

to section 122-1 of the Act (725 ILCS 5/122-1 (West 2010)). In his postconviction petition, the defendant first argued that the three-year limitation for filing his petition was tolled until he was sentenced for a subsequent federal crime. He also claimed that he had ineffective assistance of counsel when he pled guilty to residential burglary. Specifically, he claimed his counsel was ineffective because he was not told that his conviction for residential burglary would enhance his sentence in a later federal conviction. The circuit court advanced the postconviction petition proceedings to the second stage and appointed counsel for the defendant.

¶ 6 On March 21, 2011, the circuit court entered an order dismissing the defendant's postconviction petition. In the order, the court aptly noted that "[i]f the defendant's argument were to prevail, the time limit for filing a post-conviction relief petition would never start to run at the time of the conviction because of the possibility that a defendant might at some point in the future commit an offense and make the argument that the time limit for filing such a petition should have been tolled in the meantime." The defendant appealed. On May 10, 2012, this court remanded the case because defense counsel did not file the certificate required by Supreme Court Rule 651(c) (eff. Apr. 26, 2012). *People v. Johnston*, 2012 IL App (5th) 110164-U (unpublished order under Supreme Court Rule 23). On remand, the circuit court adopted its prior findings with respect to the defendant's postconviction petition and dismissed the petition. The defendant appeals from the circuit court's order dismissing his postconviction petition.

¶ 7

ANALYSIS

¶ 8 We review the second-stage dismissal of a postconviction petition *de novo*. *People v. Coleman*, 183 Ill. 2d 366, 389 (1998). The defendant first argues that principles of equitable estoppel or equitable tolling should apply and his petition should not have been dismissed as untimely. Second, the defendant argues that he was provided with ineffective

assistance of counsel.

¶ 9

Timeliness

¶ 10 The defendant argues that his time for filing should have been tolled because his attorney did not inform him of the potential collateral consequences of entering a guilty plea. The defendant contends that he did not discover that he could face a federal sentencing enhancement until he was convicted of a federal crime, and thus, the "discovery rule," specifically the fraudulent concealment provision found in section 13-215 of the Code of Civil Procedure (735 ILCS 5/13-215 (West 2010)), should apply. Section 13-215 states that "[i]f a person liable to an action fraudulently conceals the cause of such action from the knowledge of the person entitled thereto, the action may be commenced at any time within 5 years after the person entitled to bring the same discovers that he or she has such cause of action, and not afterwards." 735 ILCS 5/13-215 (West 2010). Thus, a claimant's cause of action accrues at the time that the claimant discovers the injury. By contrast, section 122-1(c) of the Act states that "[i]f a defendant does not file a direct appeal, the post-conviction petition shall be filed no later than 3 years from the date of conviction, unless the petitioner alleges facts showing that the delay was not due to his or her culpable negligence." 725 ILCS 5/122-1(c) (West 2010). The Illinois Supreme Court has found that the filing period in section 122-1(c) is "akin to a statute of limitation." *People v. Bocclair*, 202 Ill. 2d 89, 98 (2002).

¶ 11 We cannot find any instance where equitable tolling, specifically, the "discovery rule," or equitable estoppel have been applied in a postconviction petition context. The Act provides a safety valve for defendants by including the "culpable negligence" exception. It is the defendant's burden to show that he lacked culpable negligence. *People v. Tooley*, 328 Ill. App. 3d 418, 420-21 (2002). Culpable negligence involves a disregard for the consequences that are likely to flow from one's actions. *People v. Lander*, 215 Ill. 2d 577,

586-87 (2005). "Neither a lack of knowledge of the law nor an unfamiliarity with the Act's requirements will excuse the delay in filing a suit." *People v. Stoecker*, 384 Ill. App. 3d 289, 292 (2008).

¶ 12 Here, the defendant does not show how he was prevented from determining that a previous criminal conviction could potentially enhance a later sentence. He does not present any information that refutes his culpable negligence in failing to timely file his petition. As the circuit court correctly stated, if the defendant's "discovery rule" argument were to prevail, the time limit for filing a postconviction petition would not begin to run until the defendant was convicted of a future crime.

¶ 13 Ineffective Assistance of Counsel

¶ 14 To prevail on a claim of ineffective assistance of counsel, a defendant must show that his counsel's performance fell below an objective standard of reasonableness and that the deficient performance prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668 (1984); *People v. Albanese*, 104 Ill. 2d 504 (1984). Prejudice is established when the defendant can show that there is a reasonable probability that, but for counsel's deficient performance, the result of the proceedings would have been different. *People v. Colon*, 225 Ill. 2d 125, 135 (2007).

¶ 15 The defendant argues that under the United States Supreme Court case *Padilla v. Kentucky*, 559 U.S. 356 (2010), his counsel was ineffective for not informing him about the possible future consequences of entering a guilty plea. Specifically, the defendant argues that counsel should have informed him that his conviction in the residential burglary case could potentially enhance a sentence for a future conviction.

¶ 16 In *Padilla*, a consequence of the defendant's guilty plea was deportation. *Id.* The United States Supreme Court found that an attorney's duties under *Strickland* included informing a defendant of the possibility of deportation. *Id.* The Illinois Supreme Court

recently held that an attorney's duty under *Strickland* applies to events that are "certain to occur." *People v. Hughes*, 2012 IL 112817, ¶ 49. In *Hughes*, the Illinois Supreme Court held that defense counsel had a minimal duty to inform the defendant that, following a prison sentence, the defendant would have to undergo a mandatory psychological evaluation related to the Sexually Violent Persons Commitment Act. *Id.* ¶ 60.

¶ 17 Here, we do not find that the defense counsel's assistance fell below an objective standard of reasonableness. Our supreme court stated that defense counsel's duty to inform the defendant about the potential collateral consequences of pleading guilty is only necessary in limited situations. *Id.* Defense counsel in this case would have had to speculate as to whether the defendant would commit a future crime. As noted above, our supreme court stated that counsel needs to inform a defendant about events that are certain to occur, not speculative situations that may not take place. The defendant pled guilty in 2003. He was not charged with the federal offense until 2007. Defense counsel could not have known that the defendant was going to commit another crime four years in the future. Thus, defense counsel's representation did not fall below an objective standard of reasonableness.

¶ 18 Further, the defendant has failed to show, other than by speculation, that he was prejudiced as a result of his attorney's representation. The defendant would have to show that he knew he was going to commit the federal crime four years into the future to have actually been prejudiced. This prospect is counterintuitive, because it would mean that the defendant knew, and would have to admit, that he was going to commit a federal crime in four years. He has failed to show that he would not have committed a future crime had he known that he would face a sentence enhancement.

¶ 19 Finally, in connection with his ineffective assistance claim, the defendant argues that he is actually innocent. The time limitation found in section 122-1(c) of the Act does not apply to claims of actual innocence. 735 ILCS 5/122-1(c) (West 2010). A defendant may

present a freestanding claim of actual innocence based on newly discovered evidence. *People v. Orange*, 195 Ill. 2d 437, 459 (2001). The newly discovered evidence must be of such a conclusive nature that it would have changed the result of the trial, or in this case, the proceedings. *People v. Holey*, 182 Ill. 2d 404, 449 (1998). Newly discovered evidence must be evidence that was not available at the time of trial and could not have been discovered sooner through diligence. *People v. Dunn*, 306 Ill. App. 3d 75, 80 (1999).

¶ 20 Here, the defendant claims that the newly discovered evidence in his case was the potential sentencing enhancement that he could face in the future. However, the defendant could have discovered, through diligence, that a guilty plea could serve to enhance a sentence in the future. Moreover, the defendant does not attach any affidavit or disclose any other information that was not available at the time that he pled guilty. Thus, the defendant's claim of actual innocence fails.

¶ 21

CONCLUSION

¶ 22 For the foregoing reasons, the judgment of the circuit court of Monroe County is affirmed.

¶ 23 Affirmed.