No. 122307

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, -vs- TORRENCE D. DUPREE Defendant-Appellant	))))))))))	Appeal from the Appellate Court of Illinois, No. 2-14-1013. There on appeal from the Circuit Court of the Nineteenth Judicial Circuit, Lake County, Illinois, No. 10 CF 1138. Honorable Daniel B. Shanes, Judge Presiding.

REPLY BRIEF FOR DEFENDANT-APPELLANT

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E-FILED
4/24/2018 3:18 PM
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No. 122307

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Appellate Court of Illinois, No. 2-14-1013.
Plaintiff-Appellee,	)	There on appeal from the Circuit Court of the Nineteenth Judicial
-vs-	)	Circuit, Lake County, Illinois, No. 10 CF 1138.
TORRENCE D. DUPREE	)	Honorable Daniel B. Shanes,
Defendant-Appellant	)	Judge Presiding.

REPLY BRIEF FOR DEFENDANT-APPELLANT

Section 122-2 of the Post-Conviction Hearing Act does not limit the supporting evidence for a post-conviction petition to a witness "affidavit." Torrence Dupree's petition, and the attached documentation of eyewitness Matthew Morrison's exculpatory statements to the police, satisfied Section 122-2 and made a substantial showing that trial counsel was ineffective for failing to call Morrison to testify.

A. Section 122-2's plain language allows petitioners to support their claims with "records, or other evidence," in addition to "affidavits[.]" The documentation Dupree attached in this case therefore satisfied the Act, contrary to the appellate court's ruling.

The State argues that when a post-conviction petitioner alleges that trial counsel was ineffective for not calling a witness to testify, 725 ILCS 5/122-2 ("Section 122-2") can only be satisfied by an affidavit from that witness (St. Br. 8). It relies on *People v. Guest*, 166 Ill. 2d 381, 402 (1995), *People v. Enis*, 194 Ill. 2d 361, 380 (2000), and *People v. Thompkins*, 161 Ill.2d 148 (1994), all of which include language to this effect (St. Br. 8). But while the State accuses Torrence Dupree of arguing

that this Court "did not mean what it said" in those cases, it fails to acknowledge the context in which those cases used that affidavit language, and does not directly respond to most of Dupree's arguments (St. Br. 8; *see* Def. Br. 27-31).

Indeed, while the State contends that *Guest*, *Enis* and *Thompkins* did not find that reliable "other evidence" could have supported their respective ineffectiveness claims, it ignores that none of them presented the opportunity to do so (St. Br. 8). Rather, in those cases either (1) *no evidence* was attached at all (*Guest*), or (2) the only evidence attached was uncertain and unreliable, such as an affidavit from someone *other than* the proposed witness (*Thompkins*), or a copy of an untitled document labeled "investigation notes," which was unsigned, unsworn, without a named author, and which contained multiple layers of hearsay (*Enis*) (*see* Def. Br. 27-31). It also bears reiterating that the sources of the affidavit language in the State's cited cases are *People v. Carmickle*, 97 Ill. App. 3d 917, 920 (3d Dist. 1981), which cited no authority that limited Section 122-2 to affidavits, and *People v. Ashford*, 121 Ill. 2d 55, 74-75 (1988), which was not even a post-conviction case (*see* Def. Br. 31, n. 3)(explaining in more detail).

This Court has never used Section 122-2 to reject reliable supporting evidence simply because it did not qualify as an "affidavit," and the State's cases can be upheld under this Court's other post-conviction precedent, which does not impose that restriction (Def. Br. 29-31). *See People v. Collins*, 202 Ill. 2d. 59, 66-67 (absence of any supporting documentation is fatal to a post-conviction claim); *People v. Delton*, 227 Ill. 2d 247, 254-55 (2008) (supporting documentation need only show that the claim is "capable of objective or independent corroboration"; it should "identify

with reasonable certainty the sources, character and availability" of helpful evidence).

The State does not dispute that imposing an affidavit requirement on Section 122-2 would improperly "read ... exceptions, limitations, or other conditions" into "plain and unambiguous" language (*see* St. Br. 7-10; Def. Br. 18-19, 21-22). *See People v. Fort*, 2017 IL 118966, ¶ 20; 725 ILCS 5/122-2 ("records" or "other evidence" can be attached to a petition). Nor does the State answer Dupree's contention that an arbitrary "affidavit" requirement would contravene the very "purpose of Section 122-2[,]" which is merely "to establish that a petition's allegations are *capable of* objective or independent corroboration" (*see* Def. Br. 20-21). *See Delton*, 227 Ill. 2d at 254-55 (emphasis supplied); *see also People v. Allen*, 2015 IL 113135, ¶ 36 ("the legislature contemplated a wide range of documentary evidence would satisfy Section 122-2" at the pleading stage; discussing the first stage); *People v. Reeves*, 412 Ill. 555, 560 (1955)(Section 122-2 should not be construed "so strictly that a fair hearing be denied and the purposes of the act defeated").

Since the State's interpretation of Section 122-2 is contrary to its plain language and would undermine its purpose, and the cases the State relies upon can be read consistently with other post-conviction authority that does *not* impose this unnecessary restriction, this Court should reject the State's argument (Def. Br. 26-32).

The State's proffered justification for its "affidavit" limitation is unpersuasive (St. Br. 7-9). Its argument that an affidavit is the *only* evidence that can demonstrate whether a particular witness has useful information or testimony is difficult to

understand (St. Br. 7-8). Even apart from the police documentation at issue in this case, there are numerous non-affidavit exhibits that might be attached to a petition to demonstrate the substance of a witness's helpful potential testimony, such as transcripts from other cases, lab records, e-mails, text messages, video-recorded statements, etc. (*see* Def. Br. 20-21, n. 1)(listing examples).

The State nonetheless claims that in this case, Dupree cannot "allege the substance of Matthew Morrison's proposed testimony" without an affidavit, and characterizes Morrison's potential testimony that Dupree was not the gunman as "wishful thinking[,]" because this fact was not specifically pled in Dupree's petition (St. Br. 9). This argument makes no sense in light of the record and this Court's post-conviction precedent.

Dupree's petition alleged that Morrison did not identify Dupree in a police lineup that contained his picture, identified someone else in a second lineup, and described the gunman as being up to seven to eight inches taller than Dupree (C. 336-37). These facts were directly corroborated by the general case reports ("GCRs") and handwritten statements Dupree attached to his petition (C. 429A-439). It is perfectly reasonable to infer from this evidence that Morrison did not believe Dupree was the gunman and would have testified to that fact, particularly considering that Dupree's petition must be to be "liberally construed in [his] favor ... and taken as true" at this stage of post-conviction proceedings, *see People v. Sanders*, 2016 IL 118123, ¶ 31, and that his attached documentation need only show that his claim was "capable of" objective or independent corroboration, *see Delton*, 227 Ill. 2d at 254-55.

But even if Dupree's petition was limited to Morrison's prior statements to the police, those prior statements are still exculpatory (*see, e.g.*, C. 436A – Morrison identified someone else as the gunman in a lineup). The State does not appear to argue otherwise, nor does it deny that these statements would have been admissible under various hearsay exceptions at trial had Morrison testified (*see* Def. Br. 23-25; St. Br. 7-12). *Delton*, 227 Ill. 2d at 254-55; *see People v. Williams*, 193 Ill. 2d 306, 358-60 (2000) (evidence that victim previously identified someone other than the defendant is substantively admissible). This Court should reject the notion that an affidavit is the *only* Section 122-2 evidence that can demonstrate the substance of a potential witness's testimony (St. Br. 8, 9).

The State further contends that an affidavit is necessary because uncalled witnesses must write in their affidavit that they were "willing to testify" at trial (St. Br. 7, 9). Appellate counsel is unaware of any opinion from this Court rejecting a post-conviction petition because the supporting documentation did not include this language, and the State cites none. *Cf. Enis*, 194 Ill. 2d at 380; *Guest*, 166 Ill. 2d at 402; *Thompkins*, 161 Ill.2d at 148 (cited by the State; none stating this rule). And even in the First District case the State relies upon, the appellate court did *not* hold that the absence of this language rendered supporting documentation insufficient at the second stage; rather, that case advanced to a third-stage evidentiary hearing. *See People v. Brown*, 371 Ill. App. 3d 972, 982 (1st Dist. 2007) (upholding rejection of defendant's ineffectiveness claim on its merits after an evidentiary hearing, as it was supported by the affidavit of a co-defendant who had been simultaneously on trial for the same murder, and who did not say that

he would have waived his right against self-incrimination).

Unless the record clearly indicates that the witness would *not* have taken the stand, the State's "willingness to testify" requirement is incompatible with this Court's precedent. Again, at the second stage post-conviction petitions are "liberally construed in favor of the petitioner and taken as true." *Sanders*, 2016 IL 118123 at ¶ 31. The purpose of Section 122-2 is merely to demonstrate that a particular post-conviction claim is "*capable of* objective or independent corroboration," and attached documentation only has to identify the character, sources and availability of helpful evidence "with reasonable certainty." *See Delton*, 227 Ill. 2d at 254-55 (emphasis supplied). Under this authority, it would be improper for a post-conviction court to presume that a petitioner's proposed witness would not testify, such that the petitioner has some burden to prove otherwise, at the second stage.

Indeed, a sufficiently-reliable record of an uncalled witness's helpful pre-trial statement, if attached to a petition, should be more than sufficient to demonstrate that the petitioner's ineffectiveness claim is "capable of" corroboration, regardless of whether it specifically indicates that the witness would have testified. *Delton*, 227 Ill. 2d at 254-55; *see also*, *Jones v. Calloway*, 842 F.3d 454, 464–65 (7th Cir. 2016) (Illinois appellate court erred when it upheld denial of post-conviction petition before an evidentiary hearing based on, *inter alia*, its belief that the witness "probably would have refused to testify"; this "supposition was speculative").

Regardless, criminal defendants have the right to subpoena even unwilling witnesses to the stand, *see* 725 ILCS 5/115-17 (West 2010), and Illinois's rules

of evidence provide several methods by which a defense attorney can admit unwilling witnesses' prior statements at trial. *See* 725 ILCS 5/115-10.1 (certain types of recorded prior statements can be admitted into evidence if the witness gave inconsistent trial testimony); *People v. Holveck*, 141 Ill. 2d 84, 104-105 (1990)(third parties can testify to a person's prior statements of identification, regardless of whether the witness makes an in-court identification). Accordingly, if a petitioner's attached documentation fits within certain evidentiary rules, he can demonstrate that helpful evidence would be presented at trial *regardless* of the witness's willingness to testify.

In this case, for example, Dupree attached GCRs and handwritten documents describing exculpatory identifying statements Morrison made before trial (C. 429A-449). This documentation established "with reasonable certainty" that Morrison would have testified similarly at trial had he been gone to the stand. *Delton*, 227 Ill. 2d at 254-55. Moreover, the State does not dispute that Morrison's exculpatory prior statements of identification would have been admitted at trial even if he was an unwilling or uncooperative witness, no matter what he said on the stand (*see* Def. Br. 24-25)(explaining the admissibility of prior inconsistent statements, prior statements of identification, etc.). Dupree's supporting documentation thus shows that his ineffectiveness claim was "capable of" objective or independent corroboration regardless of whether Morrison would have been a willing witness. *Delton*, 227 Ill. 2d at 254-55.

The State nonetheless emphasizes that Morrison "may have" refused to testify and invoked his Fifth Amendment right to self-incrimination (St. Br. 9).

But since this issue will not arise in every case, it hardly demonstrates the necessity for an affidavit describing the witness's willingness to testify every time a petitioner alleges a similar ineffectiveness claim, as the State suggests (St. Br. 9).

The State's Fifth Amendment argument is also premature at the second stage of post-conviction proceedings. Morrison's marijuana possession raises at most a fact question as to whether he would have invoked his right against self-incrimination. *Cf. Brown*, 371 Ill. App. 3d at 982 (cited by the State; ineffectiveness claim predicated on a co-defendant's post-trial affidavit advanced to the third stage, even absent an assertion that he would waive his right against self-incrimination). Since Morrison already incriminated himself when he told the police he was selling marijuana, and the State very likely would not have been able to prosecute Morrison for this drug crime (*see infra*), he very well may have chosen to testify (R. 429A-449). This issue can only be resolved at an evidentiary hearing. *See People v. Coleman*, 183 Ill. 2d 366, 380-81 (1998)(fact questions can only be decided at the third stage of post-conviction proceedings) ; *see Jones*, 842 F. 3d at 464-65 (improper for Illinois appellate court to uphold dismissal of post-conviction petition before an evidentiary hearing based on its belief that it was"highly likely" the witness "would have invoked his Fifth Amendment privilege not to testify"; this was improperly "speculative").

There are also fact questions as to (1) whether the court would have allowed Morrison to invoke his Fifth Amendment privilege; (2) how and when Morrison might have invoked that privilege if he chose to do so, and/or (3) whether his prior statements would have been admissible even if he refused to testify.

First, Morrison likely would not have been permitted to invoke his right

against self-incrimination, because his answers to the parties' questions about the robbery would not have subjected him to prosecution for a marijuana offense. A witness may only invoke their Fifth Amendment privilege against self-incrimination if "he has reasonable cause to believe he might subject himself to prosecution if he answers." *People v. Ousley*, 235 Ill. 2d 299, 306 (2009). However, "[i]t is for the court to say whether his silence is justified, and to require him to answer if it clearly appears to the court that he is mistaken." *Hoffman v. U. S.*, 341 U.S. 479, 486 (1951) (citation omitted).

In this case, Officer Kueber admitted that no marijuana was recovered during the police investigation, which means that the State could not have proved beyond a reasonable doubt that Morrison possessed (or delivered) that substance (R. 751). *See People v. Park*, 72 Ill. 2d 203, 211-12 (1978)(in drug cases, the State has the burden to prove "the actual identity of the substance in question beyond a reasonable doubt"; reversing marijuana conviction absent adequate proof that the substance the police recovered was marijuana, despite a non-expert officer's testimony and the defendant's admission); *see also People v. Hagberg*, 192 Ill. 2d 29, 34 (2000); *People v. Jones*, 174 Ill. 2d 427, 428–29 (1996)(similarly holding); *In re Jarrell C.*, 2017 IL App (1st) 170932, ¶ 39 (reversing drug conviction after finding drugs should have been suppressed at trial, "[b]ecause the State cannot prevail on remand without th[is] evidence").

Since the State could not have prosecuted Morrison for any marijuana crime arising from his testimony, the court would not have allowed Morrison to invoke his right against self-incrimination. *Cf. People v. Walker*, 28 Ill. 2d 585, 590 (1963)

(if a witness gets immunity that bars their prosecution for an offense "shown in whole or in part" by their potential testimony, this "eliminates the constitutional privilege against self-incrimination").

Second, the fact that Morrison was selling marijuana when he was robbed is collateral to the issue of Dupree's culpability, and at most pertained to Morrison's credibility. As such, even if Morrison wanted to invoke his Fifth Amendment privilege, he might have chosen to do so selectively. *See U.S. v. McClurge*, 311 F. 3d 866, 973-74 (7th Cir. 2002) (refusing to strike entirety of witness testimony based on witness's refusal to answer four incriminating questions, which were "merely collateral to [his] direct testimony [about the offense], such as 'credibility'"); *State of Wis. ex rel. Monsoor v. Gagnon*, 497 F.2d 1126, 1129–30 (7th Cir. 1974) (courts cannot strike a witness's testimony based on their refusal to answer "collateral questions which relate only to [the witness's] credibility"; "a defendant may not, consistent with the Sixth and Fourteenth Amendments, be arbitrarily deprived of competent testimony which is relevant and material to the defense"); *see also*, LaFave, Wayne R., et al., CRIMINAL PROCEDURE, § 2.10(b), p. 835 (3d Ed. 2007) ("LaFave")("The witness exercising the privilege must be sworn and assert the privilege separately as to each question calling for an incriminating response").

Third and finally, Morrison's prior statements might have been admissible as "statements against interest" even if he refused to testify. *See* Ill. Evid. R. 804 (b)(3) ("statements against interest" are admissible if the declarant is "unavailable as a witness"); Ill. Evid. R. 804(a)(1) ("Unavailability as a witness" includes

situations in which the declarant invokes a privilege); *People v. Wright*, 2017 IL 119561, ¶¶80-81 ("a declarant who properly asserts his fifth amendment right not to testify is unavailable for the purposes of" the "statement against interest" rule).

Statements against interest include statements that "so far tend[] to subject the declarant to ... criminal liability ... that a reasonable person in declarant's position would not have made the statement unless believing it to be true," so long as "corroborating circumstances clearly indicate the trustworthiness of the statement." *See Wright*, 2017 IL 119561 at ¶¶80-81; Ill. Evid. R. 804 (b)(3). And here, by reporting the robbery to the police and making identifying statements about the gunman, Morrison necessarily subjected himself to a serious risk that the police would discover he had been committing a marijuana crime during that robbery. *See* Ill. Evid. R. 804 (b)(3). Even the State seems to agree that since "Morrison was attempting to sell marijuana to Nowell when the robbery occurred[,] ... even admitting he was present at the scene of the crime [] would have potentially implicated him in a crime" (St. Br. 9).

There is no question that Morrison *actually did* inculpate himself in a crime by going to the police to make identifying statements: he admitted to selling marijuana both orally and in writing (C. 429A-435), and the police investigation he initiated led the police to Nowell and Collins, who were witnesses to this offense (*see* R. 518, 548, 573). No reasonable person in Morrison's position would risk police discovery of, and prosecution for, their drug crime by going to the police to make identifying handwritten and lineup statements about the man who robbed them,

unless they believed those identifying statements were true. *See* Ill. Evid. R. 804 (b)(3).

Rule 804(b)(3) nonetheless requires the proponent to establish that "corroborating circumstances... clearly indicate the trustworthiness" of the declarant's prior statements. *See* Ill. Evid. R. 804 (b)(3). While such circumstances exist in this case – Morrison was a victim of the robbery, reported the crime the day it happened, and made identifying statements that were witnessed and documented and police officers – post-conviction courts can only resolve fact and credibility questions after a third-stage evidentiary hearing, not at the second stage (C. 429A-434A; R. 490, 496). *See People v. Warren*, 2016 IL App (1st) 090884-C, ¶ 92 (agreeing that the hearsay statements in that case may have been admissible under Rule 804 if they were sufficiently "trustworth[y]," but holding that it cannot "fully assess" this issue because "[c]redibility determinations may be made only at a third-stage evidentiary hearing")(citation omitted).

This Court has further recognized that when "constitutional rights that directly affect the ascertainment of guilt are implicated, the hearsay rule may not be mechanically applied to defeat the ends of justice." *See People v. Tenney*, 205 Ill. 2d 411, 434 (2002). As such, "where hearsay testimony bears persuasive assurances of trustworthiness and is critical to the accused's defense, its exclusion deprives the defendant of a fair trial in accord with due process." *Id.*, *citing Chambers v. Mississippi*, 410 U.S. 284, 298-99 (1973). Morrison's exculpatory prior statements were undoubtably critical to Dupree's defense in this case. But again, only an evidentiary hearing judge can resolve whether those statements bore "persuasive

assurances of trustworthiness." *See Coleman*, 183 Ill. 2d at 380-81; *Warren*, 2016 IL App (1st) 090884-C at ¶ 92.

In sum, Dupree's supporting documentation shows that Morrison made exculpatory prior statements of identification that were admissible at trial if he testified, and at most raises fact questions as to whether and how he would have invoked his Fifth Amendment privilege, whether the judge would have allowed him to do so, whether his prior statements would be admissible even if he did. At the second stage of post-conviction proceedings, Dupree's petition is therefore more than sufficient to establish that his ineffectiveness claim is "capable of" independent or objective corroboration. *Delton*, 227 Ill. 2d at 254-55. This case should advance to a third-stage evidentiary hearing, where these fact issues can be resolved. *Coleman*, 183 Ill. 2d at 380-81.

B. Dupree's petition and attached documentation made a substantial showing of a constitutional violation.

(1) Dupree's petition made a substantial showing of Strickland *prejudice.*

The State argues that the absence of Morrison's testimony was not prejudicial because Dupree's petition did not specifically allege that "Morrison would have testified that Dupree was not the gunman," a fact it claims is "mere conjecture" (St. Br. 12, *citing* Def. Br. 12). The State also contends that the police documentation "did not show whether Morrison would have testified" (St. Br. 12).

But the only question here is whether Dupree's petition made a substantial showing of a *reasonable probability* of a different trial outcome had trial counsel called Morrison to the stand. *See People v. Harris*, 206 Ill. 2d 293, 303, 307

(2002)(applying *Strickland* at the second stage). As discussed above, since Morrison's prior statements to the police necessarily indicated his belief that Dupree was not the gunman, is reasonable infer that Morrison would have actually testified that "Dupree was not the gunman" had he been called to the stand (St. Br. 12; *see* C. 336-37, 429A-439)(*e.g.*, identifying a picture of someone other than Dupree). *See Sanders*, 2016 IL 118123, ¶ 31 (post-conviction petitions must be "liberally construed in favor of the petitioner and taken as true" at this stage). And even if Morrison's testimony was exclusively limited to his prior statements of identification, as the State argues (St. Br. 12), those prior statements are still exculpatory (C. 336-37, 429A-439)(*e.g.,* Morrison identified someone other than Dupree in a photo lineup).

Finally, Morrison could have been subpoenaed even if he was unwilling to testify; there is at most a fact question as to whether (and how, and if) he would have been able to invoke his Fifth Amendment rights; and his exculpatory prior statements of identification were admissible regardless of what he testified about on the stand (*see* Def. Br. 24-25). *See* 725 ILCS 5/115-17 (West 2010)(defendants have the right to subpoena witnesses); *see also* LaFave,§ 2.10(b), p. 835 ("Where a person is subpoenaed to testify as a witness[,]" even his Fifth Amendment "privilege does not allow him to simply refuse to be sworn"); *Jones*, 842 F.3d at 465 (Illinois appellate court erred when found no *Strickland* prejudice based on its "speculative" belief that the uncalled witness "probably would have refused to testify").

Dupree's petition therefore makes at least a substantial showing of a

"reasonable probability" that Morrison's exculpatory evidence would have been presented at trial, and that this would have resulted in a different outcome in light of the State's indisputably weak identification case (Def. Br. 34-41; *see* St. Br. 12, State Appellate Court Brief [St. App. Ct. Br.] 12 – characterizing Collins's identification as "less than certain," and Nowell's "testimony [ ]as naturally suspect").

(2) Dupree's petition made a substantial showing that counsel's failure to present Morrison's testimony was objectively unreasonable.

The State additionally contends that counsel made a "strategic" decision not to call Morrison, because counsel (1) elicited Officer Manges's testimony that Morrison said the gunman was 6' 3", and (2) "intimated in closing that the State did not want the jury to hear from Morrison" (St. Br. 11). But absent speculation, neither fact actually demonstrates that trial counsel made "an *actual* strategic trial judgment[ ]" to exclude Morrison's testimony. *See Jones,* 842 F. 3d at 454 (emphasis in original; Illinois appellate court could not find counsel made an actual strategic decision because he did not explain his strategy on the record); *cf. People v. Peterson*, 2017 IL 120331, ¶ 81 (record sufficient to evaluate counsel's strategy, where he had actually "disclosed ... his strategy in calling Smith as a witness" at "a hearing during trial").

Indeed, Illinois and federal authority holds that it is improper for post-conviction courts to speculate, before an evidentiary hearing, as to what counsel's strategy *might have been* (Def. Br. 43-44)(citing cases). *See Jones,* 842 F. 3d at 459. In *Jones*, for example, an Illinois appellate court affirmed the denial of a post-conviction petition alleging counsel's ineffectiveness for failing to call a witness,

after concluding that trial counsel made a strategic choice. The Seventh Circuit Court of Appeals found that this ruling was "contrary to[,] or an unreasonable application of[,] .. the Sixth Amendment right of the accused to effective counsel." *Id*. at 463. It explained that since "there was no postconviction hearing in state court, [counsel's] *actual reason* for omitting [the proposed witness] was then unknown," and "[w]ithout an explanation from [counsel] about his reason for not calling [the witness], there was no factual foundation for the state appellate court's determination that he omitted [the witness] as a matter of trial strategy." *Id*. 464 (emphases supplied); *see also People v. Tate*, 305 Ill. App. 3d 607, 612 (1st Dist. 1999)(holding that while counsel may have made a strategic decision not to call certain witnesses because they would not be truthful or persuasive due to their close relationship with the defendant, it could not "say as a matter of law that was counsel's reasoning").

The same is true here. Since counsel never disclosed his actual reason for omitting Morrison's testimony on the record, whether his conduct was the product of a trial strategy is a fact question that a circuit court should decide after counsel testifies at an evidentiary hearing. *See Jones,* 842 F. 3d at 459*; Tate*, 305 Ill. App. 3d at 612 (remanding for an evidentiary hearing where the record did not show "whether counsel made a professionally reasonable tactical decision not to call the witnesses or whether ... counsel failed to call them as a result of incompetence").

Regardless, the record demonstrates that trial counsel's decision to exclude Morrison's testimony could not have been a *reasonable* trial strategy (Def. Br. 44-47). While the State repeatedly emphasizes that counsel elicited Officer Manges's

testimony that Morrison said the gunman was 6'3" (St. Br. 10, 12), it omits that the judge specifically instructed the jury that they could not to consider that statement for its truth (*see* Def. Br. 8, 46, *citing* R. 701). The State also notes that counsel's closing argument implied that Morrison had helpful evidence the State did not want the jury to hear (St. Br. 11), but counsel could have *actually presented* that helpful evidence at trial (*see* Def. Br. 23-24). No reasonable trial attorney would choose to rely on a statement that the jury could not consider, and make this vague argument, rather than directly present Morrison's exculpatory testimony and/or prior statements.

The State nonetheless contends that trial counsel would have been justified in excluding Morrison's testimony, because Nowell allegedly warned Morrison that the gunman "just got out of jail" (St. Br. 11). This comment – an out-of-court statement by Nowell – would not have been admissible had Morrison testified at trial; it was irrelevant, inadmissable hearsay, and constituted improper other-crimes evidence. And even if Nowell's comment was admissible, it did not identify *Dupree* as the gunman. To the contrary, the State drew this comment from one of Morrison's handwritten statements to the police, which did not identify Dupree, and instead described the gunman as being up to eight inches taller than Dupree (St. Br. 11, *citing*, C. 429B). No reasonable attorney would conclude that the risk posed by this inadmissible comment, which does not identify Dupree and includes important facts suggesting that Dupree was *not* the gunman, would justify excluding Morrison's exculpatory testimony and/or prior statements.

The State also notes that Morrison's description of the gunman was similar

to Collins's description, but glosses over the fact that they were corroborative of an *exculpatory* trait (St. Br. 11). Indeed, while Dupree was just 5'7" or 5'8", Morrison and Collins told the police that gunman was *six to eight inches taller*, at 6'2" (Collins) or 6'3" (Morrison) (R. 525-27, 531, 794; C. 429A-431A). Nor was there any other danger that Morrison's description of the gunman would somehow corroborate Collins's actual *identification* of Dupree, which the State below admitted was "less than certain" (St. App. Ct. Br. 12; *see* Def. Br. 34-35). Indeed, in addition to the describing the gunman as significantly taller than Dupree, the GCRs show that Morrison told the police during the lineup identifications that *someone else* was the gunman (C. 436; *see* Def. Br. 34-35). No rational attorney would chose to forgo Morrison's direct, exculpatory evidence under these circumstances.

As such, even if counsel made a strategic choice to exclude Morrison's testimony, that strategy was not rational or reasonable (*see* Def. Br. 44-47). *See Jones*, 842 F.3d at 465 ("a defense attorney's failure to present a material exculpatory witness of which he was aware qualifies as deficient performance"; deficient performance proved where an uncalled witness's exculpatory testimony "would have been powerful" when weighed against the "very weak prosecution witnesses").

Since Dupree's petition makes a substantial showing that trial counsel was ineffective for not presenting Morrison's testimony, this Court should reject the State's arguments and reverse and remand for an evidentiary hearing.

CONCLUSION

For the foregoing reasons, Torrence D. Dupree, defendant-appellant, respectfully requests that this Court reverse the appellate court's ruling, and remand for an evidentiary hearing.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I, Christopher L. Gehrke, certify that this reply brief conforms to the requirements of Supreme Court Rule 341(a) and (b). The length of this reply brief, excluding pages containing the Rule 341(d) cover and the Rule 341(c) certificate of compliance is 19 pages.

/s/Christopher L. Gehrke
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NOTICE AND PROOF OF SERVICE

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Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. On April 24, 2018, the Reply Brief was filed with the Clerk of the Supreme Court of Illinois using the court's electronic filing system in the above-entitled cause. Upon acceptance of the filing from this Court, persons named above with identified email addresses will be served using the court's electronic filing system and one copy is being mailed to the defendant-appellant in an envelope deposited in a U.S. mail box in Chicago, Illinois, with proper postage prepaid. Additionally, upon its acceptance by the court's electronic filing system, the undersigned will send 13 copies of the Reply Brief to the Clerk of the above Court.

/s/Joseph Tucker
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