Fundamental Fairness over Finality: *People v. Reed* and Freestanding Innocence Claims for Guilty-Plea Defendants in Illinois

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It is well documented that most criminal proceedings are resolved via plea agreements. However, given the high stakes, imbalanced bargaining power, and transactional costs, defendants have pled guilty to crimes of which they are actually innocent. Until recently, it was uncertain whether defendants in Illinois were able to raise freestanding claims of actual innocence to collaterally attack a sentence resulting from a guilty plea.

In People v. Reed*, the Illinois Supreme Court established an important relief valve for innocent defendants who plead guilty. The court held that a defendant can collaterally attack a sentence resulting from a guilty plea if they produce new, material, and noncumulative evidence which clearly and convincingly demonstrates that a new trial would probably result in acquittal. This Note will explore the pre-existing statutory and case-law landscape for guilty-plea defendants in Illinois and analyze the court's holding in* Reed*. This Note will also compare the test established in* Reed *to standards in other states and tease out potential issues with implementing the holding. Finally, this Note will argue that while this is indeed an important development for guilty-plea defendants, structural dependence on plea bargaining and the high standard required to succeed in post-conviction claims make it unlikely that* Reed *will drastically change the incidence of or outcome for innocent individuals who plead guilty to crimes they did not commit.*

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I. INTRODUCTION

A vast majority of felony charges nationwide are resolved with guilty pleas.[1] In Illinois, fifty-two percent of felony charges were resolved in this manner, corresponding to 27,000 felony defendants in 2020.[2] The statistics for federal felony defendants are even more drastic, with well over ninety percent of convictions resulting from guilty pleas.[3] Individuals who plead guilty to crimes waive a host of rights beyond just the right to a trial by a jury.[4] And, as has become increasingly clear in recent decades, thousands of individuals have been wrongfully incarcerated,

1. *See* SEAN P. ROSENMERKEL ET AL., U.S. DEP'T OF JUST., BUREAU OF JUST. STATS., FELONY SENTENCES IN STATE COURTS, 2006 — STATISTICAL TABLES 25 (2010), https://bjs.ojp.gov/content/pub/pdf/fssc06st.pdf [https://perma.cc/FKK2-K6RH] (providing a statistical breakdown of state felony convictions, indicating that ninety-four percent of felonies nationwide resulted from a guilty plea).

2. SUP. CT. OF ILL., IL COURTS ANNUAL REPORT 2020 82–83 (2020), https://ilcourtsaudio.blob.core.windows.net/antilles-resources/resources/de4253a6-147f-4643-a201-0e29ce403179/2020%20Annual%20Report%20Statistical%20Summary.pdf [https://perma.cc/9Q9F-SA25].

3. ADMIN. OFF. OF THE U.S. CTS., TABLE D-4 — CRIMINAL STATISTICAL TABLES FOR THE FEDERAL JUDICIARY (2021), https://www.uscourts.gov/statistics/table/d-4/statistical-tables-federal-judiciary/2021/06/30 [https://perma.cc/M7EN-HETA].

4. *See* People v. Burton, 703 N.E.2d 49, 61 (Ill. 1998) ("A plea of guilty waives all nonjurisdictional defenses or defects."); Ill. Sup. Ct. R. 402, 605 (describing the admonitions required before entering a guilty plea and sentencing under that plea).

including some who pled guilty to the charged crime.[5] As a result, individuals who are wrongfully convicted following a guilty plea are particularly disadvantaged compared to individuals serving sentences for crimes which they did not commit. Given the ubiquity of plea agreements, this issue should be of particular concern for practitioners, lawmakers, and courts.

The Illinois Supreme Court recently grappled with this issue in *People v. Reed*, where it addressed whether an individual who pled guilty to a crime can collaterally attack their sentence with a freestanding claim of innocence.[6] In holding that such individuals could indeed mount such a collateral attack, the court echoed its reasoning in *People v. Washington*, in which it held that the Illinois Constitution's Due Process Clause demanded courts to consider a *trial-convicted* defendant's freestanding innocence claim "as a matter of both procedural and substantive due process."[7] While the *Reed* court recognized the importance of the State's interest in maintaining the finality of proceedings, it ultimately concluded that "'[i]mprisonment of the innocent would also be so conscience shocking as to trigger operation of substantive due process' . . . and to ignore such a claim would be fundamentally unfair in terms of procedural due process."[8] The *Reed* court modified the test created by *Washington*,[9] holding that a successful actual-innocence claim requires the guilty-plea defendant to "provide new, material, noncumulative evidence that clearly and convincingly demonstrates that a trial would probably result in acquittal."[10] By holding that such defendants can collaterally attack their convictions with freestanding innocence claims, the court took an important step to alleviate the irreparable harm caused by wrongful convictions.

While *Reed* established a critical avenue of relief for individuals who plead guilty to a crime they did not commit, absent other reforms, it is unlikely to drastically change the landscape of innocent individuals being incarcerated. Similarly, it is unlikely to have a substantial effect on the

5. *See generally* THE NATIONAL REGISTRY OF EXONERATIONS, UNIV. OF MICH. L. SCH., https://www.law.umich.edu/special/exoneration/Pages/about.aspx [https://perma.cc/D84V-UX5M] (last visited Feb. 6, 2022).

6. People v. Reed, 2020 IL 124940, ¶ 1.

7. People v. Washington, 665 N.E.2d 1330, 1336 (Ill. 1996); *see Reed*, 2020 IL 124940, ¶¶ 29–32, 40–41 (discussing and extending *Washington* to cover guilty-plea defendants).

8. *Reed*, 2020 IL 124940, ¶¶ 19, 42 (alteration in original) (quoting *Washington*, 665 N.E.2d at 1336).

9. In *Washington*, the court held that relief will be granted if "the supporting evidence [is] new, material, noncumulative and, most importantly, 'of such conclusive character' as would 'probably change the result on retrial.'" *Washington*, 665 N.E.2d at 1337 (quoting People v. Silagy, 507 N.E.2d 830, 834 (Ill. 1987)). Thus, the difference between the two tests is that a guilty-plea defendant simply has a higher burden to satisfy compared to a trial-convicted defendant.

10. *Reed*, 2020 IL 124940, ¶ 49.

plea-bargaining process.

Part I of this Note discusses the controlling state law—the Illinois Post-Conviction Hearing Act—and briefly surveys jurisprudence interpreting the Illinois Constitution's Due Process Clause. Then, it turns to a general discussion of plea bargaining in the United States and concludes by establishing the case-law context for the court's holding, including a detailed analysis of the holding in *Washington*. Part II turns to a discussion of *Reed*, including the factual background, the court's reasoning, and Justice Burke's concurring opinion. Part III analyzes the majority and concurring opinions and compares the court's holding to similar cases in Colorado, Iowa, and Texas.[11] Part IV discusses the impact of *Reed*, arguing that while its holding is correct and an important step to ensuring the innocent do not remain behind bars, it is far from a panacea and unlikely to greatly change the landscape of innocent individuals being incarcerated. Ultimately, *Reed*'s impact on plea bargaining will likely be muted because of the persistent structural incentives to plead guilty and the high bar defendants must clear to succeed in a post-conviction proceeding. Part IV also explores potential wrinkles for lower courts applying *Reed* and provides recommendations for navigating those wrinkles.

II. BACKGROUND

A. The Illinois Post-Conviction Hearing Act

Aside from direct appeals, the primary avenue for post-conviction remedies in Illinois is the Post-Conviction Hearing Act (the Act).[12] The Act was initially passed in 1949 in response to the United States Supreme Court's criticism of the convoluted post-conviction procedures in Illinois.[13] The Act provides for a separate civil action, distinct from the post-sentencing phase of the original criminal case.[14] Notably, only incarcerated individuals can pursue relief under the Act—once an individual

11. These states are chosen because the majority and concurring opinions refer to their highest courts' holdings on the issue of guilty-plea defendants raising freestanding claims of innocence.

12. *See generally* 725 ILL. COMP. STAT. 5/122-1 (2021). Defendants can also collaterally attack a sentence with a petition to vacate the sentence under 735 ILL. COMP. STAT. 5/2-1401 (a "Section 2-1401 petition"), but this must generally be done within two years of the judgment. Like a petition under the Act, a Section 2-1401 petition is a separate civil action which can attack a criminal sentence. People v. Vincent, 871 N.E.2d 17, 22–23 (Ill. 2007). Additionally, a defendant can seek state or federal habeas corpus. *See* Round v. Lamb, 2017 IL 122271, ¶ 8 (discussing state habeas corpus); Metrish v. Lancaster, 569 U.S. 351, 357–58 (2013) (discussing federal habeas corpus).

13. *See* Alan Rabunski, *Practice and Procedure Under the Illinois Post-Conviction Hearing Act*, 8 J. MARSHALL J. PRAC. & PROC. 129, 129–30 (1974) (describing the Court's castigation of Illinois and the legislature's response with the Post-Conviction Hearing Act).

14. *Reed*, 2020 IL 124940, ¶ 18 ("A post-conviction petition is not a substitute for appeal but, rather, is a collateral attack." (citing People v. English, 2013 IL 112890, ¶ 21)).

completes their sentence, they are foreclosed from relief through the Act.[15] But so long as the action is filed while the individual is incarcerated, courts will consider the action, even if the individual shortly thereafter completes their sentence.[16]

Under the Act, convicted individuals may attack their sentences by claiming a substantial denial of federal or state constitutional rights.[17] Common claims include ineffective assistance of counsel, denial of due process, and denial of the right to a fundamentally fair trial.[18] However, petitioners can also allege that they were actually innocent.[19] Unlike in a direct appeal, a petitioner in a post-conviction action can present claims on matters outside of the record, but under the doctrine of res judicata, they are precluded from raising claims made on direct appeal.[20] Furthermore, any issues they could have raised in direct appeal, but did not, are waived.[21] To begin, a petitioner must file their claim in the court that imposed the sentence.[22] There are three stages of review through which a petitioner must pass for a new trial to be granted.[23]

The first stage, which is often commenced pro se, requires the claim to clear a low threshold for summary dismissal.[24] The court reviews the claim to see whether it is "frivolous or patently without merit."[25] The claim will survive summary dismissal if it states a "gist of a constitutional claim," a low threshold requiring limited detail and no legal arguments.[26] The allegations must be liberally construed, and the court is forbidden to engage in any fact-finding—the court merely questions the sufficiency of the pleadings.[27] A post-conviction petition will be dismissed at the first

15. 725 ILL. COMP. STAT. 5/122-1(a) (2021) ("Any person imprisoned in the penitentiary may institute a proceeding under this Article . . . ."); Hugh M. Mundy, *Free, But Still Behind Bars: Reading the Illinois Post-Conviction Hearing Act to Allow Any Person Convicted of a Crime to Raise a Claim of Actual Innocence*, 35 B.C.J.L. & SOC. JUST. 1, 4 (2015).

16. People v. Davis, 235 N.E.2d 634, 636 (Ill. 1968).

17. 725 ILL. COMP. STAT. 5/122-1(a)(1) (2021).

18. Kerry J. Bryson, *A Guide to the Illinois Post-Conviction Hearing Act*, 91 ILL. BAR J. 248, 248 (2003).

19. 725 ILL. COMP. STAT. 5/122-1(a-5) (2021).

20. People v. Dorsey, 2021 IL 123010, ¶ 31 ("[T]he doctrine of *res judicata* bars issues that were raised and decided on direct appeal, and forfeiture precludes issues that could have been raised but were not."); Bryson, *supra* note 18, at 251.

21. 725 ILL. COMP. STAT. 5/122-3 (2021); *Dorsey*, 2021 IL 123010, ¶ 31.

22. 725 ILL. COMP. STAT. 5/122-1(b) (2021).

23. *See* 725 ILL. COMP. STAT. 5/122-2.1 to -6 (2021) (setting forth the three-step process); *see also* People v. Marquez, 756 N.E.2d 345, 348 (Ill. App. Ct. 2001) ("The Post–Conviction Hearing Act [] establishes a three-step process for adjudicating petitions . . . ."); Bryson, *supra* note 18, at 249 (surveying the three-step process).

24. People v. Hatter, 2021 IL 125981, ¶ 23 (citing People v. Tate, 2012 IL 112214, ¶ 9).

25. 725 ILL. COMP. STAT. 5/122-2.1(a)(2) (2021).

26. *See Hatter*, 2021 IL 125981, ¶ 24 ("The allegations of the petition, taken as true and liberally construed, must present the gist of a constitutional claim." (citing People v. Edwards, 757 N.E.2d 442, 445 (Ill. 2001))); Bryson, *supra* note 18, at 249 (discussing the "gist" threshold in *Edwards*).

27. People v. Coleman, 701 N.E.2d 1063, 1075 (Ill. 1998).

stage only if it is "based on an indisputably meritless legal theory or a fanciful factual allegation."[28] Thus, because the court's analysis at this point is essentially legal, if the petition is summarily dismissed, the petitioner can appeal and the dismissal is subject to plenary review (i.e., de novo review).[29] If the court finds a valid "gist of a constitutional claim," it will docket the claim and proceed to stage two, securing an evidentiary hearing.[30]

The second stage requires the petitioner to make a "substantial showing" of a constitutional violation.[31] At this stage, the court may appoint counsel to indigent clients; however, such appointment is merely provided by statute and is not constitutionally guaranteed.[32] The court will award an evidentiary hearing only if the allegations in the petition make a substantial showing that the petitioner's constitutional rights were violated and that those allegations are appropriately supported by the record and any accompanying affidavits.[33] The court must accept as true all well-pleaded facts and liberally construe the allegations in favor of the petitioner, but conclusory statements alone cannot establish a substantial showing.[34] At this stage, the State also gets its first opportunity to respond, either with an answer or a motion to dismiss.[35] On the State's motion to dismiss, the court must again take as true all "well-pleaded facts that are not positively rebutted by the trial record."[36] When ruling on the motion to dismiss, the court is precluded from engaging in fact-finding.[37] If the court ultimately finds that the petitioner has indeed mounted a substantial showing of a constitutional violation in their conviction, the petition proceeds to the final step, an evidentiary hearing.[38] Similar to the first stage, if the petitioner appeals the denial of an evidentiary hearing, the appellate court reviews de novo.[39]

At the final stage, the evidentiary hearing, the petitioner bears the burden of establishing a substantial denial of constitutional rights.[40] At its

28. *Hatter*, 2021 IL 125981, ¶ 23 (citing People v. Hodges, 912 N.E.2d 1204, 1212 (Ill. 2009)).
29. *Id.* ¶ 24 (citing People v. Boykins, 2017 IL 121365, ¶ 9); *Coleman*, 701 N.E.2d at 1075.
30. 725 ILL. COMP. STAT. 5/122-2.1(b) (2021).
31. People v. Johnson, 2018 IL 122227, ¶ 15; *Coleman*, 701 N.E.2d at 1072.
32. 725 ILL. COMP. STAT. 5/122-4 (2021); People v. McNeal, 742 N.E.2d 269, 273 (Ill. 2000).
33. *Johnson*, 2018 IL 122227, ¶ 15; People v. Morgan, 719 N.E.2d 681, 697 (Ill. 1999).
34. *Morgan*, 719 N.E.2d at 697; *Coleman*, 701 N.E.2d at 1072.
35. 725 ILL. COMP. STAT. 5/122-5 (2021); *see Johnson*, 2018 IL 122227, ¶ 15 (discussing the parameters of this second stage).
36. People v. Childress, 730 N.E.2d 32, 35 (Ill. 2000).
37. *Id.* ("The inquiry into whether a post-conviction petition contains sufficient allegations of constitutional deprivations does not require the trial court to engage in any fact-finding or credibility determinations.").
38. *Johnson*, 2018 IL 122227, ¶ 15; *see also* Bryson, *supra* note 18, at 251 (providing a general overview of the three-step process for post-conviction petitions).
39. *Childress*, 730 N.E.2d at 35.
40. People v. Moore, 327 N.E.2d 324, 326 (Ill. 1975).

discretion, the court may allow discovery and consider any affidavits, depositions, testimony, or other evidence in determining whether the petitioner's sentence is unconstitutional.[41] If the petitioner succeeds at the evidentiary hearing, the court will vacate the sentence and enter any other appropriate order, such as ordering a retrial.[42] Either party may appeal from the court's judgment. Because the trial court engages in substantial fact-finding at the evidentiary hearing, unlike for the other stages, an appellate court will only reverse for manifest error.[43]

Another important provision of the Act concerns successive petitions.[44] The Act allows the filing of only one petition as of right, and defendants face "immense procedural default hurdles when bringing a successive postconviction petition."[45] Courts will only entertain successive petitions in limited circumstances where fundamental fairness requires it.[46] Before pursuing a successive petition, the petitioner must first obtain leave of the court.[47] Such leave will be granted only if the petitioner demonstrates good cause for failure to bring the claim in the original petition, and that prejudice resulted from that failure.[48]

This "cause-and-prejudice" test is stringent—only where fundamental fairness requires "will the strict application of [the] statutory bar be relaxed."[49] A petitioner can show good cause by "identifying an objective factor that impeded his or her ability to raise a specific claim" in the initial petition.[50] The petitioner can show prejudice "by demonstrating that the claim not raised during his or her initial post-conviction proceedings so infected the trial that the resulting conviction or sentence violated due process."[51]

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41. People *ex rel*. Daley v. Fitzgerald, 526 N.E.2d 131, 135 (Ill. 1988); 725 ILL. COMP. STAT. 5/122-6 (2021).

42. 725 ILL. COMP. STAT. 5/122-6 (2021).

43. People v. Pitsonbarger, 793 N.E.2d 609, 619 (Ill. 2002) (citing People v. Coleman, 701 N.E.2d 1063, 1074 (Ill. 1998)); People v. Thompkins, 732 N.E.2d 553, 568–69 (Ill. 2000).

44. *See* Bryson, *supra* note 18, at 251 (discussing successive post-conviction petitions).

45. People v. Dorsey, 2021 IL 12310, ¶ 32 (first quoting People v. Lusby, 2020 IL 124046, ¶ 27; then quoting People v. Davis, 2014 IL 115595, ¶ 14).

46. *See id.* ¶ 32 (stating that the hurdles imposed by the Act are "lowered only in very limited circumstances so as not to impede on the finality of criminal litigation"); People v. Flores, 606 N.E.2d 1078, 1083 (Ill. 1992) ("[W]here fundamental fairness so requires, strict application of procedural bars may be relaxed.").

47. 725 ILL. COMP. STAT. 5/122-1(f) (2021).

48. *Id.* The Illinois Supreme Court originally created this "cause-and-prejudice" test, which was then codified by the General Assembly. *See Davis*, 2014 IL 115595, ¶ 14 ("We observe that following *Pitsonbarger*, the General Assembly added section 122-1(f) to the Act, which codifies our cause-and-prejudice case law.").

49. People v. Pitsonbarger, 793 N.E.2d 609, 621 (Ill. 2002).

50. 725 ILL. COMP. STAT. 5/122-1(f) (2021); *see also Dorsey*, 2021 IL 123010, ¶ 32 (discussing successive post-conviction petitions).

51. 725 ILL. COMP. STAT. 5/122-1(f) (2021); *see also Dorsey*, 2021 IL 123010, ¶ 32 (discussing successive post-conviction petitions).

However, a court may grant leave to file a successive petition even if a defendant cannot satisfy the cause-and-prejudice test if withholding leave to file would precipitate "a fundamental miscarriage of justice."[52] In other words, a petitioner must satisfy the cause-and-prejudice test or demonstrate that, notwithstanding their failure to raise a claim in an earlier petition, withholding leave to file will cause a miscarriage of justice. "To demonstrate such a miscarriage of justice, a petitioner must show actual innocence."[53] Ultimately, while the Act creates the procedure for adjudicating post-conviction petitions, it is the Due Process Clause of the Illinois Constitution which actually ensures that defendants can challenge an unlawful conviction.

B. Due Process Clause of the Illinois Constitution

To aid in interpretating the Illinois Constitution, the Illinois Supreme Court employs a "limited-lockstep approach" when a provision is analogous to a provision in the U.S. Constitution.[54] Under the limited-lockstep approach, the court presumptively interprets cognate provisions of the state constitution in the same manner that the U.S. Supreme Court has interpreted the federal constitution.[55] However, the Illinois Supreme Court may diverge from the interpretation of the U.S. Supreme Court if the state constitutional framers indicated a different intent in the cognate provision, or if Illinois's long-standing values and traditions, as reflected in case law, support a different interpretation.[56] How a court interprets the Illinois Constitution is important, given that a claim under the Post-Conviction Hearing Act turns on showing a substantial deprivation of a state or federal constitutional right.

Echoing the Fourteenth Amendment to the U.S. Constitution, Article I, Section 2 of the Illinois Constitution provides "[n]o person shall be deprived of life, liberty or property without due process of law nor be denied the equal protection of the laws."[57] The Illinois Supreme Court has noted that nothing in the state constitutional convention record suggests that the legislature intended for the state's Due Process Clause to be

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52. *Pitsonbarger*, 793 N.E.2d at 621.

53. *Id.* In the context of the death penalty, the petitioner can also demonstrate a miscarriage of justice will occur by showing that but for the claimed constitutional violation, the petitioner would not have been eligible for the death penalty. *Id.* Because Illinois abolished the death penalty in 2011, petitioners can now effectively only prove that a miscarriage of justice will occur despite failing to satisfy the cause-and-prejudice test by showing actual innocence. *See* 725 ILL. COMP. STAT. 5/119-1(a) (2022) (abolishing the death penalty).

54. People v. Caballes, 851 N.E.2d 26, 42 (Ill. 2006).

55. James K. Leven, *A Roadmap to State Judicial Independence Under the Illinois Limited Lockstep Doctrine Predicated on the Intent of the Framers of the 1970 Illinois Constitution and Illinois Tradition*, 62 DEPAUL L. REV. 63, 68 (2012).

56. *Id.* at 68–69.

57. ILL. CONST. art. I, § 2.

interpreted differently from the Fourteenth Amendment's Due Process Clause.[58] Nevertheless, in following its limited-lockstep doctrine, the court has occasionally found that the Illinois Constitution's Due Process Clause affords protection greater than the federal constitution.[59] The court held that, at its core, the state Due Process Clause requires "fairness, integrity, and honor in the operation of the criminal justice system, and in its treatment of the citizen's cardinal constitutional protections."[60] While any state constitutional violation can be grounds for a petition under the Post-Conviction Hearing Act, many petitions rely on deprivation of procedural or substantive due process; thus, courts' interpretation of this clause is critically important.[61]

C. Plea Bargaining

Plea bargains are ubiquitous in the U.S. criminal justice system. Indeed, well over ninety percent of all felony convictions are obtained in this manner.[62] These judicial shortcuts are facilitated by several structural features of the U.S. legal system, including its adversarial nature, the relatively large latitude granted to prosecutors to choose which charges to pursue, the sole power of the prosecutor to pursue criminal charges, and the severe penalties imposed by criminal statutes.[63] All parties make various tradeoffs for plea agreements.

From defendants' perspectives, plea bargains may be desirable because they save defendants the anxiety and cost of litigation, and they may be able to obtain lighter sentences than if they proceeded to trial.[64] In exchange, they waive many constitutional rights and forgo the ability to prove their innocence.[65] In turn, the State saves the time and effort of

58. People v. Washington, 665 N.E.2d 1330, 1335 (Ill. 1996).

59. *See, e.g.*, People v. McCauley, 645 N.E.2d 923, 929 (Ill. 1994) (holding that the state due process and self-incrimination clauses afforded defendants greater rights to access counsel than the Fifth Amendment of the U.S. Constitution); *Washington*, 665 N.E.2d at 1336–37 (extending the protections of the state Due Process Clause to allow freestanding claims of actual innocence following conviction after trial where the federal constitution did not). *Washington* is discussed in greater detail below in Section II.D.1.

60. *McCauley*, 645 N.E.2d at 937 (citations omitted).

61. *See* Bryson, *supra* note 18, at 248–49 (noting that aside from ineffective assistance of counsel, denial of due process and denial of the right to a fundamentally fair trial are common bases for post-conviction petitions).

62. ROSENMERKEL ET AL., *supra* note 1, at 1 (reporting that ninety-four percent of felony offenders sentenced in 2006 pleaded guilty).

63. Jacqueline E. Ross, *The Entrenched Position of Plea Bargaining in United States Legal Practice*, 54 AM. J. COMP. L. 717, 717–18 (Supp. 2006).

64. *See generally id.* at 723–31; *see also* Boaz Sangero, *Safety from Plea-Bargains' Hazards*, 38 PACE L. REV. 301, 312–13 (2018) (discussing the tradeoffs made by parties in negotiated plea agreements).

65. *See* People v. Reed, 2020 IL 124940, ¶ 27 (discussing the tradeoffs made by defendants in plea agreements); Sangero, *supra* note 64, at 313 ("[W]hen a defendant waives his right to a full

a trial, but it forgoes the ability to present all of its evidence and may agree to a charge lower than what it could likely prove.[66] The court is also often eager to accept plea agreements to ease congested dockets.

Supporters of plea agreements often cite these mutual tradeoffs as a reason for which they are desirable.[67] However, despite the logical sense and benefits of plea agreements, many disagree with their use entirely or would prefer they be used far more sparingly.[68] For example, many criticize the plea-bargaining system as encouraging gamesmanship and bluffing by prosecutors.[69] Plea bargains are also criticized as being particularly pernicious for indigent defendants who do not have the resources to fight charges or who may not be able to accurately consider the consequences of their decisions.[70] Furthermore, given the harsh penalties of many crimes, some consider virtually all plea bargains to be the result of coercion, especially in light of the so-called "trial tax."[71]

Despite their controversy, plea agreements remain an entrenched feature of the criminal justice system. Courts generally treat them as binding contracts with each party usually facing repercussions for breaking them.[72] If the prosecution fails to deliver on any promises which induced the defendant to plead guilty, courts will allow the defendant to withdraw from the plea or may even force specific performance.[73] On the other hand, if the defendant breaks the deal, the prosecution can pursue any

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trial and suffices with conviction in a plea-bargain, he is also waiving the requirement to prove guilt beyond a reasonable doubt, which is one of the principal mechanisms for preventing false convictions.").

66. *See Reed*, 2020 IL 124940, ¶ 25 (discussing the tradeoffs made by the state in plea agreements); *see also* Sangero, *supra* note 64, at 313 (noting that the state saves resources by foregoing a trial and can channel them into law enforcement, thereby increasing deterrence).

67. *See, e.g.*, Ross, *supra* note 63, at 725–27 (discussing arguments in support of plea bargains).

68. *See* Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 STAN. L. REV. 29, 30–31 (2002) (discussing the general "take it or leave it" approach most practitioners, judges, and academics take toward plea-bargaining).

69. *See* Ross, *supra* note 63, at 723–31 (discussing the various arguments for and against plea bargains); s*ee also* Wright & Miller, *supra* note 68, at 33 (identifying dishonesty and inaccessibility as plea bargaining's "least attractive features").

70. *See* Ross, *supra* note 63, at 723–31 (discussing the various arguments for and against plea bargains).

71. *Id.*; J. Vincent Aprile II, *Judicial Imposition of the Trial Tax*, 32 GPSOLO 74, 74 (2015) ("Trial tax is a euphemism for a judge imposing a more severe sentence on a defendant, in whole or in part, because the accused, who elected to reject the prosecution's plea agreement and go to trial, wasted judicial and prosecutorial resources involved in a trial."); *see also* Brief of Amicus Curiae Center on Wrongful Convictions in Support of Petitioner-Appellant at 13, People v. Reed, 2020 IL 124940 (No. 124940) ("[The] trial 'tax' also acts as a powerful incentive for defendants to give up their constitutional right to a fair trial.").

72. Ross, *supra* note 63, at 722; *see also* Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1910 (1992) ("The courts . . . have proceeded to construct a body of contract-based law to regulate the plea bargaining process . . . .").

73. Ross, *supra* note 63, at 722.

dropped charges or ignore any agreement not to seek harsher sentences.[74]

Just as with a trial, a guilty plea does not always ensure that the person convicted is actually guilty. Of the 2,869 exonerations currently recorded in the National Registry of Exonerations, nearly twenty percent involved some type of guilty plea.[75] Often, to reverse their wrongful convictions, these individuals must overcome hurdles even more substantial than trial-convicted defendants. For example, because these individuals waived many constitutional guarantees by pleading guilty, they face increased procedural hurdles and more limited avenues for relief.[76]

D. Relevant Case Law

The Illinois Supreme Court's holding in *Reed* was informed by several key cases. Most prominent among them is *People v. Washington*, in which the Illinois Supreme Court first considered freestanding innocence claims. Another key case important to creating the standard in *Reed* was *People v. Schneider*, in which the Colorado Supreme Court confronted the same issue faced by the *Reed* court. Additionally, in *People v. Cannon*, on which the Illinois Appellate Court, Fourth District, relied in *Reed*, the Illinois Supreme Court briefly touched upon a defendant's challenge to a guilty-plea conviction. Finally, in *People v. Shaw*, the Illinois Appellate Court, First District, set up the confrontation between the appellate districts, necessitating the Illinois Supreme Court's intervention.

1. *People v. Washington*

In the pivotal case of *People v. Washington*, the Illinois Supreme Court held that the Illinois Constitution's Due Process Clause guarantees the ability of trial-convicted defendants to pursue a freestanding claim of innocence under the Post-Conviction Hearing Act.[77] The defendant in *Washington* was originally charged with murder.[78] At trial, two witnesses testified that they saw the defendant shoot the victim while the defendant contended that he was at the grocery store when the murder occurred.[79] The defendant was ultimately convicted and sentenced to twenty-five

74. *Id.* at 723.

75. THE NAT'L REGISTRY OF EXONERATIONS, *supra* note 5 (filtering the records to only those with guilty plea "tags" shows that 640 out of the 2,961 exonerations involved guilty pleas).

76. *See* People v. Reed, 2020 IL 124940, ¶ 27 ("As such, by pleading, a defendant 'waives all nonjurisdictional defenses or defects,' including constitutional ones."); THE NAT'L REGISTRY OF EXONERATIONS, INNOCENTS WHO PLEAD GUILTY 1 (2015), https://www.law.umich.edu/special/exoneration/Documents/NRE.Guilty.Plea.Article1.pdf [https://perma.cc/4XQD-FE4J] (discussing the additional hurdles guilty-plea defendants face); *supra* Part I.A (discussing the procedural hurdles of Illinois's Post-Conviction Hearing Act).

77. People v. Washington, 665 N.E.2d 1330, 1337 (Ill. 1996).

78. *Id.* at 1331.

79. *Id.*

years in prison.[80]

Eight years later, in 1990, the defendant filed a post-conviction petition alleging, inter alia, ineffective assistance of counsel.[81] The post-conviction court held *in camera* hearings in which an individual testified that her boyfriend was actually the one that shot the victim, and that she was threatened to keep quiet.[82] Based on this testimony, the defendant amended his post-conviction petition to also include a freestanding claim of innocence, and the post-conviction court granted a retrial on only that ground.[83] The State appealed and the appellate court affirmed.[84] The Illinois Supreme Court then granted the State's petition for leave to appeal.[85]

Since all petitions under the Post-Conviction Hearing Act must allege a constitutional violation, the court began by analyzing whether a federal constitutional violation had occurred. The court turned to the U.S. Supreme Court's holding in *Herrera v. Collins* and determined that federal due process was not implicated by the defendant's claim of actual innocence.[86] However, by invoking its limited-lockstep doctrine, the court held that the defendant's freestanding claim of actual innocence did implicate the Illinois Constitution's Due Process Clause.[87] The court held that as a matter of both procedural and substantive due process, the defendant could present his claim of actual innocence under the Post-Conviction Hearing Act.[88] In terms of procedural due process, ignoring the defendant's claim would be fundamentally unfair.[89] Furthermore, allowing an innocent person to remain imprisoned would be "so conscience shocking as to trigger . . . substantive due process."[90] The court held that to obtain relief with a claim of freestanding innocence, petitioners must

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80. *Id.*
81. *Id.*
82. *Id.* at 1331–32.
83. *Id.* at 1332.
84. *Id.*
85. *Id.*
86. *Id.* at 1333. In *Herrera*, the U.S. Supreme Court held that defendants cannot succeed in a federal habeas corpus petition by only pleading a freestanding claim of innocence. Herrera v. Collins, 506 U.S. 390, 400 (1993). Because the presumption of innocence is dispelled after a lawful conviction, the claim must be analyzed as a matter of procedural due process instead of substantive due process. *Id.* at 407 n.6. As a result, the habeas petitioner must allege "an independent constitutional violation occurr[ed] in the underlying state criminal proceeding." *Id.* at 400.
87. *Washington*, 665 N.E.2d at 1336.
88. *Id.*
89. *Id.* The Illinois Supreme Court has noted that "[t]he essence of due process is fundamental fairness." People v. McCauley, 645 N.E.2d 923, 937 (Ill. 1994) (citations omitted). As a result, "[d]ue process essentially requires fairness, integrity, and honor in the operation of the criminal justice system . . . ." *Id.* (citations omitted). Thus, anything that degrades the integrity of the criminal justice system and is fundamentally unfair violates procedural due process. *See id.* at 938–39 (concluding that police interference with defendant's access to counsel violated procedural due process because it was fundamentally unfair).
90. *Washington*, 665 N.E.2d at 1336.

present "new, material, noncumulative" evidence "of such conclusive character as would probably change the result on retrial."[91] The holding in *Washington* provided the bedrock for *Reed*.

2. *People v. Schneider*

The *Reed* court looked not only to its own precedent, but also that of the Supreme Court of Colorado to help it craft the appropriate standard for guilty-plea defendants to raise a claim of actual innocence. In particular, the *Reed* court looked to the Colorado court's holding in *People v. Schneider*.[92] The defendant in *Schneider* entered an *Alford* guilty plea[93] to four counts of aggravated incest against his daughter and one count of sexual assault on a child.[94] Following a stipulation by the State, the court sentenced the defendant to eight years of probation.[95] But two years later, the defendant moved to withdraw his guilty plea after his daughter, the alleged victim of the assault, recanted her accusations.[96] In granting the defendant's motion with no precedent on point, the trial court reasoned that the withdrawal of a plea after conviction was analogous to a motion for new trial after conviction by trial.[97] The appellate court affirmed with one dissenting judge arguing that a more stringent standard should be adopted for withdrawal of guilty pleas.[98]

The Supreme Court of Colorado reversed the decision, holding that the standard for a motion for a new trial was an inappropriate standard for the withdrawal of a guilty plea.[99] Adopting a portion of the appellate court's dissent, the court held that before granting a new trial, a court must reasonably conclude that (1) new evidence was discovered after entry of the plea, which could not be discovered earlier through reasonable diligence, (2) the withdrawal would probably bring about an acquittal at trial, and (3) the charges brought against the defendant, or the charges to

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91. *Id.* at 1337 (citations omitted). As for the defendant in *Washington*, the state supreme court affirmed the appellate court and granted the defendant a retrial. *Id.*

92. People v. Reed, 2020 IL 124940, ¶ 48; *see also id.* ¶ 63 (Burke, J., concurring) (contrasting the *Reed* court's test with the test in *Schneider*).

93. Based on the U.S. Supreme Court's opinion in *North Carolina v. Alford*, 400 U.S. 25 (1970), an *Alford* plea is a "guilty plea that a defendant enters as part of a plea bargain without admitting guilt." *Alford Plea*, BLACK'S LAW DICTIONARY (11th ed. 2019). Unlike pleas of *nolo contendere*, in which defendants take no position on guilt or innocence, with *Alford* pleas, defendants admit and accept that there is a factual basis for a jury to find them guilty, but still maintain they are not guilty. *See, e.g.*, United States v. Mancinas-Flores, 588 F.3d 677, 681 (9th Cir. 2009) (explaining an *Alford* plea).

94. People v. Schneider, 25 P.3d 755, 758 (Colo. 2001).

95. *Id.*

96. *Id.*

97. *Id.*

98. People v. Schneider, 991 P.2d 296, 298–99 (Colo. App. 1999), *rev'd*, 25 P.3d 755 (Colo. 2001).

99. *Schneider*, 25 P.3d at 758, 761.

which the defendant pleaded guilty, were actually false or unfounded.[100]

The court reasoned that the withdrawal of a guilty plea implicated different policy considerations than a motion for a new trial.[101] Namely, the court was concerned with disturbing the finality of proceedings following a guilty plea.[102] Whereas following a trial, all parties involved understand that a defendant can appeal and vigorously dispute a conviction, after a guilty plea, all parties consider the case effectively closed.[103] Given these policy concerns, the court found that a more stringent test was warranted before allowing the withdrawal of a guilty plea as compared to a motion for a new trial.[104] As will be discussed below, the *Reed* court considered these same concerns, ultimately adopting two of the three prongs of the Colorado court's holding in *Schneider*.[105]

3. *People v. Cannon*

In *Reed*, the Illinois Appellate Court, Fourth District, relied largely upon the state supreme court's holding in *People v. Cannon*.[106] *Cannon* involved a defendant who pled guilty to a charge of indecent liberties with a child.[107] The defendant then filed a post-conviction petition, which the circuit court denied.[108] The only argument raised before the court was that the county board of supervisors was unlawfully elected in violation of the one-man, one-vote principle.[109] As a result, the defendant argued that the grand jury assembled by the board was also unlawful and its indictment violated his state and federal constitutional rights.[110]

In a brief, four paragraph opinion, the court held this claim was without merit because, even if true, nothing indicated it adversely affected the defendant.[111] Additionally, the court held that even if the board election violated the one-man, one-vote principle, the board still had de facto authority to assemble the grand jury.[112] The court then turned to claims that, while argued in the circuit court, were not argued on appeal.[113] In dicta,

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100. *Id.* at 757.
101. *Id.* at 758.
102. *Id.* at 760.
103. *Id.*
104. *Id.*
105. *See infra* Section III.C (discussing the *Reed* court's reasoning).
106. People v. Reed, 2019 IL App (4th) 170090, ¶ 21. The Fourth District's holding in *Reed* is discussed in more detail below in Section III.B.
107. People v. Cannon, 263 N.E.2d 45, 45 (Ill. 1970).
108. *Id.* at 45–46.
109. *Id.* at 46.
110. *Id.*
111. *Id.*
112. *Id.*
113. The court explained:

> We have examined the claims advanced by the defendant in his post-conviction petition

the court concluded that because he was represented by counsel and was properly admonished before pleading guilty, the defendant's post-conviction attack of his guilty plea based on actual innocence "cannot be entertained."[114] The Illinois Appellate Court, Fourth District, was the only court to afford *Cannon* any precedential weight, citing it twice before its decision in *Reed*.[115]

4. *People v. Shaw*

Before the Fourth District's holding in *Reed*, no court in Illinois had categorically prohibited freestanding claims of innocence following a guilty plea; though, some had expressed skepticism.[116] While noting this nonconformity in opinions, the Illinois Appellate Court, First District, held in *People v. Shaw* that a defendant could raise a freestanding claim of actual innocence without attacking the knowing and voluntary nature of their guilty plea.[117]

Following a guilty plea to several charges stemming from two home invasions, the defendant in *Shaw* raised a claim of actual innocence.[118] However, the trial court granted the State's motion to dismiss in a second-stage proceeding.[119] After noting the support, albeit fractured, for freestanding innocence claims in Illinois courts for guilty-plea defendants, the *Shaw* court disagreed with the Fourth District's categorical bar to

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> which were not argued in this court. They amount basically to an unsupported assertion that the accusation against him was false and that his daughter and two of his sons were coerced by threats from their mother, the defendant's wife, to refrain from asserting the defendant's innocence.

Id.

114. *Id.*; *see infra* notes 179–181, 229–231 and accompanying text (discussing further *Cannon*'s dicta).

115. *See* People v. Barnslater, 869 N.E.2d 293, 307 (Ill. App. Ct. 2007) (affirming dismissal of guilty-plea defendant's post-conviction petition); *see also* People v. Altobelli, 275 N.E.2d 209, 209 (Ill. App. Ct. 1971) (citing *Cannon* for the proposition that violating statutory standards of conduct or procedure have no bearing on the guilt of the defendant).

116. *See* People v. Knight, 937 N.E.2d 789, 798 (Ill. App. Ct. 2010) (holding that guilty-plea defendants can raise freestanding claims of innocence independent of a claim that the plea was involuntary); *but see Barnslater*, 869 N.E.2d at 306 (noting that while not squarely faced by the court, it "strongly question[ed]" whether freestanding claims of actual innocence were cognizable as constitutional deprivations).

117. People v. Shaw, 143 N.E.3d 228, 237–38, 240 (Ill. App. Ct. 2019). The courts that had expressed skepticism about freestanding claims of innocence reasoned that there was only a constitutional deprivation if the plea was not knowingly or voluntarily entered. *See Barnslater*, 869 N.E.2d at 306 ("If a defendant claims that his guilty plea was coerced, then that coercion provides the necessary constitutional deprivation for which postconviction relief would be appropriate, but not where he claims actual innocence in the face of a prior, constitutionally valid confession of guilt."). Because the defendant had waived the argument that his plea was not voluntary, the *Shaw* court thus found it important to clarify that this waiver did not bar his claim. *Shaw*, 143 N.E.3d at 242.

118. *Shaw*, 143 N.E.3d at 231.

119. *Id.*; *see also supra* Section II.A (discussing the stages of a proceeding under the Post-Conviction Hearing Act).

these claims.[120] The *Shaw* court concluded that the Illinois Supreme Court's reasoning in *Washington* applied equally, regardless of whether the conviction stemmed from a trial or a guilty plea.[121] While the court recognized that policy considerations could warrant a higher standard for convictions stemming from guilty pleas, it declined to define such a standard, citing its lack of supervisory authority.[122] It ultimately affirmed the trial court's dismissal of the defendant's claim on the grounds that new evidence was inadmissible hearsay and thus would not affect the outcome of a trial, regardless of the standard.[123]

5. Implications for *Reed*

As will be discussed, the Illinois Supreme Court had several important issues to navigate in *Reed* related to this case law. First, the court had to decide whether the reasoning in *Washington* was as persuasive for guilty-plea defendants as it was for trial-convicted defendants, or if its dicta in *Cannon* already foreclosed the issue. Second, as illustrated by the Supreme Court of Colorado's holding in *Schneider*, if the court concluded that guilty-plea defendants could indeed bring freestanding claims of actual innocence, it would have to determine whether policy considerations warranted a more stringent standard for guilty-plea defendants as compared to trial-convicted defendants. Finally, if a more stringent standard was warranted, the court would have to determine what standard would strike the appropriate balance between the interests of the innocent defendant and the interests of the state and society.

III. DISCUSSION

A. Facts

On September 23, 2014, Officer Daniels of the Decatur Police Department received a tip from an unidentified informant that three people were sitting on a porch selling drugs and that one of them might be armed with a shotgun.[124] Police considered the area to be a high-crime neighborhood known for the sale of narcotics.[125] Officer Daniels began a patrol of the area in a marked police car and observed Demario Reed, Davie Callaway, and one other individual on a porch.[126] Upon seeing Officer Daniels exit

120. *Shaw*, 143 N.E.3d at 241–42.
121. *Id.* at 240.
122. *Id.* at 244.
123. *Id.* at 244–45.
124. Brief and Argument for Defendant-Appellant at 6, People v. Reed, 2020 IL 124940 (No. 124940) [hereinafter Defendant's Brief].
125. People v. Reed, 2020 IL 124940, ¶ 4.
126. *Id.*; *see also* Defendant's Brief, *supra* note 124 (noting that the police department received a tip from an unidentified informant).

his car to speak with them, Reed and Callaway jumped up and ran into the house.[127] The third individual remained seated on the porch with his hands in the air.[128] Officer Daniels observed that as Reed ran into the house, he grabbed the right side of his leg and ran with a stiff, unbending leg, suggesting that he was concealing something long in the leg of his pants.[129]

Officer Daniels and other officers entered the house and secured Callaway and the other individual.[130] The officers then found Reed in a bedroom in the southwest corner of the house, lying face down on the bed pretending to be asleep.[131] A search incident to the arrest revealed a scale in Reed's pocket.[132] After speaking to witnesses who described Reed's flight path through the house, Officer Daniels searched an unoccupied room in the northwest corner of the house.[133] In this room, Officer Daniels discovered a cellophane wrapper for a cigarette pack containing 0.4 grams of suspected cocaine at the foot of a bed.[134] Officer Daniels also discovered a sawed-off shotgun under the bed, situated in a manner that suggested it was thrown underneath.[135] Officers remarked that there was condensation on the barrels of the gun, suggesting it had recently been brought inside.[136] Subsequent testing revealed Reed's DNA on the shotgun.[137] Callaway was also arrested, and a search incident to his arrest turned up 1.5 grams of suspected cocaine.[138]

On September 29, 2014, Reed was charged with one count each of armed violence, unlawful possession of a weapon by a felon, unlawful possession of a controlled substance with intent to deliver, and unlawful possession of a controlled substance.[139] After a failed motion to dismiss the charges, Reed agreed to plead guilty to one count of armed violence in exchange for a sentence of fifteen years in prison.[140] After properly admonishing Reed and finding that he entered the plea knowingly and voluntarily, the trial court accepted the plea on April 13, 2015, and sentenced him to fifteen years in prison.[141] All the remaining charges were

127. *Reed*, 2020 IL 124940, ¶¶ 4, 6.
128. *Id.* ¶ 6.
129. *Id.* ¶ 5; Defendant's Brief, *supra* note 124.
130. *Reed*, 2020 IL 124940, ¶ 6.
131. Defendant's Brief, *supra* note 124.
132. *Id.*
133. *Reed*, 2020 IL 124940, ¶ 7; Defendant's Brief, *supra* note 124.
134. *Reed*, 2020 IL 124940, ¶ 7.
135. *Id.*
136. *Id.*
137. *Id.* ¶ 9.
138. *Id.* ¶ 8.
139. *Id.* ¶ 3.
140. *Id.* ¶ 9.
141. *Id.*

dismissed as part of the plea agreement.[142] The other defendant, Callaway, was charged with possession of a controlled substance and was subsequently convicted and sentenced to prison.[143]

Reed filed his first post-conviction petition on June 16, 2015, asserting claims of actual innocence and ineffective assistance of counsel.[144] Regarding the actual-innocence claim, Reed alleged that he had neither constructive nor actual possession of the shotgun or cocaine and that his DNA was not on the cellophane cocaine wrapper.[145] Reed also claimed that his plea counsel was ineffective because he failed to file pre-trial motions and "tricked" Reed into pleading guilty.[146] The trial court summarily dismissed this petition as frivolous in a stage-one post-conviction proceeding.[147]

Approximately six months later, Reed sought leave to file a successive post-conviction petition asserting that he was actually innocent, his plea counsel was ineffective, he had not knowingly pleaded guilty, and that fundamental fairness should excuse forfeiture and waiver.[148] Reed repeated many of the claims in his first petition, but also included with the successive petition a sworn affidavit from Callaway, in which Callaway stated that the cocaine found in the bedroom was his.[149] The circuit court granted leave for Reed to file his petition, appointed him counsel, and advanced the petition to the second stage of post-conviction hearings.[150] The State filed a motion to dismiss in response, arguing, inter alia, that by knowingly and voluntarily pleading guilty, Reed had waived a post-conviction claim of innocence.[151] In support, the state relied on dicta from *People v. Barnslater* which suggested that in light of a guilty plea, a defendant is not deprived of due process even if they are actually innocent.[152] The circuit court denied the State's motion to dismiss on August 10, 2016.[153] In doing so, the circuit court found that the affidavit was

142. *Id.*
143. Defendant's Brief, *supra* note 124, at 7.
144. *Reed*, 2020 IL 124940, ¶ 10.
145. Defendant's Brief, *supra* note 124, at 5.
146. *Id.*
147. *Reed*, 2020 IL 124940, ¶ 10; *see also supra* Section II.A (discussing that the purpose of first-stage proceeding is to determine whether the petitioner has even stated a "gist" of a constitutional claim).
148. Defendant's Brief, *supra* note 124, at 5–6.
149. *Id.* at 6–7.
150. *Reed*, 2020 IL 124940, ¶ 12; Defendant's Brief, *supra* note 124, at 7; *see also supra* Section II.A (discussing that the purpose of a second-stage proceeding is to determine whether the petitioner has stated a valid claim which should advance to an evidentiary hearing).
151. Brief and Supplemental Appendix of Respondent-Appellee People of the State of Illinois at 5, People v. Reed, 2020 IL 124940 (No. 124940) [hereinafter State's Brief].
152. *Reed*, 2020 IL 124940, ¶ 12 (citing People v. Barnslater, 869 N.E.2d 293, 311 (Ill. App. Ct. 2007), *rev'd on other grounds*, People v. Robinson, 2020 IL 123849, ¶ 55).
153. Defendant's Brief, *supra* note 124, at 7.

newly discovered evidence which, if believed, would absolve Reed.[154] Accordingly, the circuit court advanced the petition to the third stage, an evidentiary hearing.[155]

B. Procedural History

On January 18, 2017, the circuit court held an evidentiary hearing at which Callaway took the stand.[156] Callaway, who was on parole from his arrest with Reed, testified that the cocaine Reed had been charged with possessing was actually his.[157] Callaway testified that he "had a bad drug habit" and did not previously come forward because he did not want to get in trouble for it.[158] On cross-examination, Callaway admitted that he wrote the affidavit while he was incarcerated with Reed, but denied that Reed had asked him to do so.[159] Callaway claimed to have written the affidavit because he felt bad that Reed was charged with possessing his cocaine.[160]

Two days later, the circuit court denied Reed's petition.[161] While the circuit court found that Callaway's testimony was new evidence, it did not find it credible, noting as significant the fact that Callaway wrote the affidavit only after pleading guilty and being incarcerated with Reed.[162] Furthermore, the circuit court pointed out that at the time, Callaway was a known codefendant on which Reed could have tried to pin the drugs.[163] Relying on the Illinois Supreme Court's test in *Washington*, the circuit court ultimately concluded that the affidavit and testimony was not of such a conclusive character that it would probably change the result on retrial.[164] The ensuing appeal resulted in dueling opinions between the First and Fourth Districts of the Appellate Court of Illinois.

On appeal, Reed argued that the circuit court did not properly weigh Callaway's credibility and instead reflexively discredited it because Callaway did not come forward sooner.[165] This, Reed argued, amounted to manifest error warranting reversal.[166] In support of his argument, Reed cited *People v. Shaw*, in which the First District held that guilty-plea

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154. *Id.*
155. *Id.*
156. *Id.*
157. *Id.*
158. State's Brief, *supra* note 151, at SA14.
159. *Reed*, 2020 IL 124940, ¶ 13.
160. *Id.*
161. *Id.* ¶ 14.
162. *Id.*
163. State's Brief, *supra* note 151, at SA19.
164. *Reed*, 2020 IL 124940, ¶ 14.
165. Defendant's Brief, *supra* note 124, at 8–9.
166. *Id.*

defendants can raise freestanding claims of innocence.[167] In its initial opinion dated March 27, 2019, the Fourth District declined to follow *Shaw* and affirmed the circuit court's denial of Reed's petition without reaching the merits.[168] The Fourth District disagreed with the First District's extension of *Washington* to include guilty-plea defendants and instead relied on obiter dictum from *People v. Cannon*, which suggested that guilty-plea defendants are categorically barred from raising actual-innocence claims.[169] While the Fourth District recognized that the language from *Cannon* was obiter dictum, because it could not find any binding authority to the contrary, it felt bound to follow it.[170] The Fourth District also found Reed's claim categorically barred by the doctrines of waiver and invited error.[171]

However, on March 19, 2019, about a week before the Fourth District released its initial opinion, the First District withdrew its opinion in *Shaw* after hearing oral arguments regarding the out-of-state authorities it had cited.[172] On April 9, 2019, the First District granted the State's motion to cite the Fourth District's initial decision in *Reed*, after that decision was issued.[173] As a result, on April 17, 2019, Reed petitioned the Fourth

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167. *Id.*; *see* People v. Shaw, 2018 IL App (1st) 152994, *withdrawn*, 143 N.E.3d 228 (Ill. App. Ct. 2019) (providing the First District's initial opinion, decided Sept. 28, 2018).

168. *See* Defendant's Brief, *supra* note 124, at 4, 9 ("The Fourth District did not examine the merits of this issue . . . ."); People v. Reed, 2019 IL App (4th) 170090, ¶ 2 (denying defendant's petition for rehearing and affirming the lower court's judgment).

169. Defendant's Brief, *supra* note 124, at 9–10 (stating that the Fourth District declined to follow *Shaw*, 2018 IL App (1st) 152994, and instead relied on People v. Cannon, 46 Ill. 2d 319 (1970)); People v. Reed, 2019 IL App (4th) 170090, ¶¶ 2, 21 ("Because the validity of defendant's guilty plea is undisputed on appeal, we hold . . . that he remains bound by his guilty plea and that his claim of actual innocence cannot be entertained."). The State also initially relied on this dictum in its motion to dismiss in the circuit court. *Reed*, 2020 IL 124940, ¶ 12. Obiter dictum is distinguishable from judicial dictum:

> "*Obiter dictum*," frequently referred to as simply "*dictum*," is a remark or opinion that a court uttered as an aside. [It] is not essential to the outcome of the case, is not an integral part of the opinion, and is generally not binding authority or precedent within the *stare decisis* rule. "In contrast, 'an expression of opinion upon a point in a case argued by counsel *and deliberately passed upon by the court*, though not essential to the disposition of the cause, if *dictum*, is a judicial *dictum*. [J]udicial *dictum* is entitled to much weight, and should be followed unless found to be erroneous.'"

Lebron v. Gottlieb Mem'l Hosp., 930 N.E.2d 895, 907 (Ill. 2010) (internal citations omitted).

170. *See* Defendant's Brief, *supra* note 124, at 9–10 ("The appellate court 'conclude[d] that the *obiter dictum* of *Cannon* is still the law . . . .'"); People v. Reed, 2019 IL App (4th) 170090, ¶ 21 ("The question, then, is whether there is a 'contrary decision' of the supreme court . . . .").

171. People v. Reed, 2019 IL App (4th) 170090, ¶¶ 26–29. Under the doctrine of waiver, by knowingly and voluntarily pleading guilty, the court held that Reed had waived any constitutional claim to his sentence, including one based on actual innocence. *Id.* ¶ 25. "[U]nder the doctrine of invited error, an accused may not request to proceed in one manner and then later contend . . . that the course of action was in error." People v. Harvey, 813 N.E.2d 181, 192 (Ill. 2004) (citations omitted). In such situations, to discourage such "duplicitous" behavior, courts may find the party estopped from changing course. *Id.* (emphasis in original) (citation omitted).

172. Defendant's Brief, *supra* note 124, at 9.

173. *Id.* at 9, A-28.

Circuit for a rehearing, asking that the parties be allowed to fully brief the issue after the First Circuit reissued its opinion in *Shaw*.[174] Instead, the Fourth Circuit withdrew its initial opinion and reissued a new opinion on May 8, 2019, which denied the rehearing petition.[175] The reissued opinion omitted the analysis of *Shaw* and left the rest of the analysis regarding *Cannon* and *Washington* intact.[176] Thus, the Fourth District maintained that because Reed was not challenging the validity of his plea agreement, under *Cannon* and the doctrines of estoppel and waiver, his claim—and any claim of actual innocence by guilty-plea defendants—was categorically barred.[177] The Supreme Court of Illinois granted leave for Reed's appeal to resolve the disagreement between the First and Fourth Districts over whether *Washington* allowed Reed to raise his claim of innocence or whether *Cannon* foreclosed that claim.[178]

C. Reasoning

1. Opinion of the Court

The Illinois Supreme Court began its analysis by determining whether *Cannon* controlled. It noted that the language in *Cannon* did suggest that a defendant's claim that they were actually innocent "cannot be entertained" once they have knowingly and voluntarily pled guilty.[179] Mirroring the First District's analysis on whether *Cannon* controlled, the court held that in light of the more recent opinion in *Washington*, it would be too broad to interpret *Cannon* as creating a categorical bar to innocence claims following a guilty plea.[180] Because the issue of actual innocence was not argued, briefed, or essential to the holding in *Cannon*, the court agreed with the First and Fourth Districts that the statements regarding innocence claims in *Cannon* were dicta.[181] Accordingly, the court held that *Cannon* was not controlling and that the issue of whether guilty-plea defendants can raise a claim of actual innocence was one of first impression.[182]

Having recognized that the appeal raised novel questions of law, the court cleaved its analysis in two. First, it considered whether guilty-plea

174. *Id*.
175. *Id.*
176. *Id.* at 9–10.
177. People v. Reed, 2019 IL App (4th) 170090, ¶¶ 2, 27.
178. *Reed*, 2020 IL 124940, ¶¶ 1, 22 ("This case presents the issue of whether a guilty plea prevents a defendant from asserting an actual-innocence claim . . . .").
179. *Id.* ¶ 21 (quoting People v. Cannon, 263 N.E.2d 45, 46 (Ill. 1970)).
180. *Id.* ¶ 22 ("Therefore, in light of this court's more recent statements in *Washington*, *Cannon*'s *dicta* cannot be read to prohibit actual-innocence claims following guilty pleas in all circumstances.").
181. *Id.* ¶ 23.
182. *Id.* ¶¶ 23, 24.

defendants can raise claims of actual innocence and, if so, what is the correct standard for doing so. Since this issue raised questions of law, the court reviewed the Fourth District's decision de novo.[183] The second portion of its analysis applied its new standard to the facts of Reed's appeal. Since Reed's innocence claim had progressed to a third-stage evidentiary hearing, the court reviewed the circuit court's denial only for manifest error.[184]

The court then turned to a discussion of the purposes, benefits, and policy considerations surrounding plea agreements. It began by discussing the mutual tradeoffs made by defendants and the State when a defendant pleads guilty. While the State enjoys speedy disposition of a case and preserves resources, it makes several concessions, "including sacrificing the opportunity to present the entirety of the evidence, dismissal of certain charges, and ceasing further investigation that may result in additional charges."[185] Similarly, while defendants can obtain more favorable sentences and the dismissal of other charges and are spared the ordeal of a trial by pleading guilty, they "waive the right to a jury trial, relieving the State of its burden to prove defendant guilty beyond a reasonable doubt."[186] This results in the waiver of all nonjurisdictional defenses or defects, even constitutional ones.[187] While recognizing that mutual concessions and benefits are key aspects of plea bargaining, the court rejected the State's argument that allowing guilty-plea defendants to assert claims of actual innocence would obviate the benefits of finality and certainty enjoyed by the State due to plea agreements.[188] In doing so, it invoked the constitutional underpinnings of *Washington*.

In examining the holding in *Washington*, the court noted that a claim of actual innocence is distinct from "a challenge to the sufficiency of the evidence or an allegation of error in the court below."[189] This is because a credible claim of actual innocence undermines the court's confidence that the conviction was in accord with substantive due process.[190] At that point, the Due Process Clause of the Illinois Constitution becomes operative.[191] As a result, the fact that a guilty-plea defendant waives their right to challenge the State's evidence to prove them guilty beyond a

183. *Reed*, 2020 IL 124940, ¶ 20.

184. *Id.* ¶ 51; *see supra* Section II.A (discussing that the purpose of the third-stage evidentiary hearing is to consider the new evidence raised by a petitioner and determine whether it satisfied the applicable standard for violating a constitutional right).

185. *Id.* ¶ 25.

186. *Id.* ¶¶ 26–27.

187. *Id.* ¶ 27.

188. *Reed*, 2020 IL 124940, ¶ 28.

189. *Id.* ¶ 29.

190. *Id.* ¶ 30.

191. *Id.*; *see* ILL. CONST. art. I, § 2 ("No person shall be deprived of life, liberty or property without due process of law nor be denied the equal protection of the laws.").

reasonable doubt does not affect an actual-innocence claim.[192] This reasoning from *Washington*, the court found, was persuasive regardless of the manner of conviction.[193] While recognizing that plea agreements are "vital to our criminal justice system," the court noted that "the purpose of our criminal justice system is to seek justice."[194] In particular, plea agreements are not designed to separate the guilty from the innocent, as evidenced by the fact that eighteen percent of all exonerees pled guilty to a crime they did not commit.[195] Indeed, the fact that a defendant can plead guilty while asserting innocence illustrates that "pleas are no more foolproof than trials."[196]

The court concluded that "[w]hen met with a truly persuasive demonstration of innocence, a conviction based on a voluntary and knowing plea is reduced to a legal fiction. At that point, the additional due process afforded by the Illinois due process clause is triggered," despite the waiver of nonjurisdictional defects.[197] The court also concluded that the record of guilty-plea proceedings does not positively rebut a claim of actual innocence, because an admission of guilt is not guilt in fact.[198] The court also rejected the State's argument that guilty-plea defendants are equitably estopped under the invited-error doctrine because they lacked knowledge and could not have reasonably discovered the new evidence which provides the compelling evidence of innocence.[199] In other words, because the defendant had an incomplete picture of the case for their innocence, through no fault of their own, they did not invite the error of pleading guilty. As a result, the court held that a guilty plea does not categorically bar a defendant from raising a claim of actual innocence under the Post-Conviction Hearing Act.[200]

Having concluded that guilty-plea defendants could raise a claim of actual innocence, the court then turned to deciding the applicable standard for when such a defendant would succeed on their claim. Reed argued

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192. *Id.* ¶ 31.

193. *Id.* ¶¶ 30–31 (examining the reasoning in *Washington* and finding that it applies in equal force for guilty pleas).

194. *Id.* ¶¶ 32–33.

195. *Id.* ¶ 33 (citing Peter A. Joy & Kevin C. McMunigal, *Post-Conviction Relief After a Guilty Plea?*, 35 CRIM. JUST. 53, 55 (2020)).

196. *Reed*, 2020 IL 124940, ¶¶ 34–35 (explaining that current rules around guilty pleas allow a defendant to plead guilty while at the same time asserting his innocence).

197. *Id.* ¶ 35 (internal citations omitted).

198. *Id.* ¶ 38.

199. *Id.* ¶ 39–40.

200. The court stated:

> [W]e find the defendant's waiver of his right to challenge the State's proof of guilt beyond a reasonable doubt at trial in the proceedings that led to his conviction does not prevent him from asserting his right to not be deprived of life and liberty given compelling evidence of actual innocence under the Act.

Id. ¶ 37.

that the standard in *Washington* should still apply—i.e., that he must produce new, material, and noncumulative evidence "of such conclusive character as would probably change the result on trial."[201]

In response, the State argued that the *Washington* standard is unworkable for guilty-plea defendants because there is no detailed record to which the new evidence can be compared to determine whether it would probably change the outcome.[202] Instead, the State proposed that only new forensic evidence could create a viable claim of actual innocence.[203]

While the court rejected both proposed standards, it agreed with the State that the lack of a record made strict application of the *Washington* standard impractical.[204] The court also sought to emphasize the "grave" nature of pleading guilty, allowing innocence claims only when necessary to "correct a manifest injustice."[205] As a result, the court felt that the standard for successfully raising a claim of actual innocence should be more stringent than the standard in *Washington* for trial-convicted defendants.[206]

The court settled on the standard that a guilty-plea defendant must "provide new, material, noncumulative evidence that clearly and convincingly demonstrates that a trial would probably result in acquittal," to succeed in a claim of actual innocence.[207] This test, the court reasoned, was the middle ground between the impractical *Washington* standard and the most stringent standard of redeciding the defendant's guilt.[208] Under this standard, "[n]ew means the evidence was discovered after the court accepted the plea and could not have been discovered earlier through the exercise of due diligence."[209] Because the new evidence must be so conclusive that it "'undercuts the court's confidence in the factual correctness' of the conviction," the reliability of the evidence must necessarily be strong.[210] Thus, the court reasoned that there was no need to adopt the State's more stringent standard that only forensic evidence could support

201. *Id.* ¶ 43 (quoting People v. Washington, 665 N.E.2d 1330, 1337 (Ill. 1996); Defendant's Brief, *supra* note 124, at 24–25.

202. *Reed*, 2020 IL 124940, ¶ 44; State's Brief, *supra* note 151, at 20–21 ("[G]uilty-plea cases are *inherently* incapable of meeting the *Washington* standard . . . . [I]t is impossible to consider the new evidence along with the trial evidence if, because of a guilty plea, there was no trial evidence.") (emphasis in original).

203. *Reed*, 2020 IL 124940, ¶ 44; State's Brief, *supra* note 151, at 23–24. "Forensic evidence" meaning fingerprint, DNA, or ballistic analysis. *Id.*; *see also* 725 ILL. COMP. STAT. 5/116-3 (2021) (providing for post-conviction motions to compel forensic testing).

204. *Reed*, 2020 IL 124940, ¶ 45.

205. *Id.* ¶ 47 (quoting People v. Evans, 673 N.E.2d 244, 247 (Ill. 1996)).

206. *Id.* ¶ 48.

207. *Id.* ¶ 49.

208. *Id.* ¶¶ 45, 48.

209. *Id.* ¶ 49 (citing People v. Coleman, 996 N.E.2d 617, 637 (Ill. 2013)).

210. *Id.* ¶ 49–50 (quoting *Coleman*, 996 N.E.2d at 637).

a claim of actual innocence.[211]

Having concluded that Reed could mount a claim of actual innocence, and having determined the appropriate standard, the court then considered the merits of Reed's claim, reviewing the circuit court's denial of his petition for manifest error.[212] Because the circuit court concluded that Reed's new evidence failed under the less stringent *Washington* standard, it necessarily would have concluded the same under the court's new standard.[213] The court ultimately found that it was not manifest error for the circuit court to reject Reed's petition.[214] While Callaway's testimony did suggest Reed's innocence, it was not unreasonable for the circuit court to question his credibility since Callaway only came forward after being imprisoned and talking with Reed.[215] Without more in the record pointing to Reed's innocence, the court refused to find that the circuit court's decision was manifestly erroneous.[216] As a result, even though the court rejected the Fourth District's categorical bar to Reed's claim, it nevertheless affirmed because the claim failed on its merits.[217]

2. Special Concurrence

Concurring in the judgment, Justice Michael Burke agreed that guilty-plea defendants should not be categorically barred from raising claims of actual innocence.[218] He also agreed that Reed's claim failed on the merits.[219] Nevertheless, he disagreed with the majority on two points. First, Justice Burke argued that guilty-plea defendants should be held to a higher standard to prove a claim of actual innocence than the standard adopted by the court.[220] Second, he would have granted the circuit court more leeway to deny claims at the initial leave-to-file stage.[221] This second argument reiterated an argument he first raised in a dissenting opinion in *People v. Robinson*.[222]

Justice Burke generally found the State's interests warranted a higher standard than the one adopted by the court. He noted that it is burdensome for the State to produce evidence, which likely grew stale in the years

211. *Id.* ¶ 50.
212. *Id.* ¶ 51.
213. *Id.* ¶ 52.
214. *Id.* ¶ 53.
215. *Id.* ¶ 54.
216. *Id.*
217. *Id.* ¶ 55.
218. *Id.* ¶ 60 (Burke, J., concurring).
219. *Id.*
220. *Id.*
221. *Id.*
222. *Id.* ¶ 65; *see* People v. Robinson, 2020 IL 123849, ¶¶ 114–18 (Burke, J., dissenting) (arguing that for a court to grant leave to file a successive post-conviction petition the petitioner should present evidence which raises a probability of success and not a mere possibility of success).

after a defendant pled guilty, and that the trial court's analysis is hampered by the lack of a developed record.[223] While he agreed with the court that *Washington* demanded that guilty-plea defendants be able to raise claims of innocence, he advocated for a higher standard analogous to those adopted by Texas and Iowa, which would require that the defendant demonstrate by clear and convincing evidence that no reasonable jury could find the defendant guilty.[224] Justice Burke also criticized the court for only adopting a portion of the test outlined by the Supreme Court of Colorado in *People v. Schneider*.[225] However, he agreed with the court that the State's proposed test requiring forensic evidence was too high because some evidence, even though not forensic, could still be so conclusive and reliable as to warrant a retrial.[226]

Having established the standard he would impose for the third-stage evidentiary hearing, Justice Burke noted that the court failed to address the standards for the other two stages for review of post-conviction claims.[227] If the court intended to adopt the standard in *Robinson* for the initial leave-to-file stage, Justice Burke disagreed. Resurrecting an argument made in his dissent in *Robinson*, Justice Burke argued that circuit court should have found Callaway's affidavit unreliable and denied Reed's petition at the leave-to-file stage.[228]

IV. ANALYSIS

A. The Core Holding in Reed *is a Natural Extension of* Washington

As an initial matter, the Illinois Supreme Court correctly concluded that *Cannon* was not controlling. The court agreed with the First and Fourth Districts that the language relied upon by the Fourth District was

223. *Reed*, 2020 IL 124940, ¶ 61 (Burke, J., concurring).

224. *Id.* ¶¶ 62–63 (first citing Schmidt v. State, 909 N.W.2d 778, 797 (Iowa 2018), then citing *Ex parte* Tuley, 109 S.W.3d 388, 392 (Tex. Crim. App. 2002)); *see infra* Section IV.B (discussing the Texas and Iowa courts' holdings in detail).

225. *Reed*, 2020 IL 124940, ¶ 63 (Burke, J., concurring). The portion of the test in *Schneider* which the court did not adopt requires guilty-plea defendants "to demonstrate to the trial court's satisfaction that the charges filed by the People or the charges to which the defendant pleaded guilty were actually false or unfounded." People v. Schneider, 25 P.3d 755, 762 (Colo. 2001).

226. *Reed*, 2020 IL 124940, ¶ 64 (Burke, J., concurring).

227. *Id.* ¶ 65.

228. *Id.* ¶¶ 66, 72. In *Robinson*, Justice Burke argued for a probability standard when a court is deciding whether to grant leave to file a successive post-conviction petition. People v. Robinson, 2020 IL 123849, ¶ 118 (Burke, J., dissenting). Pointing to the court's holding in *People v. Edwards*, Justice Burke contended that leave to file should be granted only if the defendant presents evidence which "raises the probability that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence." *Id.* (quoting People v. Edwards, 969 N.E.2d 829, 836 (Ill. 2012)). Instead, the *Robinson* court adopted a possibility standard, holding that test for granting leave to file is "whether the new evidence, if believed and not positively rebutted by the record, could lead to acquittal on retrial." *Id.* ¶ 60 (majority opinion).

obiter dicta.[229] Because the Fourth District could not find any opinion from the higher court to the contrary, it concluded it was still bound.[230] In drawing this conclusion, the Fourth District failed to consider the larger due-process concerns *Washington* invoked, and instead focused on the specific language of the test created.[231] Furthermore, as the petitioner's brief pointed out, *Cannon* was on even shakier ground given that it was decided before the adoption of the current Illinois Constitution and *Washington*.[232] The court, however, refrained from weighing in on whether the Fourth District was entirely wrong to rely on the obiter dicta and instead concluded that, because the analysis in *Cannon* was dicta, it was not binding on "this" court.[233] In light of the "scant analysis" in *Cannon* and the substantial advancement of due process in *Washington*, the court correctly found that *Cannon* did not control its analysis.[234]

Both procedural and substantive due process ensure that trial-convicted defendants have a "footing in the Illinois Constitution for asserting freestanding innocence claims."[235] The fact that the Illinois Constitution's Due Process Clause affords more substantive due process than the federal constitution regarding actual-innocence claims is one of the core holdings in *Washington*.[236] The primary justification for expanding substantive due process under Illinois's constitution is that a truly persuasive claim of actual innocence reduces a guilty conviction to "legal fiction," resulting in a deprivation of liberty that shocks the conscience.[237] While executive clemency often is the avenue of relief for truly innocent people, it often involves arbitrary factors and lacks meaningful due process, so the *Washington* court correctly concluded that it was not a sufficient substitute for a constitutional claim.[238] As the majority and concurring opinions recognized, the justifications for allowing trial-convicted defendants to raise claims of actual innocence apply in equal force to guilty-plea defendants.[239]

Individuals consider plea agreements for reasons which may have

229. *Reed*, 2020 IL 124940, ¶ 23.
230. People v. Reed, 2019 IL App (4th) 170090, ¶ 21.
231. *See id.* at 485–86 (focusing on the language of the *Washington* test); Defendant's Brief, *supra* note 124, at 23–24 ("The Fourth District instead focused on a single phrase in this Court's substantive guidance.").
232. Defendant's Brief, *supra* note 124, at 21–22.
233. *Reed*, 2020 IL 124940, ¶ 23.
234. *Id.*
235. People v. Washington, 665 N.E.2d 1330, 1337 (Ill. 1996).
236. *See* Gregg Walters, *The Freestanding Claim of Innocence — The Supreme Court of Illinois Breaks Lockstep but Leaves Material Issues Unresolved*, 22 S. ILL. U.L.J. 763, 763, 773 (1998) (discussing the holding in *Washington*).
237. *Washington*, 665 N.E.2d at 1336 (citing Herrera v. Collins, 506 U.S. 390, 436–37 (1993) (Blackmun, J., dissenting)).
238. Walters, *supra* note 236, at 777–78.
239. *Reed*, 2020 IL 124940, ¶ 31; *id.* ¶ 62 (Burke, J., concurring).

nothing to do with their actual guilt.[240] For example, a defendant may plead guilty because they do not have compelling proof of their innocence in light of substantial evidence of guilt possessed by the State.[241] Likewise, the defendant may simply wish to spare themselves and their family the expense and humiliation of a trial.[242] The increasing severity of criminal penalties over the past several decades makes the decision to plead guilty to receive a favorable sentence even more enticing to a defendant than trying their luck in a trial.[243] The fact that a defendant obtained some benefit by submitting to this economic analysis does not change the basic force of the court's reasoning in *Washington*.

Both innocent trial-convicted and innocent guilty-plea defendants suffer from the same fundamental injustice the *Washington* court identified—the deprivation of liberty despite being innocent. While finality and efficiency are laudable principles, the *Reed* court was correct to conclude that they would not excuse "the manifest injustice and failure of [the] criminal justice system that would result from the continued incarceration of a demonstrably innocent person."[244] Just because a person said they were guilty does not make it so, and their incarceration is no less shocking to the conscience than if they had been convicted at trial. Because the court had already determined that the Illinois Due Process Clause enables

240. *See id.* ¶ 33 (discussing defendants' motivations for pleading guilty); *see also* Christopher Sherrin, *Guilty Pleas from the Innocent*, 30 WINDSOR REV. LEGAL & SOC. ISSUES 1, 7–13 (2011) (discussing the reasons why innocent individuals may plead guilty); Lucian E. Dervan & Vanessa A. Edkins, *The Innocent Defendant's Dilemma: An Innovative Empirical Study of Plea Bargaining's Innocence Problem*, 103 J. CRIM. L. & CRIMINOLOGY 1, 48 (2013) ("[M]ore than half of the study participants were willing to forgo an opportunity to argue their innocence in court and instead falsely condemned themselves in return for a perceived benefit.").

241. *See* Russell D. Covey, *Plea Bargaining and Price Theory*, 84 GEO. WASH. L. REV. 920, 965–66 (2016) (characterizing these defendants as suffering from the "mismatch between available and potential evidence"); *see also* Brief of Amicus Curiae Center on Wrongful Convictions in Support of Petitioner-Appellant at 14–15, People v. Reed, 2020 IL 124940 (No. 124940) (noting that defendants are incentivized to plead guilty because it can take years for exculpatory evidence to be uncovered). Similarly, a defendant could be operating under a factual misunderstanding or a legal misunderstanding. Sherrin, *supra* note 240, at 11–12. A factual misunderstanding occurs when defendants are uncertain or mistaken about their actions, such as if they were too intoxicated to remember what happened. *Id.* Defendants could also be operating under the false impression that their actions were actually criminal. In other words, they believed they were acting with the requisite criminal mens rea when they were not. *Id.*

242. *See* Sherrin, *supra* note 240, at 8–10 (identifying financial cost, stress, time, and humiliation as reasons individuals may falsely plead guilty); Sangero, *supra* note 64, at 313 ("[D]efendants are spared the tension of a trial and the uncertainty as to their future, as well as saving heavy legal representation costs.").

243. *See* Brief of Amicus Curiae Center on Wrongful Convictions in Support of Petitioner-Appellant at 10–12, People v. Reed, 2020 IL 124940 (No. 124940) (pointing to so-called truth-in-sentencing laws which increase penalties as incentivizing innocent defendants to plead guilty); Peter A Joy & Kevin C. McMunigal, *Post-Conviction Relief after a Guilty Plea?*, CRIM. JUST. 53, 54–55 (2020) (identifying sentencing differentials as factoring into innocent defendants' decisions to plead guilty).

244. *Reed*, 2020 IL 124940, ¶ 41.

trial-convicted defendants to raise freestanding claims of innocence, it was only natural to extend this substantive due process to guilty-plea defendants.

B. *Standard Adopted by Majority in* Reed

While the *Reed* court was straightforward and logical in extending the basic holding of *Washington*, it was less so on the question of what standard should be adopted. As the First District and Justice Burke's concurrence pointed out, there were numerous templates the court could have followed.[245] Ultimately, it settled on a modified version of the test adopted by the Supreme Court of Colorado in *Schneider*.[246]

This section will compare and contrast the standard adopted by the *Reed* court with the standards adopted in *Washington* and by other courts. It will conclude that the *Reed* court's standard correctly balances the interests of the State and the defendant and will likely be workable for Illinois courts.

States that have considered the issue of whether guilty-plea defendants can raise freestanding claims of innocence have employed a variety of standards. Some courts have generally aimed at determining whether the court's confidence in the verdict has been undercut, reducing the plea to a "legal fiction," but they set no clear burden of proof.[247] On the other hand, other courts have tried to craft more specific standards, often employing a clear and convincing burden of proof.[248] However, even these courts diverge on what must be proven. On the stricter end, Iowa and Texas courts have concluded that guilty-plea defendants must prove that new evidence clearly and convincingly establishes that *no reasonable*

245. *See id.* ¶ 63 (Burke, J., concurring) (discussing the tests adopted by the Colorado, Iowa, and Texas courts); People v. Shaw, 143 N.E.3d 228, 242–44 (discussing the tests adopted by South Carolina, California, Colorado, Texas, Missouri, Utah, and Connecticut courts).

246. *Compare Reed*, 2020 IL 124940, ¶ 57 *with* People v. Schneider, 25 P.3d 755, 757 (Colo. 2001). *See Reed*, 2020 IL 124940, ¶ 63 (Burke, J., concurring) (discussing the modified *Schneider* standard adopted by the court).

247. *See, e.g.*, *In re* Bell, 170 P.3d 153, 157 (Cal. 2007) (internal citations omitted) ("The petition's claim of actual innocence depends on an evidentiary showing that would undermine the entire prosecution case and point unerringly to innocence or reduced culpability."); Jamison v. State, 765 S.E.2d 123, 130 (S.C. 2014) ("[An] applicant may successfully disavow his or her guilty plea only where the interests of justice outweigh the waiver and solemn admission of guilt encompassed in a plea of guilty and the compelling interests in maintaining the finality of guilty-plea convictions.").

248. *See, e.g.*, Schmidt v. State, 909 N.W.2d 778, 797 (Iowa 2018) ("For an applicant to succeed on a freestanding actual-innocence claim, the applicant must show by clear and convincing evidence that, despite the evidence of guilt supporting the conviction, no reasonable fact finder could convict the applicant of the crimes for which the sentencing court found the applicant guilty in light of all the evidence, including the newly discovered evidence.").

fact finder could have convicted the defendant.[249] On the more forgiving end, to which Illinois now belongs, courts ask whether the defendant's new evidence would *probably result* in acquittal.[250]

A taxonomy for possible tests begins to emerge from which the *Reed* court could have drawn inspiration. It could have adopted a general test aimed at determining whether substantive due process is undermined;[251] it could have joined the seeming majority and adopted a clear and convincing burden of proof that no reasonable jury could convict;[252] or it could have adopted a lower standard requiring only that a jury would probably not convict.[253] Ultimately, the court created a seemingly unique test, mashing the majority of courts' "clear and convincing" standard with Colorado's "probably bring about a verdict of acquittal."[254] The result hews closely to the *Washington* standard, but with the standard of proof raised from merely "demonstrate" to "clearly and convincingly demonstrate."[255]

The *Reed* court correctly eschewed more general tests aimed at whether the court's confidence was undermined, such as the ones created by California and South Carolina.[256] As the Supreme Court of Iowa remarked, such tests are "not only amorphous but also impractical."[257] Undoubtedly, these standards would likely lead to inconsistent results as courts wrestle with at what point "the interests of justice" outweigh the

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249. *Id.*; *Ex parte* Tuley, 109 S.W.3d 388, 392 (Tex. Crim. App. 2002) ("[T]he successful applicant shows by clear and convincing evidence that, despite the evidence of guilt that supports the conviction, no reasonable juror could have found the applicant guilty in light of the new evidence.").

250. *See Schneider*, 25 P.3d at 757 ("[T]he newly discovered evidence would probably bring about a verdict of acquittal in a trial.").

251. *See, e.g.*, *Jamison*, 765 S.E.2d at 130 (allowing a defendant to withdraw a plea if the interests of justice so demanded).

252. *See, e.g.*, *Schmidt*, 909 N.W.2d at 797 (requiring defendants to "show by clear and convincing evidence that . . . no reasonable fact finder could convict" in light of all the evidence, including that which is newly discovered).

253. Courts also generally require that the evidence be discovered after the conviction and that it was missed despite reasonable efforts by defense counsel and the defendant. *See, e.g.*, *Jamison*, 765 S.E.2d at 130 ("[R]elief is appropriate only where the applicant presents evidence showing that [] the newly discovered evidence was discovered after the entry of the plea and, in the exercise of reasonable diligence, could not have been discovered prior to the entry of the plea . . . ."); *Schneider*, 25 P.3d at 757 ("[T]he court must reasonably conclude that: . . . the newly discovered evidence was discovered after entry of the plea, and, in the exercise of reasonable diligence by the defendant and his or her counsel, could not have been earlier discovered.").

254. *Schneider*, 25 P.3d at 757; *see, e.g.*, *Schmidt*, 909 N.W.2d at 797 (imposing a clear and convincing burden of proof).

255. *Compare* People v. Washington, 665 N.E.2d 1330, 1337 (Ill. 1996) ("[S]upporting evidence [must] be new, material, noncumulative and, most importantly, of such conclusive character as would probably change the result on retrial."), *with Reed*, 2020 IL 124940, ¶ 57 ("To obtain relief under such claim, a guilty-plea defendant must provide new, material, noncumulative evidence that clearly and convincingly demonstrates that a trial would probably result in acquittal.").

256. *See supra* note 247 (describing the tests created by California and South Carolina).

257. *Schmidt*, 909 N.W.2d at 795.

guilty plea or when the prosecution's case is "undermined." Furthermore, as many courts which have considered this issue have pointed out, there are serious policy concerns weighing in favor of a heightened standard.[258] Indeed, as the State pointed out in oral arguments, it would seem duplicitous for the defendant to induce the State to drop charges or recommend a lower sentence in exchange for a guilty plea, only to return later with fresh evidence the State will now have to rebut with its likely stale evidence.[259] As such, while the fundamental tenets of justice require that guilty-plea defendants be allowed to raise freestanding innocence claims, policy concerns warrant a heightened standard.

As Justice Burke's concurrence showed, the primary question then becomes, what the guilty-plea defendant must show by clear and convincing evidence.[260] One view, endorsed by Texas, Iowa, and Justice Burke, is that "no reasonable factfinder" could have found the defendant guilty, and the other view, endorsed by Colorado and in *Washington*, is that a trial would "probably result in acquittal." Because *Washington* provides a similar test, albeit a less strict one, Illinois courts are already familiar with the "probably result in acquittal" approach.[261] As a result, the *Reed* court wisely adopted that test over the alternative "no reasonable factfinder" test. Since the policy interests favoring that the guilty plea remain intact are already adequately accounted for with the heightened burden of proof, it would be superfluous to also require the defendant prove that no reasonable factfinder could convict in light of the new evidence.

The *Reed* court also correctly eschewed the second prong of the Supreme Court of Colorado's test in *Schneider*. That prong requires that the defendant show that "the charges that the People filed against the defendant, or the charge(s) to which the defendant pleaded guilty were actually false or unfounded."[262] The *Schneider* court adopted its test largely from the dissent of the appellate court.[263] Notably, the dissent proposed that prong of the test because the newly discovered evidence in *Schneider* was

258. *See, e.g.*, *id.* at 797 (weighing the interests of the state in the finality of proceedings against the interests of an innocent defendant who pled guilty).

259. Oral Argument at 31:00, People v. Reed, 2020 IL 124940 (No. 124940), https://vimeo.com/537854199 [https://perma.cc/2YYA-5FPG] [hereinafter Oral Argument] (arguing that the *Washington* test does not extend to guilty-plea defendants because of the sparse factual records in the guilty-plea context).

260. *Reed*, 2020 IL 124940 ¶ 63 (Burke, J., concurring).

261. *See, e.g.*, People v. Dodds, 801 N.E.2d 63, 65 (Ill. App. Ct. 2003) (reversing circuit court's second-stage dismissal of trial-convicted petitioner's actual-innocence claim); People v. Johnson, No. 04-CR-04019(01), 2008 WL 7193320, at *2–3 (Ill. Cir. Ct. May 27, 2008) (summarily dismissing trial-convicted petitioner's actual-innocence claim in a first-stage proceeding).

262. People v. Schneider, 25 P.3d 755, 757 (Colo. 2001).

263. *Id.* at 762 n.4.

based on the victim's recantation of her testimony.[264] While this prong may be suited to petitions based on recanted testimony, there is no logical reason that it should apply to all freestanding innocence claims.

Ultimately, the *Reed* court struck the right balance between the defendant's interests in freedom and the State's interests in finality. The heightened "clear and convincing" standard ensures that the State's interests are accounted for while the lower "probably result in acquittal" test ensures that petitioners do not face a nearly insurmountable hurdle. Additionally, by hewing close to its test in *Washington*, the court also crafted a standard which will likely be familiar to Illinois courts.

V. IMPACT

While *Reed* provides a critical avenue of relief for guilty-plea defendants, it will likely have little, if any, effect on plea bargaining and on the incidence of wrongfully convicted individuals due to false guilty pleas. Additionally, as Justice Burke pointed out, the *Reed* court did not address what standard is to be used at first- and second-stage proceedings.[265] This section explores how lower courts could implement *Reed* in first- and second-stage proceedings and recommends that courts retain a lower standard for first-stage proceedings but adopt a higher standard, commensurate with *Reed*, for second-stage proceedings. Finally, while this was not addressed in the court's decision, at oral argument there was lengthy discussion regarding what would happen if a guilty-plea petitioner succeeded in raising a claim of actual innocence.[266] This section argues that the relief that best balances the parties' interests is to vacate the guilty-plea conviction and return all parties to their ex ante positions.

A. Effect on Defendants and Plea Bargains

One common argument against allowing guilty-plea defendants to raise claims of actual innocence is that doing so will undermine the State's incentives to engage in plea bargaining, or that it will otherwise render guilty pleas meaningless.[267] As previously discussed, the State's primary motivators for making concessions are to save resources, eliminate trial risk, and ensure finality of proceedings.[268] Thus, the argument

264. *See* People v. Schneider, 991 P.2d 296, 301–02 (Colo. App. 1999) (Briggs, J., dissenting) (discussing how because courts view recanted testimony with skepticism, they usually must be convinced that the original testimony was actually false), *rev'd* 25 P.3d 755 (Colo. 2001).

265. *Reed*, 2020 IL 124940, ¶ 65 (Burke, J., concurring).

266. *See, e.g.*, Oral Argument, *supra* note 259, at 6:56 ("What happens then? Is his plea vacated? Is he exonerated? Is he freed? Is it set for trial? What happens to the counts and cases that were dismissed by the state as part of this plea agreement?").

267. State's Brief, *supra* note 151, at 12–14; *see also* Joy & McMunigal, *supra* note 243, at 54 (identifying safeguarding the sanctity of the guilty plea as a primary argument against allowing collateral challenges to guilty pleas).

268. *See supra* Section I.C. (discussing plea bargaining generally).

goes, if a defendant could later attack that guilty plea, the State's incentives are substantially weakened since they could be hauled back into court and required to produce stale evidence. As a result, prosecutors would be less inclined to plea bargain. Because plea bargaining is mutually beneficial for everyone, all parties would suffer.

However, these concerns are unfounded, as the share of convictions reached by guilty pleas has not substantially changed in several states after their courts allowed for guilty-plea defendants to raise claims of actual innocence. Texas provides a prime example of this. In December 2002, the Court of Criminal Appeals of Texas ruled in *Ex parte Tuley* that a guilty-plea defendant could succeed in a claim of actual innocence by presenting new evidence which clearly and convincingly demonstrates that no reasonable jury would have convicted them in light of the new evidence.[269] In 2000–2001, Texas state district courts reported that nearly ninety-six percent of felony convictions resulted from guilty pleas.[270] In 2003–2004, the first full fiscal year after *Ex parte Tuley*, that rate remained steady.[271] That proportion has remained virtually unchanged, as the latest statistics indicate that ninety-five percent of convictions from 2019–2020 resulted from guilty pleas.[272] Similarly, the Colorado court's holding in *Schneider* in 2001 had little effect on the rate of guilty plea convictions. In 2000, 84.4 percent of felony convictions resulted from guilty pleas.[273] Two years later, the guilty plea felony conviction rate stood at 83.5 percent.[274] Thus, in both Colorado and Texas, the rate of felony convictions resulting from guilty pleas was virtually unchanged following their respective courts' holdings that defendants could challenge their guilty plea with a claim of actual innocence.

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269. *Ex parte* Tuley, 109 S.W.3d 388, 390 (Tex. Crim. App. 2002) ("We interpreted this to mean that the applicant must prove by clear and convincing evidence that no reasonable juror would have convicted the applicant in light of the new evidence.").

270. OFF. OF CT. ADMIN., 2001 ANNUAL STATISTICAL REPORT DISTRICT COURT STATEWIDE SUMMARY OF REPORTED ACTIVITY – CRIMINAL (2001), http://www.txcourts.gov/statistics/annual-statistical-reports/2001/ [https://perma.cc/U7UC-UZ3Y]. Texas state district courts have original jurisdiction over all felony charges. The report reveals that of 84,833 felony convictions, 81,330 resulted from guilty pleas.

271. OFF. OF CT. ADMIN., 2004 ANNUAL STATISTICAL REPORT DISTRICT COURT SUMMARY OF ACTIVITY BY CASE TYPE (2004), http://www.txcourts.gov/statistics/annual-statistical-reports/2004/ [https://perma.cc/84BL-L7VF]. Out of 104,023 felony convictions, 100,243 resulted from guilty pleas.

272. OFF. OF CT. ADMIN., 2020 ANNUAL STATISTICAL REPORT DISTRICT COURT ACTIVITY DETAIL (2020), http://www.txcourts.gov/statistics/annual-statistical-reports/2020/ [https://perma.cc/48ZR-4T3J]. From 2019-2020, 71,082 out of 74,821 felony convictions resulted from guilty pleas.

273. E-mail with case disposition data from State Ct. Adm'r Off., Colo. Cts. (Oct. 1, 2021) (on file with author). In 2000, there were 39,204 felony convictions in Colorado, of which 33,067 resulted from guilty pleas.

274. *Id.* In 2002, there were 43,911 felony convictions, of which 36,646 resulted from guilty pleas.

Another concern often raised against allowing guilty-plea defendants to raise claims of actual innocence centers on the possible administrative burden for courts.[275] This argument supposes that when armed with an avenue to challenge their guilty plea on a non-procedural basis, guilty-plea defendants will flood the courthouse with petitions. However, the three-stage process of the Post-Conviction Hearing Act mitigates this risk. At the first stage, the trial court evaluates petitions for merely a "gist of a constitutional claim."[276] Equipped with the *Reed* test, the court will make a cursory review to ensure that the defendant has new, material, and noncumulative evidence. Even though the first-stage threshold is low, courts will still be able to dispatch frivolous claims expediently. As the *Ex parte Tuley* court recognized, trial courts can likely "tell the difference between a meritorious claim of actual innocence accompanied by compelling new evidence and a bogus claim accompanied by bare allegations of innocence."[277] Furthermore, it would offend the cannons of justice upon which the *Reed* court based its opinion to find that administrative efficiency so thoroughly trumps substantive due process as to categorically bar these claims.

For related reasons, *Reed* will likely not have a great impact on the incidence of innocent individuals pleading guilty. The fact that an avenue of relief exists does nothing to alter the structural defects that result in wrongful convictions resulting from guilty pleas.[278] Defendants are subject to the same high-stakes pressures with limited bargaining power. Because the *Reed* standard is so stringent, as evidenced by the outcome in *Reed*, it will likely not change the calculus for defendants. To truly reduce the incidence of false guilty pleas, more substantial structural change will likely be necessary, such as reformation of the plea-bargaining process.[279]

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275. *See, e.g.*, Schmidt v. State, 909 N.W.2d 778, 802 (Iowa 2018) (Waterman, J., dissenting) (claiming that allowing guilty-plea defendants to raise claims of actual innocence will result in, inter alia, a "flood" of post-conviction applications).

276. People v. Edwards, 757 N.E.2d 442, 445 (Ill. 2001); *see also supra* Section I.A (discussing the three-step process for petitions under the Post-Conviction Hearing Act).

277. *Ex parte* Tuley, 109 S.W.3d 388, 394–95 (Tex. Crim. App. 2002).

278. *See* Ross, *supra* note 63 (discussing the structural features of the U.S. criminal justice system which incentivize plea bargaining); *see also supra* notes 240–243 and accompanying text (discussing the various reasons innocent defendants may plead guilty).

279. Judge Rakoff of the U.S. District Court for the Southern District of New York argued that harsh mandatory minimum sentences encourage defendants to plead guilty regardless of their actual guilt. *America's Guilty Plea Problem: US District Judge Jed S. Rakoff*, THE INNOCENCE PROJECT (Jan. 23, 2017), https://guiltypleaproblem.org/?id=jed_rakoff [https://perma.cc/7LEM-PYWV]. In response, he proposed greater judicial involvement in plea bargaining whereby a magistrate judge would hear preliminary evidence from the prosecution and defense before issuing a plea bargain recommendation. JED S. RAKOFF, WHY THE INNOCENT PLEAD GUILTY AND THE GUILTY GO FREE: AND OTHER PARADOXES OF OUR BROKEN LEGAL SYSTEM 31–34 (2021). Many other proposed reforms seek to level the playing field in bargaining negotiations. For example, Donald Gifford argued that one of the primary issues with plea bargaining is largely unrestricted prosecutorial

Thus, because of the well-entrenched interests at issue, *Reed* will likely not substantially affect the plea-bargaining process in Illinois. This is supported by the fact that similar rules have failed to do so in other states. Additionally, because of the three-stage process of the Post-Conviction Hearing Act and the stringent standard set forth in *Reed*, petitions for post-conviction relief from guilty-plea defendants are unlikely to flood courts to an unmanageable degree. For similar reasons, the effect on the incidence of wrongfully convicted guilty-plea defendants is unlikely to be substantial, and most petitioners will fail to secure relief. Nevertheless, for those few that can provide new, material, and noncumulative evidence which clearly and convincingly demonstrates that a jury would probably return an acquittal, *Reed* is of incalculable value and effect.

B. Implementation by Lower Courts

As previously suggested, because the *Reed* standard is similar to the test established in *Washington*, Illinois trial courts will likely find it familiar and straightforward to apply. However, two potential wrinkles could emerge from *Reed*'s implementation by trial courts. First, as Justice Burke pointed out, *Reed* creates a standard for third-stage evidentiary hearings but does not mention what standard should be used for post-conviction petitions at the first and second stages.[280] Second, as oral arguments revealed, there is a question of exactly what relief a court should award if it finds that a guilty-plea defendant successfully raised a claim of actual innocence.[281]

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discretion. Donald G. Gifford, *Meaningful Reform of Plea Bargaining: The Control of Prosecutorial Discretion*, 1983 U. ILL. L. REV. 37, 64–66 (1983). Rather than an adversarial negotiation, Gifford argued that plea bargaining resembles a unilateral administrative determination. *Id.* at 42–55. As a result, Gifford argued that implementing administrative controls, such as established guidelines and heightened judicial scrutiny, would result in more equitable outcomes. *Id.* at 74–96. On the other hand, Russell Covey looked at plea bargains as any other market transaction and instead proposed economics-based solutions. Covey, *supra* note 241, at 965–68. For example, Covey argued that greater pre-plea discovery would ensure parties negotiate with reliable information on individual charges, rather than engaging in "wholesale" transactions. *Id.* at 964. Covey also argued that parties should be required to commit to factual assertions early before discovery produces corroborating or impeaching evidence to reduce bluffing. *Id.* at 966. However, perhaps Covey's most interesting solution was to create an innocence "call option" for guilty-plea defendants. *Id.* at 967–77. Likening actually innocent defendants to "investors with inside information regarding the likely future appreciation of asset value," Covey argued that defendants could make a concession in exchange for a defined possibility to further develop their case and challenge the conviction. *Id.* If a defendant "purchases" an "innocence option," the legal system continues to engage in discovery and the defendant who "invested" in the innocence option could cash in that option mid-sentence and demand an evidentiary review. *Id.*

280. People v. Reed, 2020 IL 124940, ¶ 65 (Burke, J., concurring) ("The majority adopts the clear and convincing standard but never sets forth what standard a petitioner must meet at each stage of the proceedings.").

281. *See* Oral Argument, *supra* note 259, at 6:56 ("What happens then? Is his plea vacated? Is he exonerated? Is he freed? Is it set for trial? What happens to the counts and cases that were dismissed by the state as part of this plea agreement?").

The first case to squarely face the evidentiary standard issue at the first- and second-stage proceedings was *People v. Emery*, decided in an unreported opinion by the Fourth District shortly after *Reed*. The defendant in *Emery* entered a pro se open guilty plea to unlawful delivery of a controlled substance following a controlled purchase from a confidential informant.[282] Several years later, the defendant raised a claim of actual innocence in a post-conviction petition, basing his claim on the fact that the State failed to turn over a recording of the controlled purchase.[283] However, because *Reed* had not yet been decided, the trial court summarily dismissed the defendant's petition on the basis that *Cannon*'s obiter dicta completely foreclosed an actual-innocence claim for guilty-plea defendants.[284]

On appeal, now armed with the holding in *Reed*, the Fourth District considered the first-stage summary dismissal of the petition. For trial-convicted defendants, the court noted that in the first stage, all well-pleaded allegations are accepted as true and, under the *Robinson* standard, the newly presented evidence need only "place[] the trial evidence in a different light and undermine[] the court's confidence in the judgement of guilt."[285] Unfortunately for the defendant at bar, the court affirmed the trial court's summary dismissal because "even if accepted as true, the [new evidence] does not 'clearly and convincingly demonstrate that a trial would probably result in acquittal.'"[286] Thus, the Fourth District appeared to bring the clear and convincing evidentiary standard down to the first-stage proceeding.

The second decision to grapple with potentially differing evidentiary standards did so at an appeal from a second-stage dismissal. In *People v. Harris*, the defendant, who had pled guilty to first degree murder, raised a claim of actual innocence in a successive post-conviction petition.[287] The trial court dismissed the petition at a second-stage proceeding and the defendant appealed.[288] On appeal, the Fourth District noted the point raised by Justice Burke regarding the applicable standard for first- and second-stage proceedings.[289] As such, it requested supplemental briefing from the parties on the question of which standard applies to second-stage proceedings.[290] The Fourth District, while agreeing with the State that a higher standard should now exist for second-stage proceedings,

282. People v. Emery, 2021 IL App (4th) 190484-U, ¶¶ 2, 8.
283. *Id.* ¶ 27.
284. *Id.* ¶¶ 35, 39–40.
285. *Id.* ¶ 48.
286. *Id.* ¶ 52.
287. People v. Harris, 2021 IL App (4th) 200095-U, ¶ 2.
288. *Id.* ¶¶ 23–24.
289. *Id.* ¶ 36.
290. *Id.*

ultimately refrained from so holding because it found that the defendant failed the existing lower standard under *Washington*.[291] Like its opinion in *Emery*, the Fourth District's holding was unreported and thus is generally of limited precedential value.[292]

As a result, even though the opinions are unreported, it appears that if a guilty-plea defendant raises a claim of actual innocence, the Fourth District sees *Reed* as establishing a higher evidentiary standard for all stages. In doing so, the Fourth District appears to see innocence claims raised by trial-convicted defendants as wholly separate from innocence claims by guilty-plea defendants.

In this view, it is logical to carry *Reed*'s heightened pleading standard down to the first and second stages. However, this heightened pleading standard, while perhaps appropriate for a second-stage proceeding, is not appropriate for a first-stage proceeding. The first-stage proceeding is merely designed to determine whether the claim is "frivolous or patently without merit."[293] This is an exceedingly low bar meant only to tease out whether there is a "gist of a constitutional claim."[294] A heightened standard at this stage would be in tension with the mere "sniff test" established in the Post-Conviction Hearing Act and applicable case law for first-stage proceedings.

In contrast, a heightened standard would be appropriate for a second-stage proceeding in which the defendant must make a "substantial showing" of a constitutional violation.[295] Because, under *Reed*, establishing a constitutional violation requires "clear and convincing" evidence for guilty-plea defendants raising a claim of actual innocence, it is logical to require a heightened standard to make a substantial showing that this constitutional violation has occurred.

Thus, at a second-stage proceeding, the appropriate standard would be whether, after liberally construing and accepting all well-pled factual allegations not positively rebutted by the record as true, the defendant made a substantial showing that the new evidence clearly and convincingly demonstrates that a trial probably would result in acquittal. On the other hand, at a first-stage proceeding, the appropriate standard should remain the same as it does for trial-convicted defendants raising a claim of actual innocence—"whether the new evidence, if believed and not positively rebutted by the record, could lead to acquittal on retrial."[296] These

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291. *Id.*
292. Ill. S. Ct. R. 23(b), (e)(1).
293. 725 ILL. COMP. STAT. 5/122-2.1(a)(2) (2021).
294. People v. Edwards, 757 N.E.2d 442, 445 (Ill. 2001); *see also supra* notes 23–27 and accompanying text (discussing the low threshold used for first-stage post-conviction proceedings).
295. People v. Coleman, 701 N.E.2d 1063, 1072 (Ill. 1998).
296. People v. Robinson, 2020 IL 123849, ¶ 60.

different standards are warranted because each stage holds a different purpose. While the first stage is designed only to determine whether the defendant raises a colorable claim under the Act, the second stage tests the legal sufficiency of the allegations. It is at the second stage that it would be appropriate to introduce a heightened standard.

The second major question raised by *Reed* for lower courts is what the appropriate remedy is for a defendant who succeeds in an actual-innocence claim. Because the court found that Reed's petition failed, it did not need to consider this question. As Justice Theis recognized in questioning of defense counsel, several options exist.[297] Defense counsel argued that, like in *Washington*, the State could refile the dismissed charges, in particular the charge to which the defendant pled guilty.[298] However, counsel also argued that the court could consider whether the State had entered a nolle prosequi on the dropped charges and is barred by the statute of limitations from reinstating them under *People v. Shinaul*, save the charge to which the defendant pled guilty.[299]

On the other hand, the State argued that if the defendant succeeded, all parties should be placed in their ex ante positions—in other words, as if the plea agreement never existed in the first place.[300] As Justice Theis pointed out, in pleading guilty, the defendant enjoys the benefit of the bargain.[301] It would be unfair for the successful innocence-claim defendant to enjoy the benefit of the dismissal of the other charges while having their conviction on the dismissed charge vacated. As a result, the fairest relief to all parties would be for the existing conviction to be vacated and the parties to be in the same position as when they started.[302] Indeed, the

297. *See* Oral Argument, *supra* note 259, at 6:56 ("Is his plea vacated? Is he exonerated? Is he freed? Is it set for trial?").

298. *Id.* at 7:43.

299. *Id.* at 8:00; People v. Shinaul, 88 N.E.3d 760, 767 (Ill. 2017). *Nolle prosequi* ("not to wish to prosecute") occurs when the state gives notice that it is abandoning prosecution of a charge. *See id.* at 762 (discussing nol-prossed charges and reinstatement); *Nolle Prosequi*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining *nolle prosequi*).

300. Oral Argument, *supra* note 259, at 33:10.

301. *Id.* at 8:45.

302. The District of Columbia's statute governing post-conviction petitions similarly tends to put the parties in their ex-ante positions for guilty-plea defendants, though the contested charges may be treated differently depending on the evidence presented by the defendant. *See* D.C. CODE § 22-4135(g)(4) (2021) ("If the conviction resulted from a plea of guilty, and other charges were dismissed as part of a plea agreement, the court shall reinstate any charges of which the defendant has not demonstrated that the defendant is actually innocent."). D.C.'s statute provides a comprehensive guide to resolving the issue of remedies through a scheme of shifting remedies based on the burden of proof satisfied by the defendant. After considering several statutory facts, if the court concludes that it is "more likely than not that the movant is actually innocent of the crime, the court shall grant a new trial." D.C. CODE § 22-4135(g)(2) (2021). On the other hand, if the defendant satisfies a higher clear and convincing standard, "the court shall vacate the conviction and dismiss the relevant count with prejudice." D.C. CODE § 22-4135(g)(3) (2021). Thus, if the defendant shows that they are more likely than not innocent of the crime (but not by clear and convincing evidence), then the parties are truly put in their ex-ante positions.

Texas Court of Criminal Appeals seems to have come to this conclusion in *Ex parte Tuley*.[303] Because a bargain no longer exists, it would be unfair for either side to continue to benefit from the bargain.[304]

VI. CONCLUSION

In *People v. Reed,* the Illinois Supreme Court established a critical avenue of relief for individuals who plead guilty to a crime they did not commit. The court created a rule which appropriately balances the interests of the innocent defendant with those of the broader judicial system. While *Reed* is an important holding, absent other reforms, it is unlikely to drastically change the landscape of innocent individuals being incarcerated. Similarly, it is unlikely to have a substantial effect on the plea-bargaining process.

There are also two areas where it remains to be seen how lower courts will apply *Reed*. First, lower courts will likely have to interpret how *Reed* effects the first- and second-stage proceedings in post-hearing convictions. In doing so, they should retain the current low threshold for first-stage proceedings but carry a heightened standard to second-stage proceedings. Second, lower courts will likely have to grapple with what exact relief they should grant to successful petitioners. The relief that best balances the interests of the defendant with those of the State is to vacate the conviction stemming from the guilty plea and return all parties to their ex ante positions.

303. *Ex parte* Tuley, 109 S.W.3d 388, 397 (Tex. Crim. App. 2002) ("The Director of the Texas Department of Criminal Justice, Institutional Division is ordered to return the applicant to the custody of the convicting court so that he may answer the charges against him.").

304. This comports with the plea-bargains-as-contracts view and aligns with how courts have historically dealt with one party breaking a plea agreement. *See* Ross, *supra* note 63, at 722–23 (noting that if a prosecutor breaches the agreement, the defendant may be able to withdraw from the plea agreement, but if defendant breaches, the prosecution can pursue dropped charges); *see* Santobello v. New York, 404 U.S. 257, 263 (1971) (remanding to state court to determine whether prosecutor's breach of plea agreement should allow defendant to withdraw from plea agreement to ex-ante position or should require specific performance by prosecutor).