NOTICE
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2011 IL App (4th) 100183-U

NO. 4-10-0183

Order filed October 3, 2011

Modified upon denial of Rehearing December 2, 2011

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Vermilion County
JUAN REYES,	)	No. 05CF467
Defendant-Appellant.	)	
	)	Honorable
	)	Craig H. DeArmond,
	)	Judge Presiding.

JUSTICE APPLETON delivered the judgment of the court.
Justices Turner and Cook concurred in the judgment.

ORDER

¶ 1 *Held*: (1) A postconviction petition must be verified by "affidavit" (725 ILCS 5/122-1(b) (West 2008))—that is, by a document sworn to before a person authorized by law to administer oaths—and verification pursuant to section 1-109 of the Code of Civil Procedure (Code) (735 ILCS 5/1-109 (West 2008)) will not suffice; nevertheless, a postconviction petition should not be summarily dismissed for lack of a valid verification, because the defect is procedural rather than substantive.

¶ 2 (2) Defendant has forfeited his claim that the State violated his right to due process in a grand-jury hearing, because instead of filing a timely motion to dismiss the indictment, he waited until after the trial and the affirmance of his convictions on direct appeal to raise this claim, for the first time, in a postconviction proceeding.

¶ 3 (3) Impeachment with a prior inconsistent statement must be premised on an inconsistency between a prior statement by the witness and the witness's trial testimony, not on an inconsistency between two prior pretrial statements by the witness.

¶ 4 Defendant, Juan Reyes, who is serving a sentence of life imprisonment for first-degree murder (720 ILCS 5/9-1(a)(1) (West 2002)), appeals from the December 2009 summary

dismissal of his October 2009 postconviction petition. He argues that, contrary to the trial court's decision, his petition states the gist of a constitutional claim in that (1) the State deprived him of due process by eliciting misrepresentations and half-truths from a police officer in the grand-jury hearing, and (2) defense counsel rendered ineffective assistance at trial by failing to impeach this police officer with contradictions between his grand-jury testimony and his police reports. See *People v. Holborow*, 382 Ill. App. 3d 852, 859 (2008).

¶ 5 In our *de novo* review, we affirm the summary dismissal of the postconviction petition—first of all, because defendant has forfeited any error in the grand-jury hearing by failing to file a timely motion to dismiss the indictment. See *Holborow*, 382 Ill. App. 3d at 859. As for defendant's claim of ineffective assistance, he seems to be under the mistaken impression that two prior pretrial statements by a nonparty witness, one statement inconsistent with the other, are fodder for impeachment of that witness at trial. Actually, for the impeachment to occur, a prior statement by the witness must be inconsistent with the witness's trial testimony. Therefore, we affirm the trial court's judgment.

¶ 6 I. BACKGROUND

¶ 7 In defendant's January 2007 jury trial, the State presented evidence that defendant participated in a robbery that went bad. The evidence tended to show that on January 28, 2004, he accompanied several other men to the Danville residence of a drug dealer, William Thomas. They intended to rob Thomas of his marijuana and cash. Two men entered the house: defendant and Andre Smith. Thomas struggled with defendant, trying to disarm him. Defendant and Smith shot Thomas, killing him, and at some point, either defendant or Smith shot a guest, Timothy Landon, severely wounding him.

¶ 8 The jury found defendant guilty of first-degree murder (720 ILCS 5/9-1(a)(1) (West 2002)), attempt (first-degree murder) (720 ILCS 5/8-4(a), 9-1(a)(1) (West 2002)), aggravated battery with a firearm (720 ILCS 5/12-4.2(a)(1) (West 2002)), home invasion (720 ILCS 5/12-11(a)(1), (a)(2) (West 2002)), and aggravating factors (730 ILCS 5/5-8-1(a)(1)(d)(ii), (a)(1)(d)(iii) (West 2002)). The trial court sentenced him to life imprisonment.

¶ 9 Defendant filed a direct appeal, in which he made two arguments: (1) the State failed to provide him a speedy trial, and (2) the photographic arrays that the police showed Landon were so suggestive as to violate due process. *People v. Reyes*, No. 4-07-0412, slip order at 1 (October 7, 2008) (unpublished order under Supreme Court Rule 23). On January 28, 2009, we issued an order disagreeing with both arguments and affirming the trial court's judgment. *Reyes*, slip order at 1-2. The supreme court denied leave to appeal. *People v. Reyes*, No. 107710, 902 N.E. 2d 1089 (Jan. 28, 2009). It does not appear that defendant filed a petition for a writ of *certiorari*.

¶ 10 On October 5, 2009, defendant filed a petition for postconviction relief. It is unnecessary to recount all the claims in the petition. Instead, we will recount only the claims that he pursues in this appeal from the December 29, 2009, summary dismissal of his petition. Broadly speaking, those claims are as follows: (1) a Danville police officer, Keith Garrett, made inaccurate and deceptive representations in his testimony before the grand jury; and (2) defense counsel rendered ineffective assistance at trial by failing to impeach Garrett with the contradictions between his grand-jury testimony and his police reports. These two claims overlap in that they both are premised on perceived contradictions between what Garrett told the grand jury and what the police reports say. Defendant argues that the contradictions are as follows.

¶ 11 A. Garrett's Representation to the Grand Jury of What Alex Garcia Said

¶ 12 The evidence tended to show that the robbery was planned at the residence of Kenneth Wright. Like Thomas, Wright was in the drug business. Alex Garcia was one of the persons to whom Wright supplied cocaine for resale. Garcia was not present at Thomas's house during the shootings, but he was at Wright's house when the robbers returned there ("would-be robbers" might be more accurate, since, apparently, they did not end up taking anything from Thomas).

¶ 13 On September 29, 2004, while Garcia was in custody on an unrelated charge, Garrett and another police officer, named Miller, interviewed Garcia. On August 4, 2005, Garrett testified to the grand jury regarding Garcia's statement, and defendant attached to his petition, as exhibit A, an excerpt from the transcript of Garrett's grand-jury testimony. Garrett told the grand jury: "Garcia's first statement to us—well, his only statement to us—indicated that he had been at Kenneth Wright's house the night that the William Thomas incident took place."

¶ 14 Defendant complains that this part of Garrett's testimony was misleading in that Garcia actually made more than one statement to the police and Garcia's statements did not agree with one another. Garcia's first statement was on July 6, 2004, a statement he made to Miller and a police officer named Thompson (exhibit B of the petition). Defendant contends that concealing this first statement from the grand jury was especially egregious because in this first statement, Garcia told Miller and Thompson that he had no knowledge of the shooting and that on the date of the shooting, January 28, 2004, he was at home with his wife and his newborn child. By contrast, on September 29, 2004, Garcia told Miller and Garrett that he was at Wright's house on January 28, 2004, when the group of men returned from trying to rob Thomas. Garcia told Miller and Garrett that defendant, who was part of this group, returned to Wright's house covered with blood and that

Garcia heard the others upbraiding defendant for "fucking up" and defendant bemoaning that he had "killed this dude for nothing." Defendant argues that by actively concealing from the grand jury the first statement by Garcia—by telling the grand jury that Garcia made only one statement, *i.e.*, the second statement, which incriminated defendant—Garrett misled the grand jury as to Garcia's credibility and thereby violated defendant's right to due process. See *People v. DiVincenzo*, 183 Ill. 2d 239, 257 (1998).

¶ 15 It is worth noting, however, that at trial, defense counsel impeached Garcia with his first statement (the July 6, 2004, statement) and the jury nevertheless found defendant guilty.

¶ 16 B. Garrett's Representation to the Grand Jury of What Troy Hutchins Said

¶ 17 According to Garrett's testimony before the grand jury (the relevant excerpt is attached to his postconviction petition as exhibit D), Troy Hutchins made a statement to the police on the day he was served with a grand-jury subpoena (one of several statements that he made to the police). Garrett testified: "When he came in, he still gives kind of an exculpatory version of the facts, but he admits that he told Kenneth Wright and these other guys that there was a large quantity of marijuana in Thomas's house and there probably would be a lot of money."

¶ 18 Further, according to Garrett's testimony to the grand jury, Hutchins told the police he was at Wright's house the day of the murder and that when the group of men returned from attempting to rob Thomas, Hutchins overheard what the men said about the incident. Garrett told the grand jury: "[Hutchins] said when they came back, he was still at the house [(Wright's house)] and that everybody was getting in arguments and they were all excited because they said they had gone there, there had been a bunch of shooting and that Juan and one of the other guys had shot the place up and they had shot people in the house."

¶ 19 On the other hand, according to the actual transcript of the statement that Hutchins made to the police on August 2, 2005 (exhibit E of the postconviction petition), Hutchins did not explicitly say he had told the men that Thomas had a lot of marijuana, and probably a lot of money, in his house. Instead, Hutchins told the police that the men *knew* that Thomas had a lot of marijuana and that was the reason they decided to try to rob him. Hutchins stated: "[T]hey just was going over there because they know I was getting drugs off him." He also stated: "[T]hey knew I was getting my weed from him" and "they just knew he sold *** a[] lot of weed." Hutchins agreed with the police officer that, generally, drugs and cash went "hand in hand." But, it is true, he did not specifically admit telling the men that Thomas would have a lot of cash along with the large quantity of marijuana.

¶ 20 Also, it is true, judging from the transcript of his statement, that Hutchins did not tell the police that defendant, specifically, had shot Thomas. Instead, Hutchins said he heard the men say, " 'Man, they shot[,] they shot,' " and that when he heard them say that, he exclaimed, " 'Oh my God,' " and took off running for his cousin's house. At the end of his transcribed statement, Hutchins identified these men in photographic arrays. He knew the names of some of them (Kenneth Wright and Joe Hernandez), and he did not know the names of others. It is unclear, from the transcript of his statement, whether defendant was among those he identified.

¶ 21 C. Garrett's Representation to the Grand Jury of What Kenneth Wright Said

¶ 22 According to Garrett's testimony to the grand jury (exhibit F of the petition), Wright made a statement to the police while he was in federal custody for drug-trafficking—he agreed to cooperate—and in his statement, Wright repeated what he had heard from one of the shooters, Andre Smith. Garrett testified:

> "Within an hour [after the attempted robbery,] they had returned, and [Wright] said that Joe Hernandez didn't even come in his house, he just left that night. But he said Andre Smith, Juan Reyes, and Alex Garcia came in and he said that everybody was all jacked up, they were all hyped up because—well, they basically said Juan got stupid, said he walked in the house and started shooting, said Andre Smith was mad because he had to go and bail him out. He said that he had to shoot the guy to get him off Juan and then they had a big argument about it because when they got back he said that Juan was mad that it happened and when they got outside, the guy followed them outside and when he fell on the ground, he said Juan shot him a couple more times just for good measure."

¶ 23 Defendant complains that in the transcript of the statement that Wright made to the police on June 24, 2005, Wright does not actually say that defendant shot Thomas—let alone that defendant shot him two more times, on the driveway, "just for good measure." Defendant admits that Wright identified him as part of a group of men who shot Thomas in the course of trying to rob him. Defendant contends, however, that Garrett "[misled] the grand jury into believing that Wright identified [him] as the person who fought with Thomas and shot and killed him." Further, defendant argues, "Garrett's statement that [defendant] unnecessarily and callously shot Thomas 'for good measure' portrayed [defendant] to the grand jury in the most unsympathetic manner."

¶ 24 Presumably, though, in the unintelligible parts of the audio recording, Wright himself portrayed defendant as a callous killer. The transcript of Wright's statement begins with the caveat

"This statement has numerous areas where the interviewee cannot be understood," and Wright's lines are liberally sprinkled with the parenthetical notation "(Unintelligible)." Amongst the portions of his statement that the recording device failed to pick up, Wright could have said what Garrett testified he said, especially considering that both Garrett and Miller purportedly heard him say it.

¶ 25 On June 24, 2005, Garrett and Miller wrote a report in which they summarized the statement Wright had made to them that day, and their report reads in part as follows:

> "WRIGHT says that Juan claimed that the guy that was wrestling w/him tried to take the gun away from him and that Juan ended up getting slammed against a big screen tv and when Andre SMITH came in, he shot the guy that was wrestling w/REYES and he also shot the other guy because he said that guy tried to run away.
>
> Juan had told WRIGHT that he wrestled w/the guy all the way to the front door and he finally got loose from him and kept the gun so he shot the guy, 'a couple of times' and left the guy laying on the driveway and ran away."

¶ 26 By comparison, the transcript of Wright's statement of June 24, 2005 (exhibit F of the petition), reads in part as follows:

> "Q. Do you remember them saying specifically who did what? Because you said you think that Alex never got out of the . . . the van.
>
> A. Yeah, well I was told (unintelligible). . . Well, Juan actually told me (unintelligible) what happened. Didn't nobody expect that to go like that. They got in the house, (unintelligible) ah

> gun (unintelligible). (Unintelligible). . . Actually, (unintelligible) they walked in the house. He said . . . the guy that got killed, I guess, was sitting on the couch. He told 'em, you know, they come for (unintelligible) try to (unintelligible). The guy actually got off the couch and came towards him and tried to take the gun out of his hand, they struggled. But he drawed back on him, (unintelligible) or something. That's when the other guy came in. The other guy got up and tried to run to the back. (Unintelligible) Smith . . . took shots at him. That dude was struggling out there, (unintelligible) shot that other guy, I think it was in the back or something. And ah . . . he said he struggled (unintelligible) all the way out to the front porch. Then, you know, take the gun out of his hand and (unintelligible) got it loose and he had pulled (sic) ah couple shots at him. (Unintelligible) . . ."

¶ 27 As the State notes in its brief (citing from the transcript of the trial), investigators found Thomas lying on the driveway. A forensic pathologist testified that, in the autopsy, he found that Thomas had been shot seven times. These gunshot wounds included an entrance wound to the buttocks and an entrance wound to the right hip.

¶ 28 D. Garrett's Representation to the Grand Jury of What Timothy Landon Said

¶ 29 Timothy Landon was a friend of Thomas's, and he was present with Thomas when the intruders entered Thomas's house. Landon was shot, and he fled through the back door. He heard more gunshots as he was running away.

¶ 30 Defendant argues that "Garrett's grand jury testimony regarding Timothy Landon's statements represents an example of deception by omission." According to defendant, the first deception by omission was as follows:

> "Officer Garrett told the grand jury (Petitioner's Exhibit H) that Landon had identified Reyes out of a photographic array as the person who had shot him. However, Officer Garrett did not mention the long and tortured course to Landon's eventual identification of Reyes, which did not occur until the fourth photographic lineup that Landon was shown on July 27, 2004 (about seven months after the shooting), even though Reyes' photograph was included in the preceding three arrays. [Citation to record.]"

¶ 31 This allegation is a little puzzling because in the pages of Garrett's grand-jury testimony attached to the postconviction petition as exhibit H, we find no mention of Landon's identification of defendant. See 725 ILCS 5/122-2 (West 2008) ("The petition shall have attached thereto affidavits, records, or other evidence supporting its allegations or shall state why the same are not attached.") Instead, in the excerpt defendant provides, Garrett testified as follows:

> "Tim Landon tells us that he didn't recognize either of the guys. The first one he said made no attempt to cover his face but he had a hooded sweatshirt on and that the guy was either a light complected male black or possibly a Hispanic male. He said the guy had a little bit of a mustache and a thin build and wasn't too familiar.
>
> The second gunman that had come in, he said he was pretty

> sure he was definitely a male black. He was dark complected. He was also wearing some kind of a hooded sweatshirt, but he said he really didn't get that good of a look at the second guy because by that time he had already been shot and he said it was just pandemonium as it was unfolding.
>
> Q. So at this point did you have any real suspects?
>
> A. At that point, no.
>
> Q. So did you at sometime [*sic*] develop some suspects?
>
> A. Yes."

And that is the end of the excerpt of Garrett's grand-jury testimony labeled as "exhibit H."

¶ 32 It is worth noting as well that what defendant calls "the long and tortured course to Landon's eventual identification of Reyes" was explored at trial.

¶ 33 In addition, defendant complains that Garrett "failed to tell the grand jury that Landon made four contradictory statements regarding the shooting and his description of the alleged shooter (Reyes attached Landon's four statements to his petition, as Petitioner's Exhibit I)." Defendant says:

> "Landon indicated in his first statement to Officer Garrett on January 28, 2004, that the intruders were juveniles. On January 29, 2004, Landon told Officer Garrett that the man who shot him was a black male with light-complected skin. In his third statement to Officer Garrett on February 3, 2004, Landon relayed that the shooter could have been 'of mixed race or even Hispanic.' On February 23, 2004, Landon again stated that a light-skinned black male, 'or possibly

Hispanic' entered Thomas' house and shot him. (Petitioner's Exhibit I)."

¶ 34 But Garrett conveyed most of the content of these statements in his testimony before the grand jury. Garrett testified that, according to Landon, "the guy was either a light complected male black or possibly a Hispanic male." This sums up the four statements, except for Landon's mention that they were "juveniles."

¶ 35 In its order of December 29, 2009, summarily dismissing the postconviction petition, the trial court did not address the substantive merits of defendant's claims of constitutional violations in securing an indictment, because the court held those claims to be "waived" (*i.e.*, forfeited), considering that defendant had never raised those claims before or during trial or by a posttrial motion.

¶ 36 As for defendant's claim of ineffective assistance, the trial court noted that defense counsel sought and obtained the appointment of cocounsel and they defended against the prosecution. Even if their performance in some way fell short, the trial court saw "nothing in the record to indicate that but for them, the outcome probably would have been different." Therefore, the court summarily dismissed the postconviction petition as frivolous or patently without merit. See 725 ILCS 5/122-2.1(a)(2) (West 2008)).

¶ 37 This appeal followed.

¶ 38 II. ANALYSIS

¶ 39 A. The Lack of a Verifying Affidavit

¶ 40 According to the State, one reason to uphold the summary dismissal—a reason that the State contends is sufficient in and of itself—is that defendant failed to verify his postconviction

petition by affidavit. Section 122–1(b) of the Post-Conviction Hearing Act (Act) says: "The proceeding shall be commenced by filing with the clerk of the court in which the conviction took place a petition (together with a copy thereof) verified by affidavit." 725 ILCS 5/122–1(b) (West 2010). The appellate court has held that affidavits filed pursuant to the Act must be notarized to be valid. *People v. Carr*, 407 Ill. App. 3d 513, 515 (2011). The purported affidavit at the end of defendant's petition, in which he asserts the truth of his petition, is not notarized.

¶ 41 Defendant responds that the lack of a notarization makes no difference because he verified his petition in the manner permitted by section 1-109 of the Code (735 ILCS 5/1-109 (West 2008)). He points out that in *People v. Rivera*, 342 Ill. App. 3d 547, 550 (2003), the appellate court held that in a postconviction proceeding, certification pursuant to section 1-109 of the Code was "at least the equivalent of an affidavit."

¶ 42 We disagree with *Rivera* because section 1-109 of the Code, by its terms, does not apply to proceedings under the Act. Section 1-109 provides as follows:

> "*Unless otherwise expressly provided by rule of the Supreme Court, whenever in this Code* any complaint, petition, answer, reply, bill of particulars, answer to interrogatories, affidavit, return or proof of service, or other document or pleading filed in any court of this State is required or permitted to be verified, or made, sworn to or verified under oath, such requirement or permission is hereby defined to include a certification of such pleading, affidavit or other document under penalty of perjury as provided in this Section.
>
> Whenever any such pleading, affidavit or other document is

so certified, the several matters stated shall be stated positively or upon information and belief only, according to the fact. The person or persons having knowledge of the matters stated in a pleading, affidavit or other document certified in accordance with this Section shall subscribe to a certification in substantially the following form: 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, except as to matters therein stated to be on information and belief and as to such matters the undersigned certifies as aforesaid that he verily believes the same to be true.

Any pleading, affidavit or other document certified in accordance with this Section may be used in the same manner and with the same force and effect as though subscribed and sworn to under oath.

Any person who makes a false statement, material to the issue or point in question, which he does not believe to be true, in any pleading, affidavit or other document certified by such person in accordance with this Section shall be guilty of a Class 3 felony." (Emphasis added.) 735 ILCS 5/1-109 (West 2008).

¶ 43 Consequently, unless a supreme court rule says otherwise, section 1-109 applies only to situations in which "this Code"—that is, the Code of Civil Procedure—requires or permits an

affidavit. 735 ILCS 5/1-109 (West 2008). In such situations, a notarization is unnecessary; the declarant can certify the truth of the document by using the language in section 1-109, and, like perjury (720 ILCS 5/32-2(e) (West 2008)), a deliberately false certification will be punishable as a Class 3 felony. In this case, however, when section 122-1(b) of the Act (725 ILCS 5/122-1(b) (West 2008)) requires an affidavit, it is not "this Code" that is requiring the affidavit (735 ILCS 5/1-109 (West 2008)). To be sure, as defendant points out in his petition for rehearing, postconviction proceedings are "civil in nature" (*People v. Johnson*, 191 Ill. 2d 257, 270 (2000)), but it does not follow that *the Code* requires the verification of the postconviction petition by affidavit (rather, section 122-1(b) of the Act so requires)—and by its terms, section 1-109 is applicable if "this Code" requires a pleading to be sworn to. Alternatively, a supreme court rule or a statute can make section 1-109 applicable. We are aware of no supreme court rule or statute making section 1-109 applicable to proceedings under the Act. Therefore, we conclude that a certification pursuant to section 1-109 of the Code does not fulfill the requirement, in section 122-1(b) of the Act, that the postconviction petition be verified by (a notarized) affidavit.

¶ 44 Nevertheless, the lack of a verification is merely a procedural defect in the postconviction petition (see *In re L.M.*, 205 Ill. App. 3d 497, 502 (1990)), and in the first stage of the postconviction proceeding, the court looks only at the substantive merits of the petition, ignoring procedural defects (*People v. Boclair*, 202 Ill. 2d 89, 102 (2002)). "The process at the summary review stage measures a petition's substantive virtue rather than its procedural compliance." *Id.* Just because a postconviction petition has a defective verification, it does not necessarily follow that the petition lacks substantive merit. See *People v. Johnson*, 312 Ill. App. 3d 532, 534 (2000). We conclude, then, that the lack of a verification is not grounds for summarily dismissing a

postconviction petition. To the extent that *People v. Carr*, 407 Ill. App. 3d 513, 516 (2011), suggests otherwise, we decline to follow that decision. We agree with *Carr* that verification by an affidavit, in section 122-1(b), means verification by a notarized affidavit (*Carr*, 407 Ill. App. 3d at 515), but we disagree that the lack of a verification—a procedural defect—is grounds for summary dismissal.

¶ 45 It is true that, in *People v. Collins*, 202 Ill. 2d 59, 68-69 (2002), the supreme court upheld the summary dismissal of a postconviction petition on the ground of noncompliance with section 122-2 of the Act (725 ILCS 5/122-2 (West 2000)), which required that the petition include either "affidavits, records, or other evidence supporting its allegations" or, alternatively, an explanation as to why such supporting evidence was omitted. Nevertheless, it does not follow that omitting the verifying affidavit required by section 122-1(b) (725 ILCS 5/122-1(b) (West 2010)) is likewise grounds for summary dismissal. An affidavit under section 122-1(b) is different from an affidavit under section 122-2. These two affidavits serve different functions, as the supreme court made clear in *Collins*.

¶ 46 The supreme court explained: "[T]he sworn verification described in section 122-1 serves a purpose wholly distinct from the 'affidavits, records, or other evidence' described in section 122-2. The former, like all pleading verifications, confirms that the allegations are brought truthfully and in good faith. [Citation.] The latter, by contrast, shows that the verified allegations are capable of objective or independent corroboration." *Collins*, 202 Ill. 2d at 67. Section 122-2 refers to "affidavits, records, or *other evidence*"—signifying that affidavits under that section are a form of evidence. (Emphasis added.) 725 ILCS 5/122-2 (West 2010). The verifying affidavit under section 122-1(b), by contrast, is *not* evidence, as we know from the supreme court's rejection

of the defendant's argument in *Collins* that his verifying affidavit under section 122-1(b) could serve as a substitute for the supporting affidavits required by section 122-2. See *Collins*, 202 Ill. 2d at 66.

¶ 47 Instead of being evidence, the verification under section 122-1(b) is a procedural requirement. This court has said that the verification of a petition is "a procedural formality." *In re L.M.*, 205 Ill. App. 3d 497, 502 (1990). Other courts agree. For example, a federal court has said: "While the distinction between substantive and procedural can sometimes become blurred, verification of a pleading easily falls into the latter category." *Harris Technical Sales, Inc. v. Eagle Test Systems, Inc.*, 2007 U.S. Dist. LEXIS 48044, at *6 (Dist. Ariz. 2007). See also *R & R White Family Limited Partnership v. Jones*, 182 S.W.3d 454, 458 (Tex. Ct. App. 2006). Under *Boclair*, 202 Ill. 2d at 102, "[t]he process at the summary review stage measures a petition's substantive virtue rather than its procedural compliance"—including compliance with the procedure of verifying the petition.

¶ 48 B. Failure To File a Timely Motion To Dismiss the Indictment

¶ 49 Section 114-1(b) of the Code of Criminal Procedure of 1963 (725 ILCS 5/114-1(b) (West 2008)) says that, generally, a motion to dismiss an indictment must be filed within a reasonable time after the arraignment or else the asserted grounds for dismissal of the indictment are forfeited ("waived"). The statute provides as follows: "The court shall require any motion to dismiss to be filed within a reasonable time after the defendant has been arraigned. Any motion not filed within such time or an extension thereof shall not be considered by the court and the grounds therefor, except as to subsections (a)(6) and (a)(8) of this Section, are waived." 725 ILCS 5/114-1(b) (West 2008). Subsection (a) contains a nonexclusive list of the grounds for dismissing an indictment, information, or complaint. *People v. Lawson*, 67 Ill. 2d 449, 456 (1977). In subsection

(a)(6) (725 ILCS 5/114-1(a)(6) (West 2008)), the ground is lack of jurisdiction, and in subsection (a)(8) (725 ILCS 5/114-1(a)(8) (West 2008)), the ground is the failure of the charge to state an offense. So, unless the ground for the motion to dismiss the indictment is lack of jurisdiction or failure to state an offense, a defendant forfeits the ground for dismissal by failing to file the motion within a reasonable time after arraignment or within an extension of time granted by the trial court. Essentially, in this appeal, defendant contends that the indictment should have been dismissed because of violations of due process in the grand-jury hearing (he contends that there never should have been a conviction because there never should have been an indictment). Nevertheless, it does not appear that he ever filed a motion to dismiss the indictment. Consequently, under section 114-1(b), he has forfeited his due-process theory for dismissal of the indictment.

¶ 50 There are sound reasons for this rule of forfeiture. If defendant had filed a timely motion to dismiss the indictment and the trial court had granted the motion, another grand-jury hearing could have been held, in which, this time, Garrett might have gotten all his facts right. See *DiVincenzo*, 183 Ill. 2d at 258 ("A determination of no probable cause does not generally prevent a subsequent consideration of probable cause."). Instead of acting promptly, defendant has waited until after his trial and after his direct appeal to challenge the grand-jury proceeding. At this late hour, after the guilty verdicts and the affirmance of his convictions, any challenge of the grand jury's probable-cause determination is very late. See *United States v. Mechanik*, 475 U.S. 66, 70 (1986); see *United States v. Roth*, 777 F.2d 1200, 1202-03 (7th Cir. 1985). To overturn all the intervening judicial proceedings on the basis of an issue that should have been raised years ago would exact too great a societal cost. See *Mechanik*, 475 U.S. at 72. As the Supreme Court put it, " 'the moving finger writes; and, having writ, moves on.' " *Id.* at 71. In short, it is too late to complain of what

happened in the grand-jury hearing.

¶ 51 Of course, we are aware of the possibility that this finding of procedural forfeiture might trigger a claim of ineffective assistance premised on the failure to file a motion to dismiss the indictment. Such a claim, though, would be futile because, assuming, *arguendo*, that defense counsel rendered substandard performance by failing to file a motion to dismiss the indictment, defendant could not establish any resulting prejudice, given his ultimate convictions at trial. See *Washington*, 38 Ill. 2d at 449 ("The time to dispose of those issues is now."); *People v. Jackson*, 362 Ill. App. 3d 1196, 1201 (2006) ("Ineffective assistance of counsel has two elements: (1) defense counsel's performance fell below an objective standard of reasonableness, and (2) there is a reasonable probability that the outcome of the case would have been different but for defense counsel's substandard performance."). If the evidence was sufficient to prove him guilty beyond a reasonable doubt, then, by corollary, the evidence was sufficient to meet the lesser standard of probable cause for purposes of a grand-jury hearing, and a prosecutor would "have enough evidence to procure an indictment without engaging in shenanigans." *Roth*, 777 F.2d at 1203. See also *Mechanik*, 475 U.S. at 70 ("But the petit jury's subsequent guilty verdict means not only that there was probable cause to believe that the defendants were guilty as charged, but also that they are in fact guilty as charged beyond a reasonable doubt. Measured by the petit jury's verdict, then, any error in the grand jury proceeding connected with the charging decision was harmless beyond a reasonable doubt."); *People v. Sampson*, 406 Ill. App. 3d 1054, 1057 (2011) ("The grand jury determines whether probable cause exists that an individual has committed a crime.").

¶ 52 C. The Asserted Failure To Impeach Garrett With the Contradictions Between His Grand-Jury Testimony and His Police Reports

¶ 53 Defendant claims that his defense counsel rendered ineffective assistance at trial in

that his defense counsel never impeached Garrett with the contradictions between his grand-jury testimony and his police reports. The short response to this claim is that trial counsel could not have done so. As the State points out, in order to impeach Garrett with an inconsistent statement, the statement would have had to be inconsistent with Garrett's testimony *at trial*. See *People v. Johnson*, 385 Ill. App. 3d 585, 608 (2008). "A prior statement of a witness may be employed for purposes of impeachment only if inconsistent with the witness's in-court testimony." Michael Graham, Cleary & Graham's Handbook of Illinois Evidence § 613.1, at 567 (7th ed. 1999).

¶ 54 Defendant insists, though, that showing the inconsistencies between Garrett's pretrial statements would have called into question "Garrett's credibility and veracity, by portraying him as a person who fashion[ed] his recount of events in varying ways." Nevertheless, discrediting the veracity of a witness is impeachment, and unless the law recognized the comparison of one pretrial statement with another as a valid method of impeaching a nonparty witness, defense counsel cannot fairly be blamed for omitting to use that method. According to McCormick, "[t]here are five main lines of attack upon the credibility of a witness," *i.e.*, five ways of impeaching a witness:

> "The first, and probably the most effective and most frequently employed, is an attack by proof that the witness on a previous occasion has made statements inconsistent with his present testimony. The second is an attack by a showing that the witness is biased on account of emotional influences such as kinship for one party or hostility to another, or motives of pecuniary interest, whether legitimate or corrupt. The third is an attack on the character of the witness. The fourth is an attack by showing a defect of capacity in

> the witness to observe, remember or recount the matters testified about. The fifth is proof by other witnesses that material facts are otherwise than as testified to by the witness under attack." Edward W. Cleary, McCormick's Handbook of the Law of Evidence § 33, at 66 (2d ed. 1972).

Defendant has cited no authority in support of his suggestion that there is a sixth line of attack on a nonparty witness's credibility: comparing what the witness said in one pretrial statement with what the witness said in another pretrial statement.

¶ 55 III. CONCLUSION

¶ 56 For the foregoing reasons, we affirm the trial court's judgment. We also award the State $50 against defendant in costs of this appeal.

¶ 57 Affirmed.