

No. 1-11-3772

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Respondent-Appellee,)	Cook County
)	
v.)	No. 01 CR 30741
)	
PETER LAWRENCE,)	Hon. Vincent M. Gaughan,
)	Judge Presiding
Petitioner-Appellant.)	

JUSTICE EPSTEIN delivered the judgment of the court.
Presiding Justice Howse and Justice Fitzgerald Smith concurred in the judgment.

ORDER

- ¶ 1 *Held:* Summary dismissal of petitioner's post-conviction petition affirmed, where the circuit court's dismissal was timely; the circuit court did not make an improper partial summary dismissal; the petition did not state an arguable claim of actual innocence; the petition did not state an arguable claim of ineffective assistance of trial counsel; and the petition did not state an arguable claim of ineffective assistance of appellate counsel. Petitioner's mittimus corrected.
- ¶ 2 Following a jury trial, petitioner Peter Lawrence was convicted of first degree murder in the death of Tamika McFadden-Harris and sentenced to natural life imprisonment. We affirmed his conviction on direct appeal. *People v. Lawrence*, No. 1-08-0045 (2010) (unpublished order under Supreme Court Rule 23). He subsequently filed a nine-issue *pro se* post-conviction

petition, which the circuit court summarily dismissed in a written order. He now appeals the first-stage dismissal of his petition. We affirm, but correct his mittimus.

¶ 3 BACKGROUND

¶ 4 On November 16, 2001, Tamika McFadden-Harris was shot and killed near 108 South Francisco Avenue in Chicago, Illinois, while leaving church with her daughter. Petitioner was arrested on November 21, 2001, provided a handwritten confession the following day, and was later charged with first degree murder.

¶ 5 Motion to Suppress Statement

¶ 6 Petitioner moved to suppress his statement prior to trial, claiming that he was denied his right to counsel. The trial court denied his motion following a hearing. The court found that petitioner had waived his right to counsel when he initiated contact with police.

¶ 7 Trial

¶ 8 April Dunlap testified that, on November 16, 2001, she, McFadden-Harris, and their daughters attended choir rehearsal at their church. At approximately 9:15 p.m., Dunlap was waiting in her car for McFadden-Harris, when she heard gunshots and saw a young man in a hooded sweatshirt running.

¶ 9 Former Gangster Disciple Roy Harris testified that he was walking past the church when at least three persons in a Buick fired at him. Harris hid behind a car and returned fire with a .45-caliber semiautomatic pistol. During the exchange of gunfire, he saw McFadden-Harris cover a little girl next to her. Harris later turned his gun in to police and viewed a lineup, but was unable to identify the cars' occupants. Harris noted that he was wearing a dark hooded sweatshirt that night.

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¶ 10 Sergeant Dennis Keane testified that, after his arrest, petitioner asked what guns had been used in McFadden-Harris' murder. When Keane told him that a .38-caliber bullet killed McFadden-Harris, petitioner placed his head in his hands and said, "thank you."

¶ 11 Assistant State's Attorney Jennifer Coleman testified that, after she advised petitioner of his *Miranda* rights, he voluntarily answered her questions regarding McFadden-Harris' murder and subsequently provided a handwritten statement.

¶ 12 In his statement, which was admitted at trial, petitioner said that he was 20 years old and a member of the Black Souls street gang, which was at war with the Gangster Disciples. On November 16, 2001, he, Edward Franklin, Jabari Brown, and Derrick Hall—all members of the Black Souls—drove around in hopes of finding and killing a Gangster Disciple in retaliation for another murder. Brown drove, Franklin sat in the front passenger seat, Hall sat behind Brown, and petitioner sat behind Franklin. As they neared the church, petitioner spotted a man, whom he believed was a Gangster Disciple. Franklin fired, and the presumed-Gangster Disciple returned fire. Petitioner ducked, pointed his gun out the window, and fired blindly. He later learned that a woman had been shot.

¶ 13 Detective Patrick Deenihan testified that, based on information obtained from petitioner, he located petitioner's girlfriend, Ruthie Guider, and retrieved from her the gun petitioner used to shoot McFadden-Harris. He inventoried the gun and identified it at trial.

¶ 14 Medical examiner Dr. John Scott Denton testified that he performed McFadden-Harris' autopsy. He stated that McFadden-Harris was shot twice—one bullet grazed her abdomen, the other punctured her femoral artery. Denton recovered a medium-caliber bullet from her femur, which he identified at trial. He concluded that the cause of death was a femoral gunshot wound, and the manner of death was homicide.

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¶ 15 Caryn Tucker was qualified as a firearms identification expert and testified that the .38-caliber bullet recovered during McFadden-Harris' autopsy was fired from the .38-caliber gun recovered from Guider. She further testified that she received Roy Harris' .45-caliber semiautomatic pistol, as well as bullet fragments, which she determined had been fired from that gun.

¶ 16 Attorneys Presita May and Dawn Sheikh of First Defense Legal Aid testified for the defense. May saw petitioner shortly after his arrest and asked him to sign a “declaration of rights” form indicating that he did not wish to speak to police without an attorney present. Sheikh testified that she attempted to meet with petitioner on the night of his arrest, but was turned away by a lieutenant, who claimed petitioner had seen too many attorneys that day.

¶ 17 A jury found petitioner guilty of first degree murder and further found that he personally discharged a firearm. At sentencing, the State offered a certified copy of conviction showing that petitioner had previously been convicted of first degree murder. The trial court sentenced him to natural life imprisonment.

¶ 18 Direct Appeal

¶ 19 On direct appeal, petitioner argued that the trial court improperly denied his motion to suppress his statement and that the State failed to establish a chain of custody for the bullet recovered from McFadden-Harris. We affirmed his conviction. *People v. Lawrence*, No. 1-08-0045 (2010) (unpublished order under Supreme Court Rule 23).

¶ 20 Post-Conviction Petition

¶ 21 On February 18, 2011, petitioner mailed a *pro se* post-conviction petition. The clerk stamped it “received” on March 8, 2011, but did not docket it until August 5, 2011. Petitioner raised nine issues in his pleading, but only three are germane to this appeal. Petitioner argued

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that trial counsel was ineffective in failing to investigate and present Brittney Brown as a witness. He further claimed that appellate counsel was ineffective in failing to raise the circuit court's noncompliance with Illinois Supreme Court Rule 431(b). Finally, he argued that he is actually innocent.

¶ 22 Petitioner attached an unsigned, unnotarized statement, purporting to represent the views of "Brittney." In it, the would-be affiant claimed that she saw the car involved in McFadden-Harris' death, but did not see petitioner in the car. She further stated that she told petitioner's attorney this information and was willing to testify, but was never called as a witness.

¶ 23 Petitioner also attached an affidavit from Ruthie Guider, his girlfriend at the time of the offense. Guider claimed that, in December of 2001, Brittney told her that she saw the car involved in McFadden-Harris' murder on the night of the shooting and did not see petitioner in the car. Guider stated that she took Brittney to petitioner's attorney. Guider claimed she was always willing to testify to her interaction with Brittney.

¶ 24 Finally, petitioner attached codefendant Edward Franklin's affidavit, which, in pertinent part, provided the following:

"I unknowingly implicated [petitioner] in a crime that he did not have anything to do with. I had no contact with [petitioner] on November 16th, 2001, the night of the shooting.

***I cannot sit and allow [petitioner] to be rotting in jail for something he had nothing to do with.

I also attest that I have been willing to testify to [petitioner's] innocence, but I was never called to testify on his behalf. Had I been called to testify, I would have testified to the facts stated in this sworn affidavit."

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Franklin's affidavit was both signed and notarized.

¶ 25 The circuit court summarily dismissed the petition on October 27, 2011. The court's written order addressed his first eight claims, but did not expressly mention his actual innocence claim.

¶ 26 ANALYSIS

¶ 27 On appeal, petitioner argues that this court should reverse the summary dismissal of his petition and remand this cause for second-stage proceedings, where (1) the circuit court failed to dismiss his petition within 90 days as required by the Act; (2) the circuit court failed to address his actual innocence claim, resulting in improper partial summary dismissal; (3) he set forth the arguable basis of a claim of actual innocence supported by codefendant Edward Franklin's affidavit; (4) he set forth the arguable basis of a claim that trial counsel was ineffective in failing to investigate and present eyewitness Brittney Brown; and (5) he set forth the arguable basis of a claim that appellate counsel was ineffective in failing to raise the trial court's noncompliance with Supreme Court Rule 431(b). He also argues that his mittimus should be corrected to reflect a single first degree murder conviction.

¶ 28 The Post-Conviction Hearing Act allows a criminal defendant to challenge a conviction where the underlying proceedings involved the substantial denial of a constitutional right. 725 ILCS 5/122-1 *et seq.* (West 2008). The Act sets forth a three-stage process. *People v. Bocclair*, 202 Ill.2d 89, 99 (2002). At the first stage, a petition may be summarily dismissed if it is "frivolous or patently without merit." 725 ILCS 5/122-2.1(a). A petition is frivolous or patently without merit where it has no arguable basis in law or fact. *People v. Hodges*, 234 Ill.2d 1, 11 (2009). "The circuit court is required to make an independent assessment in the summary review stage as to whether the allegations in the petition, liberally construed and taken as true,

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set forth a constitutional claim for relief.” *Boclair*, 202 Ill. 2d at 99. The court is foreclosed from engaging in any fact finding or review of matters beyond the allegations of the petition. *Id.* The summary dismissal of a post-conviction petition is reviewed *de novo*. *People v. Coleman*, 183 Ill. 2d 366, 388 (1998).

¶ 29 I. Timely Dismissal

¶ 30 Petitioner argues that, due to a delay in the clerk's office, the circuit court did not dismiss his petition until more than seven months after it was received, well beyond the Act's 90-day period for summary dismissal. The State responds that the court timely dismissed his petition, and the clerk's docketing delay does not require advancing this cause to second-stage proceedings. We agree with the State.

¶ 31 The Act requires petitioners to file a post-conviction petition with the clerk of the circuit court. 725 ILCS 5/122-1(b). The Act provides that the clerk “shall docket the petition for consideration by the court***upon his or her receipt thereof and bring the same promptly to the attention of the court.” 725 ILCS 5/122-1(b). “Within 90 days after the filing and docketing of each petition, the court shall examine such petition and enter an order thereon***.” 725 ILCS 5/122-2.1(a). A petition that is not dismissed within 90 days must advance to second-stage proceedings. 725 ILCS 5/122-2.1(b). The 90-day period is mandatory, and an order summarily dismissing a petition outside this time period is void. *People v. Porter*, 122 Ill. 2d 64, 86 (1988).

¶ 32 Here, petitioner mailed his pleading on February 18, 2011. It was stamped “received” by the circuit court clerk’s office on March 8, 2011. The petition was not docketed, however, until August 5, 2011, nearly five months later. The circuit court dismissed his petition on October 27, 2011.

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¶ 33 On appeal, petitioner argues that, due to a delay in the clerk's office, the circuit court did not dismiss his petition until more than seven months after it was received, well beyond the 90-day period. Petitioner conflates two issues: (1) whether the trial court dismissed his petition within 90 days; and (2) whether the circuit court clerk complied with section 122-1(b) of the Act.

¶ 34 The first question presents little difficulty. As stated above, where a circuit court chooses to summarily dismiss a post-conviction petition, it must do so "[w]ithin 90 days after the filing and docketing" of the petition. 725 ILCS 5/122-2.1(a). Thus, we need only count the days between the petition's docketing and its summary dismissal. *People v. Brooks*, 221 Ill. 2d 381, 391 (2006). Here, the parties agree that the petition was docketed on August 5, 2011, and summarily dismissed on October 27, 2011. Thus, only 83 days passed between the petition's docketing and summary dismissal. The circuit court's dismissal of the petition in this case was therefore timely.

¶ 35 Nonetheless, petitioner maintains that, "in order to give the 90-day time limit any meaning, this Court should hold that a nearly five month delay in docketing violates the spirit and purpose of the 90-day rule." We disagree. The Act provides that the 90-day period begins when a petition is filed and docketed. 725 ILCS 5/122-2.1(a). Although the Act does not define the term *docketing*, our supreme court clarified the term's meaning in *Brooks*. There, the defendant argued that a petition is docketed within the meaning of the Act when it is received by the circuit court clerk. *Brooks*, 221 Ill. 2d at 388, 391. The State contended, however, that a petition is docketed when it is placed on a judge's call. *Id.* Our supreme rejected these arguments and held that docketing occurs "when the clerk of the circuit court enter[s] the petition into the case file and set[s] it for a hearing." *Id.* at 391. We decline petitioner's invitation to part with *Brooks*.

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¶ 36 Petitioner further claims that *Brooks* is distinguishable because "the dispute between the parties [in that case] concerned a mere seven days, compared to the nearly five months in this case." The length of the docketing delay is irrelevant, however, to the calculation of the 90-day period. Whether the delay in docketing is seven days or five months, the 90-day period does not begin until a petition is docketed. 725 ILCS 5/122-2.1(a); *Brooks*, 221 Ill. 2d at 391. Nothing in the Act, *Brooks*, or any of the cases cited by petitioner supports a conclusion to the contrary.

¶ 37 Turning to the second question, we reject petitioner's argument that the clerk's failure to comply with section 122-1(b) of the Act requires us to advance this cause to the second stage. In pertinent part, section 122-2.1(b) provides that "[t]he clerk shall docket the petition for consideration by the court pursuant to Section 122-2.1 upon his or her receipt thereof and bring the same promptly to the attention of the court." 725 ILCS 5/122-1(b). Petitioner argues that we should remand this cause for second-stage proceedings, where the circuit court clerk in this case violated his duty under section 122-1(b) to "promptly docket" the petition.

¶ 38 Initially, we note that the clerk did not have a duty to "promptly docket" the petition. In section 122-1(b), *promptly* modifies the act of bringing the petition to the court's attention, not the act of docketing the petition. *Id.* The clerk here was required to docket the petition "upon his or her receipt thereof." *Id.* Unsurprisingly, the Act does not define the phrase "upon his or her receipt thereof," nor have we discovered any case bearing on this phrase's meaning. Whatever its precise meaning, a nearly five-month delay in docketing likely falls outside of this mandate. Thus, the clerk in this case failed to docket the petition "upon his or her receipt thereof."

¶ 39 We must next determine the consequence of the clerk's error. Specifically, although the Act provides that the clerk "*shall* docket the petition *** upon his or her receipt thereof," we must decide if noncompliance with this clause requires advancement to second-stage

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proceedings. See *People v. Robinson*, 217 Ill. 2d 43, 51 (2005) ("[T]here is no dispute that 'shall' means shall, and therefore the clerk failed to do something that was obligatory. The issue is the *consequence* of the clerk's failure." (Emphasis in original)). We hold that it does not.

¶ 40 Illinois courts have drawn a distinction between “mandatory” and “directory” commands. Whether a provision is mandatory or directory is a question of the drafters' intent. *Porter*, 122 Ill. 2d at 81. Failure to comply with a “mandatory” command invalidates the governmental action related to the command. *Robinson*, 217 Ill. 2d at 51-52 (citing *Morris v. County of Marin*, 559 P.2d 606, 610-11 (1977)). Failure to comply with a “directory” command, however, does not invalidate the related action. *Robinson*, 217 Ill. 2d at 51-52 (citing *Morris v. County of Marin*, 559 P.2d 606, 610-11 (1977)). Generally, “procedural commands to government officials are directory.” *Id.* at 57. There are two exceptions to this rule: (1) commands intended to protect citizens, where an official's error would usually "injure the right the procedure was designed to protect"; and (2) commands accompanied by negative words mandating that " 'the acts required shall not be done in any other manner or time.' " *Id.* at 57-58 (quoting *People v. Jennings*, 3 Ill. 2d 125, 127 (1954)). Whether a command is mandatory or directory is a question of statutory construction reviewed *de novo*. *Id.* at 54.

¶ 41 In *Robinson*, the Illinois Supreme Court addressed section 122-2.1(a)(2) of the Act, which provides in part that an order of dismissal "shall be served upon the petitioner by certified mail within 10 days of its entry." *Robinson*, 217 Ill. 2d at 50 (discussing 725 ILCS 5/122-2.1(a)(2) (West 2000)). It was clear in *Robinson* that a clerk had failed to comply with that provision. *Id.* at 51. The question remained, however, whether the statute was mandatory or directory. *Id.* The *Robinson* court found that the provision was meant only to secure “order, system, and dispatch of proceedings” for the sake of protecting a petitioner’s right to appeal, and

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that late service was unlikely to injure a petitioner's rights. *Id.* at 57. The court also found that the Act did not "include negative words indicating that no dismissal shall occur *** unless the petitioner is timely served." *Id.* at 58. Because neither of the exceptions applied, the court held that the duty to serve a petitioner within 10 days was directory, not mandatory. *Id.* at 58-59; see also *Porter*, 122 Ill. 2d at 81-82 (section 122-2.1 of the Act, which requires a written order, is directory).

¶ 42 Here, too, the clerk violated only a directory command. Procedural commands to government officials, such as the one at issue here, are generally directory, unless an exception applies. *Robinson*, 217 Ill. 2d at 57. Neither of the exceptions set forth in *Robinson* and *Porter* applies here. The Act lacks any negative language indicating that a petition cannot be dismissed unless a clerk docketed that petition upon his or her receipt thereof. 722 ILCS 5/122-1(b). Nor is there usually a risk of injury to the petitioner when a clerk fails to timely docket a petition. Indeed, the risk is less than that presented by the failure to comply with the provision examined in *Robinson*. While a late order like the kind in *Robinson* could make it impossible for a petitioner to file a timely appeal, here, delayed docketing still entitles a petitioner to a review of his or her claims. See *Robinson*, 217 Ill. 2d at 57. We therefore hold that the circuit court properly dismissed the instant petition within 90 days, and the circuit court clerk's failure to timely docket the petition does not require remanding this cause for second-stage proceedings.

¶ 43 II. Partial Summary Dismissal

¶ 44 Petitioner contends that the circuit court failed to address his actual innocence claim in its dismissal order and therefore improperly entered a partial summary dismissal. The State argues that the circuit court, despite its failure to expressly address petitioner's claim, intended to dismiss the entire petition. We agree with the State.

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¶ 45 If even one claim raised in a post-conviction petition is not frivolous or patently without merit, the entire petition must advance to second-stage proceedings. *People v. Rivera*, 198 Ill. 2d 364, 370-71 (2001). Although partial summary dismissal is improper, the failure to address every claim in writing does not necessarily render a dismissal partial. *People v. Lee*, 344 Ill. App. 3d 851, 855 (2003). Where an order may be construed as intending to dismiss the entire petition, it is treated as a summary dismissal of all claims. See *id.*

¶ 46 We addressed this issue in *Lee*. In that case, the petitioner raised two issues in his post-conviction petition. *Lee*, 334 Ill. App. 3d at 852. The circuit court's written order summarily dismissing the petition explained its reasons for rejecting one of the issues, but not the other. *Id.* The petitioner argued that the court's failure to address the second issue in writing constituted partial summary dismissal. *Id.* at 855. We rejected this claim, holding that, although the court did not expressly address one of the issues presented, it "plainly intended to dismiss the entire petition, and the parties understood the order as a complete dismissal subject to immediate appellate review." *Id.*

¶ 47 This case is nearly identical to *Lee*. Here, the circuit court expressly addressed some, but not all, of petitioner's claims in a written order. Although the court did not expressly address petitioner's actual innocence claim, it concluded, "Based upon the foregoing discussion, the court further finds that the issues raised and presented by petitioner are frivolous and patently without merit. Accordingly, the petition for post-conviction relief is hereby dismissed." Here, as in *Lee*, the court plainly intended to dismiss the entire petition. Nowhere does the order suggest that any of petitioner's claims should survive summary dismissal.

¶ 48 Like the appellant in *Lee*, petitioner cites *People v. Rivera*, arguing that the failure to address one claim requires advancing the whole petition to second-stage proceedings. 198 Ill. 2d

at 364. Petitioner misapprehends *Rivera*. In that case, the circuit court found that two claims in an otherwise frivolous petition were meritorious and advanced these claims alone to second-stage review. *Id.* at 366. The Illinois Supreme Court rejected this partial summary dismissal, holding that if any part of a petition states the gist of a claim, the entire petition must advance to second-stage proceedings. *Id.* at 371. In contrast, the circuit court here did not find any of petitioner's claims to be meritorious.

¶ 49 Petitioner further claims that the circuit court violated the plain language of the Act when it failed to dismiss his actual innocence claim *in writing*. However, the Act " 'contains no expression that the proceedings should be held void if the trial court fails to specify its findings, nor would such a failure injure a defendant's rights since the dismissal of a post-conviction petition is subject to review.' " *Porter*, 122 Ill. 2d at 82 (quoting *People v. Wilson*, 146 Ill. App. 3d 567, 579 (1986)). The court's failure to expressly address petitioner's actual innocence claim in writing is therefore inconsequential.

¶ 50 III. Actual Innocence

¶ 51 Relying, as he did below, on codefendant Edward Franklin's affidavit, petitioner argues that his post-conviction petition set forth an arguable basis for a claim of actual innocence. The State responds that Franklin's affidavit does not constitute newly discovered evidence.

¶ 52 In his affidavit, Franklin stated that he "unknowingly implicated" petitioner in "a crime that he did not have anything to do with," and that he "had no contact with [petitioner] on November 16, 2001, the night of the shooting." Franklin further stated that he was always willing to testify to petitioner's innocence, but was never called to as a witness.

¶ 53 "The due process clause of the Illinois Constitution affords post-conviction petitioners the right to assert a freestanding claim of actual innocence based on newly discovered evidence."

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People v. Ortiz, 235 Ill. 2d 319, 333 (2009) (citing *People v. Washington*, 171 Ill. 2d 475, 489 (1996)). The supporting evidence must be newly discovered, material and not merely cumulative, and of such conclusive character as would probably change the result on retrial. *Id.* (quoting *People v. Morgan*, 212 Ill. 2d 148, 154 (2004)).

¶ 54 We turn first to the requirement that evidence be newly discovered. For evidence to be newly discovered, it must not have been available at a defendant's original trial, and the defendant could not have discovered the evidence sooner through due diligence. *People v. Morgan*, 212 Ill. 2d 148, 154 (2004). Evidence is not newly discovered when it presents facts already known to a defendant at or prior to trial, though the source of these facts may have been unknown, unavailable, or uncooperative. *People v. Jones*, 339 Ill. App. 3d 341, 365 (2010). An affidavit from a codefendant may be newly discovered evidence, even if the evidence was available prior to trial, where a codefendant cannot be forced to violate his or her fifth-amendment right against self-incrimination. *People v. Edwards*, 2012 IL 111711, ¶ 38; *People v. Molstad*, 101 Ill. 2d 128, 135 (1984).

¶ 55 Franklin's affidavit was not newly discovered. Petitioner admits that he knew of Franklin and his proposed testimony at the time of trial. He asserts, however, that Franklin's testimony is newly discovered, because, as a codefendant, he could not have been compelled to waive his fifth-amendment right and testify at petitioner's trial. While it is true that a codefendant may not be compelled to testify in violation of the fifth amendment, see *Molstad*, 101 Ill. 2d at 135, compulsion was not an issue in this case. Franklin admits in his affidavit that he would have waived his fifth-amendment right: he was "always***willing to testify to [petitioner's] innocence, but***was never called" as a witness. Thus, the exception expressed in *Molstad* does not apply here, and Franklin was not a newly discovered witness.

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¶ 56 Nor was this evidence of such conclusive character that it would probably change the result on retrial. *Ortiz*, 235 Ill. 2d at 336. Evidence that merely impeaches a witness will typically not be of such conclusive character as to justify post-conviction relief. *People v. Collier*, 387 Ill. App. 3d 630, 637 (2008). “[C]onclusive means the evidence, when considered along with the trial evidence, would probably lead to a different result.” *People v. Coleman*, 2013 IL 113307 ¶ 96. Probability, not certainty, is the key in determining whether a different result would occur. *Id.* ¶ 97.

¶ 57 In *People v. Jones*, 399 Ill. App. 3d 341, 366 (2010), a codefendant provided an affidavit, in which he averred that he was “solely responsible” for the murder in that case. We held that his affidavit was not “of such conclusive nature that it would probably change the result on retrial.” *Id.* Specifically, we noted that the affiant never actually inculpated himself. *Id.* Indeed, he never even admitted that he was present at the crime scene. *Id.* Here, as in *Jones*, we cannot say that the affidavit is of such a conclusive nature that it would probably change the result on retrial. Franklin, like the affiant in *Jones*, neither inculpated himself nor admitted that he was present at the crime scene. Franklin's affidavit was as vague as that provided in *Jones* and, given the firearms evidence and petitioner's confession, would not change the result on retrial.

¶ 58 Petitioner also offers an affidavit from Ruthie Guider, as well as his own affidavit, to support his actual innocence claim. Neither establishes an actual innocence claim. As we explain in greater detail below, Guider's affidavit is hearsay and, even assuming its truth, is not exculpatory. Petitioner's own affidavit, alleging that he was not in the car the night of the shooting, is also inadmissible, because it is not new evidence. *Morgan*, 212 Ill. 2d at 154. Petitioner has therefore failed to set forth an arguable basis for an actual innocence claim.

¶ 59 IV. Ineffective Trial Counsel

¶ 60 Petitioner argues that his trial attorney was ineffective in failing to investigate and present Brittney Brown. According to petitioner, Brown would have testified that she did not see him in the car the night of McFadden-Harris' murder and that petitioner's attorney never interviewed her. The State argues that the circuit court's dismissal was proper, because petitioner has failed to submit an affidavit from Brittney.

¶ 61 Criminal defendants have a constitutional right to the effective assistance of trial counsel. *Strickland v. Washington*, 466 U.S. 668, 687-89 (1984); *People v. Albanese*, 104 Ill. 2d 504, 526-27 (1984). To prevail on an ineffectiveness claim, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that this deficient performance resulted in prejudice. *Strickland*, 466 U.S. at 687-88. In the context of a first-stage post-conviction petition, an ineffective assistance claim may not be summarily dismissed if it is arguable that counsel's performance fell below an objective standard of reasonableness and arguable that the defendant suffered prejudiced as a result. *Hodges*, 234 Ill. 2d at 17. A claim that trial counsel failed to investigate and call a witness must be supported by an affidavit from the proposed witness. *People v. Enis*, 194 Ill. 2d 361, 380 (2000).

¶ 62 Petitioner attached a statement purporting to represent Brown's proposed testimony. The statement, however, is unsigned, unnotarized, and therefore not an affidavit. *Roth v. Illinois Farmers Insurance Co.*, 202 Ill. 2d 490, 493, 497 (2002) (“[A]n affidavit must be sworn to, and statements in a writing not sworn to before an authorized person cannot be considered affidavits.***An affidavit that is not sworn is a nullity.”). Without an affidavit from Brown, petitioner's ineffectiveness claim must fail. See *People v. Collins*, 202 Ill. 2d 59, 66 (2002) (“Failure to attach the necessary ‘affidavits, records, or other evidence’ is ‘fatal’ to a post-

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conviction petition." (citing *People v. Turner*, 187 Ill. 2d 406, 414 (1999)). Without affidavits, a reviewing court cannot determine whether the allegations are capable of objective or independent corroboration. *Id.* at 67.

¶ 63 Petitioner attempts to bolster Brown's alleged statement by attaching a signed, notarized affidavit from Guider, who claims that Brown told her she did not see him in the car on the night of McFadden-Harris' murder. Guider's affidavit is also insufficient to establish petitioner's claim. First, this is not an affidavit from the eyewitness counsel allegedly failed to investigate. *Enis*, 194 Ill. 2d at 380. Second, Guider's affidavit consists entirely of inadmissible hearsay. Hearsay affidavits are generally inadmissible. *People v. Morales*, 339 Ill. App. 3d 554, 565 (2003). Although claims are presumed to be true for purposes of first-stage review, this does not oblige the court to allow a claim to survive first-stage proceedings based on inadmissible hearsay evidence. See Ill. Sup. Ct. R. 191 (precluding hearsay affidavits unless the affiant is unavailable due to hostility or otherwise).

¶ 64 Citing *People v. Cihlar*, 111 Ill. 2d 212 (1986), and *People v. Sanchez*, 115 Ill. 2d 238 (1986), petitioner claims that hearsay evidence may be admissible to determine whether to grant a retrial. Neither case is on point. *Cihlar* addressed the admissibility of affidavits from third parties, who claimed that the victim, whose testimony alone led to the defendant's conviction, perjured herself by giving contradictory statements regarding the crime. *Cihlar*, 111 Ill. 2d at 216-17. Here, Brown's testimony would not show previous contradictory statements by an eyewitness or victim. In *Sanchez*, a case concerning a petition for relief from judgment pursuant to section 2-1401, the court departed from the general rule that a petition supported only by hearsay will not warrant relief, because the primary witness had invoked his fifth-amendment

right against self-incrimination. *Sanchez*, 115 Ill. 2d at 285. Procuring Brown's affidavit presents no such problem, and we see no reason to depart from the general rule here.

¶ 65 Finally, petitioner argues that, even if Guider's affidavit and Brown's alleged statement are inadmissible, he nonetheless explained, in accordance with the Act, why Brown was unavailable to sign the affidavit. Specifically, in his petition, he stated that he cannot locate her because he cannot afford an investigator. Petitioner refers to the Act's pleading requirement that petitions “have attached thereto affidavits, records, or other evidence supporting its allegations or***state why the same are not attached.” 725 ILCS 5/122-2. Assuming that petitioner has met this pleading requirement, however, he must still show that his attorney was arguably ineffective. *Hodges*, 234 Ill. 2d at 17. This he has failed to do.

¶ 66 Even if Brown's statement were signed and notarized, petitioner would not have established that trial counsel was arguably ineffective. According to petitioner, Brown would have testified that she did not see him in the car on the night of the shooting. Brown's testimony would not have been exculpatory. On the contrary, it would have corroborated petitioner's statement to police, in which he admitted ducking down in the car during the shooting. Thus, counsel was not arguably ineffective in failing to present Brown as a witness.

¶ 67 V. Ineffective Assistance of Appellate Counsel

¶ 68 Petitioner argues that his appellate attorney was ineffective in failing to challenge the trial court's noncompliance with Illinois Supreme Court Rule 431(b). The State responds that counsel's performance was not deficient, because this error was not preserved for appellate review and the plain error doctrine was inapplicable.

¶ 69 Rule 431(b), which codified the Illinois Supreme Court's holding in *People v. Zehr*, 103 Ill. 2d 472 (1984), provides the following:

“The court shall ask each potential juror, individually or in a group, whether that juror understands and accepts the following principles: (1) that the defendant is presumed innocent of the charge(s) against him or her; (2) that before a defendant can be convicted the State must prove the defendant guilty beyond a reasonable doubt; (3) that the defendant is not required to offer any evidence on his or her own behalf; and (4) that the defendant's failure to testify cannot be held against him or her; however, no inquiry of a prospective juror shall be made into the defendant's failure to testify when the defendant objects. The court's method of inquiry shall provide each juror an opportunity to respond to specific questions concerning the principles set out in this section.” Ill. S. Ct. R. 431(b) (eff. May 1, 2007).

¶ 70 Here, during voir dire, the trial court instructed potential jurors regarding the *Zehr* principles. The trial court failed, however, to ask whether they understood and accepted these principles. Ill. S. Ct. R. 431(b) (eff. May 1, 2007). The parties agree the circuit court failed to comply with Rule 431(b). They also agree that petitioner failed to preserve this issue for appellate review. The question, therefore, is whether appellate counsel was ineffective, where he failed to raise this issue as plain error on direct appeal.

¶ 71 Criminal defendants have a constitutional right to the effective assistance of counsel when pursuing a first appeal as of right. *Evitts v. Lucey*, 469 U.S. 387, 396-97 (1985). Appellate counsel is ineffective where his or her representation falls below an objective standard of reasonableness, and but for the deficiencies, there is a reasonable probability that the appeal would have been successful. *People v. Golden*, 229 Ill. 2d 277, 283 (2008). Appellate counsel will be deemed ineffective for failing to raise a meritorious issue that may have resulted in relief for the defendant. *People v. Moore*, 177 Ill. 2d 421, 428 (1997). At the first stage, a petition

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alleging ineffective assistance may not be summarily dismissed if it is arguable that appellate counsel's performance fell below an objective standard of reasonableness, and it is arguable that the defendant was prejudiced as a result. *Hodges*, 234 Ill. 2d at 17. Appellate counsel is not required to raise every conceivable issue on appeal, and it is not incompetence for counsel to refrain from raising an issue that he or she believes is without merit. *People v. Lacy*, 407 Ill. App. 3d 442, 457 (2011).

¶ 72 If a defendant fails to preserve an issue for review, appellate counsel may, in some circumstances, raise that issue under the plain error doctrine. *People v. Herron*, 213 Ill. 2d 167, 187 (2005). Under the plain error doctrine, a reviewing court may consider an unpreserved error, where the evidence was closely balanced or the error was so serious that it affected the fairness of defendant's trial and undermined the integrity of the judicial process. *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007). For an unpreserved error to warrant review under the "closely balanced" prong, the evidence must have been so closely balanced that the error alone severely threatened to tip the scales of justice against the defendant. *Herron*, 213 Ill. 2d at 186. A defendant bears the burden of persuasion in a plain error claim. *Id.* at 187.

¶ 73 In *People v. Thompson*, 238 Ill. 2d 598, 613-15 (2010), the Illinois Supreme Court held that failing to ask potential jurors if they understood and accepted the *Zehr* principles "does not implicate a fundamental right or constitutional protection" and therefore does not warrant consideration under the second plain-error prong. In light of *Thompson*, petitioner cannot prevail under the second plain-error prong. We must turn, therefore, to the first prong and determine whether the evidence here was closely balanced.

¶ 74 Petitioner claims that the evidence at trial was closely balanced, because his conviction rested primarily on his statement, and no eyewitnesses placed him in the car the night of the

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shooting. He cites *People v. Mullen* for the proposition that a confession, standing alone against conflicting evidence, may not be enough to sustain a murder conviction. 141 Ill. 2d 394, 403 (1990). Petitioner's statement did not stand alone, however. It was corroborated by expert testimony that the .38-caliber bullet that killed McFadden-Harris was fired from the gun recovered from petitioner's girlfriend. The State also presented eyewitnesses to McFadden-Harris' murder, as well as witnesses to petitioner's handwritten statement. Unlike in *Mullen*, the evidence presented at trial in this case did not conflict with petitioner's statement. See *Mullen*, 141 Ill. 2d at 401-02. Indeed, the evidence corroborated the events outlined in his statement. Roy Harris, for example, testified that, upon seeing at least three men firing shots from a vehicle, he returned fire. This corroborated petitioner's statement that he and three others fired at a man they believed to be a Gangster Disciple, and ducked when the man returned fire. Similarly, firearms evidence that a .38-caliber bullet fired from the gun recovered from petitioner's girlfriend killed McFadden-Harris, an innocent bystander, corroborates his statement that he fired blindly from the car window. We therefore reject petitioner's argument that the evidence in this case was closely balanced.

¶ 75 Even if petitioner's claim had merit, appellate counsel is not required to raise every conceivable issue on appeal. *Lacy*, 407 Ill. App. 3d at 457. Given that petitioner failed to preserve this issue, *Thompson* barred application of one of the plain-error prongs, and the evidence here was not closely balanced, we cannot say that appellate counsel erred in failing to raise this issue on direct appeal.

¶ 76 VI. Petitioner's Mittimus

¶ 77 Petitioner's mittimus reflects convictions for four counts of first degree murder. He asks that his mittimus be corrected to show only one count of first degree murder, as only one death

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occurred in this case. See *People v. Pitsonbarger*, 142 Ill. 2d 353, 377 (1990) (where a mittimus erroneously reflects multiple convictions for one act, the less culpable convictions must be vacated). We agree and order that his mittimus be corrected to reflect conviction on only Count 11, the most serious of the first degree murder charges.

¶ 78 CONCLUSION

¶ 79 For the foregoing reasons, we affirm the summary dismissal of the petitioner's post-conviction petition. Petitioner's mittimus shall be corrected to show one count of first degree murder.

¶ 80 Affirmed, mittimus corrected.