony regarding petitioner's confession but had refused to sign an affidavit to that effect (R. Vol. XI, C2792-96);
- an affidavit from Roberts averring that petitioner had toasted someone named "Billy" but did not mention the surname "Little" (R. Vol. XI, C2774);
- an affidavit from Tanasz attesting that petitioner told him only that police had accused him of a robbery — not that he was "involved" in a robbery (R. Vol. XI, C2803-08);
- an affidavit from Wright averring that he lied about petitioner's involvement in Little's murder and that he used his familiarity with the discovery materials in petitioner's case to tell police what they wanted to hear (R. Vol. XIII, C3305-08);
- "sentencing documents" showing that Winkler pleaded guilty to a forgery charge pursuant to a plea agreement on January 28, 2000, and that, although the charge carried a maximum term of ten years of imprisonment, Winkler was sentenced to only four years (Pet. App. A16); and
- a July 2000 motion for a "downward sentencing departure" filed by the government in Schaal's federal prosection (*id.*).

The State moved to dismiss the petition in April 2010, and, in March 2011, petitioner filed a motion for postconviction ballistics testing under 725 ILCS 5/116-3 seeking to compare bullets recovered from the scene against the Integrated Ballistics Identification System (IBIS) database. (*Id.*). The trial court dismissed the petition in April 2011, holding that petitioner's ineffective assistance claims were barred by res judicata, and denied the motion for ballistics testing in May 2011. (*Id.* at A4, A12). Although petitioner had also filed a motion for discovery, he failed to obtain a hearing on the motion during the ten months preceding the dismissal of his petition, and the trial court — addressing the motion at the final hearing — rejected the discovery request as untimely. (R. Vol. X, C2596, C2598-07; R. Vol. XIV, C3735; R. Vol. XXXV, 3, 36).

Petitioner appealed, and the appellate court affirmed. First, the appellate court rejected petitioner's claims that Officer Pelo's affidavit and the affidavits suggesting that Scheel, Roberts, Tanasz, and Wright had recanted portions of their trial testimony qualified as "newly discovered evidence" that was not available at trial. (Pet. App. at A9-A10).

Second, the court rejected petitioner's challenge to the trial court's ruling that his ineffective assistance claims were barred by res judicata, observing that petitioner's brief failed to provide any "real analysis" showing why the ruling was incorrect: petitioner offered the vague assertion that the "bulk" of his ineffective assistance claims were not barred by res judicata, but he failed to specify which claims were not barred. (*Id.* at A13). The appellate court further noted that the record provided strong support for the trial court's ruling: the trial court had "thoroughly questioned" all parties about all of petitioner's ineffective assistance allegations at the *Krankel* hearing, and "[t]hose issues were again raised on direct

appeal and addressed by th[e appellate] court." (*Id.* at A13). The court concluded that petitioner's undeveloped appellate argument was insufficient to demonstrate that the trial court's res judicata determination was incorrect:

> Due to the fact ineffective assistance of counsel has already been addressed by this court and a record on the issue established, *res judicata* is not an issue that can be summarily addressed as [petitioner] attempts to do in his brief. [Petitioner] fails to provide any real analysis on this issue, and it is not the job of this court to bear [petitioner's] burden of argument. Accordingly, we find [petitioner] failed to prove his claims were not barred by *res judicata* . . . .

(*Id.* at A14) (internal citations and quotation marks omitted).

Finally, the appellate court held that the trial court properly rejected petitioner's *Brady* claim and his motion for ballistics testing. With respect to the *Brady* claim, the court noted that the documents relating to Winkler and Schaal's sentencing proceedings were public, and thus the State was under no obligation to "disclose" them. (*Id.* at A16). As to petitioner's motion for ballistics testing, the court observed that such testing would not significantly undermine the State's case — which did not rely on ballistics evidence — and that, because no gun was recovered, "[a]ny new evidence would not []prove a gun used by [petitioner] to shoot Little was not the murder weapon." (*Id.* at A27).

ARGUMENT

I. Petitioner's "Actual Innocence" Claim Is Meritless.

Petitioner's sole argument with respect to his actual innocence claim — that the appellate court erred in determining that the information in Officer Pelo's affidavit and the "recantation affidavits" was not "newly discovered" evidence (Pet. 14-16) — is incorrect. The information in Pelo's affidavit — that Pelo did not see anyone leave the gas station once

he obtained sight of the door — was known to petitioner at the time of trial because Pelo testified at trial that he never saw anyone exit the station. (R. Vol. XXII at 103). Indeed, petitioner does not dispute the appellate court's conclusion that he was aware of this information even before trial because it was "clear from [the pretrial] discovery." (Pet. 14; Pet. App. A10, A15). The same is true with respect to what petitioner terms the "recantation affidavits" (Pet. 15) — the affidavits from Roberts, Tanasz, and Wright contradicting their trial testimony and the investigator's affidavit recounting Scheel's unsworn recantation. If the substance of these affidavits is true — that is, if petitioner toasted a "Billy" but not "Billy Little"; if petitioner told Tanasz only that he was accused of the gas station robbery, not that he was "involved"; and if petitioner never confessed his involvement in Little's murder to Wright or Scheel — then petitioner knew as much at the time of trial. Accordingly, the appellate court correctly determined that none of this information was "newly discovered." *See People v. Harris*, 206 Ill.2d 293, 301 (2002) (information within defendant's personal knowledge at time of trial not "newly discovered"); *People v. English*, 403 Ill. App. 3d 121, 133 (1st Dist. 2010) (same); *People v. Collier*, 387 Ill. App. 3d 630, 637 (1st Dist. 2008) (same).

Further — even assuming that it was newly discovered (and it was not) — the evidence on which petitioner relies would not support a claim of actual innocence because it is not "of such a conclusive character that it would probably change the result of retrial." *Harris*, 206 Ill.2d at 301. Contrary to petitioner's claims (Pet. 14-15), Pelo's affidavit does not demonstrate that Martinez's testimony that he saw petitioner leaving the gas station immediately after the murder "cannot be true" because Pelo and Martinez were not at the

station at the same time. The trial testimony shows that, while Martinez was present at the station when the shots were fired, Pelo did not arrive until several minutes later. (R. Vol. XXII, 99-100, 103, 118-19, 158-59, 161, 163, 177-78). Pelo's affidavit thus does not disprove Martinez's testimony.

II. Petitioner's Ineffective Assistance Claim Is Forfeited And Meritless.

Petitioner's argument that the appellate court erred in rejecting his ineffective assistance claim misunderstands the nature of appellate review: petitioner acknowledges that the court deemed the claim forfeited because he failed to sufficiently brief it, but he insists that the *State* "b[ore] the burden of showing [that] res judicata applie[d]" because res judicata is an affirmative defense. (Pet. 16). Petitioner is incorrect: res judicata is an affirmative defense, but the State *prevailed* on that defense in the trial court (Pet. App. A12); petitioner — as the appellant — then bore the burden of demonstrating on appeal that the trial court's ruling was incorrect. *See, e.g.*, *Wolfe v. Menard, Inc.*, 364 Ill. App. 3d 338, 349 (2d Dist. 2006) ("The appellant must argue the points that he or she raises, or they are waived."). The appellate court held that petitioner forfeited this point by failing to provide a cogent argument in his appellate brief (Pet. App. A13-14), and petitioner's PLA does nothing to demonstrate that the appellate court's forfeiture ruling was incorrect.[1] Accordingly, petitioner has

[1] Petitioner's contention that "post-conviction proceedings are the best venue for addressing ineffective assistance of counsel issues" (Pet. 17) is irrelevant. Where a defendant chooses to litigate an ineffective assistance claim on direct appeal, res judicata bars him from relitigating that same claim on postconviction review even if he adds "somewhat different allegations of incompetence." *People v. Albanese*, 125 Ill.2d 100, 105 (1988). Petitioner does not dispute the appellate court's determination that at least some of his ineffective assistance claims were adjudicated on direct appeal. (Pet. 16-18; Pet. App. A13).

forfeited any argument on this point. *See, e.g.*, *MD Elec. Contractors, Inc. v. Abrams*, 228 Ill.2d 281, 296 (2008) (question not properly presented in PLA was forfeited).

Moreover — even aside from petitioner's forfeiture of any challenge to the appellate court's res judicata ruling — petitioner's ineffective assistance claim fails on the merits. Petitioner asserts that attorney Picl was drinking heavily, being treated for depression, and suffering from other mental health problems at the time of his trial. (Pet. 18). But those allegations — even if true — are irrelevant because petitioner makes no attempt to link them to any act or omission on Picl's part that might have affected the outcome of his trial. *See Strickland v. Washington*, 466 U.S. 668, 690 (1984) ("A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment."). Further, petitioner's contention that Picl was ineffective in failing to elicit Officer Pelo's testimony that he did not see anyone leave the gas station once he obtained sight of the door (Pet. 17-18) is baseless: as noted above, Pelo testified at trial that he never saw anyone exit the station, and his further testimony along those lines would not have disproved Martinez's eyewitness account because Pelo arrived at the scene after Martinez. *See id.* at 694 (defendant alleging ineffective assistance must show reasonable probability that, but for counsel's unprofessional errors, result of proceeding would have been different).

III. Petitioner's *Brady* Claim Is Forfeited And Meritless.

Although petitioner asserts, in a single paragraph of his petition, that the appellate court erred in rejecting his *Brady* claim (Pet. 18-19), his argument is too vague and undeveloped to preserve this claim: for example, petitioner does not specify what evidence

the State purportedly failed to disclose. *See, e.g.*, *People v. Cunningham*, 2012 IL App (3d) 100013, ¶ 18 (appellant waived *Brady* claim on appeal by failing to "fully brief" argument). Even assuming that petitioner's reference to the appellate court's ruling regarding "[p]ublicly-available evidence of sentencing records" (Pet. 18-19) is sufficient to preserve the argument that *Brady* required the State to disclose Winkler's plea agreement and sentence and the government's downward departure motion in Schaal's federal prosecution, that argument would fail on the merits. First, as the appellate court held (Pet. App. A16), those documents were public records and thus need not have been "disclosed" under *Brady*. *See, e.g.*, *Matthews v. Ishee*, 486 F.3d 883, 891 (6th Cir. 2007) (prosecution has no obligation to "disclose" information readily available to defense from another source); *United States v. O'Hara*, 301 F.3d 563, 569 (7th Cir. 2002) (evidence is "suppressed" for purposes of *Brady* only if not otherwise available to defendant through exercise of reasonable diligence). Moreover, the documents were neither impeaching nor material. *See generally Strickler v. Greene*, 527 U.S. 263, 281-82 (1999) (*Brady* violation requires that undisclosed information be either exculpatory or impeaching and that prejudice result from nondisclosure). The documents do not reflect that Winkler or Schaal was promised anything in exchange for their testimony against petitioner. At most, they suggest that Winkler and Schaal might have *hoped* that prosecutors would take their cooperation into account — but the jury already knew that, because Winkler and Schaal acknowledged as much in their trial testimony. *See* R. Vol. XXV, 127 (Winkler admitted asking prosecutors what he would receive in exchange for cooperation); R. Vol. XXVI, 55-56 (Schall acknowledged his attorney's advice that cooperation might result in sentencing reduction). Further, the nondisclosure of Winkler's

plea agreement and sentence and the government's downward departure motion in Schaal's case did not result in prejudice because the documents could not have been used to impeach Winkler's or Schaal's testimony and because the other evidence of petitioner's guilt was overwhelming. *See, e.g.*, *Wood v. Bartholomew*, 516 U.S. 1, 8 (1995) (nondisclosure does not violate *Brady* where evidence against defendant is overwhelming).

Although petitioner also offers a one-line argument that he "should be . . . allowed further discovery to prove up" whether "an actual deal existed" in either Winkler's or Schaal's case (Pet. 19), that argument was thrice forfeited. First — as the appellate court held (Pet. App. A21) — petitioner forfeited the argument in the trial court by failing to present his discovery motion at a hearing before the court ruled on his postconviction petition. *See, e.g.*, *People v. Redd*, 173 Ill.2d 1, 35 (1996) ("A movant has the responsibility to obtain a ruling from the court on his motion to avoid waiver on appeal."). Second — as the appellate court further held (Pet. App. A21) — petitioner forfeited the argument on appeal by "failing to provide any argument . . . as to why the trial court's denial [of the discovery motion] was erroneous." *See, e.g.*, *Pilat v. Loizzo*, 359 Ill. App. 3d 1062, 1063 (2d Dist. 2005) ("[T]he appellant must argue the points that he or she raises, or they are waived."). Third, petitioner forfeited the argument in his PLA by failing to explain why the motion should have been granted or why the appellate court's forfeiture determinations were incorrect. *See, e.g.*, *MD Elec. Contractors, Inc.*, 228 Ill.2d at 296 (arguments not presented in PLA are forfeited).

IV. Petitioner's Ballistic Testing Claim Is Meritless.

Finally, petitioner's claim for ballistic testing is meritless because he has not shown that such testing has the potential to "significantly advance" his claim of actual innocence. *People v. Savory*, 197 Ill.2d 203, 213 (2001). To begin with, petitioner's pleadings failed to demonstrate that the bullets recovered in this case are suitable for the IBIS testing he seeks. (R. Vol. XXXV, C3755-C3805). Further, even assuming that the bullets are suitable for comparison, the results of testing would not support petitioner's claim of innocence: matching the bullets from Little's murder to bullets or weapons tied to other crimes would not tend to exculpate petitioner; it would merely show either that petitioner committed those crimes, too, or that he obtained the gun and/or bullets from — or provided them to — the perpetrator of those crimes. Accordingly, the trial court properly denied petitioner's motion for ballistic testing. *See Savory*, 197 Ill.2d at 214-16 (testing not "materially relevant" to claim of innocence where defendant made inculpatory statements and evidence to be tested was "minor part" of State's case).

CONCLUSION

For the foregoing reasons, the People respectfully request that this Court deny petitioner's petition for leave to appeal.

May 14, 2012

Respectfully submitted,

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