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CUMULATIVE DIGEST

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§9-1
Post-Conviction Hearing Act

§9-1(a)

People v. Domagala, 2013 IL 113688 (No. 113688, 4/18/13)

The Post-Conviction Hearing Act sets forth three stages of review. At the first stage, the trial court may summarily dismiss a post-conviction petition that is frivolous or patently without merit. If the petition is not dismissed, it advances to the second stage, at which counsel may be appointed for an indigent defendant and the State may either file a motion to dismiss or an answer to the petition. At the second stage, the trial court must determine whether the petition and any accompanying documentation make a substantial showing of a constitutional violation.

At the second stage, the petitioner bears the burden of making a substantial showing of a constitutional violation. However, evidentiary questions are not resolved. Instead, all well-pleaded facts that are not positively rebutted by the trial record are taken as true.

If the petition makes a substantial showing that the constitutional rights of the defendant were violated, the case proceeds to a third stage evidentiary hearing. At that hearing, the trial court serves as a fact finder and determines credibility and the weight to be given to testimony. At this stage, the trial court determines whether the evidence demonstrates that the petitioner is entitled to relief.

(Defendant was represented by Assistant Defender Shawn O'Toole, Chicago.)

People v. Chester, 2014 IL App (4th) 120564 (No. 4-12-0564, 1/28/14)

1. While post-conviction proceedings are civil in nature, proceedings under the Post-Conviction Hearing Act are *sui generis*. Thus, procedures authorized by the Code of Civil Procedure apply to post-conviction proceedings only to the extent they do not conflict with the Post-Conviction Hearing Act.

In civil cases, the plaintiff may dismiss an action without prejudice any time before the trial or hearing begins. However, because 725 ILCS 5/122-5 gives the trial court discretion whether to grant leave to withdraw a post-conviction petition, a post-conviction petition may be withdrawn only if the court grants leave. The court rejected the argument that under the Civil Procedure Act, a petitioner has an absolute right to withdraw a post-conviction petition at the first stage of the proceedings.

2. The trial court did not abuse its discretion where it failed to rule on a motion to withdraw a petition before summarily dismissing it as frivolous and patently without merit. The motion to withdraw did not seek time to develop the arguments that had been raised in the petition, but instead requested time to add additional arguments. The motion failed to list the new issues which defendant claimed to have recently discovered, and defendant had nearly four years before filing the petition to develop any arguments concerning constitutional violations. Under these circumstances, the trial court did not abuse its discretion by refusing to allow additional time.

(Defendant was represented by Assistant Deputy Defender Nancy Vincent, Springfield.)

People v. Cole, 2012 IL App (1st) 102499 (No. 1-10-2499, 9/21/12)

Under **People v. Jones**, 213 Ill. 2d 498, 821 N.E.2d 1093 (2004), claims that were not

raised in the post-conviction petition may not be raised for the first time on appeal from the trial court's dismissal of that petition. The court concluded that the post-conviction petition here failed to raise a claim of ineffective assistance by appellate counsel because it made no explicit reference to appellate counsel's performance on direct appeal. The court also held that the petition could not be deemed to have raised an "implicit claim" of ineffective assistance of appellate counsel merely because it raised issues which had not been raised on direct appeal.

In a dissenting opinion, Justice Gordon argued that the petitioner raised ineffectiveness of appellate counsel where one of the opening paragraphs of the *pro se* petition complained of "attorney ineffectiveness" and then specifically described the petitioner's claims, without indicating whether the reference to ineffectiveness concerned trial or appellate counsel. The dissenting opinion criticized the majority for construing the phrase "attorney ineffectiveness" as necessarily referring only to actions by trial counsel.

The dissenting opinion also found that defendant's petition should not be deemed to have been a post-conviction petition at all, because it was filed after the petitioner's sentences had been vacated on direct appeal and the cause remanded for resentencing, but before the new sentencing hearing was held. Because the petitioner was not "convicted" until a new sentence was imposed, and the Post-Conviction Hearing Act provides a method by which persons under criminal sentences may raise constitutional claims, a petition filed before sentencing is not a post-conviction petition. Justice Gordon would have dismissed the petition without prejudice in recognition of the fact that the petitioner was entitled to file both a direct appeal after resentencing and a post-conviction petition if he failed to obtain relief on direct appeal.

(Defendant was represented by Assistant Defender Stephen Gentry, Chicago.)

People v. Gonzalez, 407 Ill.App.3d 1026, 944 N.E.2d 834 (2d Dist. 2011)

1. Newly discovered evidence warrants a new trial when it: (1) has been discovered since the trial, (2) is of such character that it could not have been discovered before trial through the exercise of due diligence, (3) is material and not merely cumulative, and (4) of such conclusive character as to probably change the result of a retrial. The evidence need not establish the defendant's innocence; a new trial is warranted when the circumstances, including the new evidence, warrant closer scrutiny on the issue of guilt or innocence. Claims of newly discovered evidence are not favored and must be closely scrutinized.

2. Defendant's post-conviction petition satisfied the first three prongs in the test for obtaining a new trial based on newly discovered evidence: the evidence was newly discovered, could not have been discovered before trial, and was material. The defendant presented a co-defendant's affidavit executed two years after the defendant's conviction and which indicated that the co-defendant had acted alone. The affidavit was newly discovered because it was executed only after the defendant's conviction. Due diligence could not have discovered the evidence at the time of trial, as the co-defendant was on trial at the same time and could not have been forced to surrender his 5th Amendment rights. Finally, the evidence was not merely cumulative where the defense presented no evidence at trial and relied solely on challenging the State's evidence.

However, the court held that the evidence was not of such conclusive character as to make a different result likely at a retrial. The co-defendant's affidavit was executed some two years after the co-defendant had been sentenced and only nine months before the co-defendant was scheduled to be released from prison. Thus, the co-defendant's statements could have no bearing on his personal situation, making his credibility suspect.

In addition, the post-conviction judge found that the co-defendant's testimony was not

credible. The court noted that the new claims conflicted with the co-defendant's testimony at his own trial, there was testimony by disinterested witnesses that defendant had been present at the scene, and there was testimony at trial that defendant had admitted to the offense. Furthermore, the evidence at trial indicated that defendant and the co-defendant were together on the morning of the offense. Finally, when in court for their bond hearings, each defendant was heard accusing the other of "tricking" on them. Under these circumstances, the trial court did not err by finding that the affidavit was merely an attempt by the co-defendant to help the defendant.

3. On remand, the trial court lacks authority to act beyond the scope of the mandate. If specific instructions are given by the reviewing court, the lower court must comply with those instructions. If no specific instructions are given, the lower court must examine the opinion and proceed consistently with it.

Where the cause was remanded for an evidentiary hearing on the defendant's post-conviction petition, which contained a single allegation of constitutional error, the trial judge did not exceed the mandate by allowing the defendant to amend the petition to raise a new claim. The court concluded that the mandate directed the trial judge to consider whether newly discovered evidence was of such conclusive character as to probably change the result of a retrial, but did not otherwise dictate the scope of the hearing.

(Defendant was represented by Assistant Defender Kerry Bryson, Ottawa.)

People v. Greco, 2014 IL App (1st) 112582 (No. 1-11-2582, 5/12/14)

In **Padilla v. Kentucky**, 559 U.S. 356 (2010), the Supreme Court held that counsel is deficient if he does not inform defendant that a guilty plea may have immigration consequences. In **Chaidez v. United States**, ___ U.S. ___, 133 S.Ct. 1103 (2013), however, the Court (utilizing the test of **Teague v. Lane**, 489 U.S. 288 (1989)) held that the ruling in **Padilla** did not apply retroactively to cases on collateral review.

Here, defendant argued that despite **Chaidez**, **Padilla** should apply retroactively to his post-conviction claim that counsel was ineffective for failing to inform him of the immigration consequences of his guilty plea. Defendant relied on **Danforth v. Minnesota**, 522 U.S. 264 (2008), where the Supreme Court held that state courts are not bound by **Teague's** retroactivity analysis. Defendant argued that Illinois courts should not feel bound by **Chaidez**, but should instead follow the pre-**Chaidez** decision in **People v. Gutierrez**, 2011 IL App (1st) 093499, which held that **Padilla** does apply retroactively to cases on collateral review.

The Appellate Court rejected defendant's argument, holding that Illinois courts use **Teague's** retroactivity analysis and agreeing with "the well-reasoned decision" in **Chaidez**. Accordingly, defendant's post-conviction claim relying on **Padilla** was properly dismissed.

(Defendant was represented by Assistant Defender Brian Koch, Chicago.)

People v. Griffin, 2013 IL App (2d) 110631 (No. 2-11-0631, 8/22/13)

1. Generally, the Post-Conviction Hearing Act contemplates the filing of only one post-conviction petition. However, the statutory bar to successive petitions will be relaxed where required by fundamental fairness, including where the petitioner makes a claim of actual innocence.

Generally, a petition is subject to the statute of limitations which is in effect at the time the petition is filed. Defendant's multiple amended petitions raising claims of actual innocence pended in the trial court for nearly ten years. While they were pending, the PCHA was amended to change the statute of limitations and to eliminate any limitation period for the

filing of a petition claiming actual innocence. Where the State had argued in the trial court that the amended statute applied, the Appellate Court concluded that no statute of limitations violation occurred concerning the amended petitions because they claimed actual innocence.

In addition, the post-conviction statute of limitations is an affirmative defense which the State may raise, waive, or forfeit. Because the State argued in the lower court that the subsequent amendment to the Post-Conviction Hearing Act applied, it forfeited the argument, which it raised for the first time on appeal, that the statute of limitations in effect when the first petition was filed should be applied.

2. When the trial court dismisses an incarcerated petitioner's claim as frivolous or patently without merit, it must do so in a written order which specifies findings of fact and conclusions of law. That order must be served on the defendant by certified mail within 10 days of the decision.

Defendant was not notified that his 1999 petition had been summarily dismissed, and in the intervening decade three "amended" petitions were filed, an eyewitness recanted his testimony, counsel was appointed on one of the petitions, and DNA testing ordered by the trial court excluded defendant as a source of the DNA profile left at the scene. The State called the court's attention to the original dismissal order in a motion to dismiss the amended petition, and argued that defendant could not appeal the order, move to reconsider it, or file an amended petition. The trial court ruled that it would "give effect" to the 1999 summary dismissal order by allowing defendant 30 days to appeal that order.

The Appellate Court noted that permitting defendant to appeal the 1999 dismissal would mean ignoring the recantation, the affidavits which accompanied the amended petitions, and the DNA testing, "all of which inured to defendant's favor." Because the State's motion to dismiss the third amended petition on statute of limitations grounds should have been denied, and the State should have been ordered to file an answer in 20 days, the cause was remanded for the State to file an answer and for additional proceedings as warranted.

(Defendant was represented by Assistant Defender Mark Levine, Elgin.)

People v. Hemingway, 2014 IL App (4th) 121039 (No. 4-12-1039, 7/23/14)

1. The Post-Conviction Hearing Act refers to two separate and distinct types of affidavits. A verifying affidavit must be filed with the post-conviction petition and is intended to affirm that the allegations are brought truthfully and in good faith. The absence of a verification affidavit does not justify summary dismissal of a post-conviction proceeding.

In addition, a post-conviction petition "must have attached thereto affidavits, records, or other evidence supporting its allegations or shall state why the same are not attached." 725 ILCS 5/122-2. Thus, a supporting affidavit is one means of providing evidentiary support for the allegations of the petition. The purpose of a supporting affidavit is to show that the verified allegations of the petition are capable of objective or independent corroboration.

An affidavit is a written declaration made under oath before a person who has legal authority to administer oaths. A document which is not sworn before a person who is authorized to administer oaths is not a defective or inchoate affidavit. Instead, it is not an affidavit at all.

Thus, unsworn witness statements do not constitute affidavits and do not fulfill the requirement of a supporting affidavit.

Noting a conflict in appellate authority, the court concluded that summary dismissal is justified where a statement that is submitted as a supporting affidavit is not notarized. The court rejected the reasoning of **People v. Parker**, 2012 IL App (1st) 101809, which held that a lack of notarization is a mere technical defect which does not justify summary dismissal. The

court adopted the reasoning of **People v. Gardner**, 2013 IL App (2d) 110598, which found that summary dismissal is justified where a statement that is submitted as a supporting affidavit is not notarized and the petition is not accompanied by other supporting evidence or an explanation of why such evidence is unavailable.

2. A post-conviction claim is forfeited if it is not raised in the original or amended petition. A *pro se* post-conviction petition which alleges only that appellate counsel failed to raise any issue concerning the sentence does not allege the gist of an issue that appellate counsel was ineffective for failing to challenge the sentence. "[T]he mere fact that appellate counsel was silent about a sentence is not arguably a constitutional claim."

Thus, because he failed to present the issue in the petition, defendant forfeited any ineffective assistance claim concerning appellate counsel's failure to challenge the sentence.

(Defendant was represented by Assistant Defender Jessica Ware, Chicago.)

People v. Henderson, 2011 IL App (1st) 090923 (No. 1-09-0923, 11/17/11)

1. The Post-Conviction Hearing Act provides that any person "imprisoned in the penitentiary" may seek relief under the Act. 725 ILCS 5/122-1(a). A remedy under the Act is only available to persons who are actually being deprived of their liberty, not persons who have completely served their sentences and merely wish to purge their criminal records of past convictions. Thus a defendant has standing under the Act so long as he is challenging a conviction for which he continues to serve some form of sentence. When a defendant's conviction is no longer an encumbrance on his liberty, he no longer needs assistance from the Act to secure his liberty, and the Act is no longer available to him.

2. The Appellate Court recognized that no court has previously addressed whether a defendant, who had standing under the Act to file a petition, subsequently loses standing when no portion of his sentence remains to be served. The court concluded that no meaningful distinction could be drawn between instances where a defendant's liberty is not encumbered when he files the petition and those instances in which a defendant regains his liberty after the petition is filed. In neither case is the purpose of the Act served by giving defendant relief.

Because defendant had completely served his sentence, including his MSR term, while his appeal from the dismissal of his post-conviction petition was pending, he no longer needed the Act's assistance to secure his liberty. Even if the cause were remanded, the trial court would be obligated to deny relief to defendant due to this defect. Therefore, the appeal from the dismissal of the petition was moot.

3. The Act allows summary dismissal at the first stage only where a defect renders the petition frivolous or patently without merit. 725 ILCS 5/122-2.1(a)(2). At the first stage, the court does not measure the petition's procedural compliance, only its substantive virtue.

The Act requires that the allegations of the petition be supported by "affidavits, records, or other evidence." 725 ILCS 5/122-2. The purpose of these affidavits is to show that the allegations can be objectively and independently corroborated, and therefore their absence can be the basis for a first-stage dismissal as they relate to the substance of the petition.

The Act also requires that the "proceedings shall be commenced by filing . . . a petition . . . verified by affidavit." 725 ILCS 5/122-1(b). The lack of notarization of the verification affidavit required by §122-1(b) does not qualify as the basis for a first-stage dismissal because that affidavit has no relation to the substance of defendant's allegations. The verification affidavit requirement merely confirms that the allegations are brought truthfully and in good faith.

The State can object to the lack of notarization at the second stage and appointed counsel can assist in arranging for notarization of the verification affidavit. The court found

that addressing this defect at the second stage also comports with "practical considerations which arise in the prison system." Although not properly before the court, a memorandum written by a IDOC employee that was attached to defendant's reply brief stated that notaries are not always available in prisons. Defendant's affidavit in **People v. Wilborn**, 2011 IL App (1st) 092802, also indicated that prisoners lack the ability to have affidavits notarized.

(Defendant was represented by Assistant Defender Pamela Rubeo, Chicago.)

People v. Jakes, 2013 IL App (1st) 113057 (No. 1-11-3057, 12/11/13)

1. The trial court has discretion to order discovery in post-conviction proceedings, and should do so if the moving party establishes good cause for the request. In determining whether discovery is appropriate, the post-conviction court should consider the totality of the relevant circumstances including the issues presented in the petition, the scope of the discovery sought, the length of time between the conviction and the post-conviction proceeding, the burden of granting discovery, and the availability of the desired evidence through other sources. The trial court's decision concerning a request for discovery in a post-conviction proceeding is reviewed for abuse of discretion.

2. The trial court abused its discretion by denying a post-conviction petitioner's request for discovery concerning alleged official misconduct by two police officers. Defendant alleged that one of the officers beat and physically abused him until he confessed, and the other watched the abuse without intervening. Defendant also alleged that both officers committed perjury when they testified at the hearing on a motion to suppress the statement and at trial.

Defendant alleged in a supplemental post-conviction petition that the officers had beaten and intimidated 28 other suspects over a period of several years, and had lied when they testified in various proceedings that the confessions had been obtained without coercion or abuse. Defendant submitted affidavits from some of the persons who had allegedly been beaten, complaints from lawsuits brought by some of the alleged victims, Appellate Court decisions discussing the records in criminal proceedings against some of the victims, and transcripts of testimony in other proceedings. The trial court rejected the allegations concerning all of the victims except two, and held that the allegations concerning those two victims did not establish a pattern of abuse by the officers.

The Appellate Court concluded that based on the level of detail alleged in the amended petition, the motion for discovery should have been granted. The court noted that the trial court dismissed the claims concerning several persons as inadequately supported, underscoring the need for discovery. In addition, the State had much better access to the evidence in question than the defense, which had for several years been unsuccessful in obtaining evidence concerning the alleged abuse. Finally, the evidence of misconduct by the officers in other cases could be critical because it would alter the relative credibility of the defendant, the officers, and a defense witness who testified concerning the circumstances of the arrest.

The court rejected the State's argument that because the second officer was alleged to have only observed the first officer beating the defendant, there was no justification for ordering discovery concerning abuse of other suspects by the second officer. An officer who observes misconduct by other officers without intervening brings "added coercive power" to an interrogation, because the "silent acceptance of the crime committed by a fellow officer can help persuade [the suspect] that no one associated with police will help him and he will face worse beatings if he tells a police officer, an assistant State's Attorney, or a doctor working for the State about the beatings." Furthermore, because the second officer testified at defendant's trial and at the hearing on the motion to suppress, evidence that he committed perjury in

other cases could significantly affect his credibility in this case.

The trial court's order was reversed and the cause remanded for discovery and a new evidentiary hearing.

People v. Kelley, 2013 IL App (4th) 110874 (No. 4-11-0874, 4/5/13)

1. Shackling a defendant during trial is disfavored because the jury may be prejudiced against the defendant, shackling restricts the defendant's ability to assist counsel at trial, and shackling offends the dignity of the judicial process. Under **People v. Boose**, 66 Ill.2d 261, 362 N.E.2d 303 (1977), a criminal defendant may not be shackled during court proceedings unless, after a hearing held outside the presence of the jury, the trial court finds that restraint is necessary. Shackling may be permitted where it is shown that the defendant may try to escape or poses a threat to persons in the courtroom, or where shackling is necessary to maintain order during trial.

Boose has been expanded to other proceedings and other types of restraints, including bench trials and electronic stun belts worn under the defendant's clothing. In addition, in 2010 the Supreme Court enacted Rule 430, which addresses the use of shackles during trial proceedings at which innocence or guilt is to be determined. Rule 430 does not apply to bond hearings or other pretrial hearings.

2. The Appellate Court held that the requirements of **Boose** do not apply to third stage evidentiary hearings during post-conviction proceedings. An evidentiary hearing does not involve a jury, and the presumption of innocence and constitutional right to counsel do not apply. Furthermore, because post-conviction petitioners have been convicted and are seeking review of possible constitutional errors, the considerations present at trial and sentencing are not of concern.

Thus, the presumption that shackling is improper in the absence of a showing of manifest need does not apply during post-conviction proceedings. Instead, the post-conviction court has discretion to order that a defendant be shackled.

3. The trial court did not abuse its discretion by denying defense counsel's request to remove the petitioner's shackles during a third-stage evidentiary hearing. The court noted that even when he was restrained defendant could walk freely and raise his hand sufficiently to take the oath. In addition, the trial court stated that it would not be affected by the shackles in rendering a decision. The judge also expressed security concerns because the room had four exits and only one guard, with two of the exits leading to unsecured areas and one to a public area in the courthouse. Finally, other persons were present in the courtroom and defendant had a history of being disruptive during court proceedings.

(Defendant was represented by Assistant Defender Mark Fisher, Ottawa.)

People v. Macri, 2011 IL App (2d) 100325 (No. 2-10-0325, 12/14/11)

The Post-Conviction Hearing Act provides: "The court may in its discretion grant leave, at any stage of the proceedings prior to entry of judgment, to withdraw the petition. The court may in its discretion make such order as to amendment of the petition or any other pleading, or as to pleading over, or filing further pleadings, or extending the time of filing any pleading other than the original petition, as shall be appropriate, just and reasonable and as is generally provided in civil cases." 725 ILCS 5/122-5. This section has been construed to mean that if a defendant moves to refile or reinstate a petition within one year after it is withdrawn, the trial court must grant the motion. **People v. English**, 381 Ill.App.3d 906, 885 N.E.2d 1214 (3d Dist. 2008).

Defendant voluntarily withdrew his petition for post-conviction relief and then moved

to reinstate the petition six years later. The court denied the motion. Because defendant did not act within one year, he was not entitled to have his petition reinstated and treated as an original petition. Although the court had discretion to reinstate the petition, defendant did not argue that the court abused its discretion in denying his motion to reinstate.

(Defendant was represented by Assistant Defender Jaime Montgomery, Elgin.)

People v. Pinkston, 2013 IL App (4th) 111147 (No. 4-11-1147, 4/30/13)

1. Upon a showing of "good cause," the trial court has inherent authority to order discovery in post-conviction proceedings. Because of the possibility for abuse of the discovery process, the trial court must exercise discretion in deciding whether to grant a discovery request. Discovery should be allowed when good cause is shown considering the issues presented in the petition, the scope of the requested discovery, the length of time between the conviction and the post-conviction proceeding, the burden of discovery on the State and any witnesses, and the availability of the same evidence from other sources. The trial court's denial of a post-conviction discovery request is reviewed for abuse of discretion.

The trial court errs when it refuses to exercise discretion because it erroneously believes that it lacks discretion. Where defendant's request for discovery was rejected because the trial court believed that discovery is not authorized in post-conviction proceedings, reversible error occurred.

The court rejected the State's argument that the trial court did not abuse its discretion because the request was merely a "fishing expedition" which any reasonable trial judge would have rejected. The court noted that the petitioner was not allowed to present an argument in support of his request, and found that the request would not necessarily have been denied had the trial court realized that it could grant discovery. The court also found that in light of the petitioner's claim of ineffective assistance of trial counsel, the absence of discovery may have resulted in prejudice.

2. The court also noted that the denial of a post-conviction discovery request cannot be appealed except upon denial of the post-conviction petition.

The cause was remanded with instructions that the trial court exercise its discretion in ruling on the petitioner's discovery request, and for further proceedings as necessary.

(Defendant was represented by Assistant Defender Dan Evers, Mt. Vernon.)

People v. Reid, 2014 IL App (3rd) 130296 (No. 3-13-0296, 12/15/14)

After he was convicted of first degree murder, defendant agreed to waive his right to appeal and his right to file a post-conviction petition. In return, the State agreed to not seek a death sentence. Defendant subsequently filed a direct appeal, which the Appellate Court heard after finding that the trial court had given improper admonishments regarding the waiver of appellate rights.

Defendant then filed a post-conviction petition which was dismissed as frivolous and patently without merit. The Appellate Court affirmed the dismissal order, holding that defendant had been properly admonished concerning the waiver of his right to file a post-conviction petition.

1. Because a waiver of the right to appeal resembles a guilty plea, before accepting such a waiver the trial court must admonish defendant under Supreme Court Rule 605. However, because no specific admonishments are prescribed by statute or rule, the validity of a waiver of the right to file a post-conviction petition is determined under general constitutional standards. Thus, a waiver of the right to file a post-conviction petition is valid if it represents an intelligent and voluntary relinquishment of a known right.

2. The court concluded that defendant's waiver of his right to pursue post-conviction relief was knowing and voluntary where the trial court explained in open court that defendant had the right to seek post-conviction relief, explained that post-conviction proceedings would occur after the direct appeal was complete, and stated that agreeing to the waiver would mean that defendant "could take no further legal action" to challenge his conviction. The court found that the trial judge was not required to discuss the specific process of post-conviction proceedings, including the standard to be applied at first-stage proceedings and the right to receive a free transcript.

Because defendant's waiver of post-conviction proceedings was proper and could be enforced, the trial court's order denying the petition as frivolous was affirmed.

(Defendant was represented by Assistant Defender Steve Wiltgen, Elgin.)

People v. Wingate, 2015 IL App (5th) 130189 (No. 5-13-0189, 4/20/15)

To establish actual innocence based upon newly discovered evidence, a defendant must show that he would be acquitted of all offenses. It is not enough to show that he would be convicted of a lesser offense. Here defendant presented in his second-stage post-conviction petition newly discovered evidence that would have reduced his conviction from first-degree to second-degree murder. The Appellate Court held that this did not constitute a showing of actual innocence since it only reduced the level of his offense; it did not constitute a complete exoneration. The dismissal of defendant's petition was affirmed.

(Defendant was represented by Assistant Defender Larry O'Neill, Mt. Vernon.)

Caffey v. Atchison, ___ F.Supp. ___ (U.S. Dist.Ct., Northen Dist., No. 09-C-5458, 2/3/12)

1. A federal court may not consider a federal *habeas* claim if the state court declined to address the federal issues on their merits and decided the case on a state law ground that is independent of the federal question and adequate to support the judgment. The state law ground may be either substantive or procedural. The adequacy of the state law ground is a question of federal law; a state ground is "adequate" only if state courts apply the state rule in a consistent and principled way.

Furthermore, the state rule must represent a firmly established and regularly followed practice. In other words, a state rule that is invoked infrequently, unexpectedly, or freakishly is not an adequate ground to support the judgement.

2. 725 ILCS 5/122-2 provides that the petitioner must attach to a post-conviction petition affidavits, records, or other evidence supporting the allegations, or shall explain why such are not attached. The Appellate Court applied §122-2 in declining to consider witness statements relevant to **Brady v. Maryland** claims which the defendant raised in his amended post-conviction petition; the court held that the statements could not be considered because they were unverified.

The federal district court held that under the circumstances of this case, §122-2 did not constitute an independent and adequate state ground to preclude federal review of defendant's *habeas* claim. The court noted that the statements were submitted at the second stage of post-conviction proceedings - Illinois precedent indicates that §122-2 applies only at first-stage proceedings, when the trial court determines whether the petition is frivolous and patently without merit. Thus, the Appellate Court's ruling requiring defendant to submit sworn evidence at second-stage proceedings enforced a rule which by its terms did not apply to defendant's case.

Second, even if §122-2 applied to second-stage proceedings, it was not adequate to support the judgement where the Appellate Court applied the rule in an unpredictable way

which was inconsistent with the statute's language and prior case law. In numerous cases Illinois courts have considered unsworn evidence, including statements by witnesses, in post-conviction proceedings. Furthermore, the case law relied upon by the Appellate Court holds only that affidavits must be notarized, not that all evidence in a post-conviction proceeding must be notarized. The court concluded that applying such case law to bar non-affidavit evidence was an unexpected application of the rule and was inadequate to support the judgement.

The court acknowledged that a state rule is not rendered inadequate to support the judgement because state courts may exercise discretion and not apply the rule in a particular case. Here, however, the Appellate Court did not exercise discretion, but applied the rule to a situation to which on its face it was inapplicable.

The court granted an evidentiary hearing on defendant's **Brady v. Maryland** claims.

(Defendant was represented by Supervisor Patricia Mysza, Chicago.)

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§9-1(b)
Filing the Petition

§9-1(b)(1)
Who May Petition for Relief

People v. Carrera, 239 Ill.2d 241, 940 N.E.2d 1111 (2010)

1. Under the Post-Conviction Hearing Act, a person who is "imprisoned in the penitentiary" is authorized to commence a post-conviction proceeding. (725 ILCS 5/122-1(a)). Under Illinois Supreme Court precedent, the phrase "imprisoned in the penitentiary" is not interpreted literally. Instead, post-conviction proceedings are authorized when the defendant's liberty interests are "actually restrained," even if the petitioner is not actually incarcerated.

Thus, a post-conviction petition is proper where it is timely filed by an inmate who is subsequently released from custody, or by an inmate who is on mandatory supervised release. Similarly, a petition may be filed by a prisoner who is serving consecutive sentences so long as any of the sentences have not expired. Finally, persons sentenced to probation or sentenced but released on appeal bond have standing to file for post-conviction relief.

However, post-conviction relief is unavailable to a defendant who has completed his Illinois sentence and seeks relief for the purpose of purging his record of a criminal conviction.

2. A defendant who had completely served his probation sentence and been discharged was not "imprisoned" for purposes of the Post-Conviction Hearing Act, although as a result of his Illinois conviction the Immigration and Naturalization service had taken him into custody and instituted deportation proceedings. Because defendant faced no limitations on his liberty as a result of the Illinois sentence, he was not "imprisoned" for post-conviction purposes despite the possible federal consequences from what he alleged was an involuntary Illinois guilty plea.

3. The court rejected the argument that **Padilla v. Kentucky**, 559 U.S. ___, 130 S.Ct. 1473, 176 L.Ed.2d 284 (2010), required a different result. In **Padilla**, the Supreme Court held that to satisfy the 6th Amendment, defense counsel must inform a guilty plea defendant of the possible or likely consequences of a criminal conviction on his immigration status. The court

rejected the argument that **Padilla** confers standing to file a State post-conviction petition after the State sentence has been fully discharged, even where counsel inaccurately informed the defendant that the guilty plea would not affect his immigration status.

4. Finally, the court rejected defendant's argument that he was entitled to post-conviction relief even if he was not "imprisoned," because he had no other remedy to withdraw his guilty plea. The Post-Conviction Hearing Act provides a remedy for deportation consequences resulting from an Illinois conviction, provided the petition is filed while the defendant is serving the sentence imposed on that conviction. "While sympathetic to defendant's plight, this court cannot expand the remedy set forth in the [Post-Conviction Hearing] Act in order to bring defendant's case within the reach of the Act."

The trial court's dismissal of the post-conviction petition was affirmed.

In re E.W., 2015 IL App (5th) 140341 (No. 5-14-0341, 2/23/15)

A juvenile prosecution for an offense that would be a felony if committed by an adult may be designated as an extended jurisdiction juvenile (EJJ) prosecution. 705 ILCS 405/5-810. An EJJ prosecution has two components. First, the trial court imposes a juvenile sentence which applies unless its terms are violated. Second, the court imposes an adult sentence that is stayed on the condition that the minor complies with the juvenile sentence.

Defendant was adjudicated delinquent after he pleaded guilty in an EJJ proceeding. After defendant entered a guilty plea on the juvenile portion of the proceeding, a negotiated five-year probation term was imposed as the juvenile sentence. Defendant then entered an open plea to the adult portion of the EJJ proceeding. The trial court imposed an adult sentence of 15 years imprisonment and lifetime MSR.

Defendant was subsequently found to have violated the conditions of the juvenile probation term on the ground that he failed to comply with sex offender counseling when he refused to admit that he was guilty of acting in an inappropriate manner. The trial court revoked the juvenile sentence and imposed the 15-year adult sentence.

1. The court concluded that where the juvenile sentence was revoked and the adult sentence placed in effect, the minor had standing under the Post-Conviction Hearing Act to challenge the voluntariness of his guilty plea. Although the Post-Conviction Hearing Act is not generally applicable in juvenile proceedings, when the trial court imposed an adult prison sentence the case was brought within the scope of the post-conviction act.

2. In addition, the post-conviction petition presented the gist of a constitutional issue in that the minor's plea was involuntary due to the trial court's failure to give proper admonishments during the juvenile portion of the plea. The court found that defendant was improperly admonished concerning the right to a jury trial, the minimum and maximum sentences, the MSR requirement, and the right to persist in a plea of not guilty. The court acknowledged that during the guilty plea admonishments for the adult sentence the trial court attempted to correct the erroneous admonishments that had been made in the juvenile portion of the proceeding. However, it concluded that the errors were not corrected where the minor had already entered his plea on the juvenile portion and was not asked whether he wished to persist in that plea.

The trial court's order summarily dismissing the post-conviction petition was reversed and the cause remanded for further proceedings.

(Defendant was represented by Assistant Deputy Defender Amanda Horner, Mt. Vernon.)

In re Vincent K., 2013 IL App (1st) 112915 (No. 1-11-2915, 12/12/13)

1. The Appellate Court reiterated precedent that minors who are adjudicated delinquent do not have a right to relief under the Post-Conviction Hearing Act. **In re R.R.**, 75 Ill.App. 3d 494, 394 N.E.2d 75 (2nd Dist. 1979); **In re A.W.H.**, 95 Ill.App 3d 1106, 420 N.E.2d 1041 (5th Dist. 1981). The court acknowledged that amendments to the Juvenile Court Act enacted in 1999 shifted the focus of the Act from the overriding goal of rehabilitation to protection of the public and holding juveniles accountable for violating the law. However, the court rejected the argument that juvenile proceedings are now akin to criminal proceedings and that the Post-Conviction Hearing Act should therefore apply. In the course of its holding, the court noted that the Post-Conviction Hearing Act requires that a petitioner have a "conviction" and be "imprisoned in the penitentiary," neither of which apply to delinquents.

2. The court rejected the argument that equal protection would be violated if post-conviction procedures are not afforded to persons who are adjudicated delinquent under the extended juvenile jurisdiction statute (705 ILCS 405/5-810). To be adjudicated delinquent under EJJ, the trial court must find probable cause to believe that a minor is at least 13 years old and has committed an offense which would be a felony if committed by an adult. A minor who is adjudicated under EJJ receives both a juvenile sentence and an adult sentence. The adult sentence takes effect only if the minor violates the terms of the juvenile sentence.

The court concluded that because persons adjudicated delinquent under the EJJ statute are not similarly situated to adults who are imprisoned after being convicted of a crime, the failure to afford post-conviction relief to EJJ minors does not create an equal protection violation. The court noted that unlike an adult offender, an EJJ minor does not have a criminal "conviction" even if his adult sentence becomes effective.

3. The court rejected the argument that post-conviction procedures should be afforded to minors adjudicated delinquent because such persons have no collateral remedy by which to challenge "fundamental unfairness." The court stated that the relationship between courts and minors subject to the Juvenile Court Act is that of *parens patrie,* and that courts therefore have a duty to intervene in juvenile cases where substantial injustice occurs.

People v. Bethel, 2012 IL App (5th) 100330 (No. 5-10-0330, 8/31/12)

1. A person imprisoned in the penitentiary may institute a proceeding under the Post-Conviction Hearing Act. 725 ILCS 5/122-1(a)(1). A person is imprisoned in the penitentiary within the meaning of the Act if his liberty is actually constrained because of a criminal conviction. Post-conviction relief is therefore available to persons who are actually incarcerated and those who are subject to being confined, such as those on probation, parole, MSR, or appeal bond. Those who have completely served their sentence, including any period of parole or MSR, are not imprisoned persons entitled to seek relief under the Act.

2. Just before defendant was scheduled to be released on MSR, the State filed a petition seeking his commitment as a sexually violent person. By statute, the filing of the petition tolls the running of an inmate's MSR term until the petition is dismissed, or a finding is made that the inmate is not a sexually violent person, or the inmate is discharged by the court as no longer sexually violent. 725 ILCS 207/15(e). Defendant filed a post-conviction petition during the period that his MSR term would be tolled by statute.

Defendant has standing under the Act. It is inconsequential whether the running of his MSR term was tolled. Defendant had not completed his MSR term when the petition was filed and remained subject to potential revocation of MSR. Therefore he fit within the class of persons whose liberty was constrained by virtue of his convictions.

(Defendant was represented by Assistant Defender Robert Burke, Mt. Vernon.)

People v. Carrera, 394 Ill.App.3d 368, 915 N.E.2d 755 (2d Dist. 2009)

Noting a conflict in appellant authority, the court held that a defendant who has completed his or her probation sentence lacks standing to file a post-conviction petition. The court rejected the contrary holding of **People v. Sak**, 186 Ill.App.3d 816, 542 N.E.2d 1155 (1st Dist. 1989).

People v. Dent, 408 Ill.App.3d 650, 948 N.E.2d 247 (1st Dist. 2011)

The Post-Conviction Hearing Act allows any person "imprisoned in the penitentiary" to pursue relief under the Act. 725 ILCS 5/122-1(a). The Illinois Supreme Court has construed this provision to permit persons actually being deprived of their liberty to avail themselves of the Act's remedies, but not persons who have completely served their sentences.

Defendant did not have standing under the Act where he had completely served his terms of imprisonment and mandatory supervised release for his challenged conviction when he filed his petition. The court rejected defendant's argument that he had standing because the challenged conviction was an actual element of the offense for which he was presently imprisoned, and therefore his conviction would become void if his prior conviction was invalidated. His liberty interest for the challenged conviction could not be affected because that sentence had been discharged.

(Defendant was represented by Assistant Defender Caroline Bourland, Chicago.)

People v. Henderson, 2011 IL App (1st) 090923 (No. 1-09-0923, 11/17/11)

1. The Post-Conviction Hearing Act provides that any person "imprisoned in the penitentiary" may seek relief under the Act. 725 ILCS 5/122-1(a). A remedy under the Act is only available to persons who are actually being deprived of their liberty, not persons who have completely served their sentences and merely wish to purge their criminal records of past convictions. Thus a defendant has standing under the Act so long as he is challenging a conviction for which he continues to serve some form of sentence. When a defendant's conviction is no longer an encumbrance on his liberty, he no longer needs assistance from the Act to secure his liberty, and the Act is no longer available to him.

2. The Appellate Court recognized that no court has previously addressed whether a defendant, who had standing under the Act to file a petition, subsequently loses standing when no portion of his sentence remains to be served. The court concluded that no meaningful distinction could be drawn between instances where a defendant's liberty is not encumbered when he files the petition and those instances in which a defendant regains his liberty after the petition is filed. In neither case is the purpose of the Act served by giving defendant relief.

Because defendant had completely served his sentence, including his MSR term, while his appeal from the dismissal of his post-conviction petition was pending, he no longer needed the Act's assistance to secure his liberty. Even if the cause were remanded, the trial court would be obligated to deny relief to defendant due to this defect. Therefore, the appeal from the dismissal of the petition was moot.

3. The Act allows summary dismissal at the first stage only where a defect renders the petition frivolous or patently without merit. 725 ILCS 5/122-2.1(a)(2). At the first stage, the court does not measure the petition's procedural compliance, only its substantive virtue.

The Act requires that the allegations of the petition be supported by "affidavits, records, or other evidence." 725 ILCS 5/122-2. The purpose of these affidavits is to show that the allegations can be objectively and independently corroborated, and therefore their absence can be the basis for a first-stage dismissal as they relate to the substance of the petition.

The Act also requires that the "proceedings shall be commenced by filing . . . a petition

. . . verified by affidavit." 725 ILCS 5/122-1(b). The lack of notarization of the verification affidavit required by §122-1(b) does not qualify as the basis for a first-stage dismissal because that affidavit has no relation to the substance of defendant's allegations. The verification affidavit requirement merely confirms that the allegations are brought truthfully and in good faith.

The State can object to the lack of notarization at the second stage and appointed counsel can assist in arranging for notarization of the verification affidavit. The court found that addressing this defect at the second stage also comports with "practical considerations which arise in the prison system." Although not properly before the court, a memorandum written by a IDOC employee that was attached to defendant's reply brief stated that notaries are not always available in prisons. Defendant's affidavit in **People v. Wilborn**, 2011 IL App (1st) 092802, also indicated that prisoners lack the ability to have affidavits notarized.

(Defendant was represented by Assistant Defender Pamela Rubeo, Chicago.)

People v. Jones, 2012 IL App (1st) 093180 (No. 1-09-3180, 5/1/12)

A post-conviction petition that is timely filed while the petitioner is serving any sentence imposed, including any period of mandatory supervised release, does not become moot when the petitioner has fully served his sentence. The court disagreed with the contrary holding of **People v. Henderson**, 2011 IL App (1st) 090923, which reasoned that because defendant no longer needed the assistance of the Post-Conviction Hearing Act to secure his liberty, he lost standing under the Act.

1. Proceedings under the Post-Conviction Hearing Act are civil in nature. A statutory civil cause of act that is timely filed cannot be declared moot by subsequent events.

2. Post-conviction petitions frequently experience delays not found in other categories of cases before they receive final review. They can be filed after the conclusion of direct review. The full litigation of the petition can entail one or more appeals. Public offices charged with representing parties in these proceedings suffer from understaffing and underfunding, which predicably result in severe backlogs.

3. The Illinois Supreme Court has declined to narrowly construe the Act, a remedial statute, to preclude a post-conviction remedy in every case in which the petition is not filed and the hearing completed before the petitioner has fully served his sentence, mindful of the "obvious advantages in purging oneself of the stigma and disabilities which attend a criminal conviction."

4. "It would frustrate justice to shut the door on the one avenue for Illinois prisoners to obtain relief from a criminal conviction on constitutional grounds because the State and Appellate Defender's office delayed, through no fault of their own, the petitioner's case for so long that he eventually serves his entire sentence and is released."

People v. Larimer, 409 Ill.App.3d 827, 949 N.E.2d 303 (1st Dist. 2011)

A post-conviction petition was premature where the defendant had been convicted of a misdemeanor and was serving a term of supervision. Although Illinois courts have permitted post-conviction challenges to misdemeanor convictions under some circumstances, a post-conviction petition lies only where there is a conviction and a final judgement. A term of supervision does not constitute a final judgement under Illinois law.

The court declined to decide whether a post-conviction petition would lie if a similarly-convicted defendant had successfully completed supervision. The court also noted that a defendant who receives supervision has a means to challenge that order by filing a direct appeal under Supreme Court Rule 604(b).

People v. Stavenger, 2015 IL App (2d) 140885 (No. 2-14-0885, 7/9/15)

To have standing to file a post-conviction petition, a defendant must be "imprisoned in the penitentiary." 725 ILCS 5/122-1(a). A defendant on probation satisfies this standing requirement, but the act is unavailable to defendants who have completely served their sentences and merely wish to purge their criminal convictions.

The Appellate Court held that defendant, who had served his entire sentence but was required to register as a sex offender, did not have standing to file a post-conviction petition. The requirement to register imposes no actual restraint on defendant's liberty and is merely a collateral consequence of his conviction. The dismissal of defendant's petition was affirmed.

People v. Steward, 406 Ill.App.3d 82, 940 N.E.2d 140 (1st Dist. 2010)

1. To have standing to file a post-conviction petition, one must be "imprisoned in the penitentiary." 725 ILCS 5/122-1(a). A proceeding under the Sexually Violent Persons Commitment Act (725 ILCS 207/1) is civil in nature and can result in commitment to the Department of Human Services. A person who is imprisoned under the SVPCA is not imprisoned in the penitentiary within the meaning of the Post-Conviction Hearing Act and does not have standing to file a post-conviction petition.

2. Defendants who are on MSR or released on an appeal bond are considered to be "imprisoned in the penitentiary" and have standing to file a post-conviction petition. An amendment to the SVPCA effective 1/1/07 provides that the filing of a SVPCA petition tolls the running of a term of mandatory supervised release until dismissal of the petition, a finding that defendant is not a sexually violent person, or the discharge of the defendant under the Act. 725 ILCS 207/15(e). The tolling of the MSR term did not confer standing on defendant to file a post-conviction petition. First, the amendment does not apply to defendant because it did not become effective until nine months after defendant was placed on MSR and defendant had actually been discharged from MSR before he filed his post-conviction petition. Second, even if the amendment did apply, defendant must be currently on MSR, not have his MSR tolled, to be considered imprisoned in the penitentiary within the meaning of the PCHA.

3. Standing is defined as a party's right to make a legal claim or seek judicial enforcement of a duty or right. The legislature intended that the phrase "frivolous or patently without merit" in the Post-Conviction Hearing Act encompass the issue of standing because "merit" means legal significance and standing. **People v. Boclair**, 202 Ill.2d 89, 789 N.E.2d 734 (2002). Standing, unlike timeliness, is an inherent element of the right to bring a post-conviction petition, and absence of standing may therefore be the basis for a first-stage dismissal of a petition.

4. A post-conviction petition may be summarily dismissed as frivolous and patently without merit only if it has no arguable basis in fact or in law. An indisputably meritless legal theory is one that is completely contradicted by the record.

Defendant's claim of newly-discovered evidence of actual innocence based on a recantation by the complainant of her trial testimony is meritless because it is contradicted not only by the record, but also by the complainant's post-trial deposition that defendant asserted constituted a recantation. At trial, complainant testified that defendant grabbed her on the street, forced her into his apartment, and forced her to have sexual relations. In her post-trial deposition, complainant testified that she willingly went to defendant's apartment and twice voluntarily engaged in intercourse with defendant. But her testimony did not change with respect to her allegation that a fight ensued when she refused to perform oral sex on defendant, and that he used a hammer on her in an attempt to force her to perform an act of oral sex. Under either version, defendant committed aggravated battery and attempt

aggravated criminal sexual assault.

5. A prisoner confined in an Illinois Department of Corrections facility can be assessed court costs and fees for the filing of a frivolous post-conviction petition. 735 ILCS 5/22-105. A defendant confined to a Department of Human Services facility as a sexually violent person may not be assessed those costs and fees because he is not confined in the IDOC.

People v. Vasquez, 2013 IL App (2d) 120344 (No. 2-12-0344, 7/15/13)

To have standing under the PCHA, a defendant must be "imprisoned" at the time that the post-conviction petition is filed. 725 ILCS 5/122-1(a). But lack of standing under the Act does not derive the court of subject matter jurisdiction.

Subject matter jurisdiction does not depend on the legal sufficiency of the pleadings. The only consideration is whether the alleged claim falls within the general class of cases that the court has the inherent power to hear and determine.

By statute, defendant is entitled to *per diem* monetary credit. 725 ILCS 5/110-14. The credit cannot be waived and may be raised at any time, even for the first time on appeal in a post-conviction proceeding. A trial court thus has subject matter jurisdiction over a defendant's request for monetary credit for presentencing incarceration.

Defendant had completed MSR when he filed his post-conviction petition. Although he did not have standing to raise a constitutional claim, the trial court would have subject matter jurisdiction to hear his request for monetary credit for presentencing incarceration. Although defendant did not make a request for the credit at the trial court level, his lack of standing under the Act does not bar him from seeking the credit on appeal.

The Appellate Court disagreed with **People v. Vinokur**, 2011 IL App (1st) 090798, which held that because the defendant did not have standing under the PCHA, he could not attack his sentence as void on appeal in a post-conviction proceeding. **Vinokur** incorrectly conflates the legal principles of standing and subject matter jurisdiction. Standing has no effect on subject matter jurisdiction.

The Appellate Court modified the trial court's sentencing order to reflect the monetary credit for which defendant was entitled for presentencing custody.

(Defendant was represented by Assistant Defender Kim DeWitt, Elgin.)

People v. Vinokur, 2011 IL App (1st) 090798 (No. 1-09-0798, 8/24/11)

1. The Post-Conviction Hearing Act provides that "[a]ny person imprisoned in the penitentiary may institute a proceeding under this Article." 725 ILCS 2/122-1(a). A person is "imprisoned in the penitentiary" for the purposes of the Act when his liberty is actually constrained by the State. When defendant is no longer constrained, such as when he has fully served his sentence, he has no standing to file a petition.

In the context of a guilty plea, the meaning of "imprisoned in the penitentiary" includes only the direct consequences of the plea, and does not include collateral consequences not related to the length or nature of the sentence. Deportation is a collateral consequence of a plea, and does not confer standing where defendant has fully served his sentence. It is irrelevant that the court, rather than defense counsel, misinformed the defendant of the deportation consequences of his plea. Defendant is not left without a remedy, as he could have filed a petition while he was serving the sentence imposed on his conviction.

2. At the first stage of post-conviction proceedings, a trial court may dismiss a petition if it is "frivolous or patently without merit." 725 ILCS 5/122-2.1(a)(2). "Merit" means "legal significance, standing, or importance." **People v. Boclair**, 202 Ill.2d 89, 789 N.E.2d 732

(2002). Because a petition filed by a person who has no standing lacks merit, standing can be the basis for a first-stage dismissal.

(Defendant was represented by Assistant Defender Rachel Kindstrand, Chicago.)

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§9-1(b)(2)
Timely Filing Requirement – Generally

People v. Hansen, ___ Ill.App.3d ___, ___ N.E.2d ___ (2d Dist. 2011) (No. 2-08-1226, 5/27/11)

1. A document that is received by the clerk after its due date is deemed to have been filed on the date it was mailed if "proof of service" is attached. Supreme Court Rule 373. Under Rule 12(b)(3), proof of service may be by the certificate of an attorney or the affidavit of a person other than an attorney.

Rejecting the holding of **People v. Lugo**, 391 Ill.App.3d 995, 910 N.E.2d 767 (2d Dist. 2009), the court concluded that a clear postmark showing that the document was mailed on or before the due date is sufficient to establish the mailing date, despite the absence of either an attorney's certificate or an affidavit of a person other than an attorney. The court concluded that Rule 373 was intended to address problems caused by illegible postmarks, but was not intended to require that clear evidence of a postmark be disregarded. The court noted that any other reading would make service by mail a practical impossibility for *pro se* incarcerated defendants, because an inmate must place outgoing mail in the hands of prison staff and cannot insure that a pleading is mailed on time. "We cannot conclude that our supreme court intended that the Illinois Department of Corrections staff must execute an affidavit . . . for every legal filing by a *pro se* inmate, nor can we conclude that a defendant must depend on a third party other than the post office to timely deal with the delivery of his mail."

2. In dissent, Justice Jorgensen concluded that despite the harshness of refusing to accept a legible postmark as proof of the mailing date, the Appellate Court lacks authority to disregard a clear Supreme Court rule requiring an attorney's certificate or a non-attorney's affidavit as proof of service for mailings which arrive in the clerk's office after the due date.

(Defendant was represented by Assistant Defender Larry Wells, Mt. Vernon.)

People v. Harper, 2013 IL App (1st) 102181 (No. 1-10-2181, 3/29/13)

1. The time limitation for commencing post-conviction proceedings does not apply to a petition advancing a claim of actual innocence. 725 ILCS 5/122-19(c). Because defendant's third successive petition contained an actual-innocence claim, the circuit court erroneously dismissed it as untimely.

2.The filing of only one post-conviction petition is contemplated under the Post-Conviction Hearing Act. There are two exceptions under which the bar against successive proceedings will be relaxed. One is the exception for a fundamental miscarriage of justice where defendant sets forth a colorable claim of actual innocence.

Because defendant made a colorable claim of actual innocence, the circuit court erred in dismissing his petition on the ground that defendant had failed to satisfy the cause-and-prejudice test. A defendant who claims actual innocence need not satisfy the cause-and-prejudice test.

3. It is the burden of the defendant to obtain leave of court before a successive post-

conviction petition can be filed. Defendant must prompt the court, by whatever means, to consider whether leave should be granted, and must obtain a ruling on that question. A formal motion or a request and an articulated argument is usually, but not always, required.

Defendant in fact filed a motion for leave to file his successive petition and the court granted that motion by docketing his petition, appointing counsel, and stating on the record that defendant would get his day in court despite his having previously pursued collateral relief. Although the court did not expressly articulate a finding of a colorable claim of actual innocence, such a finding may be inferred from the court's ruling.

4. To succeed on a claim of actual innocence, defendant must show that the evidence he now presents is: (1) newly discovered; (2) material and not cumulative; and (3) of such conclusive character that it would probably change the result on retrial. Evidence is newly discovered if it has been discovered since trial and could not have been discovered sooner through due diligence. At the second stage of post-conviction proceedings, all well-pleaded facts that are not positively rebutted by the record are taken as true. Defendant must make a substantial showing of actual innocence to be entitled to an evidentiary hearing.

Defendant was convicted of arson and first-degree murder based largely on his confession, which admitted to starting a fire at a video store operated by defendant's mother in order to obtain insurance proceeds for damaged videotapes. Two persons who lived in an adjacent store died of smoke inhalation as a result of the fire. Defendant claimed that his confession was coerced by police threats. Hingston, the manager of a nearby service station, testified that at about the time of the fire two men purchased gasoline in a gas can and left in a vehicle matching the general description of defendant's vehicle.

Defendant's successive post-conviction petition was supported by two affidavits. An affidavit from Hingston recanted his trial testimony and alleged that he was told by the police that two individuals had confessed to purchasing gasoline from him the morning of the fire, and that the police threatened him with a fine and a negative report to his employer if he did not cooperate. The second affidavit from a James Bell confessed to setting the fire for which defendant was convicted. Bell did not reveal his guilt until after defendant filed his first three post-conviction petitions.

The successive petition sufficiently stated a claim of newly-discovered evidence of actual innocence to warrant an evidentiary hearing.

The affidavits are newly-discovered evidence. No amount of due diligence on defendant's part could have led to the discovery of Bell's confession at the time of defendant's trial or his prior collateral proceedings. Nor could due diligence have compelled Hingston to testify truthfully at defendant's trial. Even though defendant had filed a previous post-conviction petition claiming actual innocence based on the confession of a "James Dell," the court refused to assume or speculate that Bell and Dell were the same person. Even if they were the same person, Bell's affidavit was not available when defendant filed his prior petitions.

Bell's affidavit could not be rejected on the ground that it is positively rebutted by the record and thus is unreliable. The State's assertion that Bell's version of the events is refuted by evidence that a backdraft explosion occurred as a result of an oxygen-starved environment would require the court to speculate regarding several facts and conclusions. The court declined to make such credibility determinations.

The new evidence is material and not cumulative. Evidence is cumulative when it adds nothing to what was already before the jury. Bell's affidavit is exculpatory evidence that was never heard by the jury at defendant's trial. It is material to the central issue in the case – the identity of the arsonist. Hingston's evidence of police coercion was also not before the jury.

Hingston's affidavit is material to the issue of police coercion, and would weaken the State's case because defendant claimed that his confession was also the product of police coercion.

The new evidence is also of such a conclusive character that it would probably change the result on retrial. No eyewitness testimony directly connected defendant to the arson. Defendant has long maintained that his confession was coerced. Taking the content of Bell's affidavit as true, it could be found to exculpate the defendant and refute the State's evidence, thereby changing the result on retrial. Taking Hingston's affidavit as true would lend credence to defendant's claim that his confession was coerced, which if believed by the fact finder on retrial would likely change the outcome of the case.

(Defendant was represented by Assistant Defender Kieran Wiberg, Chicago.)

People v. Inman, 407 Ill.App.3d 1156, 947 N.E.2d 319 (5th Dist. 2011)

1. In a post-conviction proceeding, the trial court ordered a new sentencing hearing after vacating defendant's natural life sentence, which was to be served concurrently with a 30-year-sentence for attempt murder. At the new sentencing hearing, the court imposed a 35-year-sentence to be served consecutively to the 30-year-sentence. Defendant then filed a post-conviction petition raising a double jeopardy challenge to the consecutive nature of the new sentences. The trial court dismissed the petition after finding that it was a "second or subsequent" petition which the defendant could file only after obtaining leave of the court.

The Appellate Court found that the 35-year-sentence constituted a new "conviction" for purposes of the Post-Conviction Hearing Act. Thus, a post-conviction petition challenging the 35-year-sentence was not a "subsequent" petition, but the first petition challenging the new "conviction." Because defendant was not required to obtain leave of the court, the dismissal order was reversed.

2. A trial court loses authority to summarily dismiss a post-conviction petition where it fails to examine the petition within 90 days to determine whether it is frivolous and patently without merit. In such cases, counsel must be appointed and the petition advanced to the second stage.

The court concluded that erroneously believing that a petition could be filed only with leave of the court was analogous to the situation in **People v. Harris**, 24 Ill.2d 115, 862 N.E.2d 960 (2007), where the petition was required to be advanced to the second stage although the trial court's failure to act was due to its mistaken belief that a post-conviction petition could not proceed while the direct appeal was pending. Thus, the trial court's dismissal order was vacated and the cause remanded so that counsel could be appointed and second stage proceedings conducted.

(Defendant was represented by Assistant Defender Duane Schuster, Supreme Court Unit.)

People v. Medrano, 2014 IL App (1st) 102440 (No. 1-10-2440, 4/16/14)

A void sentence can be corrected at any time and is not subject to waiver or forfeiture. But the issue of voidness must be raised in a proceeding that is properly pending before a court that has jurisdiction. If the court lacks jurisdiction, it cannot confer any relief, even from a void judgment.

Here, defendant argued for the first time on appeal from the second-stage dismissal of his post-conviction petition that the sentence imposed on his guilty plea was void, and therefore he should be allowed to withdraw his guilty plea. The State, relying on **People v. Flowers**, 208 Ill. 2d 291 (2003), argued that since defendant filed his post-conviction petition well beyond the three-year statute of limitations period, the voidness issue was procedurally

barred.

In **Flowers**, defendant filed an untimely Rule 604(d) motion arguing that her sentence was void. The trial court denied the motion as being untimely, but the Appellate Court reversed, holding that the timeliness requirements of Rule 604(d) were not jurisdictional and could be excused when considering a void sentence. The Illinois Supreme Court reversed the Appellate Court, holding that the only matter properly before the Appellate Court was the trial court's lack of jurisdiction over the untimely 604(d) motion. Because strict compliance with Rule 604(d) is a condition precedent to an appeal on the merits, the Appellate Court had no authority to vacate the void sentence.

The court held that **Flowers** did not apply to the present case. Unlike Rule 604(d), which divests the trial court of jurisdiction after 30 days, the time limits on filing a post-conviction petition are not jurisdictional. Instead, they act as a statute of limitations that the State can waive or forfeit. The trial court thus had jurisdiction to address the issues raised in defendant's petition, and since defendant filed a timely appeal, the Appellate Court had jurisdiction to address the trial court's judgment.

Since the Appellate Court had jurisdiction to address the lower court's judgment, it could address the issue of whether the sentence was void, even though the issue was not raised below, since void judgments "can be challenged on collateral review for the first time on appeal."

(Defendant was represented by Assistant Defender Chris Kopacz, Chicago.)

People v. Robinson, 2015 IL App (4th) 130815 (No. 4-13-0815, 7/16/15)

1. Under the current version of the post-conviction hearing act, a defendant who files a direct appeal but not a certiorari petition must file his post-conviction petition within six months "from the date for filing a certiorari petition," unless he alleges facts showing the delay was not due to his culpable negligence. 725 ILCS 5/122-1(c).

2. Defendant's conviction and sentence were affirmed on direct appeal on February 11, 2009. Defendant did not file a petition for leave to appeal. Defendant filed his post-conviction petition on July 26, 2010. At the second stage, the court granted the State's motion to dismiss the petition on the ground of untimeliness.

On appeal, both parties agreed that the petition was not timely filed, but defendant argued that the delay was not due to his culpable negligence since appellate counsel failed to notify defendant when the direct appeal decision was issued. Neither party discussed the operation of section 122-1(c), simply assuming that the petition was untimely.

3. The Appellate Court held that before it could determine whether the delay was due to defendant's culpable negligence, it had to determine what the correct due date was under 122-1(c). The Court agreed that defendant's petition had to be filed within six months from the date for filing cert, but the date for filing cert depends on the date leave to appeal was denied. The United States Supreme Court only has subject-matter jurisdiction to review a judgement of an Appellate Court if the state Supreme Court declined to review the judgment. And United States Supreme Court Rule 13(1) states that a cert petition is due within 90 days after entry of the order denying discretionary review.

Since defendant never filed leave to appeal, the Appellate Court found it impossible to calculate the date his cert petition was due and hence impossible to determine the due date for filing his post-conviction petition. Without knowing the due date, the "excuse for lateness lacks a legal context," and the Court could not determine whether the delay was due to culpable negligence.

The second-stage dismissal of defendant's petition was affirmed.

(Defendant was represented by Assistant Defender Susan Wilham, Springfield.)

People v. Sanders, 393 Ill.App.3d 152, 911 N.E.2d 1096 (1st Dist. 2009)

People v. Strain, 194 Ill.2d 467, 742 N.E.2d 315 (2000), which provides that a trial judge must inquire about the potential gang bias of veniremembers where gang related evidence is integral at trial, constituted a "new" rule which could not be applied retroactively on collateral review. Furthermore, a post-conviction petition filed the year after **Strain** was decided, but eight years after defendant was convicted, was untimely.

The Appellate Court acknowledged that its rulings conflicted with **People v. Gardner**, 331 Ill.App.3d 358, 771 N.E.2d 26 (1st Dist. 2002), which held that a defendant could obtain retroactive relief on a post-conviction petition based on **Strain** although the ordinary statutory period for filing such a petition had expired. The Appellate Court stated "that as much as we respect the opinions of the **Gardner** court we cannot align ourselves with its analysis on these matters."

(This summary was written by Deputy State Appellate Defender Daniel Yuhas.)

People v. Wallace, 406 Ill.App.3d 172, 941 N.E.2d 436 (2d Dist. 2010)

1. 725 ILCS 5/122-1(c) provides three alternatives for calculating the statute of limitations for a post-conviction petition in a non-death case: (1) six months after the conclusion of proceedings in the United States Supreme Court, (2) six months from the date for filing a *certiorari* petition if review was not sought in the United States Supreme Court, and (3) three years from the date of conviction if no direct appeal was taken. All three methods are subject to exceptions for delay not caused by the petitioner's culpable negligence and for claims of actual innocence.

The court concluded that the term "*certiorari*" refers not only to petitions for *certiorari* in the United States Supreme Court, but also to petitions seeking leave to appeal in the Illinois Supreme Court. Thus, where the defendant did not seek Illinois Supreme Court review from the Appellate Court's decision, and thus could not have sought U.S. Supreme Court review, the second alternative allowed him to file a post-conviction petition within six months after the petition for leave to appeal would have been due. Applying the version of Supreme Court Rule 315(b) in effect at the time of the Appellate Court's opinion, that date would have been either 21 or 35 days after the Appellate Court decision, depending on whether the defendant filed an affidavit of intent to seek leave. Under either period, defendant's petition was untimely.

2. Even if the term "*certiorari*" is interpreted as applying only to petitions for *certiorari* in the United States Supreme Court, defendant's petition was untimely. Because a defendant who fails to seek discretionary review by the Illinois Supreme Court cannot file a *certiorari* petition with the U.S. Supreme Court, under the second alternative the six-month period began to run when the Appellate Court's decision became final. Defendant's petition was not filed within six months of that date.

(Defendant was represented by Assistant Defender Steve Wiltgen, Elgin.)

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§9-1(b)(3)
Untimely Filing – Lack of Culpable Negligence

People v. Cruz, 2013 IL App (1st) 091944 (No. 1-09-1944, 9/24/13)

Post-conviction proceedings may not be commenced outside the time limitations of the Post-Conviction Hearing Act unless the defendant alleges sufficient facts to show that the delay in filing was not due to his culpable negligence. 725 ILCS 5/122-1(c). Culpable negligence contemplates something greater than ordinary negligence and is akin to recklessness.

Ignorance of the law or legal rights will not excuse delay in filing a lawsuit. It is defendant's obligation to know the time requirements for filing a post-conviction petition. Whether a defendant's reliance on the advice of jailhouse lawyers, law clerks or law librarians is sufficient to establish that his delay in filing is not due to his culpable negligence is determined by examining the specific facts of each case. Entrusting the responsibility for timely filing to jailhouse lawyers, law clerks and law librarians where defendant is aware they have no specialized knowledge in post-conviction matters shows an indifference to the consequences likely to follow from those actions and is insufficient to establish a lack of culpable negligence.

Defendant claimed that his untimely filing of a post-conviction petition resulted from his reliance on a prison law clerk's erroneous advice about the time requirements of the Act. But defendant also was fully aware that prison law clerks have no specialized legal knowledge and are assigned to the law library without any consideration of their qualifications. He should have been prepared for the probability that he would receive incorrect advice, but did not seek more reliable advice and must therefore accept the consequences.

Defendant's claim that he was illiterate did not change this conclusion. The court found his claim of illiteracy highly dubious where it found evidence in the record of his ability to read and speak English. But even if he were illiterate, he was culpably negligent because he relied on the advice of a law clerk that he had reason to believe was probably inaccurate.

Neville, J., dissented. Defendant's claim of illiteracy must be accepted as true because it is not positively contradicted by the record and therefore is a matter that should be determined at an evidentiary hearing. His illiteracy explains his need to rely on the advice of a law clerk who could read and understand English, and does not show blameable conduct or more than ordinary negligence. Because defendant sufficiently alleged lack of culpable negligence and the petition made a substantial showing of a claim of ineffective assistance of trial and appellate counsel, the cause should be remanded for an evidentiary hearing.

(Defendant was represented by Assistant Defender Pamela Rubeo, Chicago.)

People v. Knight, 405 Ill.App.3d 461, 937 N.E.2d 789 (3d Dist. 2010)

1. A defendant who seeks to file an untimely post-conviction petition must demonstrate that the late filing was not due to his culpable negligence.

Defendant filed a post-conviction petition alleging that he was actually innocent of a gang-related murder that occurred when he was incarcerated in the penitentiary, but was coerced to plead guilty to the murder by gang members who forced him to accept responsibility in order to placate prison officials. The petition alleged that the gang chief who ordered defendant to accept responsibility died after the deadline for filing a timely petition had passed, and that the gangs no longer controlled the prison. The court found that defendant's delay in filing the petition was not due to his culpable negligence but due to the continued presence of the coercive force that caused defendant to plead guilty.

2. A freestanding claim of actual innocence is cognizable in post-conviction proceedings following a conviction resulting from a guilty plea when the defendant can show that the plea was not knowing or voluntary. Defendant's petition stated a cognizable claim of actual innocence despite his plea of guilty because it alleged that defendant pleaded guilty despite

his innocence because of his fear of what gang members would do to him if he did not accept responsibility for the murder.

3. To obtain relief under a claim of actual innocence, the evidence adduced by the defendant must be newly discovered, i.e., it must be evidence that was not available at the defendant's original trial and that the defendant could not have discovered sooner through due diligence. Evidence can qualify as newly discovered even if defendant was aware of it before trial. The affidavits attesting to defendant's innocence qualify as newly discovered because the witnesses risked death by gang retaliation had they come forward sooner.

4. A post-conviction petition may be dismissed without an evidentiary hearing at the second stage if its factual claims are baseless or rebutted by the record. Otherwise, the allegations must be taken as true and their credibility resolved by an evidentiary hearing.

Defendant's guilty plea did not rebut his claim of innocence. Defendant did not state at the plea hearing that he actually murdered the victim. The factual basis for the plea did not contain a confession by the defendant. Defendant merely stipulated to the evidence that the State represented it would present. His statement at the plea hearing that his plea was not coerced was itself the result of coercion, according to the defendant. Whether the plea was coerced should be resolved at an evidentiary hearing.

The affidavit of a witness that he relayed to defendant a message from the Gangster Disciples that defendant had to "take the case" for the murder and that the gang would provide defendant with an attorney is not so implausible as to not warrant an evidentiary hearing. The State offered no evidence to rebut the witness's allegation or to deny its plausibility. Because the relevance of the witness's testimony was to show the impact of the perceived threat on defendant and not for the truth of the nature of the threat defendant faced, any hearsay objection the State might have would fail.

One of the affidavits supporting the petition was from a co-defendant who pled guilty to a lesser offense and stated at his plea hearing that the defendant stabbed the victim while he participated. The State may not rely on those proceedings to rebut defendant's petition and defeat his request for an evidentiary hearing. Only the record of the proceedings from which defendant seeks post-conviction relief may be considered to rebut defendant's claim. Since nothing in the defendant's record positively rebutted the co-defendant's affidavit, it must be taken as true.

The court remanded for an evidentiary hearing.

(Defendant was represented by Assistant Defender Mark Fisher, Ottawa.)

People v. Marino, 397 Ill.App.3d 1030, 927 N.E.2d 75 (2d Dist. 2010)

1. Under 725 ILCS 5/122-1(c), the post-conviction statute of limitations is inapplicable if the petitioner can show that the delay was not due to his or her culpable negligence. Culpable negligence is something greater than ordinary negligence, and is akin to recklessness. Examples of delays which courts have found to be attributable to causes other than the defendant's culpable negligence include post-conviction claims that are based on changes in existing law, where the petitioner lacked access to legal materials because he was in segregation or the prison was on lockdown, or where the defendant relied on the incorrect advice of appellate counsel.

2. The court rejected the argument that **People v. Davis**, 351 Ill.App.3d 215, 813 N.E.2d 1149 (2d Dist. 2004), holds that the delayed discovery of a legal claim does not constitute a ground for finding a lack of culpable negligence. Instead, **Davis** stands for the proposition that the statute of limitations is not tolled by the failure to discover a claim. Whether the defendant's failure to discover a legal claim precludes a finding of lack of culpable

negligence depends on several factors, including when the claim was discovered and how promptly the petitioner took action after the discovery.

3. To determine culpable negligence, the trial court must assess the petitioner's credibility. Because credibility determinations are beyond the scope of a motion to dismiss at the second stage of post-conviction proceedings, the trial court should have advanced the petition to the third stage, at which both the defendant and the State could have presented evidence concerning whether the belated discovery of a constitutional claim justified a finding of no culpable negligence.

(Defendant was represented by Assistant Defender Melissa Maye, Ottawa.)

People v. Robinson, 2015 IL App (4th) 130815 (No. 4-13-0815, 7/16/15)

1. Under the current version of the post-conviction hearing act, a defendant who files a direct appeal but not a certiorari petition must file his post-conviction petition within six months "from the date for filing a certiorari petition," unless he alleges facts showing the delay was not due to his culpable negligence. 725 ILCS 5/122-1(c).

2. Defendant's conviction and sentence were affirmed on direct appeal on February 11, 2009. Defendant did not file a petition for leave to appeal. Defendant filed his post-conviction petition on July 26, 2010. At the second stage, the court granted the State's motion to dismiss the petition on the ground of untimeliness.

On appeal, both parties agreed that the petition was not timely filed, but defendant argued that the delay was not due to his culpable negligence since appellate counsel failed to notify defendant when the direct appeal decision was issued. Neither party discussed the operation of section 122-1(c), simply assuming that the petition was untimely.

3. The Appellate Court held that before it could determine whether the delay was due to defendant's culpable negligence, it had to determine what the correct due date was under 122-1(c). The Court agreed that defendant's petition had to be filed within six months from the date for filing cert, but the date for filing cert depends on the date leave to appeal was denied. The United States Supreme Court only has subject-matter jurisdiction to review a judgement of an Appellate Court if the state Supreme Court declined to review the judgment. And United States Supreme Court Rule 13(1) states that a cert petition is due within 90 days after entry of the order denying discretionary review.

Since defendant never filed leave to appeal, the Appellate Court found it impossible to calculate the date his cert petition was due and hence impossible to determine the due date for filing his post-conviction petition. Without knowing the due date, the "excuse for lateness lacks a legal context," and the Court could not determine whether the delay was due to culpable negligence.

The second-stage dismissal of defendant's petition was affirmed.

(Defendant was represented by Assistant Defender Susan Wilham, Springfield.)

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§9-1(b)(4)
Treating Petition as Post-Conviction Petition/Recharacterizing Petition

People v. Stoffel, 239 Ill.2d 314, 941 N.E.2d 147 (2010)

1. Under **People v. Shellstrom**, 216 Ill.2d 45, 833 N.E.2d 863 (2005), a trial judge has

authority to recharacterize, as a post-conviction petition, a *pro se* pleading which is not denoted as a post-conviction petition but which raises constitutional issues. Before recharacterizing such a pleading, the court must advise the petitioner that subsequent post-conviction petitions will be subject to limitation and that the litigant may want to amend or withdraw the petition.

Shellstrom admonishments are intended to protect *pro se* litigants at the summary dismissal stage by providing accurate information concerning the effect of recharacterization and the need to amend the petition. Because a defendant who relies on counsel suffers no prejudice if **Shellstrom** admonitions are not given, **Shellstrom** does not apply to defendants who are represented by an attorney.

2. Under 725 ILCS 5/1-22(d), the trial court "is under no obligation" to evaluate a pleading that does not mention the Post-Conviction Hearing Act to determine whether it should be treated as a post-conviction petition. Furthermore, **Shellstrom** makes clear that recharacterization is solely within the discretion of the trial judge. Thus, while the trial court has discretion to recharacterize a *pro se* pleading as a post-conviction petition, it is not obligated to do so. Because a court does not err by failing to do something it is not required to do, a decision not to recharacterize may not be reviewed for error.

Section 122-1(d) has no application once the trial court decides to recharacterize, however. In other words, once the decision to recharacterize is made, that decision may not be reversed unless subsequent events make it clear that the substantive claims should be addressed by some vehicle other than a post-conviction proceeding. Where the trial court treated a §2-1401 petition as a post-conviction petition, and in effect advanced the petition to the second stage by appointing counsel to consult with the defendant, supplement the petition, and file a Rule 651(c) certificate, it lacked discretion to reverse its holding and conclude that the petition would not be recharacterized. Thus, the trial court erred by denying appointed counsel's motion to amend the recharacterized petition.

3. In a dissenting opinion, Justices Karmeier, Kilbride and Garman found that the trial court did not recharacterize the motion as a post-conviction petition even though it appointed counsel and ordered that a Rule 651(c) certificate be filed. Because recharacterization cannot occur until a defendant has been given **Shellstrom** admonishments, the appointment of counsel without giving such admonishments precludes a finding of recharacterization.

However, the court agreed with the majority that the trial court has no obligation to recharacterize pleadings, and that its refusal to do so is unreviewable.

4. In the interest of judicial economy, the court elected to reach the issue raised by the recharacterized post-conviction petition rather than remanding the cause for the trial court to do so. After rejecting the issue, the court remanded the cause with instructions to allow the defendant to file his supplemental petition but to deny the petition on the merits.
(Defendant was represented by Assistant Defender Duane Schuster, Supreme Court Unit.)

People v. Swamynathan, 236 Ill.2d 103, 923 N.E.2d 276 (2010)

1. A trial judge has discretion to recharacterize a pleading as a post-conviction petition. Under **People v. Shellstrom**, 216 Ill.2d 45, 833 N.E.2d 863 (2005), before making such a recharacterization the trial court must advise the petitioner of several matters, including that he or she has the opportunity to withdraw the pleading or to amend it to raise all potential post-conviction claims.

The 90-day period in which the trial court may dismiss a post-conviction petition as frivolous or patently without merit begins to run when the recharacterization is made. However, recharacterization cannot occur until the defendant has been fully admonished

under **Shellstrom**.

2. Here, the trial court took an inordinate amount of time to complete the **Shellstrom** admonishments (*i.e.*, six months passed between the trial court's first statement of its intention to recharacterize a motion as a post-conviction petition and the completion of the **Shellstrom** admonishments, although defendant was in court on more than one occasion and the case was placed on the call 14 times.) However, the trial judge appeared to be unsure of the ramifications of **Shellstrom** (which had recently been decided), and believed that cases pending in the Appellate Court would provide direction for handling the case. In addition, the judge had difficulty obtaining an interpreter who could communicate with the defendant in his native language. "While these factors do not explain every delay that occurred, and there was little doubt that the trial court could have handled this matter in a more expeditious manner, the record nevertheless demonstrates that the trial court had legitimate reasons for prolonging the recharacterization process."

The court also stressed that the recharacterization benefitted the defendant and that the delay did not cause prejudice. Because the petition was dismissed as frivolous within 90 days of the recharacterization, no error occurred.

3. The court declined to exercise its supervisory authority to create a time limit for admonishing defendants under **Shellstrom**. "[W]e trust in a trial court's ability to properly utilize its inherent authority to control its own docket and the proceedings before it."

(Defendant was represented by Assistant Defender Barb Paschen, Elgin.)

People v. Bland, 2011 IL App (4th) 100624 (No. 4-10-0624, 12/2/11)

1. Under **People v. Shellstrom**, 216 Ill.2d 45, 833 N.E.2d 863 (2005), before the trial court *sua sponte* recharacterizes a pleading as a first post-conviction petition, it most inform the *pro se* litigant of the intent to recharacterize, warn that after recharacterization any subsequent post-conviction petition will be subject to the restrictions imposed on successive post-conviction petitions, and provide an opportunity to withdraw or amend the pleading. Here, the court found that **Shellstrom** applies only where the trial court *sua sponte* recharacterizes the pleading.

The trial judge noted that the pleading referred to both the Post-Conviction Hearing Act and §2-1401, and asked defendant in open court to clarify whether he intended to file a post-conviction petition or a §2-1401 petition. The Appellate Court concluded that under these circumstances, the court did not recharacterize the pleading. Thus, **Shellstrom** did not apply, and the failure to give **Shellstrom** admonishments was not error.

2. However, once defendant requested that his pleading be treated as a post-conviction petition, the trial court erred by treating the matter as a second-stage proceeding but failing to appoint counsel. At the first stage of a post-conviction proceeding, the court considers only whether the petition is frivolous or patently without merit. This determination is made without input from the State. If the petition is not dismissed at stage one and advances to stage two, counsel must be appointed before the trial court considers the State's answer or motion to dismiss.

By considering (and eventually granting) the State's motion to dismiss, the trial court treated the petition as if it were at a second-stage proceeding. Because no appointment of counsel was made, the dismissal order was reversed and the cause remanded for further proceedings.

(Defendant was represented by Assistant Defender Susan Wilham, Springfield.)

People v. Corredor, 399 Ill.App.3d 804, 927 N.E.2d 1231 (2d Dist. 2010)

1. Under **People v. Shellstrom**, 216 Ill.2d 45, 833 N.E.2d 863 (2005), the trial court may recharacterize a *pro se* pleading as a post-conviction petition only after advising the petitioner that it intends to make the recharacterization, that any subsequent post-conviction petition will be subject to the restrictions on successive post-conviction petitions, and that the petitioner may elect to either withdraw or amend the pleading. The court concluded that the **Shellstrom** rule applies to the recharacterization of any *pro se* pleading, whether or not the initial filing is "cognizable" under Illinois law.

2. Alternatively, a motion for order *nunc pro tunc* to require DOC to grant sentencing credit that had been ordered by the trial court is "cognizable" under Illinois law. The trial court has limited continuing jurisdiction to conform the record to the judgment actually entered, and could do so through either a motion for an order *nunc pro tunc* or a motion to correct the mittimus.

(Defendant was represented by Assistant Defender Kim DeWitt, Elgin.)

People v. Hood, 395 Ill.App.3d 584, 916 N.E.2d 1287 (4th Dist. 2009)

Where the trial court fails to give **Shellstrom** admonishments[1] before recharacterizing a *pro se* petition as a post-conviction petition, the appropriate remedy is to vacate the dismissal order and remand the cause with instructions to afford the defendant an opportunity to either withdraw or amend his *pro se* pleading. The court rejected **People v. Higginbotham**, 368 Ill.App.3d 1137, 859 N.E.2d 634 (3d Dist. 2006), which affirmed the trial court's decision to recharacterize a *habeas corpus* petition as a first post-conviction petition, but held that in the absence of the **Shellstrom** admonishments the pleading was not to be treated as a first post-conviction petition for purposes of the rule against successive petitions.

(Defendant was represented by Assistant Defender John McCarthy, Springfield.)

People v. Santana, 401 Ill.App.3d 663, 931 N.E.2d 273 (2d Dist. 2010)

In **People v. Morris**, 236 Ill.2d 345, ___ N.E.2d ___ (2010), the Supreme Court held that its decision in **People v. Whitfield**, 217 Ill.2d 177, 840 N.E.2d 658 (2005), does not apply retroactively to convictions that were final when **Whitfield** was announced. **Whitfield** held that a defendant may seek reduction of his sentence of imprisonment by the length of the applicable MSR (mandatory supervised release) term, where the court fails to admonish him that his sentence includes the MSR term when he enters a negotiated plea of guilty.

Upon remand from the Supreme Court for reconsideration in light of **Morris**, the court held:

1. Defendant's assertion of his **Whitfield** claim in a 2-1401 petition was untimely because 735 ILCS 5/2-1401 provides that such petitions must be filed within two years of the date of judgment. The judgment was not void and subject to attack at any time because mere absence of the MSR admonition did not deprive the court of the authority to sentence defendant.

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[1]**People v. Shellstrom**, 216 Ill.2d 45, 833 N.E.2d 863 (2005) held that before characterizing a *pro se* pleading as a post-conviction petition, the trial court must advise the defendant that it intends to recharacterize the pleading and that the recharacterization means that any subsequent post-conviction petition will be treated as a successive petition. The court must also provide an opportunity to withdraw the pleading or to amend it to include all post-conviction claims.

2. By statute (725 ILCS 5/122-1(d)), the circuit court was not required to recharacterize the 2-1401 petition as a post-conviction petition. The court declined to follow **People v. Smith**, 386 Ill.App.3d 473, 898 N.E.2d 119 (5th Dist. 2008), finding it questionable authority and distinguishable, because the petition in **Smith** would have been timely if considered as a post-conviction petition, whereas the petition at bar was timely whether considered as a post-conviction or a 2-1401 petition.

3. Because defendant's conviction was final when **Whitfield** was announced in that he had taken no direct appeal, defendant was not entitled to application of **Whitfield**.

The court affirmed the dismissal of the 2-1401 petition.

(Defendant was represented by Assistant Defender Yasemin Eken, Elgin.)

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§9-1(c)
Cognizable and Non-Cognizable Claims

People v. Coleman, 2013 IL 113307 (No. 113307, 10/3/13)

1. As a general rule, any constitutional claim not raised in an original or amended post-conviction petition is forfeited. There are two exceptions to this procedural default rule: 1) where defendant can establish cause for failing to raise the claim in the original or amended petition and resulting prejudice; and 2) where the claim involves actual innocence.

A freestanding claim of actual innocence is not cognizable as a Fourteenth Amendment due process claim. As a matter of Illinois constitutional jurisprudence, however, a claim of newly discovered evidence showing a defendant to be actually innocent of the crime for which he was convicted is cognizable as a matter of due process. Procedurally, a court treats this claim like any other post-conviction claim.

Substantively, a court should grant relief only if the defendant has presented supporting evidence that is new, material, noncumulative, and of such conclusive character as to probably change the result on retrial. "New" evidence must have been discovered after trial and be of such character that it could not have been discovered earlier through the exercise of due diligence. Evidence is "material" if it is relevant and probative of the petitioner's innocence. "Noncumulative" evidence adds to that which the jury has heard. "Conclusive" evidence, when considered with the trial evidence, would probably lead to a different result.

As a matter of practice, the circuit court should first review the evidence presented at the evidentiary hearing to determine if any of it is new, material, and noncumulative. If there is such evidence, the court must consider whether that evidence places the evidence presented at trial in a different light and undercuts the court's confidence in the factual correctness of the verdict. Although this question involves credibility determinations, the court should not redecide the defendant's guilt in deciding whether to grant relief. The key is probability rather than certainty requires the court to consider what another jury would likely do when presented with all the evidence both new and old.

2. Federal law does recognize gateway claims of actual innocence. A "gateway" claim is not itself a constitutional claim, but is a gateway through which a federal habeas petitioner must pass in order to have his otherwise barred constitutional claim considered on its merits. To obtain relief on a gateway actual-innocence claim, a defendant must show that it is more

likely than not that no reasonable juror would have convicted him in light of the new evidence. **Schlup v. Delo**, 513 U.S. 298 (1995).

The Supreme Court declined to adopt an enhanced **Schlup** test providing that in order to prevail on a claim of actual innocence, a post-conviction petitioner must prove by clear and convincing evidence that no reasonable juror would have found him guilty in light of the new evidence. Illinois does not regard a claim of actual innocence as a gateway to relief on other issues, and the State's arguments based on federal jurisprudence are therefore irrelevant. Furthermore, adoption of the State's proposed test would make an actual-innocence claim harder to prove than any other post-conviction claim.

3. Here, it was uncontested that the defense presented new, material, and noncumulative evidence of actual innocence at the evidentiary hearing on his petition, because five men who were involved in or present for the attack testified that defendant was not involved. The defense may have known about the witnesses before trial, but in all likelihood they would have asserted their privilege against self-incrimination if called to testify at trial. Although another offender did testify at trial and exonerated defendant, the uncorroborated testimony of one offender does not render the testimony of five additional witnesses merely cumulative, particularly where four of the additional witnesses were never charged with the offense and they offered significant details missing from the testimony of the offender who did testify.

The court acknowledged that four of the witnesses had extensive criminal records, three admitted drinking alcohol and smoking marijuana before the attack, and there were discrepancies in the accounts of the attack which they provided 16 years after the fact. Although these matters would affect their credibility at a second trial, their testimony was remarkably consistent regarding key details of the events and on the issue of the persons involved in or present for the attack. Although the witnesses' credibility would also be affected by the fact that the statute of limitations had expired, the court noted that the prosecution did not pursue charges against them although they had been implicated in the offense before the statute of limitations ran.

While the State's evidence was sufficient to convict, it was far from overwhelming. The post-conviction hearing testimony of the detective who investigated the attack was inconsistent with his trial testimony and revealed that defendant became a suspect not as a result of a computerized "cold search," but based on information supplied by other police officers. The court concluded:

> [T]he evidence presented by defendant at the evidentiary hearing, together with the evidence presented by the defendant at trial, places the evidence presented by the State in a new light and undermines our confidence in that evidence and the result it produced. Weighed against the State's evidence, the defendant's new evidence is conclusive enough that another trier of fact would probably reach a different result.

Because the circuit court's dismissal of the post-conviction petition was manifestly erroneous, the dismissal order was reversed and the cause remanded for further proceedings.

People v. Ortiz, 235 Ill.2d 319, 919 N.E.2d 941 (2009)

1. Generally, the Post-Conviction Hearing Act contemplates that only a single post-conviction petition will be filed. Any constitutional claim not raised in the original or amended petition is waived, unless a successive petition is permitted for reasons of fundamental fairness. Interests of fundamental fairness justify a successive petition if the petitioner

satisfies the "cause and prejudice" test, or if a claim of actual innocence is raised.

Successive petitions raising claims of actual innocence are not subject to the "cause and prejudice" test. In rejecting the State's argument that 725 ILCS 5/122-1 requires that the "cause and prejudice" test be satisfied for all successive petitions, the court stressed that the due process clause of the Illinois Constitution affords post-conviction petitioners the right to assert a free-standing claim of innocence based on newly-discovered evidence.

2. The court rejected the State's argument that multiple post-conviction petitions raising claims of actual innocence assert the same "claim," and therefore are subject to the "cause and prejudice" test. A claim of actual innocence based on additional newly discovered evidence is not the same as a previous claim that was based on different evidence. "Defendant is not precluded from raising multiple claims of actual innocence where each claim is supported by new discovered evidence."

Thus, collateral estoppel did not apply where the defendant filed three post-conviction petitions alleging actual innocence, but the third petition offered two eyewitnesses who had previously been unknown.

3. In addition, the trial court erred by denying post-conviction relief on defendant's claim of actual innocence. To qualify as "newly-discovered" evidence justifying relief, evidence must have been discovered since the trial and such that it could not have been discovered at the time of trial through the exercise of due diligence. In addition, the evidence must be material rather than cumulative, and of such conclusive character as to probably change the result on retrial.

The testimony of a eyewitness who was not known at the time of trial, and who claimed that defendant had not been present at the time of the offense, clearly qualified as "newly discovered" evidence. Although a prior petition raised a claim of actual innocence based on a different eyewitness whose existence had been unknown at trial, this instant petition was proper where it concerned a separate witness whose testimony was broader than that raised in the previous argument.

The court also found that the evidence was material and not cumulative. Because the testimony "supplied a first-person account of the incident that directly contradicted the prior statements of the two eyewitnesses for the prosecution," it was not cumulative to testimony which supported defendant's alibi defense or to the State's witnesses recantations of their trial testimony. "Rather, it added to what was before the fact-finder."

Finally, the evidence was of such conclusive character as to likely change the result on retrial. The new evidence directly contradicted the testimony of two prosecution witnesses, which had been recanted, and made the evidence of innocence stronger than it had been at the original trial. In addition, there was no physical evidence linking defendant to the offense. Under these circumstances, defendant satisfied the requirements for obtaining a new trial due to newly discovered evidence.

The trial court's order denying defendant's post-conviction petition was reversed, and the cause was remanded for a new trial.

People v. Butler, 2013 IL App (5th) 110282 (No. 5-11-0282, 2/6/13)

Under 725 ILCS 5/110-14, a person incarcerated on a bailable offense who does not post bail is entitled to a credit of $5 per day of incarceration against any fine imposed as part of the sentence. A $5 credit issue may be raised at any time, including on appeal from denial of a post-conviction petition where the defendant abandoned the issue presented in the petition and raised no constitutional issue in the Appellate Court. Thus, defendant was entitled to raise the $5 per day credit issue on appeal from denial of a post-conviction petition which

argued only that before defendant entered a negotiated plea, he was not sufficiently admonished about the two-year period of mandatory supervised release.

The mittimus was modified to reflect a $30 credit against a Children's Advocacy Center fee, which the parties agreed was actually a "fine."

(Defendant was represented by Assistant Defender Larry O'Neill, Mt. Vernon.)

People v. Chambers, 2013 IL App (1st) 100575 (No. 1-10-0575, 8/13/13)

1. The trial court's order denying leave to file a successive post-conviction petition stated that defendant "is hereby fined $105.00 and the Clerk of the Circuit Court will be instructed not to accept any further filings from [defendant] until his sanction has been satisfied in full." 735 ILCS 5/22-105, which authorizes the imposition of court costs against prison inmates who file post-conviction petitions which are determined to be frivolous, provides that "[n]othing in this Section prohibits an applicant from filing an action or proceeding if the applicant is unable to pay the court costs."

Applying *de novo* review on the ground that the issue concerned the statutory authority of the trial court, the Appellate Court found that the prohibition against additional filings conflicted with the plain and ordinary language of §22-105. "The circuit court . . . effectively prohibited defendant from making future filings based on court costs assessed, despite the clear language stating otherwise in section 22-105 of the Code."

The court also noted that in **People v. Alcozer**, 241 Ill.2d 248, 948 N.E.2d 70 (2011), the Illinois Supreme Court upheld the imposition of court costs upon persons who file frivolous post-conviction proceedings but found that §22-105 does not prohibit prisoners from petitioning for post-conviction relief even if they cannot afford to pay court costs.

The Appellate Court rejected the State's argument that Illinois Supreme Court Rule 137, which provides that the signature of an attorney or a party constitutes a certificate that he or she believes that the allegation is warranted by existing law or a good faith argument for the extension of existing law and authorizes an appropriate sanction where a document is signed in violation of the rule, permits a ban on filing post-conviction petitions until court costs for prior petitions have been paid. The court noted that §22-105 is a specific provision addressing frivolous filings by prisoners, while Rule 137 is a general rule governing the filing of all documents. It is a fundamental rule of statutory construction that a specific provision prevails over a general provision.

Because the trial court erred by prohibiting the defendant from filing further pleadings before the sanction for prior filings was paid, the prohibition was void. The court remanded the cause with instructions that the trial court vacate its order precluding defendant from filing future petitions until the $105 penalty had been paid.

2. The court rejected defendant's argument that on appeal from denial of post-conviction relief, he could argue for the first time that a mandatory life sentence on a person who was a minor at the time of the offense violates **Miller v. Alabama**, ___ U.S. ___, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012). In **Miller**, the Supreme Court held that the Eighth Amendment is violated by mandatory life sentences without parole for persons who were under the age of 18 at the time of their crimes. **Miller** did not prohibit sentencing juveniles to life imprisonment without parole, but held that the mandatory imposition of such a sentence violates the Constitution.

The court noted that mandatory life sentences may be applied to persons other than those whose offenses were committed when they were minors, and that under **People v. Williams**, 2012 IL App (1st) 111145, a sentence which violates **Miller** is not void *ab initio*. In **Williams**, the court could reach the issue because the petitioner satisfied the "cause and

prejudice" test for successive post-conviction petitions by arguing that the Eighth Amendment was violated by a mandatory life without parole for a juvenile.

Here, by contrast, defendant's successive post-conviction petition did not include any argument concerning the constitutionality of his mandatory sentence of life without parole. Under these circumstances, defendant failed to satisfy the cause and prejudice requirement. Thus, the court could have considered the issue only if the sentence was void *ab initio*, a holding which was foreclosed by **Williams**.

The court also noted that a sentence is void only if the court which rendered it lacked jurisdiction to do so. Unless a statute is unconstitutional on its face, the fact that the sentence which it authorizes is applied improperly does not mean that the trial court lacked jurisdiction.

In reaching its holding, the court rejected the reasoning of **People v. Luciano**, 2013 IL App (2d) 110792, which held that a sentence which violates **Miller** is void.

(Defendant was represented by Assistant Defender Manuel Serritos, Chicago.)

People v. Cichon, 408 Ill.App.3d 1020, 945 N.E.2d 140 (3d Dist. 2011)

A person imprisoned in the penitentiary can file a petition for post-conviction relief if he claims that "in the proceedings which resulted in his or her conviction there was a substantial denial of his or her rights" under the state or federal constitution. 725 ILCS 5/122-1(a).

Defendant complained that he received ineffective assistance of counsel because counsel who represented him in a previous post-conviction proceeding that resulted in vacation of his guilty plea and 25-year sentence erroneously advised him that he faced a sentence not greater than 30 years on retrial. This claim is not cognizable on post-conviction because counsel had not represented defendant in a proceeding that resulted in his conviction.

The court rejected defendant's argument that the prior post-conviction proceeding was part of the proceedings resulting in his conviction because the parties discussed possible outcomes of defendant's case during the pendency of those proceedings. These discussions did not constitute plea bargaining as there could be no second criminal proceeding while defendant's original guilty plea and sentence remained valid.

People v. Dupree, 397 Ill.App.3d 719, 922 N.E.2d 503 (2d Dist. 2010)

Under **People v. Brocksmith**, 162 Ill.2d 224, 642 N.E.2d 1230 (1994), a defendant has a personal right to decide whether to tender an instruction on a lesser included offense. The court questioned whether an alleged **Brocksmith** violation is itself a constitutional violation which can be raised in a post-conviction petition, or whether the issue must be raised in post-conviction by a claim of ineffective assistance of counsel. The court declined to resolve this question because the petition raised the issue in terms of ineffective assistance.

The court also held that defendant's petition presented the gist of an issue of ineffective assistance of counsel. (See also **COUNSEL**, §13-4(a)(2) & **JURY**, §32-8(a)).

(Defendant was represented by Assistant Defender Jack Hildebrand, Elgin.)

People v. Gonzalez, 407 Ill.App.3d 1026, 944 N.E.2d 834 (2d Dist. 2011)

1. Newly discovered evidence warrants a new trial when it: (1) has been discovered since the trial, (2) is of such character that it could not have been discovered before trial through the exercise of due diligence, (3) is material and not merely cumulative, and (4) of such conclusive character as to probably change the result of a retrial. The evidence need not establish the defendant's innocence; a new trial is warranted when the circumstances,

including the new evidence, warrant closer scrutiny on the issue of guilt or innocence. Claims of newly discovered evidence are not favored and must be closely scrutinized.

2. Defendant's post-conviction petition satisfied the first three prongs in the test for obtaining a new trial based on newly discovered evidence: the evidence was newly discovered, could not have been discovered before trial, and was material. The defendant presented a co-defendant's affidavit executed two years after the defendant's conviction and which indicated that the co-defendant had acted alone. The affidavit was newly discovered because it was executed only after the defendant's conviction. Due diligence could not have discovered the evidence at the time of trial, as the co-defendant was on trial at the same time and could not have been forced to surrender his 5th Amendment rights. Finally, the evidence was not merely cumulative where the defense presented no evidence at trial and relied solely on challenging the State's evidence.

However, the court held that the evidence was not of such conclusive character as to make a different result likely at a retrial. The co-defendant's affidavit was executed some two years after the co-defendant had been sentenced and only nine months before the co-defendant was scheduled to be released from prison. Thus, the co-defendant's statements could have no bearing on his personal situation, making his credibility suspect.

In addition, the post-conviction judge found that the co-defendant's testimony was not credible. The court noted that the new claims conflicted with the co-defendant's testimony at his own trial, there was testimony by disinterested witnesses that defendant had been present at the scene, and there was testimony at trial that defendant had admitted to the offense. Furthermore, the evidence at trial indicated that defendant and the co-defendant were together on the morning of the offense. Finally, when in court for their bond hearings, each defendant was heard accusing the other of "tricking" on them. Under these circumstances, the trial court did not err by finding that the affidavit was merely an attempt by the co-defendant to help the defendant.

3. On remand, the trial court lacks authority to act beyond the scope of the mandate. If specific instructions are given by the reviewing court, the lower court must comply with those instructions. If no specific instructions are given, the lower court must examine the opinion and proceed consistently with it.

Where the cause was remanded for an evidentiary hearing on the defendant's post-conviction petition, which contained a single allegation of constitutional error, the trial judge did not exceed the mandate by allowing the defendant to amend the petition to raise a new claim. The court concluded that the mandate directed the trial judge to consider whether newly discovered evidence was of such conclusive character as to probably change the result of a retrial, but did not otherwise dictate the scope of the hearing.

(Defendant was represented by Assistant Defender Kerry Bryson, Ottawa.)

People v. Gutierrez, ___ Ill.App.3d ___, ___ N.E.2d ___ (1st Dist. 2011) (No. 1-09-3499, 6/30/11)

1. Whether or not a constitutional rule of criminal procedure is fully retroactive depends, in the first instance, on whether the decision announces a new rule or merely expands upon existing precedent. A case announces a new rule when it breaks new ground or imposes a new obligation on the state or federal government. It fails to announce a new rule if the result was dictated by precedent existing at the time defendant's conviction became final. A decision that applies an established general rule to a new set of facts is not a new rule. **Teague v. Lane**, 489 U.S. 288 (1989).

Implicit in the rules of retroactivity is the principle that *habeas corpus* cannot be used

as a vehicle to create a new constitutional rule of criminal procedure unless that rule would be applied to all defendants on collateral review through one of the two **Teague** exceptions (either placing certain kinds of primary, private individual conduct beyond the power of the criminal law-making power to proscribe, or requiring the observance of procedures implicit in the concept of ordered liberty). Therefore, the issue of retroactivity should be decided as a threshold question before addressing the underlying merits of a constitutional claim.

Notwithstanding the apparent novelty of its holding, the decision in **Padilla v. Kentucky**, 559 U.S. ___, 130 S.Ct. 1473, ___ L.Ed.2d ___ (2010), that counsel has a duty to inform the defendant of the deportation consequences of his guilty plea, applies retroactively to convictions that were final when **Padilla** was decided. First, it can be inferred from the **Padilla** court's failure to address retroactivity as a threshold matter when the case came before the court from state post-conviction review, that the court did not intend to announce a new rule. Second, **Padilla** merely applied **Strickland v. Washington**, 466 U.S. 669 (1984), and expanded it to include counsel's obligation to inform a defendant of possible deportation. "A decision that applies an established general rule (**Strickland**) to a new set of facts (deportation) is not a new rule." Additionally, the **Padilla** court acknowledged that its holding would undermine the finality of convictions obtained by guilty pleas, but noted that it had dismissed similar concerns in **Hill v. Lockhart**, 474 U.S. 52 (1985), where it had applied **Strickland** to a claim that counsel had failed to advise defendant regarding his parole eligibility when he pleaded guilty, again without deciding the threshold question of retroactivity.

2. The Post-Conviction Hearing Act contemplates the filing of only one post-conviction petition. Successive petitions are governed by 725 ILCS 5/122-1(f), which provides that the court may grant defendant leave to file a successive petition only if he demonstrates cause for his failure to bring the claim in the initial petition and prejudice resulting from that failure. "Cause" is defined as any objective factor external to the defense that impeded the defendant's ability to raise the claim in the initial post-conviction proceeding. "Prejudice" is defined as an error so infectious to the proceedings that the resulting conviction violates due process.

Defendant filed a successive petition claiming that his counsel was ineffective in failing to notify him that his guilty plea would subject him to deportation, and that had he been provided that information, he would have gone to trial because the evidence against him was not overwhelming.

Defendant established cause for his failure to raise this claim in his previous petition where he was unaware of the deportation consequences of his plea, even though he did not provide the date on which he became aware of that consequence, particularly where defendant's previous petition was *pro se* and denied at the first stage.

Defendant did not establish prejudice under the cause-and-prejudice test because he could not establish prejudice under the second prong of **Strickland v. Washington**, 466 U.S. 668 (1984). In the guilty plea context, to establish prejudice under **Strickland**, defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial. Whether the alleged error was prejudicial depends largely whether it was likely that defendant would have succeeded at trial. The evidence of defendant's guilt was overwhelming in that he was identified by an eyewitness as the offender, he admitted accountability in a videotaped statement, and the gun used in the offense was recovered in connection with an unrelated case involving defendant, and defendant's palm print and DNA were found on the gun. Therefore, he has not shown that he would have succeeded at trial.

3. A claim that the court failed to inform defendant at the time of his guilty plea that

if he is not a citizen, deportation may be a consequence of his conviction, as required by 725 ILCS 5/113-8, is not a constitutional claim cognizable in a post-conviction proceeding. **People v. Delviller**, 235 Ill.2d 507, 922 N.E.2d 330 (2009), holding that due process does not require that the court admonish defendant of the collateral consequences of a guilty plea such as deportation, was not effectively overruled by **Padilla v. Kentucky**, 559 U.S. ___, 130 S.Ct. 1473 (2010). **Padilla** concluded that the direct/collateral consequences distinction is ill-suited to evaluating a claim of ineffective assistance of counsel, but did not reject the direct/collateral distinction in determining whether a guilty plea is knowingly and voluntarily entered.

(Defendant was represented by Assistant Defender Rebecca Levy, Chicago.)

People v. Hall, 2014 IL App (1st) 122868 (No. 1-12-2868, 10/20/14)

Defendant was convicted of violating the Sex Offender Registration Act (730 ILCS 150/6) because he failed to register after having been convicted of aggravated criminal sexual assault and of a prior failure to register. As charged, the offense was a Class 2 felony. The trial court imposed a Class X sentence based on two prior convictions - the same aggravated criminal sexual assault conviction that was an element of the offense, and a prior DUI conviction.

The court concluded that the legislature did not intend for a single conviction to be used both as an element of the offense of failing to register as a sex offender and as a reason to enhance the sentence. Thus, the Class X sentence was void and could be challenged for the first time on appeal from the denial of a post-conviction petition.

(Defendant was represented by Assistant Defender Lauren Bauser, Chicago.)

People v. Knight, 405 Ill.App.3d 461, 937 N.E.2d 789 (3d Dist. 2010)

1. A defendant who seeks to file an untimely post-conviction petition must demonstrate that the late filing was not due to his culpable negligence.

Defendant filed a post-conviction petition alleging that he was actually innocent of a gang-related murder that occurred when he was incarcerated in the penitentiary, but was coerced to plead guilty to the murder by gang members who forced him to accept responsibility in order to placate prison officials. The petition alleged that the gang chief who ordered defendant to accept responsibility died after the deadline for filing a timely petition had passed, and that the gangs no longer controlled the prison. The court found that defendant's delay in filing the petition was not due to his culpable negligence but due to the continued presence of the coercive force that caused defendant to plead guilty.

2. A freestanding claim of actual innocence is cognizable in post-conviction proceedings following a conviction resulting from a guilty plea when the defendant can show that the plea was not knowing or voluntary. Defendant's petition stated a cognizable claim of actual innocence despite his plea of guilty because it alleged that defendant pleaded guilty despite his innocence because of his fear of what gang members would do to him if he did not accept responsibility for the murder.

3. To obtain relief under a claim of actual innocence, the evidence adduced by the defendant must be newly discovered, i.e., it must be evidence that was not available at the defendant's original trial and that the defendant could not have discovered sooner through due diligence. Evidence can qualify as newly discovered even if defendant was aware of it before trial. The affidavits attesting to defendant's innocence qualify as newly discovered because the witnesses risked death by gang retaliation had they come forward sooner.

4. A post-conviction petition may be dismissed without an evidentiary hearing at the second stage if its factual claims are baseless or rebutted by the record. Otherwise, the

allegations must be taken as true and their credibility resolved by an evidentiary hearing.

Defendant's guilty plea did not rebut his claim of innocence. Defendant did not state at the plea hearing that he actually murdered the victim. The factual basis for the plea did not contain a confession by the defendant. Defendant merely stipulated to the evidence that the State represented it would present. His statement at the plea hearing that his plea was not coerced was itself the result of coercion, according to the defendant. Whether the plea was coerced should be resolved at an evidentiary hearing.

The affidavit of a witness that he relayed to defendant a message from the Gangster Disciples that defendant had to "take the case" for the murder and that the gang would provide defendant with an attorney is not so implausible as to not warrant an evidentiary hearing. The State offered no evidence to rebut the witness's allegation or to deny its plausibility. Because the relevance of the witness's testimony was to show the impact of the perceived threat on defendant and not for the truth of the nature of the threat defendant faced, any hearsay objection the State might have would fail.

One of the affidavits supporting the petition was from a co-defendant who pled guilty to a lesser offense and stated at his plea hearing that the defendant stabbed the victim while he participated. The State may not rely on those proceedings to rebut defendant's petition and defeat his request for an evidentiary hearing. Only the record of the proceedings from which defendant seeks post-conviction relief may be considered to rebut defendant's claim. Since nothing in the defendant's record positively rebutted the co-defendant's affidavit, it must be taken as true.

The court remanded for an evidentiary hearing.

(Defendant was represented by Assistant Defender Mark Fisher, Ottawa.)

People v. Lofton, ___ Ill.App.3d ___, ___ N.E.2d ___ (1st Dist. 2011) (No. 1-10-0118, 6/30/11)

1. The Post-Conviction Hearing Act generally contemplates the filing of only one post-conviction petition. Fundamental fairness allows the filing of a successive petition where the petition complies with the cause-and-prejudice test. Even if a petitioner cannot show cause and prejudice, the failure to raise a claim in an earlier petition will be excused if necessary to prevent a fundamental miscarriage of justice where the defendant sets forth a claim of actual innocence.

Petitioner's claim of actual innocence was based on the affidavit of a co-defendant who had been acquitted, alleging that he was the actual shooter and stating that petitioner was not at the scene. This affidavit was consistent with the alibi that petitioner had asserted since the date of his arrest. Because the petition contained a legitimate claim of actual innocence, this claim is not subject to the cause-and-prejudice test, and thus is not statutorily barred and may be considered on its merits.

2. At the second stage of a post-conviction proceeding, the relevant inquiry is whether the petitioner has made a substantial showing of actual innocence such that an evidentiary hearing is warranted. Dismissal at the second stage is warranted only when the petition's allegations of fact, liberally construed and in light of the original trial record, fail to make a substantial showing of imprisonment in violation of the state or federal constitution. All well-pleaded facts that are not positively rebutted by the trial record must be taken as true. The circuit court may not engage in fact-finding or credibility determinations at the dismissal stage; such determinations are made at the evidentiary stage.

The circuit court dismissed a petition, supported by a co-defendant's affidavit claiming that he was the actual shooter and that petitioner was not present at the scene. The court dismissed on the ground that the affidavit did not support a claim of actual innocence because

the co-defendant had been acquitted at trial, had made a post-arrest statement implicating petitioner, and did not execute the affidavit until 10 years after the fact. This was an impermissible credibility determination by the circuit court. Credibility is an issue to be reached at the evidentiary stage, not a second-stage dismissal hearing.

3. Evidence in support of a claim of actual innocence must be newly discovered, material and not merely cumulative, and of such conclusive character that it would probably change the result on retrial. Newly-discovered evidence is evidence that was discovered since the trial and could not have been discovered earlier through due diligence. Evidence is cumulative when it does not add anything to what was previously before the trier of fact.

The petition made a substantial showing that the evidence upon which petitioner's actual innocence was based was newly discovered. The co-defendant's admission that he was the shooter and that petitioner was not at the scene was not discovered until the co-defendant contacted petitioner and subsequently signed the affidavit. Petitioner had no reason to contact the co-defendant prior to the co-petitioner contacting him. Petitioner maintained he was not at the scene and would not have known that the co-defendant was the shooter. Petitioner would only have known that the co-defendant had been identified by a witness and charged with the murder, but acquitted. This would not alert petitioner to the fact that the co-defendant was the shooter and would sign an affidavit to that effect. Why co-defendant came forward when he did was a matter to be investigated at an evidentiary hearing, rather than to be considered at the dismissal stage.

Evidence that someone else was the shooter and that petitioner was not present at the shooting is certainly material. It also adds to the evidence that was before the jury. A police report named the co-defendant as the shooter, although the police officer who prepared the report testified that was a mistake and he just assumed the co-defendant was the shooter. An eyewitness testified that the co-defendant ran from the scene with the gun, although he testified that petitioner was the shooter. Another co-defendant testified that he did not know if petitioner was at the scene, although he had made a post-arrest statement that petitioner was the shooter. The jury also had petitioner's alibi testimony. The post-conviction petition included an affidavit from an alibi witness who had testified at petitioner's first trial (that ended in a hung jury) that he would have testified if called as a witness at the second trial, as well as the co-defendant's affidavit. The record supports the affidavits to the extent that the co-defendant is the only one who was immediately named and described by the eyewitness, and the eyewitness consistently maintained that he saw the co-defendant run from the scene with the gun.

The newly-discovered evidence is also so conclusive that it would probably change the result on retrial. The co-defendant's affidavit states not only that he was the shooter, but that petitioner was not there. This is inconsistent with the eyewitness's identification of petitioner, but consistent with petitioner's alibi and the eyewitness's apparent initial identification of the co-defendant as the shooter and his testimony that he saw the co-defendant run from the scene with the gun. The co-defendant's account is also consistent with the testimony of the eyewitness to the extent that the co-defendant named another participant in the offense who remained in a car, and the eyewitness testified that he knew that person, but did not see him at the scene. Although the eyewitness identified petitioner in a lineup and at some point provided a physical description of petitioner to the police, his initial identifications and descriptions were of the co-defendant and another accomplice.

Because petitioner made a substantial showing of a claim of actual innocence based on newly-discovered evidence, the cause was remanded for an evidentiary hearing.

(Defendant was represented by Assistant Defender Jonathan Steffy, Chicago.)

People v. Munoz, 406 Ill.App.3d 884, 941 N.E.2d 318 (1st Dist. 2010)

1. Ordinarily, a defendant must satisfy the "cause and prejudice" test in order to file a second or successive post-conviction petition. "Cause" consists of an objective factor external to the defense which impeded counsel or the defendant from raising the claim in an earlier proceeding. "Prejudice" is shown where a constitutional error so infected the trial that the conviction violated due process.

A post-conviction petition which raises a viable claim of actual innocence is not required to satisfy the "cause" and "prejudice" test. To allege a claim of actual innocence based on newly discovered evidence, the defendant must show that the evidence is material, noncumulative, and likely to change the result of a retrial. In addition, the evidence could not have been discovered in a more timely manner with the exercise of due diligence.

2. Defendant's *pro se* post-conviction petition made a sufficient showing of actual innocence to dispense with the cause and prejudice requirement for his second post-conviction petition. The petition presented the affidavit of an eyewitness who was discovered some 20 years after the original murder trial. The affidavit identified a different person as the shooter, and said that defendant had not been at the scene. The affidavit also averred that the witness contacted two police officers after the offense and told them what he had seen. Although one of the officers testified at defendant's trial and the witness would have been willing to testify, the witness was not disclosed to the defense or contacted by the prosecution.

3. Defendant also made a sufficient showing of a meritorious issue to avoid summary dismissal. First, there was a sufficient showing that due diligence would not have disclosed the witness at an earlier time. Although defendant did not indicate how or when he learned of the witness, the affidavit was notarized by a Massachusetts notary public, indicating that at some point the witness left Illinois. Furthermore, the State not only failed to disclose the witness at the time of trial, but after he was convicted defendant unsuccessfully sought to obtain grand jury transcripts and police investigation reports by filing a mandamus action.

The court also concluded that defendant made a *prima facie* showing that the evidence was noncumulative and would likely have changed the result at trial. An eyewitness who exonerates the defendant does more than merely corroborate the defendant's alibi. In addition, although another eyewitness testified at trial that defendant was the shooter, that testimony was suspect because the witness had been shot during the incident, which occurred on a dark street, and the witness did not originally identify defendant as the shooter. Under these circumstances, after hearing the newly-discovered witness a reasonable trier of fact could conclude that defendant was not involved in the offense.

Because defendant's petition had an arguable basis in law and fact, the trial court erred by dismissing it as frivolous and patently without merit. The order denying defendant's request for leave to file a successive post-conviction was vacated and the cause remanded for further proceedings.

(Defendant was represented by Assistant Defender Jonathan Yeasting, Chicago.)

People v. Parker, 2012 IL App (1st) 101809 (No. 1-10-1809, 6/29/12)

1. A court may dismiss a post-conviction petition at the first stage of the proceeding as frivolous or patently without merit only if it has no arguable basis in law or fact, which means that it is based either on an indisputably meritless legal theory or a fanciful factual allegation.

2. The absence of a notarized affidavit is not an appropriate basis for a first-stage dismissal. The purposes of the Post-Conviction Hearing Act would be hindered by preventing petitions that are neither frivolous nor patently without merit from advancing to the second stage due to the technicality of a lack of notarization. At the second stage, the State will have

an opportunity to object to the lack of notarization, and appointed counsel will be able to assist the petitioner in arranging for notarization.

An affidavit from a co-defendant supporting defendant's claim of actual innocence was not notarized. Because the petition was dismissed at the first stage of the proceedings, the absence of notarization was not a basis on which the court could affirm the first-stage dismissal.

3. The wrongful conviction of an innocent person violates due process. Ill. Const. 1970, art. I, §2. A defendant can therefore raise a freestanding claim of actual innocence based on newly-discovered evidence in a post-conviction proceeding. The claim requires a showing that the evidence was (1) newly discovered in that it has been discovered since trial and could not have discovered sooner through due diligence; (2) material and not merely cumulative; and (3) of such a conclusive character that it would probably change the result on retrial.

A co-defendant's affidavit can constitute newly-discovered evidence even though the co-defendant's identity was previously known to the defendant. The co-defendant has a Fifth Amendment right to avoid self-incrimination and no amount of diligence can force him to violate that right should he choose not to do so.

Defendant's petition supported by the co-defendant's affidavit stated a non-frivolous claim of actual innocence based on newly-discovered evidence. Defendant did not discover the affidavit until after trial and could not have discovered it earlier because of the co-defendant's Fifth Amendment privilege. The affidavit, if credited, completely exculpated defendant. It stated that defendant had not been present and played no part in the murder. No physical evidence or eyewitness testimony inculpated defendant in the offense. The primary evidence against him was a confession obtained after multiple interrogations and 15 hours in custody, while he was a high school student who had no prior record, no juvenile record, no gang affiliation, and had been held back in school. Defendant's petition is thus not based on an indisputably meritless legal theory or a fanciful factual allegation.

The Appellate Court reversed the first-stage dismissal of defendant's post-conviction petition and remanded for further proceedings.

(Defendant was represented by Assistant Defender Jessica Hunter, Chicago.)

People v. Rodriguez, 402 Ill.App.3d 932, 932 N.E.2d 113, 2010 WL 2675047 (1st Dist. 2010)

1. An unreasonable disparity in sentences between non-capital co-defendants is a constitutional claim cognizable under the Post-Conviction Hearing Act.

2. Generally the standard of review in an appeal from the denial of post-conviction relief after an evidentiary hearing is whether the hearing court's findings were manifestly erroneous. But if no credibility determination was necessary to the finding and the issue is purely legal, review is *de novo*.

(Defendant was represented by Assistant Defender Rebecca Levy, Chicago.)

People v. Shamlodhiya, 2013 IL App (2d) 120065 (No. 2-12-0065, 2/26/13)

1. Defendant cannot complain that, at the second stage, the circuit court improperly dismissed his claim that, had he known that defense counsel would abandon his request that the jury consider involuntary manslaughter in closing argument, he would have chosen a bench trial on stipulated evidence. Defendant contends that because the trial court believed that a conviction for second-degree murder would have been appropriate, proceeding on this claim would have allowed him to establish that he was prejudiced by counsel's ineffectiveness in closing argument.

Prejudice is a component of a claim of ineffective assistance of counsel. It is not an

independent claim. If the underlying facts would have been relevant to establish prejudice in the context of a fully-developed ineffective-assistance-of-counsel claim, "the dismissal of this *claim* would not have foreclosed defendant from relying on those *facts*." Therefore, the court did not err in concluding that this allegation was not a viable freestanding claim.

2. Whether to waive a jury trial is a state constitutional right belonging to defendant. But just because defense counsel's strategy in closing argument impacted defendant's decision whether to waive a jury trial does not mean that defendant's disagreement with counsel's strategy rises to the level of a constitutional deprivation. Issues that traditionally fall within the realm of trial strategy are not elevated to constitutional magnitude merely because that strategy had some impact on defendant's exercise of a constitutional right.

(Defendant was represented by Assistant Defender Tom Karalis, Ottawa.)

People v. Sparks, 393 Ill.App.3d 878, 913 N.E.2d 692 (1st Dist. 2009)

1. A *pro se* post-conviction petition may be summarily dismissed as frivolous or patently without merit only if it has no arguable basis either in law or fact. (**People v. Hodges**, ___ Ill.2d ___, ___ N.E.2d ___ (2009) (No. 1-05-0767, 7/15/09)). A petition which lacks an arguable basis in law or fact is one based on an indisputably meritless legal theory or a fanciful factual allegation. An example of an indisputably meritless legal theory is one which is completely contradicted by the record. "Fanciful factual allegations" include allegations that are fantastic or delusional.

A post-conviction petitioner may pursue a claim of actual innocence based on newly discovered evidence where the supporting evidence is new, material, and non-cumulative, and is of such conclusive character as to likely change the result on retrial. Newly discovered evidence must have been unavailable at trial and incapable of having been discovered at that time by the exercise of due diligence.

2. Defendant, who was convicted of first degree murder after raising a self-defense claim and testifying that the offense occurred when the decedent and his companion attempted to rob the defendant, filed a *pro se* post-conviction petition raising a claim of actual innocence. Attached to the petition was an affidavit from a previously unknown eyewitness.

The court concluded that the affidavit alleged the gist of an argument of newly discovered evidence supporting a claim of actual innocence. The allegations of the affidavit were not fantastic or delusional, and the witness's credibility was not a factor which could be considered at the first stage of post-conviction proceedings.

In addition, there was no reason to believe that defendant should have known of the eyewitness where the affidavit stated that the witness observed the incident from the foyer of a nearby apartment building. There was also no reason to believe that defendant could have discovered the witness through due diligence at the time of trial; the court noted that police knew of the witness, and that one of defendant's post-conviction claims was that the State failed to disclose her existence under **Brady v. Maryland**.

(Defendant was represented by Assistant Defender Peter Sgro, Chicago.)

People v. Steward, 406 Ill.App.3d 82, 940 N.E.2d 140 (1st Dist. 2010)

1. To have standing to file a post-conviction petition, one must be "imprisoned in the penitentiary." 725 ILCS 5/122-1(a). A proceeding under the Sexually Violent Persons Commitment Act (725 ILCS 207/1) is civil in nature and can result in commitment to the Department of Human Services. A person who is imprisoned under the SVPCA is not imprisoned in the penitentiary within the meaning of the Post-Conviction Hearing Act and does not have standing to file a post-conviction petition.

2. Defendants who are on MSR or released on an appeal bond are considered to be "imprisoned in the penitentiary" and have standing to file a post-conviction petition. An amendment to the SVPCA effective 1/1/07 provides that the filing of a SVPCA petition tolls the running of a term of mandatory supervised release until dismissal of the petition, a finding that defendant is not a sexually violent person, or the discharge of the defendant under the Act. 725 ILCS 207/15(e). The tolling of the MSR term did not confer standing on defendant to file a post-conviction petition. First, the amendment does not apply to defendant because it did not become effective until nine months after defendant was placed on MSR and defendant had actually been discharged from MSR before he filed his post-conviction petition. Second, even if the amendment did apply, defendant must be currently on MSR, not have his MSR tolled, to be considered imprisoned in the penitentiary within the meaning of the PCHA.

3. Standing is defined as a party's right to make a legal claim or seek judicial enforcement of a duty or right. The legislature intended that the phrase "frivolous or patently without merit" in the Post-Conviction Hearing Act encompass the issue of standing because "merit" means legal significance and standing. **People v. Boclair**, 202 Ill.2d 89, 789 N.E.2d 734 (2002). Standing, unlike timeliness, is an inherent element of the right to bring a post-conviction petition, and absence of standing may therefore be the basis for a first-stage dismissal of a petition.

4. A post-conviction petition may be summarily dismissed as frivolous and patently without merit only if it has no arguable basis in fact or in law. An indisputably meritless legal theory is one that is completely contradicted by the record.

Defendant's claim of newly-discovered evidence of actual innocence based on a recantation by the complainant of her trial testimony is meritless because it is contradicted not only by the record, but also by the complainant's post-trial deposition that defendant asserted constituted a recantation. At trial, complainant testified that defendant grabbed her on the street, forced her into his apartment, and forced her to have sexual relations. In her post-trial deposition, complainant testified that she willingly went to defendant's apartment and twice voluntarily engaged in intercourse with defendant. But her testimony did not change with respect to her allegation that a fight ensued when she refused to perform oral sex on defendant, and that he used a hammer on her in an attempt to force her to perform an act of oral sex. Under either version, defendant committed aggravated battery and attempt aggravated criminal sexual assault.

5. A prisoner confined in an Illinois Department of Corrections facility can be assessed court costs and fees for the filing of a frivolous post-conviction petition. 735 ILCS 5/22-105. A defendant confined to a Department of Human Services facility as a sexually violent person may not be assessed those costs and fees because he is not confined in the IDOC.

People v. Toy, 2013 IL App (1st) 120580 (No. 1-12-0580, 12/20/13)

1. On appeal from the denial of his post-conviction petition, the defendant argued for the first time that his sentence for aggravated criminal sexual assault violated the proportionate penalties clause because it was more severe than the sentence for armed violence based on sexual assault, which was composed of identical elements. The State acknowledged that the Appellate Court had authority to consider whether the sentence was unconstitutional, but argued that the court was not required to reach the issue and should "defer" to the trial judge, who was considering the same issue in a §2-1401 motion. The court stated that "[w]hile the State's argument is technically correct, we choose to consider whether defendant has presented an arguable claim to warrant second stage proceedings under the Post-Conviction Act."

2. Although the instant appeal was from the summary dismissal of a post-conviction petition, the court found that it was unnecessary to remand the matter for second-stage post-conviction hearings. There was no factual dispute requiring an evidentiary hearing, and under the applicable precedent defendant was required to be resentenced to a term that did not include an unconstitutional enhancement. The order dismissing the post-conviction petition was reversed, post-conviction relief was granted, the sentences for aggravated criminal sexual assault were vacated, and the cause was remanded for resentencing.

(Defendant was represented by Assistant Defender Karl Mundt, Chicago.)

People v. Williams, 392 Ill.App.3d 359, 910 N.E.2d 627 (1st Dist. 2009)

In reversing the trial court's order denying leave to file a third post-conviction petition presenting newly discovered evidence raising a claim of actual innocence, the court held that a petition raising a claim of actual innocence is not subject to the "cause and prejudice" test. After an exhaustive examination of the facts set forth in the defendant's affidavits, including expanded affidavits by two witnesses who had previously executed affidavits for the second petition, the Appellate Court held that defendant "presented a valid freestanding claim of actual innocence, which is an alternative means by which a defendant can gain review of a successive petition, not an additional inquiry to the cause and prejudice test."

The court declined to apply any form of procedural default although the evidence had not presented in either of the first two petitions. "[G]iven the *pro se* status of the defendant in his initial two post-conviction petitions and the gravity of the offenses . . . fundamental fairness requires that defendant's claims receive full consideration on their merits."

(This summary was written by Deputy State Appellate Defender Daniel Yuhas.)

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§9-1(d)
Contents of Petition

People v. Barghouti, 2013 IL App (1st) 112373 (No. 1-11-2373, 12/20/13)

Based on its own review of the record, the Appellate Court identified a potential issue and asked the parties for further briefing. Following briefing, the Appellate Court held that defendant's first-stage post-conviction petition made an arguable claim of ineffective assistance of counsel where trial counsel failed to properly advise defendant of the sentencing consequences he faced if he rejected the State's plea offer.

1. To determine whether a first-stage post-conviction petition states the gist of a constitutional claim, the Appellate Court must review the entire petition in light of the trial record. The court's review is not limited to those claims raised on appeal. Where the court on its own review of the record discovers a clear and obvious error not raised by appellate counsel, the court may properly request that the parties brief the issue.

Here, the court determined that defendant's post-conviction petition raised a meritorious claim that he rejected a plea bargain based on erroneous advice of his trial counsel. Since this claim had not been raised by appellate counsel, the court ordered the parties to brief the issue. The court rejected the State's argument that it had overstepped its authority by requesting briefing on this issue. After examining the Illinois Supreme Court's decisions in **Coleman**, 183 Ill.2d 366 (1998), **Edwards**, 197 Ill. 2d 239 (2001), and **Hodges**,

234 Ill. 2d 1 (2009)(all discussing the appropriate standards for reviewing first-stage dismissals), the Appellate Court concluded that nothing in those decisions limited review to those parts of the petition argued on appeal. Instead, those decisions allow the Appellate Court to address any issues it discovers during its own review of the record. A reviewing court has the authority to address unbriefed issues where a clear and obvious error exists in the lower court's proceedings.

2. A first-stage post-conviction petition alleging ineffective assistance of counsel may not be dismissed if it is arguable that (a) counsel's performance fell below an objective standard of reasonableness and (b) the defendant was prejudiced. A petition lacks an arguable basis in law or fact only if it is based on an indisputably meritless legal theory or a fanciful factual allegation.

Here, the petition alleged that trial counsel failed to advise defendant that if he rejected the State's 12-year plea offer and was found guilty, he faced a prison term of 6 to 60 years; instead counsel erroneously advised defendant that he would be eligible for probation. The petition also alleged that defendant would have accepted the State's offer if counsel had properly advised him of the correct sentencing range. These allegations made an arguable claim that trial counsel provided ineffective assistance and that defendant suffered prejudice because he would have accepted the plea bargain if he had received accurate advice about the sentencing range.

3. A defendant alleging ineffective assistance of trial counsel in a first-stage post-conviction petition does not need to obtain an affidavit from his counsel. Even without an affidavit, the reviewing court will still accept as true the defendant's allegations of ineffective assistance of counsel. Such affidavits are difficult or impossible to obtain and requiring them would contravene the settled standards requiring a reviewing court to accept as true all facts alleged in the petition unless contradicted by the record.

(Defendant was represented by Assistant Defender Robert Hirschhorn, Chicago.)

People v. Cage, 2013 IL App (2d) 111264 (No. 2-11-1264, 3/29/13)

Noting a conflict in precedent, the Appellate Court concluded that the petitioner's failure to verify a *pro se* post-conviction petition by affidavit is not an adequate ground for dismissal of the petition at the first stage. In evaluating a post-conviction petition at the first stage, the standard is whether the petition is frivolous or patently without merit, or in other words whether it has an arguable basis in law or fact. The lack of notarization of a verification affidavit does not render a petition patently without merit, but is instead a non-jurisdictional procedural defect which can be cured at the second stage.

The trial court's summary dismissal order was reversed and the cause remanded for further proceedings.

(Defendant was represented by Assistant Defender Jack Hildebrand, Elgin.)

People v. Carr, 407 Ill.App.3d 513, 944 N.E.2d 859 (2d Dist. 2011)

Under 725 ILCS 5/122-1(b), a post-conviction petition must be verified by "affidavit." Under 725 ILCS 5/122-2, a post-conviction petition must include "affidavits, records, and other evidence" supporting its allegations or state why the same are not attached.

The court concluded that for purposes of the Post-Conviction Hearing Act, a document does not constitute an "affidavit" unless it is notarized. Where a petitioner fails to have his "affidavits" notarized, the petition is properly dismissed because it does not comply with the requirements of the Act.

The court rejected the argument that the notarization requirement applies only to

affidavits required under §122-2, and not to the affidavit verifying the petition under §122-1(b). The court concluded that under Illinois law, all affidavits must be notarized unless a Supreme Court Rule or Illinois statute provides an exception to the general rule.

(Defendant was represented by Assistant Defender Josette Skelnik, Elgin.)

People v. Coleman, 2012 IL App (4th) 110463 (No. 4-11-0463, 12/24/12)

Defendant filed a post-conviction petition claiming that: (1) defense counsel was ineffective for failing to call two witnesses who would have given exculpatory testimony, (2) the State committed a **Brady** violation by failing to disclose to the defense that police officers tested only one of the 15 bags of white powder found at the scene of the arrest before emptying all the bags into one large bag for testing by the crime lab, and (3) defense counsel was ineffective for entering a stipulation that the large bag contained 926 grams of cocaine. The trial court summarily dismissed the petition as frivolous and patently without merit, finding that to show prejudice under **Strickland** defendant was required to show that had the lab analyst been called to testify, he either would not have testified or would have testified differently from what was stated in the stipulation.

In a *pro se* motion to reconsider the summary dismissal, defendant submitted an affidavit from a private investigator who had interviewed the analyst who performed the testing. The affidavit stated that the analyst said he had not performed tests to determine the purity of the cocaine in the large bag of white powder. The analyst also described the decision of police to commingle the contents of the 15 bags as "bad evidence gathering." Although defendant did not submit an affidavit from the analyst, the investigator's affidavit stated that additional efforts to contact the analyst had been unsuccessful.

The Appellate Court reversed the order summarily dismissing the petition.

1. To survive summary dismissal, a post-conviction petition must state the "gist" of a constitutional claim. However, the "gist" standard describes the petitioner's burden in alleging a constitutional deprivation, not the legal standard to be applied by the trial court in determining whether the petition should be summarily dismissed. In making that determination, the trial court must apply the "frivolous or patently without merit" standard.

A petition is patently without merit if it has no arguable basis in either law or fact. A petition lacks an arguable basis in law or fact when it is based on an indisputably meritless legal theory or a fanciful factual allegation. The fact that a factual proposition is unlikely does not make it frivolous or patently without merit. A petition should not be summarily dismissed unless the lack of legal or factual merit is indisputable.

2. The court found that the petition failed to present the gist of a constitutional violation concerning counsel's failure to call two witnesses to testify, because the only affidavit attached to the petition was that of the defendant, not the witnesses themselves. Although the Post-Conviction Hearing Act requires only that the petition be supported by affidavits, the court concluded that such affidavits should concern matters to which the affiant could testify if called as a witness. Although defendant's sworn affidavit described the anticipated testimony of the two witnesses whom defense counsel failed to call, the defendant would not be competent to testify to such testimony if called as a witness. Thus, the defendant's affidavit was insufficient to withstand summary dismissal, at least in the absence of an explanation why affidavits from the witnesses themselves were unavailable.

3. However, the court concluded that the petition showed an arguable case of ineffective assistance concerning counsel's agreement to the stipulation that the entire large bag contained cocaine. To allege the gist of a claim of ineffective assistance of counsel, the petitioner need not satisfy the **Strickland** standard of deficient performance and prejudice.

Instead, at the first stage of proceedings a claim of ineffective assistance is sufficient if counsel's performance was arguably unreasonable and defendant was arguably prejudiced. An arguable allegation of prejudice exists if it could be reasonably argued that confidence in the outcome of the trial was undermined by counsel's deficient performance.

Here, defense counsel's stipulation relieved the State of a potentially serious problem. In order to aggregate the contents of the 15 bags and obtain a conviction for the cumulative weight, the State was required to prove beyond a reasonable doubt that each of the 15 bags contained cocaine. Because only one bag had been tested before the bags were commingled, the State would have been unable to carry this burden. By stipulating that the entire weight of the large bag's contents was cocaine, counsel's performance was arguably deficient and arguably undermined confidence in the outcome of the trial, especially in light of the investigator's affidavit that no purity test had been conducted.

The court noted that it need not resolve at this stage whether counsel was ineffective. Because the claim was arguable, it was clearly not frivolous or patently without merit. Thus, the petition should not have been summarily dismissed.

4. The court also found that the petition made an arguable **Brady** claim. Due process requires the State to disclose evidence that is favorable to the accused and material to either guilt or innocence. Evidence is material if there is a reasonable probability that had it been disclosed, the result of the proceeding would have been different. **Brady** evidence must be disclosed in adequate time to allow the defense to use the favorable material effectively in the preparation or presentation of its case.

The petition, supported by defendant's affidavit, alleged that the State did not inform the defense that a police officer had commingled 15 bags of white powder into one large bag after testing only one of the smaller bags. The record did not contradict this claim, because at trial both attorneys spoke of the commingling as a surprise to the defense. Under these circumstances, the **Brady** claim was arguable and therefore sufficient to survive first stage dismissal.

(Defendant was represented by Assistant Defender Allen Andrews, Springfield.)

People v. Hemingway, 2014 IL App (4th) 121039 (No. 4-12-1039, 7/23/14)

1. The Post-Conviction Hearing Act refers to two separate and distinct types of affidavits. A verifying affidavit must be filed with the post-conviction petition and is intended to affirm that the allegations are brought truthfully and in good faith. The absence of a verification affidavit does not justify summary dismissal of a post-conviction proceeding.

In addition, a post-conviction petition "must have attached thereto affidavits, records, or other evidence supporting its allegations or shall state why the same are not attached." 725 ILCS 5/122-2. Thus, a supporting affidavit is one means of providing evidentiary support for the allegations of the petition. The purpose of a supporting affidavit is to show that the verified allegations of the petition are capable of objective or independent corroboration.

An affidavit is a written declaration made under oath before a person who has legal authority to administer oaths. A document which is not sworn before a person who is authorized to administer oaths is not a defective or inchoate affidavit. Instead, it is not an affidavit at all.

Thus, unsworn witness statements do not constitute affidavits and do not fulfill the requirement of a supporting affidavit.

Noting a conflict in appellate authority, the court concluded that summary dismissal is justified where a statement that is submitted as a supporting affidavit is not notarized. The court rejected the reasoning of **People v. Parker**, 2012 IL App (1st) 101809, which held that

a lack of notarization is a mere technical defect which does not justify summary dismissal. The court adopted the reasoning of **People v. Gardner**, 2013 IL App (2d) 110598, which found that summary dismissal is justified where a statement that is submitted as a supporting affidavit is not notarized and the petition is not accompanied by other supporting evidence or an explanation of why such evidence is unavailable.

2. A post-conviction claim is forfeited if it is not raised in the original or amended petition. A *pro se* post-conviction petition which alleges only that appellate counsel failed to raise any issue concerning the sentence does not allege the gist of an issue that appellate counsel was ineffective for failing to challenge the sentence. "[T]he mere fact that appellate counsel was silent about a sentence is not arguably a constitutional claim."

Thus, because he failed to present the issue in the petition, defendant forfeited any ineffective assistance claim concerning appellate counsel's failure to challenge the sentence.

(Defendant was represented by Assistant Defender Jessica Ware, Chicago.)

People v. Henderson, 2011 IL App (1st) 090923 (No. 1-09-0923, 11/17/11)

1. The Post-Conviction Hearing Act provides that any person "imprisoned in the penitentiary" may seek relief under the Act. 725 ILCS 5/122-1(a). A remedy under the Act is only available to persons who are actually being deprived of their liberty, not persons who have completely served their sentences and merely wish to purge their criminal records of past convictions. Thus a defendant has standing under the Act so long as he is challenging a conviction for which he continues to serve some form of sentence. When a defendant's conviction is no longer an encumbrance on his liberty, he no longer needs assistance from the Act to secure his liberty, and the Act is no longer available to him.

2. The Appellate Court recognized that no court has previously addressed whether a defendant, who had standing under the Act to file a petition, subsequently loses standing when no portion of his sentence remains to be served. The court concluded that no meaningful distinction could be drawn between instances where a defendant's liberty is not encumbered when he files the petition and those instances in which a defendant regains his liberty after the petition is filed. In neither case is the purpose of the Act served by giving defendant relief.

Because defendant had completely served his sentence, including his MSR term, while his appeal from the dismissal of his post-conviction petition was pending, he no longer needed the Act's assistance to secure his liberty. Even if the cause were remanded, the trial court would be obligated to deny relief to defendant due to this defect. Therefore, the appeal from the dismissal of the petition was moot.

3. The Act allows summary dismissal at the first stage only where a defect renders the petition frivolous or patently without merit. 725 ILCS 5/122-2.1(a)(2). At the first stage, the court does not measure the petition's procedural compliance, only its substantive virtue.

The Act requires that the allegations of the petition be supported by "affidavits, records, or other evidence." 725 ILCS 5/122-2. The purpose of these affidavits is to show that the allegations can be objectively and independently corroborated, and therefore their absence can be the basis for a first-stage dismissal as they relate to the substance of the petition.

The Act also requires that the "proceedings shall be commenced by filing . . . a petition . . . verified by affidavit." 725 ILCS 5/122-1(b). The lack of notarization of the verification affidavit required by §122-1(b) does not qualify as the basis for a first-stage dismissal because that affidavit has no relation to the substance of defendant's allegations. The verification affidavit requirement merely confirms that the allegations are brought truthfully and in good faith.

The State can object to the lack of notarization at the second stage and appointed

counsel can assist in arranging for notarization of the verification affidavit. The court found that addressing this defect at the second stage also comports with "practical considerations which arise in the prison system." Although not properly before the court, a memorandum written by a IDOC employee that was attached to defendant's reply brief stated that notaries are not always available in prisons. Defendant's affidavit in **People v. Wilborn**, 2011 IL App (1st) 092802, also indicated that prisoners lack the ability to have affidavits notarized.

(Defendant was represented by Assistant Defender Pamela Rubeo, Chicago.)

People v. Hommerson, 2013 IL App (2d) 110805 (No. 2-11-0805, 1/18/13)

1. Noting a conflict in appellate authority, the Appellate Court concluded that at the first stage of post-conviction proceedings, the trial court may summarily dismiss a *pro se* post-conviction petition because it lacks a valid, notarized affidavit attesting to the veracity of its contents. The court acknowledged that it is improper to base a first stage dismissal on a procedural ground such as untimeliness, but held that the requirement of a notarized affidavit "goes to the very heart of whether [the] allegations are frivolous or patently without merit." The court concluded that the purpose of requiring an affidavit is to confirm that the allegations have been brought truthfully and in good faith, and that the absence of an affidavit creates "the logical inference . . . that the allegations are neither truthful nor brought in good faith. Allegations that are untruthful or are not brought in good faith are frivolous and patently without merit."

The court rejected appellate authority holding that the affidavit requirement is merely a procedural or technical requirement, and is therefore not an appropriate ground for summary dismissal at the first stage proceedings. The court criticized such cases as rendering the affidavit requirement of §122-1(b) "surplusage" and allowing the petitioner to advance to second stage proceedings by merely making sufficient allegations to allege the gist of a constitutional issue, without regard to the truthfulness of those allegations.

2. In dissent, Justice Burke found that a petitioner's failure to verify a post-conviction petition by affidavit is a non-jurisdictional, procedural defect, and like other procedural defects does not provide a basis for summary dismissal of a post-conviction petition. Justice Burke noted that most *pro se* petitions are drafted by incarcerated defendants with little legal knowledge or training, and that at the first stage the sole issue concerns whether the petition states constitutional claims. The merits of such claims and whether the petition satisfies procedural requirements are questions that are left to second stage proceedings.

(Defendant was represented by Assistant Defender Kathleen Hamill, Elgin.)

People v. McCoy, 2011 IL App (2d) 100424 (No. 2-10-0424, 12/16/11)

The Post-Conviction Hearing Act provides that "[t]he proceeding shall be commenced by filing . . . a petition . . . verified by affidavit." 725 ILCS 5/122-1(b). Affidavits filed pursuant to the Act must be notarized to be valid. Certification pursuant to §1-109 of the Code of Civil Procedure (735 ILCS 5/1-109) is not an adequate substitute for the verification requirement. The court also rejected the argument that, because a petition that fails to comply with the verification requirement does not commence the proceedings as provided by §122-1(b), any such petition should be dismissed without prejudice.

Defendant's post-conviction petition was supported by a properly notarized affidavit, but the verification page signed by defendant was not notarized. Even if certification pursuant §1-109 could suffice as a substitute for notarization, defendant's verification page made no reference to §1-109 or the penalties provided by that section. It was in the form of an affidavit and therefore needed to be notarized. Defendant's attached affidavit also did was not a

substitute for verification because although defendant "swore to the truth of certain broad elements of his petition, the statements were sufficiently vague that he avoided swearing to the truth of the essential details." Therefore, the petition was properly dismissed with prejudice.

(Defendant was represented by Assistant Defender Bruce Kirkham, Elgin.)

People v. Nitz, 2011 IL App (2d) 100031 (No. 2-10-0031, 10/24/11)

1. 725 ILCS 5/122-1(b) provides that a post-conviction petition must be verified by affidavit. An affidavit is valid only if it is notarized. The trial court properly dismisses a post-conviction petition which does not include a notarized affidavit.

The failure to provide a notarized affidavit does not deprive the trial court or the Appellate Court of jurisdiction to consider the petition, but does provide a basis for dismissing the petition.

Although 735 ILCS 5/1-109 provides a verification process where verification is required by the Code of Civil Procedure, verification is not applicable to post-conviction proceedings, which are governed by the Post-Conviction Hearing Act. Therefore, verification under §1-109 is not a satisfactory substitute for a notarized petition. (Overruling **People v. Rivera**, 342 Ill.App.3d 547, 795 N.E.2d 1016 (2d Dist. 2003)).

2. Although there is no constitutional right to counsel in post-conviction proceedings, once counsel is appointed and the petition advanced to the second stage, the Post-Conviction Hearing Act affords indigents a statutory right to the reasonable assistance of counsel. Supreme Court Rule 651(c) requires counsel to make any amendments to a *pro se* petition that are necessary to adequately present defendant's contentions. The failure to present defendant's post-conviction claims in appropriate legal form constitutes unreasonable assistance.

Here, post-conviction counsel failed to provide reasonable assistance when he failed to remedy the absence of a notarized affidavit when the amended petition was filed. The cause was remanded for the appointment of new counsel and the filing of a new amended petition.

(Defendant was represented by Assistant Defender Jack Hildebrand, Elgin.)

People v. Terry, 2012 IL App (4th) 100205 (No. 4-10-0205, 1/31/12)

The Post-Conviction Hearing Act provides that '[t]he proceeding shall be commenced by filing with the clerk of the court in which the conviction took place a petition (together with a copy thereof) verified by affidavit. 725 ILCS 5/122-1(b).

Persuaded by the First District decision in **People v. Henderson**, 2011 IL App (1st) 090923, the Fourth District held that the failure to attach a notarized verification affidavit to a post-conviction petition is not a reason to summarily dismiss the petition at the first stage. The court declined to adopt the contrary approach of the Second District in **People v. Carr**, 407 Ill.App.3d 513, 944 N.E.2d 859 (2d Dist. 2011).

An affidavit filed pursuant to the Act must be notarized. But the Act allows for summary dismissal at the first stage only where the defect renders the petition frivolous and patently without merit. Those terms do not encompass there mere lack of notarization of a verification affidavit. The technicality of not having a notarized affidavit is a more appropriate objection at the second stage.

(Defendant was represented by Assistant Defender Larry Bapst, Springfield.)

People v. Turner, 2012 IL App (2d) 100819 (No. 2-10-0819, modified 7/11/12)

1. The Post-Conviction Hearing Act provides that the proceeding shall be commenced by the filing of a petition verified by affidavit. 725 ILCS 5/122-1(b). An affidavit filed pursuant to the Act must be notarized to be valid. Lack of notarization is not cured by certification under §1-109 of the Code of Civil Procedure. 735 ILCS 5/1-109.

There is a split of authority among the Appellate Courts as to whether a petition lacking a notarized affidavit may be dismissed for that reason at the first stage of a post-conviction proceeding. Regardless of this split, the State was permitted to raise the issue for the first time on appeal from a first-stage dismissal because that was its earliest opportunity to do so. At first-stage proceedings, the court acts without input from the State.

Raising the issue for the first time on appeal is not permissible in an appeal from a second-stage dismissal. If the State raises the issue in the trial court, it can be addressed and resolved. Appointed counsel has a duty to remedy procedural defects in the petition. The State procedurally defaults the issue of lack of notarization by failing to raise it in its motion to dismiss.

2. The State did not move to dismiss defendant's petition on the ground that the affidavit accompanying the petition was not notarized. It argued for the first time on appeal that dismissal of the petition could be affirmed on the ground that the affidavit was not notarized. The State forfeited this challenge by failing to raise it in its motion to dismiss, which would have given defendant the opportunity to remedy the defect and promoted efficient disposition of the petition.

3. Addressing the split of authority regarding whether the absence of a notarized affidavit is a basis for a first-stage dismissal, the Appellate Court opined that it was not. The State's ability to forfeit the defect makes an invalid affidavit akin to a petition's untimeliness, which likewise is not a basis for a first-stage dismissal.

The Appellate Court nonetheless affirmed the dismissal of the petition, finding the allegations insufficient to merit an evidentiary hearing.

(Defendant was represented by Assistant Defender Jessica Pamon, Chicago.)

People v. Wilborn, 2011 IL App (1st) 092802 (No. 1-09-2802, 9/23/11, modified on denial of rehearing, 2/24/12)

The Post-Conviction Hearing Act provides that a post-conviction petition "shall have attached thereto affidavits, records, or other evidence supporting its allegations or shall state why the same are not attached." 725 ILCS 5/122-2. An affidavit is a declaration, on oath, in writing, sworn to before some person who has authority under the law to administer oaths.

A document purporting to be an affidavit that was signed but not notarized was attached to defendant's post-conviction petition. The appellate court agreed with the decision in **People v. Henderson**, 2011 IL App (1st) 090923, that the absence of notarization did not qualify as the basis for a first-stage dismissal of the petition, where the defendant was imprisoned and there was no guarantee that he would be afforded the services of a notary. The court declined to follow the contrary decision in **People v. Carr**, 407 Ill.App.3d 513, 944 N.E.2d 859 (2d Dist. 2011).

The purposes of the Post-Conviction Hearing Act and 725 ILCS 5/122-2.1 would be hindered by preventing petitions that are neither frivolous nor patently without merit from proceeding to the second stage due to the technicality of lack of notarization. At the second stage, the State will have the opportunity to object to the lack of notarization, and appointed counsel can assist in arranging for notarization.

(Defendant was represented by Assistant Defender David Harris, Chicago.)

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§9-1(e)
First Stage of Post-Conviction Proceedings

§9-1(e)(1)
Summary Dismissal Generally

People v. Allen, 2015 IL 113135 (No. 113135, 5/21/15)

1. At first-stage proceedings on a post-conviction petition, the court considers the petition's substantive merit rather than its compliance with procedural rules. The threshold to avoid summary dismissal is low, in recognition of the fact that many petitions are drafted by inmates without the assistance of an attorney. If a petition alleges sufficient facts to state the gist of a constitutional claim, first-stage dismissal is improper. A petition which presents legal points that are arguable on their merits may not be summarily dismissed.

Despite the low threshold to avoid first-stage dismissal, the *pro se* petitioner must supply a sufficient factual basis to show that the allegations in the petition are "capable of objective or independent corroboration." Thus, a petition must be accompanied by supporting evidence, which may include "affidavits, records, or other evidence." 725 ILCS 5/122-2.

A supporting affidavit is separate from a verification affidavit, which also must accompany the petition. 725 ILCS 5/122-1(b). The purpose of the verification affidavit is to confirm that the allegations are brought truthfully and in good faith.

In **People v. Collins**, 202 Ill. 2d 59, 782 N.E.2d 195 (2002), the court affirmed the first stage dismissal of a post-conviction petition which had a verification affidavit but lacked any supporting evidence. By contrast, in **People v. Hommerson**, 2014 IL 115638, the court concluded that it is improper to summarily dismiss a petition solely because it lacks a verification affidavit. Instead, if a petition alleges the gist of a constitutional violation, the lack of a verification affidavit should be raised by the State at the second-stage of the proceedings, after counsel has been appointed and had an opportunity to file an amended petition.

2. Defendant's *pro se* petition contained a signed statement by a person named Langford. The statement took responsibility for the offense and stated that defendant had not been involved. The statement asserted that it was made under penalty of perjury, and contained several fingerprints at the bottom. However, it was not notarized. In summarily dismissing the petition at the first stage, the trial court stated that the statement did not qualify as an "affidavit" because it had not been notarized.

The Supreme Court acknowledged that a statement is an "affidavit" only if it has been sworn before a person with legal authority to administer oaths. The lack of notarization of a supporting affidavit does not justify summary dismissal of the petition, however, because supporting evidence is not required to be in the form of an affidavit and the presence or absence of notarization does not prevent the trial court determining whether the "gist" standard for first stage proceedings is satisfied.

Thus, a petition may not be summarily dismissed solely for lack of notarization of an evidentiary affidavit. The court noted, however, that the State would be able to raise the lack of notarization of an evidentiary affidavit at second-stage proceedings if counsel was unable to obtain a properly notarized affidavit. At that time, the absence of notarization might be an adequate basis on which the trial court could dismiss the petition.

3. The court also found that the petition was not frivolous and patently without merit

for reasons other than the lack of notarization of Langford's statement. Although the statement was "bare-bones," it was sufficient to show that the petition's allegations were subject to corroboration. The court criticized the trial court for evaluating credibility at the first stage instead of focusing on whether the petition set forth the gist of a constitutional issue.

The court noted that a petition claiming actual innocence based on newly discovered evidence must present supporting evidence that is new, noncumulative, material, and of such character as to change the result of the trial. However, the court found that there was no reason to believe that defendant could have obtained Langford's statement at an earlier date, even if he was aware of Langford's name at the time of trial, where both defendant and Langford were incarcerated and Langford would presumably be reluctant to confess to a murder.

Because the petition made an adequate showing that evidence was available to support the petition's allegations, the trial court erred by ordering summary dismissal. The order was reversed and the cause remanded for second stage proceedings.

(Defendant was represented by Assistant Defender Brian McNeill, Chicago.)

People v. Brown, 236 Ill.2d 175, 923 N.E.2d 748 (2010)

1. The summary dismissal of a post-conviction petition is reviewed *de novo*. To survive first stage dismissal, the petitioner must present the "gist" of a constitutional violation. A "gist" requires only a limited amount of factual detail, without legal argument or citations.

A post-conviction petition fails to present the "gist" of a constitutional violation if it has no arguable basis either in law or in fact. A petition lacks an arguable basis in law or fact if it is based on an "indisputably meritless legal theory" or "fanciful factual allegations." One example of an "indisputably meritless legal theory" is a claim that is completely contradicted by the record. "Fanciful factual allegations" include those that are "fantastic or delusional."

2. The court concluded that a *pro se* post-conviction petition challenging a conviction for attempt murder of a police officer was sufficient to survive summary dismissal. The allegation that trial counsel was ineffective for failing to request a fitness hearing was not based on an indisputably meritless legal theory or fanciful allegations; defendant submitted medical records indicating that he had been diagnosed as mentally ill and prescribed psychotropic medications, the petition included affidavits from defendant's mother and aunt stating that they had informed defense counsel of defendant's mental illness and use of psychotropic medications, and the mother's affidavit indicated that she had told counsel of defendant's history of suicide attempts.

Furthermore, the claim was not rebutted by the record. Although defense counsel said at sentencing that he had no knowledge of defendant's use of psychotropic medication, his statements were contradicted by the affidavits attached to the post-conviction petition and undermined by defendant's claim that counsel spent only a few minutes with him before each hearing and was distracted by his father's death. The court also stressed that counsel's statements did not positively rebut defendant's allegations concerning his mental illness, suicide attempts, and inability to understand the trial proceedings due to the effect of psychotropic medications.

Similarly, although the trial court said at sentencing that it had no *bona fide* doubt of defendant's fitness, that statement was not determinative of the issue of fitness to stand trial and did not positively rebut the defendant's allegations.

In addition, defendant made a statement at sentencing in which he stated that he had been depressed at the time of the offense, had threatened officers because he wanted to force

them to kill him, and had been under the influence of psychotropic medications at the time of trial. The court noted that because the sentencing occurred more than a month after trial, defendant's lucidity at sentencing did not establish that he had been fit at the time of trial. In addition, defendant's statements at sentencing did not contradict his statements concerning the effect of the psychotropic medication on his ability to understand the trial proceedings or rebut the evidence of a *bona fide* doubt of fitness.

At most, the record created a factual dispute concerning a *bona fide* doubt of petitioner's fitness to stand trial. Because the allegations of the petition are to be taken as true at the first stage of the proceedings, and weight and credibility are not at issue, defendant clearly alleged the "gist" of a constitutional issue. Therefore, the post-conviction petition should have proceeded to a second stage proceeding.

3. For two reasons, the court criticized the dissent's finding that the petition should have been summarily dismissed. First, the majority stated that the dissent erroneously applied capital and second-stage precedents to the summary dismissal stage. Second, the majority stated that the dissent failed to accept the allegations of the petition as true for purposes of deciding whether summary dismissal was appropriate.

(Defendant was represented by Assistant Defender Yasaman Navai, Chicago.)

People v. Hodges, 234 Ill.2d 1, 912 N.E.2d 1204 (2009)

1. To survive dismissal at the first stage of post-conviction proceedings, a *pro se* defendant need allege only the "gist" of a constitutional claim. A *pro se* petitioner is not excused for providing any factual detail concerning the alleged constitutional violation, however, and must attach affidavits or other evidence supporting the petition or explain why such items are not attached. Evidentiary support for a post-conviction petition is required to show that the petition's allegations are capable of objective or independent corroboration.

2. When determining whether a *pro se* post-conviction petition is subject to dismissal as frivolous, the trial court must determine whether the "gist" of the claim alleged by the defendant is frivolous or patently without merit. Although the terms "frivolous" and "patently without merit" are not defined by the Post-Conviction Hearing Act, a claim is "frivolous or patently without merit" if it has no arguable basis in either law or fact. Thus, a petition is subject to first-stage dismissal if it is based on "an indisputably meritless legal theory or a fanciful factual allegation."

A claim that is completely rebutted by the record is one example of an indisputably meritless legal theory. Similarly, "[f]anciful factual allegations include those which are fantastic or delusional."

3. Where the defendant alleged ineffective assistance of counsel because his attorney failed to investigate and present evidence which would have corroborated the defenses presented at trial, the petition was subject to summary dismissal only if it was not "arguable" that counsel's performance fell below an objective standard of reasonableness and caused prejudice. Because the defendant specifically named three witnesses whose testimony had not been investigated, summarized the testimony the witnesses would have given, and attached the witnesses' affidavits to the petition, and because none of the allegations could be described as fantastic or delusional, the petition had an arguable basis in fact.

Furthermore, the petition had an arguable basis in law where the testimony of the potential witnesses – that the decedent was armed at the time of the offense – at least arguably supported the defense that defendant acted with an unreasonable belief in self-defense. The court rejected the State's argument that the court need consider only the theories of relevance on which the petition specifically focused – "[t]he State's strict construction of

defendant's petition is inconsistent with the requirement that a *pro se* petition be given a liberal construction."

Because it was at least arguable that defense counsel was ineffective for failing to investigate and present evidence, the trial court erred by summarily dismissing the post-conviction petition. The dismissal order was reversed and the cause remanded for second-stage proceedings.

(Defendant was represented by Assistant Defender Patrick Cassidy, Chicago.)

People v. Hommerson, 2014 IL 115638 (No. 115638, 1/24/14)

Under 725 ILCS 5/122-1(b), a post-conviction proceeding is commenced by filing a post-conviction petition that is "verified by affidavit." The purpose of the verification affidavit is to confirm that the allegations are truthful and brought in good faith.

The court concluded that a trial judge may not summarily dismiss a post-conviction petition solely because there is no verification affidavit. At the first stage of post-conviction proceedings, the relevant question is whether the allegations of the petition, if assumed to be true, allege the gist of a constitutional issue. Whether the petitioner has complied with the procedural requirements of the Post-Conviction Hearing Act, including the statute of limitations and the verification affidavit, are to be considered at the second stage if asserted by the State in a motion to dismiss.

Because defendant's post-conviction petition was summarily dismissed solely because it lacked a verification affidavit, the dismissal order was reversed and the cause remanded for further proceedings.

(Defendant was represented by Assistant Defender Kathleen Hamill, Elgin.)

People v. Perez, 2014 IL 115927 (No. 115927, 9/18/14)

Under section 122-2.1(a) of the Post-Conviction Hearing Act (725 ILCS 5/122-2.1(a)), the circuit court shall "enter an order" on a petition within 90 days after it was filed and docketed. If the court finds that the petition is frivolous or patently without merit, "it shall dismiss the petition in a written order."

Here the circuit court signed and dated an order dismissing defendant's petition on the 90th day after the petition was filed. The clerk stamped the order filed on the 91st day. The Illinois Supreme Court held that the circuit court failed to properly dismiss the petition within 90 days since the order was not entered until the 91st day.

The word "enter" connotes some type of "formalizing of the decision." Webster's Third New International Dictionary defines "enter" to mean "place in regular form before a law court," usually in writing, and to "put upon record in proper form and order." Black's Law Dictionary defines "entry of judgment" as "the ministerial recording of a court's final decision."

Illinois Supreme Court Rule 272, entitled "When Judgment is Entered," states that where a written judgment order signed by the judge is required, "the judgment becomes final only when the signed judgment is filed." The committee comments state that the whole purpose of this rule is establish a uniform date for determining the date judgments have been entered. Accordingly, a written judgment is not entered until it is filed.

Here the judgment dismissing defendant's petition was not entered until the clerk filed the court's order on the 91st day. Since the petition was not dismissed within 90 days, the dismissal was reversed and the cause remanded for second stage proceedings.

(Defendant was represented by Assistant Defender Alison Shah, Chicago.)

People v. Tate, 2012 IL 112214 (No. 112214, 11/29/12)

1. A post-conviction proceeding contains three stages. At the first stage, the circuit court must independently review the petition, taking the allegations as true, and determine whether the petition is frivolous or patently without merit. A petition is frivolous or patently without merit only if it has no arguable basis in fact or in law. There is no involvement by the State in this initial stage. The court acts strictly in an administrative capacity by screening out those petitions that are without legal substance or are obviously without merit.

Most petitions for post-conviction relief are filed *pro se* by persons who are incarcerated and lack the means to hire their own attorney. At the first stage of the proceedings, *pro se* petitions, as well as petitions filed by attorneys, are judged by first-stage standards.

2. An ineffective-assistance claim based on what the record discloses counsel did in fact do is subject to the usual rules of procedural default. But an ineffectiveness claim based on what counsel ought to have done may depend on proof of matters that could not have been included in the record precisely because of the allegedly deficient representation. Therefore, a default may not preclude an ineffective-assistance claim based on what trial counsel allegedly ought to have done in presenting a defense.

Defendant did not forfeit his post-conviction claim of ineffective assistance of counsel for failing to include that claim in a post-trial motion. Defendant's claim was based on what counsel ought to have done at trial, not on what counsel did. The claim was based on the content of affidavits attached to the petition, which, as a result of counsel's allegedly deficient representation, could not have been included in the direct appeal record.

3. At the first-stage of post-conviction proceedings, a petition alleging ineffective assistance of counsel may not be summarily dismissed if (1) it is arguable that counsel's performance fell below an objective standard of reasonableness, and (2) it is arguable that the defendant was prejudiced.

Defendant's petition was supported by the affidavits of alibi witnesses and occurrence witness who attested that defendant was not the offender. These affidavits are sufficient to make an arguable claim of ineffective assistance of counsel. At trial, four eyewitnesses testified and identified defendant, but no murder weapon was recovered, no DNA or fingerprints linked defendant to the offense, and defendant did not confess. It is at least arguable that defendant was prejudiced by the absence of his witnesses and that counsel's performance fell below an arguable standard of reasonableness. It is inappropriate to consider at the first stage whether defense counsel made a strategic decision not to call the witnesses to testify.

People v. Bowens, 2013 IL App (4th) 120860 (No. 4-12-0860, 11/19/13)

1. At the first stage of post-conviction proceedings, a petition withstands dismissal if it states the gist of a constitutional claim and has an arguable basis in law or fact. The "gist" standard is a low threshold which does not require a petitioner to set forth a constitutional claim in its entirety. Instead, only a limited amount of detail is necessary.

Under **Strickland**, a defendant establishes that his attorney was ineffective where counsel's performance fell below an objective standard of reasonableness and the deficient performance prejudiced the defense. Thus, a post-conviction petition alleging ineffective assistance may not be summarily dismissed if it is arguable that counsel's performance fell below an objective standard of reasonableness and arguable that the defendant was prejudiced.

2. At defendant's trial for attempt first degree murder, aggravated domestic battery, and aggravated battery, the trial judge denied a motion to excuse the judge's husband from the jury for cause. The Appellate Court affirmed on direct appeal, noting that defense counsel's

failure to exercise a peremptory challenge against the judge's husband amounted to acquiescence to the husband's jury service, and therefore waived the issue for appeal.

Defendant then filed a *pro se* post-conviction petition alleging that defense counsel was ineffective for failing to use an available peremptory challenge to remove the trial judge's husband from the jury. The judge who had presided over the jury trial also heard the post-conviction petition, and summarily dismissed the petition as frivolous and patently without merit.

The court concluded that the defendant raised the gist of a constitutional claim, finding that where the defense had peremptory challenges available, it was objectively unreasonable for counsel to allow the trial judge's husband to be seated as a juror. The court noted that other jurisdictions have found that regardless whether peremptory challenges are available, the constitutional right to a fair trial is violated where the spouse or close relative of the trial judge serves as a juror. In addition, the Illinois Supreme Court has held that the conviction must be reversed and a new trial awarded where the wrongful denial of a challenge for cause denies a defendant the right to a trial before a fair and impartial jury.

The court remanded the cause for second stage proceedings and directed the Chief Judge to appoint counsel for the defendant. Although the trial judge who presided over the trial would ordinarily hear any post-conviction petition, due to the nature of the allegations the Chief Judge was ordered to assign a judge other than the trial judge to conduct the post-conviction proceedings.

(Defendant was represented by Assistant Defender Colleen Morgan, Springfield.)

People v. Cage, 2013 IL App (2d) 111264 (No. 2-11-1264, 3/29/13)

Noting a conflict in precedent, the Appellate Court concluded that the petitioner's failure to verify a *pro se* post-conviction petition by affidavit is not an adequate ground for dismissal of the petition at the first stage. In evaluating a post-conviction petition at the first stage, the standard is whether the petition is frivolous or patently without merit, or in other words whether it has an arguable basis in law or fact. The lack of notarization of a verification affidavit does not render a petition patently without merit, but is instead a non-jurisdictional procedural defect which can be cured at the second stage.

The trial court's summary dismissal order was reversed and the cause remanded for further proceedings.

(Defendant was represented by Assistant Defender Jack Hildebrand, Elgin.)

People v. Carballido, 2011 IL App (2d) 090340 (No. 2-09-0340, mod. op., 8/10/11)

1. Generally, the Post-Conviction Hearing Act limits the scope of a defendant's challenge to constitutional matters that have not been, and could not have been, previously adjudicated. Appellate counsel can work only with the record as it exists. Where the record on direct appeal is insufficient to establish ineffective assistance of counsel, defendant may bring and develop the claim in a post-conviction proceeding.

Where appellate counsel argued on direct appeal that trial counsel was ineffective for failing to litigate a motion to suppress statements based on the inadequacy of **Miranda** warnings, but did not have the benefit of a complete record concerning counsel's failure to litigate a suppression motion based on the involuntariness of the statements, the latter issue was not waived for post-conviction purposes. Therefore, the defendant was not required to allege ineffectiveness by appellate counsel in order to raise the issue on post-conviction.

2. In non-capital cases, post-conviction proceedings are divided into three stages. At the first stage, the trial court must review the petition within 90 days to determine whether it

should be dismissed as frivolous or patently without merit. A *pro se* post-conviction petition is frivolous or patently without merit if it has no arguable basis in law or fact. The petition has no basis in law if it is based on an indisputably meritless legal theory or a legal theory that is completely contradicted by the record. A petition has no basis in fact when it is based on fanciful factual allegations.

Pro se petitions are to be judged leniently at the first stage, so that borderline claims may proceed if the gist of a constitutional claim is raised. Here, the trial court erred where it did not restrict its examination of the trial record to determining whether the petition's factual allegations were rebutted. Instead, the judge weighed the facts at trial and the allegations of the post-conviction petition and determined that the defendant's statements were voluntary. "[T]he court strayed from answering the limited stage-one questions on whether defendant's claim was frivolous or patently without merit and whether the record positively rebutted defendant's assertion; rather, it stepped into the role of factfinder."

3. Defendant alleged the gist of a constitutional issue that trial counsel was ineffective for failing to litigate a motion to suppress statements as involuntary. The record showed that trial counsel was familiar with several relevant factors indicating that a motion to suppress would have had a reasonable chance of success. Furthermore, counsel knew that several other matters relevant to voluntariness were not rebutted by the evidence and needed to be investigated.

Finally, suppression of defendant's statements likely would have changed the outcome of the case because the State would have been without direct evidence of the "lynchpin" of its case. Under these circumstances, the petition should have been advanced to the second stage of proceedings.

4. The court held that a post-conviction petition alleged the gist of a constitutional issue concerning a State investigator's failure to disclose field notes of his interview of a defense witness. The court noted that the failure to disclose material evidence after a defense request might violate due process. The witness testified at defendant's trial, and was impeached by the officer's testimony.

Supreme Court Rule 412 requires the prosecution to insure a flow of information between various investigative personnel, so that the prosecutor obtains all information relevant to the case. Furthermore, 725 ILCS 5/114-13(b) requires an investigating officer to provide the prosecutor with all investigative material, including field notes. Because the impeachment was on a critical point, and because the witness's testimony and the officer's impeachment were confusing concerning the precise content of the witness's out-of-court statement, the court directed the State to ensure that discovery requirements were completed before any proceedings occurred on remand.

The trial court's dismissal of defendant's post-conviction petition was reversed, and the cause was remanded for further proceedings.

(Defendant was represented by Assistant Defender Mike Vonnahmen, Springfield.)

People v. Carballido, ___ Ill.App.3d ___, ___ N.E.2d ___ (2d Dist. 2011) (No. 2-09-0340, 3/17/11)

1. Generally, a claim of ineffective assistance of counsel need not be raised on direct appeal in order to avoid forfeiture in post-conviction proceedings. Because the record on ineffective assistance issues is usually not complete on direct review, most claims of ineffective assistance by trial counsel are better raised through collateral review, after the parties have an opportunity to develop the record.

Where appellate counsel argued on direct appeal that trial counsel was ineffective for

failing to litigate a motion to suppress statements based on the inadequacy of **Miranda** warnings, but did not have the benefit of a complete record concerning counsel's failure to litigate a suppression motion based on the involuntariness of the statements, the latter issue was not waived for post-conviction purposes. Therefore, the defendant was not required to allege ineffectiveness by appellate counsel in order to raise the issue on post-conviction.

2. In non-capital cases, post-conviction proceedings are divided into three stages. At the first stage, the trial court must review the petition within 90 days to determine whether it should be dismissed as frivolous or patently without merit. A *pro se* post-conviction petition is frivolous or patently without merit if it has no arguable basis in law or fact. The petition has no basis in law if it is based on an indisputably meritless legal theory or a legal theory that is completely contradicted by the record. A petition has no basis in fact when it is based on fanciful factual allegations.

Pro se petitions are to be judged leniently at the first stage, so that borderline claims may proceed if the gist of a constitutional claim is raised. Here, the trial court erred where it did not restrict its examination of the trial record to determining whether the petition's factual allegations were rebutted. Instead, the judge weighed the facts at trial and the allegations of the post-conviction petition and determined that the defendant's statements were voluntary. "[T]he court strayed from answering the limited stage-one questions on whether defendant's claim was frivolous or patently without merit and whether the record positively rebutted defendant's assertion; rather, it stepped into the role of factfinder."

3. Defendant alleged the gist of a constitutional issue that trial counsel was ineffective for failing to litigate a motion to suppress statements as involuntary. The record showed that trial counsel was familiar with several relevant factors indicating that a motion to suppress would have had a reasonable chance of success. Furthermore, counsel knew that several other matters relevant to voluntariness were not rebutted by the evidence and needed to be investigated. Finally, suppression of defendant's statements likely would have changed the outcome of the case because the State would have been without direct evidence of the "lynchpin" of its case. Under these circumstances, the petition should have been advanced to the second stage of proceedings.

4. The court held that a post-conviction petition alleged the gist of a constitutional issue concerning a State investigator's failure to disclose field notes of his interview of a defense witness. The court noted that the failure to disclose material evidence after a defense request might violate due process. The witness testified at defendant's trial, and was impeached by the officer's testimony.

Supreme Court Rule 412 requires the prosecution to insure a flow of information between various investigative personnel, so that the prosecutor obtains all information relevant to the case. Furthermore, 725 ILCS 5/114-13(b) requires an investigating officer to provide the prosecutor with all investigative material, including field notes. Because the impeachment was on a critical point, and because the witness's testimony and the officer's impeachment were confusing concerning the precise content of the witness's out-of-court statement, the court directed the State to ensure that discovery requirements were completed before any proceedings occurred on remand.

The trial court's dismissal of defendant's post-conviction petition was reversed, and the cause was remanded for further proceedings.

(Defendant was represented by Assistant Defender Mike Vonnahmen, Springfield.)

People v. Cathey, 406 Ill.App.3d 503, 942 N.E.2d 1 (1st Dist. 2010)

1. The doctrine of *res judicata* applies if: (1) there was a final judgment on the merits

rendered by a court of competent jurisdiction; (2) there is an identity of cause of action; and (3) there is an identity of parties or their privies. Separate claims will be considered the same cause of action for purposes of *res judicata* if they arise from a single group of operative facts, regardless of whether they assert different theories of relief. An otherwise barred claim may proceed under a fundamental-fairness exception if the law has changed on defendant's rejected claim since the direct appeal was decided.

On direct appeal, defendant argued that the trial court improperly admitted defendant's prior conviction to impeach his testimony per **People v. Montgomery**, 47 Ill.2d 510, 268 N.E.2d 695 (1971). On post-conviction, defendant argued that the court abused its discretion and infringed on defendant's right to testify when it failed to rule on defendant's motion to exclude his prior conviction until after he testified per **People v. Patrick**, 233 Ill.2d 62, 908 N.E.2d 1 (2009). The court held that these theories were different but arose from the same group of operative facts, and therefore *res judicata* applied. The court concluded that **Patrick**, decided after defendant's direct appeal was final, adopted a new rule, but did not apply the fundamental fairness exception as it held that **Patrick** did not apply retroactively to convictions that were final when **Patrick** was decided.

2. Generally, new rules of criminal procedure will not be applied retroactively to convictions that were final when the new rule was adopted. **Teague v. Lane**, 489 U.S. 288 (1989). A case announces a new rule if the result was not dictated by precedent at the time that the defendant's conviction became final. The key consideration is whether the court considering the claim would have felt compelled by existing precedent to conclude that the rule was required by the constitution.

Patrick announced a new rule. Although Appellate Court decisions predating **Patrick** are consistent with that decision, there was a difference of opinion in the lower courts that was resolved by **Patrick**. **Patrick** did not merely apply earlier decisions to a different set of facts.

3. Non-retroactivity may be the basis for a first-stage dismissal. Unlike timeliness, non-retroactivity is a substantive defect in the petition, rather than a procedural defect in the manner in which it was filed.

The court affirmed the first-stage dismissal of defendant's post-conviction claim based on **Patrick**.

(Defendant was represented by Assistant Defender Sean Southern, Chicago.)

People v. Chambers, 2013 IL App (1st) 100575 (No. 1-10-0575, 8/13/13)

1. The trial court's order denying leave to file a successive post-conviction petition stated that defendant "is hereby fined $105.00 and the Clerk of the Circuit Court will be instructed not to accept any further filings from [defendant] until his sanction has been satisfied in full." 735 ILCS 5/22-105, which authorizes the imposition of court costs against prison inmates who file post-conviction petitions which are determined to be frivolous, provides that "[n]othing in this Section prohibits an applicant from filing an action or proceeding if the applicant is unable to pay the court costs."

Applying *de novo* review on the ground that the issue concerned the statutory authority of the trial court, the Appellate Court found that the prohibition against additional filings conflicted with the plain and ordinary language of §22-105. "The circuit court . . . effectively prohibited defendant from making future filings based on court costs assessed, despite the clear language stating otherwise in section 22-105 of the Code."

The court also noted that in **People v. Alcozer**, 241 Ill.2d 248, 948 N.E.2d 70 (2011), the Illinois Supreme Court upheld the imposition of court costs upon persons who file frivolous post-conviction proceedings but found that §22-105 does not prohibit prisoners from

petitioning for post-conviction relief even if they cannot afford to pay court costs.

The Appellate Court rejected the State's argument that Illinois Supreme Court Rule 137, which provides that the signature of an attorney or a party constitutes a certificate that he or she believes that the allegation is warranted by existing law or a good faith argument for the extension of existing law and authorizes an appropriate sanction where a document is signed in violation of the rule, permits a ban on filing post-conviction petitions until court costs for prior petitions have been paid. The court noted that §22-105 is a specific provision addressing frivolous filings by prisoners, while Rule 137 is a general rule governing the filing of all documents. It is a fundamental rule of statutory construction that a specific provision prevails over a general provision.

Because the trial court erred by prohibiting the defendant from filing further pleadings before the sanction for prior filings was paid, the prohibition was void. The court remanded the cause with instructions that the trial court vacate its order precluding defendant from filing future petitions until the $105 penalty had been paid.

2. The court rejected defendant's argument that on appeal from denial of post-conviction relief, he could argue for the first time that a mandatory life sentence on a person who was a minor at the time of the offense violates **Miller v. Alabama**, ___ U.S. ___, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012). In **Miller**, the Supreme Court held that the Eighth Amendment is violated by mandatory life sentences without parole for persons who were under the age of 18 at the time of their crimes. **Miller** did not prohibit sentencing juveniles to life imprisonment without parole, but held that the mandatory imposition of such a sentence violates the Constitution.

The court noted that mandatory life sentences may be applied to persons other than those whose offenses were committed when they were minors, and that under **People v. Williams**, 2012 IL App (1st) 111145, a sentence which violates **Miller** is not void *ab initio*. In **Williams**, the court could reach the issue because the petitioner satisfied the "cause and prejudice" test for successive post-conviction petitions by arguing that the Eighth Amendment was violated by a mandatory life without parole for a juvenile.

Here, by contrast, defendant's successive post-conviction petition did not include any argument concerning the constitutionality of his mandatory sentence of life without parole. Under these circumstances, defendant failed to satisfy the cause and prejudice requirement. Thus, the court could have considered the issue only if the sentence was void *ab initio*, a holding which was foreclosed by **Williams**.

The court also noted that a sentence is void only if the court which rendered it lacked jurisdiction to do so. Unless a statute is unconstitutional on its face, the fact that the sentence which it authorizes is applied improperly does not mean that the trial court lacked jurisdiction.

In reaching its holding, the court rejected the reasoning of **People v. Luciano**, 2013 IL App (2d) 110792, which held that a sentence which violates **Miller** is void.

(Defendant was represented by Assistant Defender Manuel Serritos, Chicago.)

People v. Coleman, 2012 IL App (4th) 110463 (No. 4-11-0463, 12/24/12)

Defendant filed a post-conviction petition claiming that: (1) defense counsel was ineffective for failing to call two witnesses who would have given exculpatory testimony, (2) the State committed a **Brady** violation by failing to disclose to the defense that police officers tested only one of the 15 bags of white powder found at the scene of the arrest before emptying all the bags into one large bag for testing by the crime lab, and (3) defense counsel was ineffective for entering a stipulation that the large bag contained 926 grams of cocaine. The

trial court summarily dismissed the petition as frivolous and patently without merit, finding that to show prejudice under **Strickland** defendant was required to show that had the lab analyst been called to testify, he either would not have testified or would have testified differently from what was stated in the stipulation.

In a *pro se* motion to reconsider the summary dismissal, defendant submitted an affidavit from a private investigator who had interviewed the analyst who performed the testing. The affidavit stated that the analyst said he had not performed tests to determine the purity of the cocaine in the large bag of white powder. The analyst also described the decision of police to commingle the contents of the 15 bags as "bad evidence gathering." Although defendant did not submit an affidavit from the analyst, the investigator's affidavit stated that additional efforts to contact the analyst had been unsuccessful.

The Appellate Court reversed the order summarily dismissing the petition.

1. To survive summary dismissal, a post-conviction petition must state the "gist" of a constitutional claim. However, the "gist" standard describes the petitioner's burden in alleging a constitutional deprivation, not the legal standard to be applied by the trial court in determining whether the petition should be summarily dismissed. In making that determination, the trial court must apply the "frivolous or patently without merit" standard.

A petition is patently without merit if it has no arguable basis in either law or fact. A petition lacks an arguable basis in law or fact when it is based on an indisputably meritless legal theory or a fanciful factual allegation. The fact that a factual proposition is unlikely does not make it frivolous or patently without merit. A petition should not be summarily dismissed unless the lack of legal or factual merit is indisputable.

2. The court found that the petition failed to present the gist of a constitutional violation concerning counsel's failure to call two witnesses to testify, because the only affidavit attached to the petition was that of the defendant, not the witnesses themselves. Although the Post-Conviction Hearing Act requires only that the petition be supported by affidavits, the court concluded that such affidavits should concern matters to which the affiant could testify if called as a witness. Although defendant's sworn affidavit described the anticipated testimony of the two witnesses whom defense counsel failed to call, the defendant would not be competent to testify to such testimony if called as a witness. Thus, the defendant's affidavit was insufficient to withstand summary dismissal, at least in the absence of an explanation why affidavits from the witnesses themselves were unavailable.

3. However, the court concluded that the petition showed an arguable case of ineffective assistance concerning counsel's agreement to the stipulation that the entire large bag contained cocaine. To allege the gist of a claim of ineffective assistance of counsel, the petitioner need not satisfy the **Strickland** standard of deficient performance and prejudice. Instead, at the first stage of proceedings a claim of ineffective assistance is sufficient if counsel's performance was arguably unreasonable and defendant was arguably prejudiced. An arguable allegation of prejudice exists if it could be reasonably argued that confidence in the outcome of the trial was undermined by counsel's deficient performance.

Here, defense counsel's stipulation relieved the State of a potentially serious problem. In order to aggregate the contents of the 15 bags and obtain a conviction for the cumulative weight, the State was required to prove beyond a reasonable doubt that each of the 15 bags contained cocaine. Because only one bag had been tested before the bags were commingled, the State would have been unable to carry this burden. By stipulating that the entire weight of the large bag's contents was cocaine, counsel's performance was arguably deficient and arguably undermined confidence in the outcome of the trial, especially in light of the investigator's affidavit that no purity test had been conducted.

The court noted that it need not resolve at this stage whether counsel was ineffective. Because the claim was arguable, it was clearly not frivolous or patently without merit. Thus, the petition should not have been summarily dismissed.

4. The court also found that the petition made an arguable **Brady** claim. Due process requires the State to disclose evidence that is favorable to the accused and material to either guilt or innocence. Evidence is material if there is a reasonable probability that had it been disclosed, the result of the proceeding would have been different. **Brady** evidence must be disclosed in adequate time to allow the defense to use the favorable material effectively in the preparation or presentation of its case.

The petition, supported by defendant's affidavit, alleged that the State did not inform the defense that a police officer had commingled 15 bags of white powder into one large bag after testing only one of the smaller bags. The record did not contradict this claim, because at trial both attorneys spoke of the commingling as a surprise to the defense. Under these circumstances, the **Brady** claim was arguable and therefore sufficient to survive first stage dismissal.

(Defendant was represented by Assistant Defender Allen Andrews, Springfield.)

People v. Couch, 2012 IL App (4th) 100234 (No. 4-10-0234, 6/15/12)

At the first stage of a post-conviction proceeding, the trial court examines the petition only to determine whether it alleges a constitutional deprivation that is unrebutted by the record. Allegations not rebutted by the record must be accepted as true. Fanciful allegations that describe fantastic or delusional scenarios are frivolous.

Defendant alleged that the trial judge was biased against him because as a youth he had fought with her stepson, his mother had publicly condemned the trial judge for having an affair with a married man, and the judge had sentenced him based on facts she learned from her current husband, Glen Anderson.

The post-conviction court improperly dismissed the petition as frivolous based on its personal knowledge that the trial judge had only been married once, and was still married to that person, and his name was not Glen Anderson. While the defendant's allegations were unlikely, they were not delusional or fantastic, and had to be accepted as true.

The Appellate Court affirmed, however, because the petition was not supported by any affidavits, records, or other evidence, and failed to explain their absence. 725 ILCS 5/122-2.

Steigmann, J., specially concurred. Claims that are not reality based need not be accepted as true. A definition of "reality based" is not necessary because, "paraphras[ing] Justice Stewart, I know it when I see it."

(Defendant was represented by Assistant Defender Jay Wiegman, Ottawa.)

People v. Gardner, 2013 IL App (2d) 110598 (No. 2-11-0598, 1/30/13)

1. The Post-Conviction Hearing Act provides that the "proceeding shall be commenced by filing . . . a petition . . . verified by affidavit." 725 ILCS 5/122-1(b). An invalid verification affidavit required by §122-1(b) is not a basis for the first-stage dismissal of the petition. A petition that is not verified can have merit, just as a petition can have merit despite its untimeliness.

2. The Act also provides that a petition shall have "affidavits, records, or other evidence supporting its allegation" attached or shall state why such documentation is not attached. 725 ILCS 5/122-2. Unlike the verification affidavit, which serves to confirm that the defendant's allegations are brought truthfully and in good faith, the supporting documentation requirement of §122-2 serves to show that defendant's allegations can be independently

corroborated. Because this affidavit requirement serves a different purpose than the affidavit requirement of §122-1(b), a petition can be summarily dismissed for failing to comply with §122-2.

(Defendant was represented by Assistant Defender Andrew Boyd, Ottawa.)

People v. Griffin, 2013 IL App (2d) 110631 (No. 2-11-0631, 8/22/13)

1. Generally, the Post-Conviction Hearing Act contemplates the filing of only one post-conviction petition. However, the statutory bar to successive petitions will be relaxed where required by fundamental fairness, including where the petitioner makes a claim of actual innocence.

Generally, a petition is subject to the statute of limitations which is in effect at the time the petition is filed. Defendant's multiple amended petitions raising claims of actual innocence pended in the trial court for nearly ten years. While they were pending, the PCHA was amended to change the statute of limitations and to eliminate any limitation period for the filing of a petition claiming actual innocence. Where the State had argued in the trial court that the amended statute applied, the Appellate Court concluded that no statute of limitations violation occurred concerning the amended petitions because they claimed actual innocence.

In addition, the post-conviction statute of limitations is an affirmative defense which the State may raise, waive, or forfeit. Because the State argued in the lower court that the subsequent amendment to the Post-Conviction Hearing Act applied, it forfeited the argument, which it raised for the first time on appeal, that the statute of limitations in effect when the first petition was filed should be applied.

2. When the trial court dismisses an incarcerated petitioner's claim as frivolous or patently without merit, it must do so in a written order which specifies findings of fact and conclusions of law. That order must be served on the defendant by certified mail within 10 days of the decision.

Defendant was not notified that his 1999 petition had been summarily dismissed, and in the intervening decade three "amended" petitions were filed, an eyewitness recanted his testimony, counsel was appointed on one of the petitions, and DNA testing ordered by the trial court excluded defendant as a source of the DNA profile left at the scene. The State called the court's attention to the original dismissal order in a motion to dismiss the amended petition, and argued that defendant could not appeal the order, move to reconsider it, or file an amended petition. The trial court ruled that it would "give effect" to the 1999 summary dismissal order by allowing defendant 30 days to appeal that order.

The Appellate Court noted that permitting defendant to appeal the 1999 dismissal would mean ignoring the recantation, the affidavits which accompanied the amended petitions, and the DNA testing, "all of which inured to defendant's favor." Because the State's motion to dismiss the third amended petition on statute of limitations grounds should have been denied, and the State should have been ordered to file an answer in 20 days, the cause was remanded for the State to file an answer and for additional proceedings as warranted.

(Defendant was represented by Assistant Defender Mark Levine, Elgin.)

People v. Henderson, 2011 IL App (1st) 090923 (No. 1-09-0923, 11/17/11)

1. The Post-Conviction Hearing Act provides that any person "imprisoned in the penitentiary" may seek relief under the Act. 725 ILCS 5/122-1(a). A remedy under the Act is only available to persons who are actually being deprived of their liberty, not persons who have completely served their sentences and merely wish to purge their criminal records of past convictions. Thus a defendant has standing under the Act so long as he is challenging a

conviction for which he continues to serve some form of sentence. When a defendant's conviction is no longer an encumbrance on his liberty, he no longer needs assistance from the Act to secure his liberty, and the Act is no longer available to him.

2. The Appellate Court recognized that no court has previously addressed whether a defendant, who had standing under the Act to file a petition, subsequently loses standing when no portion of his sentence remains to be served. The court concluded that no meaningful distinction could be drawn between instances where a defendant's liberty is not encumbered when he files the petition and those instances in which a defendant regains his liberty after the petition is filed. In neither case is the purpose of the Act served by giving defendant relief.

Because defendant had completely served his sentence, including his MSR term, while his appeal from the dismissal of his post-conviction petition was pending, he no longer needed the Act's assistance to secure his liberty. Even if the cause were remanded, the trial court would be obligated to deny relief to defendant due to this defect. Therefore, the appeal from the dismissal of the petition was moot.

3. The Act allows summary dismissal at the first stage only where a defect renders the petition frivolous or patently without merit. 725 ILCS 5/122-2.1(a)(2). At the first stage, the court does not measure the petition's procedural compliance, only its substantive virtue.

The Act requires that the allegations of the petition be supported by "affidavits, records, or other evidence." 725 ILCS 5/122-2. The purpose of these affidavits is to show that the allegations can be objectively and independently corroborated, and therefore their absence can be the basis for a first-stage dismissal as they relate to the substance of the petition.

The Act also requires that the "proceedings shall be commenced by filing . . . a petition . . . verified by affidavit." 725 ILCS 5/122-1(b). The lack of notarization of the verification affidavit required by §122-1(b) does not qualify as the basis for a first-stage dismissal because that affidavit has no relation to the substance of defendant's allegations. The verification affidavit requirement merely confirms that the allegations are brought truthfully and in good faith.

The State can object to the lack of notarization at the second stage and appointed counsel can assist in arranging for notarization of the verification affidavit. The court found that addressing this defect at the second stage also comports with "practical considerations which arise in the prison system." Although not properly before the court, a memorandum written by a IDOC employee that was attached to defendant's reply brief stated that notaries are not always available in prisons. Defendant's affidavit in **People v. Wilborn**, 2011 IL App (1st) 092802, also indicated that prisoners lack the ability to have affidavits notarized.

(Defendant was represented by Assistant Defender Pamela Rubeo, Chicago.)

People v. Hommerson, 2013 IL App (2d) 110805 (No. 2-11-0805, 1/18/13)

1. Noting a conflict in appellate authority, the Appellate Court concluded that at the first stage of post-conviction proceedings, the trial court may summarily dismiss a *pro se* post-conviction petition because it lacks a valid, notarized affidavit attesting to the veracity of its contents. The court acknowledged that it is improper to base a first stage dismissal on a procedural ground such as untimeliness, but held that the requirement of a notarized affidavit "goes to the very heart of whether [the] allegations are frivolous or patently without merit." The court concluded that the purpose of requiring an affidavit is to confirm that the allegations have been brought truthfully and in good faith, and that the absence of an affidavit creates "the logical inference . . . that the allegations are neither truthful nor brought in good faith. Allegations that are untruthful or are not brought in good faith are frivolous and patently without merit."

The court rejected appellate authority holding that the affidavit requirement is merely a procedural or technical requirement, and is therefore not an appropriate ground for summary dismissal at the first stage proceedings. The court criticized such cases as rendering the affidavit requirement of §122-1(b) "surplusage" and allowing the petitioner to advance to second stage proceedings by merely making sufficient allegations to allege the gist of a constitutional issue, without regard to the truthfulness of those allegations.

2. In dissent, Justice Burke found that a petitioner's failure to verify a post-conviction petition by affidavit is a non-jurisdictional, procedural defect, and like other procedural defects does not provide a basis for summary dismissal of a post-conviction petition. Justice Burke noted that most *pro se* petitions are drafted by incarcerated defendants with little legal knowledge or training, and that at the first stage the sole issue concerns whether the petition states constitutional claims. The merits of such claims and whether the petition satisfies procedural requirements are questions that are left to second stage proceedings.

(Defendant was represented by Assistant Defender Kathleen Hamill, Elgin.)

People v. House, 2013 IL App (2d) 120746 (No. 2-12-0746, 11/20/13)

1. The Post-Conviction Hearing Act provides that the proceeding shall be commenced by filing with the clerk of the court in which the conviction took place a petition verified by affidavit. 725 ILCS 5/122-1(b). There is a split among the Appellate Courts on whether the absence of a notarized verification affidavit is a sufficient basis for a first-stage summary dismissal. The issue is presently pending before the Illinois Supreme Court in **People v. Hommerson**, No. 115638.

Defendant filed a post-conviction petition that included an un-notarized verification certified pursuant to 735 ILCS 5/1-109. He also alleged that the prison paralegal refused to notarize his documents despite repeated requests. The circuit court dismissed the petition because it was not verified by a notarized affidavit.

The Appellate Court concluded that the absence of a notarized verification affidavit was not a sufficient basis for a first-stage dismissal. It inferred that conclusion from the Illinois Supreme Court's decision in **People v. Cruz**, 2013 IL 113399, which held that the State had forfeited an argument that the absence of a notarized verification affidavit supported a second-stage dismissal by not raising that issue in the circuit court. **Cruz** cited favorably to **People v. Turner**, 2012 IL App (2d) 100819, where the Appellate Court relied on **People v. Boclair**, 202 Ill. 2d 89, 789 N.E.2d 734 (2002), to find that the absence of a notarized verification affidavit was a non-jurisdictional procedural defect that should have been remedied by defendant's counsel at the second stage, and had been forfeited by the State 's failure to raise it in a second-stage motion to dismiss.

2. The Act also requires that the petition be supported by affidavits, records, or other evidence supporting its allegations, or provide an explanation for its absence. 725 ILCS 5/122-2. Because the requirement is stated in the disjunctive, any of the three forms of proof will suffice. Because a petition my not be summarily dismissed in part, not every allegation in a petition must have evidentiary support for a petition to survive first-stage dismissal.

The Appellate Court rejected the State's alternative argument that first-stage dismissal was proper because defendant failed to provide notarized affidavits from witnesses in support of his petition as required by §122-2. Defendant did not have affidavits, but did submit records to support at least one of the claims in his petition.

The Appellate Court reversed and remanded for second-stage proceedings.

Schostok, J., dissented. The absence of a notarized verification affidavit supported first-stage dismissal. **Cruz** does not specifically address the issue.

(Defendant was represented by Assistant Defender Daniel Mallon, Chicago.)

People v. Inman, 407 Ill.App.3d 1156, 947 N.E.2d 319 (5th Dist. 2011)

1. In a post-conviction proceeding, the trial court ordered a new sentencing hearing after vacating defendant's natural life sentence, which was to be served concurrently with a 30-year-sentence for attempt murder. At the new sentencing hearing, the court imposed a 35-year-sentence to be served consecutively to the 30-year-sentence. Defendant then filed a post-conviction petition raising a double jeopardy challenge to the consecutive nature of the new sentences. The trial court dismissed the petition after finding that it was a "second or subsequent" petition which the defendant could file only after obtaining leave of the court.

The Appellate Court found that the 35-year-sentence constituted a new "conviction" for purposes of the Post-Conviction Hearing Act. Thus, a post-conviction petition challenging the 35-year-sentence was not a "subsequent" petition, but the first petition challenging the new "conviction." Because defendant was not required to obtain leave of the court, the dismissal order was reversed.

2. A trial court loses authority to summarily dismiss a post-conviction petition where it fails to examine the petition within 90 days to determine whether it is frivolous and patently without merit. In such cases, counsel must be appointed and the petition advanced to the second stage.

The court concluded that erroneously believing that a petition could be filed only with leave of the court was analogous to the situation in **People v. Harris**, 24 Ill.2d 115, 862 N.E.2d 960 (2007), where the petition was required to be advanced to the second stage although the trial court's failure to act was due to its mistaken belief that a post-conviction petition could not proceed while the direct appeal was pending. Thus, the trial court's dismissal order was vacated and the cause remanded so that counsel could be appointed and second stage proceedings conducted.

(Defendant was represented by Assistant Defender Duane Schuster, Supreme Court Unit.)

People v. King, 2012 IL App (2d) 100801 (No. 2-10-0801, 2/7/12)

Under 725 ILCS 5/122-2.1(a)(2), the trial court may summarily dismiss a post-conviction petition as frivolous and patently without merit if it enters a written order within 90 days of the filing of the petition. In **People v. Porter**, 122 Ill.2d 64, 521 N.E.2d 1158 (1988), the Supreme Court held that a summary dismissal order need not be in writing. Supreme Court Rule 272 provides that if the trial court requires submission of a written order, the judgment becomes final only when the signed order is filed.

The Appellate Court concluded that where the trial court orally dismisses the petition at the summary dismissal stage, but states that a written order will be filed, the written order must be filed within 90 days of the filing of the petition. Otherwise, the petition must be advanced to second stage proceedings.

The court stated that its holding does not conflict with **Porter's** holding that a dismissal order need not be in writing:

> Nothing in **Porter** prohibits a trial court from orally dismissing a petition and then filing a written order consistent with that oral dismissal. However, when the trial court indicates that a written order is going to be entered, the written order must be filed within 90 days after the defendant filed the petition.

The court noted that a contrary ruling would pose a practical problem in that an *ex*

parte oral dismissal would start the 30-day period for filing a notice of appeal, but the defendant would have no way of knowing that the time for filing a notice of appeal had commenced until the trial court entered the written order and a copy was mailed to the defendant. "Moreover, a defendant's time to appeal from a 'back dated' written order could have expired by the time the order is filed with the clerk and a copy sent to the defendant."

Where the trial court orally dismissed the post-conviction petition within 90 days after the petition was filed and stated that a written order would be filed, but the written order was filed 109 days after the petition was filed, the court failed to act within the 90-day period in which summary dismissal is authorized by §122-2.1(a)(2). The trial court's order was reversed and the cause remanded for second stage proceedings.

(Defendant was represented by Assistant Defender Geoffrey Burkhart, Chicago.)

People v. Lentz, 2014 IL App (2d) 130332 (No. 2-13-0332, 1/24/14)

1. 725 ILCS 5/122-1(a) provides that within 90 days "after the filing and docketing" of a post-conviction petition, the trial court has authority to enter a summary dismissal if it finds that the petition is frivolous or patently without merit. The 90-day requirement is mandatory rather than directory. In other words, if the trial court fails to enter a summary dismissal order within 90 days, it loses authority to do so and must advance the petition to the second stage.

2. Defendant filed a post-conviction petition that was entered in the circuit clerk's computerized docketing system on August 27, 2012. On the following day, the clerk's office mailed a letter to defense counsel stating that a $40 filing fee was due. The fee was paid on September 6, 2012.

No further action occurred until January 25, 2013, when the clerk placed the petition on the call of a judge and set it for a hearing. The trial court found that a petition is not "docketed" until it is placed on a judge's call and set for a hearing, and that the 90-day period for first stage proceedings did not commence until January 25, 2013. The trial court also noted that under local rules it was up to the attorney who files a pleading to set it for a hearing, "something the defendant's attorney apparently did not know." The petition was then summarily dismissed.

The Appellate Court concluded that the petition was "filed" and "docketed" on August 27, 2012, and that the 90-day period for entering a summary dismissal began to run on that date. Therefore, the time for entering a summary dismissal order expired before the petition was seen by the trial judge.

The court found that a petition is "docketed" when it is entered in an official record, without regard to when it is placed on a specific judge's call or set for a hearing. Here, the computerized docket clearly showed that defendant's petition was entered in the official record on August 27, the date on which it was filed. Likewise, the letter sent to defense counsel concerning the filing fee showed that the petition had been "entered into the official record."

The court acknowledged that because the legislature chose to use different words in §122-1(a), the terms "filed" and "docketed" must be construed as applying to separate acts. However, both acts may occur on the same day. "Indeed, it appears to us that it is the usual practice of court clerks to note the filing of a post-conviction petition in the official record or docket of a case on the same day that the petition is stamped 'Filed.'"

3. The court rejected the argument that the local rule requiring the attorney who prepares pleadings to set them for hearing applies to post-conviction petitions. 725 ILCS 5/122-1(b) states that it is the duty of the clerk to docket a post-conviction petition "upon his or her receipt thereof and bring the same promptly to the attention of the court." Thus, it is

the duty of the clerk to bring the petition before the court. "In light of this language, it may be appropriate for the clerk's office to reconsider its procedures for setting hearings on [post-conviction] petitions."

The trial court's order summarily dismissing defendant's post-conviction petition was reversed, and the cause was remanded for further proceedings.

People v. Little, 2012 IL App (5th) 100547 (No. 5-10-0547, 10/9/12)

1. The Post-Conviction Hearing Act (PCHA) generally limits a defendant to one post-conviction petition. Successive petitions are disfavored. A defendant attempting to institute a successive post-conviction proceeding through the filing of a second or successive petition must first obtain leave of court by either demonstrating actual innocence or satisfying the cause-and-prejudice test codified in 725 ILCS 5/122-1(f). The denial of leave to file a successive petition is reviewed *de novo*.

2. Where a defendant files an initial post-conviction petition seeking only to reinstate the right to a direct appeal that was lost due to counsel's ineffectiveness, a subsequent petition is not a successive petition for purposes of §122-1(f). The reference in §122-1(f) to "one petition . . . without leave of court" refers to one complete opportunity to collaterally attack the proceedings resulting in the conviction. Where a defendant has been denied that opportunity because he used an initial petition solely to reinstate his right to a direct appeal that was forfeited through no fault of his own, he is restored to the procedural posture he would have enjoyed if he had been represented by effective counsel who had filed a timely notice of appeal. This construction is consistent with federal habeas law, which the Illinois Supreme Court has relied on in interpreting the PCHA, as well as the intent of the legislature expressed in the PCHA to make Illinois law consistent with federal law.

Because defendant's first post-conviction petition was filed only to rescue his right to a direct appeal, it was not a true collateral attack and should not have been counted as such. The Appellate Court reversed the order of the circuit court denying defendant leave to file a successive petition.

3. The PCHA requires that a court review a petition within 90 days to determine if it is frivolous or patently without merit. 725 ILCS 5/122-2.1. Failure to do so requires that the court docket the petition for second-stage proceedings. This rule applies even if by honest mistake the court disposes of a petition on the erroneous belief that it is a successive petition brought without leave of court.

Because the circuit court had failed to determine within 90 days of the filing of defendant's petition whether it was frivolous or patently without merit, the Appellate Court further directed that the cause be remanded for second-stage proceedings.

(Defendant was represented by Assistant Defender Deborah Pugh, Chicago.)

People v. Longbrake, 2013 IL App (4th) 120665 (No. 4-12-0665, 10/11/13)

A court must examine a post-conviction petition within 90 days of its filing and either (1) enter an order dismissing it as frivolous and patently without merit, or (2) docket it for further consideration at the second stage of the post-conviction proceedings. This 90-day time limit is mandatory. Failure to comply with the 90-day limit renders any subsequent summary dismissal void. Harmless error analysis is not appropriate if the 90-day time limit is not met.

The circuit court dismissed defendant's post-conviction petition without prejudice to refile on the ground that it was not ripe for review because defendant's appeal was still pending. The Appellate Court had reached a decision but not yet issued its mandate. After the mandate issued, defendant refiled his petition. The court dismissed the refiled petition as

frivolous within 90 days of the refiling, but more than 90 days after the original filing date.

The Appellate Court remanded for second-stage proceedings. The circuit court wrongly dismissed the original petition as there is no impediment to a post-conviction case proceeding at the same time as a direct appeal. The unavailability of the record to the circuit court while the direct appeal is pending is of no consequence because the 90-day rule is absolute. Because the circuit court did not dismiss the original petition as frivolous within 90 days, it was required to docket the petition for second-stage proceedings.

(Defendant was represented by Deputy Defender Thomas Lilien, Elgin.)

People v. Love, 2013 IL App (2d) 120600 (No. 2-12-0600, 12/19/13)

1. The court reiterated precedent that a *pro se* post-conviction petition may not be summarily dismissed at the first stage of post-conviction proceedings on the ground that the petition lacks a notarized verification affidavit. See **People v. Turner**, 2012 IL App (2nd) 100819. In support of its holding, the court referred to **People v. Cruz**, 2013 IL 113399, which "favorably cited" **Turner**.

Similarly, the absence of a notarized verification affidavit is not a suitable ground for denying leave to file a successive post-conviction petition.

2. Defendant filed a *pro se* post-conviction petition while his direct appeal was pending. That petition was summarily dismissed on the same day his direct appeal was decided. The ground for the summary dismissal was that the defendant failed to raise a constitutional issue and argued only that a statutory provision had been violated.

Defendant did not appeal the summary dismissal, but subsequently filed a second *pro se* post-conviction petition and an amended second post-conviction petition. The second petition alleged, among other matters, that trial and appellate counsel were ineffective and that the prosecution engaged in misconduct. The trial court treated the amended petition as a successive post-conviction petition and denied leave to file it.

On appeal, defendant argued that because the petition filed during his direct appeal did not raise a constitutional issue, it should have been characterized as a §2-1401 petition even though it was labeled a post-conviction petition. Thus, defendant contended that his second filing was his first post-conviction petition and that leave to file was not required.

The court concluded that it lacked jurisdiction to address issues concerning defendant's first petition, including whether the trial court should have characterized the pleading as a §2-1401 motion instead of a post-conviction petition. To preserve review of a judgement entirely disposing of a post-conviction proceeding, the party seeking review must file a notice of appeal within 30 days of the entry of judgement or an order disposing of a timely filed motion attacking the judgement. The trial court treated the first filing as a post-conviction petition and entered a summary dismissal. Because that dismissal was a final judgement resolving all of the issues that were raised in the petition, defendant had 30 days to file either a notice of appeal or a motion attacking the judgement. By failing to act, defendant deprived the Appellate Court of jurisdiction to consider any issues arising from the initial petition, including whether it should have been treated as a post-conviction or §2-1401 proceeding.

3. Although the Post-Conviction Hearing Act contemplates that only one post-conviction petition will be filed, the bar on multiple petitions is relaxed where: (1) the petitioner can establish "cause" and "prejudice" for failing to raise the claim in the first petition, and (2) where the defendant alleges that he is actually innocent of the crime.

Regardless of the basis for the exception, a petitioner who seeks to file a successive post-conviction petition must first obtain leave of the court. It is the petitioner's burden to obtain leave and to submit sufficient documentation to allow the court to determine whether

leave should be granted.

To show "cause" for filing a subsequent post-conviction petition, the defendant must show some objective factor external to the defense that prevented him from raising a specific claim in the initial post-conviction petition. "Prejudice" is shown where the petitioner demonstrates that the claims which he seeks to raise in the subsequent proceeding so infected the trial that the conviction or sentence violated due process.

Here, defendant failed to show "cause." The court rejected defendant's argument that he could not have challenged appellate counsel's ineffectiveness in his initial petition because the direct appeal was still pending when that petition was filed. The court noted that defendant had possession of the appellate briefs before he filed the initial petition, and therefore knew what issues had been raised on direct appeal.

Because no external reason impeded defendant's ability to raise his claims in the initial post-conviction proceeding, he was unable to show cause for the failure to assert the claims at that point. Because defendant failed to show cause and both cause and prejudice must be shown, the court was not required to consider the "prejudice" prong of the test.

4. In the course of its holding, the court noted that the "frivolous or patently without merit" standard, which applies at the first stage of post-conviction proceedings, is inapplicable to a successive petition. Because a petitioner must obtain leave of the court before a successive petition may be filed, it would be superfluous to apply the "frivolous or patently without merit" standard once leave has been granted.

(Defendant was represented by Assistant Defender Emily Filpi, Chicago.)

People v. Luciano, 2013 IL App (2d) 110792 (No. 2-11-0792, 3/14/13)

1. At the first stage in the post-conviction process, the trial court reviews the defendant's petition on its own, without the input of the parties. The court may review the court file, transcripts, and any Appellate Court actions. The court must liberally construe the petition and treat allegations of fact as true so long as they are not affirmatively rebutted by the record.

Defendant claimed that his trial and appellate counsel were ineffective in failing to move to dismiss his 2007 murder charges because they were subject to compulsory joinder to weapons charges to which he had pleaded guilty in 1991. He contended that the murder charges were known to the prosecutor in 1991 because the prosecution had information from a confidential informant that defendant had both passed out the weapons and issued instructions for the shooting, and it had used his involvement in the murder as aggravation at his sentencing on the weapons charges.

The State contended it only suspected defendant's involvement in the shooting. Witnesses had lied to the police during the 1991 investigation and it was only when witnesses decided to cooperate with the authorities that the State was able to prosecute in 2007.

The Appellate Court acknowledged that the record contained information contrary to defendant's theory of the case; it also contained information supporting it. Because the record did not completely contradict defendant's allegations, it cannot be said that defendant's theory of the case is indisputably meritless. Considering the petition and the record together demonstrates the existence of a factual issue that could not appropriately be resolved at first stage. Therefore, the petition should have advanced to second stage.

2. New constitutional rules are generally not applied retroactively to convictions that were final when the new rule was announced. Two exceptions exist: (1) where the rule places certain kinds of primary, private individual conduct beyond the power of the criminal-law-making authority to proscribe, or (2) where the rule requires observance of those procedures

that are implicit in the concept of ordered liberty. The first exception encompasses new substantive rules that limit the persons or conduct that constitutionally may be subject to a certain penalty, or that limit the penalty to be applied to a certain defendant.

Finding the reasoning of **People v. Morphin**, 2012 IL App (1st) 103568, persuasive, the Appellate Court concluded that the holding of **Miller v. Alabama**, 567 U.S. ___, 132 S. Ct. 2455, ___ L.Ed.2d ___ (2012), that persons under age 18 may not be subject to mandatory natural-life imprisonment, is a substantive rule that is fully retroactive. **Miller** could be read to announce a procedural rule requiring that youth-related mitigation be considered before sentencing any minor to natural life imprisonment. But it was substantive because it required the court to consider a sentencing range broader than that required by statute for minors convicted of first-degree murder, categorically broadening the sentencing range for minors.

The Appellate Court vacated defendant's sentence and remanded for a new sentencing hearing at which the court could consider "all permissible sentences and is not limited to the sentence of life without parole." The option of life without parole was "still on the table," although "its imposition should be uncommon because [as **Miller** states] it will be the 'rare juvenile offender whose crime reflects irreparable corruption.'"

(Defendant was represented by Assistant Defender Jonathan Yeasting, Chicago.)

People v. McCaskill, 2012 IL App (1st) 110174 (No. 1-11-0174, 8/21/12)

If a trial court does not dismiss a post-conviction petition within 90 days of its "filing and docketing," the trial court must advance the petition to second-stage proceedings. 725 ILCS 5/12-2.1. The trial court's failure to act in compliance with this provision renders its summary dismissal of the petition void, and requires that the petition be docketed for second-stage proceedings.

"Filing and docketing" connotes more than the mere receipt of the petition by the circuit court clerk. It requires that the cause be entered in an official record, but does not require that the case be placed on the specific call of a judge. **People v. Brooks**, 221 Ill. 2d 381, 851 N.E.2d 59 (2006).

The circuit court clerk stamped the post-conviction petition "filed" on February 16, 2010. The petition first appeared on a judge's call on June 2, 2010, and the court dismissed the petition on August 6, 2010. The date that the petition was stamped "filed," rather than the date that it appeared on the judge's call, is the date that the petition was filed and docketed for purposes of §122-2.1. Because the court summarily dismissed the petition more than 90 days after that date, the Appellate Court reversed and remanded for second-stage proceedings.

(Defendant was represented by Assistant Defender Todd McHenry, Chicago.)

People v. Mescall, 403 Ill.App.3d 956, 935 N.E.2d 529 (2d Dist. 2010)

1. At the first stage of a post-conviction proceeding, the petitioner is required to present only the gist of a constitutional claim. A *pro se* petition should be reviewed leniently to allow borderline cases to proceed, as a *pro se* petitioner may be aware of the factual basis for a claim but unaware of the precise legal basis.

2. Defendant presented the gist of a constitutional argument - that trial and appellate counsel were ineffective for failing to argue that defendant should have been sentenced under the law which existed at the time of the offenses, rather than under an amended version of the statute which made consecutive sentences mandatory. The court held that there was an arguable basis for the claim in both the facts and the law - the statute in effect at the time of the offense mandated consecutive sentencing only if the crimes occurred as part of a single course of conduct, and defendant made an arguable showing that such a finding would have

been contrary to the evidence. Furthermore, there was a reasonable basis to argue that appellate counsel was ineffective for failing to raise the issue, which was apparent from the record.

The court rejected the argument that defendant raised a different issue in the trial court - that the trial court failed to find that the offenses were part of a single course of conduct. In view of the leniency with which *pro se* petitions are reviewed at first stage proceedings, the petitioner raised the gist of the ineffectiveness argument which he presented on appeal where he claimed that the trial court failed to make an adequate finding and that counsel failed to notice that a more lenient law should have been applied.

The court rejected the trial court's holding that even if consecutive sentences were not mandatory, no error occurred because the trial court could have imposed discretionary consecutive sentences. The record showed that the consecutive sentences were based on the judge's belief that they were mandatory, and not as a matter of discretion. Furthermore, because the judge who ruled on the post-conviction petition was not the sentencing judge, it cannot be presumed that discretionary consecutive sentences would have been imposed.

3. Generally, post-conviction petitions are subject to the *res judicata* doctrine. Thus, issues that were previously decided may not be relitigated. The court held that one of the post-conviction ineffective assistance claims – that counsel had failed to challenge a defective information at trial and on direct appeal – was not the same as a §2-1401 claim that the defective charging instrument rendered the defendant's conviction void. Because the issue of ineffective assistance was not litigated in the §2-1401 proceeding, *res judicata* did not apply.

(Defendant was represented by Assistant Defender Yasemin Eken, Elgin.)

People v. Parker, 2012 IL App (1st) 101809 (No. 1-10-1809, 6/29/12)

1. A court may dismiss a post-conviction petition at the first stage of the proceeding as frivolous or patently without merit only if it has no arguable basis in law or fact, which means that it is based either on an indisputably meritless legal theory or a fanciful factual allegation.

2. The absence of a notarized affidavit is not an appropriate basis for a first-stage dismissal. The purposes of the Post-Conviction Hearing Act would be hindered by preventing petitions that are neither frivolous nor patently without merit from advancing to the second stage due to the technicality of a lack of notarization. At the second stage, the State will have an opportunity to object to the lack of notarization, and appointed counsel will be able to assist the petitioner in arranging for notarization.

An affidavit from a co-defendant supporting defendant's claim of actual innocence was not notarized. Because the petition was dismissed at the first stage of the proceedings, the absence of notarization was not a basis on which the court could affirm the first-stage dismissal.

3. The wrongful conviction of an innocent person violates due process. Ill. Const. 1970, art. I, §2. A defendant can therefore raise a freestanding claim of actual innocence based on newly-discovered evidence in a post-conviction proceeding. The claim requires a showing that the evidence was (1) newly discovered in that it has been discovered since trial and could not have discovered sooner through due diligence; (2) material and not merely cumulative; and (3) of such a conclusive character that it would probably change the result on retrial.

A co-defendant's affidavit can constitute newly-discovered evidence even though the co-defendant's identity was previously known to the defendant. The co-defendant has a Fifth Amendment right to avoid self-incrimination and no amount of diligence can force him to violate that right should he choose not to do so.

Defendant's petition supported by the co-defendant's affidavit stated a non-frivolous

claim of actual innocence based on newly-discovered evidence. Defendant did not discover the affidavit until after trial and could not have discovered it earlier because of the co-defendant's Fifth Amendment privilege. The affidavit, if credited, completely exculpated defendant. It stated that defendant had not been present and played no part in the murder. No physical evidence or eyewitness testimony inculpated defendant in the offense. The primary evidence against him was a confession obtained after multiple interrogations and 15 hours in custody, while he was a high school student who had no prior record, no juvenile record, no gang affiliation, and had been held back in school. Defendant's petition is thus not based on an indisputably meritless legal theory or a fanciful factual allegation.

The Appellate Court reversed the first-stage dismissal of defendant's post-conviction petition and remanded for further proceedings.

(Defendant was represented by Assistant Defender Jessica Hunter, Chicago.)

People v. Perez, 2013 IL App (2d) 110306 (No. 2-11-0306, 3/19/13)

725 ILCS 5/122-2.1(a)(2) provides that "within 90 days after the filing and docketing" of a post-conviction petition, the trial court "shall examine such petition and enter an order" either summarily dismissing the petition or setting it for second stage proceedings. The court concluded that a summary dismissal order is effective when it is "expressed publicly, in words and at the situs of the case."

Where the record did not reflect that any party, counsel, or court personnel other than the judge were present when the trial court signed a summary dismissal order, the order did not take effect until it was "filed" by the circuit clerk. Because the order was not filed until 91 days after the petition was filed, the summary dismissal was untimely and therefore void. The summary dismissal order was reversed and the cause remanded for second stage proceedings.

In dissent, Justice Hudson found that §122-2.1(a)(2) creates a specific procedure for use in post-conviction cases. Therefore, the trial court need only "enter" an order of summary dismissal within 90 days of filing, so long as the order is served on the petitioner within 10 days after its entry.

(Defendant was represented by Assistant Defender Alison Shah, Chicago.)

People v. Sparks, 393 Ill.App.3d 878, 913 N.E.2d 692 (1st Dist. 2009)

1. A *pro se* post-conviction petition may be summarily dismissed as frivolous or patently without merit only if it has no arguable basis either in law or fact. (**People v. Hodges**, ___ Ill.2d ___, ___ N.E.2d ___ (2009) (No. 1-05-0767, 7/15/09)). A petition which lacks an arguable basis in law or fact is one based on an indisputably meritless legal theory or a fanciful factual allegation. An example of an indisputably meritless legal theory is one which is completely contradicted by the record. "Fanciful factual allegations" include allegations that are fantastic or delusional.

A post-conviction petitioner may pursue a claim of actual innocence based on newly discovered evidence where the supporting evidence is new, material, and non-cumulative, and is of such conclusive character as to likely change the result on retrial. Newly discovered evidence must have been unavailable at trial and incapable of having been discovered at that time by the exercise of due diligence.

2. Defendant, who was convicted of first degree murder after raising a self-defense claim and testifying that the offense occurred when the decedent and his companion attempted to rob the defendant, filed a *pro se* post-conviction petition raising a claim of actual innocence. Attached to the petition was an affidavit from a previously unknown eyewitness.

The court concluded that the affidavit alleged the gist of an argument of newly

discovered evidence supporting a claim of actual innocence. The allegations of the affidavit were not fantastic or delusional, and the witness's credibility was not a factor which could be considered at the first stage of post-conviction proceedings.

In addition, there was no reason to believe that defendant should have known of the eyewitness where the affidavit stated that the witness observed the incident from the foyer of a nearby apartment building. There was also no reason to believe that defendant could have discovered the witness through due diligence at the time of trial; the court noted that police knew of the witness, and that one of defendant's post-conviction claims was that the State failed to disclose her existence under **Brady v. Maryland**.

(Defendant was represented by Assistant Defender Peter Sgro, Chicago.)

People v. Steward, 406 Ill.App.3d 82, 940 N.E.2d 140 (1st Dist. 2010)

1. To have standing to file a post-conviction petition, one must be "imprisoned in the penitentiary." 725 ILCS 5/122-1(a). A proceeding under the Sexually Violent Persons Commitment Act (725 ILCS 207/1) is civil in nature and can result in commitment to the Department of Human Services. A person who is imprisoned under the SVPCA is not imprisoned in the penitentiary within the meaning of the Post-Conviction Hearing Act and does not have standing to file a post-conviction petition.

2. Defendants who are on MSR or released on an appeal bond are considered to be "imprisoned in the penitentiary" and have standing to file a post-conviction petition. An amendment to the SVPCA effective 1/1/07 provides that the filing of a SVPCA petition tolls the running of a term of mandatory supervised release until dismissal of the petition, a finding that defendant is not a sexually violent person, or the discharge of the defendant under the Act. 725 ILCS 207/15(e). The tolling of the MSR term did not confer standing on defendant to file a post-conviction petition. First, the amendment does not apply to defendant because it did not become effective until nine months after defendant was placed on MSR and defendant had actually been discharged from MSR before he filed his post-conviction petition. Second, even if the amendment did apply, defendant must be currently on MSR, not have his MSR tolled, to be considered imprisoned in the penitentiary within the meaning of the PCHA.

3. Standing is defined as a party's right to make a legal claim or seek judicial enforcement of a duty or right. The legislature intended that the phrase "frivolous or patently without merit" in the Post-Conviction Hearing Act encompass the issue of standing because "merit" means legal significance and standing. **People v. Boclair**, 202 Ill.2d 89, 789 N.E.2d 734 (2002). Standing, unlike timeliness, is an inherent element of the right to bring a post-conviction petition, and absence of standing may therefore be the basis for a first-stage dismissal of a petition.

4. A post-conviction petition may be summarily dismissed as frivolous and patently without merit only if it has no arguable basis in fact or in law. An indisputably meritless legal theory is one that is completely contradicted by the record.

Defendant's claim of newly-discovered evidence of actual innocence based on a recantation by the complainant of her trial testimony is meritless because it is contradicted not only by the record, but also by the complainant's post-trial deposition that defendant asserted constituted a recantation. At trial, complainant testified that defendant grabbed her on the street, forced her into his apartment, and forced her to have sexual relations. In her post-trial deposition, complainant testified that she willingly went to defendant's apartment and twice voluntarily engaged in intercourse with defendant. But her testimony did not change with respect to her allegation that a fight ensued when she refused to perform oral sex on defendant, and that he used a hammer on her in an attempt to force her to perform an act

of oral sex. Under either version, defendant committed aggravated battery and attempt aggravated criminal sexual assault.

5. A prisoner confined in an Illinois Department of Corrections facility can be assessed court costs and fees for the filing of a frivolous post-conviction petition. 735 ILCS 5/22-105. A defendant confined to a Department of Human Services facility as a sexually violent person may not be assessed those costs and fees because he is not confined in the IDOC.

People v. Terry, 2012 IL App (4th) 100205 (No. 4-10-0205, 1/31/12)

The Post-Conviction Hearing Act provides that '[t]he proceeding shall be commenced by filing with the clerk of the court in which the conviction took place a petition (together with a copy thereof) verified by affidavit. 725 ILCS 5/122-1(b).

Persuaded by the First District decision in **People v. Henderson**, 2011 IL App (1st) 090923, the Fourth District held that the failure to attach a notarized verification affidavit to a post-conviction petition is not a reason to summarily dismiss the petition at the first stage. The court declined to adopt the contrary approach of the Second District in **People v. Carr**, 407 Ill.App.3d 513, 944 N.E.2d 859 (2d Dist. 2011).

An affidavit filed pursuant to the Act must be notarized. But the Act allows for summary dismissal at the first stage only where the defect renders the petition frivolous and patently without merit. Those terms do not encompass there mere lack of notarization of a verification affidavit. The technicality of not having a notarized affidavit is a more appropriate objection at the second stage.

(Defendant was represented by Assistant Defender Larry Bapst, Springfield.)

People v. Trujillo, 2012 IL App (1st) 103212 (No. 1-10-3212, 5/8/12)

At the first stage of post-conviction proceedings, a petition will be dismissed only if it has no arguable basis in fact or in law. Where the record rebuts the allegations in a petition, summary dismissal is proper. A first-stage petition alleging ineffective assistance of counsel must show that it is arguable that counsel's performance fell below an objective standard of reasonableness and that defendant was prejudiced by counsel's performance.

Defendant filed a *pro se* post-conviction petition supported by his affidavit alleging that defense counsel failed to communicate a plea offer to him, that he would have accepted the offer had he known of it, and that he only learned of the offer from a letter his counsel sent to the ARDC, a copy of which was appended to the petition, in which counsel represented that the State had offered defendant a six-year sentence if he would plead guilty, but defendant rejected the offer.

If counsel had failed to inform defendant of the plea offer, it is arguable that his assistance was deficient. Because defendant alleged that he would have accepted the offer had he been advised of it, he has arguably been prejudiced by counsel's deficient performance if he can establish that the offer was not communicated to him. Therefore, the claim did not lack legal merit.

The petition also did not lack factual merit as it was supported by defendant's affidavit and counsel's letter to the ARDC. The allegations were not rebutted by the record. Counsel's letter stating that he communicated the offer to the defendant is outside the actual trial record. Nothing in the report of proceedings supports the allegation in counsel's letter that the trial court admonished defendant about the plea offer. Any contradictions between counsel's letter and defendant's allegations cannot be resolved at the first-stage of the proceedings because they involve credibility determinations that cannot be resolved on the pleadings.

Because the petition states an arguable claim of ineffective assistance of counsel, the

dismissal order was reversed and the cause remanded for second-stage proceedings.

(Defendant was represented by Assistant Defender Jeffrey Svehla, Chicago.)

People v. Turner, 2012 IL App (2d) 100819 (No. 2-10-0819, modified 7/11/12)

1. The Post-Conviction Hearing Act provides that the proceeding shall be commenced by the filing of a petition verified by affidavit. 725 ILCS 5/122-1(b). An affidavit filed pursuant to the Act must be notarized to be valid. Lack of notarization is not cured by certification under §1-109 of the Code of Civil Procedure. 735 ILCS 5/1-109.

There is a split of authority among the Appellate Courts as to whether a petition lacking a notarized affidavit may be dismissed for that reason at the first stage of a post-conviction proceeding. Regardless of this split, the State was permitted to raise the issue for the first time on appeal from a first-stage dismissal because that was its earliest opportunity to do so. At first-stage proceedings, the court acts without input from the State.

Raising the issue for the first time on appeal is not permissible in an appeal from a second-stage dismissal. If the State raises the issue in the trial court, it can be addressed and resolved. Appointed counsel has a duty to remedy procedural defects in the petition. The State procedurally defaults the issue of lack of notarization by failing to raise it in its motion to dismiss.

2. The State did not move to dismiss defendant's petition on the ground that the affidavit accompanying the petition was not notarized. It argued for the first time on appeal that dismissal of the petition could be affirmed on the ground that the affidavit was not notarized. The State forfeited this challenge by failing to raise it in its motion to dismiss, which would have given defendant the opportunity to remedy the defect and promoted efficient disposition of the petition.

3. Addressing the split of authority regarding whether the absence of a notarized affidavit is a basis for a first-stage dismissal, the Appellate Court opined that it was not. The State's ability to forfeit the defect makes an invalid affidavit akin to a petition's untimeliness, which likewise is not a basis for a first-stage dismissal.

The Appellate Court nonetheless affirmed the dismissal of the petition, finding the allegations insufficient to merit an evidentiary hearing.

(Defendant was represented by Assistant Defender Jessica Pamon, Chicago.)

People v. Vinokur, 2011 IL App (1st) 090798 (No. 1-09-0798, 8/24/11)

1. The Post-Conviction Hearing Act provides that "[a]ny person imprisoned in the penitentiary may institute a proceeding under this Article." 725 ILCS 2/122-1(a). A person is "imprisoned in the penitentiary" for the purposes of the Act when his liberty is actually constrained by the State. When defendant is no longer constrained, such as when he has fully served his sentence, he has no standing to file a petition.

In the context of a guilty plea, the meaning of "imprisoned in the penitentiary" includes only the direct consequences of the plea, and does not include collateral consequences not related to the length or nature of the sentence. Deportation is a collateral consequence of a plea, and does not confer standing where defendant has fully served his sentence. It is irrelevant that the court, rather than defense counsel, misinformed the defendant of the deportation consequences of his plea. Defendant is not left without a remedy, as he could have filed a petition while he was serving the sentence imposed on his conviction.

2. At the first stage of post-conviction proceedings, a trial court may dismiss a petition if it is "frivolous or patently without merit." 725 ILCS 5/122-2.1(a)(2). "Merit" means "legal

significance, standing, or importance." **People v. Boclair**, 202 Ill.2d 89, 789 N.E.2d 732 (2002). Because a petition filed by a person who has no standing lacks merit, standing can be the basis for a first-stage dismissal.

(Defendant was represented by Assistant Defender Rachel Kindstrand, Chicago.)

People v. Wright, 2013 IL App (4th) 110822 (No. 4-11-0822, 4/17/13)

1. At the first stage in a post-conviction proceeding, the circuit court acts strictly in an administrative capacity by screening out those petitions that lack legal substance or are obviously without merit. A petition may be dismissed at the first stage only if it has no arguable basis in fact or in law, *i.e.*, it is based on an indisputably meritless legal theory or a fanciful factual allegation. The mere unlikelihood of a factual proposition does not make that proposition fanciful. A court should not dismiss a petition unless its lack of legal or factual merit is certain and indisputable.

2. A court may dismiss a petition at the first stage based on *res judicata*. Collateral estoppel is a branch of *res judicata*. Collateral estoppel, or issue preclusion, prevents relitigation of issues of law or fact that have been previously litigated and decided in an action involving the same parties or their privies.

3. Defendant claimed in his post-conviction petition that his trial counsel was ineffective for failing to preserve as error the trial court's consideration of an invalid aggravating factor, and appellate counsel was ineffective in failing to raise this ineffectiveness claim on appeal. On direct appeal, defendant had argued that the trial court had considered the invalid aggravating factor, but the Appellate Court found that this error was forfeited and refused to find plain error because defendant's sentencing hearing was fair despite the error.

That finding on direct appeal collaterally estopped defendant from claiming in a post-conviction petition that trial and appellate counsel were ineffective. Defendant could succeed on those ineffectiveness claims only if counsels' deficient performance caused him prejudice. Defendant suffered no prejudice if his sentencing hearing was fair.

4. Although the circuit court had not dismissed defendant's petition on collateral estoppel grounds, the Appellate Court can affirm the dismissal on any basis that has support in the record. Because the Appellate Court's conclusion on direct appeal that the sentencing hearing was fair despite the mention of an invalid aggravating factor meant that the claims of ineffective assistance of counsel were not arguable, the Appellate Court affirmed the dismissal order.

(Defendant was represented by Assistant Defender Jay Wiegman, Ottawa.)

Top

§9-1(e)(2)
Gist of a Constitutional Claim

People v. Allen, 2015 IL 113135 (No. 113135, 5/21/15)

1. At first-stage proceedings on a post-conviction petition, the court considers the petition's substantive merit rather than its compliance with procedural rules. The threshold to avoid summary dismissal is low, in recognition of the fact that many petitions are drafted by inmates without the assistance of an attorney. If a petition alleges sufficient facts to state the gist of a constitutional claim, first-stage dismissal is improper. A petition which presents legal points that are arguable on their merits may not be summarily dismissed.

Despite the low threshold to avoid first-stage dismissal, the *pro se* petitioner must supply a sufficient factual basis to show that the allegations in the petition are "capable of objective or independent corroboration." Thus, a petition must be accompanied by supporting evidence, which may include "affidavits, records, or other evidence." 725 ILCS 5/122-2.

A supporting affidavit is separate from a verification affidavit, which also must accompany the petition. 725 ILCS 5/122-1(b). The purpose of the verification affidavit is to confirm that the allegations are brought truthfully and in good faith.

In **People v. Collins**, 202 Ill. 2d 59, 782 N.E.2d 195 (2002), the court affirmed the first stage dismissal of a post-conviction petition which had a verification affidavit but lacked any supporting evidence. By contrast, in **People v. Hommerson**, 2014 IL 115638, the court concluded that it is improper to summarily dismiss a petition solely because it lacks a verification affidavit. Instead, if a petition alleges the gist of a constitutional violation, the lack of a verification affidavit should be raised by the State at the second-stage of the proceedings, after counsel has been appointed and had an opportunity to file an amended petition.

2. Defendant's *pro se* petition contained a signed statement by a person named Langford. The statement took responsibility for the offense and stated that defendant had not been involved. The statement asserted that it was made under penalty of perjury, and contained several fingerprints at the bottom. However, it was not notarized. In summarily dismissing the petition at the first stage, the trial court stated that the statement did not qualify as an "affidavit" because it had not been notarized.

The Supreme Court acknowledged that a statement is an "affidavit" only if it has been sworn before a person with legal authority to administer oaths. The lack of notarization of a supporting affidavit does not justify summary dismissal of the petition, however, because supporting evidence is not required to be in the form of an affidavit and the presence or absence of notarization does not prevent the trial court determining whether the "gist" standard for first stage proceedings is satisfied.

Thus, a petition may not be summarily dismissed solely for lack of notarization of an evidentiary affidavit. The court noted, however, that the State would be able to raise the lack of notarization of an evidentiary affidavit at second-stage proceedings if counsel was unable to obtain a properly notarized affidavit. At that time, the absence of notarization might be an adequate basis on which the trial court could dismiss the petition.

3. The court also found that the petition was not frivolous and patently without merit for reasons other than the lack of notarization of Langford's statement. Although the statement was "bare-bones," it was sufficient to show that the petition's allegations were subject to corroboration. The court criticized the trial court for evaluating credibility at the first stage instead of focusing on whether the petition set forth the gist of a constitutional issue.

The court noted that a petition claiming actual innocence based on newly discovered evidence must present supporting evidence that is new, noncumulative, material, and of such character as to change the result of the trial. However, the court found that there was no reason to believe that defendant could have obtained Langford's statement at an earlier date, even if he was aware of Langford's name at the time of trial, where both defendant and Langford were incarcerated and Langford would presumably be reluctant to confess to a murder.

Because the petition made an adequate showing that evidence was available to support the petition's allegations, the trial court erred by ordering summary dismissal. The order was reversed and the cause remanded for second stage proceedings.

(Defendant was represented by Assistant Defender Brian McNeill, Chicago.)

People v. Brown, 236 Ill.2d 175, 923 N.E.2d 748 (2010)

1. The summary dismissal of a post-conviction petition is reviewed *de novo*. To survive first stage dismissal, the petitioner must present the "gist" of a constitutional violation. A "gist" requires only a limited amount of factual detail, without legal argument or citations.

A post-conviction petition fails to present the "gist" of a constitutional violation if it has no arguable basis either in law or in fact. A petition lacks an arguable basis in law or fact if it is based on an "indisputably meritless legal theory" or "fanciful factual allegations." One example of an "indisputably meritless legal theory" is a claim that is completely contradicted by the record. "Fanciful factual allegations" include those that are "fantastic or delusional."

2. The court concluded that a *pro se* post-conviction petition challenging a conviction for attempt murder of a police officer was sufficient to survive summary dismissal. The allegation that trial counsel was ineffective for failing to request a fitness hearing was not based on an indisputably meritless legal theory or fanciful allegations; defendant submitted medical records indicating that he had been diagnosed as mentally ill and prescribed psychotropic medications, the petition included affidavits from defendant's mother and aunt stating that they had informed defense counsel of defendant's mental illness and use of psychotropic medications, and the mother's affidavit indicated that she had told counsel of defendant's history of suicide attempts.

Furthermore, the claim was not rebutted by the record. Although defense counsel said at sentencing that he had no knowledge of defendant's use of psychotropic medication, his statements were contradicted by the affidavits attached to the post-conviction petition and undermined by defendant's claim that counsel spent only a few minutes with him before each hearing and was distracted by his father's death. The court also stressed that counsel's statements did not positively rebut defendant's allegations concerning his mental illness, suicide attempts, and inability to understand the trial proceedings due to the effect of psychotropic medications.

Similarly, although the trial court said at sentencing that it had no *bona fide* doubt of defendant's fitness, that statement was not determinative of the issue of fitness to stand trial and did not positively rebut the defendant's allegations.

In addition, defendant made a statement at sentencing in which he stated that he had been depressed at the time of the offense, had threatened officers because he wanted to force them to kill him, and had been under the influence of psychotropic medications at the time of trial. The court noted that because the sentencing occurred more than a month after trial, defendant's lucidity at sentencing did not establish that he had been fit at the time of trial. In addition, defendant's statements at sentencing did not contradict his statements concerning the effect of the psychotropic medication on his ability to understand the trial proceedings or rebut the evidence of a *bona fide* doubt of fitness.

At most, the record created a factual dispute concerning a *bona fide* doubt of petitioner's fitness to stand trial. Because the allegations of the petition are to be taken as true at the first stage of the proceedings, and weight and credibility are not at issue, defendant clearly alleged the "gist" of a constitutional issue. Therefore, the post-conviction petition should have proceeded to a second stage proceeding.

3. For two reasons, the court criticized the dissent's finding that the petition should have been summarily dismissed. First, the majority stated that the dissent erroneously applied capital and second-stage precedents to the summary dismissal stage. Second, the majority stated that the dissent failed to accept the allegations of the petition as true for purposes of deciding whether summary dismissal was appropriate.

(Defendant was represented by Assistant Defender Yasaman Navai, Chicago.)

People v. Cathey, 2012 IL 111746 (No. 111746, 3/22/12)

At the first stage of post-conviction proceedings, a petition alleging ineffective assistance of counsel may not be summarily dismissed if: (1) it is arguable that counsel's performance fell below an objective standard of reasonableness, and (2) it is arguable that the defendant was prejudiced. **Strickland v. Washington**, 466 U.S. 668 (1984).

1. It was arguable that defense counsel's performance was deficient due to his failure to raise on appeal the issue of the trial court's delayed ruling on a motion *in limine* to exclude evidence of defendant's prior convictions per **People v. Montgomery**, 47 Ill. 2d 910, 268 N.E.2d 695 (1971). Counsel was aware of the delayed-ruling issue and it was frequently litigated during the pendency of defendant's trial and direct appeal.

Counsel had represented defendant at trial and had informed the trial court that the timing of the ruling would affect defendant's decision whether to testify. Counsel told the court he would recommend that defendant not testify if his priors could be used to impeach him, even though he would not be able to present a defense without his testimony. When the court allowed the State to use the prior convictions to impeach defendant after he testified, defense counsel pointed out that he had made a strategic decision not to question a critical prosecution witness about his conviction in order to prevent defendant's priors from being revealed to the jury. Counsel had relied on the court's statement in deferring its ruling that whether defendant's convictions were ultimately admitted would depend on "how much impeachment is used on other witnesses." Given counsel's own emphasis on the importance of the issue, nothing explains why counsel failed to raise it on appeal.

The Illinois Supreme Court did not address the delayed-ruling issue until after defendant's direct appeal was final in **People v. Patrick**, 233 Ill. 2d 63, 908 N.E.2d 1 (2009). But the relevant focus to determine whether a reasonable attorney should have challenged the court's delayed ruling is on the state of the law at the time of defendant's trial and appeal. During that time period, several appellate decisions addressed the issue. Two Appellate Court decisions, including the companion case to **Patrick**, found fault with a decision to delay ruling, as did courts in other jurisdictions, which were later cited by the Illinois Supreme Court in **Patrick**.

2. It is arguable that defendant was prejudiced by his counsel's failure to raise the delayed-ruling issue. The Illinois Supreme Court allowed the petition for leave to appeal in **Patrick** and its companion case months before denying defendant's petition for leave to appeal from his direct appeal. If the delayed-ruling issue had been raised on direct appeal, regardless of which party prevailed in the Appellate Court, a petition for leave to appeal would have been granted or held in abeyance pending the court's decision in **Patrick**. The court noted that the State had not responded to defendant's argument that given the similarities between his case and **Patrick**, he would have benefitted from the Supreme Court's decision in **Patrick**.

3. The court also vacated the portion of the Appellate Court's decision holding that **Patrick** does not apply retroactively to cases on collateral review. The *pro se* petition did not cite to **Patrick** or contend that a **Patrick** violation may be raised for the first time on collateral review. As the issue was not raised in the petition, it should have not been reached by the Appellate Court.

Because defendant's ineffective-assistance-of-counsel claim was not frivolous and patently without merit, the Supreme Court reversed both the appellate and the circuit courts and remanded for second-stage post-conviction proceedings.

(Defendant was represented by Assistant Defender David Holland, Chicago.)

People v. Hodges, 234 Ill.2d 1, 912 N.E.2d 1204 (2009)

1. To survive dismissal at the first stage of post-conviction proceedings, a *pro se* defendant need allege only the "gist" of a constitutional claim. A *pro se* petitioner is not excused for providing any factual detail concerning the alleged constitutional violation, however, and must attach affidavits or other evidence supporting the petition or explain why such items are not attached. Evidentiary support for a post-conviction petition is required to show that the petition's allegations are capable of objective or independent corroboration.

2. When determining whether a *pro se* post-conviction petition is subject to dismissal as frivolous, the trial court must determine whether the "gist" of the claim alleged by the defendant is frivolous or patently without merit. Although the terms "frivolous" and "patently without merit" are not defined by the Post-Conviction Hearing Act, a claim is "frivolous or patently without merit" if it has no arguable basis in either law or fact. Thus, a petition is subject to first-stage dismissal if it is based on "an indisputably meritless legal theory or a fanciful factual allegation."

A claim that is completely rebutted by the record is one example of an indisputably meritless legal theory. Similarly, "[f]anciful factual allegations include those which are fantastic or delusional."

3. Where the defendant alleged ineffective assistance of counsel because his attorney failed to investigate and present evidence which would have corroborated the defenses presented at trial, the petition was subject to summary dismissal only if it was not "arguable" that counsel's performance fell below an objective standard of reasonableness and caused prejudice. Because the defendant specifically named three witnesses whose testimony had not been investigated, summarized the testimony the witnesses would have given, and attached the witnesses' affidavits to the petition, and because none of the allegations could be described as fantastic or delusional, the petition had an arguable basis in fact.

Furthermore, the petition had an arguable basis in law where the testimony of the potential witnesses – that the decedent was armed at the time of the offense – at least arguably supported the defense that defendant acted with an unreasonable belief in self-defense. The court rejected the State's argument that the court need consider only the theories of relevance on which the petition specifically focused – "[t]he State's strict construction of defendant's petition is inconsistent with the requirement that a *pro se* petition be given a liberal construction."

Because it was at least arguable that defense counsel was ineffective for failing to investigate and present evidence, the trial court erred by summarily dismissing the post-conviction petition. The dismissal order was reversed and the cause remanded for second-stage proceedings.

(Defendant was represented by Assistant Defender Patrick Cassidy, Chicago.)

People v. Petrenko, 237 Ill.2d 490, 931 N.E.2d 1198 (2010)

Generally, claims that could have been raised on direct appeal are considered forfeited and cannot be raised on post-conviction. Claims that are not raised in the post-conviction are forfeited and cannot be raised on appeal.

Based on these forfeiture principles, the court found that a post-conviction claim that trial counsel was ineffective for failing to make a **Franks** motion was forfeited because it could have been raised on direct appeal, but was not. However, a claim that appellate counsel was ineffective for failing to argue trial counsel's ineffectiveness was not waived.

The court also concluded that a different **Franks**-related claim of ineffectiveness was forfeited because the facts underlying that claim, although mentioned in the post-conviction petition, were not raised in the context of the claim that there were facts omitted from the

affidavit that were material to the finding of probable cause.

The court affirmed the appellate court's affirmance of the summary dismissal of defendant's *pro se* post-conviction petition.

(Defendant was represented by Assistant Defender Steve Wiltgen, Elgin.)

People v. Tate, 2012 IL 112214 (No. 112214, 11/29/12)

1. A post-conviction proceeding contains three stages. At the first stage, the circuit court must independently review the petition, taking the allegations as true, and determine whether the petition is frivolous or patently without merit. A petition is frivolous or patently without merit only if it has no arguable basis in fact or in law. There is no involvement by the State in this initial stage. The court acts strictly in an administrative capacity by screening out those petitions that are without legal substance or are obviously without merit.

Most petitions for post-conviction relief are filed *pro se* by persons who are incarcerated and lack the means to hire their own attorney. At the first stage of the proceedings, *pro se* petitions, as well as petitions filed by attorneys, are judged by first-stage standards.

2. An ineffective-assistance claim based on what the record discloses counsel did in fact do is subject to the usual rules of procedural default. But an ineffectiveness claim based on what counsel ought to have done may depend on proof of matters that could not have been included in the record precisely because of the allegedly deficient representation. Therefore, a default may not preclude an ineffective-assistance claim based on what trial counsel allegedly ought to have done in presenting a defense.

Defendant did not forfeit his post-conviction claim of ineffective assistance of counsel for failing to include that claim in a post-trial motion. Defendant's claim was based on what counsel ought to have done at trial, not on what counsel did. The claim was based on the content of affidavits attached to the petition, which, as a result of counsel's allegedly deficient representation, could not have been included in the direct appeal record.

3. At the first-stage of post-conviction proceedings, a petition alleging ineffective assistance of counsel may not be summarily dismissed if (1) it is arguable that counsel's performance fell below an objective standard of reasonableness, and (2) it is arguable that the defendant was prejudiced.

Defendant's petition was supported by the affidavits of alibi witnesses and occurrence witness who attested that defendant was not the offender. These affidavits are sufficient to make an arguable claim of ineffective assistance of counsel. At trial, four eyewitnesses testified and identified defendant, but no murder weapon was recovered, no DNA or fingerprints linked defendant to the offense, and defendant did not confess. It is at least arguable that defendant was prejudiced by the absence of his witnesses and that counsel's performance fell below an arguable standard of reasonableness. It is inappropriate to consider at the first stage whether defense counsel made a strategic decision not to call the witnesses to testify.

People v. Barghouti, 2013 IL App (1st) 112373 (No. 1-11-2373, 12/20/13)

Based on its own review of the record, the Appellate Court identified a potential issue and asked the parties for further briefing. Following briefing, the Appellate Court held that defendant's first-stage post-conviction petition made an arguable claim of ineffective assistance of counsel where trial counsel failed to properly advise defendant of the sentencing consequences he faced if he rejected the State's plea offer.

1. To determine whether a first-stage post-conviction petition states the gist of a constitutional claim, the Appellate Court must review the entire petition in light of the trial

record. The court's review is not limited to those claims raised on appeal. Where the court on its own review of the record discovers a clear and obvious error not raised by appellate counsel, the court may properly request that the parties brief the issue.

Here, the court determined that defendant's post-conviction petition raised a meritorious claim that he rejected a plea bargain based on erroneous advice of his trial counsel. Since this claim had not been raised by appellate counsel, the court ordered the parties to brief the issue. The court rejected the State's argument that it had overstepped its authority by requesting briefing on this issue. After examining the Illinois Supreme Court's decisions in **Coleman**, 183 Ill.2d 366 (1998), **Edwards**, 197 Ill. 2d 239 (2001), and **Hodges**, 234 Ill. 2d 1 (2009)(all discussing the appropriate standards for reviewing first-stage dismissals), the Appellate Court concluded that nothing in those decisions limited review to those parts of the petition argued on appeal. Instead, those decisions allow the Appellate Court to address any issues it discovers during its own review of the record. A reviewing court has the authority to address unbriefed issues where a clear and obvious error exists in the lower court's proceedings.

2. A first-stage post-conviction petition alleging ineffective assistance of counsel may not be dismissed if it is arguable that (a) counsel's performance fell below an objective standard of reasonableness and (b) the defendant was prejudiced. A petition lacks an arguable basis in law or fact only if it is based on an indisputably meritless legal theory or a fanciful factual allegation.

Here, the petition alleged that trial counsel failed to advise defendant that if he rejected the State's 12-year plea offer and was found guilty, he faced a prison term of 6 to 60 years; instead counsel erroneously advised defendant that he would be eligible for probation. The petition also alleged that defendant would have accepted the State's offer if counsel had properly advised him of the correct sentencing range. These allegations made an arguable claim that trial counsel provided ineffective assistance and that defendant suffered prejudice because he would have accepted the plea bargain if he had received accurate advice about the sentencing range.

3. A defendant alleging ineffective assistance of trial counsel in a first-stage post-conviction petition does not need to obtain an affidavit from his counsel. Even without an affidavit, the reviewing court will still accept as true the defendant's allegations of ineffective assistance of counsel. Such affidavits are difficult or impossible to obtain and requiring them would contravene the settled standards requiring a reviewing court to accept as true all facts alleged in the petition unless contradicted by the record.

(Defendant was represented by Assistant Defender Robert Hirschhorn, Chicago.)

People v. Bowens, 2013 IL App (4th) 120860 (No. 4-12-0860, 11/19/13)

1. At the first stage of post-conviction proceedings, a petition withstands dismissal if it states the gist of a constitutional claim and has an arguable basis in law or fact. The "gist" standard is a low threshold which does not require a petitioner to set forth a constitutional claim in its entirety. Instead, only a limited amount of detail is necessary.

Under **Strickland**, a defendant establishes that his attorney was ineffective where counsel's performance fell below an objective standard of reasonableness and the deficient performance prejudiced the defense. Thus, a post-conviction petition alleging ineffective assistance may not be summarily dismissed if it is arguable that counsel's performance fell below an objective standard of reasonableness and arguable that the defendant was prejudiced.

2. At defendant's trial for attempt first degree murder, aggravated domestic battery,

and aggravated battery, the trial judge denied a motion to excuse the judge's husband from the jury for cause. The Appellate Court affirmed on direct appeal, noting that defense counsel's failure to exercise a peremptory challenge against the judge's husband amounted to acquiescence to the husband's jury service, and therefore waived the issue for appeal.

Defendant then filed a *pro se* post-conviction petition alleging that defense counsel was ineffective for failing to use an available peremptory challenge to remove the trial judge's husband from the jury. The judge who had presided over the jury trial also heard the post-conviction petition, and summarily dismissed the petition as frivolous and patently without merit.

The court concluded that the defendant raised the gist of a constitutional claim, finding that where the defense had peremptory challenges available, it was objectively unreasonable for counsel to allow the trial judge's husband to be seated as a juror. The court noted that other jurisdictions have found that regardless whether peremptory challenges are available, the constitutional right to a fair trial is violated where the spouse or close relative of the trial judge serves as a juror. In addition, the Illinois Supreme Court has held that the conviction must be reversed and a new trial awarded where the wrongful denial of a challenge for cause denies a defendant the right to a trial before a fair and impartial jury.

The court remanded the cause for second stage proceedings and directed the Chief Judge to appoint counsel for the defendant. Although the trial judge who presided over the trial would ordinarily hear any post-conviction petition, due to the nature of the allegations the Chief Judge was ordered to assign a judge other than the trial judge to conduct the post-conviction proceedings.

(Defendant was represented by Assistant Defender Colleen Morgan, Springfield.)

People v. Brown, 2014 IL App (4th) 120887 (No. 4-12-0887, 10/8/14)

1. A *pro se* post-conviction petition may be summarily dismissed as frivolous or patently without merit only if it has no arguable basis in law or fact. At the first stage of post-conviction proceedings, a defendant raising a claim of ineffective assistance of counsel need only establish that it is arguable that counsel's performance fell below an objective standard of reasonableness and he was arguably prejudiced as a result.

2. During his trial for the first-degree murder of two individuals, defendant asserted a claim of self-defense, but stated on the record that after consulting with his counsel, he did not want the jury instructed on second-degree murder. Defendant was found guilty of both murders and sentenced to natural life imprisonment.

Defendant filed a *pro se* post-conviction petition alleging ineffective assistance of trial counsel for misadvising him about the potential sentence for double murder. Defendant alleged that counsel informed him that he only faced 20-60 years of imprisonment if convicted of both murders. Defendant attached a letter from counsel written on the date of the guilty verdicts, in which counsel stated that the sentencing range was 20-60 years, with an additional 25 years for the firearm add-ons. Counsel also stated that life imprisonment was not a possible sentence in this case.

Defendant alleged that had he known he faced life imprisonment he would not have agreed with counsel's advice to forego tendering a second-degree murder instruction. The trial court dismissed defendant's petition as frivolous and patently without merit.

3. The Appellate Court held that defendant's *pro se* petition made an arguable claim of ineffective assistance. It was undisputed that defendant was subject to mandatory natural life imprisonment and counsel's letter clearly demonstrated that he advised defendant of the incorrect sentencing range.

Defendant had the right to decide whether to ask for second degree murder instructions. By providing defendant with incorrect advice about the sentence he faced, defendant's ability to make an informed decision regarding the jury instructions may have been impaired. Counsel's performance thus arguably fell below an objective standard of reasonableness.

The evidence at trial also supported giving the second-degree instruction and supported defendant's version of events. As such, it was arguable that there was a reasonable probability that if the jury had been instructed on second-degree murder, it would have convicted defendant of that offense rather than first-degree murder. It was thus arguable that defendant was prejudiced by counsel's incorrect advice.

Accordingly, the court found that it was at least arguable that defendant received ineffective assistance of counsel. The court reversed the dismissal of defendant's petition and remanded for second-stage proceedings.

(Defendant was represented by Assistant Defender Ryan Wilson, Springfield.)

People v. Cole, 2012 IL App (1st) 102499 (No. 1-10-2499, 9/21/12)

Under **People v. Jones**, 213 Ill. 2d 498, 821 N.E.2d 1093 (2004), claims that were not raised in the post-conviction petition may not be raised for the first time on appeal from the trial court's dismissal of that petition. The court concluded that the post-conviction petition here failed to raise a claim of ineffective assistance by appellate counsel because it made no explicit reference to appellate counsel's performance on direct appeal. The court also held that the petition could not be deemed to have raised an "implicit claim" of ineffective assistance of appellate counsel merely because it raised issues which had not been raised on direct appeal.

In a dissenting opinion, Justice Gordon argued that the petitioner raised ineffectiveness of appellate counsel where one of the opening paragraphs of the *pro se* petition complained of "attorney ineffectiveness" and then specifically described the petitioner's claims, without indicating whether the reference to ineffectiveness concerned trial or appellate counsel. The dissenting opinion criticized the majority for construing the phrase "attorney ineffectiveness" as necessarily referring only to actions by trial counsel.

The dissenting opinion also found that defendant's petition should not be deemed to have been a post-conviction petition at all, because it was filed after the petitioner's sentences had been vacated on direct appeal and the cause remanded for resentencing, but before the new sentencing hearing was held. Because the petitioner was not "convicted" until a new sentence was imposed, and the Post-Conviction Hearing Act provides a method by which persons under criminal sentences may raise constitutional claims, a petition filed before sentencing is not a post-conviction petition. Justice Gordon would have dismissed the petition without prejudice in recognition of the fact that the petitioner was entitled to file both a direct appeal after resentencing and a post-conviction petition if he failed to obtain relief on direct appeal.

(Defendant was represented by Assistant Defender Stephen Gentry, Chicago.)

People v. Coleman, 2011 IL App (1st) 091005 (No. 1-09-1005, 7/22/11)

Defendant asserted in his post-conviction petition that his trial counsel was ineffective where counsel prevented him from testifying and failed to advise petitioner that he had a right to testify. He specifically alleged that he spoke to counsel before trial and informed him that he "wanted to explain his innocence and asked his attorney if he could do so." His attorney told him that "it would be a bad idea for [him] to put [defendant] on the stand at trial because it [would] give the state an opportunity to bring up [defendant's] background, also because it will

be the police's word against [defendant's]."

1. Any claim of substantial denial of constitutional rights not raised in the original or amended petition is waived. The Appellate Court does not possess the Supreme Court's supervisory authority to recognize procedurally-defaulted claims. The proper course of action to take when appellate counsel discovers an error not raised by defendant during first-stage post-conviction proceedings is the filing of a successive petition alleging the newly-found claim.

Appellate counsel argued that the petition alleged that trial counsel misinformed defendant that his prior juvenile adjudications would be admissible for impeachment should defendant testify. This argument is not supported by a liberal reading of the allegations of the petition. The petition contains no reference to any juvenile adjudications. The court found it more likely that the reference to "background" referred to defendant's post-arrest statements, as it was connected in the petition to counsel's concern that it would be defendant's word against that of the police. Because appellate counsel went outside the allegations of the petition to argue that counsel advised defendant not to testify to prevent admission of his juvenile adjudications, that claim was defaulted and could not be reviewed on appeal.

2. The petition failed to state an arguable claim that defense counsel prevented defendant from testifying. As a general rule, advice not to testify is a matter of trial strategy that does not amount to ineffective assistance of counsel unless counsel refused to allow the defendant to testify. The allegations of the petition showed only that counsel gave his professional opinion, based on the evidence in the case, that it was a bad idea for defendant to take the stand, not that counsel gave defendant erroneous advice to dissuade him from testifying. That statement cannot form the basis for a claim that the advice was not objectively reasonable when trial counsel's statement to defendant amounts to no more than his professional opinion based on the circumstances of the case.

(Defendant was represented by Assistant Defender Bryon Reina, Chicago.)

People v. Coleman, 2012 IL App (4th) 110463 (No. 4-11-0463, 12/24/12)

Defendant filed a post-conviction petition claiming that: (1) defense counsel was ineffective for failing to call two witnesses who would have given exculpatory testimony, (2) the State committed a **Brady** violation by failing to disclose to the defense that police officers tested only one of the 15 bags of white powder found at the scene of the arrest before emptying all the bags into one large bag for testing by the crime lab, and (3) defense counsel was ineffective for entering a stipulation that the large bag contained 926 grams of cocaine. The trial court summarily dismissed the petition as frivolous and patently without merit, finding that to show prejudice under **Strickland** defendant was required to show that had the lab analyst been called to testify, he either would not have testified or would have testified differently from what was stated in the stipulation.

In a *pro se* motion to reconsider the summary dismissal, defendant submitted an affidavit from a private investigator who had interviewed the analyst who performed the testing. The affidavit stated that the analyst said he had not performed tests to determine the purity of the cocaine in the large bag of white powder. The analyst also described the decision of police to commingle the contents of the 15 bags as "bad evidence gathering." Although defendant did not submit an affidavit from the analyst, the investigator's affidavit stated that additional efforts to contact the analyst had been unsuccessful.

The Appellate Court reversed the order summarily dismissing the petition.

1. To survive summary dismissal, a post-conviction petition must state the "gist" of a constitutional claim. However, the "gist" standard describes the petitioner's burden in alleging a constitutional deprivation, not the legal standard to be applied by the trial court in

determining whether the petition should be summarily dismissed. In making that determination, the trial court must apply the "frivolous or patently without merit" standard.

A petition is patently without merit if it has no arguable basis in either law or fact. A petition lacks an arguable basis in law or fact when it is based on an indisputably meritless legal theory or a fanciful factual allegation. The fact that a factual proposition is unlikely does not make it frivolous or patently without merit. A petition should not be summarily dismissed unless the lack of legal or factual merit is indisputable.

2. The court found that the petition failed to present the gist of a constitutional violation concerning counsel's failure to call two witnesses to testify, because the only affidavit attached to the petition was that of the defendant, not the witnesses themselves. Although the Post-Conviction Hearing Act requires only that the petition be supported by affidavits, the court concluded that such affidavits should concern matters to which the affiant could testify if called as a witness. Although defendant's sworn affidavit described the anticipated testimony of the two witnesses whom defense counsel failed to call, the defendant would not be competent to testify to such testimony if called as a witness. Thus, the defendant's affidavit was insufficient to withstand summary dismissal, at least in the absence of an explanation why affidavits from the witnesses themselves were unavailable.

3. However, the court concluded that the petition showed an arguable case of ineffective assistance concerning counsel's agreement to the stipulation that the entire large bag contained cocaine. To allege the gist of a claim of ineffective assistance of counsel, the petitioner need not satisfy the **Strickland** standard of deficient performance and prejudice. Instead, at the first stage of proceedings a claim of ineffective assistance is sufficient if counsel's performance was arguably unreasonable and defendant was arguably prejudiced. An arguable allegation of prejudice exists if it could be reasonably argued that confidence in the outcome of the trial was undermined by counsel's deficient performance.

Here, defense counsel's stipulation relieved the State of a potentially serious problem. In order to aggregate the contents of the 15 bags and obtain a conviction for the cumulative weight, the State was required to prove beyond a reasonable doubt that each of the 15 bags contained cocaine. Because only one bag had been tested before the bags were commingled, the State would have been unable to carry this burden. By stipulating that the entire weight of the large bag's contents was cocaine, counsel's performance was arguably deficient and arguably undermined confidence in the outcome of the trial, especially in light of the investigator's affidavit that no purity test had been conducted.

The court noted that it need not resolve at this stage whether counsel was ineffective. Because the claim was arguable, it was clearly not frivolous or patently without merit. Thus, the petition should not have been summarily dismissed.

4. The court also found that the petition made an arguable **Brady** claim. Due process requires the State to disclose evidence that is favorable to the accused and material to either guilt or innocence. Evidence is material if there is a reasonable probability that had it been disclosed, the result of the proceeding would have been different. **Brady** evidence must be disclosed in adequate time to allow the defense to use the favorable material effectively in the preparation or presentation of its case.

The petition, supported by defendant's affidavit, alleged that the State did not inform the defense that a police officer had commingled 15 bags of white powder into one large bag after testing only one of the smaller bags. The record did not contradict this claim, because at trial both attorneys spoke of the commingling as a surprise to the defense. Under these circumstances, the **Brady** claim was arguable and therefore sufficient to survive first stage dismissal.

(Defendant was represented by Assistant Defender Allen Andrews, Springfield.)

People v. Dixon, 409 Ill.App.3d 915, 948 N.E.2d 786 (1st Dist. 2011)

1. Under **People v. Babbington**, 286 Ill.App.3d 724, 676 N.E.2d 1326 (1st Dist. 1997), participation by an alternate juror in jury deliberations constitutes plain error which causes substantial prejudice to the defendant. The court concluded that defendant's post-conviction petition failed to assert the gist of a meritorious issue under **Babbington**; the record rebutted the claim that an alternate had deliberated where the four verdict forms bore only the signatures of the 12 jurors, the alternate jurors had been instructed to remain in the courtroom when the jury retired to deliberate, and the only reason to believe that an alternate juror deliberated was the clerk's erroneous polling of an alternate. Under the circumstances, the alternate's affirmative answer to the polling question likely reflected only that he agreed with the verdict reached by the jury and not that he had participated in deliberations.

2. Furthermore, the post-conviction petition did not present the gist of a meritorious issue that appellate counsel was ineffective for failing to raise trial counsel's ineffectiveness. Although trial counsel failed to use a peremptory challenge against a prospective juror who eventually became the jury's foreperson, defendant could not show prejudice where, in light of the overwhelming evidence of guilt, there was no reasonable probability that the defendant would have been acquitted had the foreman not been part of the jury. Because defendant could not show that trial counsel was ineffective, appellate counsel's failure to raise the issue on direct appeal was not error.

(Defendant was represented by Assistant Defender Rebecca Levy, Chicago.)

People v. Henderson, 2014 IL App (2d) 121219 (No. 2-12-1219, 6/25/14)

1. A post-conviction petition presents a claim of actual innocence based on newly discovered evidence where the evidence is newly discovered, material rather than merely cumulative, and of such conclusive character as to probably change the result on retrial. Where a claim of actual innocence is raised in an initial post-conviction petition, the "gist of a constitutional issue" test applies. Such a petition must be advanced to the second stage if in light of the new evidence, "all of the facts and surrounding circumstances should be scrutinized more closely to determine guilt or innocence."

2. The court rejected the State's argument that the post-trial affidavit of a witness who at trial exercised his Fifth Amendment right does not qualify as newly discovered evidence because defendant was aware of the witness at the time of trial. The court stressed that defendant could not have forced the witness to testify at trial.

The court also criticized the State for asserting at trial that the witness could be prosecuted for his actions in an earlier altercation with defendant, declining to grant immunity, and then claiming in post-conviction proceedings that the witness's testimony was not newly discovered. The court stated:

> The State cannot have it both ways. It cannot seek to prevent defendant from obtaining testimony from a key witness . . . and then claim that this evidence could have been discovered sooner through the exercise of due diligence. No amount of diligence could have forced [the witness] to waive his fifth amendment right to avoid self-incrimination if [he] did not choose to do so during the trial.

3. The court also found that a retrial would likely have a different result if the affiant's testimony was considered. The witness was one of the victims of the shooting, and stated in

the affidavit that defendant had not been involved in the offense. Because the affidavit undermined the State's theory that defendant was the shooter, it provided an arguable basis for a claim of actual innocence.

In addition, none of the eyewitnesses identified defendant as the shooter and there was no physical evidence to link defendant to the shooting. Under these circumstances, the surviving victim's testimony exonerating defendant would arguably carry great weight with the trier of fact.

Because defendant presented the gist of a claim of actual innocence, the trial court's dismissal of the post-conviction petition was reversed and the cause remanded for second stage proceedings.

(Defendant was represented by Assistant Defender Kerry Bryson, Ottawa.)

People v. Mescall, 403 Ill.App.3d 956, 935 N.E.2d 529 (2d Dist. 2010)

1. At the first stage of a post-conviction proceeding, the petitioner is required to present only the gist of a constitutional claim. A *pro se* petition should be reviewed leniently to allow borderline cases to proceed, as a *pro se* petitioner may be aware of the factual basis for a claim but unaware of the precise legal basis.

2. Defendant presented the gist of a constitutional argument - that trial and appellate counsel were ineffective for failing to argue that defendant should have been sentenced under the law which existed at the time of the offenses, rather than under an amended version of the statute which made consecutive sentences mandatory. The court held that there was an arguable basis for the claim in both the facts and the law - the statute in effect at the time of the offense mandated consecutive sentencing only if the crimes occurred as part of a single course of conduct, and defendant made an arguable showing that such a finding would have been contrary to the evidence. Furthermore, there was a reasonable basis to argue that appellate counsel was ineffective for failing to raise the issue, which was apparent from the record.

The court rejected the argument that defendant raised a different issue in the trial court - that the trial court failed to find that the offenses were part of a single course of conduct. In view of the leniency with which *pro se* petitions are reviewed at first stage proceedings, the petitioner raised the gist of the ineffectiveness argument which he presented on appeal where he claimed that the trial court failed to make an adequate finding and that counsel failed to notice that a more lenient law should have been applied.

The court rejected the trial court's holding that even if consecutive sentences were not mandatory, no error occurred because the trial court could have imposed discretionary consecutive sentences. The record showed that the consecutive sentences were based on the judge's belief that they were mandatory, and not as a matter of discretion. Furthermore, because the judge who ruled on the post-conviction petition was not the sentencing judge, it cannot be presumed that discretionary consecutive sentences would have been imposed.

3. Generally, post-conviction petitions are subject to the *res judicata* doctrine. Thus, issues that were previously decided may not be relitigated. The court held that one of the post-conviction ineffective assistance claims – that counsel had failed to challenge a defective information at trial and on direct appeal – was not the same as a §2-1401 claim that the defective charging instrument rendered the defendant's conviction void. Because the issue of ineffective assistance was not litigated in the §2-1401 proceeding, *res judicata* did not apply.

(Defendant was represented by Assistant Defender Yasemin Eken, Elgin.)

People v. Munoz, 406 Ill.App.3d 884, 941 N.E.2d 318 (1st Dist. 2010)

1. Ordinarily, a defendant must satisfy the "cause and prejudice" test in order to file a second or successive post-conviction petition. "Cause" consists of an objective factor external to the defense which impeded counsel or the defendant from raising the claim in an earlier proceeding. "Prejudice" is shown where a constitutional error so infected the trial that the conviction violated due process.

A post-conviction petition which raises a viable claim of actual innocence is not required to satisfy the "cause" and "prejudice" test. To allege a claim of actual innocence based on newly discovered evidence, the defendant must show that the evidence is material, noncumulative, and likely to change the result of a retrial. In addition, the evidence could not have been discovered in a more timely manner with the exercise of due diligence.

2. Defendant's *pro se* post-conviction petition made a sufficient showing of actual innocence to dispense with the cause and prejudice requirement for his second post-conviction petition. The petition presented the affidavit of an eyewitness who was discovered some 20 years after the original murder trial. The affidavit identified a different person as the shooter, and said that defendant had not been at the scene. The affidavit also averred that the witness contacted two police officers after the offense and told them what he had seen. Although one of the officers testified at defendant's trial and the witness would have been willing to testify, the witness was not disclosed to the defense or contacted by the prosecution.

3. Defendant also made a sufficient showing of a meritorious issue to avoid summary dismissal. First, there was a sufficient showing that due diligence would not have disclosed the witness at an earlier time. Although defendant did not indicate how or when he learned of the witness, the affidavit was notarized by a Massachusetts notary public, indicating that at some point the witness left Illinois. Furthermore, the State not only failed to disclose the witness at the time of trial, but after he was convicted defendant unsuccessfully sought to obtain grand jury transcripts and police investigation reports by filing a mandamus action.

The court also concluded that defendant made a *prima facie* showing that the evidence was noncumulative and would likely have changed the result at trial. An eyewitness who exonerates the defendant does more than merely corroborate the defendant's alibi. In addition, although another eyewitness testified at trial that defendant was the shooter, that testimony was suspect because the witness had been shot during the incident, which occurred on a dark street, and the witness did not originally identify defendant as the shooter. Under these circumstances, after hearing the newly-discovered witness a reasonable trier of fact could conclude that defendant was not involved in the offense.

Because defendant's petition had an arguable basis in law and fact, the trial court erred by dismissing it as frivolous and patently without merit. The order denying defendant's request for leave to file a successive post-conviction was vacated and the cause remanded for further proceedings.

(Defendant was represented by Assistant Defender Jonathan Yeasting, Chicago.)

People v. Oliver, 2012 IL App (1st) 102531 (No. 1-10-2531, 5/9/12)

A post-conviction petition alleging ineffective assistance of counsel may not be summarily dismissed at the first stage of the proceedings if it is arguable that counsel's performance fell below an objective standard of reasonableness and it is arguable that defendant was prejudiced. A court assumes the truth of all facts alleged in the petition, unless the record contradicts the allegations.

Petitioner alleged in his *pro se* petition that his trial counsel's unauthorized waiver of his right to be present at a jury selection conference conducted in chambers amounted to ineffective assistance of counsel, and appellate counsel's failure to raise the issue of this

unauthorized waiver was ineffective assistance of appellate counsel. Because petitioner alleged that he had not authorized counsel to waive his appearance, counsel's on-the-record statement that she had consulted with defendant and she waived his appearance did not contradict petitioner's allegation.

The petition adequately stated a claim that trial counsel violated petitioner's constitutional right to be present at a critical stage of the proceedings by waiving his presence for part of jury selection. But the petition did not state the gist of a claim that his absence from those proceedings prejudiced him as it did not contain even a naked assertion that his absence led the court to empanel a biased jury. Without evidence that the jurors harbored any prejudice against petitioner, appellate counsel had no grounds to claim that petitioner's exclusion was reversible error.

The court affirmed the dismissal of the petition.

(Defendant was represented by Assistant Defender Robert Hirschhorn, Chicago.)

People v. Parker, 2012 IL App (1st) 101809 (No. 1-10-1809, 6/29/12)

1. A court may dismiss a post-conviction petition at the first stage of the proceeding as frivolous or patently without merit only if it has no arguable basis in law or fact, which means that it is based either on an indisputably meritless legal theory or a fanciful factual allegation.

2. The absence of a notarized affidavit is not an appropriate basis for a first-stage dismissal. The purposes of the Post-Conviction Hearing Act would be hindered by preventing petitions that are neither frivolous nor patently without merit from advancing to the second stage due to the technicality of a lack of notarization. At the second stage, the State will have an opportunity to object to the lack of notarization, and appointed counsel will be able to assist the petitioner in arranging for notarization.

An affidavit from a co-defendant supporting defendant's claim of actual innocence was not notarized. Because the petition was dismissed at the first stage of the proceedings, the absence of notarization was not a basis on which the court could affirm the first-stage dismissal.

3. The wrongful conviction of an innocent person violates due process. Ill. Const. 1970, art. I, §2. A defendant can therefore raise a freestanding claim of actual innocence based on newly-discovered evidence in a post-conviction proceeding. The claim requires a showing that the evidence was (1) newly discovered in that it has been discovered since trial and could not have discovered sooner through due diligence; (2) material and not merely cumulative; and (3) of such a conclusive character that it would probably change the result on retrial.

A co-defendant's affidavit can constitute newly-discovered evidence even though the co-defendant's identity was previously known to the defendant. The co-defendant has a Fifth Amendment right to avoid self-incrimination and no amount of diligence can force him to violate that right should he choose not to do so.

Defendant's petition supported by the co-defendant's affidavit stated a non-frivolous claim of actual innocence based on newly-discovered evidence. Defendant did not discover the affidavit until after trial and could not have discovered it earlier because of the co-defendant's Fifth Amendment privilege. The affidavit, if credited, completely exculpated defendant. It stated that defendant had not been present and played no part in the murder. No physical evidence or eyewitness testimony inculpated defendant in the offense. The primary evidence against him was a confession obtained after multiple interrogations and 15 hours in custody, while he was a high school student who had no prior record, no juvenile record, no gang affiliation, and had been held back in school. Defendant's petition is thus not based on an indisputably meritless legal theory or a fanciful factual allegation.

The Appellate Court reversed the first-stage dismissal of defendant's post-conviction petition and remanded for further proceedings.

(Defendant was represented by Assistant Defender Jessica Hunter, Chicago.)

People v. Ramirez, 371 Ill.App.3d 738, 863 N.E.2d 1141 (2d Dist. 2010)

In **People v. Hodges**, 234 Ill.2d 1, 912 N.E.2d 1204 (2009), the court held that a *pro se* post-conviction petition that has an arguable basis in fact or in law is not frivolous or patently without merit.

The defendant's petition alleged that he pled guilty because his attorney misled him to believe that the motion to suppress he had filed had no merit and that he could not appeal an adverse finding on the motion. The motion and the petition alleged that defendant's statement had been obtained in violation of his Fifth Amendment right to counsel. The petition was supported by the affidavit of counsel who represented defendant at the time of the interrogation, attesting that he had informed the police at the station that defendant was exercising his right to remain silent. The police obtained incriminating statements from defendant by subsequently wiring his mother and sending her to talk to him while he was incarcerated for a separate offense, and then questioning defendant themselves.

The Appellate Court originally affirmed the dismissal of defendant's *pro se* petition. The court had found these allegations frivolous because the State had other evidence that likely would have led to a conviction and therefore, even if the motion to suppress had been granted, defense counsel would have advised defendant to plead guilty. After the Supreme Court remanded for reconsideration in light of **Hodges**, the court concluded that the allegations had an arguable basis in fact and law. The allegation that defendant asserted his right to counsel was supported by counsel's affidavit and not contradicted by the record. The court also concluded that there was also an arguable Sixth Amendment violation because the statements were obtained after defendant was indicted. There was a reasonable likelihood of success at trial if the statements were suppressed because, according to the factual basis at the plea, the State's case rested almost entirely on the contested statements.

The court reversed the dismissal of the petition and remanded for second-stage proceedings.

(Defendant was represented by Assistant Defender Bruce Kirkham, Elgin.)

People v. Romero, 2015 IL App (1st) 140205 (No. 1-14-0205, 6/22/15)

To avoid summary dismissal, a post-conviction petition alleging ineffective assistance of trial or appellate counsel must present an arguable claim that counsel's performance was objectively unreasonable and caused prejudice. Construing the petition in this case liberally, the court concluded that defendant made an arguable claim that trial and appellate counsel were ineffective for failing to argue that the trial court considered an improper factor when imposing sentence.

Defendant was acquitted of attempt murder for firing shots at officers who were pursuing him, but was convicted of aggravated discharge of a firearm and aggravated battery with a firearm. In imposing sentence, the trial court stated that although the jury found the defendant did not intend to kill the officer, one shot hit the officer in the collar bone close to the face and "could have caused a whole lot more damage." The trial judge added, "Fortunately for [the officer] the defendant was a little worse shot than he thought he would have been."

The Appellate Court concluded that the petition made an arguable claim that trial and appellate counsel were ineffective for failing to assert that the trial court relied on a factor of which defendant had been acquitted. The court concluded that the judge's statement that

"defendant was a little worse shot than he thought" indicated that at the very least, the trial court believed that defendant intended that the shot strike the officer. In addition, the statement arguably showed that despite the jury's acquittal on attempt murder, the trial court relied on its personal opinion concerning that offense.

In either event, trial counsel acted unreasonably by failing to raise the issue at the sentencing hearing and appellate counsel acted unreasonably by failing to raise the issue as plain error on appeal. In addition, defendant was prejudiced because his sentence was increased due to consideration of an improper factor. The order dismissing the post-conviction petition was reversed and the cause remanded for second-stage proceedings.

People v. Stephens, 2012 IL App (1st) 110296 (No. 1-11-0296, 10/26/12)

A post-conviction proceeding "shall be commenced by filing with the clerk of the court in which the conviction took place a petition (together with a copy thereof) verified by affidavit." 725 ILCS 5/122-1(b). The verification affidavit of §122-1(b) confirms that the allegations are brought truthfully and in good faith.

At the first-stage of a post-conviction proceeding, the trial court only evaluates whether the petition is frivolous and patently without merit. An unnotarized verification affidavit cannot render a petition frivolous and patently without merit, and therefore the absence of notarization cannot be the basis for a first-stage dismissal.

(Defendant was represented by Assistant Defender Jessica Pamon, Chicago.)

People v. Steward, 406 Ill.App.3d 82, 940 N.E.2d 140 (1st Dist. 2010)

1. To have standing to file a post-conviction petition, one must be "imprisoned in the penitentiary." 725 ILCS 5/122-1(a). A proceeding under the Sexually Violent Persons Commitment Act (725 ILCS 207/1) is civil in nature and can result in commitment to the Department of Human Services. A person who is imprisoned under the SVPCA is not imprisoned in the penitentiary within the meaning of the Post-Conviction Hearing Act and does not have standing to file a post-conviction petition.

2. Defendants who are on MSR or released on an appeal bond are considered to be "imprisoned in the penitentiary" and have standing to file a post-conviction petition. An amendment to the SVPCA effective 1/1/07 provides that the filing of a SVPCA petition tolls the running of a term of mandatory supervised release until dismissal of the petition, a finding that defendant is not a sexually violent person, or the discharge of the defendant under the Act. 725 ILCS 207/15(e). The tolling of the MSR term did not confer standing on defendant to file a post-conviction petition. First, the amendment does not apply to defendant because it did not become effective until nine months after defendant was placed on MSR and defendant had actually been discharged from MSR before he filed his post-conviction petition. Second, even if the amendment did apply, defendant must be currently on MSR, not have his MSR tolled, to be considered imprisoned in the penitentiary within the meaning of the PCHA.

3. Standing is defined as a party's right to make a legal claim or seek judicial enforcement of a duty or right. The legislature intended that the phrase "frivolous or patently without merit" in the Post-Conviction Hearing Act encompass the issue of standing because "merit" means legal significance and standing. **People v. Boclair**, 202 Ill.2d 89, 789 N.E.2d 734 (2002). Standing, unlike timeliness, is an inherent element of the right to bring a post-conviction petition, and absence of standing may therefore be the basis for a first-stage dismissal of a petition.

4. A post-conviction petition may be summarily dismissed as frivolous and patently without merit only if it has no arguable basis in fact or in law. An indisputably meritless legal

theory is one that is completely contradicted by the record.

Defendant's claim of newly-discovered evidence of actual innocence based on a recantation by the complainant of her trial testimony is meritless because it is contradicted not only by the record, but also by the complainant's post-trial deposition that defendant asserted constituted a recantation. At trial, complainant testified that defendant grabbed her on the street, forced her into his apartment, and forced her to have sexual relations. In her post-trial deposition, complainant testified that she willingly went to defendant's apartment and twice voluntarily engaged in intercourse with defendant. But her testimony did not change with respect to her allegation that a fight ensued when she refused to perform oral sex on defendant, and that he used a hammer on her in an attempt to force her to perform an act of oral sex. Under either version, defendant committed aggravated battery and attempt aggravated criminal sexual assault.

5. A prisoner confined in an Illinois Department of Corrections facility can be assessed court costs and fees for the filing of a frivolous post-conviction petition. 735 ILCS 5/22-105. A defendant confined to a Department of Human Services facility as a sexually violent person may not be assessed those costs and fees because he is not confined in the IDOC.

People v. Thomas, 2014 IL App (2d) 121001 (No. 2-12-1001, 9/26/14)

1. A claim that has not been raised in a *pro se* post-conviction petition may not be raised for the first time on appeal from the first-stage dismissal of that petition. **People v. Jones**, 213 Ill. 2d 498 (2004). In determining whether an issue has been forfeited for not being raised below, courts should afford the petition a liberal construction allowing borderline cases to proceed. A *pro se* petitioner is unlikely to be aware of the precise legal basis for his claim, and hence need only allege enough facts to make an arguable claim. The pleading must, however, bear some relationship to the issue raised on appeal.

2. At trial, the court precluded evidence that another man, N.H., confessed to the police and to a jail pastor that he had committed the offense. The trial court ruled that the confession to the pastor was barred by clergy-penitent privilege. On direct appeal, defendant's counsel argued that the court erred in precluding evidence of N.H.'s confession to the police, but raised no issue about N.H.'s confession to the jail pastor. The court rejected defendant's argument and affirmed his conviction.

3. In his *pro se* petition, defendant argued that his direct appeal counsel was ineffective for failing to raise an issue about trial counsel's failure to investigate and present facts showing that N.H. confessed to the murder. In support of this claim, defendant referenced various facts about N.H.'s confessions, including his confession to the pastor. Defendant also claimed that trial counsel failed to take any steps to corroborate N.H.'s confession to the police.

4. On appeal from the first-stage dismissal of his petition, defendant argued that his direct appeal counsel was ineffective for failing to raise an issue that the trial court erred in precluding N.H.'s confession to the jail pastor based on clergy-penitent privilege. The State argued that defendant forfeited this claim by failing to include it in his *pro se* petition. According to the State, although defendant argued appellate counsel's ineffectiveness both below and on appeal, defendant's post-conviction petition focused on trial counsel's failure to investigate and present facts supporting the admission of N.H.'s confession to the police, while his claim on appeal focused on the trial court's error in precluding evidence of N.H.'s confession to the pastor.

The Appellate Court rejected the State's forfeiture argument. The court pointed to language in **People v. Hodges**, 234 Ill. 2d 1 (2009) and **People v. Edwards**, 197 Ill. 2d 239 (2001), stating that a *pro se* petition should be liberally construed and need not present a

completely pled or fully stated claim since a *pro se* litigant may be unaware of the legal basis for his claim. Here, defendant's petition and his appellate argument both alleged ineffectiveness based on omissions related to the same underlying issue of the admissibility of N.H.'s confession. Under the liberal standards appropriate to *pro se* petitions, the two claims are sufficiently related, and hence defendant did not forfeit his appellate argument.

5. Defendant's petition stated the gist of a constitutional claim that direct appeal counsel was ineffective for failing to argue that the trial court improperly excluded N.H.'s confession to the jail pastor based on clergy-penitent privilege. Under section 8-803 of the Code of Civil Procedure, the clergy-penitent privilege only applies where disclosure is "enjoined by the rules or practices" of the relevant religious organization. 735 ILCS 5/8-803. The privilege belongs to both the confesser and the clergyman. When the clergyman does not object to testifying about the confession, the burden shifts to the person asserting the privilege to show that disclosure is enjoined by the rules or practices of the relevant religion.

Here, the pastor agreed to testify, so the burden shifted to N.H. to show that the rules of the pastor's religion prohibited disclosure. The pastor, however, testified that the rules of his religion did not prohibit disclosure, and N.H. offered no evidence to the contrary. Under these circumstances, the trial court's decision to bar the pastor's testimony was erroneous.

6. The Appellate Court specifically rejected the State's argument that the confesser's perception of the privilege should control whether the privilege applies. Nothing in section 8-803 provides that the confesser's perception determines when the privilege applies. Instead, the rules of the pastor's religion control the outcome.

The case was remanded for second-stage proceedings.

(Defendant was represented by Assistant Defender Rachel Moran, Chicago.)

People v. Trujillo, 2012 IL App (1st) 103212 (No. 1-10-3212, 5/8/12)

At the first stage of post-conviction proceedings, a petition will be dismissed only if it has no arguable basis in fact or in law. Where the record rebuts the allegations in a petition, summary dismissal is proper. A first-stage petition alleging ineffective assistance of counsel must show that it is arguable that counsel's performance fell below an objective standard of reasonableness and that defendant was prejudiced by counsel's performance.

Defendant filed a *pro se* post-conviction petition supported by his affidavit alleging that defense counsel failed to communicate a plea offer to him, that he would have accepted the offer had he known of it, and that he only learned of the offer from a letter his counsel sent to the ARDC, a copy of which was appended to the petition, in which counsel represented that the State had offered defendant a six-year sentence if he would plead guilty, but defendant rejected the offer.

If counsel had failed to inform defendant of the plea offer, it is arguable that his assistance was deficient. Because defendant alleged that he would have accepted the offer had he been advised of it, he has arguably been prejudiced by counsel's deficient performance if he can establish that the offer was not communicated to him. Therefore, the claim did not lack legal merit.

The petition also did not lack factual merit as it was supported by defendant's affidavit and counsel's letter to the ARDC. The allegations were not rebutted by the record. Counsel's letter stating that he communicated the offer to the defendant is outside the actual trial record. Nothing in the report of proceedings supports the allegation in counsel's letter that the trial court admonished defendant about the plea offer. Any contradictions between counsel's letter and defendant's allegations cannot be resolved at the first-stage of the proceedings because they involve credibility determinations that cannot be resolved on the pleadings.

Because the petition states an arguable claim of ineffective assistance of counsel, the dismissal order was reversed and the cause remanded for second-stage proceedings.

(Defendant was represented by Assistant Defender Jeffrey Svehla, Chicago.)

People v. White, 2014 IL App (1st) 130007 (No. 1-13-0007, 12/18/14)

At the first stage of post-conviction proceedings, a petition may be dismissed as frivolous or patently without merit if it has no arguable basis either in law or fact, meaning it is based on an indisputably meritless legal theory or fanciful factual allegations. A first-stage petition claiming actual innocence based on newly discovered evidence must present evidence that is arguably new, material, non-cumulative, and so conclusive it would probably change the result on retrial.

The trial evidence in this case included two witnesses who identified defendant in-court as the offender, two who identified defendant out-of-court, but disavowed the identifications at trial, and two who testified that defendant was not the offender. After his conviction was affirmed on direct appeal, defendant filed a post-conviction petition supported by the affidavit of a witness who averred that he was present at the shooting, saw the man who committed the offense, and defendant was not the offender. Instead, the actual offender was much younger and smaller than defendant. He further averred that he was pressured and threatened by another man to falsely identify defendant as the offender. The trial court dismissed the petition at the first stage.

The Appellate Court reversed the first-stage dismissal. Although the Appellate Court found that the trial evidence "weighed heavily in the State's favor," it held that defendant made an arguable claim of actual innocence in his petition. First, even though defendant knew about the witness's presence at the crime scene, his testimony was arguably newly discovered because the pressure and threats to falsely identify defendant meant that his exculpatory testimony would not have been available to defendant at the time of trial.

Second, the evidence was arguably material and non-cumulative because it provided an additional description of the offender and additional testimony that defendant was not the offender. Finally, the evidence would arguably change the result on retrial. The allegations in the affidavit were neither fantastical nor delusional, were not positively rebutted by the record, and supported defendant's version of the conflicting identification evidence presented at trial. The newly discovered evidence thus arguably had the potential to exonerate defendant.

The case was remanded for second-stage proceedings.

People v. Wright, 2013 IL App (4th) 110822 (No. 4-11-0822, 4/17/13)

1. At the first stage in a post-conviction proceeding, the circuit court acts strictly in an administrative capacity by screening out those petitions that lack legal substance or are obviously without merit. A petition may be dismissed at the first stage only if it has no arguable basis in fact or in law, *i.e.*, it is based on an indisputably meritless legal theory or a fanciful factual allegation. The mere unlikelihood of a factual proposition does not make that proposition fanciful. A court should not dismiss a petition unless its lack of legal or factual merit is certain and indisputable.

2. A court may dismiss a petition at the first stage based on *res judicata*. Collateral estoppel is a branch of *res judicata*. Collateral estoppel, or issue preclusion, prevents relitigation of issues of law or fact that have been previously litigated and decided in an action involving the same parties or their privies.

3. Defendant claimed in his post-conviction petition that his trial counsel was

ineffective for failing to preserve as error the trial court's consideration of an invalid aggravating factor, and appellate counsel was ineffective in failing to raise this ineffectiveness claim on appeal. On direct appeal, defendant had argued that the trial court had considered the invalid aggravating factor, but the Appellate Court found that this error was forfeited and refused to find plain error because defendant's sentencing hearing was fair despite the error.

That finding on direct appeal collaterally estopped defendant from claiming in a post-conviction petition that trial and appellate counsel were ineffective. Defendant could succeed on those ineffectiveness claims only if counsels' deficient performance caused him prejudice. Defendant suffered no prejudice if his sentencing hearing was fair.

4. Although the circuit court had not dismissed defendant's petition on collateral estoppel grounds, the Appellate Court can affirm the dismissal on any basis that has support in the record. Because the Appellate Court's conclusion on direct appeal that the sentencing hearing was fair despite the mention of an invalid aggravating factor meant that the claims of ineffective assistance of counsel were not arguable, the Appellate Court affirmed the dismissal order.

(Defendant was represented by Assistant Defender Jay Wiegman, Ottawa.)

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§9-1(f)
Second Stage of Post-Conviction Proceedings

People v. Allen, 2015 IL 113135 (No. 113135, 5/21/15)

1. At first-stage proceedings on a post-conviction petition, the court considers the petition's substantive merit rather than its compliance with procedural rules. The threshold to avoid summary dismissal is low, in recognition of the fact that many petitions are drafted by inmates without the assistance of an attorney. If a petition alleges sufficient facts to state the gist of a constitutional claim, first-stage dismissal is improper. A petition which presents legal points that are arguable on their merits may not be summarily dismissed.

Despite the low threshold to avoid first-stage dismissal, the *pro se* petitioner must supply a sufficient factual basis to show that the allegations in the petition are "capable of objective or independent corroboration." Thus, a petition must be accompanied by supporting evidence, which may include "affidavits, records, or other evidence." 725 ILCS 5/122-2.

A supporting affidavit is separate from a verification affidavit, which also must accompany the petition. 725 ILCS 5/122-1(b). The purpose of the verification affidavit is to confirm that the allegations are brought truthfully and in good faith.

In **People v. Collins**, 202 Ill. 2d 59, 782 N.E.2d 195 (2002), the court affirmed the first stage dismissal of a post-conviction petition which had a verification affidavit but lacked any supporting evidence. By contrast, in **People v. Hommerson**, 2014 IL 115638, the court concluded that it is improper to summarily dismiss a petition solely because it lacks a verification affidavit. Instead, if a petition alleges the gist of a constitutional violation, the lack of a verification affidavit should be raised by the State at the second-stage of the proceedings, after counsel has been appointed and had an opportunity to file an amended petition.

2. Defendant's *pro se* petition contained a signed statement by a person named Langford. The statement took responsibility for the offense and stated that defendant had not been involved. The statement asserted that it was made under penalty of perjury, and contained several fingerprints at the bottom. However, it was not notarized. In summarily

dismissing the petition at the first stage, the trial court stated that the statement did not qualify as an "affidavit" because it had not been notarized.

The Supreme Court acknowledged that a statement is an "affidavit" only if it has been sworn before a person with legal authority to administer oaths. The lack of notarization of a supporting affidavit does not justify summary dismissal of the petition, however, because supporting evidence is not required to be in the form of an affidavit and the presence or absence of notarization does not prevent the trial court determining whether the "gist" standard for first stage proceedings is satisfied.

Thus, a petition may not be summarily dismissed solely for lack of notarization of an evidentiary affidavit. The court noted, however, that the State would be able to raise the lack of notarization of an evidentiary affidavit at second-stage proceedings if counsel was unable to obtain a properly notarized affidavit. At that time, the absence of notarization might be an adequate basis on which the trial court could dismiss the petition.

3. The court also found that the petition was not frivolous and patently without merit for reasons other than the lack of notarization of Langford's statement. Although the statement was "bare-bones," it was sufficient to show that the petition's allegations were subject to corroboration. The court criticized the trial court for evaluating credibility at the first stage instead of focusing on whether the petition set forth the gist of a constitutional issue.

The court noted that a petition claiming actual innocence based on newly discovered evidence must present supporting evidence that is new, noncumulative, material, and of such character as to change the result of the trial. However, the court found that there was no reason to believe that defendant could have obtained Langford's statement at an earlier date, even if he was aware of Langford's name at the time of trial, where both defendant and Langford were incarcerated and Langford would presumably be reluctant to confess to a murder.

Because the petition made an adequate showing that evidence was available to support the petition's allegations, the trial court erred by ordering summary dismissal. The order was reversed and the cause remanded for second stage proceedings.

(Defendant was represented by Assistant Defender Brian McNeill, Chicago.)

People v. Cruz, 2013 IL 113399 (No. 113399, 3/21/13)

At the second stage of a post-conviction proceeding, the State has the option of filing an answer to the petition or a motion to dismiss. 725 ILCS 5/122-5. Where the State files a motion to dismiss, but does not challenge the sufficiency of defendant's allegation of a lack of culpable negligence for the late filing of his petition on the ground that the supporting verification affidavit is not notarized, the State forfeits that argument. By raising the argument that the affidavit was not notarized for the first time on appeal, the State denied the circuit court the opportunity to consider the issue and the defendant the opportunity to correct the alleged pleading deficiency.

The Supreme Court remanded the cause to the Appellate Court for consideration of whether defendant sufficiently pled a lack of culpable negligence to excuse his untimely filing.

(Defendant was represented by Assistant Defender Pamela Rubeo, Chicago.)

People v. Alexander, 2014 IL App (2d) 120810 (No. 2-12-0810, 5/22/14)

At the second stage of post-conviction proceedings, the defendant must make a substantial showing of a constitutional violation (which in Illinois includes a claim of actual innocence). The trial court must accept all well-pleaded facts as true and is prohibited from

engaging in fact finding. Factual disputes about the truth of supporting affidavits or exhibits cannot be made at a second-stage hearing on a motion to dismiss, but instead must be resolved at a third-stage evidentiary hearing.

To succeed on a claim of actual innocence, a defendant must show that the evidence presented in his petition is: (1) newly discovered; (2) material and not cumulative; and (3) of such a conclusive character that it would probably change the result on retrial.

The Appellate Court held that defendant's petition, supported by an affidavit from a trial witness (Robert Lee) who now averred that he alone was responsible for the offense, made a substantial showing of actual innocence.

First, the evidence was newly discovered. Evidence is newly discovered if it has been discovered since trial and could not have been discovered sooner through due diligence. Here, Lee's affidavit could not have been discovered until Lee was ready to make the statements in the affidavit, which occurred long after the trial was completed. No one knew Lee committed the offense until he produced the affidavit. And even if defendant had known about this information prior to trial, he could not have forced Lee to waive his right against self-incrimination.

Second, Lee's affidavit presented evidence that was material and not cumulative. There was no evidence presented at trial that Lee committed the offense, and thus his affidavit was not cumulative. And Lee's admission to alone committing the offense was material since it completely exonerated defendant.

Third, the new evidence was of such conclusive character that it would probably change the result on retrial. Defendant was convicted of possession of a controlled substance with intent to deliver. The State's theory at trial was that defendant controlled the apartment where drugs were found and thus had constructive possession of the drugs.

The State's evidence showed that while executing a search warrant, the police found four men in the apartment, including defendant and Robert Lee. All four denied living in the apartment. The police found defendant hiding in the northeast bedroom. The bedroom contained a key to the front door and several recently dated documents with defendant's name. In the northwest bedroom, the police found a scale and a large amount of cocaine. They also found several cards, including a state identification card, bearing defendant's name.

Lee testified for the State that defendant, who was his friend, lived in the apartment and sold cocaine in the apartment. Lee claimed that he was never involved in any of the drug sales.

In direct contrast with his trial testimony, Lee took full responsibility for the offense in his affidavit. Lee stated that on the day of the search, without any knowledge on defendant's part, he brought the cocaine and scale to defendant's apartment and hid them in the northwest bedroom. Lee specifically stated that he alone committed the offense and would be willing to so testify at trial.

In dismissing defendant's petition, the trial court noted that recantation testimony is unreliable. But while this is generally true, the trial court's consideration of reliability was premature at a second-stage dismissal. At this stage, the trial court was foreclosed from making any determination regarding the truth or falsity of Lee's affidavit. Instead, all well-pleaded facts, including the contents of Lee's affidavit, must be accepted as true.

Lee's affidavit, taken as true, completely rebuts the State's case, which was based on circumstantial evidence, that defendant had constructive possession of the drugs. Although the State could impeach Lee with his prior trial testimony, the newly discovered evidence – viewed at this stage of the post-conviction proceedings, where the evidence is not subject to weight and credibility determinations – would probably change the result on retrial.

Defendant thus made a substantial showing of actual innocence. The cause was remanded for a third-stage evidentiary hearing.

(Defendant was represented by Assistant Defender Fletcher Hamill, Elgin.)

People v. Barkes, 399 Ill.App.3d 980, 928 N.E.2d 102 (2d Dist. 2010)

1. The decision to request a bench or jury trial is left to the defendant rather than defense counsel. Where defendant alleged in his post-conviction petition that he told counsel he wanted a bench trial, but was told that counsel "was running the show [and defendant] was getting a jury trial," the petition was sufficient to advance to a third-stage evidentiary hearing.

All well-pleaded allegations are taken to be true at the second stage of post-conviction proceedings, and if true counsel's response to defendant would have been objectively unreasonable under **Strickland**. Furthermore, prejudice is presumed under these circumstances if there is a reasonable probability that defendant would have waived a jury trial in the absence of the erroneous statement.

2. Defendant was also entitled to an evidentiary hearing on his claim that trial counsel failed to advise him that consecutive sentences were required on multiple convictions of criminal sexual assault.

Although a defendant has no constitutional right to plea bargain, if the State chooses to bargain the defendant has the right to the effective assistance of counsel during negotiations. To make a knowing and voluntary decision whether to accept or reject a plea offer, defendant must be fully informed concerning the consequences of accepting or rejecting the plea offer, including accurate advice concerning the sentencing consequences of accepting or rejecting the offer.

Because defendant alleged that defense counsel had failed to inform him that he faced mandatory consecutive sentences if convicted, and the affidavit attached to the petition stated that if defendant had been accurately advised he would have accepted the State's offer, the allegations were sufficient to warrant an evidentiary hearing.

3. The court concluded, however, that two other allegations of ineffective assistance were insufficient to require an evidentiary hearing. First, defendant's allegation that defense counsel refused to allow him to testify in his defense, despite a specific request to do so, was insufficient to require a hearing where defendant made no allegations which, even if true, satisfied the prejudice requirement of **Strickland**. In particular, defendant failed to specify the testimony he would have given had he testified.

Second, the allegation that counsel was ineffective for denying defendant the right to counsel of choice failed to show prejudice, because defendant did not allege that he would have obtained private counsel had he not been given inaccurate advice concerning whether appointed counsel could be discharged.

(Defendant was represented by Assistant Defender Kim DeWitt, Elgin.)

People v. Bland, 2011 IL App (4th) 100624 (No. 4-10-0624, 12/2/11)

1. Under **People v. Shellstrom**, 216 Ill.2d 45, 833 N.E.2d 863 (2005), before the trial court *sua sponte* recharacterizes a pleading as a first post-conviction petition, it most inform the *pro se* litigant of the intent to recharacterize, warn that after recharacterization any subsequent post-conviction petition will be subject to the restrictions imposed on successive post-conviction petitions, and provide an opportunity to withdraw or amend the pleading. Here, the court found that **Shellstrom** applies only where the trial court *sua sponte* recharacterizes the pleading.

The trial judge noted that the pleading referred to both the Post-Conviction Hearing

Act and §2-1401, and asked defendant in open court to clarify whether he intended to file a post-conviction petition or a §2-1401 petition. The Appellate Court concluded that under these circumstances, the court did not recharacterize the pleading. Thus, **Shellstrom** did not apply, and the failure to give **Shellstrom** admonishments was not error.

2. However, once defendant requested that his pleading be treated as a post-conviction petition, the trial court erred by treating the matter as a second-stage proceeding but failing to appoint counsel. At the first stage of a post-conviction proceeding, the court considers only whether the petition is frivolous or patently without merit. This determination is made without input from the State. If the petition is not dismissed at stage one and advances to stage two, counsel must be appointed before the trial court considers the State's answer or motion to dismiss.

By considering (and eventually granting) the State's motion to dismiss, the trial court treated the petition as if it were at a second-stage proceeding. Because no appointment of counsel was made, the dismissal order was reversed and the cause remanded for further proceedings.

(Defendant was represented by Assistant Defender Susan Wilham, Springfield.)

People v. Bolden, 2014 IL App (1st) 123527 (No. 1-12-3527, 6/18/14)

1. At the second stage of a post-conviction proceeding, the court must assume the truth of all facts alleged in the petition and its supporting documents unless the allegations are contradicted by the record. The dismissal of a post-conviction petition at the second stage of proceedings is reviewed *de novo*.

A third stage evidentiary hearing is warranted if the petition and its accompanying documents make a substantial showing of a violation of the petitioner's constitutional rights. In determining whether a petition should be advanced to the third stage, the trial court is not permitted to resolve issues of fact.

2. The petitioner made a substantial showing that trial counsel was ineffective at a trial for murder where he failed to request discovery sanctions and investigate alibi witnesses.

The State recovered two weapons near the scene of the offense. Neither weapon was tied to defendant, and both had been in the possession of a third person, who was also shot but who survived.

In discovery, defense counsel requested all physical evidence, including the weapons. However, the police destroyed the guns before the defense could test them. At trial, a State expert testified that neither weapon could have fired the shots that killed the decedents.

The court found that trial counsel provided objectively unreasonable assistance where he failed to request discovery sanctions upon learning that the guns had been destroyed despite the defense discovery request. The court concluded that the issue of defense counsel's ineffectiveness must be decided under the law at the time of trial although the Illinois Supreme Court subsequently modified the applicable discovery law. The court concluded that defendant was deprived of due process where the weapons were destroyed without the defense being able to test them to determine whether the State's expert's conclusions were valid. The court stressed that there was no strategic reason for failing to move for sanctions once counsel learned that police had destroyed evidence which had been requested in discovery.

Counsel also acted in an objectively unreasonable manner where he failed to take adequate steps to interview three alibi witnesses. The record showed that defense counsel asked a public defender investigator to interview the witnesses. The investigator noted on the request form that an "oral response has been given" to counsel. However, affidavits from the three witnesses were attached to the post-conviction petition and indicated that no one from

the defense had contacted any of the witnesses at the time of the trial. Furthermore, the record did not disclose what steps, if any, the investigator took in response to trial counsel's request.

The court concluded that under these circumstances trial counsel did not make an adequate effort to contact the witnesses or investigate defendant's alibi.

3. The petitioner also made a substantial showing that the result of the trial might have been different had counsel moved for discovery sanctions and fully investigated defendant's alibi. The court rejected the defendant's argument that the trial court would have dismissed the charges because evidence requested by the defense had been destroyed, but found that there was a reasonable likelihood that the judge would have imposed lesser sanctions such as excluding the State's firearms' expert from testifying and limiting the State's argument.

In addition, there were several weaknesses in the State's case. No physical evidence connected defendant to the offenses, and the identification of defendant by the only eyewitness had several weaknesses. Furthermore, although two alibi witnesses testified for defendant, their testimony was undercut in several respects. The testimony of the three additional alibi witnesses would not have been subject to the same criticism. Under these circumstances, defendant made a substantial showing that he was prejudiced by his attorney's unreasonable actions.

The order dismissing defendant's second stage post-conviction petition was reversed and the cause remanded for an evidentiary hearing.

People v. Bolden, 2014 IL App (1st) 123527 (No. 1-12-3527, 6/18/14, Mod. Op. 8/6/14)

1. At the second stage of a post-conviction proceeding, the court must assume the truth of all facts alleged in the petition and its supporting documents unless the allegations are contradicted by the record. The dismissal of a post-conviction petition at the second stage of proceedings is reviewed *de novo*.

A third stage evidentiary hearing is warranted if the petition and its accompanying documents make a substantial showing of a violation of the petitioner's constitutional rights. In determining whether a petition should be advanced to the third stage, the trial court is not permitted to resolve issues of fact.

2. The petitioner made a substantial showing that trial counsel was ineffective at a trial for murder where he failed to request discovery sanctions and investigate alibi witnesses.

The State recovered two weapons near the scene of the offense. Neither weapon was tied to defendant, and both had been in the possession of a third person, who was also shot but who survived.

In discovery, defense counsel requested all physical evidence, including the weapons. However, the police destroyed the guns before the defense could test them. At trial, a State expert testified that neither weapon could have fired the shots that killed the decedents.

The court found that trial counsel provided objectively unreasonable assistance where he failed to request discovery sanctions upon learning that the guns had been destroyed despite the defense discovery request. The court concluded that the issue of defense counsel's ineffectiveness must be decided under the law at the time of trial although the Illinois Supreme Court subsequently modified the applicable discovery law. The court concluded that defendant was deprived of due process where the weapons were destroyed without the defense being able to test them to determine whether the State's expert's conclusions were valid. The court stressed that there was no strategic reason for failing to move for sanctions once counsel learned that police had destroyed evidence which had been requested in discovery.

Counsel also acted in an objectively unreasonable manner where he failed to take adequate steps to interview three alibi witnesses. The record showed that defense counsel asked a public defender investigator to interview the witnesses. The investigator noted on the request form that an "oral response has been given" to counsel. However, affidavits from the three witnesses were attached to the post-conviction petition and indicated that no one from the defense had contacted any of the witnesses at the time of the trial. Furthermore, the record did not disclose what steps, if any, the investigator took in response to trial counsel's request.

The court concluded that under these circumstances trial counsel did not make an adequate effort to contact the witnesses or investigate defendant's alibi.

3. The petitioner also made a substantial showing that the result of the trial might have been different had counsel moved for discovery sanctions and fully investigated defendant's alibi. The court rejected the defendant's argument that the trial court would have dismissed the charges because evidence requested by the defense had been destroyed, but found that there was a reasonable likelihood that the judge would have imposed lesser sanctions such as excluding the State's firearms' expert from testifying and limiting the State's argument.

In addition, there were several weaknesses in the State's case. No physical evidence connected defendant to the offenses, and the identification of defendant by the only eyewitness had several weaknesses. Furthermore, although two alibi witnesses testified for defendant, their testimony was undercut in several respects. The testimony of the three additional alibi witnesses would not have been subject to the same criticism. Under these circumstances, defendant made a substantial showing that he was prejudiced by his attorney's unreasonable actions.

The order dismissing defendant's second stage post-conviction petition was reversed and the cause remanded for an evidentiary hearing.

People v. Clark, 2011 IL App (2d) 100188 (No. 2-10-0188, 9/15/11)

At the second stage of a post-conviction proceeding, the petition must make a substantial showing of a constitutional violation. The circuit court is foreclosed from engaging in any fact finding at this stage, as all well-pleaded facts are taken as true unless rebutted by the record.

To prevail on a claim of ineffective assistance of counsel, defendant must show both that his counsel's performance was deficient in that it fell below an objective standard of reasonableness, and that the deficient performance prejudiced him in that, but for counsel's deficient performance, there is a reasonable probability that the result of the proceeding would have been different.

While as a general rule, whether to present witnesses is a tactical decision that will not be reviewed and cannot support a claim of ineffective assistance of counsel, defense counsel has a legal and ethical obligation to explore and investigate a client's potential defense. This obligation necessarily requires discussion by defense counsel with the client regarding a possible defense. The failure to interview witnesses may indicate incompetence when defense counsel knows of the witnesses and their testimony may be exonerating.

To establish the prejudice prong of an ineffectiveness claim in a guilty-plea proceeding, defendant must show a reasonable probability that, absent counsel's errors, the defendant would not have pleaded guilty, and insisted on going to trial.

Defendant's post-conviction petition made a substantial showing of a claim of ineffective assistance of counsel. Defendant alleged that his attorney coerced him to plead

guilty under the false impression that there were no witnesses available to testify on his behalf, and that counsel had failed to investigate a known witness who was offering to present evidence that could support an insanity defense. In a supporting affidavit, the complaining witness averred that at the time of the offense, defendant was not taking his medications, he said he heard voices telling him to stab her, she knew that he did not mean to harm her, and it was his mental condition that prompted him to do what he did. She also alleged that she had tried to contact defense counsel but her calls were not returned. These allegations made a substantial showing that defense counsel failed to investigate a witness who could have provided evidence that, as a result of a mental disease, defendant lacked substantial capacity to appreciate the criminality of his conduct. 720 ILCS 5/6-2(a). Defendant also made a substantial showing of prejudice, as he averred that he pleaded guilty only because counsel told him that there were no witnesses available to support a plausible defense.

The petition was not deficient due to the absence of affidavits from defendant's attorney and mental health practitioners. The affidavit of the complaining witness provided sufficient support for defendant's claim, as an insanity defense may be supported by lay testimony. Defense counsel's affidavit would have either confirmed or denied that the witness contacted counsel, and an evidentiary hearing would be necessary in either case.

Defendant's claim was not rebutted by the record of the plea proceeding. The trial court's admonitions are not sufficient in every circumstance to negate the effect of erroneous advice from counsel. The factual basis for the plea did not include all of the material contained in the complaining witness's affidavit. Defendant was only asked if his plea was voluntary, not whether he fully discussed his case with his attorney or felt coerced or pressured to plead guilty.

The order dismissing the petition was reversed, and the cause was remanded for third-stage proceedings.

(Defendant was represented by Assistant Defender Christopher McCoy, Elgin.)

People v. Cleveland, 2012 IL App (1st) 101631 (No. 1-10-1631, 11/30/12)

1. A defendant bears the burden of demonstrating that he qualifies for relief under the Post-Conviction Hearing Act. To merit relief, a defendant must demonstrate that his conviction was the result of a violation of a constitutional right. If relief is warranted under the Act, it generally follows from a third-stage evidentiary hearing, where the defendant must prove a constitutional violation and the State is permitted to challenge the defendant's evidence and present its own evidence. A third-stage evidentiary hearing will ensue only upon a substantial showing by the defendant at the second stage that his constitutional rights were violated during trial.

Defendant's post-conviction petition made a substantial showing that his attorney suffered under a *per se* conflict of interest based on his representation of the murder victim at a preliminary hearing on a drug case several years prior. Whether that representation gives rise to a *per se* conflict can only be determined at an evidentiary hearing at which defendant must prove the facts underlying his claim before being entitled to relief. It is proper for the circuit court to hold an evidentiary hearing to establish a factual record for further review by a higher court.

2. Because there is a substantial increase in the burden a defendant must meet before being granted leave to file a successive post-conviction petition, the Post-Conviction Hearing Act provides for liberal amendments to the original petition. It is also consistent with Supreme Court Rule 651(c) to permit counsel to supplement support for the defendant's claim with such evidence as can be gathered before the circuit court rules on the State's motion to dismiss.

It was error for the circuit court to strike as untimely affidavits that were filed by appointed post-conviction counsel before the court considered the State's motion to dismiss and which added factual support to claims raised in the petition. There is no express requirement in the statute that the defendant receive leave of court to file supporting affidavits. Nothing suggests dilatory conduct on defendant's part. The defendant's petition simply did not receive the attention of appointed counsel to resolve the claims any sooner.

3. Defendant's petition supported by the affidavits of witnesses made a substantial claim of ineffective assistance of counsel for failure to call alibi witnesses and occurrence witnesses who could have exonerated defendant, despite counsel's awareness of the existence of these witnesses. Although deference is given to strategic decisions made by trial counsel, the record is barren of any reasonable strategy that may have been employed by counsel in calling no witnesses and presenting no evidence.

(Defendant was represented by Assistant Defender Rachel Moran, Chicago.)

People v. Gacho, 2012 IL App (1st) 091675 (No. 1-09-1675, 4/16/12)

1. A post-conviction petition may be dismissed at the second stage of the proceedings when the allegations in the petition, liberally construed in light of the trial record, fail to make a substantial showing of a constitutional violation. To warrant an evidentiary hearing, the allegations in the petition must be supported by the record or by accompanying affidavits. All well-pleaded facts in the petition and accompanying affidavits are taken as true in determining whether to grant an evidentiary hearing. Dismissal of the petition at the second stage is reviewed *de novo*.

2. A claim that a trial judge's corruption violated defendant's right to due process has two components: (1) a nexus between the judge's corruption or criminal conduct in other cases and the judge's conduct at the defendant's trial; and (2) actual bias resulting from the judge's extrajudicial conduct, or that the judge had a personal interest in the outcome of the trial.

Defendant's post-conviction petition sufficiently alleged that he was denied the right to a trial before a fair tribunal to entitle him to an evidentiary hearing. Defendant alleged and the State conceded that defendant's trial judge, Maloney, was corrupt and that his corruption tainted the trial of the co-defendant. Maloney had been convicted of accepting bribes in exchange for promises to fix trials and had accepted a bribe from the co-defendant who was tried in a bench trial conducted simultaneously with defendant's jury trial. There was also a nexus alleged between Maloney's corruption and defendant's case in that an affidavit of the co-defendant's father established that Maloney accepted the bribe with the expectation that he could conceal his deceit by ensuring that the jury find defendant guilty. These same allegations sufficiently alleged that Maloney had a personal interest in the outcome of defendant's trial. Regardless of whether Maloney could have been effective in steering the jury's verdict, the fact that he had an interest in doing so means that the defendant did not receive a fair trial before an impartial tribunal.

3. Defendant is constitutionally guaranteed the assistance of an attorney whose allegiance to his client is not diluted by conflicting interests or inconsistent obligations. Defendant's petition made a substantial showing of a conflict of interest where he alleged that defense counsel represented a family member of one of the victims at the same time that he represented the defendant. Although defendant did not indicate the nature of defense counsel's representation of the victim's family member, he explained in his petition that counsel did not inform him of the nature of the representation. The nature of the family member's relationship to the victim's family might bear on the intensity of counsel's conflict, but the absence of that information from the petition did not affect the sufficiency of the claim because it was still

evident that counsel owed a duty of loyalty to the victim's family.

4. Post-conviction claims are limited to those claims that were not and could not have been previously adjudicated on direct appeal.

Defendant's allegation that trial counsel was ineffective in failing to reopen the motion to suppress evidence, after three trial witnesses testified that the police admitted having physically coerced defendant's confession, was forfeited by defendant's failure to raise this claim on direct appeal. The Appellate Court rejected defendant's argument that the claim was based on matters outside the record because the petition was supported by an affidavit that one of the witnesses informed trial counsel of this admission a week before defendant's trial. This new evidence was not required to present the ineffectiveness claim where the basis of the claim was that the trial testimony should have prompted defense counsel to ask to reopen the motion to suppress. It also could be inferred from the questions he asked to elicit that testimony that defense counsel knew that the witnesses would describe the police admissions.

The Appellate Court remanded for an evidentiary hearing on the two constitutional claims on which defendant made a substantial showing: that counsel suffered from a conflict of interest and that defendant was denied his right to trial before a fair tribunal.

(Defendant was represented by Assistant Defender Brett Zeeb, Chicago.)

People v. Gamino, 2012 IL App (1st) 101077 (No. 1-10-1077, 6/21/12)

At the second stage of a post-conviction proceeding, defendant bears the burden of making a substantial showing of a constitutional violation. The trial court is foreclosed from engaging in any fact-finding at this stage because all well-pleaded facts are to be taken as true unless they are rebutted by the record. Factual disputes raised by the pleadings can only be resolved at a third-stage evidentiary hearing.

The defendant filed a petition contending that he was represented at trial by an individual who was not in fact a licensed attorney. He appended to his petition a letter from the ARDC indicating that defense counsel had been on interim suspension pursuant to Supreme Court Rule 774 on March 21, 1997, as a result of formal disciplinary proceedings pending against her that ultimately resulted in her disbarment. The State filed a motion to dismiss and appended a written order of the Illinois Supreme Court dated May 30, 1997 (after the conclusion of defendant's trial), stating that the rule to show cause issued to the attorney pursuant to Supreme Court Rule 774 on March 21, 1997 "is enforced, and respondent is suspended from the practice of law effective immediately and until further order of Court." The court granted the State's motion to dismiss, making no reference to defendant's claim that his attorney's license had been suspended at the time of his trial.

The Appellate Court concluded that the State's motion to dismiss was an inappropriate vehicle to litigate the defendant's claim. The ARDC letter appeared to be contradicted by the Supreme Court order, creating a factual dispute that only an evidentiary hearing could resolve. The relevant question was whether defendant's attorney was authorized to practice law at the time that she represented the defendant at trial. As that critical fact was in dispute and not resolved by the trial court, the court remanded for an evidentiary hearing.

(Defendant was represented by Assistant Defender Manny Serritos, Chicago.)

People v. Gomez, 409 Ill.App.3d 335, 947 N.E.2d 303 (2d Dist. 2011)

Defendant failed to make a substantial showing at the second stage of post-conviction proceedings that his counsel was ineffective for failing to comply with his request to file a motion to withdraw guilty plea, where defendant did not allege on what basis he would have moved to withdraw his plea and that there was a reasonable probability that the motion would

have been granted.

1. Because counsel's deficient performance did not result in the forfeiture of an appeal altogether, prejudice is not presumed where counsel fails to file a motion to withdraw plea at the request of defendant following a guilty plea, but does file a motion to reconsider sentence, and a motion to withdraw plea was not a prerequisite to an appeal.

2. Even if counsel's failure to file a motion to withdraw plea had resulted in the forfeiture of an appeal altogether, prejudice would not be presumed at the second-stage of a post-conviction proceeding. Unlike in **People v. Edwards**, 197 Ill.2d 239, 757 N.E.2d 442 (2001), where the Illinois Supreme Court held that a *pro se* defendant need not explain the basis on which he could have moved to withdraw his plea at the first stage of a post-conviction proceeding, defendant's petition was not summarily dismissed without appointment of counsel.

3. Defendant's petition could be construed to claim that he wanted to withdraw his plea because he did not commit the offense. The record positively rebuts this claim, despite the affidavits of defendant and his mother that they communicated to counsel defendant's desire to withdraw his plea. When a defendant does not consistently maintain his innocence, courts generally do not allow the defendant to withdraw his plea based on a claim of actual innocence.

On multiple occasions in the proceedings that resulted in his plea of guilty and sentence, defendant expressed a desire to plead guilty precisely because he committed the offense. He admitted several times that he sexually assaulted the victim. A central issue in his appeal from his motion to reconsider sentence was whether he should have been granted a continuance for the sole purpose of admitting in the PSI that he committed the offense. At no point in the proceedings or in the letters he sent to the court did defendant express a desire to withdraw his plea for any reason.

(Defendant was represented by Panel Attorney Dev Parikh, Wilmington, DE.)

People v. Harper, 2013 IL App (1st) 102181 (No. 1-10-2181, 3/29/13)

1. The time limitation for commencing post-conviction proceedings does not apply to a petition advancing a claim of actual innocence. 725 ILCS 5/122-19(c). Because defendant's third successive petition contained an actual-innocence claim, the circuit court erroneously dismissed it as untimely.

2.The filing of only one post-conviction petition is contemplated under the Post-Conviction Hearing Act. There are two exceptions under which the bar against successive proceedings will be relaxed. One is the exception for a fundamental miscarriage of justice where defendant sets forth a colorable claim of actual innocence.

Because defendant made a colorable claim of actual innocence, the circuit court erred in dismissing his petition on the ground that defendant had failed to satisfy the cause-and-prejudice test. A defendant who claims actual innocence need not satisfy the cause-and-prejudice test.

3. It is the burden of the defendant to obtain leave of court before a successive post-conviction petition can be filed. Defendant must prompt the court, by whatever means, to consider whether leave should be granted, and must obtain a ruling on that question. A formal motion or a request and an articulated argument is usually, but not always, required.

Defendant in fact filed a motion for leave to file his successive petition and the court granted that motion by docketing his petition, appointing counsel, and stating on the record that defendant would get his day in court despite his having previously pursued collateral relief. Although the court did not expressly articulate a finding of a colorable claim of actual innocence, such a finding may be inferred from the court's ruling.

4. To succeed on a claim of actual innocence, defendant must show that the evidence he now presents is: (1) newly discovered; (2) material and not cumulative; and (3) of such conclusive character that it would probably change the result on retrial. Evidence is newly discovered if it has been discovered since trial and could not have been discovered sooner through due diligence. At the second stage of post-conviction proceedings, all well-pleaded facts that are not positively rebutted by the record are taken as true. Defendant must make a substantial showing of actual innocence to be entitled to an evidentiary hearing.

Defendant was convicted of arson and first-degree murder based largely on his confession, which admitted to starting a fire at a video store operated by defendant's mother in order to obtain insurance proceeds for damaged videotapes. Two persons who lived in an adjacent store died of smoke inhalation as a result of the fire. Defendant claimed that his confession was coerced by police threats. Hingston, the manager of a nearby service station, testified that at about the time of the fire two men purchased gasoline in a gas can and left in a vehicle matching the general description of defendant's vehicle.

Defendant's successive post-conviction petition was supported by two affidavits. An affidavit from Hingston recanted his trial testimony and alleged that he was told by the police that two individuals had confessed to purchasing gasoline from him the morning of the fire, and that the police threatened him with a fine and a negative report to his employer if he did not cooperate. The second affidavit from a James Bell confessed to setting the fire for which defendant was convicted. Bell did not reveal his guilt until after defendant filed his first three post-conviction petitions.

The successive petition sufficiently stated a claim of newly-discovered evidence of actual innocence to warrant an evidentiary hearing.

The affidavits are newly-discovered evidence. No amount of due diligence on defendant's part could have led to the discovery of Bell's confession at the time of defendant's trial or his prior collateral proceedings. Nor could due diligence have compelled Hingston to testify truthfully at defendant's trial. Even though defendant had filed a previous post-conviction petition claiming actual innocence based on the confession of a "James Dell," the court refused to assume or speculate that Bell and Dell were the same person. Even if they were the same person, Bell's affidavit was not available when defendant filed his prior petitions.

Bell's affidavit could not be rejected on the ground that it is positively rebutted by the record and thus is unreliable. The State's assertion that Bell's version of the events is refuted by evidence that a backdraft explosion occurred as a result of an oxygen-starved environment would require the court to speculate regarding several facts and conclusions. The court declined to make such credibility determinations.

The new evidence is material and not cumulative. Evidence is cumulative when it adds nothing to what was already before the jury. Bell's affidavit is exculpatory evidence that was never heard by the jury at defendant's trial. It is material to the central issue in the case – the identity of the arsonist. Hingston's evidence of police coercion was also not before the jury. Hingston's affidavit is material to the issue of police coercion, and would weaken the State's case because defendant claimed that his confession was also the product of police coercion.

The new evidence is also of such a conclusive character that it would probably change the result on retrial. No eyewitness testimony directly connected defendant to the arson. Defendant has long maintained that his confession was coerced. Taking the content of Bell's affidavit as true, it could be found to exculpate the defendant and refute the State's evidence, thereby changing the result on retrial. Taking Hingston's affidavit as true would lend credence to defendant's claim that his confession was coerced, which if believed by the fact finder on

retrial would likely change the outcome of the case.

(Defendant was represented by Assistant Defender Kieran Wiberg, Chicago.)

People v. Hobson, 2014 IL App (1st) 110585 (No. 1-11-0585, 3/12/14)

1. The Appellate Court rejected the State's argument that in an appeal from the second stage dismissal of a post-conviction petition, the court "stepped outside of its proper role as neutral arbiter" by asking the parties to brief an issue which had been raised in the post-conviction petition but not included in the original brief on appeal. In reviewing an order dismissing a post-conviction petition at the second stage, the Appellate Court is required to review the entire petition and all supporting documents to determine whether, in light of the trial record, the petitioner has made a substantial showing of a constitutional violation. Because a reviewing court has authority to address unbriefed issues *sua sponte*, it necessarily has authority to request supplemental briefs instead. Therefore, the court did not act improperly by asking the parties to brief an issue that was presented by the post-conviction petition.

In a concurring opinion, Justice Hyman stated that while a reviewing court should act with restraint in using its discretionary power to reach new issues, in criminal cases the desire for restraint must be informed with regard for the defendant's right to a fair trial. Justice Hyman also noted that the defendant presented the issue to the trial court, the trial court ruled on the issue, the issue was preserved for appeal, and both parties received notice of the court's interest in the issue and could file supplemental briefs. Thus, the procedure assured a fair and just review and fulfilled the fundamental demands of procedural due process.

In a specially concurring opinion, Justice Mason disputed the court's decision to ask for briefing on an additional issue and stated that "competent counsel are in the best position to decide which of several issues raised in the trial court should be pursued on appeal.

2. At the second stage of post-conviction proceedings, the court must accept as true all well-pleaded facts that are not contradicted by the trial court record. The trial court is required to hold a third-stage evidentiary hearing if a substantial showing of a constitutional violation is made by the petition as supported by the trial record, affidavits and other evidence. To obtain an evidentiary hearing on a claim of ineffective assistance of counsel, the petitioner must make a substantial showing that counsel provided objectively unreasonable assistance which caused prejudice. The dismissal of a post-conviction petition at the second stage is reviewed *de novo*.

3. Here, the petitioner made a substantial showing that defense counsel was ineffective at trial where he failed to object to the prosecution's use of prior inconsistent statements, failed to discover and present evidence that two witnesses were given promises of leniency on their pending cases in return for grand jury testimony implicating defendant, and failed to impeach a police officer who testified that when he questioned one witness who was promised leniency in return for his testimony before the grand jury, he did not know that the witness had an outstanding warrant.

The cause was remanded for a third-stage evidentiary hearing.

(Defendant was represented by Assistant Defender Autumn Fincher, Chicago.)

People v. Knight, 405 Ill.App.3d 461, 937 N.E.2d 789 (3d Dist. 2010)

1. A defendant who seeks to file an untimely post-conviction petition must demonstrate that the late filing was not due to his culpable negligence.

Defendant filed a post-conviction petition alleging that he was actually innocent of a gang-related murder that occurred when he was incarcerated in the penitentiary, but was

coerced to plead guilty to the murder by gang members who forced him to accept responsibility in order to placate prison officials. The petition alleged that the gang chief who ordered defendant to accept responsibility died after the deadline for filing a timely petition had passed, and that the gangs no longer controlled the prison. The court found that defendant's delay in filing the petition was not due to his culpable negligence but due to the continued presence of the coercive force that caused defendant to plead guilty.

2. A freestanding claim of actual innocence is cognizable in post-conviction proceedings following a conviction resulting from a guilty plea when the defendant can show that the plea was not knowing or voluntary. Defendant's petition stated a cognizable claim of actual innocence despite his plea of guilty because it alleged that defendant pleaded guilty despite his innocence because of his fear of what gang members would do to him if he did not accept responsibility for the murder.

3. To obtain relief under a claim of actual innocence, the evidence adduced by the defendant must be newly discovered, i.e., it must be evidence that was not available at the defendant's original trial and that the defendant could not have discovered sooner through due diligence. Evidence can qualify as newly discovered even if defendant was aware of it before trial. The affidavits attesting to defendant's innocence qualify as newly discovered because the witnesses risked death by gang retaliation had they come forward sooner.

4. A post-conviction petition may be dismissed without an evidentiary hearing at the second stage if its factual claims are baseless or rebutted by the record. Otherwise, the allegations must be taken as true and their credibility resolved by an evidentiary hearing.

Defendant's guilty plea did not rebut his claim of innocence. Defendant did not state at the plea hearing that he actually murdered the victim. The factual basis for the plea did not contain a confession by the defendant. Defendant merely stipulated to the evidence that the State represented it would present. His statement at the plea hearing that his plea was not coerced was itself the result of coercion, according to the defendant. Whether the plea was coerced should be resolved at an evidentiary hearing.

The affidavit of a witness that he relayed to defendant a message from the Gangster Disciples that defendant had to "take the case" for the murder and that the gang would provide defendant with an attorney is not so implausible as to not warrant an evidentiary hearing. The State offered no evidence to rebut the witness's allegation or to deny its plausibility. Because the relevance of the witness's testimony was to show the impact of the perceived threat on defendant and not for the truth of the nature of the threat defendant faced, any hearsay objection the State might have would fail.

One of the affidavits supporting the petition was from a co-defendant who pled guilty to a lesser offense and stated at his plea hearing that the defendant stabbed the victim while he participated. The State may not rely on those proceedings to rebut defendant's petition and defeat his request for an evidentiary hearing. Only the record of the proceedings from which defendant seeks post-conviction relief may be considered to rebut defendant's claim. Since nothing in the defendant's record positively rebutted the co-defendant's affidavit, it must be taken as true.

The court remanded for an evidentiary hearing.

(Defendant was represented by Assistant Defender Mark Fisher, Ottawa.)

People v. Lofton, ___ Ill.App.3d ___, ___ N.E.2d ___ (1st Dist. 2011) (No. 1-10-0118, 6/30/11)

1. The Post-Conviction Hearing Act generally contemplates the filing of only one post-conviction petition. Fundamental fairness allows the filing of a successive petition where the petition complies with the cause-and-prejudice test. Even if a petitioner cannot show cause

and prejudice, the failure to raise a claim in an earlier petition will be excused if necessary to prevent a fundamental miscarriage of justice where the defendant sets forth a claim of actual innocence.

Petitioner's claim of actual innocence was based on the affidavit of a co-defendant who had been acquitted, alleging that he was the actual shooter and stating that petitioner was not at the scene. This affidavit was consistent with the alibi that petitioner had asserted since the date of his arrest. Because the petition contained a legitimate claim of actual innocence, this claim is not subject to the cause-and-prejudice test, and thus is not statutorily barred and may be considered on its merits.

2. At the second stage of a post-conviction proceeding, the relevant inquiry is whether the petitioner has made a substantial showing of actual innocence such that an evidentiary hearing is warranted. Dismissal at the second stage is warranted only when the petition's allegations of fact, liberally construed and in light of the original trial record, fail to make a substantial showing of imprisonment in violation of the state or federal constitution. All well-pleaded facts that are not positively rebutted by the trial record must be taken as true. The circuit court may not engage in fact-finding or credibility determinations at the dismissal stage; such determinations are made at the evidentiary stage.

The circuit court dismissed a petition, supported by a co-defendant's affidavit claiming that he was the actual shooter and that petitioner was not present at the scene. The court dismissed on the ground that the affidavit did not support a claim of actual innocence because the co-defendant had been acquitted at trial, had made a post-arrest statement implicating petitioner, and did not execute the affidavit until 10 years after the fact. This was an impermissible credibility determination by the circuit court. Credibility is an issue to be reached at the evidentiary stage, not a second-stage dismissal hearing.

3. Evidence in support of a claim of actual innocence must be newly discovered, material and not merely cumulative, and of such conclusive character that it would probably change the result on retrial. Newly-discovered evidence is evidence that was discovered since the trial and could not have been discovered earlier through due diligence. Evidence is cumulative when it does not add anything to what was previously before the trier of fact.

The petition made a substantial showing that the evidence upon which petitioner's actual innocence was based was newly discovered. The co-defendant's admission that he was the shooter and that petitioner was not at the scene was not discovered until the co-defendant contacted petitioner and subsequently signed the affidavit. Petitioner had no reason to contact the co-defendant prior to the co-petitioner contacting him. Petitioner maintained he was not at the scene and would not have known that the co-defendant was the shooter. Petitioner would only have known that the co-defendant had been identified by a witness and charged with the murder, but acquitted. This would not alert petitioner to the fact that the co-defendant was the shooter and would sign an affidavit to that effect. Why co-defendant came forward when he did was a matter to be investigated at an evidentiary hearing, rather than to be considered at the dismissal stage.

Evidence that someone else was the shooter and that petitioner was not present at the shooting is certainly material. It also adds to the evidence that was before the jury. A police report named the co-defendant as the shooter, although the police officer who prepared the report testified that was a mistake and he just assumed the co-defendant was the shooter. An eyewitness testified that the co-defendant ran from the scene with the gun, although he testified that petitioner was the shooter. Another co-defendant testified that he did not know if petitioner was at the scene, although he had made a post-arrest statement that petitioner was the shooter. The jury also had petitioner's alibi testimony. The post-conviction petition

included an affidavit from an alibi witness who had testified at petitioner's first trial (that ended in a hung jury) that he would have testified if called as a witness at the second trial, as well as the co-defendant's affidavit. The record supports the affidavits to the extent that the co-defendant is the only one who was immediately named and described by the eyewitness, and the eyewitness consistently maintained that he saw the co-defendant run from the scene with the gun.

The newly-discovered evidence is also so conclusive that it would probably change the result on retrial. The co-defendant's affidavit states not only that he was the shooter, but that petitioner was not there. This is inconsistent with the eyewitness's identification of petitioner, but consistent with petitioner's alibi and the eyewitness's apparent initial identification of the co-defendant as the shooter and his testimony that he saw the co-defendant run from the scene with the gun. The co-defendant's account is also consistent with the testimony of the eyewitness to the extent that the co-defendant named another participant in the offense who remained in a car, and the eyewitness testified that he knew that person, but did not see him at the scene. Although the eyewitness identified petitioner in a lineup and at some point provided a physical description of petitioner to the police, his initial identifications and descriptions were of the co-defendant and another accomplice.

Because petitioner made a substantial showing of a claim of actual innocence based on newly-discovered evidence, the cause was remanded for an evidentiary hearing.

(Defendant was represented by Assistant Defender Jonathan Steffy, Chicago.)

People v. Nitz, 2011 IL App (2d) 100031 (No. 2-10-0031, 10/24/11)

1. 725 ILCS 5/122-1(b) provides that a post-conviction petition must be verified by affidavit. An affidavit is valid only if it is notarized. The trial court properly dismisses a post-conviction petition which does not include a notarized affidavit.

The failure to provide a notarized affidavit does not deprive the trial court or the Appellate Court of jurisdiction to consider the petition, but does provide a basis for dismissing the petition.

Although 735 ILCS 5/1-109 provides a verification process where verification is required by the Code of Civil Procedure, verification is not applicable to post-conviction proceedings, which are governed by the Post-Conviction Hearing Act. Therefore, verification under §1-109 is not a satisfactory substitute for a notarized petition. (Overruling **People v. Rivera**, 342 Ill.App.3d 547, 795 N.E.2d 1016 (2d Dist. 2003)).

2. Although there is no constitutional right to counsel in post-conviction proceedings, once counsel is appointed and the petition advanced to the second stage, the Post-Conviction Hearing Act affords indigents a statutory right to the reasonable assistance of counsel. Supreme Court Rule 651(c) requires counsel to make any amendments to a *pro se* petition that are necessary to adequately present defendant's contentions. The failure to present defendant's post-conviction claims in appropriate legal form constitutes unreasonable assistance.

Here, post-conviction counsel failed to provide reasonable assistance when he failed to remedy the absence of a notarized affidavit when the amended petition was filed. The cause was remanded for the appointment of new counsel and the filing of a new amended petition.

(Defendant was represented by Assistant Defender Jack Hildebrand, Elgin.)

People v. Rivera, 2014 IL App (2d) 120884 (No. 2-12-0884, 2/19/14)

Once a post-conviction petition advances to the second stage of proceedings, the petitioner is entitled to an evidentiary hearing if he makes a substantial showing of a

constitutional violation. Here, the petitioner failed to make a substantial showing that counsel was ineffective for failing to allow defendant to decide whether to submit a lesser included offense instruction.

Ineffective assistance is determined by the **Strickland** test, which requires showings that counsel's representation fell below an objective standard of reasonableness and caused prejudice. The prejudice component is satisfied where defendant demonstrates a reasonable probability that had counsel acted competently, the result of the proceeding would have been different. A "reasonable probability" is shown if confidence in the outcome of the trial is undermined by counsel's errors.

The post-conviction petition alleged that at trial, counsel informed the petitioner that the attorney had decided not to submit a lesser included instruction, without allowing the petitioner to decide whether to submit such an instruction. Under Illinois law, the decision whether to submit a lesser included offense instruction belongs to the defendant.

The court noted that the petition did not claim that had the petitioner been given a choice, he would have elected to submit an instruction on the lesser included offense. Thus, the allegation failed to specify how the result at trial would have changed had counsel acted competently. Under these circumstances, the petition failed to make a substantial showing of prejudice.

Because the petition failed to make a substantial showing of ineffective assistance, the petitioner was not entitled to an evidentiary hearing. The trial court's order dismissing the petition was affirmed.

(Defendant was represented by Assistant Defender Catherine Hart, Springfield.)

People v. Starks, 2012 IL App (2d) 110324 (No. 2-11-0324, modified on denial of rehearing 8/24/12)

1. At the first stage of a post-conviction proceeding, the court has 90 days to review the petition to determine if it is frivolous or patently without merit. If the petition is not dismissed, it moves to stage two. A court's power to dismiss a petition *sua sponte* exists only at stage one.

Defendant's petition advanced to stage two when the trial court failed to rule within 90 days. The court then lost its power to *sua sponte* dismiss the petition on the ground that the defendant lacked standing. The State had not filed a motion to dismiss for the court to grant. Therefore, the court committed reversible error in dismissing the petition.

2. Generally, a defendant may only file one post-conviction petition unless the court grants leave upon a showing of cause for the failure to bring the claim in the initial petition and prejudice resulting from that failure. A defendant is excused from showing cause and prejudice if his successive petition sets forth a claim of actual innocence. A claim of actual innocence must be supported by evidence that is newly discovered, material and not merely cumulative, and of such a conclusive character that it would probably change the result on retrial.

Defendant's petition made a claim of actual innocence supported with newly-discovered DNA test results excluding him as the source of the semen on the complainant's vaginal swab. The evidence is not cumulative. Evidence is cumulative when it adds nothing to what was previously before the jury. The original post-conviction DNA test only excluded defendant as the source of semen on complainant's underwear. The new DNA evidence is different from that DNA evidence and the evidence before the jury (which was only that defendant could not be excluded as the source of the semen).

Finally, the evidence is of such a conclusive nature that it would probably change the

result on retrial. Defendant had been convicted of aggravated battery and sexual assault committed by a single offender. He had been granted a new trial on the sexual assault charges in a previous post-conviction proceeding and at issue in this proceeding was only his battery conviction. The jury heard evidence at trial that scientifically linked defendant to semen found in the complainant's vagina. This provided strong corroboration for the other evidence: the identification testimony, bite-mark evidence, and evidence that defendant's property was found on the scene. The bite-mark evidence has now been discredited and defendant maintained that he was robbed of his property the night of the attack. In these circumstances, the new DNA and bite-mark evidence is of such a conclusive nature that it would probably change the result on retrial.

Because the defendant had made a substantial showing of actual innocence, in the interests of judicial economy, the Appellate Court remanded for third-stage proceedings.

People v. Turner, 2012 IL App (2d) 100819 (No. 2-10-0819, modified 7/11/12)

1. The Post-Conviction Hearing Act provides that the proceeding shall be commenced by the filing of a petition verified by affidavit. 725 ILCS 5/122-1(b). An affidavit filed pursuant to the Act must be notarized to be valid. Lack of notarization is not cured by certification under §1-109 of the Code of Civil Procedure. 735 ILCS 5/1-109.

There is a split of authority among the Appellate Courts as to whether a petition lacking a notarized affidavit may be dismissed for that reason at the first stage of a post-conviction proceeding. Regardless of this split, the State was permitted to raise the issue for the first time on appeal from a first-stage dismissal because that was its earliest opportunity to do so. At first-stage proceedings, the court acts without input from the State.

Raising the issue for the first time on appeal is not permissible in an appeal from a second-stage dismissal. If the State raises the issue in the trial court, it can be addressed and resolved. Appointed counsel has a duty to remedy procedural defects in the petition. The State procedurally defaults the issue of lack of notarization by failing to raise it in its motion to dismiss.

2. The State did not move to dismiss defendant's petition on the ground that the affidavit accompanying the petition was not notarized. It argued for the first time on appeal that dismissal of the petition could be affirmed on the ground that the affidavit was not notarized. The State forfeited this challenge by failing to raise it in its motion to dismiss, which would have given defendant the opportunity to remedy the defect and promoted efficient disposition of the petition.

3. Addressing the split of authority regarding whether the absence of a notarized affidavit is a basis for a first-stage dismissal, the Appellate Court opined that it was not. The State's ability to forfeit the defect makes an invalid affidavit akin to a petition's untimeliness, which likewise is not a basis for a first-stage dismissal.

The Appellate Court nonetheless affirmed the dismissal of the petition, finding the allegations insufficient to merit an evidentiary hearing.

(Defendant was represented by Assistant Defender Jessica Pamon, Chicago.)

People v. Williams, 2012 IL App (1st) 111145 (Nos. 1-11-1145 & 1-11-2251 cons., modified 12/12/12)

1. An evidentiary hearing is warranted on a post-conviction claim where the allegations in the petition, supported where appropriate by the trial record or accompanying affidavits, make a substantial showing that the constitutional rights of the defendant have been violated. At the motion-to-dismiss stage, all well-pleaded facts that are not positively rebutted by the

trial record are to be taken as true. Review of the trial court's dismissal of a petition without an evidentiary hearing is *de novo*.

A claim of actual innocence requires a showing of newly-discovered evidence that was not available at defendant's original trial and that defendant could not have discovered sooner through diligence, that is noncumulative and material, and that is of such conclusive character that it would probably change the result on retrial.

Defendant was entitled to an evidentiary hearing on his actual-innocence claim. Defendant's evidence of his innocence was newly-discovered. His co-defendants and his alibi witness were previously uncooperative with the defendant. Another witness who identified defendant could not be located until well after trial. Defendant attested that this evidence was not known to him before trial and to his difficulties in communicating while in the prison system. Therefore, defendant has shown that his allegations are based on newly-discovered evidence.

The newly-discovered evidence is also material, noncumulative, and would probably change the result of defendant's trial. The co-defendants attested that they each told the police that the police had the wrong man, that they did not know the defendant, and that their descriptions of the fifth perpetrator did not match the defendant. The witness who identified defendant to the police had no knowledge that defendant was involved in the crimes. None of this evidence was before the jury. The only evidence linking the defendant to the crimes was his confession. A co-defendant who testified at another co-defendant's trial never identified defendant as one of the offenders. Therefore, defendant was entitled to an evidentiary hearing.

2. Only one post-conviction petition may be filed by a petitioner without leave of court. Leave may be granted upon a showing of cause for the failure to bring the claim in the initial post-conviction proceeding and prejudice resulting from that failure. Cause is shown by identifying an objective factor that impeded the ability to raise the claim during the initial proceeding. Prejudice is shown by demonstrating that the claim so infected the trial that the resulting conviction or sentence violates due process.

Miller v. Alabama, 567 U.S. ___, 132 S.Ct. 2455, ___ L.Ed.2d ___ (2012), held that mandatory life imprisonment without the possibility of parole for offenders under the age of 18 violates the Eighth Amendment. Because **Miller** was not available to defendant when he filed his initial petition, defendant has satisfied the cause element of the cause-and-prejudice test for his Eighth Amendment claim. Defendant has also demonstrated prejudice because **Miller** applies retroactively to his case. The sentencing court did not graduate and proportion punishment for defendant's crime considering his status as a juvenile at the time of the offense, violating the Eighth Amendment's prohibition against cruel and unusual punishment.

3. Generally, new rules of criminal procedure do not apply retroactively to convictions that are final when the new rule is announced except: (1) if the rule places certain kinds of primary, private individual conduct beyond the power of the criminal-law-making authority to proscribe; or (2) if the rule requires the observance of those procedures that are implicit in the concept of ordered liberty. This second exception is limited to watershed rules of criminal procedure without which the likelihood of an accurate conviction is seriously diminished.

The Appellate Court concluded that **Miller** was such a watershed rule that requires observance of procedures implicit in the concept of ordered liberty. **Miller** not only changed procedures but made a substantial change in the law in holding under the Eighth Amendment that the government cannot constitutionally apply a mandatory sentence of life without parole for homicides committed by persons under the age of 18. Life without parole is justified only where the State shows that it is an appropriate and fitting punishment regardless of the defendant's age.

The Appellate Court found it instructive that the companion case to **Miller** involved a life-without-parole sentence that was final. Notwithstanding its finality, the Supreme Court effectively applied **Miller** retroactively to the companion case. Once a new rule is applied to the defendant in a case announcing the new rule, evenhanded justice requires that it be applied retroactively to all who are similarly situated. It would be cruel and unusual punishment to only apply the principle of **Miller** to new cases.

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§9-1(g)
Third Stage of Post-Conviction
Proceedings – Evidentiary Hearing

People v. Coleman, 2013 IL 113307 (No. 113307, 10/3/13)

1. As a general rule, any constitutional claim not raised in an original or amended post-conviction petition is forfeited. There are two exceptions to this procedural default rule: 1) where defendant can establish cause for failing to raise the claim in the original or amended petition and resulting prejudice; and 2) where the claim involves actual innocence.

A freestanding claim of actual innocence is not cognizable as a Fourteenth Amendment due process claim. As a matter of Illinois constitutional jurisprudence, however, a claim of newly discovered evidence showing a defendant to be actually innocent of the crime for which he was convicted is cognizable as a matter of due process. Procedurally, a court treats this claim like any other post-conviction claim.

Substantively, a court should grant relief only if the defendant has presented supporting evidence that is new, material, noncumulative, and of such conclusive character as to probably change the result on retrial. "New" evidence must have been discovered after trial and be of such character that it could not have been discovered earlier through the exercise of due diligence. Evidence is "material" if it is relevant and probative of the petitioner's innocence. "Noncumulative" evidence adds to that which the jury has heard. "Conclusive" evidence, when considered with the trial evidence, would probably lead to a different result.

As a matter of practice, the circuit court should first review the evidence presented at the evidentiary hearing to determine if any of it is new, material, and noncumulative. If there is such evidence, the court must consider whether that evidence places the evidence presented at trial in a different light and undercuts the court's confidence in the factual correctness of the verdict. Although this question involves credibility determinations, the court should not redecide the defendant's guilt in deciding whether to grant relief. The key is probability rather than certainty requires the court to consider what another jury would likely do when presented with all the evidence both new and old.

2. Federal law does recognize gateway claims of actual innocence. A "gateway" claim is not itself a constitutional claim, but is a gateway through which a federal habeas petitioner must pass in order to have his otherwise barred constitutional claim considered on its merits. To obtain relief on a gateway actual-innocence claim, a defendant must show that it is more likely than not that no reasonable juror would have convicted him in light of the new evidence. **Schlup v. Delo**, 513 U.S. 298 (1995).

The Supreme Court declined to adopt an enhanced **Schlup** test providing that in order to prevail on a claim of actual innocence, a post-conviction petitioner must prove by clear and

convincing evidence that no reasonable juror would have found him guilty in light of the new evidence. Illinois does not regard a claim of actual innocence as a gateway to relief on other issues, and the State's arguments based on federal jurisprudence are therefore irrelevant. Furthermore, adoption of the State's proposed test would make an actual-innocence claim harder to prove than any other post-conviction claim.

3. Here, it was uncontested that the defense presented new, material, and noncumulative evidence of actual innocence at the evidentiary hearing on his petition, because five men who were involved in or present for the attack testified that defendant was not involved. The defense may have known about the witnesses before trial, but in all likelihood they would have asserted their privilege against self-incrimination if called to testify at trial. Although another offender did testify at trial and exonerated defendant, the uncorroborated testimony of one offender does not render the testimony of five additional witnesses merely cumulative, particularly where four of the additional witnesses were never charged with the offense and they offered significant details missing from the testimony of the offender who did testify.

The court acknowledged that four of the witnesses had extensive criminal records, three admitted drinking alcohol and smoking marijuana before the attack, and there were discrepancies in the accounts of the attack which they provided 16 years after the fact. Although these matters would affect their credibility at a second trial, their testimony was remarkably consistent regarding key details of the events and on the issue of the persons involved in or present for the attack. Although the witnesses' credibility would also be affected by the fact that the statute of limitations had expired, the court noted that the prosecution did not pursue charges against them although they had been implicated in the offense before the statute of limitations ran.

While the State's evidence was sufficient to convict, it was far from overwhelming. The post-conviction hearing testimony of the detective who investigated the attack was inconsistent with his trial testimony and revealed that defendant became a suspect not as a result of a computerized "cold search," but based on information supplied by other police officers. The court concluded:

> [T]he evidence presented by defendant at the evidentiary hearing, together with the evidence presented by the defendant at trial, places the evidence presented by the State in a new light and undermines our confidence in that evidence and the result it produced. Weighed against the State's evidence, the defendant's new evidence is conclusive enough that another trier of fact would probably reach a different result.

Because the circuit court's dismissal of the post-conviction petition was manifestly erroneous, the dismissal order was reversed and the cause remanded for further proceedings.

People v. English, 2013 IL 112890 (No. 112890, 1/25/13)

1. After a third-stage evidentiary hearing in a post-conviction proceeding at which fact-finding and credibility determinations are involved, the circuit court's decision will not be reversed unless it is manifestly erroneous. However, if no such determinations are necessary at the third stage, *i.e.*, no new evidence is presented and the issues presented are pure questions of law, a *de novo* standard of review applies, unless the hearing judge has some special expertise or familiarity with defendant's trial and sentencing, and that familiarity has some bearing on the disposition of the post-conviction petition.

At the third-stage of defendant's post-conviction proceeding, the circuit court heard no

new evidence. The court reviewed the trial transcripts and heard argument of counsel. The hearing judge had not presided at defendant's trial and had no special expertise or familiarity with the defendant's trial. Therefore, the standard of review is *de novo*.

2. Issues that could have been raised on direct appeal, but were not, are forfeited and may not be raised in a post-conviction proceeding.

Defendant's argument that aggravated battery of a child could not serve as the predicate felony for aggravated battery of that same child was forfeited by defendant's failure to raise that argument on direct appeal. The theory was not novel as it had been raised and rejected by the Illinois Supreme Court in **People v. Viser**, 62 Ill. 2d 568, 343 N.E.2d 903 (1975). Subsequent to defendant's appeal, the Illinois Supreme Court accepted the argument, adopting the independent-felonious purpose rule in **People v. Morgan**, 197 Ill. 2d 404, 758 N.E.2d 813 (2001), and **People v. Pelt**, 207 Ill. 2d 434, 800 N.E.2d 1193 (2003). The defendant in **Morgan** faced the same legal landscape as defendant but nevertheless made the argument. If the defendant in **Morgan** was able to make the argument under such circumstances, defendant could have done so.

3. The doctrine of forfeiture is relaxed where the forfeiture stems from the ineffective assistance of counsel.

To establish that appellate counsel was ineffective, defendant must satisfy the standard set forth in **Strickland v. Washington**, 466 U.S. 668 (1984). Defendant must show both that appellate counsel's performance was deficient and that, but for counsel's errors, there is a reasonable probability that the appeal would have been successful. Appellate counsel is not obligated to raise every conceivable issue on appeal, but is expected to exercise professional judgment to select from the many potential claims of error that might be asserted on appeal.

Appellate counsel's assessment of the merits of an issue depends on the state of the law at the time of the direct appeal. Representation based on the law prevailing at the time of appeal is adequate, and counsel is not incompetent for failing to accurately predict that existing law will change. Appellate counsel is not required to raise issues that he reasonably determines are not meritorious.

Because the basis on which defendant sought to invalidate his conviction was not supported by precedent at the time of his direct appeal, it was reasonable for appellate counsel to conclude that the issue was unlikely to succeed. Appellate counsel was not deficient in failing to predict a subsequent change in the law. Counsel proceeded on other challenges, one of which was ultimately successful. Therefore, appellate counsel's forfeiture of the issue on appeal is not excused based on ineffective assistance of appellate counsel.

4. Even though proper application of the forfeiture doctrine in this case leaves defendant without a remedy for remedying his improper felony-murder conviction, the limited scope of post-conviction review compels this result

Freeman, J., joined by Burke, J., specially concurred.

1. *De novo* is the proper standard of review because the case was decided by the circuit court at the second stage of the proceedings based on the pleadings and the original trial. The fact that the hearing judge did not preside at the original trial has no relevance to the standard of review employed.

2. The Post-Conviction Hearing Act requires that the petition state the denial of a constitutional right. The cognizability of an issue in a post-conviction proceeding is a threshold matter that should be addressed prior to any other matters that otherwise might defeat the claim.

Because the independent-felonious-purpose rule is based on principles of statutory construction and is not constitutionally based, defendant's challenge to his felony-murder

conviction is not forfeited by the failure to raise it on direct review. A claim cannot be forfeited for purposes of post-conviction review if it cannot be raised in a post-conviction petition in the first place.

3. The majority opinion is internally inconsistent. It concludes that the independent-felonious-purpose rule did not exist at the time of defendant's direct appeal and therefore appellate counsel cannot be faulted for failing to foresee a rule that did not exist. This is directly at odds with the majority's pronouncement that the rule was not novel at the time of defendant's direct appeal and therefore was available and could have been raised.

This inconsistent treatment of defendant's claims leaves defendant in a procedural quandary that is at odds with the legislature's intent in enacting the post-conviction statute to eliminate procedural impediments to collateral review of unconstitutional convictions.

4. Nonetheless the concurrence agrees with the majority that appellate counsel was not ineffective in failing to predict that the court would endorse the independent-felonious-purpose rule.

(Defendant was represented by Assistant Defender Kerry Bryson, Ottawa.)

People v. Andrews, 403 Ill.App.3d 654, 936 N.E.2d 648 (4th Dist. 2010)

The Appellate Court rejected defense arguments that the cause should be remanded for a third-stage evidentiary hearing on the post-conviction claim. The cause had advanced to the third stage as the court had appointed counsel on the petition and the State had elected not to file a motion to dismiss. The parties could have presented evidence at the third stage but chose not to do so. The trial court had wide discretion under the statute regarding the types of evidence it could consider at the third stage. 725 ILCS 5/122-6. The defense forfeited any issue with respect to representations the prosecutor made to the judge regarding previous guilty plea proceedings involving defendant by its failure to object to those representations.

(Defendant was represented by Assistant Deputy Defender Nancy Vincent, Springfield.)

People v. Barkes, 399 Ill.App.3d 980, 928 N.E.2d 102 (2d Dist. 2010)

1. The decision to request a bench or jury trial is left to the defendant rather than defense counsel. Where defendant alleged in his post-conviction petition that he told counsel he wanted a bench trial, but was told that counsel "was running the show [and defendant] was getting a jury trial," the petition was sufficient to advance to a third-stage evidentiary hearing.

All well-pleaded allegations are taken to be true at the second stage of post-conviction proceedings, and if true counsel's response to defendant would have been objectively unreasonable under **Strickland**. Furthermore, prejudice is presumed under these circumstances if there is a reasonable probability that defendant would have waived a jury trial in the absence of the erroneous statement.

2. Defendant was also entitled to an evidentiary hearing on his claim that trial counsel failed to advise him that consecutive sentences were required on multiple convictions of criminal sexual assault.

Although a defendant has no constitutional right to plea bargain, if the State chooses to bargain the defendant has the right to the effective assistance of counsel during negotiations. To make a knowing and voluntary decision whether to accept or reject a plea offer, defendant must be fully informed concerning the consequences of accepting or rejecting the plea offer, including accurate advice concerning the sentencing consequences of accepting or rejecting the offer.

Because defendant alleged that defense counsel had failed to inform him that he faced mandatory consecutive sentences if convicted, and the affidavit attached to the petition stated

that if defendant had been accurately advised he would have accepted the State's offer, the allegations were sufficient to warrant an evidentiary hearing.

3. The court concluded, however, that two other allegations of ineffective assistance were insufficient to require an evidentiary hearing. First, defendant's allegation that defense counsel refused to allow him to testify in his defense, despite a specific request to do so, was insufficient to require a hearing where defendant made no allegations which, even if true, satisfied the prejudice requirement of **Strickland**. In particular, defendant failed to specify the testimony he would have given had he testified.

Second, the allegation that counsel was ineffective for denying defendant the right to counsel of choice failed to show prejudice, because defendant did not allege that he would have obtained private counsel had he not been given inaccurate advice concerning whether appointed counsel could be discharged.

(Defendant was represented by Assistant Defender Kim DeWitt, Elgin.)

People v. Carter, 2013 IL App (2d) 110703 (No. 2-11-0703, 8/9/13)

For new evidence of actual innocence to warrant a new trial, defendant must demonstrate at a third-stage evidentiary hearing that the evidence: (1) is of such a conclusive character that it will probably change the result on retrial; (2) is material to the issue, not merely cumulative; and (3) was discovered since trial and is of such character that the defendant in the exercise of due diligence could not have discovered it earlier. The new evidence need not necessarily establish the defendant's innocence. A new trial is warranted if all of the facts and surrounding circumstances, including the new evidence, warrant closer scrutiny to determine the guilt or innocence of the defendant.

To make a determination at a third-stage evidentiary hearing whether the new evidence is of such conclusive character that it would probably change the result on retrial, the post-conviction hearing court acts as a fact finder. It is the court's function to determine witness credibility, decide the weight to be given testimony and evidence, and resolve any evidentiary conflicts. Therefore, the circuit court did not exceed its bounds by discrediting the testimony of one witness and crediting the testimony of another in making its determination that the evidence did not warrant a new trial.

(Defendant was represented by Assistant Deputy Defender Verlin Meinz, Ottawa.)

People v. Wrice, 406 Ill.App.3d 43, 940 N.E.2d 102 (1st Dist. 2010)

1. The Post-Conviction Hearing Act contemplates the filing of only one post-conviction petition. Fundamental fairness allows the filing of a successive petition only when the petition complies with the cause-and-prejudice test. Defendant shows cause by identifying an objective factor external to the defense that impeded his efforts to raise the claim in the earlier proceeding. He shows prejudice by demonstrating that the constitutional error so infected the entire trial that the resulting conviction violates due process.

The circuit court denied defendant leave to file his second successive post-conviction petition alleging that his confession was the result of torture by Sergeant Byrne and Detective Dignan. In support of the petition, defendant submitted the 2006 report of the Special State's Attorney appointed by the Circuit Court of Cook County. The report concluded that Commander Jon Burge was guilty of prisoner abuse and named Dignan and Byrne as officers accused of making false statements regarding their torture of prisoners. The Special State's Attorney declined to prosecute because the statute of limitations had expired.

The Appellate Court concluded that defendant had satisfied the cause-and-prejudice standard. The petition alleged for the first time that the Report of the Special State's Attorney

corroborated defendant's claims. Because the report was not in existence when defendant filed his petitions in 1991 and 2000, the unavailability of the report supplied cause that impeded defendant's efforts to raise the claim in the earlier proceedings.

The defendant also established prejudice. The Report of the Special State's Attorney was not cumulative of the OPS reports that defendant had appended to his 2000 petition. The report was the first independent evaluation by the Special State's Attorney of 148 complaints of torture by police officers under the command of Burge. Byrne and Dignan were named in the report. Unlike the OPS reports, which found certain allegations of torture established by the civil preponderance-of-the-evidence standard, the Special State's Attorney's Report found evidence of torture was established in certain cases by the criminal proof-beyond-a-reasonable-doubt standard. The report found evidence of widespread, systematic abuse of prisoners at or near the time of defendant's incarceration, adding further corroboration to defendant's claim that his confession was obtained by torture. Citing **People v. Wilson**, 116 Ill.2d 29, 506 N.E.2d 571 (1984), the Appellate Court stated that the admission of a defendant's coerced confession as substantive evidence of guilt is never harmless error.

People v. Hobley, 182 Ill.2d 404, 696 N.E.2d 313 (1998), did not compel the Appellate Court to reach a different result with respect to a finding of prejudice on the ground that defendant maintained that he never made the confession that he claims is the product of police coercion. Although defendant denied making a confession, in contrast to **Hobley**, defendant provided medical evidence corroborating his allegations of torture and has referenced the Special State's Attorney's report, which provides significant corroboration of his torture claims. A jury could believe that defendant confessed, but that the confession was coerced, as defendant's claim of physical abuse was corroborated by the medical evidence, the OPS reports, and the Report of the Special State's Attorney.

2. A defendant is entitled to an evidentiary hearing on a post-conviction claim of a coerced confession where: (1) he had consistently claimed he was tortured; (2) his claims are strikingly similar to other claims of torture; (3) the officers allegedly involved are identified in other allegations of torture; and (4) the defendant's allegations are consistent with OPS findings of systemic and methodical torture at Area 2 under Burge. **People v. Patterson**, 192 Ill.2d 93, 735 N.E.2d 616 (2000).

Defendant met this standard and is entitled to an evidentiary hearing on his claims of torture where: (1) he consistently claimed at the hearing on his motion to suppress, at trial, and on post-conviction that he was tortured; (2) his claims of being beaten are strikingly similar to those of other prisoners at Areas 2 and 3; (3) the officers involved, Byrne and Dignan, are identified in other allegations of torture; and (4) defendant's allegations are consistent not only with OPS findings of systemic and methodical torture at Area 2 under Burge, but also with the findings of torture in the Special State's Attorney's Report.

(Defendant was represented by Assistant Defender Heidi Lambros, Chicago.)

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§9-1(h)
Forfeiture and *Res Judicata*

§9-1(h)(1)
Generally

People v. Petrenko, 237 Ill.2d 490, 931 N.E.2d 1198 (2010)

Generally, claims that could have been raised on direct appeal are considered forfeited and cannot be raised on post-conviction. Claims that are not raised in the post-conviction are forfeited and cannot be raised on appeal.

Based on these forfeiture principles, the court found that a post-conviction claim that trial counsel was ineffective for failing to make a **Franks** motion was forfeited because it could have been raised on direct appeal, but was not. However, a claim that appellate counsel was ineffective for failing to argue trial counsel's ineffectiveness was not waived.

The court also concluded that a different **Franks**-related claim of ineffectiveness was forfeited because the facts underlying that claim, although mentioned in the post-conviction petition, were not raised in the context of the claim that there were facts omitted from the affidavit that were material to the finding of probable cause.

The court affirmed the appellate court's affirmance of the summary dismissal of defendant's *pro se* post-conviction petition.

(Defendant was represented by Assistant Defender Steve Wiltgen, Elgin.)

People v. English, ___ Ill.App.3d ___, ___ N.E.2d ___ (3d Dist. 2011) (No. 3-10-0764, 6/27/11)

Post-conviction claims are limited to those claims that were not and could not have been raised on direct appeal. Claims that were raised and decided on direct appeal are barred by *res judicata.* Claims that could have been raised, but were not are forfeited.

The post-conviction claim that defendant's felony murder conviction was improperly predicated on aggravated battery of a child is based entirely on matters contained in the trial court record. There was nothing new or novel about the argument at the time of defendant's direct appeal. **People v. Viser**, 62 Ill.2d 568, 343 N.E.2d 903 (1975). The fact that **People v. Morgan**, 197 Ill.2d 404, 758 N.E.2d 813 (2001), and **People v. Pelt**, 207 Ill.2d 434, 800 N.E.2d 1193 (2003), cases decided after defendant's direct appeal, "added authority to the long line of cases" discussing aggravated battery as a predicate felony to felony murder did not preclude defendant from raising this argument on direct appeal. Therefore, this claim could have been raised on direct appeal, and because it was not, "consideration of that issue is barred by the doctrine of *res judicata*."

(Defendant was represented by Assistant Defender Kerry Bryson, Ottawa.)

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§9-1(h)(2)
Forfeiture

People v. English, 2013 IL 112890 (No. 112890, 1/25/13)

1. After a third-stage evidentiary hearing in a post-conviction proceeding at which fact-finding and credibility determinations are involved, the circuit court's decision will not be reversed unless it is manifestly erroneous. However, if no such determinations are necessary at the third stage, *i.e.*, no new evidence is presented and the issues presented are pure questions of law, a *de novo* standard of review applies, unless the hearing judge has some special expertise or familiarity with defendant's trial and sentencing, and that familiarity has some bearing on the disposition of the post-conviction petition.

At the third-stage of defendant's post-conviction proceeding, the circuit court heard no new evidence. The court reviewed the trial transcripts and heard argument of counsel. The

hearing judge had not presided at defendant's trial and had no special expertise or familiarity with the defendant's trial. Therefore, the standard of review is *de novo*.

2. Issues that could have been raised on direct appeal, but were not, are forfeited and may not be raised in a post-conviction proceeding.

Defendant's argument that aggravated battery of a child could not serve as the predicate felony for aggravated battery of that same child was forfeited by defendant's failure to raise that argument on direct appeal. The theory was not novel as it had been raised and rejected by the Illinois Supreme Court in **People v. Viser**, 62 Ill. 2d 568, 343 N.E.2d 903 (1975). Subsequent to defendant's appeal, the Illinois Supreme Court accepted the argument, adopting the independent-felonious purpose rule in **People v. Morgan**, 197 Ill. 2d 404, 758 N.E.2d 813 (2001), and **People v. Pelt**, 207 Ill. 2d 434, 800 N.E.2d 1193 (2003). The defendant in **Morgan** faced the same legal landscape as defendant but nevertheless made the argument. If the defendant in **Morgan** was able to make the argument under such circumstances, defendant could have done so.

3. The doctrine of forfeiture is relaxed where the forfeiture stems from the ineffective assistance of counsel.

To establish that appellate counsel was ineffective, defendant must satisfy the standard set forth in **Strickland v. Washington**, 466 U.S. 668 (1984). Defendant must show both that appellate counsel's performance was deficient and that, but for counsel's errors, there is a reasonable probability that the appeal would have been successful. Appellate counsel is not obligated to raise every conceivable issue on appeal, but is expected to exercise professional judgment to select from the many potential claims of error that might be asserted on appeal.

Appellate counsel's assessment of the merits of an issue depends on the state of the law at the time of the direct appeal. Representation based on the law prevailing at the time of appeal is adequate, and counsel is not incompetent for failing to accurately predict that existing law will change. Appellate counsel is not required to raise issues that he reasonably determines are not meritorious.

Because the basis on which defendant sought to invalidate his conviction was not supported by precedent at the time of his direct appeal, it was reasonable for appellate counsel to conclude that the issue was unlikely to succeed. Appellate counsel was not deficient in failing to predict a subsequent change in the law. Counsel proceeded on other challenges, one of which was ultimately successful. Therefore, appellate counsel's forfeiture of the issue on appeal is not excused based on ineffective assistance of appellate counsel.

4. Even though proper application of the forfeiture doctrine in this case leaves defendant without a remedy for remedying his improper felony-murder conviction, the limited scope of post-conviction review compels this result

Freeman, J., joined by Burke, J., specially concurred.

1. *De novo* is the proper standard of review because the case was decided by the circuit court at the second stage of the proceedings based on the pleadings and the original trial. The fact that the hearing judge did not preside at the original trial has no relevance to the standard of review employed.

2. The Post-Conviction Hearing Act requires that the petition state the denial of a constitutional right. The cognizability of an issue in a post-conviction proceeding is a threshold matter that should be addressed prior to any other matters that otherwise might defeat the claim.

Because the independent-felonious-purpose rule is based on principles of statutory construction and is not constitutionally based, defendant's challenge to his felony-murder conviction is not forfeited by the failure to raise it on direct review. A claim cannot be forfeited

for purposes of post-conviction review if it cannot be raised in a post-conviction petition in the first place.

3. The majority opinion is internally inconsistent. It concludes that the independent-felonious-purpose rule did not exist at the time of defendant's direct appeal and therefore appellate counsel cannot be faulted for failing to foresee a rule that did not exist. This is directly at odds with the majority's pronouncement that the rule was not novel at the time of defendant's direct appeal and therefore was available and could have been raised.

This inconsistent treatment of defendant's claims leaves defendant in a procedural quandary that is at odds with the legislature's intent in enacting the post-conviction statute to eliminate procedural impediments to collateral review of unconstitutional convictions.

4. Nonetheless the concurrence agrees with the majority that appellate counsel was not ineffective in failing to predict that the court would endorse the independent-felonious-purpose rule.

(Defendant was represented by Assistant Defender Kerry Bryson, Ottawa.)

People v. Petrenko, 237 Ill.2d 490, 931 N.E.2d 1198 (2010)

Generally, claims that could have been raised on direct appeal are considered forfeited and cannot be raised on post-conviction. Claims that are not raised in the post-conviction are forfeited and cannot be raised on appeal.

Based on these forfeiture principles, the court found that a post-conviction claim that trial counsel was ineffective for failing to make a **Franks** motion was forfeited because it could have been raised on direct appeal, but was not. However, a claim that appellate counsel was ineffective for failing to argue trial counsel's ineffectiveness was not waived.

The court also concluded that a different **Franks**-related claim of ineffectiveness was forfeited because the facts underlying that claim, although mentioned in the post-conviction petition, were not raised in the context of the claim that there were facts omitted from the affidavit that were material to the finding of probable cause.

The court affirmed the appellate court's affirmance of the summary dismissal of defendant's *pro se* post-conviction petition.

(Defendant was represented by Assistant Defender Steve Wiltgen, Elgin.)

People v. Tate, 2012 IL 112214 (No. 112214, 11/29/12)

1. A post-conviction proceeding contains three stages. At the first stage, the circuit court must independently review the petition, taking the allegations as true, and determine whether the petition is frivolous or patently without merit. A petition is frivolous or patently without merit only if it has no arguable basis in fact or in law. There is no involvement by the State in this initial stage. The court acts strictly in an administrative capacity by screening out those petitions that are without legal substance or are obviously without merit.

Most petitions for post-conviction relief are filed *pro se* by persons who are incarcerated and lack the means to hire their own attorney. At the first stage of the proceedings, *pro se* petitions, as well as petitions filed by attorneys, are judged by first-stage standards.

2. An ineffective-assistance claim based on what the record discloses counsel did in fact do is subject to the usual rules of procedural default. But an ineffectiveness claim based on what counsel ought to have done may depend on proof of matters that could not have been included in the record precisely because of the allegedly deficient representation. Therefore, a default may not preclude an ineffective-assistance claim based on what trial counsel allegedly ought to have done in presenting a defense.

Defendant did not forfeit his post-conviction claim of ineffective assistance of counsel

for failing to include that claim in a post-trial motion. Defendant's claim was based on what counsel ought to have done at trial, not on what counsel did. The claim was based on the content of affidavits attached to the petition, which, as a result of counsel's allegedly deficient representation, could not have been included in the direct appeal record.

3. At the first-stage of post-conviction proceedings, a petition alleging ineffective assistance of counsel may not be summarily dismissed if (1) it is arguable that counsel's performance fell below an objective standard of reasonableness, and (2) it is arguable that the defendant was prejudiced.

Defendant's petition was supported by the affidavits of alibi witnesses and occurrence witness who attested that defendant was not the offender. These affidavits are sufficient to make an arguable claim of ineffective assistance of counsel. At trial, four eyewitnesses testified and identified defendant, but no murder weapon was recovered, no DNA or fingerprints linked defendant to the offense, and defendant did not confess. It is at least arguable that defendant was prejudiced by the absence of his witnesses and that counsel's performance fell below an arguable standard of reasonableness. It is inappropriate to consider at the first stage whether defense counsel made a strategic decision not to call the witnesses to testify.

People v. Carballido, 2011 IL App (2d) 090340 (No. 2-09-0340, mod. op., 8/10/11)

1. Generally, the Post-Conviction Hearing Act limits the scope of a defendant's challenge to constitutional matters that have not been, and could not have been, previously adjudicated. Appellate counsel can work only with the record as it exists. Where the record on direct appeal is insufficient to establish ineffective assistance of counsel, defendant may bring and develop the claim in a post-conviction proceeding.

Where appellate counsel argued on direct appeal that trial counsel was ineffective for failing to litigate a motion to suppress statements based on the inadequacy of **Miranda** warnings, but did not have the benefit of a complete record concerning counsel's failure to litigate a suppression motion based on the involuntariness of the statements, the latter issue was not waived for post-conviction purposes. Therefore, the defendant was not required to allege ineffectiveness by appellate counsel in order to raise the issue on post-conviction.

2. In non-capital cases, post-conviction proceedings are divided into three stages. At the first stage, the trial court must review the petition within 90 days to determine whether it should be dismissed as frivolous or patently without merit. A *pro se* post-conviction petition is frivolous or patently without merit if it has no arguable basis in law or fact. The petition has no basis in law if it is based on an indisputably meritless legal theory or a legal theory that is completely contradicted by the record. A petition has no basis in fact when it is based on fanciful factual allegations.

Pro se petitions are to be judged leniently at the first stage, so that borderline claims may proceed if the gist of a constitutional claim is raised. Here, the trial court erred where it did not restrict its examination of the trial record to determining whether the petition's factual allegations were rebutted. Instead, the judge weighed the facts at trial and the allegations of the post-conviction petition and determined that the defendant's statements were voluntary. "[T]he court strayed from answering the limited stage-one questions on whether defendant's claim was frivolous or patently without merit and whether the record positively rebutted defendant's assertion; rather, it stepped into the role of factfinder."

3. Defendant alleged the gist of a constitutional issue that trial counsel was ineffective for failing to litigate a motion to suppress statements as involuntary. The record showed that trial counsel was familiar with several relevant factors indicating that a motion to suppress

would have had a reasonable chance of success. Furthermore, counsel knew that several other matters relevant to voluntariness were not rebutted by the evidence and needed to be investigated.

Finally, suppression of defendant's statements likely would have changed the outcome of the case because the State would have been without direct evidence of the "lynchpin" of its case. Under these circumstances, the petition should have been advanced to the second stage of proceedings.

4. The court held that a post-conviction petition alleged the gist of a constitutional issue concerning a State investigator's failure to disclose field notes of his interview of a defense witness. The court noted that the failure to disclose material evidence after a defense request might violate due process. The witness testified at defendant's trial, and was impeached by the officer's testimony.

Supreme Court Rule 412 requires the prosecution to insure a flow of information between various investigative personnel, so that the prosecutor obtains all information relevant to the case. Furthermore, 725 ILCS 5/114-13(b) requires an investigating officer to provide the prosecutor with all investigative material, including field notes. Because the impeachment was on a critical point, and because the witness's testimony and the officer's impeachment were confusing concerning the precise content of the witness's out-of-court statement, the court directed the State to ensure that discovery requirements were completed before any proceedings occurred on remand.

The trial court's dismissal of defendant's post-conviction petition was reversed, and the cause was remanded for further proceedings.

(Defendant was represented by Assistant Defender Mike Vonnahmen, Springfield.)

People v. Carballido, ___ Ill.App.3d ___, ___ N.E.2d ___ (2d Dist. 2011) (No. 2-09-0340, 3/17/11)

1. Generally, a claim of ineffective assistance of counsel need not be raised on direct appeal in order to avoid forfeiture in post-conviction proceedings. Because the record on ineffective assistance issues is usually not complete on direct review, most claims of ineffective assistance by trial counsel are better raised through collateral review, after the parties have an opportunity to develop the record.

Where appellate counsel argued on direct appeal that trial counsel was ineffective for failing to litigate a motion to suppress statements based on the inadequacy of **Miranda** warnings, but did not have the benefit of a complete record concerning counsel's failure to litigate a suppression motion based on the involuntariness of the statements, the latter issue was not waived for post-conviction purposes. Therefore, the defendant was not required to allege ineffectiveness by appellate counsel in order to raise the issue on post-conviction.

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Pro se petitions are to be judged leniently at the first stage, so that borderline claims may proceed if the gist of a constitutional claim is raised. Here, the trial court erred where it did not restrict its examination of the trial record to determining whether the petition's factual allegations were rebutted. Instead, the judge weighed the facts at trial and the

allegations of the post-conviction petition and determined that the defendant's statements were voluntary. "[T]he court strayed from answering the limited stage-one questions on whether defendant's claim was frivolous or patently without merit and whether the record positively rebutted defendant's assertion; rather, it stepped into the role of factfinder."

3. Defendant alleged the gist of a constitutional issue that trial counsel was ineffective for failing to litigate a motion to suppress statements as involuntary. The record showed that trial counsel was familiar with several relevant factors indicating that a motion to suppress would have had a reasonable chance of success. Furthermore, counsel knew that several other matters relevant to voluntariness were not rebutted by the evidence and needed to be investigated. Finally, suppression of defendant's statements likely would have changed the outcome of the case because the State would have been without direct evidence of the "lynchpin" of its case. Under these circumstances, the petition should have been advanced to the second stage of proceedings.

4. The court held that a post-conviction petition alleged the gist of a constitutional issue concerning a State investigator's failure to disclose field notes of his interview of a defense witness. The court noted that the failure to disclose material evidence after a defense request might violate due process. The witness testified at defendant's trial, and was impeached by the officer's testimony.

Supreme Court Rule 412 requires the prosecution to insure a flow of information between various investigative personnel, so that the prosecutor obtains all information relevant to the case. Furthermore, 725 ILCS 5/114-13(b) requires an investigating officer to provide the prosecutor with all investigative material, including field notes. Because the impeachment was on a critical point, and because the witness's testimony and the officer's impeachment were confusing concerning the precise content of the witness's out-of-court statement, the court directed the State to ensure that discovery requirements were completed before any proceedings occurred on remand.

The trial court's dismissal of defendant's post-conviction petition was reversed, and the cause was remanded for further proceedings.

(Defendant was represented by Assistant Defender Mike Vonnahmen, Springfield.)

People v. Coleman, 2011 IL App (1st) 091005 (No. 1-09-1005, 7/22/11)

Defendant asserted in his post-conviction petition that his trial counsel was ineffective where counsel prevented him from testifying and failed to advise petitioner that he had a right to testify. He specifically alleged that he spoke to counsel before trial and informed him that he "wanted to explain his innocence and asked his attorney if he could do so." His attorney told him that "it would be a bad idea for [him] to put [defendant] on the stand at trial because it [would] give the state an opportunity to bring up [defendant's] background, also because it will be the police's word against [defendant's]."

1. Any claim of substantial denial of constitutional rights not raised in the original or amended petition is waived. The Appellate Court does not possess the Supreme Court's supervisory authority to recognize procedurally-defaulted claims. The proper course of action to take when appellate counsel discovers an error not raised by defendant during first-stage post-conviction proceedings is the filing of a successive petition alleging the newly-found claim.

Appellate counsel argued that the petition alleged that trial counsel misinformed defendant that his prior juvenile adjudications would be admissible for impeachment should defendant testify. This argument is not supported by a liberal reading of the allegations of the petition. The petition contains no reference to any juvenile adjudications. The court found it more likely that the reference to "background" referred to defendant's post-arrest statements,

as it was connected in the petition to counsel's concern that it would be defendant's word against that of the police. Because appellate counsel went outside the allegations of the petition to argue that counsel advised defendant not to testify to prevent admission of his juvenile adjudications, that claim was defaulted and could not be reviewed on appeal.

2. The petition failed to state an arguable claim that defense counsel prevented defendant from testifying. As a general rule, advice not to testify is a matter of trial strategy that does not amount to ineffective assistance of counsel unless counsel refused to allow the defendant to testify. The allegations of the petition showed only that counsel gave his professional opinion, based on the evidence in the case, that it was a bad idea for defendant to take the stand, not that counsel gave defendant erroneous advice to dissuade him from testifying. That statement cannot form the basis for a claim that the advice was not objectively reasonable when trial counsel's statement to defendant amounts to no more than his professional opinion based on the circumstances of the case.

(Defendant was represented by Assistant Defender Bryon Reina, Chicago.)

People v. Cowart, 2015 IL App (1st) 131073 (No. 1-13-1073, 2/17/15)

1. Defendant filed a post-conviction petition attacking his guilty plea by arguing that the trial court failed to properly admonish him that he would have to register as a sex offender. The State argued that defendant forfeited this issue by failing to raise it on direct appeal.

The Appellate Court rejected the State's argument. Post-conviction claims that could have been raised on direct appeal are forfeited, but the failure to file any appeal at all does not forfeit such issues. For purposes of post-conviction forfeiture, a summary remand on direct appeal for non-compliance with Rule 604(d) is treated as if defendant filed no appeal at all. Here, on direct appeal, defendant's case was remanded for compliance with Rule 604(d) and thus his direct appeal was the equivalent of filing no appeal at all. Defendant therefore did not forfeit his post-conviction claim.

2. The court also rejected the State's argument that defendant's second-stage post-conviction petition was properly dismissed because he provided no affidavits or other support for his claims. The State forfeits a non-jurisdictional procedural challenge to a post-conviction petition by failing to raise that challenge in its motion to dismiss.

Here the State made no argument in its motion to dismiss about the lack of affidavits or other support for defendant's claim. The court noted that had the State raised this issue in the circuit court, defendant could have supplied the affidavits. By failing to raise this issue, the State forfeited its argument on appeal.

(Defendant was represented by Assistant Defender Robert Hirschhorn, Chicago.)\

People v. English, ___ Ill.App.3d ___, ___ N.E.2d ___ (3d Dist. 2011) (No. 3-10-0764, 6/27/11)

Post-conviction claims are limited to those claims that were not and could not have been raised on direct appeal. Claims that were raised and decided on direct appeal are barred by *res judicata.* Claims that could have been raised, but were not are forfeited.

The post-conviction claim that defendant's felony murder conviction was improperly predicated on aggravated battery of a child is based entirely on matters contained in the trial court record. There was nothing new or novel about the argument at the time of defendant's direct appeal. **People v. Viser**, 62 Ill.2d 568, 343 N.E.2d 903 (1975). The fact that **People v. Morgan**, 197 Ill.2d 404, 758 N.E.2d 813 (2001), and **People v. Pelt**, 207 Ill.2d 434, 800 N.E.2d 1193 (2003), cases decided after defendant's direct appeal, "added authority to the long line of cases" discussing aggravated battery as a predicate felony to felony murder did not preclude defendant from raising this argument on direct appeal. Therefore, this claim could have been raised on direct appeal, and because it was not, "consideration of that issue is barred by the doctrine of *res judicata*."

(Defendant was represented by Assistant Defender Kerry Bryson, Ottawa.)

People v. Gacho, 2012 IL App (1st) 091675 (No. 1-09-1675, 4/16/12)

1. A post-conviction petition may be dismissed at the second stage of the proceedings when the allegations in the petition, liberally construed in light of the trial record, fail to make a substantial showing of a constitutional violation. To warrant an evidentiary hearing, the allegations in the petition must be supported by the record or by accompanying affidavits. All well-pleaded facts in the petition and accompanying affidavits are taken as true in determining whether to grant an evidentiary hearing. Dismissal of the petition at the second stage is reviewed *de novo*.

2. A claim that a trial judge's corruption violated defendant's right to due process has two components: (1) a nexus between the judge's corruption or criminal conduct in other cases and the judge's conduct at the defendant's trial; and (2) actual bias resulting from the judge's extrajudicial conduct, or that the judge had a personal interest in the outcome of the trial.

Defendant's post-conviction petition sufficiently alleged that he was denied the right to a trial before a fair tribunal to entitle him to an evidentiary hearing. Defendant alleged and the State conceded that defendant's trial judge, Maloney, was corrupt and that his corruption tainted the trial of the co-defendant. Maloney had been convicted of accepting bribes in exchange for promises to fix trials and had accepted a bribe from the co-defendant who was tried in a bench trial conducted simultaneously with defendant's jury trial. There was also a nexus alleged between Maloney's corruption and defendant's case in that an affidavit of the co-defendant's father established that Maloney accepted the bribe with the expectation that he could conceal his deceit by ensuring that the jury find defendant guilty. These same allegations sufficiently alleged that Maloney had a personal interest in the outcome of defendant's trial. Regardless of whether Maloney could have been effective in steering the jury's verdict, the fact that he had an interest in doing so means that the defendant did not receive a fair trial before an impartial tribunal.

3. Defendant is constitutionally guaranteed the assistance of an attorney whose allegiance to his client is not diluted by conflicting interests or inconsistent obligations. Defendant's petition made a substantial showing of a conflict of interest where he alleged that defense counsel represented a family member of one of the victims at the same time that he represented the defendant. Although defendant did not indicate the nature of defense counsel's representation of the victim's family member, he explained in his petition that counsel did not inform him of the nature of the representation. The nature of the family member's relationship to the victim's family might bear on the intensity of counsel's conflict, but the absence of that information from the petition did not affect the sufficiency of the claim because it was still evident that counsel owed a duty of loyalty to the victim's family.

4. Post-conviction claims are limited to those claims that were not and could not have been previously adjudicated on direct appeal.

Defendant's allegation that trial counsel was ineffective in failing to reopen the motion to suppress evidence, after three trial witnesses testified that the police admitted having physically coerced defendant's confession, was forfeited by defendant's failure to raise this claim on direct appeal. The Appellate Court rejected defendant's argument that the claim was based on matters outside the record because the petition was supported by an affidavit that one of the witnesses informed trial counsel of this admission a week before defendant's trial. This new evidence was not required to present the ineffectiveness claim where the basis of the claim was that the trial testimony should have prompted defense counsel to ask to reopen the motion to suppress. It also could be inferred from the questions he asked to elicit that testimony that defense counsel knew that the witnesses would describe the police admissions.

The Appellate Court remanded for an evidentiary hearing on the two constitutional

claims on which defendant made a substantial showing: that counsel suffered from a conflict of interest and that defendant was denied his right to trial before a fair tribunal.

(Defendant was represented by Assistant Defender Brett Zeeb, Chicago.)

People v. Harris, 2012 IL App (1st) 092251 (No. 1-09-2251, 4/20/12)

The court rejected the argument that defendant waived proportionate penalties arguments which he failed to present on direct appeal and which were raised for the first time in a post-conviction petition. Whether a statute is unconstitutional may be raised at any time.

(Defendant was represented by Assistant Defender Emily Wood, Chicago.)

People v. Harris, 2011 IL App (1st) 092251 (No. 1-09-2251, 7/22/11)

The unconstitutionality of a statute may be raised at any time, including on appeal from the dismissal of a post-conviction petition. Therefore, defendant's proportionate penalty and equal protection challenges to his sentences could be raised on appeal from the first-stage dismissal of defendant's post-conviction petition, even though they were not raised on direct appeal or included as claims in defendant's post-conviction petition.

(Defendant was represented by Assistant Defender Emily Wood, Chicago.)

People v. Tapia, 2014 IL App (2d) 111314 (No. 2-11-1314, 1/9/14)

Defendant entered a negotiated guilty plea in exchange for the State's recommendation of a sentencing cap. At the sentencing hearing, the trial court relied upon incorrect information in the pre-sentence investigation report (PSI) which listed a prior conviction from Georgia as a felony rather than a misdemeanor. Defendant did not object to the court's actions, and filed no post-judgment motions or direct appeal.

Defendant filed a post-conviction petition alleging that trial counsel was ineffective for failing to correct the misinformation about the Georgia conviction. At a third-stage evidentiary hearing, the State introduced trial counsel's affidavit which stated that he reviewed the PSI with defendant and defendant never indicated that the description of the Georgia conviction as a felony was inaccurate. Defendant filed an affidavit stating that he did not receive a copy of the PSI until the day of sentencing when trial counsel asked him to quickly look it over. Defendant looked it over but did not notice any errors because he did not understand all the legalese. The circuit court denied the petition and defendant appealed.

The Appellate Court held that defendant forfeited his claim of ineffective assistance by failing to file any post-judgment motions or raise the claim on direct appeal. Ordinarily, forfeiture bars a post-conviction claim that could have been, but was not, raised on direct appeal. Here, support for the claim existed and it could have been raised in a post-judgment motion or on direct appeal. The record shows that defendant reviewed the PSI. Defendant also knew that his Georgia conviction was a misdemeanor. A defendant has the obligation to notify the sentencing court of any inaccuracies in the PSI. By failing to object to the misinformation in the PSI or the court's reliance upon that misinformation, defendant failed to preserve the issue.

Although defendant entered a partially negotiated plea, and thus could not have moved to reconsider his sentence on the sole ground of excessiveness, his claim is not that his sentence was excessive, but rather that due to counsel's ineffectiveness the trial court considered inaccurate information in imposing his sentence. Such claim could have been raised in a post-judgment motion and on direct appeal.

People v. Taylor, 405 Ill.App.3d 421, 938 N.E.2d 1151 (2d Dist. 2010)

Post-conviction claims of juror misconduct, such as sleeping or inattentiveness, must be brought to the court's attention or they are forfeited. Because of the trial judge's singular position in assessing courtroom conduct, atmosphere, and demeanor, a failure to bring such problems to the attention of the trial judge prevents their ever being addressed. Failure to object in these circumstances is not a mere technical violation, an interference with efficient administration, but an insurmountable barrier to evaluation of concerns that cannot be reproduced in the record.

Defendant alleged in his post-conviction petition that one of the jurors cried during the victim's testimony and that defendant's attorney motioned to the judge what was happening. The record reflected that at trial defense counsel asked for a "moment," the court took a recess, and the court indicated that a recess was taken because one of the jurors needed to use the restroom. Since defense counsel made no objection or motion for a mistrial, and the record reflected no discussion of a crying juror, the issue was forfeited. The court was not given the opportunity to remedy any prejudice defendant claims that he suffered as a result of the juror's emotional display.

The court affirmed the summary dismissal of the post-conviction petition.

(Defendant was represented by Assistant Defender Jaime Montgomery, Elgin.)

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§9-1(h)(3)
Res Judicata

People v. Ligon, 239 Ill.2d 94, 940 N.E.2d 1067 (2010)

1. A claim of ineffective assistance of counsel cannot be considered on direct appeal where the evidentiary basis of the claim is *dehors* the record. The Appellate Court concluded on direct appeal that defendant's ineffective-assistance-of-counsel claims should more appropriately be pursued on post-conviction so that the facts relevant to the claim could be developed. That determination is *res judicata* and unassailable once the direct appeal became final.

2. An indigent defendant is entitled to appointment of counsel on an as-of-right appeal from a conviction. **Douglas v. California**, 372 U.S. 353 (1963). That right to counsel does not extend to discretionary review of a conviction after mandatory review by an intermediate reviewing court, where acceptance of the appeal is based on public importance and other indicia not related to the merits. **Ross v. Moffitt**, 417 U.S. 600 (1974). Nor does defendant have a right to counsel on an appeal collaterally attacking a conviction. **Pennsylvania v. Finley**, 481 U.S. 551 (1987).

An indigent defendant who seeks a first-tier direct appeal after pleading guilty or *nolo contendere* does have a right to appointed counsel even if the appeal is discretionary. Though discretionary, the appeal is the first, and likely the only, direct review of the conviction. Defendants seeking first-tier review are generally ill-equipped to represent themselves. **Halbert v. Michigan**, 545 U.S. 605 (2005).

Defendant has no federal constitutional right to the assistance of counsel in a collateral proceeding, even where that proceeding is defendant's first-tier review of an ineffective-assistance-of-counsel claim that the intermediate court found was not appropriate for direct review. Unlike **Halbert**, defendant has had a direct review of his conviction and the assistance of counsel in connection with that appeal. Defendant does not face the same

daunting hurdles as faced by the defendant in **Halbert** because he need only present the gist of a claim to survive summary dismissal. Defendant in this case also had the benefit of the appellate court briefs, rehearing petition, petition for leave to appeal, and the appellate court decision. Finally, unlike **Halbert**, the court performs no gatekeeping function that would bar defendant from presenting his ineffective-assistance-of-counsel claim.

(Defendant was represented by Assistant Defender Patrick Cassidy, Chicago.)

People v. Cathey, 406 Ill.App.3d 503, 942 N.E.2d 1 (1st Dist. 2010)

1. The doctrine of *res judicata* applies if: (1) there was a final judgment on the merits rendered by a court of competent jurisdiction; (2) there is an identity of cause of action; and (3) there is an identity of parties or their privies. Separate claims will be considered the same cause of action for purposes of *res judicata* if they arise from a single group of operative facts, regardless of whether they assert different theories of relief. An otherwise barred claim may proceed under a fundamental-fairness exception if the law has changed on defendant's rejected claim since the direct appeal was decided.

On direct appeal, defendant argued that the trial court improperly admitted defendant's prior conviction to impeach his testimony per **People v. Montgomery**, 47 Ill.2d 510, 268 N.E.2d 695 (1971). On post-conviction, defendant argued that the court abused its discretion and infringed on defendant's right to testify when it failed to rule on defendant's motion to exclude his prior conviction until after he testified per **People v. Patrick**, 233 Ill.2d 62, 908 N.E.2d 1 (2009). The court held that these theories were different but arose from the same group of operative facts, and therefore *res judicata* applied. The court concluded that **Patrick**, decided after defendant's direct appeal was final, adopted a new rule, but did not apply the fundamental fairness exception as it held that **Patrick** did not apply retroactively to convictions that were final when **Patrick** was decided.

2. Generally, new rules of criminal procedure will not be applied retroactively to convictions that were final when the new rule was adopted. **Teague v. Lane**, 489 U.S. 288 (1989). A case announces a new rule if the result was not dictated by precedent at the time that the defendant's conviction became final. The key consideration is whether the court considering the claim would have felt compelled by existing precedent to conclude that the rule was required by the constitution.

Patrick announced a new rule. Although Appellate Court decisions predating **Patrick** are consistent with that decision, there was a difference of opinion in the lower courts that was resolved by **Patrick**. **Patrick** did not merely apply earlier decisions to a different set of facts.

3. Non-retroactivity may be the basis for a first-stage dismissal. Unlike timeliness, non-retroactivity is a substantive defect in the petition, rather than a procedural defect in the manner in which it was filed.

The court affirmed the first-stage dismissal of defendant's post-conviction claim based on **Patrick**.

(Defendant was represented by Assistant Defender Sean Southern, Chicago.)

People v. Mescall, 403 Ill.App.3d 956, 935 N.E.2d 529 (2d Dist. 2010)

1. At the first stage of a post-conviction proceeding, the petitioner is required to present only the gist of a constitutional claim. A *pro se* petition should be reviewed leniently to allow borderline cases to proceed, as a *pro se* petitioner may be aware of the factual basis for a claim but unaware of the precise legal basis.

2. Defendant presented the gist of a constitutional argument - that trial and appellate counsel were ineffective for failing to argue that defendant should have been sentenced under

the law which existed at the time of the offenses, rather than under an amended version of the statute which made consecutive sentences mandatory. The court held that there was an arguable basis for the claim in both the facts and the law - the statute in effect at the time of the offense mandated consecutive sentencing only if the crimes occurred as part of a single course of conduct, and defendant made an arguable showing that such a finding would have been contrary to the evidence. Furthermore, there was a reasonable basis to argue that appellate counsel was ineffective for failing to raise the issue, which was apparent from the record.

The court rejected the argument that defendant raised a different issue in the trial court - that the trial court failed to find that the offenses were part of a single course of conduct. In view of the leniency with which *pro se* petitions are reviewed at first stage proceedings, the petitioner raised the gist of the ineffectiveness argument which he presented on appeal where he claimed that the trial court failed to make an adequate finding and that counsel failed to notice that a more lenient law should have been applied.

The court rejected the trial court's holding that even if consecutive sentences were not mandatory, no error occurred because the trial court could have imposed discretionary consecutive sentences. The record showed that the consecutive sentences were based on the judge's belief that they were mandatory, and not as a matter of discretion. Furthermore, because the judge who ruled on the post-conviction petition was not the sentencing judge, it cannot be presumed that discretionary consecutive sentences would have been imposed.

3. Generally, post-conviction petitions are subject to the *res judicata* doctrine. Thus, issues that were previously decided may not be relitigated. The court held that one of the post-conviction ineffective assistance claims – that counsel had failed to challenge a defective information at trial and on direct appeal – was not the same as a §2-1401 claim that the defective charging instrument rendered the defendant's conviction void. Because the issue of ineffective assistance was not litigated in the §2-1401 proceeding, *res judicata* did not apply.

(Defendant was represented by Assistant Defender Yasemin Eken, Elgin.)

People v. Miller, 2013 IL App (1st) 111147 (No. 1-11-1147, 4/15/13)

1. A court may grant a defendant leave to file a successive post-conviction petition where the defendant demonstrates cause for his failure to bring the claim in his initial post-conviction proceeding and prejudice resulting from that failure.

When a State requires a defendant to raise an ineffective-assistance-of-trial-counsel claim in a collateral proceeding, defendant may establish cause for a default of an ineffective-assistance claim that is demonstrated to be substantial, where the state courts did not appoint counsel in the initial-review collateral proceeding or where counsel appointed in the initial-review collateral proceeding was ineffective. **Martinez v. Ryan**, ___ U.S. ___, 132 S. Ct. 1309, ___ L.Ed.2d ___ (2012).

2. The Appellate Court declined to apply **Martinez** to allow defendant to raise a claim barred by *res judicata* in a successive post-conviction petition. **Martinez** applies to federal courts in habeas proceedings and is based on equitable rather than constitutional principles. It applies to initial-review collateral proceedings that provide the first opportunity to raise a claim of ineffective assistance of trial counsel, whereas Illinois considers ineffective-assistance claims on direct appeal.

Even if **Martinez** did apply to state collateral-review proceedings, only substantial claims trigger a duty to relax *res judicata*. The Appellate Court previously considered defendant's lost-plea claim at length in a published decision and found it frivolous. Moreover, while defendant did not have counsel in the circuit court, he had the benefit of counsel on

appeal from the dismissal of his *pro se* petition.

(Defendant was represented by Assistant Defender Deepa Punjabi, Chicago.)

People v. Wright, 2013 IL App (4th) 110822 (No. 4-11-0822, 4/17/13)

1. At the first stage in a post-conviction proceeding, the circuit court acts strictly in an administrative capacity by screening out those petitions that lack legal substance or are obviously without merit. A petition may be dismissed at the first stage only if it has no arguable basis in fact or in law, *i.e.*, it is based on an indisputably meritless legal theory or a fanciful factual allegation. The mere unlikelihood of a factual proposition does not make that proposition fanciful. A court should not dismiss a petition unless its lack of legal or factual merit is certain and indisputable.

2. A court may dismiss a petition at the first stage based on *res judicata*. Collateral estoppel is a branch of *res judicata*. Collateral estoppel, or issue preclusion, prevents relitigation of issues of law or fact that have been previously litigated and decided in an action involving the same parties or their privies.

3. Defendant claimed in his post-conviction petition that his trial counsel was ineffective for failing to preserve as error the trial court's consideration of an invalid aggravating factor, and appellate counsel was ineffective in failing to raise this ineffectiveness claim on appeal. On direct appeal, defendant had argued that the trial court had considered the invalid aggravating factor, but the Appellate Court found that this error was forfeited and refused to find plain error because defendant's sentencing hearing was fair despite the error.

That finding on direct appeal collaterally estopped defendant from claiming in a post-conviction petition that trial and appellate counsel were ineffective. Defendant could succeed on those ineffectiveness claims only if counsels' deficient performance caused him prejudice. Defendant suffered no prejudice if his sentencing hearing was fair.

4. Although the circuit court had not dismissed defendant's petition on collateral estoppel grounds, the Appellate Court can affirm the dismissal on any basis that has support in the record. Because the Appellate Court's conclusion on direct appeal that the sentencing hearing was fair despite the mention of an invalid aggravating factor meant that the claims of ineffective assistance of counsel were not arguable, the Appellate Court affirmed the dismissal order.

(Defendant was represented by Assistant Defender Jay Wiegman, Ottawa.)

Top

§9-1(i)
Successive Post-Conviction Petitions

§9-1(i)(1)
Generally

People v. Edwards, 2012 IL 111711 (No. 111711, 4/19/12)

1. Generally, only one post-conviction proceeding is authorized. However, the bar against successive proceedings is relaxed in two situations: (1) where the petitioner can establish both "cause" and "prejudice" for failing to raise the claim in the original post-conviction proceeding, or (2) where the defendant raises a colorable claim of actual innocence.

A petitioner seeking to file a successive post-conviction petition must first obtain leave

of the court. To obtain leave, the petitioner must present sufficient documentation to allow the trial judge to find that the cause and prejudice test or actual innocence standard have been satisfied. Where the request to file a successive petition is based on a claim of actual innocence, leave should be denied only if it is clear, from review of the successive petition and the documentation provided, that as a matter of law the petitioner cannot set forth a colorable claim of actual innocence. Stated differently, leave to file a successive petition should be granted when the supporting documentation "raises the probability that 'it is more likely than not that no reasonable juror would have convicted . . . in light of the new evidence.'"

The court rejected the petitioner's argument that a request for leave to file a successive petition based on actual innocence should be judged by the first stage standard for an initial post-conviction petition – whether the petition is frivolous or patently without merit. The court found that the "frivolous or patently without merit" standard was not intended to apply to successive petitions, and that treating successive petitions and initial petitions under the same standard would ignore the well-settled rule that successive post-conviction petitions are disfavored.

2. Without determining what standard of review should apply to the trial court's denial of a request for leave to file a successive petition based on actual innocence, the court concluded that defendant's request was insufficient under both the abuse of discretion and *de novo* standards of review. To prevail on a claim of actual innocence, the defendant must show that the evidence of actual innocence is newly discovered, material and not merely cumulative, and of such conclusive character that it would probably change the result on retrial.

A. Affidavits by two alibi witnesses did not qualify as newly discovered evidence, because knowledge of alibi witnesses was within the defendant's knowledge at all times during the original proceeding. Although the alibi witnesses indicated in their affidavits that they had refused defense counsel's attempts to get them to testify, the court noted that defense counsel did not attempt to explain why subpoenas were not issued. The court acknowledged that under some circumstances, alibi witnesses might be unavailable because they refused to testify. In the absence of an attempt to subpoena the witnesses or explain the failure to subpoena them, however, the court concluded that there was not an adequate showing of due diligence to satisfy the requirements of the "newly discovered" evidence test.
Furthermore, the failure to issue subpoenas leads to "[t]he logical assumption . . . that the witnesses' testimony would not have been helpful."

B. In support of his request to file a successive petition, defendant submitted the affidavit of a co-defendant who claimed that he was one of the shooters in the offense and that defendant "had nothing to do with this shooting." The court acknowledged that the affidavit was unavailable at trial, although defendant knew of the co-defendant, because the co-defendant had a Fifth Amendment right against self-incrimination which he could not have been forced to relinquish. However, the affidavit did not justify a finding that no reasonable juror could have voted to convict defendant, because the conviction was based on an accountability theory and the co-defendant did not assert that defendant was not present during the offense.

Because the petition failed as a matter of law to show that no reasonable juror could have convicted defendant in light of the new evidence, the trial court properly denied the request to file successive post-conviction petitions.

(Defendant was represented by Assistant Defender Shawn O'Toole, Chicago.)

People v. Ortiz, 235 Ill.2d 319, 919 N.E.2d 941 (2009)

1. Generally, the Post-Conviction Hearing Act contemplates that only a single post-

conviction petition will be filed. Any constitutional claim not raised in the original or amended petition is waived, unless a successive petition is permitted for reasons of fundamental fairness. Interests of fundamental fairness justify a successive petition if the petitioner satisfies the "cause and prejudice" test, or if a claim of actual innocence is raised.

Successive petitions raising claims of actual innocence are not subject to the "cause and prejudice" test. In rejecting the State's argument that 725 ILCS 5/122-1 requires that the "cause and prejudice" test be satisfied for all successive petitions, the court stressed that the due process clause of the Illinois Constitution affords post-conviction petitioners the right to assert a free-standing claim of innocence based on newly-discovered evidence.

2. The court rejected the State's argument that multiple post-conviction petitions raising claims of actual innocence assert the same "claim," and therefore are subject to the "cause and prejudice" test. A claim of actual innocence based on additional newly discovered evidence is not the same as a previous claim that was based on different evidence. "Defendant is not precluded from raising multiple claims of actual innocence where each claim is supported by new discovered evidence."

Thus, collateral estoppel did not apply where the defendant filed three post-conviction petitions alleging actual innocence, but the third petition offered two eyewitnesses who had previously been unknown.

3. In addition, the trial court erred by denying post-conviction relief on defendant's claim of actual innocence. To qualify as "newly-discovered" evidence justifying relief, evidence must have been discovered since the trial and such that it could not have been discovered at the time of trial through the exercise of due diligence. In addition, the evidence must be material rather than cumulative, and of such conclusive character as to probably change the result on retrial.

The testimony of a eyewitness who was not known at the time of trial, and who claimed that defendant had not been present at the time of the offense, clearly qualified as "newly discovered" evidence. Although a prior petition raised a claim of actual innocence based on a different eyewitness whose existence had been unknown at trial, this instant petition was proper where it concerned a separate witness whose testimony was broader than that raised in the previous argument.

The court also found that the evidence was material and not cumulative. Because the testimony "supplied a first-person account of the incident that directly contradicted the prior statements of the two eyewitnesses for the prosecution," it was not cumulative to testimony which supported defendant's alibi defense or to the State's witnesses recantations of their trial testimony. "Rather, it added to what was before the fact-finder."

Finally, the evidence was of such conclusive character as to likely change the result on retrial. The new evidence directly contradicted the testimony of two prosecution witnesses, which had been recanted, and made the evidence of innocence stronger than it had been at the original trial. In addition, there was no physical evidence linking defendant to the offense. Under these circumstances, defendant satisfied the requirements for obtaining a new trial due to newly discovered evidence.

The trial court's order denying defendant's post-conviction petition was reversed, and the cause was remanded for a new trial.

People v. Tidwell, 236 Ill.2d 150, 923 N.E.2d 728 (2010)

725 ILCS 5/122-1(f) provides that only one post-conviction petition may be filed without leave of the court, and that leave of the court may granted only if the petition demonstrates "cause" for failing to bring the claim in the initial post-conviction proceeding and "prejudice"

resulting from that failure. A post-conviction petitioner has the burden to obtain leave of the court before a successive post-conviction petition may be "filed."

The petitioner need not necessarily file a separate motion or request for leave, however. Even if the petitioner fails to make an explicit request for leave to file a successive petition, the trial court has inherent authority to consider whether a petition satisfies the "cause" and "prejudice" standard, and to *sua sponte* grant leave to file upon finding that the standard has been satisfied.

If the trial court sees fit to consider the matter and rule on the petition of its own accord, its ruling may be appealed. However, the trial court is under no obligation to consider the petition *sua sponte* where the petitioner fails to make an explicit request for leave.

(Defendant was represented by Assistant Defender Amanda Ingram, Chicago.)

People v. Adams, 2013 IL App (1st) 111081 (No. 1-11-1081, 8/23/13)

The Post-Conviction Hearing Act contemplates the filing of only one post-conviction petition. The bar against filing successive petitions may be relaxed where the petition and supporting documentation set forth a colorable claim of actual innocence. The evidence supporting the claim must be: (1) newly discovered; (2) material and not merely cumulative; and (3) of such conclusive character that it would probably change the result on retrial.

Evidence is newly discovered if it has been discovered since trial and could not have been discovered sooner through due diligence. Evidence that someone other than the defendant committed the offense and that defendant was not at the scene is material. Evidence is cumulative if it adds nothing to what was previously before the trier of fact. It is not cumulative if it would create new questions in the mind of the trier of fact. To be so conclusive that it would probably change the result on retrial, the new evidence must support total exoneration or vindication, not just present a reasonable doubt of guilt. A statement of a witness that is both exonerating and contradicts a State's witness can be capable of producing a different result on retrial.

Two of the three affidavits submitted in support of defendant's successive post-conviction petition made a colorable claim of actual innocence. Defendant could not have discovered the witnesses prior to trial through due diligence. According to defendant's testimony, he was not at the scene at the time of the offense. Prior to the witnesses coming forward and revealing that they had passed by the scene and witnessed someone other than defendant committing the offense, defendant would have had no reason to seek them out. The statements of the witnesses were material and not cumulative because they provided evidence that someone other than defendant committed the offense and there had been no evidence at trial of the identity of an alternate perpetrator. Because both witnesses corroborated defendant's trial testimony that he had left the scene before the victim was beaten, their statements are capable of producing a different result on retrial. Their statements did not contradict defendant's trial testimony that he walked and talked with the victim prior to leaving the scene before the beating occurred, because their statements were that they passed by during the beating and therefore would have arrived after defendant left.

The court reversed and remanded for further post-conviction proceedings.

(Defendant was represented by Assistant Defender Deborah Pugh, Chicago.)

People v. Anderson, 401 Ill.App.3d 134, 929 N.E.2d 1206 (1st Dist. 2010)

1. The court acknowledged that under **People v. Ortiz**, 235 Ill.2d 319, 919 N.E.2d 941 (2009), a post-conviction petitioner who raises a claim of actual innocence in a subsequent post-conviction petition is excused from satisfying the "cause and prejudice" test. The court

concluded, however, that even petitioners who raise claims of actual innocence are required to obtain leave of the court to file a successive post-conviction petition. Here, defendant's failure to seek leave to file a subsequent petition justified the trial court's dismissal of the petition.

2. The court also noted that where a §2-1401 petition is recharacterized as a post-conviction petition, the trial court should explicitly admonish the defendant that if he previously filed a post-conviction petition, he must seek leave to file the recharacterized pleading as a successive petition.

(Defendant was represented by Assistant Defender Michael Orenstein, Chicago.)

People v. Anderson, 402 Ill.App.3d 1017, 931 N.E.2d 715 (1st Dist. 2010)

Defendant pleaded guilty to 11 charges, and filed a total of four post-conviction petitions. On appeal from denial of a motion for leave to file the fourth petition, the Appellate Court held that the petitioner failed to show a valid claim of actual innocence or meet the "cause and prejudice" test. The trial court's order denying leave to file a successive post-conviction petition was affirmed.

1. The Post-Conviction Hearing Act contemplates the filing of only one post-conviction petition, and requires that the petitioner obtain leave of the court before filing a successive petition. Leave of the court may be granted only if the petitioner demonstrates both "cause" for the failure to bring the claim in the initial post-conviction petition and "prejudice" resulting from that failure.

To establish "cause," the petitioner must identify an objective factor that impeded his ability to raise a specific claim during the original post-conviction proceeding. To show "prejudice," the petitioner must demonstrate that the error so infected the trial that the conviction violated due process.

2. A petitioner does not need to establish "cause" and "prejudice" if he can show a valid, free-standing claim of actual innocence. To raise such a claim, the petitioner must present newly discovered evidence of actual innocence which was not available at his original trial and which could not have been discovered through the exercise of due diligence. Furthermore, the newly discovered evidence must be material, noncumulative, and of such conclusive character as to probably change the result at trial.

3. Here, the petitioner failed to establish a free-standing claim of actual innocence.

A. Initially, the court noted that it was not required to consider a claim of actual innocence based on defense counsel's ineffectiveness. The same claim had been raised in prior post-conviction petitions, and the supplemental petition did not contain any newly-discovered evidence on this point. The doctrine of *res judicata* applies to claims of actual innocence that are not based on newly discovered evidence.

B. The court did reach a claim of actual innocence based on police coercion to obtain a confession, although the issue had been raised in prior petitions, because the petitioner presented newly discovered evidence consisting of: (1) the July 2006 Report of the Special State's Attorney's Investigation into allegations of torture by members of the Chicago Police Department, and (2) a document filed by a group of 28 nonprofit organizations requesting a public hearing concerning police torture. The court agreed that the evidence was newly discovered and could not have been discovered through due diligence, because it came into existence several years after defendant's guilty pleas.

However, the newly discovered evidence was not so material and conclusive as to likely change the result at trial. To meet this burden, the petitioner was required to show that had the evidence been available, he would have gone to trial and obtained an acquittal. Neither the

report nor the request satisfied this standard, as neither contained any specific support for defendant's claims. Instead, at most the evidence showed only that other criminal suspects had been tortured by Chicago police officers. "Generalized claims of misconduct, without any link to defendant's case, . . . are insufficient to support a claim of coercion."

Furthermore, in view of the evidence presented as part of the factual basis for the guilty pleas, there was little likelihood that the newly discovered evidence would have resulted in acquittal. In particular, at least one eyewitness identified defendant as the offender in each of the charges.

4. Similarly, the petitioner could not satisfy the "cause" and "prejudice" test based on the special report and the request for a public hearing. Evidence that comes into existence after the completion of an earlier post-conviction proceeding constitutes "cause," because there was an objective impediment to raising the claim in the earlier proceeding. Here, however, there was no reasonable probability that the new evidence would have resulted in an acquittal at trial. Therefore, defendant was unable to establish "prejudice."

(Defendant was represented by Assistant Defender Brian McNeil, Chicago.)

People v. Chambers, 2013 IL App (1st) 100575 (No. 1-10-0575, 8/13/13)

1. The trial court's order denying leave to file a successive post-conviction petition stated that defendant "is hereby fined $105.00 and the Clerk of the Circuit Court will be instructed not to accept any further filings from [defendant] until his sanction has been satisfied in full." 735 ILCS 5/22-105, which authorizes the imposition of court costs against prison inmates who file post-conviction petitions which are determined to be frivolous, provides that "[n]othing in this Section prohibits an applicant from filing an action or proceeding if the applicant is unable to pay the court costs."

Applying *de novo* review on the ground that the issue concerned the statutory authority of the trial court, the Appellate Court found that the prohibition against additional filings conflicted with the plain and ordinary language of §22-105. "The circuit court . . . effectively prohibited defendant from making future filings based on court costs assessed, despite the clear language stating otherwise in section 22-105 of the Code."

The court also noted that in **People v. Alcozer**, 241 Ill.2d 248, 948 N.E.2d 70 (2011), the Illinois Supreme Court upheld the imposition of court costs upon persons who file frivolous post-conviction proceedings but found that §22-105 does not prohibit prisoners from petitioning for post-conviction relief even if they cannot afford to pay court costs.

The Appellate Court rejected the State's argument that Illinois Supreme Court Rule 137, which provides that the signature of an attorney or a party constitutes a certificate that he or she believes that the allegation is warranted by existing law or a good faith argument for the extension of existing law and authorizes an appropriate sanction where a document is signed in violation of the rule, permits a ban on filing post-conviction petitions until court costs for prior petitions have been paid. The court noted that §22-105 is a specific provision addressing frivolous filings by prisoners, while Rule 137 is a general rule governing the filing of all documents. It is a fundamental rule of statutory construction that a specific provision prevails over a general provision.

Because the trial court erred by prohibiting the defendant from filing further pleadings before the sanction for prior filings was paid, the prohibition was void. The court remanded the cause with instructions that the trial court vacate its order precluding defendant from filing future petitions until the $105 penalty had been paid.

2. The court rejected defendant's argument that on appeal from denial of post-conviction relief, he could argue for the first time that a mandatory life sentence on a person

who was a minor at the time of the offense violates **Miller v. Alabama**, ___ U.S. ___, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012). In **Miller**, the Supreme Court held that the Eighth Amendment is violated by mandatory life sentences without parole for persons who were under the age of 18 at the time of their crimes. **Miller** did not prohibit sentencing juveniles to life imprisonment without parole, but held that the mandatory imposition of such a sentence violates the Constitution.

The court noted that mandatory life sentences may be applied to persons other than those whose offenses were committed when they were minors, and that under **People v. Williams**, 2012 IL App (1st) 111145, a sentence which violates **Miller** is not void *ab initio*. In **Williams**, the court could reach the issue because the petitioner satisfied the "cause and prejudice" test for successive post-conviction petitions by arguing that the Eighth Amendment was violated by a mandatory life without parole for a juvenile.

Here, by contrast, defendant's successive post-conviction petition did not include any argument concerning the constitutionality of his mandatory sentence of life without parole. Under these circumstances, defendant failed to satisfy the cause and prejudice requirement. Thus, the court could have considered the issue only if the sentence was void *ab initio*, a holding which was foreclosed by **Williams**.

The court also noted that a sentence is void only if the court which rendered it lacked jurisdiction to do so. Unless a statute is unconstitutional on its face, the fact that the sentence which it authorizes is applied improperly does not mean that the trial court lacked jurisdiction.

In reaching its holding, the court rejected the reasoning of **People v. Luciano**, 2013 IL App (2d) 110792, which held that a sentence which violates **Miller** is void.

(Defendant was represented by Assistant Defender Manuel Serritos, Chicago.)

People v. Edgeston, ___ Ill.App.3d ___, 920 N.E.2d 467 (2d Dist. 2009) (No. 2-07-1195, 11/24/09)

1. Generally, only one post-conviction petition is permitted. A successive post-conviction petition may be allowed, however, if the petitioner demonstrates "cause" for failing to raise the claim in a prior post-conviction proceeding and "prejudice" resulting from that failure. "Cause" exists where an objective factor impeded the petitioner's ability to raise the specific claim during a prior proceeding. "Prejudice" is shown by demonstrating that an error that was not raised in the first proceeding so infected the trial that the conviction or sentence violates due process.

The "cause and prejudice" test is inapplicable to a subsequent post-conviction petition raising a claim of actual innocence.

2. Under Illinois and federal law, a court decision which narrows the application of a substantive criminal statute is applied retroactively to convictions in which the direct appeal has been exhausted. **People v. Childress**, 158 Ill.2d 275, 633 N.E.2d 635 (1994), which held that residential burglary and burglary are mutually exclusive offenses and that burglary is not a lesser included offense of residential burglary, narrowed the applicability of the burglary statute. Thus, it should be applied retroactively in collateral proceedings.

In the course of its opinion, the court noted that the **Teague v. Lane** standard for determining retroactivity applies only to procedural rules. **Teague** does not alter the general rule that a narrowing interpretation of statutory criminal liability is substantive, and applies retroactively.

3. Because **Childress** applies retroactively and would have precluded defendant's conviction for felony murder based on residential burglary, defendant's successive post-

conviction petition raised a claim of actual innocence. Therefore, he was not required to meet the "cause and prejudice" test.

4. Defendant did not waive his right to file a successive petition although he had raised the same claim in a prior petition, which he agreed to withdraw in return for post-conviction relief in another case. As part of the agreement, defendant also agreed not to file any appeals concerning the first petition.

The court acknowledged that a waiver of the right to raise a post-conviction issue would be enforceable if entered knowingly and voluntarily. However, because defendant alleged that post-conviction counsel gave erroneous advice concerning the applicability of a death sentence in the second case, the waiver could not be deemed knowing and voluntary in this case.

Furthermore, a plea agreement containing an appeal waiver is voidable if there is no consideration. The consideration which defendant received for waiving his right to seek post-conviction relief – avoidance of a death sentence in the second case – was illusory because it was dictated by the applicable caselaw:

> In return for accepting a conviction that had no legal basis, defendant obtained the "benefit" of avoiding a death sentence that rested solely on the unsupportable conviction. He could have obtained this benefit without entering into the Agreement; all he had to do was seek relief in this case. By entering into the Agreement, defendant surrendered something for nothing.

The trial court order denying leave to file a successive post-conviction petition was reversed, and the cause was remanded for further proceedings.

(Defendant was represented by Deputy Defender Chuck Schiedel, Supreme Court Unit.)

People v. Edwards, 2012 IL App (1st) 091651 (No. 1-09-1651, 2/17/12)

1. The Post-Conviction Hearing Act limits a defendant to the filing of a single post-conviction petition except where a possible due process violation compels the filing of a successive petition. 725 ILCS 5/122-1(f). Defendant must obtain leave of court to file a successive petition and must demonstrate cause and prejudice before the court can grant leave to file a successive petition.

A defendant demonstrates "cause" by identifying an objective factor external to the defense that impeded his efforts to raise his claim in the earlier proceeding. "Prejudice" exists where the defendant can show that the claimed constitutional error so infected his trial that the resulting conviction violated due process. Successive petitions are treated differently from initial petitions and the cause-and-prejudice standard is more exacting than the gist-of-a-constitutional-claim standard applied at the first stage to initial post-conviction petitions.

2. Defendant made a substantial showing of cause for his failure to raise his constitutional claim in his initial petition. At the time defendant filed his initial petition, the statute of limitations then in effect required the filing of the post-conviction petition within three years of the date of defendant's conviction. 725 ILCS 5/122-1(c) (West 2000). As defendant was forced by this limitations period to file his initial petition while his direct appeal was pending, he could not raise a claim of ineffective assistance of appellate counsel in that petition.

3. Defendant failed to make a sufficient showing of prejudice, even applying the gist standard. Defendant's claim of ineffective assistance of appellate counsel was founded on the direct appeal record, but he failed to provide any support from the record for that claim. The court refused to second-guess counsel's decision to pursue certain issues on appeal when nothing more than defendant's bare contentions were offered to support his argument that

meritorious issues were left undeveloped or omitted.

(Defendant was represented by Assistant Defender Lauren Bauser, Chicago.)

People v. English, 2014 IL App (1st) 102732-B (No. 1-10-2732, 6/18/14)

1. Generally, the Post-Conviction Hearing Act contemplates the filing of only one post-conviction petition. However, the bar to successive petitions is relaxed for reasons of fundamental fairness, including where the petitioner makes a showing of actual innocence.

To obtain relief on a claim of actual innocence based on newly discovered evidence, the defendant must offer evidence which was not available at the original trial and which could not have been discovered through due diligence. In addition, the evidence must be material, noncumulative, and of such a conclusive nature as to likely change the result on retrial.

2. The "gist of a constitutional claim" test, which applies to first-stage post-conviction petitions, does not apply to motions for leave to file successive petitions raising claims of actual innocence. Instead, leave to file a successive petition should be denied only if it is clear from a review of the petition and supporting documentation that as a matter of law, the petition cannot set forth a colorable claim of actual innocence. A colorable claim of actual innocence exists where it is more likely than not that in light of the new evidence, no reasonable juror would have voted to convict. **People v. Edwards**, 2012 IL 111711.

To advance a colorable claim of actual innocence, the defendant must both allege that he is actually innocent and offer persuasive evidence to support that claim. Newly discovered evidence must have been unavailable at the time of trial and incapable of having been discovered through the exercise of due diligence. Evidence is not newly discovered if it presents facts which were known to the defendant at the time of trial, even if the source of those facts was unknown, unavailable, or uncooperative.

3. The court concluded that the petition and supporting documentation did not make a colorable claim of actual innocence based on newly discovered evidence. Defendant's claim centered on his allegation that the police coerced witnesses into implicating him at trial. The witnesses subsequently recanted their allegations. Defendant claimed that newly discovered evidence of police misconduct explained the recantations and supported their credibility.

The court found that all of the evidence was available at the time of defendant's original post-conviction petition, and that the issue of police coercion could have been raised at that time. Furthermore, where much of the evidence raised only general allegations that were not linked to defendant's case, the newly discovered evidence was not of such character as to make it unlikely that a reasonable juror would have voted to convict. Under these circumstances, the trial court properly denied leave to file the successive petition.

(Defendant was represented by Assistant Defender Robert Hirschhorn, Chicago.)

People v. Evans, 405 Ill.App.3d 1005, 939 N.E.2d 1014 (2d Dist. 2010)

A second or subsequent post-conviction petition may be filed only with leave of the trial court upon a showing of "cause" for failure to bring the claim in the initial petition and "prejudice" resulting from that failure. A petition shows "cause" by identifying an objective factor impeding one's ability to raise a specific claim during the initial post-conviction proceedings. "Prejudice" is shown by demonstrating that the error so infected the trial that the conviction or sentence violated due process.

Because defendant failed to argue on appeal that he had satisfied the "cause and prejudice" test, he waived his argument that the trial court erred by denying leave to file a successive petition.

People v. Griffin, 2013 IL App (2d) 110631 (No. 2-11-0631, 8/22/13)

1. Generally, the Post-Conviction Hearing Act contemplates the filing of only one post-conviction petition. However, the statutory bar to successive petitions will be relaxed where required by fundamental fairness, including where the petitioner makes a claim of actual innocence.

Generally, a petition is subject to the statute of limitations which is in effect at the time the petition is filed. Defendant's multiple amended petitions raising claims of actual innocence pended in the trial court for nearly ten years. While they were pending, the PCHA was amended to change the statute of limitations and to eliminate any limitation period for the filing of a petition claiming actual innocence. Where the State had argued in the trial court that the amended statute applied, the Appellate Court concluded that no statute of limitations violation occurred concerning the amended petitions because they claimed actual innocence.

In addition, the post-conviction statute of limitations is an affirmative defense which the State may raise, waive, or forfeit. Because the State argued in the lower court that the subsequent amendment to the Post-Conviction Hearing Act applied, it forfeited the argument, which it raised for the first time on appeal, that the statute of limitations in effect when the first petition was filed should be applied.

2. When the trial court dismisses an incarcerated petitioner's claim as frivolous or patently without merit, it must do so in a written order which specifies findings of fact and conclusions of law. That order must be served on the defendant by certified mail within 10 days of the decision.

Defendant was not notified that his 1999 petition had been summarily dismissed, and in the intervening decade three "amended" petitions were filed, an eyewitness recanted his testimony, counsel was appointed on one of the petitions, and DNA testing ordered by the trial court excluded defendant as a source of the DNA profile left at the scene. The State called the court's attention to the original dismissal order in a motion to dismiss the amended petition, and argued that defendant could not appeal the order, move to reconsider it, or file an amended petition. The trial court ruled that it would "give effect" to the 1999 summary dismissal order by allowing defendant 30 days to appeal that order.

The Appellate Court noted that permitting defendant to appeal the 1999 dismissal would mean ignoring the recantation, the affidavits which accompanied the amended petitions, and the DNA testing, "all of which inured to defendant's favor." Because the State's motion to dismiss the third amended petition on statute of limitations grounds should have been denied, and the State should have been ordered to file an answer in 20 days, the cause was remanded for the State to file an answer and for additional proceedings as warranted.

(Defendant was represented by Assistant Defender Mark Levine, Elgin.)

People v. Harper, 2013 IL App (1st) 102181 (No. 1-10-2181, 3/29/13)

1. The time limitation for commencing post-conviction proceedings does not apply to a petition advancing a claim of actual innocence. 725 ILCS 5/122-19(c). Because defendant's third successive petition contained an actual-innocence claim, the circuit court erroneously dismissed it as untimely.

2.The filing of only one post-conviction petition is contemplated under the Post-Conviction Hearing Act. There are two exceptions under which the bar against successive proceedings will be relaxed. One is the exception for a fundamental miscarriage of justice where defendant sets forth a colorable claim of actual innocence.

Because defendant made a colorable claim of actual innocence, the circuit court erred in dismissing his petition on the ground that defendant had failed to satisfy the cause-and-

prejudice test. A defendant who claims actual innocence need not satisfy the cause-and-prejudice test.

3. It is the burden of the defendant to obtain leave of court before a successive post-conviction petition can be filed. Defendant must prompt the court, by whatever means, to consider whether leave should be granted, and must obtain a ruling on that question. A formal motion or a request and an articulated argument is usually, but not always, required.

Defendant in fact filed a motion for leave to file his successive petition and the court granted that motion by docketing his petition, appointing counsel, and stating on the record that defendant would get his day in court despite his having previously pursued collateral relief. Although the court did not expressly articulate a finding of a colorable claim of actual innocence, such a finding may be inferred from the court's ruling.

4. To succeed on a claim of actual innocence, defendant must show that the evidence he now presents is: (1) newly discovered; (2) material and not cumulative; and (3) of such conclusive character that it would probably change the result on retrial. Evidence is newly discovered if it has been discovered since trial and could not have been discovered sooner through due diligence. At the second stage of post-conviction proceedings, all well-pleaded facts that are not positively rebutted by the record are taken as true. Defendant must make a substantial showing of actual innocence to be entitled to an evidentiary hearing.

Defendant was convicted of arson and first-degree murder based largely on his confession, which admitted to starting a fire at a video store operated by defendant's mother in order to obtain insurance proceeds for damaged videotapes. Two persons who lived in an adjacent store died of smoke inhalation as a result of the fire. Defendant claimed that his confession was coerced by police threats. Hingston, the manager of a nearby service station, testified that at about the time of the fire two men purchased gasoline in a gas can and left in a vehicle matching the general description of defendant's vehicle.

Defendant's successive post-conviction petition was supported by two affidavits. An affidavit from Hingston recanted his trial testimony and alleged that he was told by the police that two individuals had confessed to purchasing gasoline from him the morning of the fire, and that the police threatened him with a fine and a negative report to his employer if he did not cooperate. The second affidavit from a James Bell confessed to setting the fire for which defendant was convicted. Bell did not reveal his guilt until after defendant filed his first three post-conviction petitions.

The successive petition sufficiently stated a claim of newly-discovered evidence of actual innocence to warrant an evidentiary hearing.

The affidavits are newly-discovered evidence. No amount of due diligence on defendant's part could have led to the discovery of Bell's confession at the time of defendant's trial or his prior collateral proceedings. Nor could due diligence have compelled Hingston to testify truthfully at defendant's trial. Even though defendant had filed a previous post-conviction petition claiming actual innocence based on the confession of a "James Dell," the court refused to assume or speculate that Bell and Dell were the same person. Even if they were the same person, Bell's affidavit was not available when defendant filed his prior petitions.

Bell's affidavit could not be rejected on the ground that it is positively rebutted by the record and thus is unreliable. The State's assertion that Bell's version of the events is refuted by evidence that a backdraft explosion occurred as a result of an oxygen-starved environment would require the court to speculate regarding several facts and conclusions. The court declined to make such credibility determinations.

The new evidence is material and not cumulative. Evidence is cumulative when it adds

nothing to what was already before the jury. Bell's affidavit is exculpatory evidence that was never heard by the jury at defendant's trial. It is material to the central issue in the case – the identity of the arsonist. Hingston's evidence of police coercion was also not before the jury. Hingston's affidavit is material to the issue of police coercion, and would weaken the State's case because defendant claimed that his confession was also the product of police coercion.

The new evidence is also of such a conclusive character that it would probably change the result on retrial. No eyewitness testimony directly connected defendant to the arson. Defendant has long maintained that his confession was coerced. Taking the content of Bell's affidavit as true, it could be found to exculpate the defendant and refute the State's evidence, thereby changing the result on retrial. Taking Hingston's affidavit as true would lend credence to defendant's claim that his confession was coerced, which if believed by the fact finder on retrial would likely change the outcome of the case.

(Defendant was represented by Assistant Defender Kieran Wiberg, Chicago.)

People v. Inman, 407 Ill.App.3d 1156, 947 N.E.2d 319 (5th Dist. 2011)

1. In a post-conviction proceeding, the trial court ordered a new sentencing hearing after vacating defendant's natural life sentence, which was to be served concurrently with a 30-year-sentence for attempt murder. At the new sentencing hearing, the court imposed a 35-year-sentence to be served consecutively to the 30-year-sentence. Defendant then filed a post-conviction petition raising a double jeopardy challenge to the consecutive nature of the new sentences. The trial court dismissed the petition after finding that it was a "second or subsequent" petition which the defendant could file only after obtaining leave of the court.

The Appellate Court found that the 35-year-sentence constituted a new "conviction" for purposes of the Post-Conviction Hearing Act. Thus, a post-conviction petition challenging the 35-year-sentence was not a "subsequent" petition, but the first petition challenging the new "conviction." Because defendant was not required to obtain leave of the court, the dismissal order was reversed.

2. A trial court loses authority to summarily dismiss a post-conviction petition where it fails to examine the petition within 90 days to determine whether it is frivolous and patently without merit. In such cases, counsel must be appointed and the petition advanced to the second stage.

The court concluded that erroneously believing that a petition could be filed only with leave of the court was analogous to the situation in **People v. Harris**, 24 Ill.2d 115, 862 N.E.2d 960 (2007), where the petition was required to be advanced to the second stage although the trial court's failure to act was due to its mistaken belief that a post-conviction petition could not proceed while the direct appeal was pending. Thus, the trial court's dismissal order was vacated and the cause remanded so that counsel could be appointed and second stage proceedings conducted.

(Defendant was represented by Assistant Defender Duane Schuster, Supreme Court Unit.)

People v. Knight, 405 Ill.App.3d 461, 937 N.E.2d 789 (3d Dist. 2010)

1. A defendant who seeks to file an untimely post-conviction petition must demonstrate that the late filing was not due to his culpable negligence.

Defendant filed a post-conviction petition alleging that he was actually innocent of a gang-related murder that occurred when he was incarcerated in the penitentiary, but was coerced to plead guilty to the murder by gang members who forced him to accept responsibility in order to placate prison officials. The petition alleged that the gang chief who ordered

defendant to accept responsibility died after the deadline for filing a timely petition had passed, and that the gangs no longer controlled the prison. The court found that defendant's delay in filing the petition was not due to his culpable negligence but due to the continued presence of the coercive force that caused defendant to plead guilty.

2. A freestanding claim of actual innocence is cognizable in post-conviction proceedings following a conviction resulting from a guilty plea when the defendant can show that the plea was not knowing or voluntary. Defendant's petition stated a cognizable claim of actual innocence despite his plea of guilty because it alleged that defendant pleaded guilty despite his innocence because of his fear of what gang members would do to him if he did not accept responsibility for the murder.

3. To obtain relief under a claim of actual innocence, the evidence adduced by the defendant must be newly discovered, i.e., it must be evidence that was not available at the defendant's original trial and that the defendant could not have discovered sooner through due diligence. Evidence can qualify as newly discovered even if defendant was aware of it before trial. The affidavits attesting to defendant's innocence qualify as newly discovered because the witnesses risked death by gang retaliation had they come forward sooner.

4. A post-conviction petition may be dismissed without an evidentiary hearing at the second stage if its factual claims are baseless or rebutted by the record. Otherwise, the allegations must be taken as true and their credibility resolved by an evidentiary hearing.

Defendant's guilty plea did not rebut his claim of innocence. Defendant did not state at the plea hearing that he actually murdered the victim. The factual basis for the plea did not contain a confession by the defendant. Defendant merely stipulated to the evidence that the State represented it would present. His statement at the plea hearing that his plea was not coerced was itself the result of coercion, according to the defendant. Whether the plea was coerced should be resolved at an evidentiary hearing.

The affidavit of a witness that he relayed to defendant a message from the Gangster Disciples that defendant had to "take the case" for the murder and that the gang would provide defendant with an attorney is not so implausible as to not warrant an evidentiary hearing. The State offered no evidence to rebut the witness's allegation or to deny its plausibility. Because the relevance of the witness's testimony was to show the impact of the perceived threat on defendant and not for the truth of the nature of the threat defendant faced, any hearsay objection the State might have would fail.

One of the affidavits supporting the petition was from a co-defendant who pled guilty to a lesser offense and stated at his plea hearing that the defendant stabbed the victim while he participated. The State may not rely on those proceedings to rebut defendant's petition and defeat his request for an evidentiary hearing. Only the record of the proceedings from which defendant seeks post-conviction relief may be considered to rebut defendant's claim. Since nothing in the defendant's record positively rebutted the co-defendant's affidavit, it must be taken as true.

The court remanded for an evidentiary hearing.

(Defendant was represented by Assistant Defender Mark Fisher, Ottawa.)

People v. Little, 2012 IL App (5th) 100547 (No. 5-10-0547, 10/9/12)

1. The Post-Conviction Hearing Act (PCHA) generally limits a defendant to one post-conviction petition. Successive petitions are disfavored. A defendant attempting to institute a successive post-conviction proceeding through the filing of a second or successive petition must first obtain leave of court by either demonstrating actual innocence or satisfying the cause-and-prejudice test codified in 725 ILCS 5/122-1(f). The denial of leave to file a successive

petition is reviewed *de novo*.

2. Where a defendant files an initial post-conviction petition seeking only to reinstate the right to a direct appeal that was lost due to counsel's ineffectiveness, a subsequent petition is not a successive petition for purposes of §122-1(f). The reference in §122-1(f) to "one petition . . . without leave of court" refers to one complete opportunity to collaterally attack the proceedings resulting in the conviction. Where a defendant has been denied that opportunity because he used an initial petition solely to reinstate his right to a direct appeal that was forfeited through no fault of his own, he is restored to the procedural posture he would have enjoyed if he had been represented by effective counsel who had filed a timely notice of appeal. This construction is consistent with federal habeas law, which the Illinois Supreme Court has relied on in interpreting the PCHA, as well as the intent of the legislature expressed in the PCHA to make Illinois law consistent with federal law.

Because defendant's first post-conviction petition was filed only to rescue his right to a direct appeal, it was not a true collateral attack and should not have been counted as such. The Appellate Court reversed the order of the circuit court denying defendant leave to file a successive petition.

3. The PCHA requires that a court review a petition within 90 days to determine if it is frivolous or patently without merit. 725 ILCS 5/122-2.1. Failure to do so requires that the court docket the petition for second-stage proceedings. This rule applies even if by honest mistake the court disposes of a petition on the erroneous belief that it is a successive petition brought without leave of court.

Because the circuit court had failed to determine within 90 days of the filing of defendant's petition whether it was frivolous or patently without merit, the Appellate Court further directed that the cause be remanded for second-stage proceedings.

(Defendant was represented by Assistant Defender Deborah Pugh, Chicago.)

People v. Lofton, ___ Ill.App.3d ___, ___ N.E.2d ___ (1st Dist. 2011) (No. 1-10-0118, 6/30/11)

1. The Post-Conviction Hearing Act generally contemplates the filing of only one post-conviction petition. Fundamental fairness allows the filing of a successive petition where the petition complies with the cause-and-prejudice test. Even if a petitioner cannot show cause and prejudice, the failure to raise a claim in an earlier petition will be excused if necessary to prevent a fundamental miscarriage of justice where the defendant sets forth a claim of actual innocence.

Petitioner's claim of actual innocence was based on the affidavit of a co-defendant who had been acquitted, alleging that he was the actual shooter and stating that petitioner was not at the scene. This affidavit was consistent with the alibi that petitioner had asserted since the date of his arrest. Because the petition contained a legitimate claim of actual innocence, this claim is not subject to the cause-and-prejudice test, and thus is not statutorily barred and may be considered on its merits.

2. At the second stage of a post-conviction proceeding, the relevant inquiry is whether the petitioner has made a substantial showing of actual innocence such that an evidentiary hearing is warranted. Dismissal at the second stage is warranted only when the petition's allegations of fact, liberally construed and in light of the original trial record, fail to make a substantial showing of imprisonment in violation of the state or federal constitution. All well-pleaded facts that are not positively rebutted by the trial record must be taken as true. The circuit court may not engage in fact-finding or credibility determinations at the dismissal stage; such determinations are made at the evidentiary stage.

The circuit court dismissed a petition, supported by a co-defendant's affidavit claiming

that he was the actual shooter and that petitioner was not present at the scene. The court dismissed on the ground that the affidavit did not support a claim of actual innocence because the co-defendant had been acquitted at trial, had made a post-arrest statement implicating petitioner, and did not execute the affidavit until 10 years after the fact. This was an impermissible credibility determination by the circuit court. Credibility is an issue to be reached at the evidentiary stage, not a second-stage dismissal hearing.

3. Evidence in support of a claim of actual innocence must be newly discovered, material and not merely cumulative, and of such conclusive character that it would probably change the result on retrial. Newly-discovered evidence is evidence that was discovered since the trial and could not have been discovered earlier through due diligence. Evidence is cumulative when it does not add anything to what was previously before the trier of fact.

The petition made a substantial showing that the evidence upon which petitioner's actual innocence was based was newly discovered. The co-defendant's admission that he was the shooter and that petitioner was not at the scene was not discovered until the co-defendant contacted petitioner and subsequently signed the affidavit. Petitioner had no reason to contact the co-defendant prior to the co-petitioner contacting him. Petitioner maintained he was not at the scene and would not have known that the co-defendant was the shooter. Petitioner would only have known that the co-defendant had been identified by a witness and charged with the murder, but acquitted. This would not alert petitioner to the fact that the co-defendant was the shooter and would sign an affidavit to that effect. Why co-defendant came forward when he did was a matter to be investigated at an evidentiary hearing, rather than to be considered at the dismissal stage.

Evidence that someone else was the shooter and that petitioner was not present at the shooting is certainly material. It also adds to the evidence that was before the jury. A police report named the co-defendant as the shooter, although the police officer who prepared the report testified that was a mistake and he just assumed the co-defendant was the shooter. An eyewitness testified that the co-defendant ran from the scene with the gun, although he testified that petitioner was the shooter. Another co-defendant testified that he did not know if petitioner was at the scene, although he had made a post-arrest statement that petitioner was the shooter. The jury also had petitioner's alibi testimony. The post-conviction petition included an affidavit from an alibi witness who had testified at petitioner's first trial (that ended in a hung jury) that he would have testified if called as a witness at the second trial, as well as the co-defendant's affidavit. The record supports the affidavits to the extent that the co-defendant is the only one who was immediately named and described by the eyewitness, and the eyewitness consistently maintained that he saw the co-defendant run from the scene with the gun.

The newly-discovered evidence is also so conclusive that it would probably change the result on retrial. The co-defendant's affidavit states not only that he was the shooter, but that petitioner was not there. This is inconsistent with the eyewitness's identification of petitioner, but consistent with petitioner's alibi and the eyewitness's apparent initial identification of the co-defendant as the shooter and his testimony that he saw the co-defendant run from the scene with the gun. The co-defendant's account is also consistent with the testimony of the eyewitness to the extent that the co-defendant named another participant in the offense who remained in a car, and the eyewitness testified that he knew that person, but did not see him at the scene. Although the eyewitness identified petitioner in a lineup and at some point provided a physical description of petitioner to the police, his initial identifications and descriptions were of the co-defendant and another accomplice.

Because petitioner made a substantial showing of a claim of actual innocence based on

newly-discovered evidence, the cause was remanded for an evidentiary hearing.

(Defendant was represented by Assistant Defender Jonathan Steffy, Chicago.)

People v. Love, 2013 IL App (2d) 120600 (No. 2-12-0600, 12/19/13)

1. The court reiterated precedent that a *pro se* post-conviction petition may not be summarily dismissed at the first stage of post-conviction proceedings on the ground that the petition lacks a notarized verification affidavit. See **People v. Turner**, 2012 IL App (2nd) 100819. In support of its holding, the court referred to **People v. Cruz**, 2013 IL 113399, which "favorably cited" **Turner**.

Similarly, the absence of a notarized verification affidavit is not a suitable ground for denying leave to file a successive post-conviction petition.

2. Defendant filed a *pro se* post-conviction petition while his direct appeal was pending. That petition was summarily dismissed on the same day his direct appeal was decided. The ground for the summary dismissal was that the defendant failed to raise a constitutional issue and argued only that a statutory provision had been violated.

Defendant did not appeal the summary dismissal, but subsequently filed a second *pro se* post-conviction petition and an amended second post-conviction petition. The second petition alleged, among other matters, that trial and appellate counsel were ineffective and that the prosecution engaged in misconduct. The trial court treated the amended petition as a successive post-conviction petition and denied leave to file it.

On appeal, defendant argued that because the petition filed during his direct appeal did not raise a constitutional issue, it should have been characterized as a §2-1401 petition even though it was labeled a post-conviction petition. Thus, defendant contended that his second filing was his first post-conviction petition and that leave to file was not required.

The court concluded that it lacked jurisdiction to address issues concerning defendant's first petition, including whether the trial court should have characterized the pleading as a §2-1401 motion instead of a post-conviction petition. To preserve review of a judgement entirely disposing of a post-conviction proceeding, the party seeking review must file a notice of appeal within 30 days of the entry of judgement or an order disposing of a timely filed motion attacking the judgement. The trial court treated the first filing as a post-conviction petition and entered a summary dismissal. Because that dismissal was a final judgement resolving all of the issues that were raised in the petition, defendant had 30 days to file either a notice of appeal or a motion attacking the judgement. By failing to act, defendant deprived the Appellate Court of jurisdiction to consider any issues arising from the initial petition, including whether it should have been treated as a post-conviction or §2-1401 proceeding.

3. Although the Post-Conviction Hearing Act contemplates that only one post-conviction petition will be filed, the bar on multiple petitions is relaxed where: (1) the petitioner can establish "cause" and "prejudice" for failing to raise the claim in the first petition, and (2) where the defendant alleges that he is actually innocent of the crime.

Regardless of the basis for the exception, a petitioner who seeks to file a successive post-conviction petition must first obtain leave of the court. It is the petitioner's burden to obtain leave and to submit sufficient documentation to allow the court to determine whether leave should be granted.

To show "cause" for filing a subsequent post-conviction petition, the defendant must show some objective factor external to the defense that prevented him from raising a specific claim in the initial post-conviction petition. "Prejudice" is shown where the petitioner demonstrates that the claims which he seeks to raise in the subsequent proceeding so infected the trial that the conviction or sentence violated due process.

Here, defendant failed to show "cause." The court rejected defendant's argument that he could not have challenged appellate counsel's ineffectiveness in his initial petition because the direct appeal was still pending when that petition was filed. The court noted that defendant had possession of the appellate briefs before he filed the initial petition, and therefore knew what issues had been raised on direct appeal.

Because no external reason impeded defendant's ability to raise his claims in the initial post-conviction proceeding, he was unable to show cause for the failure to assert the claims at that point. Because defendant failed to show cause and both cause and prejudice must be shown, the court was not required to consider the "prejudice" prong of the test.

4. In the course of its holding, the court noted that the "frivolous or patently without merit" standard, which applies at the first stage of post-conviction proceedings, is inapplicable to a successive petition. Because a petitioner must obtain leave of the court before a successive petition may be filed, it would be superfluous to apply the "frivolous or patently without merit" standard once leave has been granted.

(Defendant was represented by Assistant Defender Emily Filpi, Chicago.)

People v. Munoz, 406 Ill.App.3d 884, 941 N.E.2d 318 (1st Dist. 2010)

1. Ordinarily, a defendant must satisfy the "cause and prejudice" test in order to file a second or successive post-conviction petition. "Cause" consists of an objective factor external to the defense which impeded counsel or the defendant from raising the claim in an earlier proceeding. "Prejudice" is shown where a constitutional error so infected the trial that the conviction violated due process.

A post-conviction petition which raises a viable claim of actual innocence is not required to satisfy the "cause" and "prejudice" test. To allege a claim of actual innocence based on newly discovered evidence, the defendant must show that the evidence is material, noncumulative, and likely to change the result of a retrial. In addition, the evidence could not have been discovered in a more timely manner with the exercise of due diligence.

2. Defendant's *pro se* post-conviction petition made a sufficient showing of actual innocence to dispense with the cause and prejudice requirement for his second post-conviction petition. The petition presented the affidavit of an eyewitness who was discovered some 20 years after the original murder trial. The affidavit identified a different person as the shooter, and said that defendant had not been at the scene. The affidavit also averred that the witness contacted two police officers after the offense and told them what he had seen. Although one of the officers testified at defendant's trial and the witness would have been willing to testify, the witness was not disclosed to the defense or contacted by the prosecution.

3. Defendant also made a sufficient showing of a meritorious issue to avoid summary dismissal. First, there was a sufficient showing that due diligence would not have disclosed the witness at an earlier time. Although defendant did not indicate how or when he learned of the witness, the affidavit was notarized by a Massachusetts notary public, indicating that at some point the witness left Illinois. Furthermore, the State not only failed to disclose the witness at the time of trial, but after he was convicted defendant unsuccessfully sought to obtain grand jury transcripts and police investigation reports by filing a mandamus action.

The court also concluded that defendant made a *prima facie* showing that the evidence was noncumulative and would likely have changed the result at trial. An eyewitness who exonerates the defendant does more than merely corroborate the defendant's alibi. In addition, although another eyewitness testified at trial that defendant was the shooter, that testimony was suspect because the witness had been shot during the incident, which occurred on a dark street, and the witness did not originally identify defendant as the shooter. Under these

circumstances, after hearing the newly-discovered witness a reasonable trier of fact could conclude that defendant was not involved in the offense.

Because defendant's petition had an arguable basis in law and fact, the trial court erred by dismissing it as frivolous and patently without merit. The order denying defendant's request for leave to file a successive post-conviction was vacated and the cause remanded for further proceedings.

(Defendant was represented by Assistant Defender Jonathan Yeasting, Chicago.)

People v. Starks, 2012 IL App (2d) 110324 (No. 2-11-0324, modified on denial of rehearing 8/24/12)

1. At the first stage of a post-conviction proceeding, the court has 90 days to review the petition to determine if it is frivolous or patently without merit. If the petition is not dismissed, it moves to stage two. A court's power to dismiss a petition *sua sponte* exists only at stage one.

Defendant's petition advanced to stage two when the trial court failed to rule within 90 days. The court then lost its power to *sua sponte* dismiss the petition on the ground that the defendant lacked standing. The State had not filed a motion to dismiss for the court to grant. Therefore, the court committed reversible error in dismissing the petition.

2. Generally, a defendant may only file one post-conviction petition unless the court grants leave upon a showing of cause for the failure to bring the claim in the initial petition and prejudice resulting from that failure. A defendant is excused from showing cause and prejudice if his successive petition sets forth a claim of actual innocence. A claim of actual innocence must be supported by evidence that is newly discovered, material and not merely cumulative, and of such a conclusive character that it would probably change the result on retrial.

Defendant's petition made a claim of actual innocence supported with newly-discovered DNA test results excluding him as the source of the semen on the complainant's vaginal swab. The evidence is not cumulative. Evidence is cumulative when it adds nothing to what was previously before the jury. The original post-conviction DNA test only excluded defendant as the source of semen on complainant's underwear. The new DNA evidence is different from that DNA evidence and the evidence before the jury (which was only that defendant could not be excluded as the source of the semen).

Finally, the evidence is of such a conclusive nature that it would probably change the result on retrial. Defendant had been convicted of aggravated battery and sexual assault committed by a single offender. He had been granted a new trial on the sexual assault charges in a previous post-conviction proceeding and at issue in this proceeding was only his battery conviction. The jury heard evidence at trial that scientifically linked defendant to semen found in the complainant's vagina. This provided strong corroboration for the other evidence: the identification testimony, bite-mark evidence, and evidence that defendant's property was found on the scene. The bite-mark evidence has now been discredited and defendant maintained that he was robbed of his property the night of the attack. In these circumstances, the new DNA and bite-mark evidence is of such a conclusive nature that it would probably change the result on retrial.

Because the defendant had made a substantial showing of actual innocence, in the interests of judicial economy, the Appellate Court remanded for third-stage proceedings.

People v. Wideman, 2013 IL App (1st) 102273 (No. 1-10-2273, mod. op. 8/5/13)

1. Under 725 ILCS 5/122-1(f), a petitioner must obtain leave of the court to file a

successive post-conviction petition. Leave may be granted where the petitioner demonstrates "cause" for failing to raise the claim in the original petition and "prejudice" resulting from the error, or where the petitioner demonstrates newly discovered evidence of actual innocence.

A successive petition is not evaluated under the "frivolous or patently without merit" standard which applies to first stage proceedings. Instead, where a claim of actual innocence is raised, leave to file the successive petition should be granted unless it is clear from a review of the petition and supporting documentation that as a matter of law, the petitioner cannot assert a colorable claim of actual innocence. A colorable claim is one raising a probability "that it is more likely than not that no reasonable juror would have convicted the defendant in light of the new evidence."

2. Post-conviction petitions are subject to two verification requirements. First, §122-1(b) of the Post-Conviction Hearing Act requires that a petition be "verified by affidavit." Section 122-1 is intended to assure that the allegations of the petition are brought truthfully and in good faith.

Second, 725 ILCS 5/122-2 requires that a petition be accompanied by "affidavits, records, or other evidence supporting its allegations or . . . state why the same are not attached." Section 122-2 is intended to show that the petition's allegations can be objectively and independently corroborated. The failure to satisfy the requirements of §122-2 justifies summary dismissal of the petition.

3. The court concluded that the trial court properly denied leave to file a successive petition based upon actual innocence. First, a self-verified statement by the defendant did not constitute newly discovered evidence, as defendant was available both to testify at the original trial and to provide detailed support for his claim of actual innocence during the initial post-conviction proceedings.

Furthermore, the supporting affidavits of two witnesses, which were attached to the successive post-conviction petition, were not notarized, and no reasons were given to explain the lack of notarization. The court concluded that the failure to notarize the supporting affidavits, or explain the lack of notarization, provided sufficient justification for the trial court to deny leave to file the petition without considering whether it would have also been proper to deny leave based solely on defendant's failure to have his own affidavit notarized.

(Defendant was represented by Assistant Defender Todd McHenry, Chicago.)

People v. Wilson, 2014 IL App (1st) 113570 (No. 1-11-3570, 9/12/14)

Successive post-conviction petitions are disfavored and may proceed only where the petitioner obtains leave of the court by either asserting actual innocence or satisfying the cause-and-prejudice test. However, where the initial post-conviction petition sought only to reinstate a direct appeal that was lost due to counsel's ineffectiveness, a second petition is not "successive."

The Illinois Constitution provides a convicted person with the right to appeal his or her conviction, and the Post-Conviction Hearing Act affords the statutory right to one complete opportunity to collaterally attack the conviction via post-conviction proceedings. A post-conviction petition which seeks only to reinstate an appeal which was lost through no fault of the defendant is not a true collateral attack and does not represent a complete opportunity to collaterally challenge the conviction.

Where defendant filed a post-conviction petition to regain the right to a direct appeal after defense counsel failed to file a notice of appeal despite defendant's request, a second petition filed after the direct appeal had been resolved should not have been treated as a successive petition. However, the court concluded that by dismissing the subsequent petition

as frivolous and patently without merit, the trial court applied the proper first-stage post-conviction test. Therefore, the order dismissing the post-conviction petition was affirmed.

(Defendant was represented by Assistant Defender Tom Gonzalez, Chicago.)

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§9-1(i)(2)
Cause-and-Prejudice Test

People v. Davis, 2014 IL 115595 (No. 115595, 3/20/14)

1. Defendant filed a successive post-conviction petition arguing that his mandatory sentence of natural life imprisonment for an offense he committed when he was 14 years old violated the Eighth Amendment to the United States Constitution. The Illinois Supreme Court held that defendant established cause and prejudice allowing him to raise this issue for the first time in a successive petition.

The Post-Conviction Hearing Act contemplates the filing of only one post-conviction petition. 725 ILCS 5/122-1(f). Because successive petitions impede the finality of criminal litigation, a defendant faces immense procedural default hurdles in filing a successive petition, and these hurdles are lowered only in very limited circumstances. One such circumstance is where the petitioner establishes cause and prejudice. Cause refers to some objective factor external to the defense that impeded counsel's efforts to raise the claim in an earlier proceeding. Prejudice refers to a constitutional error that so infected the entire trial that the resulting conviction or sentence violates due process.

2. In **Miller v. Alabama**, 567 U.S. ___ , 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012), the United States Supreme Court held that because juveniles "are constitutionally different from adults for purposes of sentencing," it is impermissible to impose a mandatory sentence of natural life imprisonment on juveniles under 18. A mandatory sentence precludes consideration of mitigating circumstances such as: the juvenile's age; his family and home environment; the circumstances of the offense, including the extent of his participation; his ability to interact with police, prosecutors, and to assist in his defense; the effect of family or peer pressure; and the possibility of rehabilitation. For these reasons, a sentencing court must have the opportunity to consider mitigating circumstances before imposing a sentence of natural life imprisonment on a juvenile.

3. The Illinois Supreme Court held that **Miller** applies retroactively to cases on collateral review and thus defendant established cause and prejudice allowing him to raise his sentencing issue for the first time in a successive petition. **Miller's** new ruling, which was decided after defendant filed his prior post-conviction petition, constitutes cause because it was not available earlier to counsel. It constitutes prejudice because it applies retroactively to defendant's sentencing hearing, rendering his mandatory life sentence unconstitutional. The Court vacated defendant's mandatory life sentence and remanded for a new sentencing hearing.

4. Defendant also attempted to argue in his successive petition that he received ineffective assistance of counsel at his juvenile transfer hearing. The Court held that defendant was not entitled to raise this claim in a successive petition. Since this was defendant's fifth request for collateral review the procedural default hurdles he faced were "immense."

Defendant's claim was based on a recently obtained affidavit from a witness who now claimed, contrary to his earlier testimony, that defendant did not take an active role in the

offense. Defendant argued that his claim could not have been raised earlier because he did not discover this evidence until his current counsel recently spoke to the witness. The Court rejected this argument, holding that defendant failed to explain why he was unable to discover this allegedly new evidence sooner, or raise this issue in any of his earlier petitions. A defendant is not permitted to develop the evidentiary basis for claims in a piecemeal fashion. Defendant thus failed to establish cause and his claim was barred.

People v. Evans, 2013 IL 113471 (No. 113471, 2/22/13)

The Post-Conviction Hearing Act permits the filing of only one petition without leave of court. Leave of court is granted only when the defendant demonstrates cause for the failure to bring the claim in the initial post-conviction proceeding and prejudice resulting from that failure. 725 ILCS 5/1221(f). To show cause, defendant must identify an objective factor that impeded his ability to raise a specific claim during the initial proceedings.

All citizens are charged with knowledge of the law and ignorance of the law or legal rights will not excuse a delay in filing a lawsuit. Therefore, ignorance of the law cannot, as a matter of law, constitute cause that excuses the failure to raise the claim in the prior proceeding.

Defendant claimed that the requirement that he serve an MSR term violated his right to due process because the MSR term was not imposed by the trial court at sentencing. The excuse that he offered for failing to include the claim in his initial petition was that he had not yet discovered that he would be subject to an MSR term, and when he did, he had to do more research to discover what could be done.

At the time that defendant was sentenced, the Unified Code of Corrections provided that every Class X sentence included an MSR term by operation of law. 730 ILCS 5-8-1(d)(1). Defendant is presumptively charged with knowledge of this provision and his subjective ignorance of it is not an objective factor that impeded his ability to raise the MSR claim sooner. Therefore, as a matter of law, defendant cannot demonstrate cause that would allow him to file a successive petition.

(Defendant was represented by Assistant Defender Patrick Cassidy, Chicago.)

People v. Guerrero, 2012 IL 112020 (No. 112020, 2/17/12)

1. A successive post-conviction petition may be filed only with leave of the court. (725 ILCS 5/122-1(f)). Leave to file may be granted only if the petitioner demonstrates "cause" for failing to bring the claim in the initial post-conviction petition and "prejudice" resulting from that failure. "Cause" requires a showing of an objective factor that impeded the petitioner's ability to raise a specific claim during the initial post-conviction proceeding. "Prejudice" requires a showing that the claim which was not raised in the first proceeding so infected the trial that the conviction or sentence violated due process. Both "cause" and "prejudice" must be shown for the trial court to grant leave to file a subsequent petition.

2. The Supreme Court concluded that defendant who entered a guilty plea for an agreed sentence, and who claimed that the trial court had failed to admonish him of the mandatory supervised release term, could not show "cause" for failing to raise the issue in his initial post-conviction proceeding. Although defendant claimed that he first learned of the MSR term several years after the initial post-conviction proceeding was complete, he testified that he knew he would be required to serve a parole term when he was transferred to adult DOC. Because the record showed that defendant was in an adult institution during the initial post-conviction proceeding, the record rebutted his claim that he could not have raised the trial court's failure to admonish at that time.

In addition, the trial court's finding that there was not "cause" for failing to raise the issue in the initial proceeding was subject to the manifest weight of the evidence standard of review. The trial court's finding was not against the manifest weight of the evidence; the failure of a post-conviction petitioner (or his counsel) to recognize the factual or legal basis of a claim does not constitute "cause."

Finally, although the case law at the time of the initial proceeding was against defendant on the failure to admonish issue, the claim itself was not new and had been raised unsuccessfully for several years. A lack of precedent for a particular position does not constitute "cause" for failing to raise the issue; even where the law is unfavorable, an issue must be raised to preserve it for review.

(Defendant was represented by Assistant Defender Kerry Bryson, Ottawa.)

People v. Ortiz, 235 Ill.2d 319, 919 N.E.2d 941 (2009)

1. Generally, the Post-Conviction Hearing Act contemplates that only a single post-conviction petition will be filed. Any constitutional claim not raised in the original or amended petition is waived, unless a successive petition is permitted for reasons of fundamental fairness. Interests of fundamental fairness justify a successive petition if the petitioner satisfies the "cause and prejudice" test, or if a claim of actual innocence is raised.

Successive petitions raising claims of actual innocence are not subject to the "cause and prejudice" test. In rejecting the State's argument that 725 ILCS 5/122-1 requires that the "cause and prejudice" test be satisfied for all successive petitions, the court stressed that the due process clause of the Illinois Constitution affords post-conviction petitioners the right to assert a free-standing claim of innocence based on newly-discovered evidence.

2. The court rejected the State's argument that multiple post-conviction petitions raising claims of actual innocence assert the same "claim," and therefore are subject to the "cause and prejudice" test. A claim of actual innocence based on additional newly discovered evidence is not the same as a previous claim that was based on different evidence. "Defendant is not precluded from raising multiple claims of actual innocence where each claim is supported by new discovered evidence."

Thus, collateral estoppel did not apply where the defendant filed three post-conviction petitions alleging actual innocence, but the third petition offered two eyewitnesses who had previously been unknown.

3. In addition, the trial court erred by denying post-conviction relief on defendant's claim of actual innocence. To qualify as "newly-discovered" evidence justifying relief, evidence must have been discovered since the trial and such that it could not have been discovered at the time of trial through the exercise of due diligence. In addition, the evidence must be material rather than cumulative, and of such conclusive character as to probably change the result on retrial.

The testimony of a eyewitness who was not known at the time of trial, and who claimed that defendant had not been present at the time of the offense, clearly qualified as "newly discovered" evidence. Although a prior petition raised a claim of actual innocence based on a different eyewitness whose existence had been unknown at trial, this instant petition was proper where it concerned a separate witness whose testimony was broader than that raised in the previous argument.

The court also found that the evidence was material and not cumulative. Because the testimony "supplied a first-person account of the incident that directly contradicted the prior statements of the two eyewitnesses for the prosecution," it was not cumulative to testimony which supported defendant's alibi defense or to the State's witnesses recantations of their trial

testimony. "Rather, it added to what was before the fact-finder."

Finally, the evidence was of such conclusive character as to likely change the result on retrial. The new evidence directly contradicted the testimony of two prosecution witnesses, which had been recanted, and made the evidence of innocence stronger than it had been at the original trial. In addition, there was no physical evidence linking defendant to the offense. Under these circumstances, defendant satisfied the requirements for obtaining a new trial due to newly discovered evidence.

The trial court's order denying defendant's post-conviction petition was reversed, and the cause was remanded for a new trial.

People v. Smith, 2014 IL 115946 (No. 115946, 12/4/14)

1. Unless an issue of actual innocence is involved, leave to file a successive post-conviction petition may be granted only if the petitioner satisfies the "cause and prejudice" test. 725 ILCS 5/122-1(f). "Cause" is shown by identifying an objective factor that impeded the petitioner's ability to raise a specific claim during the initial post-conviction proceedings. "Prejudice" is demonstrated where the claim in question "so infected the trial that the resulting conviction or sentence violated due process." 725 ILCS 5/122-1(f).

Section 122-1(f) does not define a standard for determining whether the petitioner has met the cause and prejudice test. In other words, §122-1(f) "does not answer whether a successive post-conviction petitioner must demonstrate cause and prejudice by actively *pleading* it, or by actually *proving* it. If the petitioner is required to prove cause and prejudice, section 122-1(f) does not provide a method for presentation of evidence." Furthermore, the legislature has not heeded the Supreme Court's requests that it provide guidance on this point. See **People v. Evans**, 2013 IL 113471.

In the absence of legislative guidance, the court concluded that where leave to file a successive petition is sought prior to first stage proceedings on the successive petition, cause and prejudice is to be determined on the pleadings rather than based on evidence. Thus, a *pro se* motion for leave to file a successive post-conviction petition satisfies the cause and prejudice requirement if it alleges facts demonstrating cause and prejudice.

The court noted, however, that a higher standard than the first stage "frivolous or patently without merit" standard is required in order for the trial court to grant leave to file a successive petition. Instead, the petitioner must submit enough documentation to allow the trial judge to determine whether the allegations fail as a matter of law or whether the successive petition and supporting documentation are insufficient to justify further proceedings.

2. Here, the petitioner did not satisfy the prejudice prong of the cause and prejudice test. The motion for leave to file a successive petition claimed that: (1) direct appeal counsel was ineffective for failing to argue that the prosecutor had made improper comments during opening statements, and (2) initial post-conviction counsel provided unreasonable representation where he failed to amend the *pro se* petition to include a claim of ineffective assistance of appellate counsel. To establish prejudice, defendant must show that the claim omitted from the initial petition so infected the entire trial that the resulting conviction violated due process.

This test was not satisfied here. Although the prosecutor commented in opening argument that a witness would testify that defendant had a gun on the night of the shooting, the trial court instructed the jury repeatedly that opening statements were not evidence. In addition, in closing argument the prosecutor acknowledged that defendant did not have a gun. Furthermore, in his closing argument defense counsel pointed out the inconsistency between

the State's opening and closing arguments. Finally, defendant was convicted on a theory of accountability. Under these circumstances, erroneously claiming in opening statement that defendant had a gun could not have infected the entire trial to the extent that the resulting conviction violated due process.

(Defendant was represented by Assistant Defender Brian Carroll, Chicago.)

People v. Wrice, 2012 IL 111860 (No. 111860, 2/2/12)

1. Under **People v. Wilson**, 116 Ill.2d 29, 506 N.E.2d 571 (1987), use of a coerced confession as substantive evidence of guilt cannot be harmless error. Here, the court modified the rule to hold that use of a ***physically*** coerced confession as substantive evidence of guilt cannot be harmless error.

2. The court rejected the State's argument that the **Wilson** rule will allow petitioners to easily establish "prejudice" for purposes of the "cause" and "prejudice" test, and will therefore invite frivolous claims of coerced confessions in successive post-conviction petitions. First, a post-conviction petitioner must show both "cause" and "prejudice" in order to obtain leave to file a subsequent post-conviction petition. Here, the State conceded that the defendant had established "cause" for failing to raise the issue in his earlier petitions.

Second, meeting the "cause" and "prejudice" test does not entitle the petitioner to relief. Instead, the petition merely proceeds to adjudication, with the petitioner required to carry the burden to establish the truth of his allegations.

Because defendant alleged that newly discovered evidence showed that his confession was the product of police torture, and the State conceded that defendant had shown "cause" for failing to raise the issue in prior post-conviction proceedings, the trial court's order denying leave to file a subsequent post-conviction petition was reversed and the cause remanded for the appointment of post-conviction counsel and second stage proceedings.

(Defendant was represented by Assistant Defender Heidi Lambros, Chicago.)

People v. Almodovar, 2013 IL App (1st) 101476 (No. 1-10-1476, 1/18/13)

1. The Post-Conviction Hearing Act generally contemplates the filing of only one post-conviction petition. Fundamental fairness will allow the filing of a successive petition where petitioner satisfies the cause-and-prejudice test or where the petition sets forth a claim of actual innocence.

"Cause" exists where an objective factor impeded the petitioner's ability to raise a specific claim during the prior post-conviction proceeding. "Prejudice" is shown where the error so infected the trial that the resulting conviction or sentence violates due process. This test is codified in the Act. 725 ILCS 5/122-1(f).

2. Defendant sought leave to file a successive post-conviction petition alleging that newly-discovered evidence of a pattern of misconduct by Detective Guevara supported his claim that Guevara had used suggestion to induce witnesses to identify him as the offender. In a prior post-conviction proceeding, defendant had claimed that Guevara had suggested the identification of the defendant to the witnesses. The hearing court had rejected that claim after an evidentiary hearing at which it found the testimony of the identification witness who claimed that suggestion occurred to be not credible.

3. The Appellate Court concluded that the new evidence satisfied the cause-and-prejudice test. The State did not contest that if Guevara did use suggestive procedures, prejudice exists. Nor did it contend that evidence of Guevara's pattern of misconduct was reasonably available to defendant in the prior proceeding. The new evidence was highly relevant to the central issue of whether Guevara improperly influenced the witness

identifications used to convict defendant and, if true, would damage the credibility of Guevara's account that no suggestion occurred. The credibility problems of the witness who claimed suggestion at the prior proceeding merely highlighted the importance of the new evidence casting doubt on Guevara's credibility. A fact finder could view the evidence of Guevara's pattern of misconduct as leveling the playing field between him and the witness in terms of credibility.

(Defendant was represented by Assistant Defender Sean Collins-Stapleton, Chicago.)

People v. Anderson, 401 Ill.App.3d 134, 929 N.E.2d 1206 (1st Dist. 2010)

1. The court acknowledged that under **People v. Ortiz**, 235 Ill.2d 319, 919 N.E.2d 941 (2009), a post-conviction petitioner who raises a claim of actual innocence in a subsequent post-conviction petition is excused from satisfying the "cause and prejudice" test. The court concluded, however, that even petitioners who raise claims of actual innocence are required to obtain leave of the court to file a successive post-conviction petition. Here, defendant's failure to seek leave to file a subsequent petition justified the trial court's dismissal of the petition.

2. The court also noted that where a §2-1401 petition is recharacterized as a post-conviction petition, the trial court should explicitly admonish the defendant that if he previously filed a post-conviction petition, he must seek leave to file the recharacterized pleading as a successive petition.

(Defendant was represented by Assistant Defender Michael Orenstein, Chicago.)

People v. Anderson, 402 Ill.App.3d 1017, 931 N.E.2d 715 (1st Dist. 2010)

Defendant pleaded guilty to 11 charges, and filed a total of four post-conviction petitions. On appeal from denial of a motion for leave to file the fourth petition, the Appellate Court held that the petitioner failed to show a valid claim of actual innocence or meet the "cause and prejudice" test. The trial court's order denying leave to file a successive post-conviction petition was affirmed.

1. The Post-Conviction Hearing Act contemplates the filing of only one post-conviction petition, and requires that the petitioner obtain leave of the court before filing a successive petition. Leave of the court may be granted only if the petitioner demonstrates both "cause" for the failure to bring the claim in the initial post-conviction petition and "prejudice" resulting from that failure.

To establish "cause," the petitioner must identify an objective factor that impeded his ability to raise a specific claim during the original post-conviction proceeding. To show "prejudice," the petitioner must demonstrate that the error so infected the trial that the conviction violated due process.

2. A petitioner does not need to establish "cause" and "prejudice" if he can show a valid, free-standing claim of actual innocence. To raise such a claim, the petitioner must present newly discovered evidence of actual innocence which was not available at his original trial and which could not have been discovered through the exercise of due diligence. Furthermore, the newly discovered evidence must be material, noncumulative, and of such conclusive character as to probably change the result at trial.

3. Here, the petitioner failed to establish a free-standing claim of actual innocence.

A. Initially, the court noted that it was not required to consider a claim of actual innocence based on defense counsel's ineffectiveness. The same claim had been raised in prior post-conviction petitions, and the supplemental petition did not contain any newly-discovered evidence on this point. The doctrine of *res judicata* applies to claims of actual innocence that

are not based on newly discovered evidence.

B. The court did reach a claim of actual innocence based on police coercion to obtain a confession, although the issue had been raised in prior petitions, because the petitioner presented newly discovered evidence consisting of: (1) the July 2006 Report of the Special State's Attorney's Investigation into allegations of torture by members of the Chicago Police Department, and (2) a document filed by a group of 28 nonprofit organizations requesting a public hearing concerning police torture. The court agreed that the evidence was newly discovered and could not have been discovered through due diligence, because it came into existence several years after defendant's guilty pleas.

However, the newly discovered evidence was not so material and conclusive as to likely change the result at trial. To meet this burden, the petitioner was required to show that had the evidence been available, he would have gone to trial and obtained an acquittal. Neither the report nor the request satisfied this standard, as neither contained any specific support for defendant's claims. Instead, at most the evidence showed only that other criminal suspects had been tortured by Chicago police officers. "Generalized claims of misconduct, without any link to defendant's case, . . . are insufficient to support a claim of coercion."

Furthermore, in view of the evidence presented as part of the factual basis for the guilty pleas, there was little likelihood that the newly discovered evidence would have resulted in acquittal. In particular, at least one eyewitness identified defendant as the offender in each of the charges.

4. Similarly, the petitioner could not satisfy the "cause" and "prejudice" test based on the special report and the request for a public hearing. Evidence that comes into existence after the completion of an earlier post-conviction proceeding constitutes "cause," because there was an objective impediment to raising the claim in the earlier proceeding. Here, however, there was no reasonable probability that the new evidence would have resulted in an acquittal at trial. Therefore, defendant was unable to establish "prejudice."

(Defendant was represented by Assistant Defender Brian McNeil, Chicago.)

People v. Chambers, 2013 IL App (1st) 100575 (No. 1-10-0575, 8/13/13)

1. The trial court's order denying leave to file a successive post-conviction petition stated that defendant "is hereby fined $105.00 and the Clerk of the Circuit Court will be instructed not to accept any further filings from [defendant] until his sanction has been satisfied in full." 735 ILCS 5/22-105, which authorizes the imposition of court costs against prison inmates who file post-conviction petitions which are determined to be frivolous, provides that "[n]othing in this Section prohibits an applicant from filing an action or proceeding if the applicant is unable to pay the court costs."

Applying *de novo* review on the ground that the issue concerned the statutory authority of the trial court, the Appellate Court found that the prohibition against additional filings conflicted with the plain and ordinary language of §22-105. "The circuit court . . . effectively prohibited defendant from making future filings based on court costs assessed, despite the clear language stating otherwise in section 22-105 of the Code."

The court also noted that in **People v. Alcozer**, 241 Ill.2d 248, 948 N.E.2d 70 (2011), the Illinois Supreme Court upheld the imposition of court costs upon persons who file frivolous post-conviction proceedings but found that §22-105 does not prohibit prisoners from petitioning for post-conviction relief even if they cannot afford to pay court costs.

The Appellate Court rejected the State's argument that Illinois Supreme Court Rule 137, which provides that the signature of an attorney or a party constitutes a certificate that he or she believes that the allegation is warranted by existing law or a good faith argument

for the extension of existing law and authorizes an appropriate sanction where a document is signed in violation of the rule, permits a ban on filing post-conviction petitions until court costs for prior petitions have been paid. The court noted that §22-105 is a specific provision addressing frivolous filings by prisoners, while Rule 137 is a general rule governing the filing of all documents. It is a fundamental rule of statutory construction that a specific provision prevails over a general provision.

Because the trial court erred by prohibiting the defendant from filing further pleadings before the sanction for prior filings was paid, the prohibition was void. The court remanded the cause with instructions that the trial court vacate its order precluding defendant from filing future petitions until the $105 penalty had been paid.

2. The court rejected defendant's argument that on appeal from denial of post-conviction relief, he could argue for the first time that a mandatory life sentence on a person who was a minor at the time of the offense violates **Miller v. Alabama**, ___ U.S. ___, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012). In **Miller**, the Supreme Court held that the Eighth Amendment is violated by mandatory life sentences without parole for persons who were under the age of 18 at the time of their crimes. **Miller** did not prohibit sentencing juveniles to life imprisonment without parole, but held that the mandatory imposition of such a sentence violates the Constitution.

The court noted that mandatory life sentences may be applied to persons other than those whose offenses were committed when they were minors, and that under **People v. Williams**, 2012 IL App (1st) 111145, a sentence which violates **Miller** is not void *ab initio*. In **Williams**, the court could reach the issue because the petitioner satisfied the "cause and prejudice" test for successive post-conviction petitions by arguing that the Eighth Amendment was violated by a mandatory life without parole for a juvenile.

Here, by contrast, defendant's successive post-conviction petition did not include any argument concerning the constitutionality of his mandatory sentence of life without parole. Under these circumstances, defendant failed to satisfy the cause and prejudice requirement. Thus, the court could have considered the issue only if the sentence was void *ab initio*, a holding which was foreclosed by **Williams**.

The court also noted that a sentence is void only if the court which rendered it lacked jurisdiction to do so. Unless a statute is unconstitutional on its face, the fact that the sentence which it authorizes is applied improperly does not mean that the trial court lacked jurisdiction.

In reaching its holding, the court rejected the reasoning of **People v. Luciano**, 2013 IL App (2d) 110792, which held that a sentence which violates **Miller** is void.

(Defendant was represented by Assistant Defender Manuel Serritos, Chicago.)

People v. Edgeston, ___ Ill.App.3d ___, 920 N.E.2d 467 (2d Dist. 2009) (No. 2-07-1195, 11/24/09)

1. Generally, only one post-conviction petition is permitted. A successive post-conviction petition may be allowed, however, if the petitioner demonstrates "cause" for failing to raise the claim in a prior post-conviction proceeding and "prejudice" resulting from that failure. "Cause" exists where an objective factor impeded the petitioner's ability to raise the specific claim during a prior proceeding. "Prejudice" is shown by demonstrating that an error that was not raised in the first proceeding so infected the trial that the conviction or sentence violates due process.

The "cause and prejudice" test is inapplicable to a subsequent post-conviction petition raising a claim of actual innocence.

2. Under Illinois and federal law, a court decision which narrows the application of a substantive criminal statute is applied retroactively to convictions in which the direct appeal has been exhausted. **People v. Childress**, 158 Ill.2d 275, 633 N.E.2d 635 (1994), which held that residential burglary and burglary are mutually exclusive offenses and that burglary is not a lesser included offense of residential burglary, narrowed the applicability of the burglary statute. Thus, it should be applied retroactively in collateral proceedings.

In the course of its opinion, the court noted that the **Teague v. Lane** standard for determining retroactivity applies only to procedural rules. **Teague** does not alter the general rule that a narrowing interpretation of statutory criminal liability is substantive, and applies retroactively.

3. Because **Childress** applies retroactively and would have precluded defendant's conviction for felony murder based on residential burglary, defendant's successive post-conviction petition raised a claim of actual innocence. Therefore, he was not required to meet the "cause and prejudice" test.

4. Defendant did not waive his right to file a successive petition although he had raised the same claim in a prior petition, which he agreed to withdraw in return for post-conviction relief in another case. As part of the agreement, defendant also agreed not to file any appeals concerning the first petition.

The court acknowledged that a waiver of the right to raise a post-conviction issue would be enforceable if entered knowingly and voluntarily. However, because defendant alleged that post-conviction counsel gave erroneous advice concerning the applicability of a death sentence in the second case, the waiver could not be deemed knowing and voluntary in this case.

Furthermore, a plea agreement containing an appeal waiver is voidable if there is no consideration. The consideration which defendant received for waiving his right to seek post-conviction relief – avoidance of a death sentence in the second case – was illusory because it was dictated by the applicable caselaw:

> In return for accepting a conviction that had no legal basis, defendant obtained the "benefit" of avoiding a death sentence that rested solely on the unsupportable conviction. He could have obtained this benefit without entering into the Agreement; all he had to do was seek relief in this case. By entering into the Agreement, defendant surrendered something for nothing.

The trial court order denying leave to file a successive post-conviction petition was reversed, and the cause was remanded for further proceedings.

(Defendant was represented by Deputy Defender Chuck Schiedel, Supreme Court Unit.)

People v. Edwards, 2012 IL App (1st) 091651 (No. 1-09-1651, 2/17/12)

1. The Post-Conviction Hearing Act limits a defendant to the filing of a single post-conviction petition except where a possible due process violation compels the filing of a successive petition. 725 ILCS 5/122-1(f). Defendant must obtain leave of court to file a successive petition and must demonstrate cause and prejudice before the court can grant leave to file a successive petition.

A defendant demonstrates "cause" by identifying an objective factor external to the defense that impeded his efforts to raise his claim in the earlier proceeding. "Prejudice" exists where the defendant can show that the claimed constitutional error so infected his trial that the resulting conviction violated due process. Successive petitions are treated differently from initial petitions and the cause-and-prejudice standard is more exacting than the gist-of-a-constitutional-claim standard applied at the first stage to initial post-conviction petitions.

2. Defendant made a substantial showing of cause for his failure to raise his constitutional claim in his initial petition. At the time defendant filed his initial petition, the statute of limitations then in effect required the filing of the post-conviction petition within three years of the date of defendant's conviction. 725 ILCS 5/122-1(c) (West 2000). As defendant was forced by this limitations period to file his initial petition while his direct appeal was pending, he could not raise a claim of ineffective assistance of appellate counsel in that petition.

3. Defendant failed to make a sufficient showing of prejudice, even applying the gist standard. Defendant's claim of ineffective assistance of appellate counsel was founded on the direct appeal record, but he failed to provide any support from the record for that claim. The court refused to second-guess counsel's decision to pursue certain issues on appeal when nothing more than defendant's bare contentions were offered to support his argument that meritorious issues were left undeveloped or omitted.

(Defendant was represented by Assistant Defender Lauren Bauser, Chicago.)

People v. Evans, 405 Ill.App.3d 1005, 939 N.E.2d 1014 (2d Dist. 2010)

A second or subsequent post-conviction petition may be filed only with leave of the trial court upon a showing of "cause" for failure to bring the claim in the initial petition and "prejudice" resulting from that failure. A petition shows "cause" by identifying an objective factor impeding one's ability to raise a specific claim during the initial post-conviction proceedings. "Prejudice" is shown by demonstrating that the error so infected the trial that the conviction or sentence violated due process.

Because defendant failed to argue on appeal that he had satisfied the "cause and prejudice" test, he waived his argument that the trial court erred by denying leave to file a successive petition.

People v. Gutierrez, ___ Ill.App.3d ___, ___ N.E.2d ___ (1st Dist. 2011) (No. 1-09-3499, 6/30/11)

1. Whether or not a constitutional rule of criminal procedure is fully retroactive depends, in the first instance, on whether the decision announces a new rule or merely expands upon existing precedent. A case announces a new rule when it breaks new ground or imposes a new obligation on the state or federal government. It fails to announce a new rule if the result was dictated by precedent existing at the time defendant's conviction became final. A decision that applies an established general rule to a new set of facts is not a new rule. **Teague v. Lane**, 489 U.S. 288 (1989).

Implicit in the rules of retroactivity is the principle that *habeas corpus* cannot be used as a vehicle to create a new constitutional rule of criminal procedure unless that rule would be applied to all defendants on collateral review through one of the two **Teague** exceptions (either placing certain kinds of primary, private individual conduct beyond the power of the criminal law-making power to proscribe, or requiring the observance of procedures implicit in the concept of ordered liberty). Therefore, the issue of retroactivity should be decided as a threshold question before addressing the underlying merits of a constitutional claim.

Notwithstanding the apparent novelty of its holding, the decision in **Padilla v. Kentucky**, 559 U.S. ___, 130 S.Ct. 1473, ___ L.Ed.2d ___ (2010), that counsel has a duty to inform the defendant of the deportation consequences of his guilty plea, applies retroactively to convictions that were final when **Padilla** was decided. First, it can be inferred from the **Padilla** court's failure to address retroactivity as a threshold matter when the case came before the court from state post-conviction review, that the court did not intend to announce

a new rule. Second, **Padilla** merely applied **Strickland v. Washington**, 466 U.S. 669 (1984), and expanded it to include counsel's obligation to inform a defendant of possible deportation. "A decision that applies an established general rule (**Strickland**) to a new set of facts (deportation) is not a new rule." Additionally, the **Padilla** court acknowledged that its holding would undermine the finality of convictions obtained by guilty pleas, but noted that it had dismissed similar concerns in **Hill v. Lockhart**, 474 U.S. 52 (1985), where it had applied **Strickland** to a claim that counsel had failed to advise defendant regarding his parole eligibility when he pleaded guilty, again without deciding the threshold question of retroactivity.

2. The Post-Conviction Hearing Act contemplates the filing of only one post-conviction petition. Successive petitions are governed by 725 ILCS 5/122-1(f), which provides that the court may grant defendant leave to file a successive petition only if he demonstrates cause for his failure to bring the claim in the initial petition and prejudice resulting from that failure. "Cause" is defined as any objective factor external to the defense that impeded the defendant's ability to raise the claim in the initial post-conviction proceeding. "Prejudice" is defined as an error so infectious to the proceedings that the resulting conviction violates due process.

Defendant filed a successive petition claiming that his counsel was ineffective in failing to notify him that his guilty plea would subject him to deportation, and that had he been provided that information, he would have gone to trial because the evidence against him was not overwhelming.

Defendant established cause for his failure to raise this claim in his previous petition where he was unaware of the deportation consequences of his plea, even though he did not provide the date on which he became aware of that consequence, particularly where defendant's previous petition was *pro se* and denied at the first stage.

Defendant did not establish prejudice under the cause-and-prejudice test because he could not establish prejudice under the second prong of **Strickland v. Washington**, 466 U.S. 668 (1984). In the guilty plea context, to establish prejudice under **Strickland**, defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial. Whether the alleged error was prejudicial depends largely whether it was likely that defendant would have succeeded at trial. The evidence of defendant's guilt was overwhelming in that he was identified by an eyewitness as the offender, he admitted accountability in a videotaped statement, and the gun used in the offense was recovered in connection with an unrelated case involving defendant, and defendant's palm print and DNA were found on the gun. Therefore, he has not shown that he would have succeeded at trial.

3. A claim that the court failed to inform defendant at the time of his guilty plea that if he is not a citizen, deportation may be a consequence of his conviction, as required by 725 ILCS 5/113-8, is not a constitutional claim cognizable in a post-conviction proceeding. **People v. Delviller**, 235 Ill.2d 507, 922 N.E.2d 330 (2009), holding that due process does not require that the court admonish defendant of the collateral consequences of a guilty plea such as deportation, was not effectively overruled by **Padilla v. Kentucky**, 559 U.S. ___, 130 S.Ct. 1473 (2010). **Padilla** concluded that the direct/collateral consequences distinction is ill-suited to evaluating a claim of ineffective assistance of counsel, but did not reject the direct/collateral distinction in determining whether a guilty plea is knowingly and voluntarily entered.

(Defendant was represented by Assistant Defender Rebecca Levy, Chicago.)

People v. Johnson, 392 Ill.App.3d 897, 910 N.E.2d 677 (1st Dist. 2009)

Defendant's attempt to litigate a **Whitfield** claim in a successive post-conviction

petition was rejected because he could not meet the "cause and prejudice" test.

1. Although defendant entered his plea three years before **Whitfield** was decided and filed a *pro se* post-conviction petition one year before the **Whitfield** decision, the "benefit of the bargain" concept was first announced in **Santobello v. New York**, 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971), and was frequently cited in subsequent decisions. Because defendant could have used such authority to raise his claim in his first post-conviction petition, he failed to show "cause" for failing to do so. "[W]e cannot say that defendant's claim is so novel that it lacked a legal basis prior to **Whitfield**."

2. Furthermore, defendant could not show actual prejudice where his plea agreement provided for only a recommendation by the State, not a specific sentence. Because the trial judge repeatedly stated that he was not bound by the State's recommendation, and because the combined sentence and MSR period was less than the maximum sentence mentioned in the guilty plea admonitions, defendant was not denied the benefit of his bargain.

(Defendant was represented by Assistant Defender David Harris, Chicago.)

(This summary was written by Deputy State Appellate Defender Daniel Yuhas.)

People v. Jones, 2013 Il App (1st) 113263 (No. 1-11-3263, 12/31/13)

1. The Post-Conviction Hearing Act contemplates the filing of only one petition, and any claim not raised in that petition is waived. A claim raised in a successive petition may, however, be considered on the merits where a defendant shows cause for failing to raise the claim in the initial petition and prejudice resulting from that failure. To show cause, a defendant must demonstrate that some objective factor external to the defense impeded his ability to raise the claim in the initial petition. To show prejudice, a defendant must demonstrate that the error so infected his trial that the resulting conviction violated due process.

Section 122-1(f) of the Post-Conviction Hearing Act provides that only one petition may be filed without leave of the court. It also provides that the court may grant such leave only if a defendant demonstrates cause and prejudice.

Here, the trial court granted leave to file a successive petition based on a mistaken belief that the Illinois Supreme Court had instructed it to allow defendant to proceed with a successive petition. The trial court did not specifically rule on the question of cause and prejudice when it allowed the successive petition to go forward. Later, at the second stage of proceedings, the trial court granted the State's motion to dismiss on the ground that the claims brought in the successive petition were procedurally barred.

Defendant argued on appeal that the trial court's order allowing leave to file raised a presumption that it found defendant had satisfied the cause and prejudice test. Defendant additionally argued that once such a finding was entered, the trial court did not have authority to revisit it. The Appellate Court rejected this argument holding that the record rebutted any presumption that the trial found defendant met the cause and prejudice test. Instead, the record clearly showed that the trial court was laboring under a misconception that it had been instructed by the Supreme Court to allow defendant to proceed with a successive petition. In allowing the petition to proceed, the trial court specifically stated (albeit in error) that it was following the Supreme Court's directions. Accordingly, the trial court failed to engage in any analysis or make any findings as to whether defendant established cause and prejudice. Since there was no finding as to cause and prejudice, the Appellate Court declined to determine whether such a finding could be revisited.

2. The Appellate Court held that the trial court correctly found that defendant failed to establish cause and prejudice. Defendant argued that his failure to timely file the correct

post-plea document was the result of the trial court's improper admonishments and trial counsel's incorrect advice following his guilty plea, and thus these errors were the cause of his failure to assert his claim. The Appellate Court rejected this argument, holding that it was a misapplication of the cause and prejudice test. This issue is not why defendant filed the wrong motion after his guilty plea; the issue is why he failed to assert his claims in his original post-conviction petition. None of the allegedly improper actions by the trial court or defendant's counsel prevented him from raising his claims in the original post-conviction petition. And once the trial court denied defendant's post-plea motion on the basis of timeliness, defendant had all the information he needed to raise this issue in his original petition.

The Appellate Court also rejected the argument that as a lay person defendant did not realize he had a claim. Merely failing to recognize a claim cannot be an objective factor external to the defense that prevents raising a claim. If it were, the bar against successive petitions would be meaningless, since a defendant would only need to claim ignorance to avoid the bar.

3. Defendant argued that the United State's Supreme Court's reasoning in **Martinez v. Ryan**, 132 S.Ct. 1309 (2012) applied to his case and excused his failure to raise his claims in his original post-conviction petition. **Martinez** held that Arizona's failure to provide counsel at an initial-review collateral proceeding in State court would excuse the bar of procedural default (based on failing to bring the claim in the Arizona State court) in a federal habeas proceeding.

The Appellate Court held that **Martinez** did not require the court to excuse procedural default in this case for two reasons. First, Illinois, unlike Arizona, does not preclude defendants from raising claims of ineffective assistance of trial counsel on direct appeal and thus the concept of initial-review collateral proceedings does not apply in Illinois. In this case, all of defendant's claims were apparent from the record and thus could have been raised on appeal where defendant would have had the right to appointed counsel. Second, **Martinez** did not hold that the Arizona State court had to excuse defendant's procedural default. Instead, **Martinez** simply held that federal courts could find cause to avoid the federal doctrine of procedural default in a federal habeas proceeding. Martinez thus does not require Illinois to similarly excuse procedural default in its own State court proceedings.

(Defendant was represented by Assistant Defender Kathleen Hill, Chicago.)

People v. Knight, 405 Ill.App.3d 461, 937 N.E.2d 789 (3d Dist. 2010)

1. A defendant who seeks to file an untimely post-conviction petition must demonstrate that the late filing was not due to his culpable negligence.

Defendant filed a post-conviction petition alleging that he was actually innocent of a gang-related murder that occurred when he was incarcerated in the penitentiary, but was coerced to plead guilty to the murder by gang members who forced him to accept responsibility in order to placate prison officials. The petition alleged that the gang chief who ordered defendant to accept responsibility died after the deadline for filing a timely petition had passed, and that the gangs no longer controlled the prison. The court found that defendant's delay in filing the petition was not due to his culpable negligence but due to the continued presence of the coercive force that caused defendant to plead guilty.

2. A freestanding claim of actual innocence is cognizable in post-conviction proceedings following a conviction resulting from a guilty plea when the defendant can show that the plea was not knowing or voluntary. Defendant's petition stated a cognizable claim of actual innocence despite his plea of guilty because it alleged that defendant pleaded guilty despite his innocence because of his fear of what gang members would do to him if he did not accept

responsibility for the murder.

3. To obtain relief under a claim of actual innocence, the evidence adduced by the defendant must be newly discovered, i.e., it must be evidence that was not available at the defendant's original trial and that the defendant could not have discovered sooner through due diligence. Evidence can qualify as newly discovered even if defendant was aware of it before trial. The affidavits attesting to defendant's innocence qualify as newly discovered because the witnesses risked death by gang retaliation had they come forward sooner.

4. A post-conviction petition may be dismissed without an evidentiary hearing at the second stage if its factual claims are baseless or rebutted by the record. Otherwise, the allegations must be taken as true and their credibility resolved by an evidentiary hearing.

Defendant's guilty plea did not rebut his claim of innocence. Defendant did not state at the plea hearing that he actually murdered the victim. The factual basis for the plea did not contain a confession by the defendant. Defendant merely stipulated to the evidence that the State represented it would present. His statement at the plea hearing that his plea was not coerced was itself the result of coercion, according to the defendant. Whether the plea was coerced should be resolved at an evidentiary hearing.

The affidavit of a witness that he relayed to defendant a message from the Gangster Disciples that defendant had to "take the case" for the murder and that the gang would provide defendant with an attorney is not so implausible as to not warrant an evidentiary hearing. The State offered no evidence to rebut the witness's allegation or to deny its plausibility. Because the relevance of the witness's testimony was to show the impact of the perceived threat on defendant and not for the truth of the nature of the threat defendant faced, any hearsay objection the State might have would fail.

One of the affidavits supporting the petition was from a co-defendant who pled guilty to a lesser offense and stated at his plea hearing that the defendant stabbed the victim while he participated. The State may not rely on those proceedings to rebut defendant's petition and defeat his request for an evidentiary hearing. Only the record of the proceedings from which defendant seeks post-conviction relief may be considered to rebut defendant's claim. Since nothing in the defendant's record positively rebutted the co-defendant's affidavit, it must be taken as true.

The court remanded for an evidentiary hearing.

(Defendant was represented by Assistant Defender Mark Fisher, Ottawa.)

People v. Love, 2013 IL App (2d) 120600 (No. 2-12-0600, 12/19/13)

1. The court reiterated precedent that a *pro se* post-conviction petition may not be summarily dismissed at the first stage of post-conviction proceedings on the ground that the petition lacks a notarized verification affidavit. See **People v. Turner**, 2012 IL App (2nd) 100819. In support of its holding, the court referred to **People v. Cruz**, 2013 IL 113399, which "favorably cited" **Turner**.

Similarly, the absence of a notarized verification affidavit is not a suitable ground for denying leave to file a successive post-conviction petition.

2. Defendant filed a *pro se* post-conviction petition while his direct appeal was pending. That petition was summarily dismissed on the same day his direct appeal was decided. The ground for the summary dismissal was that the defendant failed to raise a constitutional issue and argued only that a statutory provision had been violated.

Defendant did not appeal the summary dismissal, but subsequently filed a second *pro se* post-conviction petition and an amended second post-conviction petition. The second petition alleged, among other matters, that trial and appellate counsel were ineffective and that the

prosecution engaged in misconduct. The trial court treated the amended petition as a successive post-conviction petition and denied leave to file it.

On appeal, defendant argued that because the petition filed during his direct appeal did not raise a constitutional issue, it should have been characterized as a §2-1401 petition even though it was labeled a post-conviction petition. Thus, defendant contended that his second filing was his first post-conviction petition and that leave to file was not required.

The court concluded that it lacked jurisdiction to address issues concerning defendant's first petition, including whether the trial court should have characterized the pleading as a §2-1401 motion instead of a post-conviction petition. To preserve review of a judgement entirely disposing of a post-conviction proceeding, the party seeking review must file a notice of appeal within 30 days of the entry of judgement or an order disposing of a timely filed motion attacking the judgement. The trial court treated the first filing as a post-conviction petition and entered a summary dismissal. Because that dismissal was a final judgement resolving all of the issues that were raised in the petition, defendant had 30 days to file either a notice of appeal or a motion attacking the judgement. By failing to act, defendant deprived the Appellate Court of jurisdiction to consider any issues arising from the initial petition, including whether it should have been treated as a post-conviction or §2-1401 proceeding.

3. Although the Post-Conviction Hearing Act contemplates that only one post-conviction petition will be filed, the bar on multiple petitions is relaxed where: (1) the petitioner can establish "cause" and "prejudice" for failing to raise the claim in the first petition, and (2) where the defendant alleges that he is actually innocent of the crime.

Regardless of the basis for the exception, a petitioner who seeks to file a successive post-conviction petition must first obtain leave of the court. It is the petitioner's burden to obtain leave and to submit sufficient documentation to allow the court to determine whether leave should be granted.

To show "cause" for filing a subsequent post-conviction petition, the defendant must show some objective factor external to the defense that prevented him from raising a specific claim in the initial post-conviction petition. "Prejudice" is shown where the petitioner demonstrates that the claims which he seeks to raise in the subsequent proceeding so infected the trial that the conviction or sentence violated due process.

Here, defendant failed to show "cause." The court rejected defendant's argument that he could not have challenged appellate counsel's ineffectiveness in his initial petition because the direct appeal was still pending when that petition was filed. The court noted that defendant had possession of the appellate briefs before he filed the initial petition, and therefore knew what issues had been raised on direct appeal.

Because no external reason impeded defendant's ability to raise his claims in the initial post-conviction proceeding, he was unable to show cause for the failure to assert the claims at that point. Because defendant failed to show cause and both cause and prejudice must be shown, the court was not required to consider the "prejudice" prong of the test.

4. In the course of its holding, the court noted that the "frivolous or patently without merit" standard, which applies at the first stage of post-conviction proceedings, is inapplicable to a successive petition. Because a petitioner must obtain leave of the court before a successive petition may be filed, it would be superfluous to apply the "frivolous or patently without merit" standard once leave has been granted.

(Defendant was represented by Assistant Defender Emily Filpi, Chicago.)

People v. Miller, 2013 IL App (1st) 111147 (No. 1-11-1147, 4/15/13)

1. A court may grant a defendant leave to file a successive post-conviction petition

where the defendant demonstrates cause for his failure to bring the claim in his initial post-conviction proceeding and prejudice resulting from that failure.

When a State requires a defendant to raise an ineffective-assistance-of-trial-counsel claim in a collateral proceeding, defendant may establish cause for a default of an ineffective-assistance claim that is demonstrated to be substantial, where the state courts did not appoint counsel in the initial-review collateral proceeding or where counsel appointed in the initial-review collateral proceeding was ineffective. **Martinez v. Ryan**, ___ U.S. ___, 132 S. Ct. 1309, ___ L.Ed.2d ___ (2012).

2. The Appellate Court declined to apply **Martinez** to allow defendant to raise a claim barred by *res judicata* in a successive post-conviction petition. **Martinez** applies to federal courts in habeas proceedings and is based on equitable rather than constitutional principles. It applies to initial-review collateral proceedings that provide the first opportunity to raise a claim of ineffective assistance of trial counsel, whereas Illinois considers ineffective-assistance claims on direct appeal.

Even if **Martinez** did apply to state collateral-review proceedings, only substantial claims trigger a duty to relax *res judicata*. The Appellate Court previously considered defendant's lost-plea claim at length in a published decision and found it frivolous. Moreover, while defendant did not have counsel in the circuit court, he had the benefit of counsel on appeal from the dismissal of his *pro se* petition.

(Defendant was represented by Assistant Defender Deepa Punjabi, Chicago.)

People v. Mitchell, 2012 IL App (1st) 100907 (No. 1-10-0907, 5/16/12)

1. For a court to order an evidentiary hearing on a successive post-conviction petition, petitioner must either meet the cause-and-prejudice test or must present new evidence of actual innocence. To satisfy the cause-and-prejudice test, petitioner must show that an objective impediment precluded him from raising the issue in an earlier proceeding, and that he suffered a violation of his right to due process.

2. Because a reasonably diligent defendant may rely on his attorney to conduct his defense, ineffective assistance of counsel constitutes cause for a defendant's failure to raise an issue at a stage of proceedings for which he had relied on his counsel. To show that post-trial counsel provided ineffective assistance, a defendant must show that counsel committed objectively unreasonable errors, and if counsel had not erred, there is a reasonable probability that the Appellate Court would have reversed defendant's conviction.

After defendant was convicted, substitute counsel appeared for defendant who litigated in post-trial proceedings whether trial counsel was ineffective for failing to call defendant's attorney as a witness at the hearing on the motion to suppress. Post-trial counsel did not investigate the case thoroughly enough to discover that trial counsel also failed to contact an eyewitness named on the State's list of witness who would have testified that defendant was not one of the offenders. Defendant did not learn of this witness until he first viewed the police reports after his first post-conviction petition was dismissed. Thus, defendant demonstrated "cause for failing to raise the issue earlier, because he did not know about the witness his attorney apparently failed to interview," and his post-trial counsel "provided objectively unreasonable assistance by failing to discover trial counsel's insufficient investigation."

If post-trial counsel had raised the issue of the failure to interview the eyewitness as grounds for an ineffective-assistance-of-trial-counsel argument, the court would likely have reversed the conviction on direct appeal. The eyewitness swore in his affidavit that he saw the shooters well enough to identify them. He knew the defendant from the neighborhood and defendant's appearance did not match the appearance of the shooters. The case against

defendant was "very weak" and dependent on the testimony of Detective McDermott, whom the Appellate Court characterized as an admitted perjurer, that defendant had confessed. Thus defendant demonstrated both cause and prejudice resulting from his counsel's unprofessional error.

3. The Appellate Court found that a 2006 special prosecutor's report, that Detective McDermott battered suspects and committed perjury about the suspects' alleged confessions, constituted cause for the failure to present that evidence in any prior proceeding because that report was not published until all prior proceedings had concluded.

To establish prejudice resulting from the discovery of this new evidence, the new evidence must: (1) be of such a conclusive character that it will probably change the result on retrial; (2) be material to the issue and not merely cumulative; and (3) have been discovered since the trial and be of such character that the defendant in the exercise of due diligence could not have discovered it earlier.

Defendant could not have discovered the special prosecutor's report until it was published. The evidence is not cumulative because no one previously admitted to McDermott's perjury regarding the circumstances of defendant's inculpatory statement. The report strongly corroborates the testimony of defendant and his mother that he made no statement voluntarily. The evidence of McDermott's prior perjury significantly shifts the balance of credibility in the contest between McDermott's testimony and the testimony of defendant and his mother. Because the court would have suppressed the statement if it believed the testimony of defendant's mother, new evidence of McDermott's perjury probably would change the result of a motion to suppress statements. Without the statements, the State had no case against defendant. Thus, defendant demonstrated both cause and prejudice with respect to the 2006 special prosecutor's report.

4. A witness who testified in rebuttal at defendant's trial that defendant was a gang member provided an affidavit that his testimony was false and that he perjured himself because the police threatened to charge him with the murder if he did not make a statement and testify against defendant. Cause existed for defendant's failure to present this affidavit in the first post-conviction proceeding as at that time the witness had not admitted that he had lied under oath. At defendant's first trial, at which the witness had not testified, the jury had been unable to reach a verdict. The Appellate Court found that the testimony of this witness was the most significant difference between the evidence at the first and second trials, particularly because the State relied on gang retaliation as the motive for the shooting. Therefore there was a reasonable likelihood that the false testimony could have affected the jury's verdict, which was required to demonstrate a due process violation.

The cause was remanded for an evidentiary hearing on these claims.

People v. Munoz, 406 Ill.App.3d 884, 941 N.E.2d 318 (1st Dist. 2010)

1. Ordinarily, a defendant must satisfy the "cause and prejudice" test in order to file a second or successive post-conviction petition. "Cause" consists of an objective factor external to the defense which impeded counsel or the defendant from raising the claim in an earlier proceeding. "Prejudice" is shown where a constitutional error so infected the trial that the conviction violated due process.

A post-conviction petition which raises a viable claim of actual innocence is not required to satisfy the "cause" and "prejudice" test. To allege a claim of actual innocence based on newly discovered evidence, the defendant must show that the evidence is material, noncumulative, and likely to change the result of a retrial. In addition, the evidence could not have been discovered in a more timely manner with the exercise of due diligence.

2. Defendant's *pro se* post-conviction petition made a sufficient showing of actual innocence to dispense with the cause and prejudice requirement for his second post-conviction petition. The petition presented the affidavit of an eyewitness who was discovered some 20 years after the original murder trial. The affidavit identified a different person as the shooter, and said that defendant had not been at the scene. The affidavit also averred that the witness contacted two police officers after the offense and told them what he had seen. Although one of the officers testified at defendant's trial and the witness would have been willing to testify, the witness was not disclosed to the defense or contacted by the prosecution.

3. Defendant also made a sufficient showing of a meritorious issue to avoid summary dismissal. First, there was a sufficient showing that due diligence would not have disclosed the witness at an earlier time. Although defendant did not indicate how or when he learned of the witness, the affidavit was notarized by a Massachusetts notary public, indicating that at some point the witness left Illinois. Furthermore, the State not only failed to disclose the witness at the time of trial, but after he was convicted defendant unsuccessfully sought to obtain grand jury transcripts and police investigation reports by filing a mandamus action.

The court also concluded that defendant made a *prima facie* showing that the evidence was noncumulative and would likely have changed the result at trial. An eyewitness who exonerates the defendant does more than merely corroborate the defendant's alibi. In addition, although another eyewitness testified at trial that defendant was the shooter, that testimony was suspect because the witness had been shot during the incident, which occurred on a dark street, and the witness did not originally identify defendant as the shooter. Under these circumstances, after hearing the newly-discovered witness a reasonable trier of fact could conclude that defendant was not involved in the offense.

Because defendant's petition had an arguable basis in law and fact, the trial court erred by dismissing it as frivolous and patently without merit. The order denying defendant's request for leave to file a successive post-conviction was vacated and the cause remanded for further proceedings.

(Defendant was represented by Assistant Defender Jonathan Yeasting, Chicago.)

People v. Nicholas, 2013 IL App (1st) 103202 (No. 1-10-3202, 3/27/13)

1. The Post-Conviction Hearing Act contemplates the filing of only one post-conviction petition. Successive petitions are allowed when defendant can make a substantial showing of cause and prejudice for failing to raise an issue in an earlier proceeding. "Cause" is any objective factor, external to the defense, that impeded the defendant's ability to raise a specific claim at the initial post-conviction proceeding. "Prejudice" is an error so infectious to the proceedings that the resulting conviction violates due process. Review of a trial court's denial of a motion to file a successive petition is *de novo*.

2. Defendant satisfied the prejudice standard because his allegation that a physically-coerced confession was used as substantive evidence of his guilt is never harmless error. **People v. Wrice**, 2012 IL 111860. Defendant has consistently maintained that he was tortured and his claim of being beaten and the manner in which the beating occurred are strikingly similar to the physical abuse documented in the 2006 Report of the Special State's Attorney as to the time period, location, manner, method, participants, and the role of the participants in securing coerced statements from other prisoners in Areas 2 and 3.

3. Defendant also satisfied cause. Although defendant argued that his confession was physically coerced in his initial petition, and he relied on the 2006 report to support that claim, those proceedings were fundamentally deficient. Post-conviction appellate counsel filed a **Finley** motion contending that there was no link between the misconduct documented in the

2006 report and defendant's coercion claim, misrepresenting that the officer defendant alleged was involved in his beating was not referenced in the report. Effective post-conviction appellate counsel would have established that the 2006 report did reference the officer and, had that assistance been provided, it is likely that the cause would have been remanded for further proceedings on the first petition.

Cause is also demonstrated where defendant alleged that he recently identified Detective McWeeney as the previously unknown officer who had stopped the beating, warned defendant to cooperate or the beatings would continue, and rehearsed the statement with him. Identification of this officer by name would have carried more weight than simply claiming, as in the initial petition, that an unknown detective participated in the physical abuse. The identification of McWeeney injected a "significant fact" into the cause analysis.

The court remanded for second-stage proceedings on defendant's claim that his confession was physically coerced.

(Defendant was represented by Assistant Defender David Holland, Chicago.)

People v. Schlosser, 2012 IL App (1st) 092523 (No. 1-09-2523, 6/15/12)

1. There is no constitutional right to the assistance of counsel at post-conviction proceedings. The right to counsel is provided by statute and provides for a reasonable level of assistance. 725 ILCS 5/122-4.

To ensure that defendant receives this level of assistance, Supreme Court Rule 651(c) requires that counsel file an affidavit certifying that he has: (1) consulted with the defendant to ascertain his contentions of deprivation of constitutional right; (2) examined the record of proceedings at trial; and (3) made any amendments to the *pro se* petition necessary for an adequate presentation of defendant's contentions. The mere filing of a 651(c) certificate is not conclusive of compliance.

The duty to adequately present defendant's substantive claims necessarily includes attempting to overcome procedural bars that will result in dismissal of a petition if not rebutted. Even if the allegations in the petition are insufficient to raise a constitutional issue, it is error to dismiss the petition on the pleadings where there has not been adequate representation by counsel.

2. Despite counsel's filing of a 651(c) certificate, the Appellate Court concluded that counsel's performance was unreasonable. Defendant filed a *pro se* petition alleging that the evidence was insufficient to prove his guilt and that his sentencing hearing was unfair. Counsel elected to stand on the petition and failed to amend the petition to allege ineffective assistance of appellate counsel . That allegation was necessary to avoid the bar of forfeiture where the issues could have been raised on direct appeal but were not. At the hearing on the State's motion to dismiss, counsel argued that appellate counsel was ineffective. That argument was insufficient to correct the deficiency in the pleadings because it was rejected by the post-conviction hearing court on the ground that the ineffectiveness allegation was not included in the petition.

Because counsel failed to make additional amendments necessary for adequate presentation of the defendant's *pro se* claims, the Appellate Court reversed and remanded for further proceedings. Remand was required regardless of the substantive merit of defendant's underlying claims.

(Defendant was represented by Assistant Defender David Holland, Chicago.)

People v. Sutherland, 2013 IL App (1st) 113072 (No. 1-11-3072, 6/28/13)

To initiate a successive post-conviction petition, defendant must obtain leave of court.

Unless defendant asserts actual innocence, to obtain leave of court, defendant must demonstrate cause for his failure to bring the claim in his initial post-conviction petition and prejudice resulting from that failure.

In **Martinez v. Ryan**, 566 U.S. ___, 132 S. Ct. 1309, ___ L.Ed.2d ___ (2012), the Supreme Court held that in a state that proscribes raising ineffective-assistance-of-counsel claims on direct appeal and reserves them only for collateral proceedings, federal habeas petitioners may establish cause for default of such a claim (1) where the state court did not appoint counsel in the initial-review collateral proceeding, or (2) where appointed counsel in the initial-review proceeding was ineffective under **Strickland** standards. The Court extended the equitable rule of **Martinez** to states where defendants can in theory raise claims of ineffective assistance on direct appeal, but as a matter of procedural design and systemic operation are forced to raise the claim in collateral proceedings. **Trevino v. Tahler**, ___U.S.___, 131 S. Ct. 1911, ___ L.Ed.2d ___ (2013).

The Appellate Court refused to find that a defendant can demonstrate cause that would permit him to raise an ineffectiveness claim in a successive post-conviction petition based on the rule of **Martinez**-**Trevino**. **Martinez** and **Trevino** address federal habeas law, not state collateral-review law. **Martinez** and **Trevino** are inconsistent with pronouncements of the Illinois Supreme Court on post-conviction law. Illinois defendants do not have a constitutional right to be represented by counsel in post-conviction proceedings, even where those proceedings are the first tier of review for ineffectiveness claims. Counsel may be appointed at second stage proceedings only as a matter of legislative grace. Illinois also refuses to recognize a *pro se* defendant's ignorance of the law as cause that justifies a procedural default.

The Appellate Court further concluded that defendant could not establish prejudice because his underlying ineffectiveness claim lacked merit.

(Defendant was represented by Assistant Defender Patrick Cassidy, Chicago.)

People v. Tripp, 407 Ill.App.3d 813, 944 N.E.2d 405 (1st Dist. 2011)

1. Leave to file a successive post-conviction petition is conditioned on satisfaction of the cause-and-prejudice test. 725 ILCS 5/122-1(f). To establish cause, petitioner must identify an objective factor that impeded his ability to raise a specific claim during his initial post-conviction proceeding. To establish prejudice, petitioner must show that the claim that he did not raise in the initial proceeding so infected the proceeding that his resulting conviction violated due process.

Petitioner failed to satisfy the cause-and-prejudice test based on his claim that his pre-trial motion to suppress should have been granted in light of **Arizona v. Gant**, __ U.S. __, 129 S.Ct. 1710, ___ L.Ed.2d ___ (2009). Because **Gant** was not decided until nine years after defendant's initial post-conviction petition, an objective factor impeded defendant's ability to raise the issue in his initial petition. Petitioner cannot establish prejudice, however, because **Gant** is a new rule of criminal procedure that does not apply retroactively to convictions that were final when **Gant** was announced. Even if **Gant** did apply retroactively, petitioner was not prejudiced. **Gant** would not bar admission of the seized evidence because on direct appeal the Appellate Court found that probable cause to search the vehicle existed independent of any search incident to arrest that would have been illegal post-**Gant**.

2. New constitutional rules of criminal procedure do not apply to convictions that were final when the new rule was announced. A case announces a new rule when it breaks new ground or imposes a new obligation on the states or federal government. A decision constitutes a new rule unless a state court considering the claim at the time the conviction became final would have felt compelled by existing precedent to conclude that the rule was required by the

constitution.

Two exceptions to this rule of non-retroactivity exist: (1) the new rule places certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe; or (2) the new rule requires the observance of those procedures that are implicit in the concept of ordered liberty. Under this second exception, the new rule must represent a watershed rule of criminal procedure implicit in the concept of ordered liberty and central to the accuracy of the conviction. It is not enough that the new rule is based on a bedrock right or is fundamental in the abstract sense. It must constitute a previously-unrecognized bedrock procedural element that is essential to the fairness of a proceeding.

Gant constitutes a new rule. Prior to **Gant**, police were permitted to search the passenger compartment of an arrestee's automobile contemporaneous to an arrest, so long as the arrestee was a recent occupant of the vehicle. In contrast, **Gant** limits an officer's ability to search a vehicle incident to a recent occupant's arrest to where: (1) the arrestee is within reaching distance of the passenger compartment at the time of the search; or (2) it is reasonable to believe that the vehicle contains evidence of the offense of the arrest.

Neither exception to the rule of non-retroactivity applies to **Gant**. **Gant** does not legalize primary, private individual conduct and does not reinterpret a statute. While important, **Gant** is not a watershed rule of criminal procedure implicit in the concept of ordered liberty. It merely introduced a new rule regarding the already-existing limitations placed on officers when conducting a search incident to an arrest.

(Defendant was represented by Assistant Defender Rachel Moran, Chicago.)

People v. Williams, 2012 IL App (1st) 111145 (Nos. 1-11-1145 & 1-11-2251 cons., modified 12/12/12)

1. An evidentiary hearing is warranted on a post-conviction claim where the allegations in the petition, supported where appropriate by the trial record or accompanying affidavits, make a substantial showing that the constitutional rights of the defendant have been violated. At the motion-to-dismiss stage, all well-pleaded facts that are not positively rebutted by the trial record are to be taken as true. Review of the trial court's dismissal of a petition without an evidentiary hearing is *de novo*.

A claim of actual innocence requires a showing of newly-discovered evidence that was not available at defendant's original trial and that defendant could not have discovered sooner through diligence, that is noncumulative and material, and that is of such conclusive character that it would probably change the result on retrial.

Defendant was entitled to an evidentiary hearing on his actual-innocence claim. Defendant's evidence of his innocence was newly-discovered. His co-defendants and his alibi witness were previously uncooperative with the defendant. Another witness who identified defendant could not be located until well after trial. Defendant attested that this evidence was not known to him before trial and to his difficulties in communicating while in the prison system. Therefore, defendant has shown that his allegations are based on newly-discovered evidence.

The newly-discovered evidence is also material, noncumulative, and would probably change the result of defendant's trial. The co-defendants attested that they each told the police that the police had the wrong man, that they did not know the defendant, and that their descriptions of the fifth perpetrator did not match the defendant. The witness who identified defendant to the police had no knowledge that defendant was involved in the crimes. None of this evidence was before the jury. The only evidence linking the defendant to the crimes was his confession. A co-defendant who testified at another co-defendant's trial never identified

defendant as one of the offenders. Therefore, defendant was entitled to an evidentiary hearing.

2. Only one post-conviction petition may be filed by a petitioner without leave of court. Leave may be granted upon a showing of cause for the failure to bring the claim in the initial post-conviction proceeding and prejudice resulting from that failure. Cause is shown by identifying an objective factor that impeded the ability to raise the claim during the initial proceeding. Prejudice is shown by demonstrating that the claim so infected the trial that the resulting conviction or sentence violates due process.

Miller v. Alabama, 567 U.S. ___, 132 S.Ct. 2455, ___ L.Ed.2d ___ (2012), held that mandatory life imprisonment without the possibility of parole for offenders under the age of 18 violates the Eighth Amendment. Because **Miller** was not available to defendant when he filed his initial petition, defendant has satisfied the cause element of the cause-and-prejudice test for his Eighth Amendment claim. Defendant has also demonstrated prejudice because **Miller** applies retroactively to his case. The sentencing court did not graduate and proportion punishment for defendant's crime considering his status as a juvenile at the time of the offense, violating the Eighth Amendment's prohibition against cruel and unusual punishment.

3. Generally, new rules of criminal procedure do not apply retroactively to convictions that are final when the new rule is announced except: (1) if the rule places certain kinds of primary, private individual conduct beyond the power of the criminal-law-making authority to proscribe; or (2) if the rule requires the observance of those procedures that are implicit in the concept of ordered liberty. This second exception is limited to watershed rules of criminal procedure without which the likelihood of an accurate conviction is seriously diminished.

The Appellate Court concluded that **Miller** was such a watershed rule that requires observance of procedures implicit in the concept of ordered liberty. **Miller** not only changed procedures but made a substantial change in the law in holding under the Eighth Amendment that the government cannot constitutionally apply a mandatory sentence of life without parole for homicides committed by persons under the age of 18. Life without parole is justified only where the State shows that it is an appropriate and fitting punishment regardless of the defendant's age.

The Appellate Court found it instructive that the companion case to **Miller** involved a life-without-parole sentence that was final. Notwithstanding its finality, the Supreme Court effectively applied **Miller** retroactively to the companion case. Once a new rule is applied to the defendant in a case announcing the new rule, evenhanded justice requires that it be applied retroactively to all who are similarly situated. It would be cruel and unusual punishment to only apply the principle of **Miller** to new cases.

People v. Wrice, 406 Ill.App.3d 43, 940 N.E.2d 102 (1st Dist. 2010)

1. The Post-Conviction Hearing Act contemplates the filing of only one post-conviction petition. Fundamental fairness allows the filing of a successive petition only when the petition complies with the cause-and-prejudice test. Defendant shows cause by identifying an objective factor external to the defense that impeded his efforts to raise the claim in the earlier proceeding. He shows prejudice by demonstrating that the constitutional error so infected the entire trial that the resulting conviction violates due process.

The circuit court denied defendant leave to file his second successive post-conviction petition alleging that his confession was the result of torture by Sergeant Byrne and Detective Dignan. In support of the petition, defendant submitted the 2006 report of the Special State's Attorney appointed by the Circuit Court of Cook County. The report concluded that Commander Jon Burge was guilty of prisoner abuse and named Dignan and Byrne as officers

accused of making false statements regarding their torture of prisoners. The Special State's Attorney declined to prosecute because the statute of limitations had expired.

The Appellate Court concluded that defendant had satisfied the cause-and-prejudice standard. The petition alleged for the first time that the Report of the Special State's Attorney corroborated defendant's claims. Because the report was not in existence when defendant filed his petitions in 1991 and 2000, the unavailability of the report supplied cause that impeded defendant's efforts to raise the claim in the earlier proceedings.

The defendant also established prejudice. The Report of the Special State's Attorney was not cumulative of the OPS reports that defendant had appended to his 2000 petition. The report was the first independent evaluation by the Special State's Attorney of 148 complaints of torture by police officers under the command of Burge. Byrne and Dignan were named in the report. Unlike the OPS reports, which found certain allegations of torture established by the civil preponderance-of-the-evidence standard, the Special State's Attorney's Report found evidence of torture was established in certain cases by the criminal proof-beyond-a-reasonable-doubt standard. The report found evidence of widespread, systematic abuse of prisoners at or near the time of defendant's incarceration, adding further corroboration to defendant's claim that his confession was obtained by torture. Citing **People v. Wilson**, 116 Ill.2d 29, 506 N.E.2d 571 (1984), the Appellate Court stated that the admission of a defendant's coerced confession as substantive evidence of guilt is never harmless error.

People v. Hobley, 182 Ill.2d 404, 696 N.E.2d 313 (1998), did not compel the Appellate Court to reach a different result with respect to a finding of prejudice on the ground that defendant maintained that he never made the confession that he claims is the product of police coercion. Although defendant denied making a confession, in contrast to **Hobley**, defendant provided medical evidence corroborating his allegations of torture and has referenced the Special State's Attorney's report, which provides significant corroboration of his torture claims. A jury could believe that defendant confessed, but that the confession was coerced, as defendant's claim of physical abuse was corroborated by the medical evidence, the OPS reports, and the Report of the Special State's Attorney.

2. A defendant is entitled to an evidentiary hearing on a post-conviction claim of a coerced confession where: (1) he had consistently claimed he was tortured; (2) his claims are strikingly similar to other claims of torture; (3) the officers allegedly involved are identified in other allegations of torture; and (4) the defendant's allegations are consistent with OPS findings of systemic and methodical torture at Area 2 under Burge. **People v. Patterson**, 192 Ill.2d 93, 735 N.E.2d 616 (2000).

Defendant met this standard and is entitled to an evidentiary hearing on his claims of torture where: (1) he consistently claimed at the hearing on his motion to suppress, at trial, and on post-conviction that he was tortured; (2) his claims of being beaten are strikingly similar to those of other prisoners at Areas 2 and 3; (3) the officers involved, Byrne and Dignan, are identified in other allegations of torture; and (4) defendant's allegations are consistent not only with OPS findings of systemic and methodical torture at Area 2 under Burge, but also with the findings of torture in the Special State's Attorney's Report.

(Defendant was represented by Assistant Defender Heidi Lambros, Chicago.)

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Counsel

§9-1(j)(1)
Generally

People v. Kuehner, 2015 IL 117695 (No. 117695, 5/21/15)

Where a *pro se* post-conviction petition has been advanced to second-stage proceedings on the basis of an affirmative determination by the trial court that the petition is neither frivolous nor patently without merit, appointed counsel may still move to withdraw from representation, but his motion to withdraw must contain at least some explanation as to why all of the claims in the *pro se* petition are so lacking in legal and factual support that counsel is compelled to withdraw.

Here, the trial court examined the merits of defendant's *pro se* petition, determined that it was neither frivolous nor patently without merit, and advanced the case to the second stage and appointed counsel to represent defendant. Counsel filed a motion to withdraw which addressed some but not all of claims in the *pro se* petition. Since the motion failed to address every claim, the Court reversed the judgment of the trial court allowing counsel to withdraw, and remanded the cause to the trial court for further second stage proceedings and the appointment of new counsel to represent defendant.

The Court distinguished the present case from **People v. Greer**, 212 Ill. 2d 192 (2004), where the Court upheld the trial court's decision to allow counsel to withdraw even though counsel's motion to withdraw failed to address every claim in the *pro se* petition. In **Greer**, unlike here, the petition advanced to the second stage based on the trial court's failure to rule on it within 90 days. The trial court thus never determined that the petition was neither frivolous nor patently without merit.

(Defendant was represented by Assistant Defender Kieran Wiberg, Chicago.)

People v. Csaszar, 2013 IL App (1st) 100467 (No. 1-10-0467, 12/4/13)

Counsel appointed to assist a defendant with post-conviction proceedings must provide a reasonable level of assistance consistent with Supreme Court Rule 651(c). But Rule 651(c) applies only when the petitioner files his original petition *pro se*, and not when petitioner obtains the assistance of retained counsel. As there is no constitutional right to counsel in post-conviction proceedings, the State has no duty to provide counsel, and no duty to prove reasonable assistance of counsel, for any petitioner able to hire his own counsel.

States do not violate the equal protection clause when they provide benefits to indigents that they do not provide to persons with sufficient means to purchase the benefits. The provision of counsel only to the indigent bears a fair relationship to a legitimate public purpose of providing assistance of counsel to petitioners unable to retain private counsel.

While the State bears no responsibility for providing a petitioner reasonable assistance from his privately-retained counsel, an attorney who fails to provide competent representation is potentially subject to disciplinary action as well as to liability for professional malpractice. Petitioner may also seek recourse for the attorney's alleged failings by bringing a successive post-conviction petition in which he argues that his retained counsel's failings show cause for his failure to raise meritorious issues in his initial petition.

Because defendant's appellate claim that his retained counsel had not provided reasonable assistance was not a cognizable claim for relief on appeal, the Appellate Court affirmed the dismissal of defendant's post-conviction petition.

(Defendant was represented by Assistant Defender Anne Carlson, Chicago.)

People v. Gray, 2013 IL App (1st) 101064 (No. 1-10-1064, 2/15/13)

1. The Post-Conviction Hearing Act provides that if a "petitioner is without counsel and alleges that he is without means to procure counsel, he shall state whether or not he wishes counsel to be appointed to represent him." 725 ILCS 5/122-4. The Act creates a statutory right to counsel and expressly leaves to defendant the decision whether to invoke that right. The Act does not contemplate compelling a defendant who does not want counsel to accept counsel.

A defendant's waiver of counsel must be clear and unambiguous. Courts must indulge every reasonable presumption against waiver. Whether there has been an intelligent waiver depends on the particular facts and circumstances of the case. The trial court's determination is reviewed for an abuse of discretion.

2. The circuit court abused its discretion in failing to grant or even consider defendant's request to proceed *pro se*. Although defendant's request was contingent on the court's denial of his request that the court consider his *pro se* filings while he was represented by counsel, his request to represent himself was not ambiguous as he made it clear that he would proceed *pro se* if that were the only way to have his *pro se* filings considered.

Even though the request came eight years into the proceedings, it was not dilatory. Defendant made his request as soon as it became apparent that counsel would not adopt his *pro se* filings and the court made it clear that it would not consider those filings because defendant was represented by counsel. There would be no disruption of the proceedings, as the *pro se* pleadings had already been filed and it would have been routine for the court to allow the State time to address them.

The circuit court's judgment dismissing the petition was vacated and the cause was remanded for consideration of defendant's request to proceed *pro se*.

(Defendant was represented by Assistant Defender Rachel Moran, Chicago.)

People v. Johnson, ___ Ill. App. 3d ___, ___ N.E.2d ___ (2d Dist. 2012) (No. 2-08-0839, corrected opinion 4/20/12)

Where a post-conviction petition is advanced to the second stage and counsel appointed merely because the trial judge failed to rule on the issue of frivolousness within 90 days, the trial court may grant defense counsel's motion to withdraw on the ground that there are no meritorious post-conviction issues. (See **People v. Greer**, 212 Ill. 2d 192, 817 N.E.2d 511 (2004)). However, in determining whether to allow counsel to withdraw, the trial court must determine whether the record supports trial counsel's conclusion that the petition is frivolous or patently without merit. A petition is frivolous or patently without merit if it has no arguable basis in fact.

Here, the trial court erred by granting a motion to withdraw, because defendant's *pro se* petition made an arguable showing that defense counsel was ineffective for failing to obtain evidence that five latent fingerprints found in the complainant's car did not match defendant's prints. The court noted that the evidence could have been used to argue that defendant was not in the car, as the complainant claimed, and to support defendant's contention that any sexual contact with the complainant occurred elsewhere and was consensual.

Because defendant's allegations were not frivolous or patently without merit, the trial court erred by granting appointed counsel's motion to withdraw on the ground that he could not ethically provide support for defendant's claims.

The order dismissing defendant's post-conviction petition was reversed and the cause remanded for a new second-stage hearing.

(Defendant was represented by Assistant Defender Sherry Silvern, Elgin.)

People v. Jones, 2013 Il App (1st) 113263 (No. 1-11-3263, 12/31/13)

1. The Post-Conviction Hearing Act contemplates the filing of only one petition, and any claim not raised in that petition is waived. A claim raised in a successive petition may, however, be considered on the merits where a defendant shows cause for failing to raise the claim in the initial petition and prejudice resulting from that failure. To show cause, a defendant must demonstrate that some objective factor external to the defense impeded his ability to raise the claim in the initial petition. To show prejudice, a defendant must demonstrate that the error so infected his trial that the resulting conviction violated due process.

Section 122-1(f) of the Post-Conviction Hearing Act provides that only one petition may be filed without leave of the court. It also provides that the court may grant such leave only if a defendant demonstrates cause and prejudice.

Here, the trial court granted leave to file a successive petition based on a mistaken belief that the Illinois Supreme Court had instructed it to allow defendant to proceed with a successive petition. The trial court did not specifically rule on the question of cause and prejudice when it allowed the successive petition to go forward. Later, at the second stage of proceedings, the trial court granted the State's motion to dismiss on the ground that the claims brought in the successive petition were procedurally barred.

Defendant argued on appeal that the trial court's order allowing leave to file raised a presumption that it found defendant had satisfied the cause and prejudice test. Defendant additionally argued that once such a finding was entered, the trial court did not have authority to revisit it. The Appellate Court rejected this argument holding that the record rebutted any presumption that the trial found defendant met the cause and prejudice test. Instead, the record clearly showed that the trial court was laboring under a misconception that it had been instructed by the Supreme Court to allow defendant to proceed with a successive petition. In allowing the petition to proceed, the trial court specifically stated (albeit in error) that it was following the Supreme Court's directions. Accordingly, the trial court failed to engage in any analysis or make any findings as to whether defendant established cause and prejudice. Since there was no finding as to cause and prejudice, the Appellate Court declined to determine whether such a finding could be revisited.

2. The Appellate Court held that the trial court correctly found that defendant failed to establish cause and prejudice. Defendant argued that his failure to timely file the correct post-plea document was the result of the trial court's improper admonishments and trial counsel's incorrect advice following his guilty plea, and thus these errors were the cause of his failure to assert his claim. The Appellate Court rejected this argument, holding that it was a misapplication of the cause and prejudice test. This issue is not why defendant filed the wrong motion after his guilty plea; the issue is why he failed to assert his claims in his original post-conviction petition. None of the allegedly improper actions by the trial court or defendant's counsel prevented him from raising his claims in the original post-conviction petition. And once the trial court denied defendant's post-plea motion on the basis of timeliness, defendant had all the information he needed to raise this issue in his original petition.

The Appellate Court also rejected the argument that as a lay person defendant did not realize he had a claim. Merely failing to recognize a claim cannot be an objective factor external to the defense that prevents raising a claim. If it were, the bar against successive petitions would be meaningless, since a defendant would only need to claim ignorance to avoid the bar.

3. Defendant argued that the United State's Supreme Court's reasoning in **Martinez v. Ryan**, 132 S.Ct. 1309 (2012) applied to his case and excused his failure to raise his claims in his original post-conviction petition. **Martinez** held that Arizona's failure to provide counsel

at an initial-review collateral proceeding in State court would excuse the bar of procedural default (based on failing to bring the claim in the Arizona State court) in a federal habeas proceeding.

The Appellate Court held that **Martinez** did not require the court to excuse procedural default in this case for two reasons. First, Illinois, unlike Arizona, does not preclude defendants from raising claims of ineffective assistance of trial counsel on direct appeal and thus the concept of initial-review collateral proceedings does not apply in Illinois. In this case, all of defendant's claims were apparent from the record and thus could have been raised on appeal where defendant would have had the right to appointed counsel. Second, **Martinez** did not hold that the Arizona State court had to excuse defendant's procedural default. Instead, **Martinez** simply held that federal courts could find cause to avoid the federal doctrine of procedural default in a federal habeas proceeding. Martinez thus does not require Illinois to similarly excuse procedural default in its own State court proceedings.

(Defendant was represented by Assistant Defender Kathleen Hill, Chicago.)

People v. Kuehner, 2014 IL App (4th) 120901 (No. 4-12-0901, 4/10/14)

In **People v. Greer**, 212 Ill. 2d 192 (204), the Illinois Supreme Court held that post-conviction counsel may properly withdraw from representation where the record shows that (1) counsel has fulfilled her duties under Rule 651(c), and (2) defendant's post-conviction claims are frivolous and patently without merit. The court also stated that counsel should "make some effort" to explain why the claims are frivolous, but the court did not make such an explanation a prerequisite for withdrawal.

In **People v. Komes**, 2011 IL App (2d) 100014, the Appellate Court held that under **Greer**, a motion to withdraw should include an explanation of why all of defendant's claims are frivolous, although counsel may still be allowed to withdraw, despite the motion's deficiency, if the record shows that counsel complied with Rule 651(c) and all of the claims are frivolous.

1. Defendant argued that the trial court improperly allowed post-conviction counsel to withdraw where (1) the motion failed to explain why all of defendant's claims were frivolous, and (2) the record failed to show that counsel complied with Rule 651(c) and the unaddressed claims were frivolous. Defendant interpreted **Greer** and **Komes** as holding that the court should first look at the sufficiency of counsel's motion to withdraw, and should only examine the record if the motion was insufficient.

The Appellate Court rejected defendant's argument and interpretation of the law. **Greer** did not make the sufficiency of counsel's motion the primary standard for deciding whether counsel may withdraw. Instead, **Greer** merely made a non-binding suggestion that counsel should try to explain why the petition is frivolous. The ultimate decision about whether counsel should be allowed to withdraw rests on whether the record itself shows that (1) counsel complied with Rule 651(c) and (2) defendant's claims are frivolous. The motion merely serves as a formal request by counsel to withdraw and the brief in support of the motion serves as an aid to the trial court in deciding whether the record establishes that withdrawal was proper.

The court thus declined to address defendant's first argument that counsel's motion to withdraw was deficient. The court addressed defendant's second argument and found that the record showed compliance with Rule 651(c) and defendant's claims were frivolous.

2. Supreme Court Rule 651(c) provides in part that the record must show that post-conviction counsel consulted with defendant to ascertain his constitutional claims. Defendant argued that since counsel's motion to withdraw did not address one of his claims, the record

did not show that she consulted with him about this claim, and thus she failed to comply with the rule.

The court rejected this argument. Even if counsel were required to address all of defendant's claims, which she is not, the mere fact that she failed to do so does not necessarily mean that counsel failed to consult with defendant about the missing claim. Instead, looking at the record as a whole, the court found that counsel did in fact discuss all of defendant's claims and thus properly complied with Rule 651(c).

3. Defendant also argued that because the trial court advanced his petition to the second stage after finding that the petition was not frivolous or patently without merit, that necessarily meant that defendant's post-conviction claims were not frivolous, and thus counsel could not properly withdraw.

The court rejected this argument as well, holding that defendant drastically overstated the significance of the "purposely low threshold" of a first-stage proceeding. At that stage, the trial court makes its decision without full detail or legal arguments since petitions are drafted by defendants with little legal knowledge or training. It is only at the second stage, after counsel has been appointed, that a more reliable evaluation of the claims can be made. The mere fact that a trial court has advanced the petition to the second stage does not mean that counsel cannot properly determine that the petition is frivolous. The court noted that under defendant's reasoning, counsel would always be barred from withdrawing whenever a petition passed the first-stage threshold.

The trial court properly allowed post-conviction counsel to withdraw and properly dismissed defendant's petition.

(Defendant was represented by Assistant Defender Kieran Wiberg, Chicago.)

People v. Milam, 2012 IL App (1st) 100832 (No. 1-10-0832, 5/18/12)

1. If a post-conviction petition survives summary dismissal and moves to second stage proceedings, counsel may be appointed for an indigent petitioner. Because the right to post-conviction counsel is statutory rather than constitutional, the requirements of the Sixth Amendment do not apply. However, counsel is required to provide reasonable assistance.

Supreme Court Rule 651(c) imposes three specific duties on post-conviction counsel, including to consult with the petitioner to ascertain his contentions of constitutional deprivation, examine the record of the trial proceedings, and make any amendments to the *pro se* petition necessary to adequately present the petitioner's contentions.

2. Post-conviction counsel need not conduct an investigation to discover claims that were not raised by the petitioner in the *pro se* petition, or amend the petition to allege claims not raised by the petitioner. However, Rule 651(c) does require counsel to amend the *pro se* petition to adequately present the petitioner's contentions. Included in that duty is the obligation to shape the defendant's *pro se* claims into "appropriate legal form."

3. Where post-conviction counsel filed an amended petition which alleged a new claim that had not been raised in the *pro se* petition, and the petitioner relied on counsel's action by withdrawing his *pro se* claims and proceeding only on the new claim in the amended petition, counsel failed to shape the claim into "appropriate legal form" where she failed to include an allegation that the waiver doctrine was inapplicable due to ineffective assistance by appellate counsel. Under these circumstances, "it would be improper to affirm the dismissal of the amended petition without affording defendant the opportunity to amend his claim to overcome the waiver doctrine."

The trial court's order dismissing defendant's amended petition was reversed, and the cause was remanded with instructions to conduct a new second stage hearing after allowing

defendant leave to amend his amended petition to assert a claim of ineffective assistance of appellate counsel.

(Defendant was represented by Assistant Defender Laura Weiler, Chicago.)

People v. Patterson, 2012 IL App (4th) 090656 (No. 4-09-0656, 7/11/12)

1. A defendant may not complain of inadequate assistance of counsel if he has no right to counsel. If not constitutionally guaranteed, the right to counsel must be statutorily provided. Unlike the Post-Conviction Hearing Act, 725 ILCS 5/116-3 contains no provision for appointment of counsel on a motion for forensic testing. Therefore, a defendant cannot claim inadequate assistance of counsel on a §116-3 motion. Where a request for forensic testing is included in a post-conviction petition, however, defendant can claim inadequate assistance of counsel with respect to the post-conviction claim for forensic testing.

Defendant filed a *pro se* post-conviction petition and a separate §116-3 motion for DNA testing. Counsel appointed to represent defendant in the post-conviction proceeding amended the petition to include the request for §116-3 testing. Because the request for §116-3 testing was included in the post-conviction petition, defendant could claim that he received unreasonable assistance of counsel as to that claim, even though defendant was not entitled to counsel on the independent §116-3 motion. The Appellate Court declined to decide whether a §116-3 claim was an appropriate subjection of a post-conviction petition. Even when a pleading should not be considered as a post-conviction petition, but the trial court elects to treat it as if it were, appointed counsel must comply with his duties under the Post-Conviction Hearing Act and Supreme Court Rule 651.

2. In post-conviction proceedings, defendant is entitled to the reasonable assistance of counsel. Supreme Court Rule 651(c) requires that counsel: (1) consult with the defendant, (2) examine the record, and (3) make any necessary amendments to the *pro se* petition for an adequate presentation of the defendant's contentions. Failure to make a routine amendment to a post-conviction petition that would overcome a procedural bar constitutes unreasonable assistance in violation of Rule 651(c). It is equally unreasonable for post-conviction counsel to amend a *pro se* petition in a way that creates a procedural bar for a defendant.

Post-conviction counsel amended the *pro se* petition to include the §116-3 claim, but failed to present any evidence or argument in support of that request to prevent the dismissal of that claim. Counsel thus effectively created a procedural bar of *res judicata* to defendant's §116-3 motion. Even though successive motions are permissible under §116-3, *res judicata* will bar a successive motion if the exact same issue is raised in both motions.

Because counsel rendered unreasonable assistance of counsel as to the §116-3 post-conviction claim, the Appellate Court reversed the denial of the petition as to this claim and remanded for further proceedings.

(Defendant was represented by Assistant Defender Paige Strawn, Mt. Vernon.)

People v. Profit, 2012 IL App (1st) 101307 (No. 1-10-1307, 6/28/12)

1. Under the Post-Conviction Hearing Act, petitioners are entitled to a "reasonable" level of assistance from counsel. Where counsel files the certificate required by Supreme Court Rule 651(c), there is a rebuttable presumption that reasonable assistance was afforded. The petitioner may overcome this presumption by demonstrating that the attorney failed to substantially comply with the duties mandated by Rule 651(c), which include consulting with the petitioner to ascertain the contentions of constitutional deprivation, examining the record of the trial proceeding, and making amendments to the *pro se* petition that are necessary to adequately present the petitioner's contentions.

2. Where the petitioner claimed that post-conviction counsel failed to render reasonable assistance concerning a successive post-conviction petition because he failed to amend the petition to raise additional *pro se* arguments which the petitioner alleged, the fact that counsel filed a Rule 651(c) certificate created a rebuttable presumption that the petitioner received reasonable assistance of counsel. In determining whether defendant overcame that presumption, the court concluded that it should consider whether the issues which counsel failed to raise were meritorious. The court rejected the defendant's argument that whether such issues were meritorious was irrelevant to whether counsel acted unreasonably by failing to amend the petition.

3. The court concluded that one of defendant's *pro se* issues lacked merit, and that a second issue had been forfeited because it was not raised in the original post-conviction proceeding and defendant did not claim that he was actually innocent or that the cause-and-prejudice standard could be satisfied. Under these circumstances, defendant failed to overcome the presumption that counsel provided reasonable assistance.

The trial court's order dismissing the successive post-conviction petition was affirmed.

(Defendant was represented by Assistant Defender Julianne Johnson, Chicago.)

People v. Shortridge, 2012 IL App (4th) 100663 (No. 4-10-0663, 1/11/12)

Post-conviction counsel must perform specific duties in his representation of defendant as provided by Supreme Court Rule 651(c). Counsel is not obligated to advance frivolous or spurious claims, but defendant is entitled to a reasonable level of assistance of counsel. If counsel believes that defendant's claims are frivolous or without merit, his ethical obligation is to seek to withdraw as counsel.

Appointed counsel confessed the State's motion to dismiss defendant's *pro se* post-conviction petition, after filing a 651(c) certificate, but no amendments to the petition. Within 30 days of that order, defendant filed motion to discharge his counsel and a motion to reconsider the dismissal, which the court denied.

If counsel concluded that defendant's claims were nonmeritorious, counsel should have moved to withdraw as counsel, not confessed the State's motion to dismiss. Post-conviction counsel's representation was so deficient as to amount to no representation at all. Therefore defendant was denied a reasonable level of assistance.

Without considering the merits of the petition, the court reversed and remanded for appointment of new counsel.

(Defendant was represented by Assistant Defender Gary Peterson, Springfield.)

People v. Thomas, 2013 IL App (2d) 120646 (No. 2-12-0646, 6/20/13)

The right to counsel at the second and third stages of a post-conviction proceeding is purely statutory and entitles defendant to a reasonable level of assistance. The duty to provide reasonable assistance requires compliance with the specific obligations described in Supreme Court Rule 651(c).

Where counsel is appointed because the circuit court did not examine the petition within 90 days, the Post-Conviction Hearing Act does not expressly authorize counsel to withdraw when counsel concludes that the defendant's contentions are frivolous and patently without merit. But permitting counsel to withdraw is consistent with the legislative intent underlying the Act. The purpose for requiring the appointment of counsel where the court does not consider the petition in a timely manner is to jump-start a process that has shown no sign of progress. No rationale exists in such circumstances to accord the defendant a right to continuing representation throughout the remainder of the proceedings, where a defendant

whose petition the court determines to be frivolous in a timely manner is never given counsel in the first place. **People v. Greer**, 212 Ill. 2d 192, 817 N.E.2d 511 (2004).

The court appointed counsel for defendant after failing to act on the petition in a timely manner. Counsel filed a 651(c) certificate and moved to withdraw on the ground that defendant's contentions lacked merit. The court granted the motion and denied the petition. On appeal, the Appellate Court reversed because the court had dismissed the petition before the State had filed a responsive pleading. On remand, the court appointed new counsel, who also successfully moved to withdraw, but who did not file a 651(c) certificate. The court then granted the State's motion to dismiss.

The Appellate Court rejected the argument that counsel's failure to file a 651(c) certificate demonstrated that defendant did not receive the level of legal assistance to which he was entitled. Because defendant's statutory right to appointment of counsel did not exist after initial counsel was permitted to withdraw pursuant to **Greer**, defendant was no longer entitled to the level of legal assistance guaranteed under the Act. Therefore, successor counsel's failure to fulfill the duties specified in Rule 651(c) is not grounds for reversal.

(Defendant was represented by Supervisor Arden Lang, Springfield.)

Top

§9-1(j)(2)
Reasonable Assistance of Counsel – Illinois
Supreme Court Rule 651(c)

People v. Ligon, 239 Ill.2d 94, 940 N.E.2d 1067 (2010)

1. A claim of ineffective assistance of counsel cannot be considered on direct appeal where the evidentiary basis of the claim is *dehors* the record. The Appellate Court concluded on direct appeal that defendant's ineffective-assistance-of-counsel claims should more appropriately be pursued on post-conviction so that the facts relevant to the claim could be developed. That determination is *res judicata* and unassailable once the direct appeal became final.

2. An indigent defendant is entitled to appointment of counsel on an as-of-right appeal from a conviction. **Douglas v. California**, 372 U.S. 353 (1963). That right to counsel does not extend to discretionary review of a conviction after mandatory review by an intermediate reviewing court, where acceptance of the appeal is based on public importance and other indicia not related to the merits. **Ross v. Moffitt**, 417 U.S. 600 (1974). Nor does defendant have a right to counsel on an appeal collaterally attacking a conviction. **Pennsylvania v. Finley**, 481 U.S. 551 (1987).

An indigent defendant who seeks a first-tier direct appeal after pleading guilty or *nolo contendere* does have a right to appointed counsel even if the appeal is discretionary. Though discretionary, the appeal is the first, and likely the only, direct review of the conviction. Defendants seeking first-tier review are generally ill-equipped to represent themselves. **Halbert v. Michigan**, 545 U.S. 605 (2005).

Defendant has no federal constitutional right to the assistance of counsel in a collateral proceeding, even where that proceeding is defendant's first-tier review of an ineffective-assistance-of-counsel claim that the intermediate court found was not appropriate for direct review. Unlike **Halbert**, defendant has had a direct review of his conviction and the assistance of counsel in connection with that appeal. Defendant does not face the same daunting hurdles as faced by the defendant in **Halbert** because he need only present the gist

of a claim to survive summary dismissal. Defendant in this case also had the benefit of the appellate court briefs, rehearing petition, petition for leave to appeal, and the appellate court decision. Finally, unlike **Halbert**, the court performs no gatekeeping function that would bar defendant from presenting his ineffective-assistance-of-counsel claim.

(Defendant was represented by Assistant Defender Patrick Cassidy, Chicago.)

People v. Anguiano, 2013 IL App (1st) 113458 (No. 1-11-3458, 12/26/13)

1. Illinois courts apply two different standards to post-conviction counsel's performance: (1) Supreme Court Rule 651(c) and (2) reasonable level of assistance. The standards overlap but are not coterminous. Rule 651(c) requires the record to show that counsel: (1) consulted with defendant to ascertain his constitutional claims; (2) examined the record of the trial proceedings; and (3) made any amendments to the pro se petition necessary to adequately present defendant's claims. While neither the Post-Conviction Hearing Act nor Rule 651(c) expressly guarantee a reasonable level of assistance, the Illinois Supreme Court has held that the act and the rule together ensure that post-conviction defendants receive a reasonable level of assistance. The reasonable level of assistance standard is "free-standing" and is not limited by the specific requirements of Rule 651(c).

The requirements of Rule 651(c) do not apply where privately retained counsel files the initial post-conviction petition. Defendants, however, have the right to a reasonable level of assistance when they are represented by private counsel at the second stage of post-conviction proceedings even if retained counsel filed the initial petition. It is well-settled that the Post-Conviction Hearing Act requires a reasonable level of assistance and there is no sound policy or commonsense reason that would apply this standard when counsel is appointed or retained at the second stage but not when counsel is retained at the first stage. Additionally, the Illinois Supreme Court (while not yet expressly addressing this question) has strongly indicated that all defendants represented by counsel at the second stage have the right to a reasonable level of assistance. **People v. Mitchell**, 189 Ill. 2d 257 (1999) (affirming second-stage dismissal of petition initially filed by retained counsel since defendant's attorneys provided a "reasonable level of assistance.") Accordingly, the reasonable level of assistance standard applies even where retained counsel filed the initial petition.

The contrary decision in **People v. Csaszar**, 2013 IL App (1st) 100467 (holding no right to a reasonable level of assistance at the second stage where privately retained counsel filed the initial petition) was wrongly decided. The **Csaszar** court did not discuss **Mitchell**, provided no policy reasons for its decision, and incorrectly held that the reasonable-level-of-assistance standard should be interpreted under Rule 651(c) since none of the cases relied on by **Csaszar** suggest that the right to a reasonable level of assistance is subsumed by Rule 651(c).

2. In this case, counsel provided a reasonable level of assistance at the second stage of proceedings. Although he reargued the same issue (entrapment) he raised on direct appeal, he attempted to overcome the procedural bar of res judicata by elaborating on the entrapment claim and adding additional facts about the informant who helped entrap defendant. He also attached an affidavit used to obtain an eavesdropping order which was relevant to the entrapment claim, but had not been part of the appeal record. Post-conviction counsel thus demonstrated that he understood and attempted to overcome the procedural bar of res judicata.

Counsel's arguments may not have been particularly compelling, but defendant did not explain what additional steps counsel could have taken or what additional arguments could have been made. Additionally, defendant's claim that counsel failed to consult with him was

based primarily on the failure to file a 651(c) certificate which did not apply here. Under these facts, counsel provided a reasonable level of assistance.

(Defendant was represented by Assistant Defender Brett Zeeb, Chicago.)

People v. Bell, 2014 IL App (3d) 120637 (No. 3-12-0637, 8/21/14)

Illinois Supreme Court Rule 651(c) requires that post-conviction counsel consult with defendant to ascertain his claims and then make certain the claims are adequately presented. The requirements of Rule 651(c) are limited to the claims raised by defendant in his *pro se* petition, and counsel has no duty to explore, investigate, or formulate other claims.

Here, defendant filed a *pro se* post-conviction petition. The trial court docketed the petition for second-stage proceedings and appointed counsel. Counsel filed an amended petition and a 651(c) certificate relating to the claims in the original *pro se* petition. Defendant later filed several *pro se* motions to supplement the petition, each one raising new claims. The court dismissed the petition before counsel filed an amended petition or a 651(c) certificate relating to the claims in the supplemental *pro se* petitions.

The Appellate Court upheld the dismissal, holding that counsel's duties under Rule 651(c) are limited to claims raised in the original *pro se* petition. If defendant raises further claims in supplemental *pro se* petitions, counsel has no obligation under 651(c) to examine, discuss, or adequately present those additional claims.

(Defendant was represented by Assistant Defender Todd McHenry, Chicago.)

People v. Bennett, 394 Ill.App.3d 350, 916 N.E.2d 550 (2d Dist. 2009)

Under Supreme Court Rule 651(c) and **People v. Richmond**, 188 Ill.2d 376, 721 N.E.2d 534 (1999), where an indigent files a *pro se* post-conviction petition but then retains counsel to represent him, the retained attorney must comply with Rule 651(c) by filing a certificate indicating that he or she has consulted with the defendant, examined the record of proceedings at trial, and made any necessary amendments to the *pro se* petition that are necessary to adequately present the defendant's contentions. However, where the initial petition is prepared by retained counsel, the Rule 651(c) certificate requirement does not apply.

The court also noted that defendant had asserted only that post-conviction counsel did not satisfy Rule 651(c), and not that counsel's representation was unreasonable under the Post-Conviction Hearing Act.

(Defendant was represented by Assistant Defender Sherry Silvern, Elgin.)

People v. Cotto, 2015 IL App (1st) 123489 (No. 1-12-3489, 2/11/15)

The majority follows **People v. Csaszar**, 2013 IL App (1st) 100467, and holds that the Post-Conviction Hearing Act does not require privately retained counsel to provide reasonable assistance. The dissent would follow **People v. Anguiano**, 2013 IL App (1st) 113458, and hold that the Act requires all attorneys. whether appointed or privately retained, to provide reasonable assistance.

(Defendant was represented by Assistant Defender Emily Hartman, Chicago.)

People v. Csaszar, 2013 IL App (1st) 100467 (No. 1-10-0467, 12/4/13)

Counsel appointed to assist a defendant with post-conviction proceedings must provide a reasonable level of assistance consistent with Supreme Court Rule 651(c). But Rule 651(c) applies only when the petitioner files his original petition *pro se*, and not when petitioner obtains the assistance of retained counsel. As there is no constitutional right to counsel in

post-conviction proceedings, the State has no duty to provide counsel, and no duty to prove reasonable assistance of counsel, for any petitioner able to hire his own counsel.

States do not violate the equal protection clause when they provide benefits to indigents that they do not provide to persons with sufficient means to purchase the benefits. The provision of counsel only to the indigent bears a fair relationship to a legitimate public purpose of providing assistance of counsel to petitioners unable to retain private counsel.

While the State bears no responsibility for providing a petitioner reasonable assistance from his privately-retained counsel, an attorney who fails to provide competent representation is potentially subject to disciplinary action as well as to liability for professional malpractice. Petitioner may also seek recourse for the attorney's alleged failings by bringing a successive post-conviction petition in which he argues that his retained counsel's failings show cause for his failure to raise meritorious issues in his initial petition.

Because defendant's appellate claim that his retained counsel had not provided reasonable assistance was not a cognizable claim for relief on appeal, the Appellate Court affirmed the dismissal of defendant's post-conviction petition.

(Defendant was represented by Assistant Defender Anne Carlson, Chicago.)

People v. Elken, 2014 IL App (3d) 120580 (No. 3-12-0580, 6/4/14)

Under Supreme Court Rule 651(c), the record in post-conviction proceedings must demonstrate that appointed counsel consulted with the petitioner to ascertain his contentions of deprivation of constitutional rights, examined the report of proceedings from the trial, and made any amendments to the *pro se* petitions that are necessary to adequately present the petitioner's contentions. However, fulfillment of the latter obligation does not require or permit post-conviction counsel to advance frivolous or spurious claims. An attorney who determines that a post-conviction petitioner's claims are meritless cannot in good faith file an amended petition, and must move to withdraw after giving notice to the petitioner. Although counsel's explanation of the grounds for his motion to withdraw in effect "confesses" that there are no viable arguments, the petitioner has notice of counsel's intent and an opportunity to respond.

At second stage proceedings on a successive *pro se* post-conviction petition, appointed counsel did not move to withdraw. However, he went through the petition point by point and informed the trial court that none of the claims had merit.

The petitioner was not informed before the hearing that his attorney intended to argue against his interests. The State did not make any argument concerning the petition, which was dismissed "based upon arguments of defense counsel."

The Appellate Court found reversible error because the petitioner was not afforded the opportunity to prepare for defense counsel's attack on his petition and present argument in rebuttal. "The appropriate procedure under these circumstances would be for appointed counsel to file a motion to withdraw, giving the petitioner notice of the same. This allows the petitioner to prepare to argue against appointed counsel's motion. It further obviates any opportunity for a defendant to argue that he was blindsided by his appointed counsel's arguments."

The trial court's order dismissing the petition was reversed and the cause remanded for further proceedings.

(Defendant was represented by Assistant Defender Bryon Kohut, Ottawa.)

People v. Garcia, 405 Ill.App.3d 608, 939 N.E.2d 972 (1st Dist. 2010)

Supreme Court Rule 651(c) requires that the appellate record in a post-conviction appeal contain a showing, which may be made by a certificate of counsel, that the petitioner's

attorney consulted with petitioner by mail or in person to ascertain his contentions of deprivation of constitutional rights, has examined the report of the proceedings at trial, and has made any amendments to the *pro se* petition that are necessary for adequate presentation of petitioner's contentions.

Counsel did not file a 651(c) certificate, but the record was sufficient to show 651(c) compliance. The supplemental petition filed by counsel averred that he communicated with petitioner about the petition by mail. Copies of correspondence between petitioner and counsel also appeared in the record. Counsel stated in the supplemental petition that he had read the record and reiterated before the judge that he had fulfilled this obligation. As to counsel's discharge of his obligation to make necessary amendments to the *pro se* petition, the court concluded that amendments to the petition were not necessary because "[f]or a *pro se* litigant, [petitioner's] command of the claims he intended to advance and his ability to marshal the facts and law in support is significant." Counsel had no obligation "to conduct a broader examination of the record in order to develop additional claims." The supplemental petition also evidences that counsel was mindful of his obligation to make amendments in that it stated that the *pro se* petition, the *pro se* supplemental amendment, the supplemental petition, and the exhibits filed by petitioner "adequately present his claims to this court."

(Defendant was represented by Assistant Defender Caroline Bourland, Chicago.)

People v. Guzman, 2014 IL App (3rd) 090464 (No. 3-09-0464 & 3-10-0802, 12/11/14)

1. A post-conviction petitioner is entitled to reasonable assistance by post-conviction counsel. Reasonable assistance occurs where counsel consults with the petitioner to ascertain his contentions of constitutional deprivation, examines the record of the trial proceedings, and makes any amendments to the petition necessary to adequately present the petitioner's contentions. Supreme Court Rule 651(c). Although post-conviction counsel need not scour the record to discover claims which the petitioner failed to raise, any amendments to the petition that are necessary to adequately present the petitioner's contentions must be made.

Where post-conviction counsel fails to provide reasonable assistance, it is nearly impossible to determine if post-conviction claims have merit. Therefore, the proper remedy is to reverse the order dismissing the petition and remand for further proceedings.

2. Post-conviction counsel failed to provide reasonable assistance where he did not adequately present defendant's claim that trial counsel was ineffective at the guilty plea proceeding for failing to advise defendant of the possibility that he would be deported. Where deportation is a clear consequence of a plea, defense counsel must advise the client that the pending charges may carry a risk of adverse immigration consequences. To show prejudice from the failure to give such advice, defendant must show that had it not been for the failure to advise him, there is a reasonable probability that he would have pleaded not guilty and insisted on going to trial.

In the original post-conviction petition, counsel failed to allege that defendant would not have entered a guilty plea had he been informed of the immigration consequences of the plea. At the second stage hearing, counsel submitted an affidavit stating that trial counsel failed to inform defendant of the immigration consequences. However, there was no claim that defendant would have gone to trial had he known of the likelihood that he would be deported. The trial court dismissed the petition based on the failure to make such a showing.

Counsel then filed an amended petition which contained an unnotarized affidavit stating that defendant would not have pleaded guilty had he been informed that the plea might have immigration consequences. Counsel failed to file a motion to withdraw the notice of appeal before filing the amended petition, however, and the trial court did not take any

action.

The court concluded that because post-conviction counsel did not submit a timely affidavit concerning a required element for relief, he failed to make all amendments necessary to ensure that the petition adequately presented the petitioner's claims. The court also noted that the record contained a sufficient basis to believe that defendant would not have entered a guilty plea had he been advised of the immigration consequences of the plea, because he had a plausible defense to the charge and he had family living in the United States. Under these circumstances, counsel failed to provide reasonable assistance.

(Defendant was represented by Assistant Defender Andrew Boyd, Ottawa.)

People v. Kelly, 2012 IL App (1st) 101521 (No. 1-10-1521, 9/5/12)

There is no constitutional right to counsel in post-conviction proceedings. Because the right to counsel in such proceedings is wholly statutory, petitioners are only entitled to the level of assistance provided by the Post-Conviction Hearing Act, which has been determined to be a reasonable level of assistance. To that end, Illinois Supreme Court Rule 651(c) requires that the record in post-conviction proceedings demonstrate that counsel has consulted with petitioner either by mail or in person to ascertain his contentions of deprivation of constitutional rights, has examined the record of the proceedings at trial, and has made any amendments to the petitions filed *pro se* that are necessary for an adequate presentation of petitioner's contentions. Counsel must file a certificate verifying counsel's compliance with these requirements.

The Appellate Court concluded that petitioner's counsel had not provided a reasonable level of assistance. During the nearly 12-year period that elapsed from the filing of the *pro se* post-conviction petition to the dismissal of the amended petition, counsel failed to shape into appropriate legal form petitioner's counsel-of-choice claim and his claim that his trial judge had gained his seat on the bench through fraud. Counsel also either lacked basic knowledge of the Act or fundamentally misunderstood it where he did not know at which stage of the post-conviction process the petition stood although it had pended for years, and believed the standards for assessing the sufficiency of post-conviction pleadings were identical at the first and second stages.

The Appellate Court reversed the dismissal of the post-conviction petition and remanded for further second-stage proceedings with the appointment of new counsel.

(Defendant was represented by Assistant Defender Jennifer Bontrager, Chicago.)

People v. Kirk, 2012 IL App (1st) 101606 (No. 1-10-1606, 9/24/12)

1. The right to post-conviction counsel is a matter of legislative grace, and petitioner is entitled to only a reasonable level of assistance. Supreme Court Rule 651(c) imposes specific duties on post-conviction counsel to ensure that counsel provides that reasonable level of assistance. Counsel must consult with the defendant to ascertain his contentions of deprivation of constitutional rights, examine the record of the proceedings at trial, and make any amendments to the defendant's *pro se* petition that are necessary for an adequate presentation of his contentions. Counsel's decision not to amend a *pro se* petition does not constitute inadequate representation where the claim lacks a sufficient factual basis.

The filing of a certificate representing that counsel has fulfilled her duties under Rule 651(c) creates a presumption that defendant received the required level of assistance. This presumption may be rebutted by the record, however.

2. Defendant filed a *pro* se petition alleging that trial counsel was ineffective in failing to present certain evidence in support of his claim of self-defense. The trial record showed,

however, that trial counsel had been prevented from presenting the evidence by the trial court's ruling.

At a hearing on the State's motion to dismiss the petition, post-conviction counsel made an oral claim that appellate counsel had been ineffective in failing to raise on appeal the issue of the court's exclusion of the evidence. Post-conviction counsel stated this claim had merit, but made no effort to amend the petition to include this claim.

3. Even though post-conviction counsel filed a 651(c) certificate, the Appellate Court concluded that post-conviction counsel provided unreasonable assistance in failing to amend the *pro se* petition with the claim of ineffective assistance of appellate counsel raised at the hearing on the State's motion to dismiss. This claim was derived from defendant's allegations and was recognized by counsel as the only cognizable legal avenue by which the court could reach the crux of the defendant's complaint regarding the exclusion of evidence relevant to his claim of self-defense.

(Defendant was represented by Assistant Defender Jonathan Yeasting, Chicago.)

People v. Komes, ___ Ill.App.3d ___, ___ N.E.2d ___ (2d Dist. 2011) (No. 2-10-0014, 6/24/11)

Counsel appointed to represent a post-conviction petitioner may move to withdraw as counsel, explaining why all of petitioner's claims are frivolous or patently without merit. If a motion to withdraw is deficient in any respect, a reviewing court can uphold the grant of such a motion if the record shows that counsel complied with all of the requirements of Supreme Court Rule 651(c) and that all of the petition's claims are frivolous. **People v. Greer**, 212 Ill.2d 192, 817 N.E.2d 511 (2004).

The court erred in granting counsel's motion to withdraw. Counsel's motion addressed the merits of a single issue, although the *pro se* post-conviction petition had raised seven distinct constitutional claims. Nor did the record evidence compliance with the requirement of Rule 651(c) that counsel consult with petitioner to ascertain his contentions of deprivation of constitutional rights.

Counsel represented in her motion that petitioner had been present in court with counsel on several status dates, and that petitioner spoke with counsel following his court appearances. The court found this representation to be unreliable because it misstated the record. Two other attorneys had previously appeared with defendant on status dates. One of those attorneys was not assigned to represent petitioner and merely appeared to obtain status dates. Although the other attorney was previously assigned to represent petitioner and had spoken with him, there was nothing in the record indicating that attorney gave usable records of his consultation with petitioner to new counsel. The sole indiction in the record that new counsel consulted with petitioner was her oral representation that she spoke with petitioner regarding some of the issues that he wanted addressed and reviewed cases that he wanted her to review. Given evidence in the record that defendant had low-normal intelligence and had learning disabilities that impaired his ability to understand spoken language, the need for counsel to make a proper record of consultation was even more pronounced.

Because the court could not conclude that petitioner's *pro se* claims were frivolous, including his claim of actual innocence, the court remanded for further proceedings.

(Defendant was represented by Assistant Defender Steve Wiltgen, Elgin.)

People v. Kuehner, 2014 IL App (4th) 120901 (No. 4-12-0901, 4/10/14)

In **People v. Greer**, 212 Ill. 2d 192 (204), the Illinois Supreme Court held that post-conviction counsel may properly withdraw from representation where the record shows that (1) counsel has fulfilled her duties under Rule 651(c), and (2) defendant's post-conviction

claims are frivolous and patently without merit. The court also stated that counsel should "make some effort" to explain why the claims are frivolous, but the court did not make such an explanation a prerequisite for withdrawal.

In **People v. Komes**, 2011 IL App (2d) 100014, the Appellate Court held that under **Greer**, a motion to withdraw should include an explanation of why all of defendant's claims are frivolous, although counsel may still be allowed to withdraw, despite the motion's deficiency, if the record shows that counsel complied with Rule 651(c) and all of the claims are frivolous.

1. Defendant argued that the trial court improperly allowed post-conviction counsel to withdraw where (1) the motion failed to explain why all of defendant's claims were frivolous, and (2) the record failed to show that counsel complied with Rule 651(c) and the unaddressed claims were frivolous. Defendant interpreted **Greer** and **Komes** as holding that the court should first look at the sufficiency of counsel's motion to withdraw, and should only examine the record if the motion was insufficient.

The Appellate Court rejected defendant's argument and interpretation of the law. **Greer** did not make the sufficiency of counsel's motion the primary standard for deciding whether counsel may withdraw. Instead, **Greer** merely made a non-binding suggestion that counsel should try to explain why the petition is frivolous. The ultimate decision about whether counsel should be allowed to withdraw rests on whether the record itself shows that (1) counsel complied with Rule 651(c) and (2) defendant's claims are frivolous. The motion merely serves as a formal request by counsel to withdraw and the brief in support of the motion serves as an aid to the trial court in deciding whether the record establishes that withdrawal was proper.

The court thus declined to address defendant's first argument that counsel's motion to withdraw was deficient. The court addressed defendant's second argument and found that the record showed compliance with Rule 651(c) and defendant's claims were frivolous.

2. Supreme Court Rule 651(c) provides in part that the record must show that post-conviction counsel consulted with defendant to ascertain his constitutional claims. Defendant argued that since counsel's motion to withdraw did not address one of his claims, the record did not show that she consulted with him about this claim, and thus she failed to comply with the rule.

The court rejected this argument. Even if counsel were required to address all of defendant's claims, which she is not, the mere fact that she failed to do so does not necessarily mean that counsel failed to consult with defendant about the missing claim. Instead, looking at the record as a whole, the court found that counsel did in fact discuss all of defendant's claims and thus properly complied with Rule 651(c).

3. Defendant also argued that because the trial court advanced his petition to the second stage after finding that the petition was not frivolous or patently without merit, that necessarily meant that defendant's post-conviction claims were not frivolous, and thus counsel could not properly withdraw.

The court rejected this argument as well, holding that defendant drastically overstated the significance of the "purposely low threshold" of a first-stage proceeding. At that stage, the trial court makes its decision without full detail or legal arguments since petitions are drafted by defendants with little legal knowledge or training. It is only at the second stage, after counsel has been appointed, that a more reliable evaluation of the claims can be made. The mere fact that a trial court has advanced the petition to the second stage does not mean that counsel cannot properly determine that the petition is frivolous. The court noted that under defendant's reasoning, counsel would always be barred from withdrawing whenever a petition

passed the first-stage threshold.

The trial court properly allowed post-conviction counsel to withdraw and properly dismissed defendant's petition.

(Defendant was represented by Assistant Defender Kieran Wiberg, Chicago.)

People v. Mendoza, 402 Ill.App.3d 808, 931 N.E.2d 703 (1st Dist. 2010)

1. Supreme Court Rule 651(c) provides that post-conviction counsel must file a certificate indicating that he has: (1) consulted with the petitioner to ascertain any contentions of constitutional deprivation, (2) examined the record of the proceeding of the original trial, and (3) made any amendments to the *pro se* petition necessary to adequately present the petitioner's constitutional contentions. Where the record includes defense counsel's Rule 651(c) certificate, it is presumed that the petitioner received the representation required by Rule 651(c). Unless this presumption is rebutted, the post-conviction petitioner may not challenge the reasonableness of post-conviction counsel's assistance.

In other words, an argument that counsel failed to provide reasonable assistance is not a free-standing claim which can be raised on appeal from the dismissal of a post-conviction. Instead, the petitioner may challenge the level of post-conviction counsel's assistance only by rebutting the presumption that counsel provided reasonable representation.

2. Where defendant alleged that post-conviction counsel provided unreasonable assistance, but did not claim that counsel failed to perform at least one of the three duties mandated by Rule 651(c), review of the sufficiency of counsel's assistance was foreclosed.

3. Even if defendant's general allegation of unreasonable assistance could be liberally construed to allege a violation of the requirement to amend the *pro se* post-conviction petition by failing to produce adequate evidentiary support for the petitioner's claims, there was no basis to conclude that defendant was entitled to relief. Post-conviction counsel is not required to actively seek off-the-record evidence to support general allegations of a post-conviction petition, and the petitioner did not claim that counsel failed to use evidence that was in the record.

The trial court's order dismissing defendant's post-conviction petition was affirmed.

(Defendant was represented by Assistant Defender Kim Fawcett, Supreme Court Unit.)

People v. Milam, 2012 IL App (1st) 100832 (No. 1-10-0832, 5/18/12)

1. If a post-conviction petition survives summary dismissal and moves to second stage proceedings, counsel may be appointed for an indigent petitioner. Because the right to post-conviction counsel is statutory rather than constitutional, the requirements of the Sixth Amendment do not apply. However, counsel is required to provide reasonable assistance.

Supreme Court Rule 651(c) imposes three specific duties on post-conviction counsel, including to consult with the petitioner to ascertain his contentions of constitutional deprivation, examine the record of the trial proceedings, and make any amendments to the *pro se* petition necessary to adequately present the petitioner's contentions.

2. Post-conviction counsel need not conduct an investigation to discover claims that were not raised by the petitioner in the *pro se* petition, or amend the petition to allege claims not raised by the petitioner. However, Rule 651(c) does require counsel to amend the *pro se* petition to adequately present the petitioner's contentions. Included in that duty is the obligation to shape the defendant's *pro se* claims into "appropriate legal form."

3. Where post-conviction counsel filed an amended petition which alleged a new claim that had not been raised in the *pro se* petition, and the petitioner relied on counsel's action by withdrawing his *pro se* claims and proceeding only on the new claim in the amended petition,

counsel failed to shape the claim into "appropriate legal form" where she failed to include an allegation that the waiver doctrine was inapplicable due to ineffective assistance by appellate counsel. Under these circumstances, "it would be improper to affirm the dismissal of the amended petition without affording defendant the opportunity to amend his claim to overcome the waiver doctrine."

The trial court's order dismissing defendant's amended petition was reversed, and the cause was remanded with instructions to conduct a new second stage hearing after allowing defendant leave to amend his amended petition to assert a claim of ineffective assistance of appellate counsel.

(Defendant was represented by Assistant Defender Laura Weiler, Chicago.)

People v. Nitz, 2011 IL App (2d) 100031 (No. 2-10-0031, 10/24/11)

1. 725 ILCS 5/122-1(b) provides that a post-conviction petition must be verified by affidavit. An affidavit is valid only if it is notarized. The trial court properly dismisses a post-conviction petition which does not include a notarized affidavit.

The failure to provide a notarized affidavit does not deprive the trial court or the Appellate Court of jurisdiction to consider the petition, but does provide a basis for dismissing the petition.

Although 735 ILCS 5/1-109 provides a verification process where verification is required by the Code of Civil Procedure, verification is not applicable to post-conviction proceedings, which are governed by the Post-Conviction Hearing Act. Therefore, verification under §1-109 is not a satisfactory substitute for a notarized petition. (Overruling **People v. Rivera**, 342 Ill.App.3d 547, 795 N.E.2d 1016 (2d Dist. 2003)).

2. Although there is no constitutional right to counsel in post-conviction proceedings, once counsel is appointed and the petition advanced to the second stage, the Post-Conviction Hearing Act affords indigents a statutory right to the reasonable assistance of counsel. Supreme Court Rule 651(c) requires counsel to make any amendments to a *pro se* petition that are necessary to adequately present defendant's contentions. The failure to present defendant's post-conviction claims in appropriate legal form constitutes unreasonable assistance.

Here, post-conviction counsel failed to provide reasonable assistance when he failed to remedy the absence of a notarized affidavit when the amended petition was filed. The cause was remanded for the appointment of new counsel and the filing of a new amended petition.

(Defendant was represented by Assistant Defender Jack Hildebrand, Elgin.)

People v. Patterson, 2012 IL App (4th) 090656 (No. 4-09-0656, 7/11/12)

1. A defendant may not complain of inadequate assistance of counsel if he has no right to counsel. If not constitutionally guaranteed, the right to counsel must be statutorily provided. Unlike the Post-Conviction Hearing Act, 725 ILCS 5/116-3 contains no provision for appointment of counsel on a motion for forensic testing. Therefore, a defendant cannot claim inadequate assistance of counsel on a §116-3 motion. Where a request for forensic testing is included in a post-conviction petition, however, defendant can claim inadequate assistance of counsel with respect to the post-conviction claim for forensic testing.

Defendant filed a *pro se* post-conviction petition and a separate §116-3 motion for DNA testing. Counsel appointed to represent defendant in the post-conviction proceeding amended the petition to include the request for §116-3 testing. Because the request for §116-3 testing was included in the post-conviction petition, defendant could claim that he received unreasonable assistance of counsel as to that claim, even though defendant was not entitled

to counsel on the independent §116-3 motion. The Appellate Court declined to decide whether a §116-3 claim was an appropriate subjection of a post-conviction petition. Even when a pleading should not be considered as a post-conviction petition, but the trial court elects to treat it as if it were, appointed counsel must comply with his duties under the Post-Conviction Hearing Act and Supreme Court Rule 651.

2. In post-conviction proceedings, defendant is entitled to the reasonable assistance of counsel. Supreme Court Rule 651(c) requires that counsel: (1) consult with the defendant, (2) examine the record, and (3) make any necessary amendments to the *pro se* petition for an adequate presentation of the defendant's contentions. Failure to make a routine amendment to a post-conviction petition that would overcome a procedural bar constitutes unreasonable assistance in violation of Rule 651(c). It is equally unreasonable for post-conviction counsel to amend a *pro se* petition in a way that creates a procedural bar for a defendant.

Post-conviction counsel amended the *pro se* petition to include the §116-3 claim, but failed to present any evidence or argument in support of that request to prevent the dismissal of that claim. Counsel thus effectively created a procedural bar of *res judicata* to defendant's §116-3 motion. Even though successive motions are permissible under §116-3, *res judicata* will bar a successive motion if the exact same issue is raised in both motions.

Because counsel rendered unreasonable assistance of counsel as to the §116-3 post-conviction claim, the Appellate Court reversed the denial of the petition as to this claim and remanded for further proceedings.

(Defendant was represented by Assistant Defender Paige Strawn, Mt. Vernon.)

People v. Profit, 2012 IL App (1st) 101307 (No. 1-10-1307, 6/28/12)

1. Under the Post-Conviction Hearing Act, petitioners are entitled to a "reasonable" level of assistance from counsel. Where counsel files the certificate required by Supreme Court Rule 651(c), there is a rebuttable presumption that reasonable assistance was afforded. The petitioner may overcome this presumption by demonstrating that the attorney failed to substantially comply with the duties mandated by Rule 651(c), which include consulting with the petitioner to ascertain the contentions of constitutional deprivation, examining the record of the trial proceeding, and making amendments to the *pro se* petition that are necessary to adequately present the petitioner's contentions.

2. Where the petitioner claimed that post-conviction counsel failed to render reasonable assistance concerning a successive post-conviction petition because he failed to amend the petition to raise additional *pro se* arguments which the petitioner alleged, the fact that counsel filed a Rule 651(c) certificate created a rebuttable presumption that the petitioner received reasonable assistance of counsel. In determining whether defendant overcame that presumption, the court concluded that it should consider whether the issues which counsel failed to raise were meritorious. The court rejected the defendant's argument that whether such issues were meritorious was irrelevant to whether counsel acted unreasonably by failing to amend the petition.

3. The court concluded that one of defendant's *pro se* issues lacked merit, and that a second issue had been forfeited because it was not raised in the original post-conviction proceeding and defendant did not claim that he was actually innocent or that the cause-and-prejudice standard could be satisfied. Under these circumstances, defendant failed to overcome the presumption that counsel provided reasonable assistance.

The trial court's order dismissing the successive post-conviction petition was affirmed.

(Defendant was represented by Assistant Defender Julianne Johnson, Chicago.)

People v. Robinson, 2012 IL App (4th) 101048 (No. 4-10-1048, 8/27/12)

The right to counsel in post-conviction proceedings is a matter of statutory law. Thus, a post-conviction petitioner is entitled to a reasonable level of assistance from counsel, but does not have a Sixth Amendment right to the effective assistance of counsel. To ensure that post-conviction petitioners are afforded the reasonable assistance of counsel, the Illinois Supreme Court requires counsel to consult with the petitioner to ascertain the contentions of deprivation of constitutional rights, examine the record of the trial court proceedings, and make any amendments to the *pro se* petition necessary to adequately present the petitioner's contentions. (**Supreme Court Rule 651(c)**).

Although the court acknowledged that post-conviction counsel "should have been a more vigorous advocate on defendant's behalf at the second stage hearing on the State's motion to dismiss defendant's post-conviction petition," the record showed that the post-conviction claims were adequately presented and were understood and correctly ruled upon by the court. Under these circumstances, defendant received reasonable assistance of post-conviction counsel although counsel stated to the trial court that defendant's claims were "on shaky footing."

The trial court's order granting the State's motion to dismiss the petition at the second stage was affirmed.

(Defendant was represented by Assistant Defender Christopher Gehrke, Chicago.)

People v. Schlosser, 2012 IL App (1st) 092523 (No. 1-09-2523, 6/15/12)

1. There is no constitutional right to the assistance of counsel at post-conviction proceedings. The right to counsel is provided by statute and provides for a reasonable level of assistance. 725 ILCS 5/122-4.

To ensure that defendant receives this level of assistance, Supreme Court Rule 651(c) requires that counsel file an affidavit certifying that he has: (1) consulted with the defendant to ascertain his contentions of deprivation of constitutional right; (2) examined the record of proceedings at trial; and (3) made any amendments to the *pro se* petition necessary for an adequate presentation of defendant's contentions. The mere filing of a 651(c) certificate is not conclusive of compliance.

The duty to adequately present defendant's substantive claims necessarily includes attempting to overcome procedural bars that will result in dismissal of a petition if not rebutted. Even if the allegations in the petition are insufficient to raise a constitutional issue, it is error to dismiss the petition on the pleadings where there has not been adequate representation by counsel.

2. Despite counsel's filing of a 651(c) certificate, the Appellate Court concluded that counsel's performance was unreasonable. Defendant filed a *pro se* petition alleging that the evidence was insufficient to prove his guilt and that his sentencing hearing was unfair. Counsel elected to stand on the petition and failed to amend the petition to allege ineffective assistance of appellate counsel. That allegation was necessary to avoid the bar of forfeiture where the issues could have been raised on direct appeal but were not. At the hearing on the State's motion to dismiss, counsel argued that appellate counsel was ineffective. That argument was insufficient to correct the deficiency in the pleadings because it was rejected by the post-conviction hearing court on the ground that the ineffectiveness allegation was not included in the petition.

Because counsel failed to make additional amendments necessary for adequate presentation of the defendant's *pro se* claims, the Appellate Court reversed and remanded for further proceedings. Remand was required regardless of the substantive merit of defendant's

underlying claims.

(Defendant was represented by Assistant Defender David Holland, Chicago.)

People v. Thomas, 2013 IL App (2d) 120646 (No. 2-12-0646, 6/20/13)

The right to counsel at the second and third stages of a post-conviction proceeding is purely statutory and entitles defendant to a reasonable level of assistance. The duty to provide reasonable assistance requires compliance with the specific obligations described in Supreme Court Rule 651(c).

Where counsel is appointed because the circuit court did not examine the petition within 90 days, the Post-Conviction Hearing Act does not expressly authorize counsel to withdraw when counsel concludes that the defendant's contentions are frivolous and patently without merit. But permitting counsel to withdraw is consistent with the legislative intent underlying the Act. The purpose for requiring the appointment of counsel where the court does not consider the petition in a timely manner is to jump-start a process that has shown no sign of progress. No rationale exists in such circumstances to accord the defendant a right to continuing representation throughout the remainder of the proceedings, where a defendant whose petition the court determines to be frivolous in a timely manner is never given counsel in the first place. **People v. Greer**, 212 Ill. 2d 192, 817 N.E.2d 511 (2004).

The court appointed counsel for defendant after failing to act on the petition in a timely manner. Counsel filed a 651(c) certificate and moved to withdraw on the ground that defendant's contentions lacked merit. The court granted the motion and denied the petition. On appeal, the Appellate Court reversed because the court had dismissed the petition before the State had filed a responsive pleading. On remand, the court appointed new counsel, who also successfully moved to withdraw, but who did not file a 651(c) certificate. The court then granted the State's motion to dismiss.

The Appellate Court rejected the argument that counsel's failure to file a 651(c) certificate demonstrated that defendant did not receive the level of legal assistance to which he was entitled. Because defendant's statutory right to appointment of counsel did not exist after initial counsel was permitted to withdraw pursuant to **Greer**, defendant was no longer entitled to the level of legal assistance guaranteed under the Act. Therefore, successor counsel's failure to fulfill the duties specified in Rule 651(c) is not grounds for reversal.

(Defendant was represented by Supervisor Arden Lang, Springfield.)

People v. Yaworski, 2014 IL App (2d) 130327 (No. 2-13-0327, 10/6/14)

The right to counsel in post-conviction proceedings is statutory, not constitutional, and defendants are only entitled to a reasonable level of assistance. The right to reasonable assistance includes the right to conflict-free representation.

The court held that it was improper to appoint defendant's trial attorney to represent him in his post-conviction proceedings where defendant had alleged that he had been denied the effective assistance of trial counsel. In **People v. Hardin**, 217 Ill. 2d 289 (2005), the Illinois Supreme Court addressed the question of whether it is a conflict for an attorney from a public defender's office to represent a defendant in a post-conviction proceeding alleging the ineffectiveness of another attorney from that office. The Supreme Court held that such questions should be decided on a case-by-case basis, and depend on how closely post-conviction counsel's interests are aligned with those of trial counsel. Here, where post-conviction and trial counsel are the same, the interests are identical and the conflict is inherent.

The court rejected the State's argument that under **People v. Moore**, 207 Ill. 2d 68 (2003), defendant's right to different counsel depended on the merits of the underlying

ineffectiveness claim. In **Moore** defendant raised a claim of ineffective assistance in a post-trial motion. Here, by contrast, defendant raised his claim in a *pro se* post-conviction petition. The trial court advanced the petition to the second-stage, finding that defendant had made an arguable claim of ineffectiveness. Once his *pro se* petition had cleared the first-stage hurdle, defendant was entitled to an attorney with undivided loyalty. There was no need to once again determine whether the claim had merit.

The case was remanded for further post-conviction proceedings with the appointment of new counsel.

The dissent would follow **Moore** and hold that there was no need to appoint new counsel where the underlying claim of ineffectiveness had no merit.

(Defendant was represented by Assistant Deputy Defender Paul Glaser, Elgin.)

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§9-1(n)
Filing Frivolous Pleadings and Motions

(Note: See 735 ILCS 5/22-105, which provides that a petitioner who files a frivolous post-conviction petition is liable for the full payment of filing fees and court costs.)

People v. Alcozer, 241 Ill.2d 248, 948 N.E.2d 70 (2011)

1. A post-conviction petition is frivolous or patently without merit where it has no basis in law or fact and is obviously without legal significance. The court is authorized to impose fees and costs on a prisoner who files a petition for post-conviction relief that the court finds to be frivolous. 735 ILCS 5/22-105(a). "Frivolous" is defined by §22-105 as lacking "an arguable basis in fact or in law." 735 ILCS 5/22-105(b)(1). Therefore a post-conviction petition dismissed

as frivolous or patently without merit under 725 ILCS 5/122-2.1 is subject to imposition of costs and fees under 735 ILCS 5/22-105(a). Petitions dismissed based on the procedural defects of forfeiture or *res judicata* have no basis in law and are also necessarily frivolous and patently without merit, and thus subject to assessment of costs and fees.

2. Prisoners have a constitutional right to access to the courts. **Bounds v. Smith**, 430 U.S. 817 (1977). Section 22-105 does not impinge on this right because it does not prohibit a prisoner from filing an action if he is unable to pay the court costs and only assesses fees and costs after a pleading is determined to be frivolous. It applies equally to first and successive post-conviction petitions. The absence of a *mens rea* requirement has no effect on the constitutionality of the statute.

3. If a statute challenged as a violation of equal protection implicates a fundamental right or discriminates based on a suspect classification of race or national origin, the statute is subjected to strict scrutiny and will be upheld only if it is narrowly tailored to serve a compelling state interest. If a statute does not affect a fundamental constitutional right or involve a suspect classification, it will be upheld if it bears a rational relationship to the purpose that the legislature intended to achieve by its enactment.

Prisoners are not a suspect class and thus the rational basis test applies to an equal protection challenge to §22-105. The court rejected the argument that §22-105 violates equal protection because it treats prisoners who file frivolous pleadings differently from non-incarcerated persons who file frivolous pleadings. The court found defendant's reliance on **Rinaldi v. Yeager**, 384 U.S. 305 (1966), misplaced. **Rinaldi** struck down a state statute that required incarcerated persons to reimburse the costs of their transcripts upon denial of appellate relief. The statute financially burdened prisoners whose appeals, though unsuccessful, were not frivolous, while leaving untouched many whose appeals were frivolous in fact. Section 22-105 is rationally related to the legislature's goal of stemming the tide of frivolous filings by prisoners because the imposition of costs and fees is based on a finding that the pleading filed by the prisoner is frivolous.

(Defendant was represented by Assistant Defender Kerry Goettsch, Chicago.)

People v. Chambers, 2013 IL App (1st) 100575 (No. 1-10-0575, 8/13/13)

1. The trial court's order denying leave to file a successive post-conviction petition stated that defendant "is hereby fined $105.00 and the Clerk of the Circuit Court will be instructed not to accept any further filings from [defendant] until his sanction has been satisfied in full." 735 ILCS 5/22-105, which authorizes the imposition of court costs against prison inmates who file post-conviction petitions which are determined to be frivolous, provides that "[n]othing in this Section prohibits an applicant from filing an action or proceeding if the applicant is unable to pay the court costs."

Applying *de novo* review on the ground that the issue concerned the statutory authority of the trial court, the Appellate Court found that the prohibition against additional filings conflicted with the plain and ordinary language of §22-105. "The circuit court . . . effectively prohibited defendant from making future filings based on court costs assessed, despite the clear language stating otherwise in section 22-105 of the Code."

The court also noted that in **People v. Alcozer**, 241 Ill.2d 248, 948 N.E.2d 70 (2011), the Illinois Supreme Court upheld the imposition of court costs upon persons who file frivolous post-conviction proceedings but found that §22-105 does not prohibit prisoners from petitioning for post-conviction relief even if they cannot afford to pay court costs.

The Appellate Court rejected the State's argument that Illinois Supreme Court Rule 137, which provides that the signature of an attorney or a party constitutes a certificate that

he or she believes that the allegation is warranted by existing law or a good faith argument for the extension of existing law and authorizes an appropriate sanction where a document is signed in violation of the rule, permits a ban on filing post-conviction petitions until court costs for prior petitions have been paid. The court noted that §22-105 is a specific provision addressing frivolous filings by prisoners, while Rule 137 is a general rule governing the filing of all documents. It is a fundamental rule of statutory construction that a specific provision prevails over a general provision.

Because the trial court erred by prohibiting the defendant from filing further pleadings before the sanction for prior filings was paid, the prohibition was void. The court remanded the cause with instructions that the trial court vacate its order precluding defendant from filing future petitions until the $105 penalty had been paid.

2. The court rejected defendant's argument that on appeal from denial of post-conviction relief, he could argue for the first time that a mandatory life sentence on a person who was a minor at the time of the offense violates **Miller v. Alabama**, ___ U.S. ___, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012). In **Miller**, the Supreme Court held that the Eighth Amendment is violated by mandatory life sentences without parole for persons who were under the age of 18 at the time of their crimes. **Miller** did not prohibit sentencing juveniles to life imprisonment without parole, but held that the mandatory imposition of such a sentence violates the Constitution.

The court noted that mandatory life sentences may be applied to persons other than those whose offenses were committed when they were minors, and that under **People v. Williams**, 2012 IL App (1st) 111145, a sentence which violates **Miller** is not void *ab initio*. In **Williams**, the court could reach the issue because the petitioner satisfied the "cause and prejudice" test for successive post-conviction petitions by arguing that the Eighth Amendment was violated by a mandatory life without parole for a juvenile.

Here, by contrast, defendant's successive post-conviction petition did not include any argument concerning the constitutionality of his mandatory sentence of life without parole. Under these circumstances, defendant failed to satisfy the cause and prejudice requirement. Thus, the court could have considered the issue only if the sentence was void *ab initio*, a holding which was foreclosed by **Williams**.

The court also noted that a sentence is void only if the court which rendered it lacked jurisdiction to do so. Unless a statute is unconstitutional on its face, the fact that the sentence which it authorizes is applied improperly does not mean that the trial court lacked jurisdiction.

In reaching its holding, the court rejected the reasoning of **People v. Luciano**, 2013 IL App (2d) 110792, which held that a sentence which violates **Miller** is void.

(Defendant was represented by Assistant Defender Manuel Serritos, Chicago.)

People v. Steward, 406 Ill.App.3d 82, 940 N.E.2d 140 (1st Dist. 2010)

1. To have standing to file a post-conviction petition, one must be "imprisoned in the penitentiary." 725 ILCS 5/122-1(a). A proceeding under the Sexually Violent Persons Commitment Act (725 ILCS 207/1) is civil in nature and can result in commitment to the Department of Human Services. A person who is imprisoned under the SVPCA is not imprisoned in the penitentiary within the meaning of the Post-Conviction Hearing Act and does not have standing to file a post-conviction petition.

2. Defendants who are on MSR or released on an appeal bond are considered to be "imprisoned in the penitentiary" and have standing to file a post-conviction petition. An amendment to the SVPCA effective 1/1/07 provides that the filing of a SVPCA petition tolls

the running of a term of mandatory supervised release until dismissal of the petition, a finding that defendant is not a sexually violent person, or the discharge of the defendant under the Act. 725 ILCS 207/15(e). The tolling of the MSR term did not confer standing on defendant to file a post-conviction petition. First, the amendment does not apply to defendant because it did not become effective until nine months after defendant was placed on MSR and defendant had actually been discharged from MSR before he filed his post-conviction petition. Second, even if the amendment did apply, defendant must be currently on MSR, not have his MSR tolled, to be considered imprisoned in the penitentiary within the meaning of the PCHA.

3. Standing is defined as a party's right to make a legal claim or seek judicial enforcement of a duty or right. The legislature intended that the phrase "frivolous or patently without merit" in the Post-Conviction Hearing Act encompass the issue of standing because "merit" means legal significance and standing. **People v. Boclair**, 202 Ill.2d 89, 789 N.E.2d 734 (2002). Standing, unlike timeliness, is an inherent element of the right to bring a post-conviction petition, and absence of standing may therefore be the basis for a first-stage dismissal of a petition.

4. A post-conviction petition may be summarily dismissed as frivolous and patently without merit only if it has no arguable basis in fact or in law. An indisputably meritless legal theory is one that is completely contradicted by the record.

Defendant's claim of newly-discovered evidence of actual innocence based on a recantation by the complainant of her trial testimony is meritless because it is contradicted not only by the record, but also by the complainant's post-trial deposition that defendant asserted constituted a recantation. At trial, complainant testified that defendant grabbed her on the street, forced her into his apartment, and forced her to have sexual relations. In her post-trial deposition, complainant testified that she willingly went to defendant's apartment and twice voluntarily engaged in intercourse with defendant. But her testimony did not change with respect to her allegation that a fight ensued when she refused to perform oral sex on defendant, and that he used a hammer on her in an attempt to force her to perform an act of oral sex. Under either version, defendant committed aggravated battery and attempt aggravated criminal sexual assault.

5. A prisoner confined in an Illinois Department of Corrections facility can be assessed court costs and fees for the filing of a frivolous post-conviction petition. 735 ILCS 5/22-105. A defendant confined to a Department of Human Services facility as a sexually violent person may not be assessed those costs and fees because he is not confined in the IDOC.

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Generally

People v. Barghouti, 2013 IL App (1st) 112373 (No. 1-11-2373, 12/20/13)

Based on its own review of the record, the Appellate Court identified a potential issue and asked the parties for further briefing. Following briefing, the Appellate Court held that defendant's first-stage post-conviction petition made an arguable claim of ineffective assistance of counsel where trial counsel failed to properly advise defendant of the sentencing

consequences he faced if he rejected the State's plea offer.

1. To determine whether a first-stage post-conviction petition states the gist of a constitutional claim, the Appellate Court must review the entire petition in light of the trial record. The court's review is not limited to those claims raised on appeal. Where the court on its own review of the record discovers a clear and obvious error not raised by appellate counsel, the court may properly request that the parties brief the issue.

Here, the court determined that defendant's post-conviction petition raised a meritorious claim that he rejected a plea bargain based on erroneous advice of his trial counsel. Since this claim had not been raised by appellate counsel, the court ordered the parties to brief the issue. The court rejected the State's argument that it had overstepped its authority by requesting briefing on this issue. After examining the Illinois Supreme Court's decisions in **Coleman**, 183 Ill.2d 366 (1998), **Edwards**, 197 Ill. 2d 239 (2001), and **Hodges**, 234 Ill. 2d 1 (2009)(all discussing the appropriate standards for reviewing first-stage dismissals), the Appellate Court concluded that nothing in those decisions limited review to those parts of the petition argued on appeal. Instead, those decisions allow the Appellate Court to address any issues it discovers during its own review of the record. A reviewing court has the authority to address unbriefed issues where a clear and obvious error exists in the lower court's proceedings.

2. A first-stage post-conviction petition alleging ineffective assistance of counsel may not be dismissed if it is arguable that (a) counsel's performance fell below an objective standard of reasonableness and (b) the defendant was prejudiced. A petition lacks an arguable basis in law or fact only if it is based on an indisputably meritless legal theory or a fanciful factual allegation.

Here, the petition alleged that trial counsel failed to advise defendant that if he rejected the State's 12-year plea offer and was found guilty, he faced a prison term of 6 to 60 years; instead counsel erroneously advised defendant that he would be eligible for probation. The petition also alleged that defendant would have accepted the State's offer if counsel had properly advised him of the correct sentencing range. These allegations made an arguable claim that trial counsel provided ineffective assistance and that defendant suffered prejudice because he would have accepted the plea bargain if he had received accurate advice about the sentencing range.

3. A defendant alleging ineffective assistance of trial counsel in a first-stage post-conviction petition does not need to obtain an affidavit from his counsel. Even without an affidavit, the reviewing court will still accept as true the defendant's allegations of ineffective assistance of counsel. Such affidavits are difficult or impossible to obtain and requiring them would contravene the settled standards requiring a reviewing court to accept as true all facts alleged in the petition unless contradicted by the record.

(Defendant was represented by Assistant Defender Robert Hirschhorn, Chicago.)

People v. Cole, 2012 IL App (1st) 102499 (No. 1-10-2499, 9/21/12)

Under **People v. Jones**, 213 Ill. 2d 498, 821 N.E.2d 1093 (2004), claims that were not raised in the post-conviction petition may not be raised for the first time on appeal from the trial court's dismissal of that petition. The court concluded that the post-conviction petition here failed to raise a claim of ineffective assistance by appellate counsel because it made no explicit reference to appellate counsel's performance on direct appeal. The court also held that the petition could not be deemed to have raised an "implicit claim" of ineffective assistance of appellate counsel merely because it raised issues which had not been raised on direct appeal.

In a dissenting opinion, Justice Gordon argued that the petitioner raised ineffectiveness

of appellate counsel where one of the opening paragraphs of the *pro se* petition complained of "attorney ineffectiveness" and then specifically described the petitioner's claims, without indicating whether the reference to ineffectiveness concerned trial or appellate counsel. The dissenting opinion criticized the majority for construing the phrase "attorney ineffectiveness" as necessarily referring only to actions by trial counsel.

The dissenting opinion also found that defendant's petition should not be deemed to have been a post-conviction petition at all, because it was filed after the petitioner's sentences had been vacated on direct appeal and the cause remanded for resentencing, but before the new sentencing hearing was held. Because the petitioner was not "convicted" until a new sentence was imposed, and the Post-Conviction Hearing Act provides a method by which persons under criminal sentences may raise constitutional claims, a petition filed before sentencing is not a post-conviction petition. Justice Gordon would have dismissed the petition without prejudice in recognition of the fact that the petitioner was entitled to file both a direct appeal after resentencing and a post-conviction petition if he failed to obtain relief on direct appeal.

(Defendant was represented by Assistant Defender Stephen Gentry, Chicago.)

People v. Little, 2012 IL App (5th) 100547 (No. 5-10-0547, 10/9/12)

1. The Post-Conviction Hearing Act (PCHA) generally limits a defendant to one post-conviction petition. Successive petitions are disfavored. A defendant attempting to institute a successive post-conviction proceeding through the filing of a second or successive petition must first obtain leave of court by either demonstrating actual innocence or satisfying the cause-and-prejudice test codified in 725 ILCS 5/122-1(f). The denial of leave to file a successive petition is reviewed *de novo*.

2. Where a defendant files an initial post-conviction petition seeking only to reinstate the right to a direct appeal that was lost due to counsel's ineffectiveness, a subsequent petition is not a successive petition for purposes of §122-1(f). The reference in §122-1(f) to "one petition . . . without leave of court" refers to one complete opportunity to collaterally attack the proceedings resulting in the conviction. Where a defendant has been denied that opportunity because he used an initial petition solely to reinstate his right to a direct appeal that was forfeited through no fault of his own, he is restored to the procedural posture he would have enjoyed if he had been represented by effective counsel who had filed a timely notice of appeal. This construction is consistent with federal habeas law, which the Illinois Supreme Court has relied on in interpreting the PCHA, as well as the intent of the legislature expressed in the PCHA to make Illinois law consistent with federal law.

Because defendant's first post-conviction petition was filed only to rescue his right to a direct appeal, it was not a true collateral attack and should not have been counted as such. The Appellate Court reversed the order of the circuit court denying defendant leave to file a successive petition.

3. The PCHA requires that a court review a petition within 90 days to determine if it is frivolous or patently without merit. 725 ILCS 5/122-2.1. Failure to do so requires that the court docket the petition for second-stage proceedings. This rule applies even if by honest mistake the court disposes of a petition on the erroneous belief that it is a successive petition brought without leave of court.

Because the circuit court had failed to determine within 90 days of the filing of defendant's petition whether it was frivolous or patently without merit, the Appellate Court further directed that the cause be remanded for second-stage proceedings.

(Defendant was represented by Assistant Defender Deborah Pugh, Chicago.)

People v. Maclin, 2013 IL App (1st) 110342 (No. 1–11–0342, 12/16/13)

The Appellate Court found that it lacked jurisdiction to consider defendant's post-conviction appeal.

Under Illinois Supreme Court Rule 606, a notice of appeal in a criminal case must be filed with the clerk of the circuit court within 30 days after final judgment is entered. Rule 651 provides that appeals in post-conviction cases shall be in accordance with the rules for criminal appeals. Where the notice of appeal is received by the clerk after the 30-day filing period has expired, the mailbox rule provides that the date of mailing is deemed to be the time of filing, provided that the notice of appeal was properly addressed and mailed to the circuit clerk.

Defendant, an inmate at Pontiac, placed the notice of appeal in the prison mail system several days before the 30-day filing period expired, but the notice did not reach the circuit clerk's office until after that period had passed. The court concluded that the mailbox rule did not apply, however, because the mailing had been addressed to the State's Attorney rather than to the circuit clerk. Although the State's Attorney forwarded the notice of appeal to the circuit clerk, it was not received until after the filing period had expired.

The court added:

> We are powerless to confer jurisdiction where none exists, regardless of our understanding of and sympathy for Maclin's position. We note that while this court is unable to consider Maclin's appeal, the rules allow him to seek recourse in the Illinois Supreme Court. The supreme court has the power to exercise its supervisory authority to reinstate appeals in this court that we are otherwise unable to consider.

(Defendant was represented by Assistant Defender Adrienne River, Chicago.)

People v. Medrano, 2014 IL App (1st) 102440 (No. 1-10-2440, 4/16/14)

A void sentence can be corrected at any time and is not subject to waiver or forfeiture. But the issue of voidness must be raised in a proceeding that is properly pending before a court that has jurisdiction. If the court lacks jurisdiction, it cannot confer any relief, even from a void judgment.

Here, defendant argued for the first time on appeal from the second-stage dismissal of his post-conviction petition that the sentence imposed on his guilty plea was void, and therefore he should be allowed to withdraw his guilty plea. The State, relying on **People v. Flowers**, 208 Ill. 2d 291 (2003), argued that since defendant filed his post-conviction petition well beyond the three-year statute of limitations period, the voidness issue was procedurally barred.

In **Flowers**, defendant filed an untimely Rule 604(d) motion arguing that her sentence was void. The trial court denied the motion as being untimely, but the Appellate Court reversed, holding that the timeliness requirements of Rule 604(d) were not jurisdictional and could be excused when considering a void sentence. The Illinois Supreme Court reversed the Appellate Court, holding that the only matter properly before the Appellate Court was the trial court's lack of jurisdiction over the untimely 604(d) motion. Because strict compliance with Rule 604(d) is a condition precedent to an appeal on the merits, the Appellate Court had no authority to vacate the void sentence.

The court held that **Flowers** did not apply to the present case. Unlike Rule 604(d), which divests the trial court of jurisdiction after 30 days, the time limits on filing a post-conviction petition are not jurisdictional. Instead, they act as a statute of limitations that the

State can waive or forfeit. The trial court thus had jurisdiction to address the issues raised in defendant's petition, and since defendant filed a timely appeal, the Appellate Court had jurisdiction to address the trial court's judgment.

Since the Appellate Court had jurisdiction to address the lower court's judgment, it could address the issue of whether the sentence was void, even though the issue was not raised below, since void judgments "can be challenged on collateral review for the first time on appeal."

(Defendant was represented by Assistant Defender Chris Kopacz, Chicago.)

People v. Toy, 2013 IL App (1st) 120580 (No. 1-12-0580, 12/20/13)

1. On appeal from the denial of his post-conviction petition, the defendant argued for the first time that his sentence for aggravated criminal sexual assault violated the proportionate penalties clause because it was more severe than the sentence for armed violence based on sexual assault, which was composed of identical elements. The State acknowledged that the Appellate Court had authority to consider whether the sentence was unconstitutional, but argued that the court was not required to reach the issue and should "defer" to the trial judge, who was considering the same issue in a §2-1401 motion. The court stated that "[w]hile the State's argument is technically correct, we choose to consider whether defendant has presented an arguable claim to warrant second stage proceedings under the Post-Conviction Act."

2. Although the instant appeal was from the summary dismissal of a post-conviction petition, the court found that it was unnecessary to remand the matter for second-stage post-conviction hearings. There was no factual dispute requiring an evidentiary hearing, and under the applicable precedent defendant was required to be resentenced to a term that did not include an unconstitutional enhancement. The order dismissing the post-conviction petition was reversed, post-conviction relief was granted, the sentences for aggravated criminal sexual assault were vacated, and the cause was remanded for resentencing.

(Defendant was represented by Assistant Defender Karl Mundt, Chicago.)

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Standards of Review

People v. English, 2013 IL 112890 (No. 112890, 1/25/13)

1. After a third-stage evidentiary hearing in a post-conviction proceeding at which fact-finding and credibility determinations are involved, the circuit court's decision will not be reversed unless it is manifestly erroneous. However, if no such determinations are necessary at the third stage, *i.e.*, no new evidence is presented and the issues presented are pure questions of law, a *de novo* standard of review applies, unless the hearing judge has some special expertise or familiarity with defendant's trial and sentencing, and that familiarity has some bearing on the disposition of the post-conviction petition.

At the third-stage of defendant's post-conviction proceeding, the circuit court heard no new evidence. The court reviewed the trial transcripts and heard argument of counsel. The hearing judge had not presided at defendant's trial and had no special expertise or familiarity with the defendant's trial. Therefore, the standard of review is *de novo*.

2. Issues that could have been raised on direct appeal, but were not, are forfeited and may not be raised in a post-conviction proceeding.

Defendant's argument that aggravated battery of a child could not serve as the predicate felony for aggravated battery of that same child was forfeited by defendant's failure to raise that argument on direct appeal. The theory was not novel as it had been raised and rejected by the Illinois Supreme Court in **People v. Viser**, 62 Ill. 2d 568, 343 N.E.2d 903 (1975). Subsequent to defendant's appeal, the Illinois Supreme Court accepted the argument, adopting the independent-felonious purpose rule in **People v. Morgan**, 197 Ill. 2d 404, 758 N.E.2d 813 (2001), and **People v. Pelt**, 207 Ill. 2d 434, 800 N.E.2d 1193 (2003). The defendant in **Morgan** faced the same legal landscape as defendant but nevertheless made the argument. If the defendant in **Morgan** was able to make the argument under such circumstances, defendant could have done so.

3. The doctrine of forfeiture is relaxed where the forfeiture stems from the ineffective assistance of counsel.

To establish that appellate counsel was ineffective, defendant must satisfy the standard set forth in **Strickland v. Washington**, 466 U.S. 668 (1984). Defendant must show both that appellate counsel's performance was deficient and that, but for counsel's errors, there is a reasonable probability that the appeal would have been successful. Appellate counsel is not obligated to raise every conceivable issue on appeal, but is expected to exercise professional judgment to select from the many potential claims of error that might be asserted on appeal.

Appellate counsel's assessment of the merits of an issue depends on the state of the law at the time of the direct appeal. Representation based on the law prevailing at the time of appeal is adequate, and counsel is not incompetent for failing to accurately predict that existing law will change. Appellate counsel is not required to raise issues that he reasonably determines are not meritorious.

Because the basis on which defendant sought to invalidate his conviction was not supported by precedent at the time of his direct appeal, it was reasonable for appellate counsel to conclude that the issue was unlikely to succeed. Appellate counsel was not deficient in failing to predict a subsequent change in the law. Counsel proceeded on other challenges, one of which was ultimately successful. Therefore, appellate counsel's forfeiture of the issue on appeal is not excused based on ineffective assistance of appellate counsel.

4. Even though proper application of the forfeiture doctrine in this case leaves defendant without a remedy for remedying his improper felony-murder conviction, the limited scope of post-conviction review compels this result

Freeman, J., joined by Burke, J., specially concurred.

1. *De novo* is the proper standard of review because the case was decided by the circuit court at the second stage of the proceedings based on the pleadings and the original trial. The fact that the hearing judge did not preside at the original trial has no relevance to the standard of review employed.

2. The Post-Conviction Hearing Act requires that the petition state the denial of a constitutional right. The cognizability of an issue in a post-conviction proceeding is a threshold matter that should be addressed prior to any other matters that otherwise might defeat the claim.

Because the independent-felonious-purpose rule is based on principles of statutory construction and is not constitutionally based, defendant's challenge to his felony-murder conviction is not forfeited by the failure to raise it on direct review. A claim cannot be forfeited for purposes of post-conviction review if it cannot be raised in a post-conviction petition in the first place.

3. The majority opinion is internally inconsistent. It concludes that the independent-felonious-purpose rule did not exist at the time of defendant's direct appeal and therefore

appellate counsel cannot be faulted for failing to foresee a rule that did not exist. This is directly at odds with the majority's pronouncement that the rule was not novel at the time of defendant's direct appeal and therefore was available and could have been raised.

This inconsistent treatment of defendant's claims leaves defendant in a procedural quandary that is at odds with the legislature's intent in enacting the post-conviction statute to eliminate procedural impediments to collateral review of unconstitutional convictions.

4. Nonetheless the concurrence agrees with the majority that appellate counsel was not ineffective in failing to predict that the court would endorse the independent-felonious-purpose rule.

(Defendant was represented by Assistant Defender Kerry Bryson, Ottawa.)

People v. Rodriguez, 402 Ill.App.3d 932, 932 N.E.2d 113, 2010 WL 2675047 (1st Dist. 2010)

1. An unreasonable disparity in sentences between non-capital co-defendants is a constitutional claim cognizable under the Post-Conviction Hearing Act.

2. Generally the standard of review in an appeal from the denial of post-conviction relief after an evidentiary hearing is whether the hearing court's findings were manifestly erroneous. But if no credibility determination was necessary to the finding and the issue is purely legal, review is *de novo*.

(Defendant was represented by Assistant Defender Rebecca Levy, Chicago.)

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§9-1(o)(3)
Issues Raised for the First Time on Appeal

People v. Cruz, 2013 IL 113399 (No. 113399, 3/21/13)

At the second stage of a post-conviction proceeding, the State has the option of filing an answer to the petition or a motion to dismiss. 725 ILCS 5/122-5. Where the State files a motion to dismiss, but does not challenge the sufficiency of defendant's allegation of a lack of culpable negligence for the late filing of his petition on the ground that the supporting verification affidavit is not notarized, the State forfeits that argument. By raising the argument that the affidavit was not notarized for the first time on appeal, the State denied the circuit court the opportunity to consider the issue and the defendant the opportunity to correct the alleged pleading deficiency.

The Supreme Court remanded the cause to the Appellate Court for consideration of whether defendant sufficiently pled a lack of culpable negligence to excuse his untimely filing.

(Defendant was represented by Assistant Defender Pamela Rubeo, Chicago.)

People v. Avery, 2012 IL App (1st) 110298 (No. 1-11-0298, 6/21/12)

As a general rule, a defendant must present an issue in a post-conviction petition to preserve it on appeal. This rule does not apply to a claim alleging a void judgment or sentence, neither of which is subject to waiver and either of which may be attacked at any time or in any court, either directly or collaterally.

The defendant claimed for the first time on appeal from the dismissal of his post-conviction petition that his conviction and sentence were void based on **People v. White**, 2011 IL 109616. **White** held that where a defendant pleads guilty to a charge with a firearm enhancement and the factual basis for the plea establishes that a firearm was used in the

commission of the offense, a sentence that does not include the firearm enhancement is void because it is not authorized by statute, and the plea must be vacated.

The Appellate Court agreed with defendant that he could raise this issue for the first time on appeal because he alleged his conviction and sentence were void. The court ultimately denied defendant relief, concluding that **White** announced a new rule that did not apply to convictions such as defendant's that were final when **White** was decided.

(Defendant was represented by Assistant Defender Maria Harrigan, Chicago.)

People v. Cowart, 2015 IL App (1st) 131073 (No. 1-13-1073, 2/17/15)

1. Defendant filed a post-conviction petition attacking his guilty plea by arguing that the trial court failed to properly admonish him that he would have to register as a sex offender. The State argued that defendant forfeited this issue by failing to raise it on direct appeal.

The Appellate Court rejected the State's argument. Post-conviction claims that could have been raised on direct appeal are forfeited, but the failure to file any appeal at all does not forfeit such issues. For purposes of post-conviction forfeiture, a summary remand on direct appeal for non-compliance with Rule 604(d) is treated as if defendant filed no appeal at all. Here, on direct appeal, defendant's case was remanded for compliance with Rule 604(d) and thus his direct appeal was the equivalent of filing no appeal at all. Defendant therefore did not forfeit his post-conviction claim.

2. The court also rejected the State's argument that defendant's second-stage post-conviction petition was properly dismissed because he provided no affidavits or other support for his claims. The State forfeits a non-jurisdictional procedural challenge to a post-conviction petition by failing to raise that challenge in its motion to dismiss.

Here the State made no argument in its motion to dismiss about the lack of affidavits or other support for defendant's claim. The court noted that had the State raised this issue in the circuit court, defendant could have supplied the affidavits. By failing to raise this issue, the State forfeited its argument on appeal.

(Defendant was represented by Assistant Defender Robert Hirschhorn, Chicago.)

People v. Douglas, 2014 IL App (4th) 120617 (No. 4-12-0617, 7/2/14)

1. On appeal from the dismissal of his post-conviction petition, defendant argued that the trial court improperly sent a letter to the Department of Corrections stating that defendant's petition was frivolous and patently without merit. The Appellate Court declined to rule on this issue, noting that "defendant did not raise, nor could he have raised" any argument in his post-conviction petition regarding the trial court's letter.

Relying on **People v. Jones**, 213 Ill. 2d 498 (2004), which held that an issue not raised in a post-conviction petition may not be raised for the first time on appeal from the dismissal of the petition, the Appellate Court held that it would not rule on the propriety of the trial court's letter. The Appellate Court also noted that the record did not establish that the Department of Corrections took any action against defendant because of the letter and thus the issue was potentially moot.

2. The Appellate Court, however, did address defendant's argument that he was improperly sentenced to 10 years' imprisonment as a Class X offender, even though he did not raise this issue in his post-conviction petition. **Jones** does not apply to allegations that a defendant's sentence is void. If defendant was ineligible to be sentenced as a Class X offender, the trial court had no authority to impose the 10-year Class X sentence, and hence his sentence would be void and capable of being challenged for the first time on appeal from the

dismissal of his post-conviction petition.

(Defendant was represented by Deputy Defender Jackie Bullard, Springfield.)

People v. Medrano, 2014 IL App (1st) 102440 (No. 1-10-2440, 4/16/14)

A void sentence can be corrected at any time and is not subject to waiver or forfeiture. But the issue of voidness must be raised in a proceeding that is properly pending before a court that has jurisdiction. If the court lacks jurisdiction, it cannot confer any relief, even from a void judgment.

Here, defendant argued for the first time on appeal from the second-stage dismissal of his post-conviction petition that the sentence imposed on his guilty plea was void, and therefore he should be allowed to withdraw his guilty plea. The State, relying on **People v. Flowers**, 208 Ill. 2d 291 (2003), argued that since defendant filed his post-conviction petition well beyond the three-year statute of limitations period, the voidness issue was procedurally barred.

In **Flowers**, defendant filed an untimely Rule 604(d) motion arguing that her sentence was void. The trial court denied the motion as being untimely, but the Appellate Court reversed, holding that the timeliness requirements of Rule 604(d) were not jurisdictional and could be excused when considering a void sentence. The Illinois Supreme Court reversed the Appellate Court, holding that the only matter properly before the Appellate Court was the trial court's lack of jurisdiction over the untimely 604(d) motion. Because strict compliance with Rule 604(d) is a condition precedent to an appeal on the merits, the Appellate Court had no authority to vacate the void sentence.

The court held that **Flowers** did not apply to the present case. Unlike Rule 604(d), which divests the trial court of jurisdiction after 30 days, the time limits on filing a post-conviction petition are not jurisdictional. Instead, they act as a statute of limitations that the State can waive or forfeit. The trial court thus had jurisdiction to address the issues raised in defendant's petition, and since defendant filed a timely appeal, the Appellate Court had jurisdiction to address the trial court's judgment.

Since the Appellate Court had jurisdiction to address the lower court's judgment, it could address the issue of whether the sentence was void, even though the issue was not raised below, since void judgments "can be challenged on collateral review for the first time on appeal."

(Defendant was represented by Assistant Defender Chris Kopacz, Chicago.)

People v. Thomas, 2014 IL App (2d) 121001 (No. 2-12-1001, 9/26/14)

1. A claim that has not been raised in a *pro se* post-conviction petition may not be raised for the first time on appeal from the first-stage dismissal of that petition. **People v. Jones**, 213 Ill. 2d 498 (2004). In determining whether an issue has been forfeited for not being raised below, courts should afford the petition a liberal construction allowing borderline cases to proceed. A *pro se* petitioner is unlikely to be aware of the precise legal basis for his claim, and hence need only allege enough facts to make an arguable claim. The pleading must, however, bear some relationship to the issue raised on appeal.

2. At trial, the court precluded evidence that another man, N.H., confessed to the police and to a jail pastor that he had committed the offense. The trial court ruled that the confession to the pastor was barred by clergy-penitent privilege. On direct appeal, defendant's counsel argued that the court erred in precluding evidence of N.H.'s confession to the police, but raised no issue about N.H.'s confession to the jail pastor. The court rejected defendant's argument and affirmed his conviction.

3. In his *pro se* petition, defendant argued that his direct appeal counsel was ineffective for failing to raise an issue about trial counsel's failure to investigate and present facts showing that N.H. confessed to the murder. In support of this claim, defendant referenced various facts about N.H.'s confessions, including his confession to the pastor. Defendant also claimed that trial counsel failed to take any steps to corroborate N.H.'s confession to the police.

4. On appeal from the first-stage dismissal of his petition, defendant argued that his direct appeal counsel was ineffective for failing to raise an issue that the trial court erred in precluding N.H.'s confession to the jail pastor based on clergy-penitent privilege. The State argued that defendant forfeited this claim by failing to include it in his *pro se* petition. According to the State, although defendant argued appellate counsel's ineffectiveness both below and on appeal, defendant's post-conviction petition focused on trial counsel's failure to investigate and present facts supporting the admission of N.H.'s confession to the police, while his claim on appeal focused on the trial court's error in precluding evidence of N.H.'s confession to the pastor.

The Appellate Court rejected the State's forfeiture argument. The court pointed to language in **People v. Hodges**, 234 Ill. 2d 1 (2009) and **People v. Edwards**, 197 Ill. 2d 239 (2001), stating that a *pro se* petition should be liberally construed and need not present a completely pled or fully stated claim since a *pro se* litigant may be unaware of the legal basis for his claim. Here, defendant's petition and his appellate argument both alleged ineffectiveness based on omissions related to the same underlying issue of the admissibility of N.H.'s confession. Under the liberal standards appropriate to *pro se* petitions, the two claims are sufficiently related, and hence defendant did not forfeit his appellate argument.

5. Defendant's petition stated the gist of a constitutional claim that direct appeal counsel was ineffective for failing to argue that the trial court improperly excluded N.H.'s confession to the jail pastor based on clergy-penitent privilege. Under section 8-803 of the Code of Civil Procedure, the clergy-penitent privilege only applies where disclosure is "enjoined by the rules or practices" of the relevant religious organization. 735 ILCS 5/8-803. The privilege belongs to both the confesser and the clergyman. When the clergyman does not object to testifying about the confession, the burden shifts to the person asserting the privilege to show that disclosure is enjoined by the rules or practices of the relevant religion.

Here, the pastor agreed to testify, so the burden shifted to N.H. to show that the rules of the pastor's religion prohibited disclosure. The pastor, however, testified that the rules of his religion did not prohibit disclosure, and N.H. offered no evidence to the contrary. Under these circumstances, the trial court's decision to bar the pastor's testimony was erroneous.

6. The Appellate Court specifically rejected the State's argument that the confesser's perception of the privilege should control whether the privilege applies. Nothing in section 8-803 provides that the confesser's perception determines when the privilege applies. Instead, the rules of the pastor's religion control the outcome.

The case was remanded for second-stage proceedings.

(Defendant was represented by Assistant Defender Rachel Moran, Chicago.)

People v. Turner, 2012 IL App (2d) 100819 (No. 2-10-0819, modified 7/11/12)

1. The Post-Conviction Hearing Act provides that the proceeding shall be commenced by the filing of a petition verified by affidavit. 725 ILCS 5/122-1(b). An affidavit filed pursuant to the Act must be notarized to be valid. Lack of notarization is not cured by certification under §1-109 of the Code of Civil Procedure. 735 ILCS 5/1-109.

There is a split of authority among the Appellate Courts as to whether a petition lacking a notarized affidavit may be dismissed for that reason at the first stage of a post-

conviction proceeding. Regardless of this split, the State was permitted to raise the issue for the first time on appeal from a first-stage dismissal because that was its earliest opportunity to do so. At first-stage proceedings, the court acts without input from the State.

Raising the issue for the first time on appeal is not permissible in an appeal from a second-stage dismissal. If the State raises the issue in the trial court, it can be addressed and resolved. Appointed counsel has a duty to remedy procedural defects in the petition. The State procedurally defaults the issue of lack of notarization by failing to raise it in its motion to dismiss.

2. The State did not move to dismiss defendant's petition on the ground that the affidavit accompanying the petition was not notarized. It argued for the first time on appeal that dismissal of the petition could be affirmed on the ground that the affidavit was not notarized. The State forfeited this challenge by failing to raise it in its motion to dismiss, which would have given defendant the opportunity to remedy the defect and promoted efficient disposition of the petition.

3. Addressing the split of authority regarding whether the absence of a notarized affidavit is a basis for a first-stage dismissal, the Appellate Court opined that it was not. The State's ability to forfeit the defect makes an invalid affidavit akin to a petition's untimeliness, which likewise is not a basis for a first-stage dismissal.

The Appellate Court nonetheless affirmed the dismissal of the petition, finding the allegations insufficient to merit an evidentiary hearing.

(Defendant was represented by Assistant Defender Jessica Pamon, Chicago.)

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§9-2
Section 2-1401 Petitions
(formerly Ch. 110, §72)

§9-2(a)
Generally

People v. Johnson, 2013 IL 114639 (No. 114639, 9/19/13)

The Counties Code provides that "State's attorneys shall be entitled to the following fees: * * * For each day actually employed in the hearing of a case of habeas corpus in which the people are interested, $50." 55 ILCS 5/4-2002.1(a).

This statute authorizes the fee only in various types of habeas corpus proceedings, not in all collateral proceedings. The fee was not authorized in a proceeding on a petition for relief from judgment filed pursuant to 735 ILCS 5/2-1401.

(Defendant was represented by Assistant Defender Yasaman Navai, Chicago.)

People v. Laugharn, 233 Ill.2d 318, 909 N.E.2d 802 (2009)

Although **People v. Vincent**, 226 Ill.2d 1, 871 N.E.2d 17 (2007) authorizes sua sponte dismissal of §2-1401 petitions, it does not authorize dismissal before the expiration of the 30-day period for the State to answer the petition or otherwise plead. Because the trial court sua sponte dismissed defendant's §2-1401 petition seven days after it was filed, before the State had filed an answer and the petition was "ripe for adjudication," the dismissal order was vacated and the cause remanded for further proceedings.

People v. Carter, 2014 IL App (1st) 122613 (No. 1-12-2613, mod. op. 4/22/14)

1. 735 ILCS 5/2-1401 provides a statutory procedure by which final orders, judgments, and decrees may be vacated when more than 30 days have passed since their entry. Supreme Court Rule 101(d) provides that when a party files a §2-1401 petition, the opposing party has 30 days to answer or otherwise plead. Illinois Supreme Court Rule 106 provides that notice of the filing of a §2-1401 petition must be given by the "same methods provided in Rule 105," which include service of summons, prepaid certified or registered mail, or publication. However, service cannot be made by regular mail.

In **People v. Laugharn**, 233 Ill. 2d 318, 909 N.E.2d 802 (2009), the Supreme Court held that unless the State files an answer to a §2-1401 petition, the case becomes ripe for adjudication 30 days after the service of notice on the prosecution. Thus, unless an answer is filed, the trial court errs by *sua sponte* dismissing a §2-1401 petition less than 30 days after the date of service.

2. Where the petitioner attempted to serve notice of the petition on the State by placing the documents in the institutional mail at Menard Correctional Center, the service was not performed in accordance with Supreme Court Rule 105 and therefore did not become effective. Because the State failed to file an answer and service on the State was never perfected, the trial court erred by *sua sponte* dismissing the petition.

3. The court rejected the State's argument that it effectively waived service because an Assistant State's Attorney was present when the petition was dismissed and did not object to the improper service. The court noted that the prosecutor was not present on the first day the petition was considered, when a date was set for further review. On the subsequent date, the cover page of the report of proceedings indicated that an Assistant State's Attorney was present, but the transcript did not reflect that the prosecutor was present or participated in any way in the proceedings relating to the petition. Under these circumstances, it could not be assumed that the prosecutor was aware of the petition and chose to waive the defective service.

Because a §2-1401 petition is not ripe for adjudication until 30 days after service, the trial court erred by dismissing the petition *sua sponte* where service on the State was never perfected. The dismissal order was vacated and the cause remanded for further proceedings.

(Defendant was represented by Assistant Defender Jennifer Bontrager, Chicago.)

People v. Clemons, 2011 IL App (1st) 102329 (No. 1-10-2329, 9/30/11)

The trial court's *sua sponte* dismissal of a 2-1401 petition (735 ILCS 5/2-1401) before expiration of the 30-day period in which the responding party is required to file an answer or otherwise plead is premature and requires *vacatur* of the dismissal order. **People v. Laugharn**, 233 Ill.2d 318, 909 N.E.2d 802 (2009). To determine whether an issue is ripe for adjudication, a court is required to evaluate both the fitness of the issue for judicial decision and the hardship to the parties of withholding court consideration.

Defendant's §2-1401 petition was not ripe for adjudication where only seven days had passed since its filing, even though the State had received notice of the petition, appeared in court, and offered no objection to the court's order denying the petition. The failure to respond to the petition was of no import and did not frame the issues until the 30-day period had passed. Waiting for the expiration of the 30-day period to rule imposed no hardship on any party.

The court vacated the premature order of dismissal and remanded for further proceedings.

(Defendant was represented by Assistant Defender Kieran Wiberg, Chicago.)

People v. Davis, 2012 IL App (4th) 110305 (No. 4-11-0305, 3/5/12)

1. Although §2-1401 petitions are normally subject to a two-year statute of limitations, no statute of limitations applies to petitions based on newly discovered evidence obtained through DNA testing under 725 ILCS 5/116-3. Section 116-3 authorizes post-conviction forensic testing of evidence where the testing in question was not available at the time of trial.

Newly discovered evidence warrants a new trial where the evidence is of such character that it could not have been discovered before trial by the exercise of due diligence, is material and not merely cumulative, and is of such conclusive character that it will probably change the result on retrial. Under most circumstances, the trial court's ruling on a §2-1401 petition is reviewed for abuse of discretion. However, *de novo* review is appropriate where the petition is based on an interpretation of the Supreme Court Rules or is dismissed without a response by the State and is therefore equivalent to a dismissal for failing to state a cause of action.

2. To obtain relief through a §2-1401 proceeding, the petitioner is required to show due diligence in two respects - in presenting the claim or defense in the original action, and in filing the §2-1401 petition. The court concluded that defendant showed due diligence with respect to the original action because the newly discovered evidence - DNA testing which exculpated the defendant - was not available at the time of the trial.

Defendant also showed due diligence with respect to presenting the §2-1401 petition where he filed the petition within four months after he learned the result of the new DNA testing.

The court rejected the State's argument that the defendant was also required to show that he sought DNA testing as soon as practicable after such testing became available. Thus, defendant did not fail to show due diligence although he filed the §2-1401 petition several years after the testing in question became available.

The court also stated that had there been a requirement to show diligence in seeking testing, defendant could have made the necessary showing although he requested the testing six years after it became available. Because defendant was imprisoned in a maximum security prison, was not represented by counsel, and was indigent, he "did not wilfully disregard the process of the court and . . . was not so indifferent to it that he is chargeable with culpable negligence."

3. The State conceded that defendant met three of the four requirements for a new trial based on newly discovered evidence. The only issue on appeal was whether the evidence - DNA testing exculpating the defendant and identifying another person as the source of semen and blood recovered at the scene - was of such character as to likely change the result on retrial. Whether defendant satisfied this requirement depends not on whether it is likely that defendant would be acquitted in a retrial, but on whether the likelihood of a different result on retrial is sufficient to undermine confidence in the conviction.

Because the State's theory of the case at trial was based on expert testing of blood and semen evidence which allegedly showed that defendant was within the 20% of the male population which could have produced the blood and semen found at the scene, the serological evidence was the central physical evidence supporting the State's theory, and no other person was considered as a possible perpetrator, the court found that DNA testing excluding the defendant as a possible donor of the material and identifying another suspect was of sufficient magnitude to undermine confidence in the conviction. Thus, defendant was entitled to a new trial.

The trial court's order denying defendant's §2-1401 petition was reversed and the cause remanded for a new trial.

People v. Dodds, 2014 IL App (1st) 122268 (No. 1-12-2268, 2/27/14)

1. A §2-1401 petition authorizes the trial judge to vacate a judgement where facts are shown to exist which, had they been known at the time of trial, would have prevented the judgment from being entered. To obtain relief under §2-1401, the defendant must set forth specific factual allegations showing that he: (1) had a meritorious defense or claim; (2) exercised due diligence in presenting the defense or claim; and (3) exercised due diligence in filing the §2-1401 petition.

Generally, a §2-1401 petition must be filed within two years after judgment is entered. However, the two-year statute of limitations does not apply to petitions brought on voidness grounds, if there is a clear showing that the person seeking relief is under a legal disability or duress, or if the grounds for relief were fraudulently concealed. To make a successful showing of fraudulent concealment, the defendant must specifically allege facts demonstrating that the opposing party affirmatively attempted to prevent discovery of the grounds for relief and that the defendant acted in good faith and with reasonable diligence in trying to uncover such matters before trial or within the limitations period.

Where a §2-1401 petition is dismissed with prejudice on the pleadings, the standard of review is *de novo*.

2. The court accepted the State's concession that under these circumstances, defendant could use a §2-1401 petition to argue that his plea was involuntary due to ineffective assistance of counsel. In 2001, defendant pleaded guilty to one count of possession of child pornography in return for a sentence of 18 months' probation and the requirement that he register as a sex offender for a period of 10 years. Shortly after the plea was entered, defendant filed a motion to clarify that the required registration period was 10 years and not life.

After the 10-year-period had expired, defendant was informed by the probation department that he would have to register as a sex offender for life. He filed a §2-1401 petition to vacate his plea, conviction and sentence.

In accepting the State's concession, the court noted that in **People v. Lawton**, 212 Ill.2d 285, 818 N.E.2d 326 (2004), the Illinois Supreme Court held that §2-1401 is not limited to errors of fact and may be used to raise ineffective assistance of counsel claims where relief under the Post-Conviction Hearing Act is unavailable. Here, defendant had completed his probation term and was ineligible to file a post-conviction petition.

People v. Donley, 2015 IL App (4th) 130223 (Nos. 4-13-0223, 4-13-0617 cons., 3/26/15)

The rule of **People v. Laugharn**, 233 Ill. 2d 318 (2009) (holding that a trial court may not dismiss a 2-1401 petition before the expiration of the 30-day period in which the State may answer the petition) does not apply to successive 2-1401 petitions. The trial court's dismissal of defendant's successive 2-1401 petition before 30 days had passed was affirmed.

(Defendant was represented by Assistant Defender Mark Fisher, Ottawa.)

People v. Kane, 404 Ill.App.3d 132, 935 N.E.2d 1116 (2d Dist. 2010)

A petition for relief from judgment (735 ILCS 5/2-1401) is a new proceeding, not a continuation of the case that resulted in the judgment being challenged. It is a civil remedy that extends to criminal as well as civil proceedings and is subject to the usual rules of civil procedure. The petition can be challenged by a motion to dismiss (735 ILCS 5/2-615) if it fails to state a claim upon which relief can be granted. In judging the sufficiency of the pleadings against the challenge of a motion to dismiss, the court's review is confined to the four corners

of the petition and its attachments.

After the court denied defendant's motion to reconsider sentence, defendant filed a 2-1401 petition alleging that the court relied at sentencing on grand jury testimony that was false. A deputy sheriff had testified before a grand jury that in the course of an arrest, defendant had picked him up and thrown him to the ground and had placed his hand on the holstered gun of another deputy. Appended to the 2-1401 petition was the deposition testimony of the deputy sheriff admitting that defendant had not picked him up and thrown him to the ground, and that he had no personal knowledge, and it had only been reported to him, that defendant had placed his hand on the other deputy sheriff's gun. The court granted the State's motion to dismiss or deny the petition.

The Appellate Court criticized the parties for treating the 2-1401 petition as a continuation of the proceedings on the motion to reconsider sentence, and not as a separate civil proceeding. The motion filed by the State did not state in what respect the petition was insufficient. The trial court improperly relied on its own recollection of the sentencing and post-sentencing proceedings in granting the motion. Because the Appellate Court could not say based on its review of the pleadings that no set of facts could ever be proved that would entitle defendant to relief, it reversed and remanded for further proceedings.

(Defendant was represented by Assistant Defender Jack Hildebrand, Elgin.)

People v. Kuhn, 2014 IL App (3d) 130092 (Nos. 3-13-0092, 3-13-0195 & 3-13-0618 cons., 8/15/14)

The notice requirements for filing a 2-1401 petition are governed by Illinois Supreme Court Rule 105, which provides that notice may be served by summons, certified or registered mail, or publication. In construing the sufficiency of notice, the focus is on whether the intent of the law, which is to notify a party and secure his appearance, was substantially attained, not on formal or technical requirements.

After notice has been served, the responding party has 30 days to file an answer or otherwise appear, but does not have to file a responsive pleading. A trial court may *sua sponte* dismiss a 1401 petition only after the 30-day response period has passed and the petition is ripe for adjudication. **People v. Laugharn**, 233 Ill 2d 318 (2009).

Here, defendant filed a 1401 petition and served the State by regular mail. After more than 30 days had passed, the trial court *sua sponte* dismissed the petition. Defendant argued on appeal that the trial court's dismissal should be vacated because the petition was not ripe for adjudication since defendant did not properly serve it on the State.

The Appellate Court rejected this argument on two grounds. First, the court held that defendant did not have standing to object to his own improper service on another party. A party may object to the receipt of improper service only on behalf of itself. Defendant had no standing to raise an issue regarding the State's receipt of service.

Second, the notice provided to the State, while not technically proper, was sufficient to give the State actual notice and allow it to determine how it wanted to proceed. Defendant served the State with his petition by regular mail. Thereafter the State appeared at two hearings. Defendant's service thus provided the State with actual notice allowing it to file a responsive pleading or object to the improper service if it wished.

The trial court's *sua sponte* dismissal was affirmed.

(Defendant was represented by Assistant Defender Santiago Durango, Ottawa.)

People v. Maiden, 2013 IL App (2d) 120016 (No. 2-12-0016, 6/18/13)

A circuit court may *sua sponte* dismiss a §2-1401 petition, but not until the 30-day

period for the State to answer has elapsed. That 30-day period does not commence until the State has been properly served. Remand for further proceedings is the proper remedy when a petition is prematurely dismissed where the 30-day period had not commenced due to lack of service. To avoid reversal and remand as a result of a premature dismissal, the State can waive objection to the defective service and allow the action to proceed normally through an adjudication on the merits.

Defendant served his §2-1401 petition on the State by regular mail, which does not qualify as proper service. By statute and rule, service may be by summons, prepaid certified mail, or publication. 735 ILCS 5/2-1401(b); Supreme Court Rules 105 and 106. Almost two months after the filing of the petition, the State informed the court that it had never received a copy, and the court allowed the State a 30-day extension to file a responsive pleading. At the expiration of that period, the State informed the court that it was not going to file a pleading. The court dismissed the petition *sua sponte* at the State's urging.

The State's declaration of an intention not to file anything did not constitute a waiver of an objection to proper service. There is a waiver of an objection only if the party files a responsive pleading or motion before filing a motion asserting the jurisdictional objection. 735 ILCS 5/2-301(a), (a-5). Absent a specific motion, responsive pleading, or explicit statement of a waiver of improper service and an affirmative statement that no motion or responsive pleading would be filed, the State did not waive an objection to the improper service. Therefore, the State was not in default for failing to answer or otherwise plead when the court dismissed the petition *sua sponte* because 30-day period for the State to file a responsive pleading never commenced.

Because the circuit court acted prematurely in dismissing the petition, the Appellate Court vacated the dismissal and remanded for further proceedings. On remand, the defendant can promptly serve the State if he wants to have his case heard. Otherwise, the circuit court has the power to dismiss the case for want of prosecution after a reasonable period of time. The court may also dismiss under Supreme Court Rule 103(b) if the defendant fails to exercise reasonable diligence in serving the State.

(Defendant was represented by Assistant Defender Santiago Durango, Ottawa.)

People v. Miller, 2012 IL App (5th) 110201 (No. 5-11-0201, 12/10/12)

Noting a conflict in appellate authority, the Appellate Court held that where a *pro se* §2-1401 petition is prematurely dismissed by the trial court but there was no proper service on the State, the appropriate remedy is to remand the cause for further proceedings if the petitioner properly serves the State, or for dismissal for want of prosecution if the petitioner fails to properly serve the State within a reasonable period of time. The court adopted the reasoning of **Powell v. Lewellyn**, 2012 IL App (4th) 110168, and rejected **People v. Nitz**, 2012 IL App (2d) 091165, which held that §2-1401 petitions that are not properly served should be dismissed without prejudice.

(Defendant was represented by Assistant Deputy Defender Verlin Meinz, Ottawa.)

People v. Moore, 2012 IL App (4th) 100939 (No. 4-10-0939, 2/17/12)

1. 735 ILCS 5/2-1401 creates a procedure by which a defendant may seek to vacate a final judgment where an error of fact, if known at the time of trial, would have prevented the judgment from being entered. To obtain relief under §2-1401, the defendant must show by a preponderance of the evidence that: (1) a defense or claim would have precluded entry of the judgment in the original action, and (2) the defendant acted diligently both in discovering the

defense or claim and in presenting the petition. A criminal conviction obtained through the knowing use of false testimony violates due process; a claim that a conviction was based on the knowing use of false testimony may be raised by a §2-1401 petition.

To obtain relief on such a claim, the defendant need not establish that the prosecution knowingly used false testimony. However, he must do more than merely allege that State's witnesses committed perjury; the petition must present clear, factual allegations of perjury which, if known at the time of the trial, would have prevented a conviction from being entered. Furthermore, to obtain a new trial under §2-1401, newly discovered evidence must be more than merely cumulative to the trial evidence, must be material to the issues, and must be so conclusive that it would probably change the result of a new trial.

2. Defendant failed to carry his burden to show by a preponderance of the evidence that his convictions for criminal drug conspiracy and controlled substance offenses were obtained by the State's knowing use of perjury. A police officer testified at defendant's trial that the money used to make a controlled drug buy was found on defendant's person at the time of the arrest, but testified at the co-defendant's subsequent juvenile hearing that the buy money was in the possession of the co-defendant at the time of the arrest. However, at the second hearing the officer stated that he had made a mistake in his original report and that the money had in fact been found on the co-defendant.

A person commits perjury when, under oath or affirmation in a matter where an oath or affirmation is required, he makes a false statement which is material to the issue and which he does not believe to be true. (See 720 ILCS 5/32-2(a)). Mere inconsistencies in testimony do not equate to perjury.

Furthermore, due process is violated only if the State knowingly used perjured testimony to obtain a conviction. Here, there was no evidence that the State's use of the incorrect testimony was knowing.

3. Finally, the new testimony would not satisfy the standard to obtain a new trial in §2-1401 proceedings. In view of the overwhelming evidence of guilt, the fact that buy money given to defendant had been found on the person of the codefendant would not have changed the result of the trial, and would in fact have solidified the evidence of a conspiracy.

The trial court's denial of defendant's §2-1401 petition was affirmed.

(Defendant was represented by Assistant Appellate Defender Allen Andrews, Springfield.)

People v. Nitz, 2012 IL App (2d) 091165 (No. 2-09-1165, 6/18/12)

A petition for relief from judgment filed pursuant to 735 ILCS 5/2-1401 must be served on all parties to the petition. 735 ILCS 5/2-1401(b). The petition may be dismissed by the court *sua sponte*, but not before expiration of the 30-day period for filing an answer by the adverse party following such service. **People v. Laugharn**, 233 Ill. 2d 318, 909 N.E.2d 802 (2009).

Because no proof of service accompanied defendant's filing of his §2-1401 petition, and the State did not waive service, the 30-day period for filing an answer did not commence. But the failure to provide notice to the State rendered the petition deficient. The trial court did not err in dismissing the petition within 30 days of its filing because the court did not have before it a proper pleading on which to grant relief. Dismissal on the merits was premature, but dismissal without prejudice for a deficiency in complying with §2-1401 was proper.

The Appellate Court affirmed, but modified the judgment to indicate that the dismissal was without prejudice.

(Defendant was represented by Assistant Defender Jack Hildebrand, Elgin.)

People v. Ocon, 2014 IL App (1st) 120912 (No. 1-12-0912, 2/21/14)

1. Supreme Court Rules 105 and 106 provide that notice for filing a section 2-1401 petition may be by summons, certified or registered mail, or publication. Once notice has been served, the responding party has 30 days to file an answer or otherwise appear. The notice requirements are designed to prevent one party from obtaining relief without first giving the opposing party an opportunity to appear and defend. Courts focus not on whether notice is formally and technically correct, but whether the intent of the notice provisions were substantially attained.

In **People v. Laugharn**, 233 Ill. 2d 318, the Illinois Supreme Court held that a trial court may not sua sponte dismiss a 2-1401 petition prior to the expiration of the 30-day period allowed for the State to respond. A premature dismissal before the petition is ripe for adjudication short circuits the proceedings and deprives the State of its properly allotted time "to answer or otherwise plead."

Here, defendant argued that by using regular mail he failed to properly serve the State with notice of his 2-1401 petition and hence the 30-day period never began to run. The trial court's dismissal of his petition was therefore premature. The Appellate Court rejected this argument, noting that an assistant State's attorney was present in court when the petition was docketed, giving the State actual notice of the filing. The purpose of service was achieved with actual notice, and the trial court's dismissal, which occurred after more than 30 days had passed, was proper.

2. Section 2-301 of the Code of Civil Procedure, detailing how a party may object to the court's personal jurisdiction, provides that a party may object to the court's personal jurisdiction on the ground of insufficiency of service by filing a motion to dismiss or to quash service of process. 735 ILCS 5/2-301 (a). It further provides that if the objecting party files a responsive pleading or motion prior to filing a motion to dismiss or quash for lack of proper service, the party waives all objections to personal jurisdiction. 735 ILCS 5/2-301(a-5).

In **People v. Maiden**, 2013 IL App (2d) 120016, the Second District concluded that in the absence of a responsive pleading, section 2-301 required the State to explicitly waive an objection to personal jurisdiction. Since the State did not do so, the **Maiden** court held that the 30-day period never commenced and the trial court acted prematurely when it dismissed the 2-1401 petition.

The Appellate Court disagreed with **Maiden's** interpretation of section 2-301. Nothing in section 2-301 requires a party to object to improper service. Instead, section 2-301 is permissive, stating that a party "may object" to improper service. Here, the State received actual notice in court of the defendant's petition, thereby satisfying the notice requirements of Rule 106. The State was permitted to object to the improper service, but it chose not to. Once 30 days had passed, the petition was ripe for adjudication and the trial court properly dismissed it.

(Defendant was represented by Assistant Defender Alison Shah, Chicago.)

People v. Prado, 2012 IL App (2d) 110767 (No. 2-11-0767, 11/2/12)

Section 2-1401 petitions must be served by summons, prepaid certified or registered mail, or publication. The court concluded that the trial court erred by dismissing a petition where the service was defective because the petitioner served the petition by regular mail.

The court stated that the dismissal was premature because the petitioner could properly serve the State and then ask to have the petition heard. If a reasonable period of time passed without the petitioner attempting to correct the deficient service, the trial court would have power to dismiss the case for want of prosecution or because the petitioner failed to

exercise reasonable diligence in serving the State. However, an immediate, *sua sponte* dismissal, even without prejudice, is premature and erroneous.

The court rejected the State's argument that the trial court acted properly by dismissing the petition with prejudice because judicial efficiency is not served by having a petition on file waiting for action which may or may not occur. The court reiterated that a *sua sponte* dismissal is premature when the State has not been properly served, and noted that "the law favors resolution on the merits and . . . dismissal for a technical service flaw should be a disfavored option." The court also stated that "[s]hould the State wish to make the disposition of cases such as this one more efficient, the best course would be to waive an objection to the defective service."

(Defendant was represented by Assistant Defender Steve Wiltgen, Elgin.)

People v. Serrano, 392 Ill.App.3d 1011, 912 N.E.2d 325 (1st Dist. 2009)

1. Under **People v. Whitfield**, 217 Ill.2d 177, 840 N.E.2d 658 (2005), due process is violated where a defendant pleads guilty in exchange for a specific sentence, but receives a more onerous sentence due to the application of the mandatory supervised release requirement. The court rejected the State's argument that a **Whitfield** claim may not be raised in a §2-1401 petition.

Section 2-1401 is intended to allow factual claims that would have precluded entry of the original judgment had the facts been known at the time of the judgment. The Illinois Supreme Court has recently stated that §2-1401 is not limited to correcting errors of facts, and may be used to challenge judgments that are legally defective. The court also noted that two recent Appellate Court cases have found that §2-1401 is a proper vehicle in which to raise a **Whitfield** claim.

2. Although §2-1401 petitions must normally be filed within two years after the trial, the statute of limitations is not a jurisdictional prerequisite and must be asserted by the State as an affirmative defense. Where defendant's 2-1401 petition was pending for approximately eight months before it was dismissed by the trial court, and the State filed no timely responsive pleadings or requests for extensions of time although an Assistant State's Attorney was in the courtroom when the petition was considered, the State forfeited its right to raise the statute of limitations as an affirmative defense. (See also **GUILTY PLEAS**, §24-6(d)).

(Defendant was represented by Assistant Defender Patrick Cassidy, Chicago.)

People v. Wallace, 405 Ill.App.3d 984, 938 N.E.2d 573 (2d Dist. 2010)

Defendant filed a 2-1401 petition with an affidavit of service that did not indicate on whom he served the petition or if it was by certified or registered mail. The trial court allowed the State's motion to dismiss on the ground that defendant had not utilized any appropriate form of service.

The Appellate Court held that the proper remedy for the failure to properly serve the State was to quash service, not dismiss the petition. Supreme Court Rule 103(b) allows a court to dismiss when defendant has not been diligent in obtaining service, but the State did not complain that defendant had not been diligent, the speed with which the court dismissed the petition suggests that was not the basis for the ruling, and defendant attempted to correct the service error by sending subsequent documents by certified mail. Dismissal is also a remedy under 735 ILCS 5/2-301(a), but that provision allows dismissal only where the respondent is not amenable to service in Illinois. Insufficiency of the service is remedied by quashing service, particular where the defect in service is technical and a statute of limitations makes the dismissal effectively with prejudice.

(Defendant was represented by Assistant Defender Jack Hildebrand, Elgin.)

People v. Wuebbels, ___ Ill.App.3d ___, 919 N.E.2d 1122 (4th Dist. 2009) (No. 4-09-0461, 12/15/09)

1. Section 2-1401 of the Code of Procedure establishes a comprehensive statutory procedure under which a final judgement older than 30 days can be vacated. Generally, 2-1401 petitions must be filed within two years after entry of the judgment. However, the two-year limitation does not apply to a petition which challenges a void order.

An order is void where the court which entered the judgment lacked: (1) jurisdiction over either the parties or the subject matter, or (2) the inherent power to enter the order. Any portion of a sentence which is unauthorized is void.

The court concluded that consecutive sentences are void where the trial court lacked authority to order such sentencing. Therefore, terms of 30 and 60 years to be served consecutively to a natural life sentence were void and could be challenged in a §2-1401 petition that was filed more than 11 years after the conviction.

2. In the course of its holding, the court noted that *de novo* review applies where the trial judge "enters a judgment on the pleadings or a dismissal in a §2-1401 proceeding." (See also **SENTENCING**, §45-9(a)).

The order denying defendant's §2-1401 petition was reversed, and the consecutive 30- and 60-year terms were modified to run concurrently to the natural life sentence.

(Defendant was represented by Assistant Defender Marty Ryan, Springfield.)

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§9-2(b)
Availability of Remedy

People v. Dodds, 2014 IL App (1st) 122268 (No. 1-12-2268, 2/27/14)

1. A §2-1401 petition authorizes the trial judge to vacate a judgement where facts are shown to exist which, had they been known at the time of trial, would have prevented the judgment from being entered. To obtain relief under §2-1401, the defendant must set forth specific factual allegations showing that he: (1) had a meritorious defense or claim; (2) exercised due diligence in presenting the defense or claim; and (3) exercised due diligence in filing the §2-1401 petition.

Generally, a §2-1401 petition must be filed within two years after judgment is entered. However, the two-year statute of limitations does not apply to petitions brought on voidness grounds, if there is a clear showing that the person seeking relief is under a legal disability or duress, or if the grounds for relief were fraudulently concealed. To make a successful showing of fraudulent concealment, the defendant must specifically allege facts demonstrating that the opposing party affirmatively attempted to prevent discovery of the grounds for relief and that the defendant acted in good faith and with reasonable diligence in trying to uncover such matters before trial or within the limitations period.

Where a §2-1401 petition is dismissed with prejudice on the pleadings, the standard of review is *de novo*.

2. The court accepted the State's concession that under these circumstances, defendant

could use a §2-1401 petition to argue that his plea was involuntary due to ineffective assistance of counsel. In 2001, defendant pleaded guilty to one count of possession of child pornography in return for a sentence of 18 months' probation and the requirement that he register as a sex offender for a period of 10 years. Shortly after the plea was entered, defendant filed a motion to clarify that the required registration period was 10 years and not life.

After the 10-year-period had expired, defendant was informed by the probation department that he would have to register as a sex offender for life. He filed a §2-1401 petition to vacate his plea, conviction and sentence.

In accepting the State's concession, the court noted that in **People v. Lawton**, 212 Ill.2d 285, 818 N.E.2d 326 (2004), the Illinois Supreme Court held that §2-1401 is not limited to errors of fact and may be used to raise ineffective assistance of counsel claims where relief under the Post-Conviction Hearing Act is unavailable. Here, defendant had completed his probation term and was ineligible to file a post-conviction petition.

People v. Henderson, 2011 IL App (1st) 090923 (No. 1-09-0923, 11/17/11)

1. The Post-Conviction Hearing Act provides that any person "imprisoned in the penitentiary" may seek relief under the Act. 725 ILCS 5/122-1(a). A remedy under the Act is only available to persons who are actually being deprived of their liberty, not persons who have completely served their sentences and merely wish to purge their criminal records of past convictions. Thus a defendant has standing under the Act so long as he is challenging a conviction for which he continues to serve some form of sentence. When a defendant's conviction is no longer an encumbrance on his liberty, he no longer needs assistance from the Act to secure his liberty, and the Act is no longer available to him.

2. The Appellate Court recognized that no court has previously addressed whether a defendant, who had standing under the Act to file a petition, subsequently loses standing when no portion of his sentence remains to be served. The court concluded that no meaningful distinction could be drawn between instances where a defendant's liberty is not encumbered when he files the petition and those instances in which a defendant regains his liberty after the petition is filed. In neither case is the purpose of the Act served by giving defendant relief.

Because defendant had completely served his sentence, including his MSR term, while his appeal from the dismissal of his post-conviction petition was pending, he no longer needed the Act's assistance to secure his liberty. Even if the cause were remanded, the trial court would be obligated to deny relief to defendant due to this defect. Therefore, the appeal from the dismissal of the petition was moot.

3. The Act allows summary dismissal at the first stage only where a defect renders the petition frivolous or patently without merit. 725 ILCS 5/122-2.1(a)(2). At the first stage, the court does not measure the petition's procedural compliance, only its substantive virtue.

The Act requires that the allegations of the petition be supported by "affidavits, records, or other evidence." 725 ILCS 5/122-2. The purpose of these affidavits is to show that the allegations can be objectively and independently corroborated, and therefore their absence can be the basis for a first-stage dismissal as they relate to the substance of the petition.

The Act also requires that the "proceedings shall be commenced by filing . . . a petition . . . verified by affidavit." 725 ILCS 5/122-1(b). The lack of notarization of the verification affidavit required by §122-1(b) does not qualify as the basis for a first-stage dismissal because that affidavit has no relation to the substance of defendant's allegations. The verification affidavit requirement merely confirms that the allegations are brought truthfully and in good faith.

The State can object to the lack of notarization at the second stage and appointed counsel can assist in arranging for notarization of the verification affidavit. The court found that addressing this defect at the second stage also comports with "practical considerations which arise in the prison system." Although not properly before the court, a memorandum written by a IDOC employee that was attached to defendant's reply brief stated that notaries are not always available in prisons. Defendant's affidavit in **People v. Wilborn**, 2011 IL App (1st) 092802, also indicated that prisoners lack the ability to have affidavits notarized.

(Defendant was represented by Assistant Defender Pamela Rubeo, Chicago.)

People v. Stone, 2013 IL App (1st) 111344 (No. 1-11-1344, 3/29/13)

Section 2-1401 allows relief from judgments more than 30 days but not more than two years after their entry, provided the petition proves certain elements by a preponderance of the evidence. 735 ILCS 5/2-1401. Petitions brought on voidness grounds need not be brought within the two-year time limitation. The allegation that the judgment or order is void also substitutes for and negates the need to allege a meritorious defense and due diligence.

An allegation that a sentence is void can be made for the first time on appeal because a void sentence can be attacked at any time.

On appeal from the dismissal of his §2-1401 petition, defendant could argue for the first time that his plea agreement for illegal concurrent sentences was void.

(Defendant was represented by Assistant Defender Michael Orenstein, Chicago.)

People v. Walker, 395 Ill.App.3d 860, 918 N.E.2d 1260 (2d Dist. 2009)

Rejecting the authority of **Village of Glenview v. Buschelman**, 296 Ill.App.3d 35, 693 N.E.2d 1242 (1st Dist. 1998), the court found that a trial judge has jurisdiction to consider successive §2-1401 petitions. "[N]othing in Illinois law . . . supports that a party is limited jurisdictionally to one section 2-1401 petition."

(Defendant was represented by Assistant Defender Linda Johnson, Elgin.)

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§9-2(c)
Timely Filing Requirement

People v. Davis, 2012 IL App (4th) 110305 (No. 4-11-0305, 3/5/12)

1. Although §2-1401 petitions are normally subject to a two-year statute of limitations, no statute of limitations applies to petitions based on newly discovered evidence obtained through DNA testing under 725 ILCS 5/116-3. Section 116-3 authorizes post-conviction forensic testing of evidence where the testing in question was not available at the time of trial.

Newly discovered evidence warrants a new trial where the evidence is of such character that it could not have been discovered before trial by the exercise of due diligence, is material and not merely cumulative, and is of such conclusive character that it will probably change the result on retrial. Under most circumstances, the trial court's ruling on a §2-1401 petition is reviewed for abuse of discretion. However, *de novo* review is appropriate where the petition is based on an interpretation of the Supreme Court Rules or is dismissed without a response by the State and is therefore equivalent to a dismissal for failing to state a cause of action.

2. To obtain relief through a §2-1401 proceeding, the petitioner is required to show due diligence in two respects - in presenting the claim or defense in the original action, and in filing the §2-1401 petition. The court concluded that defendant showed due diligence with respect to the original action because the newly discovered evidence - DNA testing which exculpated the defendant - was not available at the time of the trial.

Defendant also showed due diligence with respect to presenting the §2-1401 petition where he filed the petition within four months after he learned the result of the new DNA testing.

The court rejected the State's argument that the defendant was also required to show that he sought DNA testing as soon as practicable after such testing became available. Thus, defendant did not fail to show due diligence although he filed the §2-1401 petition several years after the testing in question became available.

The court also stated that had there been a requirement to show diligence in seeking testing, defendant could have made the necessary showing although he requested the testing six years after it became available. Because defendant was imprisoned in a maximum security prison, was not represented by counsel, and was indigent, he "did not wilfully disregard the process of the court and . . . was not so indifferent to it that he is chargeable with culpable negligence."

3. The State conceded that defendant met three of the four requirements for a new trial based on newly discovered evidence. The only issue on appeal was whether the evidence - DNA testing exculpating the defendant and identifying another person as the source of semen and blood recovered at the scene - was of such character as to likely change the result on retrial. Whether defendant satisfied this requirement depends not on whether it is likely that defendant would be acquitted in a retrial, but on whether the likelihood of a different result on retrial is sufficient to undermine confidence in the conviction.

Because the State's theory of the case at trial was based on expert testing of blood and semen evidence which allegedly showed that defendant was within the 20% of the male population which could have produced the blood and semen found at the scene, the serological evidence was the central physical evidence supporting the State's theory, and no other person was considered as a possible perpetrator, the court found that DNA testing excluding the defendant as a possible donor of the material and identifying another suspect was of sufficient magnitude to undermine confidence in the conviction. Thus, defendant was entitled to a new trial.

The trial court's order denying defendant's §2-1401 petition was reversed and the cause remanded for a new trial.

People v. Dodds, 2014 IL App (1st) 122268 (No. 1-12-2268, 2/27/14)

1. A §2-1401 petition authorizes the trial judge to vacate a judgement where facts are shown to exist which, had they been known at the time of trial, would have prevented the judgment from being entered. To obtain relief under §2-1401, the defendant must set forth specific factual allegations showing that he: (1) had a meritorious defense or claim; (2) exercised due diligence in presenting the defense or claim; and (3) exercised due diligence in filing the §2-1401 petition.

Generally, a §2-1401 petition must be filed within two years after judgment is entered. However, the two-year statute of limitations does not apply to petitions brought on voidness grounds, if there is a clear showing that the person seeking relief is under a legal disability or duress, or if the grounds for relief were fraudulently concealed. To make a successful showing of fraudulent concealment, the defendant must specifically allege facts demonstrating

that the opposing party affirmatively attempted to prevent discovery of the grounds for relief and that the defendant acted in good faith and with reasonable diligence in trying to uncover such matters before trial or within the limitations period.

Where a §2-1401 petition is dismissed with prejudice on the pleadings, the standard of review is *de novo*.

2. The court accepted the State's concession that under these circumstances, defendant could use a §2-1401 petition to argue that his plea was involuntary due to ineffective assistance of counsel. In 2001, defendant pleaded guilty to one count of possession of child pornography in return for a sentence of 18 months' probation and the requirement that he register as a sex offender for a period of 10 years. Shortly after the plea was entered, defendant filed a motion to clarify that the required registration period was 10 years and not life.

After the 10-year-period had expired, defendant was informed by the probation department that he would have to register as a sex offender for life. He filed a §2-1401 petition to vacate his plea, conviction and sentence.

In accepting the State's concession, the court noted that in **People v. Lawton**, 212 Ill.2d 285, 818 N.E.2d 326 (2004), the Illinois Supreme Court held that §2-1401 is not limited to errors of fact and may be used to raise ineffective assistance of counsel claims where relief under the Post-Conviction Hearing Act is unavailable. Here, defendant had completed his probation term and was ineligible to file a post-conviction petition.

People v. Donelson, 2011 IL App (1st) 092594 (No. 1-09-2594, 11/9/11)

Where the applicable statutes required consecutive sentences for first degree murder, home invasion, and aggravated criminal sexual assault, the trial court entered a void sentence by imposing concurrent sentences of 50, 30, and 30 years, respectively. Because a void sentence can be corrected at any time, defendant could raise the issue by a §2-1401 petition filed outside the normal two-year statute of limitations.

The court rejected defendant's request to vacate his plea, however, finding that the plea agreement was not void and that the appropriate remedy was to vacate the sentences and remand the cause for resentencing. A plea agreement is void where an essential term of the agreement is unforceable or illegal under the relevant statutes. Whether a term or aspect of the agreement was essential is determined by its relative importance in light of the entire agreement.

Here, the essential terms of the plea agreement included that defendant entered a guilty plea to certain charges in return for a total sentence of 50 years. The court acknowledged that a plea agreement would be void if the agreed sentence could not be imposed under the relevant statutes; here, however, a total of 50 years could be imposed as consecutive sentences under the authorized sentencing ranges for the offenses. Because the essential terms of the plea agreement could be satisfied under the applicable statutes, remand for resentencing was appropriate.

Defendant's sentences were vacated and the cause remanded for imposition of consecutive sentences totaling the 50-year sentence contemplated by the plea agreement.

(Defendant was represented by Assistant Defender Jessica Pamon, Chicago.)

People v. Gray, 2013 IL App (1st) 112572 (No. 1-11-2572, 4/11/13)

Section 2-1401 establishes a comprehensive statutory procedure allowing for vacatur of final judgments older than 30 days. 735 ILCS 5/2-1401. With certain exceptions, the petition must be filed not later than two years after entry of the order or judgment. The two-year

limitation does not apply to petitions brought on voidness grounds.

A judgment is void, rather than voidable, only if the court that entered it lacked jurisdiction because the court lacked personal or subject matter jurisdiction, or the power to render the particular judgment. Jurisdiction or the power to render a particular judgment does not mean that the judgment rendered must be the one that should have been rendered. A court will not lose jurisdiction merely because it makes a mistake in the law or the facts or both.

That which is unconstitutional is not necessarily void. A statute that is unconstitutional on its face – that is, where no set of circumstances exist under which it would be valid – is void *ab initio*. A statute that is merely unconstitutional as applied is not.

Miller v. Alabama, 567 U.S. ___, 132 S. Ct. 2455, ___ L.Ed.2d ___ (2012), held that the mandatory imposition of natural-life imprisonment on offenders under age 18 violates the Eighth Amendment. Because **Miller** does not affect the validity of the natural-life-imprisonment statute as to adults, and does not divest a court of the authority to sentence a minor to natural life, a judgment imposing a mandatory natural-life sentence on a minor is merely voidable, not void.

Defendant challenged his natural-life sentence under **Miller** in a §2-1401 petition, but did not file the petition within the two-year statutory limitation. Because the judgment was only voidable and not void, the petition was not timely filed.

(Defendant was represented by Assistant Defender Rachel Moran, Chicago.)

People v. Hubbard, 2012 IL App (2d) 101158 (No. 2-10-1158, 1/9/12)

1. A judgment is void only when it is entered by a court lacking jurisdiction. There are three elements of jurisdiction: (1) personal jurisdiction; (2) subject-matter jurisdiction; and (3) the power to render the particular judgment or sentence. A court does not lose jurisdiction because it makes a mistake in determining either the facts, the law, or both.

Judgments entered in violation of due process are not void. Therefore, a guilty plea that is involuntary because the court misadvised defendant of the sentencing range is not void.

2. The United States Supreme Court in **Boykin v. Alabama**, 395 U.S. 238 (1969), characterized an involuntary guilty plea as void, and the Illinois Supreme Court adopted that language in **People v. Williams**, 188 Ill.2d 365, 721 N.E.2d 539 (1999). But in cases where the voidness of a judgment has been specifically at issue, the Illinois Supreme Court has consistently held that a judgment is void only where the court lacks jurisdiction. Therefore, reliance on federal cases and **Williams** for the proposition that an involuntary guilty plea is void is misplaced.

3. Federal law characterizing a judgment as void is meant only to distinguish a judgment that is subject to collateral attack from a voidable judgment that is not subject to a collateral attack. A collateral attack in this context means an action or proceeding that has an independent purpose and contemplates some other relief or result. A post-conviction proceeding or a proceeding on a petition for relief from judgment (735 ILCS 5/2-1401) is not a collateral attack in this sense because the sole purpose of the proceeding is to overturn an existing judgment. A voidable judgment such as an involuntary guilty plea may be attacked in a post-conviction or §2-1401 proceeding.

Because defendant's guilty plea was not void and therefore not subject to attack at any time, the court properly found that defendant's §2-1401 petition challenging his guilty plea as involuntary was untimely.

People v. Moran, 2012 IL App (1st) 111165 (No. 1-11-1165, 8/30/12)

1. 735 ILCS 5/2-1401(f) authorizes collateral relief from a criminal conviction where there is: (1) evidence of a defense or claim which would have precluded entry of judgement in the original action, and (2) diligence both in discovering the defense or claim and presenting the petition. Generally, §2-1401 petitions must be filed within two years of the entry of judgement, excluding time during which the petitioner is under legal disability or duress or the ground for relief is fraudulently concealed. However, the two-year limitation period does not apply to petitions brought on the ground that the judgement is void.

2. A judgement is void only if the court which entered it lacked jurisdiction. A judgement is voidable, rather than void, where it is entered erroneously by a court which had jurisdiction.

Jurisdiction involves three elements: (1) personal jurisdiction, (2) subject matter jurisdiction, and (3) the power to enter the particular judgement or sentence in question. Concerning the third element, the power to render a particular judgement does not mean that the judgement must be proper. Instead, the authority to issue a judgement includes the power to decide an issue incorrectly. Once a court has acquired jurisdiction, an error in the exercise of jurisdiction does not terminate the jurisdiction.

3. Where the defendant pleaded guilty to armed robbery and felony murder predicated on armed robbery in exchange for a 39-year sentence for felony murder and a consecutive six-year sentence for armed robbery, the two-year statute of limitations applied although the trial court erred by entering judgement and imposing sentences on both felony murder and its predicate. The trial court had authority to impose a conviction and sentence for felony murder as well as authority to impose a conviction and sentence for armed robbery. However, it was error to impose convictions and sentences for both offenses where armed robbery was the predicate for felony murder. Although the judgement was erroneous, the error did not deprive the trial court of its jurisdiction or inherent power to enter the convictions and sentences.

Because the court had jurisdiction, the judgement was voidable rather than void. The two-year statute of limitations applied, therefore, and the trial court erred by finding that the judgement was void and could be challenged by a §2-1401 petition filed more than seven years after the convictions were entered.

4. The court distinguished **People v. Arna**, 168 Ill. 2d 107, 658 N.E.2d 445 (1995) and **People v. Brown**, 225 Ill. 2d 188, 866 N.E.2d 1163 (2007), which held that a sentence which exceeds the statutory maximum or violates the constitution is void. The court noted that neither **Arna** nor **Brown** concerned the improper imposition of multiple convictions for the same offense. Furthermore, imposing an unavailable sentence renders the trial court's judgement void because the judgement exceeds the court's legislatively proscribed powers. By contrast, entering multiple convictions on a single offense is merely an improper exercise of those powers. In the latter instance, the judgement is voidable rather than void.

Because the trial court erroneously denied the State's motion to dismiss defendant's §2-1401 petition as untimely, the trial court's order granting relief was reversed.

(Defendant was represented by Assistant Defender Arianne Stein, Chicago.)

People v. Santana, 401 Ill.App.3d 663, 931 N.E.2d 273 (2d Dist. 2010)

In **People v. Morris**, 236 Ill.2d 345, ___ N.E.2d ___ (2010), the Supreme Court held that its decision in **People v. Whitfield**, 217 Ill.2d 177, 840 N.E.2d 658 (2005), does not apply retroactively to convictions that were final when **Whitfield** was announced. **Whitfield** held that a defendant may seek reduction of his sentence of imprisonment by the length of the applicable MSR (mandatory supervised release) term, where the court fails to admonish him that his sentence includes the MSR term when he enters a negotiated plea of guilty.

Upon remand from the Supreme Court for reconsideration in light of **Morris**, the court held:

1. Defendant's assertion of his **Whitfield** claim in a 2-1401 petition was untimely because 735 ILCS 5/2-1401 provides that such petitions must be filed within two years of the date of judgment. The judgment was not void and subject to attack at any time because mere absence of the MSR admonition did not deprive the court of the authority to sentence defendant.

2. By statute (725 ILCS 5/122-1(d)), the circuit court was not required to recharacterize the 2-1401 petition as a post-conviction petition. The court declined to follow **People v. Smith**, 386 Ill.App.3d 473, 898 N.E.2d 119 (5th Dist. 2008), finding it questionable authority and distinguishable, because the petition in **Smith** would have been timely if considered as a post-conviction petition, whereas the petition at bar was timely whether considered as a post-conviction or a 2-1401 petition.

3. Because defendant's conviction was final when **Whitfield** was announced in that he had taken no direct appeal, defendant was not entitled to application of **Whitfield**.

The court affirmed the dismissal of the 2-1401 petition.

(Defendant was represented by Assistant Defender Yasemin Eken, Elgin.)

People v. Serrano, 392 Ill.App.3d 1011, 912 N.E.2d 325 (1st Dist. 2009)

1. Under **People v. Whitfield**, 217 Ill.2d 177, 840 N.E.2d 658 (2005), due process is violated where a defendant pleads guilty in exchange for a specific sentence, but receives a more onerous sentence due to the application of the mandatory supervised release requirement. The court rejected the State's argument that a **Whitfield** claim may not be raised in a §2-1401 petition.

Section 2-1401 is intended to allow factual claims that would have precluded entry of the original judgment had the facts been known at the time of the judgment. The Illinois Supreme Court has recently stated that §2-1401 is not limited to correcting errors of facts, and may be used to challenge judgments that are legally defective. The court also noted that two recent Appellate Court cases have found that §2-1401 is a proper vehicle in which to raise a **Whitfield** claim.

2. Although §2-1401 petitions must normally be filed within two years after the trial, the statute of limitations is not a jurisdictional prerequisite and must be asserted by the State as an affirmative defense. Where defendant's 2-1401 petition was pending for approximately eight months before it was dismissed by the trial court, and the State filed no timely responsive pleadings or requests for extensions of time although an Assistant State's Attorney was in the courtroom when the petition was considered, the State forfeited its right to raise the statute of limitations as an affirmative defense. (See also **GUILTY PLEAS**, §24-6(d)).

(Defendant was represented by Assistant Defender Patrick Cassidy, Chicago.)

People v. Stone, 2013 IL App (1st) 111344 (No. 1-11-1344, 3/29/13)

Section 2-1401 allows relief from judgments more than 30 days but not more than two years after their entry, provided the petition proves certain elements by a preponderance of the evidence. 735 ILCS 5/2-1401. Petitions brought on voidness grounds need not be brought within the two-year time limitation. The allegation that the judgment or order is void also substitutes for and negates the need to allege a meritorious defense and due diligence.

An allegation that a sentence is void can be made for the first time on appeal because a void sentence can be attacked at any time.

On appeal from the dismissal of his §2-1401 petition, defendant could argue for the first

time that his plea agreement for illegal concurrent sentences was void.

(Defendant was represented by Assistant Defender Michael Orenstein, Chicago.)

People v. Wuebbels, ___ Ill.App.3d ___, 919 N.E.2d 1122 (4th Dist. 2009) (No. 4-09-0461, 12/15/09)

1. Section 2-1401 of the Code of Procedure establishes a comprehensive statutory procedure under which a final judgement older than 30 days can be vacated. Generally, 2-1401 petitions must be filed within two years after entry of the judgment. However, the two-year limitation does not apply to a petition which challenges a void order.

An order is void where the court which entered the judgment lacked: (1) jurisdiction over either the parties or the subject matter, or (2) the inherent power to enter the order. Any portion of a sentence which is unauthorized is void.

The court concluded that consecutive sentences are void where the trial court lacked authority to order such sentencing. Therefore, terms of 30 and 60 years to be served consecutively to a natural life sentence were void and could be challenged in a §2-1401 petition that was filed more than 11 years after the conviction.

2. In the course of its holding, the court noted that *de novo* review applies where the trial judge "enters a judgment on the pleadings or a dismissal in a §2-1401 proceeding." (See also **SENTENCING**, §45-9(a)).

The order denying defendant's §2-1401 petition was reversed, and the consecutive 30- and 60-year terms were modified to run concurrently to the natural life sentence.

(Defendant was represented by Assistant Defender Marty Ryan, Springfield.)

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§9-3
***Mandamus*, Prohibition, and Supervisory Orders**

§9-3(a)
Mandamus

Cordrey v. Illinois Prisoner Review Board, 2014 IL 117155 (No. 117155, 11/20/14)

1. *Mandamus* is an extraordinary remedy and is used to enforce the performance of official duties by a public officer where no exercise of discretion on the part of the officer is involved. A writ of *mandamus* will be awarded only if a plaintiff establishes a clear right to relief, a clear duty by a public official to act, and clear authority in the public official to comply with the writ. In addition, there must be no other adequate remedy.

Mandamus is improper where the court's discretion or judgment will be substituted for that of the official. Only issues of law will be considered in original actions for *mandamus*. If factual questions are present, *mandamus* is an inappropriate remedy.

2. Here, *mandamus* was sought to prohibit the Department of Correction practice of placing sex offenders on MSR but immediately violating the inmate "at the door" of the prison for not having an adequate host site. The complaint alleged that due process and equal protection were violated because affluent inmates can generally find suitable housing, but indigent persons are unable to do so and therefore are required to serve their MSR terms in prison. Defendant sought *mandamus* to compel the Prisoner Review Board and the warden

to release him to serve MSR at a suitable host site outside the prison.

The court concluded that the complaint was insufficient to establish a clear right to relief, a clear duty on the part of a public official to act, and clear authority on the part of the official to comply with the writ. Both the Prisoner Review Board and DOC have statutory authority with regard to MSR. The Prisoner Review Board has wide discretion in setting the conditions of MSR and determining whether revocation of MSR is warranted, while DOC maintains custody of inmates who are placed on MSR and provides supervision. The court noted that it is DOC, and not the Review Board, that is statutorily required to assist an inmate in finding a suitable host site.

Furthermore, DOC's obligation is to assist the inmate in finding a site; it has no obligation to actually find a suitable site. "Under these circumstances, defendant failed to establish that "respondents have the authority, let alone a duty," to release an inmate on MSR when no suitable host site has been found.

3. Even where the requirements for a writ of *mandamus* have not been met, the court may consider a *mandamus* petition which presents a novel issue that is of crucial importance to the administration of justice. However, the petition in this case did not present an issue concerning the constitutionality of denying MSR based upon indigency.

The court found that the record presented factual issues concerning whether indigent inmates are treated disparately from wealthy inmates concerning release on MSR, and that the limited record available indicated that defendant's inability to find a suitable host site was due to his status as a sex offender rather than because he was indigent.

The petition for writ of *mandamus* was denied.

People ex rel. Alvarez v. Skryd, 241 Ill.2d 34, 944 N.E.2d 347 (2011)

The Illinois Constitution confers on the Illinois Supreme Court discretionary original jurisdiction to hear *mandamus* cases. Ill.Const. 1970, Art. IV, § 4(a). *Mandamus* is an appropriate remedy to correct an order entered by a court that erroneously assumes jurisdiction it does not possess.

In an original action to review a judicial act, the judge is only a nominal party. Counsel for the prevailing party below may file papers for that party, but shall not file any paper in the name of the judge.

Only issues of law will be considered in an original *mandamus* proceeding. The parties must attach to their pleadings only those portions of the record relevant to their respective legal arguments.

People ex rel. Birkett v. Konetski et al., 233 Ill.2d 185, 909 N.E.2d 783 (2009)

1. *Mandamus* is an extraordinary remedy which may be utilized to force the performance by a public officer of nondiscretionary official duties. *Mandamus* will be granted only if the petitioner shows a clear right to the requested relief, a clear duty on the part of public officers to act, and clear authority by the public officer to comply with the order. *Mandamus* will not be granted where the act in question involves the exercise of an official's discretion.

2. The court granted *mandamus* to compel the trial court to vacate an order exempting a juvenile delinquent from the requirement that he register as a sex offender. (See **SEX OFFENSES**, §46-7).

People ex rel. Birkett v. Dockery, 235 Ill.2d 73, 919 N.E.2d 311 (2009)

1. *Mandamus* is an extraordinary remedy intended to enforce a public officer's performance of an official, ministerial duty. *Mandamus* will lie only when the movant shows a clear affirmative duty on the part of the public official and clear authority on the part of the public official to comply with the writ. *Mandamus* will not lie when the act in question concerns an exercise of the official's discretion.

2. Because the trial court has discretion to decide whether to use a six-person jury, *mandamus* does not lie to preclude use of a jury of less than 12. (See **JURY**, §§31-1, 31-2.)

People ex rel. Glasgow v. Kinney, 2012 IL 113197 (No. 113197, 5/24/12)

Mandamus is an extraordinary remedy used to compel a public official to perform a purely ministerial duty not involving the exercise of discretion. *Mandamus* will be awarded only if the petitioner establishes a clear right to the relief requested, a clear duty by the public official to act, and clear authority in the public official to comply.

Where the trial court believed that it was compelled by Appellate Court precedent to exclude defendant's prior uncounseled misdemeanor DUI conviction from being used to enhance a subsequent sentence to a non-probationable Class 2 felony, but the authority on which the Appellate Court precedent rested had been overruled by the U.S. Supreme Court, the court granted *mandamus* and ordered the trial court to sentence the defendant in accordance with the enhanced sentencing law.

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§9-3(b)
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§9-4
State *Habeas Corpus*

(Note: Under 735 ILCS §5/10-102, a person "imprisoned or otherwise restrained of his or her liberty . . . may apply for habeas corpus . . . to obtain relief from such imprisonment or restraint, if it proved to be unlawful.")

People v. Rios, 2013 IL App (1st) 121072 (No. 1-12-1072, 11/26/16)

1. *Habeas corpus* relief is available only for the grounds specified by the Code of Civil Procedure. These grounds fall into two general categories: (1) where the prisoner was incarcerated by a court which lacked personal or subject matter jurisdiction, and (2) where an occurrence subsequent to the conviction entitles the prisoner to immediate release.

Jurisdiction lies with the court itself, and not with an individual judge. Subject matter

jurisdiction is afforded by the constitution, and personal jurisdiction is obtained when a defendant appears before the court.

2. The "*de facto* doctrine" provides that a person who performs the duties of an officer under color of title is an officer *de facto*. The acts of such a person are valid with respect to the public or third parties, and are not subject to collateral attack.

The "*de facto* doctrine" applied where the judge who presided over the trial at which defendant was convicted of first degree murder and aggravated discharge of a firearm was subsequently placed on administrative leave and eventually removed from office because he misrepresented his residency in order to run for election and remain in office. Because the conviction was obtained with subject matter and personal jurisdiction, the convictions were not subject to *habeas* relief despite the judge's fraud.

The court distinguished this case from **People v. Kelly**, 2012 IL App (1st) 101521, in which the petitioner appealed from the second-stage dismissal of a post-conviction petition which alleged that the right to a fair trial was denied because the trial judge obtained his judgeship through fraud. In **Kelly**, the issue was whether a substantial violation of a constitutional right had been sufficiently shown to withstand dismissal at the second stage of post-conviction proceedings. Here, the issue was whether *habeas corpus* relief was justified because the trial court lacked personal or subject matter jurisdiction.

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§9-5
Federal *Habeas Corpus*

§9-5(a)
Generally

Beard v. Kindler, ___ U.S. ___, 130 S.Ct. 612, ___ L.Ed.2d ___ (2009) (No. 08-992, 12/8/09)

A federal *habeas* court will not review a claim that has been rejected by a state court if the decision of the lower court rests on a state law ground that is independent of the federal issue and adequate to support the judgment. Whether a state procedural ruling is an adequate State ground is a question of federal law. A state rule is an adequate and independent ground where it is firmly established and regularly followed.

A discretionary state procedural rule can serve as an adequate and independent ground to bar federal *habeas* review, if the rule is firmly established and regularly followed. Although the exercise of discretion may permit consideration of some federal claims but not others, a contrary holding would pose an unnecessary dilemma for States, which could preserve flexibility by granting discretion to excuse procedural errors but only at the cost of undermining the finality of its own judgments and incurring the costs of federal review. The court stated its belief that many states would opt to enact mandatory rules in order to avoid federal review, but that discretionary rules are often more desirable for purposes of achieving just results.

Florida v. Powell, ___ U.S. ___, 130 S.Ct. 1195, 175 L.Ed.2d 1009 (2010) (No. 08-1175, 2/23/10)

The United States Supreme Court will not review a state court decision which rests on a State ground that is independent of the federal question and adequate to support the judgment. There was no independent and adequate state ground for a Miranda decision where

the Florida Supreme Court invoked the Florida constitution but also treated State and federal law as interchangeable and interwoven. (See **APPEAL**, §2-6(a)).

Harrington v. Richter, ___ U.S. ___, 131 S.Ct. 770, 178 L.Ed.2d 624 (2011) (No. 09-587, 1/19/11)

1. Under 28 U.S.C. §2254(d), federal *habeas corpus* relief is available on a state conviction which was adjudicated on the merits in state court proceedings only if that adjudication resulted in a decision which is: (1) contrary to or involves an unreasonable application of clearly established federal law, or (2) is based on an unreasonable determination of the facts in light of the evidence. Section 2254(d) does not require the state court to issue a statement of reasons for its decision; where the state court decision is unaccompanied by an explanation, the *habeas* petitioner must show that there were no reasonable grounds on which the State court decision could be based.

The court rejected the argument that the §2254(d) standard applies only if the state court expressly stated that it was adjudicating the claim on the merits. When a federal claim is presented to the state court and relief is denied, it is presumed that the decision is based on the merits unless there is an indication or a state law procedural principle suggesting the contrary. This presumption may be overcome by a showing that there is a more likely explanation for the decision.

2. Where a *habeas* petition claims that trial counsel was ineffective, the petitioner must both satisfy the **Strickland** standard for ineffectiveness (by showing that counsel's actions were objectively unreasonable and that effective representation would result in a substantial likelihood of a different result at trial) and the §2254(d) standard (by showing that the state court's application of **Strickland** was unreasonable). An *unreasonable* application of the law is not the same as an *incorrect* application. Where fair-minded jurists could disagree about the correctness of the State court decision, §2254(d) has not been satisfied.

3. The Supreme Court concluded that the Court of Appeals erred by finding that the petitioner was entitled to *habeas* relief because defense counsel was incompetent. (See **COUNSEL**, §§13-4(a)(1), 13-4(a)(2), 13-4(b)(1)(b), 13-4(b)(3), 13-4(b)(6)(b)). Because the case is on *habeas* review and the State court acted reasonably, its decision must be affirmed.

Holland v. Florida, ___ U.S. ___, 130 S.Ct. 2549, 177 L.Ed.2d 130 (2010)

As a matter of first impression, the Supreme Court held that the one-year statute of limitations for filing a federal *habeas corpus* petition is subject to "equitable tolling." To toll the limitation period, the petitioner must show that he pursued his rights diligently and that some "extraordinary circumstance" prevented a timely filing. Whether the limitation should be tolled is decided on a case-by-case basis.

The court remanded the cause to the Court of Appeals to determine whether the statute of limitations should be tolled where appointed counsel failed to respond to several attempts by a capital defendant to insure that the filing deadline was met.

Maples v. Thomas, ___ U.S. ___, ___ S.Ct. ___, ___ L.Ed.2d ___ (2012) (No. 10-63, 1/18/12)

1. Generally, a federal court *habeas* court will not review claims concerning a State conviction where the State court declined to address the same issues because the prisoner failed to meet a State procedural requirement, and the State judgment rests on an independent and adequate state procedural ground. Review is allowed, however, if the prisoner can show "cause" for the procedural default and actual "prejudice" from the alleged violation of federal law. "Cause" exists where some factor external to the petitioner, and which

cannot be fairly attributed to him, impeded his efforts to comply with the procedural rule.

Because an attorney is the agent of the client, the latter bears the risk of negligent conduct by counsel. Thus, negligence by post-conviction counsel does not usually qualify as "cause" for failing to comply with a State procedural requirement.

2. Under the unique circumstances of this case, however, counsel's failure to act was sufficient "cause" to excuse the failure to comply with the filing deadline for a notice of appeal in State courts. Defendant was a death row post-conviction petitioner in Alabama. In Alabama, indigent capital post-conviction petitioners are not entitled to counsel at state expense, but must rely on volunteer attorneys, usually from large, out-of-state law firms. Such *pro bono* attorneys are required to associate with a local attorney, whose name is required to appear on all notices and documents and who is deemed jointly responsible for the case.

Defendant was represented in post-conviction proceedings by two *pro bono* attorneys from a large New York law firm, and by an Alabama attorney who appeared solely for the purpose of allowing the *pro bono* volunteers to act in Alabama courts. Despite the Alabama rule that local counsel was jointly responsible for the case, the Alabama attorney stated throughout the proceeding that his role was solely to allow the *pro bono* New York attorneys to appear and that he lacked the resources, time and experience to deal with substantive issues in a death penalty case.

While the post-conviction petition was pending in the Alabama trial court, both *pro bono* attorneys left their law firm and accepted jobs at which they were prohibited from doing outside work. Neither attorney notified defendant that they were no longer representing him, however, and neither sought the trial court's leave to withdraw. No other attorneys from the New York firm entered an appearance on the defendant's behalf, moved to substitute as counsel, or notified the trial court of any change in defendant's representation.

Some nine months after the *pro bono* attorneys left their firm, the trial court denied the post-conviction petition without holding a hearing. The clerk of the court mailed copies of the order to the two New York attorneys, at their previous firm's address, and to the local Alabama attorney. The notices to the New York law firm were returned to the clerk stamped as undeliverable. The clerk took no further action, although he had personal phone numbers and home addresses of the *pro bono* attorneys.

The Alabama attorney received a copy of the order, but did not act on it because he assumed that the *pro bono* attorneys would file an appeal.

The time period for filing a notice of appeal expired without any action being taken on defendant's behalf. Approximately a month later, an Assistant Attorney General sent a letter to defendant stating that the time for filing a notice of appeal had expired and that defendant had four weeks to file a federal *habeas* petition. Defendant immediately contacted his mother, who contacted the New York law firm. The firm then asked the trial court to reissue its order and restart the 40-day period for filing a notice of appeal. When the trial court denied the motion, the defendant unsuccessfully petitioned the Alabama Court of Criminal Appeals for leave to file an out-of-time appeal.

The U.S. Supreme Court found that defendant showed sufficient "cause" to excuse his failure to comply with Alabama's time requirement for a notice of appeal. Although negligence by post-conviction counsel is not generally "cause" for failing to comply with a state procedural requirement, an exception to the general rule applies where counsel abandons the defendant without notifying him that he is no longer being represented.

Furthermore, no principal-agent relationship exists once an attorney severs his relationship with a client. Thus, a defendant cannot be bound by a failure to act by an attorney who does not purport to represent him. "[C]ommon sense dictates that a litigant cannot be

held constructively responsible for the conduct of an attorney who is not operating as his agent in any meaningful sense of that word." (Quoting concurring opinion of Justice Alito, **Holland v. Florida**, 560 U.S. 2549 (2010)).

The court also noted that under Alabama law, only the attorney of record, and not the defendant, is entitled to receive notice from the clerk. Thus, not only did defendant lack knowledge that his attorneys had abandoned the representation, but he had no way of knowing that the court had ruled on his petition.

3. The court rejected the argument that other attorneys in the New York law firm continued to represent the defendant after the *pro bono* attorneys left the firm. The record was unclear on what role, if any, the other attorneys played before they learned that the time for filing a notice of appeal had expired. Furthermore, although three attorneys came forward after being notified that the time period for filing a notice of appeal had expired, they were not admitted to practice law in Alabama, had not entered appearances on defendant's behalf, and had not informed the Alabama court that they wished to substitute for the two *pro bono* attorneys. Thus, none of the three attorneys had legal authority to act on defendant's behalf before the time to appeal expired.

The court also rejected the argument that the local Alabama counsel represented the defendant, noting that from the beginning of the case the local attorney had indicated that he would serve as counsel solely as a formality to allow the two *pro bono* attorneys to appear in Alabama court. Although counsel's failure to act on the behalf of the defendant was inconsistent with Alabama law, defendant could not be held responsible for inaction by an attorney who expressly stated that he was not acting on defendant's behalf. The court also noted that even the State did not treat the local attorney as counsel for the defendant; the Assistant Attorney General's decision to send his letter directly to the defendant rather than to counsel indicated that he did not believe defendant had representation.

The decision of the Eleventh Circuit Court of Appeals was reversed, and the cause was remanded for the court to decide whether the defendant could satisfy the prejudice requirement of the "cause" and "prejudice" test.

4. In dissent, Justice Scalia and Thomas found that even if the two *pro bono* attorneys abandoned the defendant before the trial court denied the post-conviction petition, defendant should be deemed to have been represented by the entire law firm and not solely by the two attorneys who had entered appearances. The dissenters also held that under Alabama law, the local attorney was required to at least track local court orders and advise *pro bono* counsel of impending deadlines.

Metrish v. Lancaster, ___ U.S. ___, ___ S.Ct. ___, ___ L.Ed.2d ___ (2013) (No. 12-547, 5/20/13)

1. To obtain federal habeas relief under AEDPA, a state prisoner must show that the challenged state-court ruling unreasonably applied clearly-established federal law, as determined by the Supreme Court of the United States. 28 U.S.C. §2254(d)(1). This standard is difficult to meet. The state-court ruling must rest on an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.

2. Defendant contended that the state court unreasonably applied federal law as established in **Bouie v. City of Columbia**, 378 U.S. 347 (1964), and **Rogers v. Tennessee**, 532 U.S. 451 (2001), when it concluded that due process was not violated by the retroactive application of a state Supreme Court decision holding that the diminished-capacity defense could not be invoked by criminal defendants. The state Supreme Court had held that criminal defendants could no longer invoke the diminished-capacity defense because it was not

encompassed within the comprehensive statutory scheme the state legislature had enacted to govern defenses based on mental illness or retardation. The state Appellate Court found that applying this decision retroactively to defendant did not violate due process because the state Supreme Court for the first time had interpreted an unambiguous statute.

3. In **Bouie**, the state court interpreted a trespass statute's prohibition of entry after notice that such entry was prohibited to also encompass remaining on the premises after receiving notice to leave. The Supreme Court held that due process does not countenance a state court's unforeseeable and retroactive judicial expansion of narrow and precise statutory language. In **Rogers**, the court concluded that due process was not violated by the retroactive abolition of the common-law year-and-a-day rule. The rule was widely viewed as an outdated relic of common law and had been abolished in the vast majority of jurisdictions. Abolition of the doctrine was not therefore the sort of unfair and arbitrary judicial action against which due process protects.

4. The Supreme Court concluded that the state court's retroactive abolition of the common-law diminished-capacity defense was not an unreasonable application of the law declared in **Bouie** and **Rogers**. The state-court decision presented the inverse of the situation confronted in **Bouie**. It did not broaden a statute that was narrow on its face; it disapproved lower-court precedent recognizing a defense that lacked statutory grounding. Unlike **Rogers**, the diminished-capacity defense is not an outdated relic of the common law that has been widely rejected by modern courts and legislators. Moreover, the defense had been adhered to repeatedly by state Appellate Courts. But these considerations are not sufficient to warrant federal habeas relief under AEDPA's demanding standards.

An unreasonable application of federal law is different from an incorrect application of federal law. Distinguishing **Rogers** does little to bolster defendant's claim where the Supreme Court has never found a due process violation in circumstances remotely resembling defendant's. Fairminded jurists could conclude that a state Supreme Court decision rejecting lower courts' decisions based on its reasonable interpretation of the language of the controlling statute is not unexpected and indefensible by reference to existing law.

Porter v. McCollum, ___ U.S. ___, 130 S.Ct. 447, ___ L.Ed.2d ___ (2009) (No. 08-10537, 11/30/09)

A federal *habeas corpus* petitioner is entitled to relief from a state conviction only if the state court's denial of relief was contrary to or involved in unreasonable application of federal law, or rested on an unreasonable determination of the facts in light of the evidence presented. Because the Florida Supreme Court's application of the **Strickland** requirement of prejudice was clearly unreasonable, the Court of Appeals decision was reversed and the cause remanded for further proceedings. (See also **COUNSEL**, §§13-4(b)(1)(a), (c)).

Premo v. Moore, ___ U.S. ___, 131 S.Ct. 733, 178 L.Ed.2d 649, 2011 WL 148253 (2011) (No. 09-658, 1/19/11)

A federal court may grant *habeas* corpus relief with respect to a claim a state court has adjudicated on the merits if the decision denying relief involves an unreasonable application of clearly established federal law as determined by the United States Supreme Court. 28 U.S.C. § 2254(d)(1).

When the underlying federal claim is ineffective assistance of counsel, the defendant must show both deficient performance by counsel and prejudice under **Strickland v. Washington**, 466 U.S. 668 (1984), which also applies a deferential standard in judging counsel's performance.

When **Strickland** and § 2254(d) are applied in tandem, review is doubly deferential. Federal habeas courts cannot equate unreasonableness under § 2254(d) with unreasonableness under **Strickland**. When § 2254(d) applies, the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied **Strickland**'s deferential standard.

Judged by this standard, defendant's attorney did not provide ineffective assistance by failing to seek suppression of defendant's confession to the police before advising defendant to plead guilty. With respect to the performance-prong of **Strickland**, it was not unreasonable for the state court to accept defense counsel's explanation that suppression served little purpose in light of defendant's other admissible confession to two witnesses. Given the uncertainty of defendant's prospects had he gone to trial, and the fact that the prosecution could potentially file a capital charge, it was not unreasonable for the state court to conclude that counsel made a reasonable choice to opt for a quick plea bargain.

To establish prejudice under **Strickland**, defendant had to demonstrate to the state court a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial. A defendant who accepts a plea bargain on counsel's advice does not necessarily suffer prejudice when his counsel fails to seek suppression of evidence, even if it would be reversible error for the court to admit the evidence. It was not unreasonable for the state court to determine that defendant would have accepted the plea bargain even if his second confession had been ruled inadmissible. The prosecution still had an admissible confession, defendant's bargain was for the statutory minimum to the charged offense, and the decision to forgo a challenge to the confession may have been essential to securing that agreement.

Renico v. Lett, ___ U.S. ___, 130 S.Ct. 1855, 176 L.Ed.2d 678 (2010) (No. 09-338, 5/3/10)

1. The Double Jeopardy clause does not bar retrial after a mistrial was ordered at a previous trial, provided that under all of the circumstances there was a "manifest necessity" for declaring a mistrial. The "manifest necessity" standard is not to be interpreted literally; "a mistrial is appropriate where there is a 'high degree' of necessity."

Whether to grant a mistrial is left to the broad discretion of the trial court, whose decision is entitled to "great deference" unless the judge failed to exercise discretion or acted for reasons completely unrelated to the problem which purported to be the reason for the mistrial. A judge who orders a mistrial is not required to make explicit findings concerning manifest necessity, or to articulate on the record the factors which led to the belief that a mistrial was necessary.

2. Under the ***Anti-Terrorism and Effective Death Penalty Act*** (28 U.S.C. §2254(d)), federal *habeas* relief from a state court conviction is authorized only if the state court's decision represented an unreasonable application of clearly established federal law. An *unreasonable* application of federal law is different from an *incorrect* application of federal law. In other words, a federal *habeas* court may not grant relief merely because it concludes, in its independent judgment, that the state court's application of federal law was erroneous.

The Michigan Supreme Court's decision affirming the grant of a mistrial was not an unreasonable application of federal law, but a "straightforward application of our longstanding precedents to the facts." A mistrial was declared only after the jury deliberated for several hours following a short and uncomplicated trial, the judge received several notes suggesting that the jury was having heated discussions and asking what would happen if no verdict could be reached, and the jury foreman stated in open court that the jury could not agree on a verdict. Giving the trial court's decision the deference to which it was entitled, it was

reasonable for the Michigan Supreme Court to conclude that no error occurred.

Wilson v. Corcoran, ___ U.S. ___, 131 S.Ct. 13, 178 L.Ed.2d 276(2010)

A federal court is authorized to grant *habeas* relief on a State conviction only if it finds that federal law has been violated. The Court of Appeals erred by granting relief on the theory that the State court violated State law in imposing a death sentence.

Wood v. Milyard, ___ U.S. ___, ___ S.Ct. ___, ___ L.Ed.2d ___, 2012 WL 1392558 (No. 10-9995, 4/24/12)

1. The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) provides that a state prisoner has one year to file a federal habeas corpus petition starting from the date that the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review. 28 U.S.C. §2244(d)(1)(A). The one-year limitations period runs from AEDPA's effective date for a prisoner whose judgment became final before AEDPA was enacted. The one-year clock is tolled during the time that a properly-filed application for state post-conviction relief is pending, or for equitable reasons when an extraordinary circumstance prevents a prisoner from filing his petition on time.

2. Ordinarily a statutory time limitation is forfeited if not raised in the defendant's answer or amendment thereto. Once forfeited, it cannot be raised on appeal. Where the State does not strategically withhold the limitations defense or choose to relinquish it, and where the petitioner is accorded a fair opportunity to present his petition, a court of appeals or district court may – but is not obligated to – consider the defense on its own initiative and determine whether the interests of justice would be better served by addressing the merits or dismissing the petition as time barred.

3. Wood filed a federal habeas corpus petition one year after his second petition for post-conviction relief was denied. Whether the petition was timely filed depended whether an earlier post-conviction motion also tolled the running of the limitations period. When asked by the district court to address the timeliness of the petition, the State twice responded that it would not challenge, but was not conceding, the timeliness of the petition. The district court accordingly reached the merits of the petition, but on appeal, the court of appeals held the petition was time barred and did not reach the merits.

The court of appeals abused its discretion when it concluded that Wood's petition was untimely. The State twice informed the district court that it was not conceding, but would not challenge, the timeliness of the petition, after expressing its clear and accurate understanding of the issue. Its decision not to contest timeliness was not a forfeiture, but a deliberate waiver of the defense, steering the district court toward the merits of the petition. The court of appeals should have reached the merits as well.

Griffin v. Pierce, 622 F.3d 831 , 2010 WL 3655899 (7th Cir. 2010)

A federal court may grant habeas relief only if the state court's adjudication of the federal constitutional claim was contrary to or involved an unreasonable application of clearly established federal law as determined by the Supreme Court, or was based on an unreasonable determination of the facts in light of the evidence presented. 28 U.S.C. § 2254(d). A state court unreasonably applies federal law if it identifies the correct legal principle but unreasonably applies it to the facts of the case, or unreasonably refuses to extend a principle to a context in which it should apply. A state court decision involves an unreasonable determination of the facts if it rests upon fact-finding that ignores the clear and convincing weight of the evidence.

1. With respect to defendant's claim that the prosecution obtained his conviction through the use of false testimony that a representative of the prosecution knew to be false, the court concluded that defendant could not demonstrate that there was a reasonable likelihood that the false evidence could have affected the jury's judgment. Even discounting the testimony of the prosecution witness who testified falsely regarding the consideration for his testimony, defendant's conviction was secure. Defendant made a court-reported confession testified to by both the court reporter and an Assistant State's Attorney, who also testified to a consistent oral confession made to him by the defendant. Defendant's refusal to sign the court-reported statement was of little consequence. There was an audiotape of a conversation between the witness and the defendant in which the defendant confessed. The Assistant State's Attorney testified that he overheard that conversation. Although the tape recording was unintelligible at the time of the habeas proceeding, there was no evidence that it was unintelligible at the time of the state court proceedings.

2. The state court unreasonably concluded that defendant was not prejudiced by his attorney's failure to conduct any investigation into mitigation in preparation for defendant's capital sentencing hearing. Had the attorney conducted the investigation, the sentencing court would have learned about aspects of defendant's background that the Supreme Court has declared relevant in assessing a defendant's moral culpability: his father's alcoholism and abusiveness; his mother's absence from the home and the circumstances of her death, as well as how it affected him, including increasing mental abuse from his father; his diagnosis of schizophrenic reaction chronic undifferentiated type with suicidal tendencies; details of his mental health and drug addition; his suicide attempts and attempts at self-mutilation; and his good acts of caring for dying and ill family members, including his father.

The state Supreme Court concluded that there was no reasonable probability that the mitigating evidence would have persuaded the sentencing court not to impose the death penalty. It was unclear how much weight that court gave to the sentencing court's statement that the mitigating evidence would not have changed the sentence, but the sentencing court's statement is not conclusive. The question is not whether a particular judge would have imposed a different sentence, but whether there is a reasonable probability that the sentence would have been different, based on an objective evaluation of the evidence.

The state Supreme Court also failed to evaluate the totality of the mitigating evidence against the aggravation, focusing only on the seriousness of the offense, the corroboration of the confession, and defendant's lengthy criminal history. The Supreme Court's assessment that the mitigating evidence was not inherently mitigating and cumulative of the pre-sentence investigation report, which was incomplete and misleading, was unreasonable.

(Defendant was represented by Staff Attorney Gregory Swygert, Capital Post-Conviction Unit.)

Caffey v. Atchison, ___ F.Supp. ___ (U.S. Dist.Ct., Northen Dist., No. 09-C-5458, 2/3/12)

1. A federal court may not consider a federal *habeas* claim if the state court declined to address the federal issues on their merits and decided the case on a state law ground that is independent of the federal question and adequate to support the judgment. The state law ground may be either substantive or procedural. The adequacy of the state law ground is a question of federal law; a state ground is "adequate" only if state courts apply the state rule in a consistent and principled way.

Furthermore, the state rule must represent a firmly established and regularly followed practice. In other words, a state rule that is invoked infrequently, unexpectedly, or freakishly

is not an adequate ground to support the judgement.

2. 725 ILCS 5/122-2 provides that the petitioner must attach to a post-conviction petition affidavits, records, or other evidence supporting the allegations, or shall explain why such are not attached. The Appellate Court applied §122-2 in declining to consider witness statements relevant to **Brady v. Maryland** claims which the defendant raised in his amended post-conviction petition; the court held that the statements could not be considered because they were unverified.

The federal district court held that under the circumstances of this case, §122-2 did not constitute an independent and adequate state ground to preclude federal review of defendant's *habeas* claim. The court noted that the statements were submitted at the second stage of post-conviction proceedings - Illinois precedent indicates that §122-2 applies only at first-stage proceedings, when the trial court determines whether the petition is frivolous and patently without merit. Thus, the Appellate Court's ruling requiring defendant to submit sworn evidence at second-stage proceedings enforced a rule which by its terms did not apply to defendant's case.

Second, even if §122-2 applied to second-stage proceedings, it was not adequate to support the judgement where the Appellate Court applied the rule in an unpredictable way which was inconsistent with the statute's language and prior case law. In numerous cases Illinois courts have considered unsworn evidence, including statements by witnesses, in post-conviction proceedings. Furthermore, the case law relied upon by the Appellate Court holds only that affidavits must be notarized, not that all evidence in a post-conviction proceeding must be notarized. The court concluded that applying such case law to bar non-affidavit evidence was an unexpected application of the rule and was inadequate to support the judgement.

The court acknowledged that a state rule is not rendered inadequate to support the judgement because state courts may exercise discretion and not apply the rule in a particular case. Here, however, the Appellate Court did not exercise discretion, but applied the rule to a situation to which on its face it was inapplicable.

The court granted an evidentiary hearing on defendant's **Brady v. Maryland** claims.

(Defendant was represented by Supervisor Patricia Mysza, Chicago.)

Taylor v. Grounds, ___ F. 3d ___ (7th Cir. 2013) (No. 12-2632, 7/3/13)

1. A writ of habeas corpus will not issue unless the state-court adjudication resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States. 28 U.S.C. §2254(d)(1)-(2). An unreasonable application of federal law is different from an incorrect application of federal law. To entitle petitioner to relief, the state-court ruling must be so lacking in justification that there is an error well understood and comprehended in existing law beyond any possibility for fair-minded disagreement.

The Illinois Supreme Court unreasonably applied federal law as determined by the Supreme Court in **Cuyler v. Sullivan**, 446 U.S. 335 (1980), when it equated defense counsel's adoption of a common defense strategy for the defendant and his brother with the absence of antagonism between their interests. By failing to consider the strength of defendant's defense and its relationship to the interests of his brother, the Illinois Supreme Court unreasonably applied United States Supreme Court precedent requiring examination of the proverbial road not taken to determine whether a conflict of interest existed between co-defendants with shared representation.

2. State-court factual determinations are presumed correct unless the petitioner rebuts

the presumption by clear and convincing evidence. 28 U.S.C. §2254(e)(1). A decision involves an unreasonable determination of the facts if it rests upon fact-finding that ignores the clear and convincing weight of the evidence.

The Illinois Supreme Court unreasonably determined the facts in light of the record as its decision was based solely on a non-existent credibility finding by the post-conviction hearing court. The post-conviction hearing court ruled only that defendant "did not receive any substantial deviation of his constitutional rights." Such a sparse decision devoid of factual matter does not support the assumption of an implicit credibility finding, where the ruling could have been based on a component of defendant's claim that required no resolution of a credibility issue.

Because the state court did not make a critical factual finding to which the federal court could defer, the cause was remanded to the district court for an evidentiary hearing to determine if the conflict of interest adversely affected counsel's performance.

(Defendant was represented by Supervisor Patricia Mysza, Chicago.)

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§9-5(b)
Forfeiture, Exhaustion of State Remedies,
and Successive Petitions

Martinez v. Ryan, ___ U.S. ___, ___ S. Ct. ___, ___ L.Ed.2d ___ (2012) (No. 10-1001, 3/20/12)

1. When reviewing the constitutionality of state convictions, federal *habeas* courts are governed by several rules that are designed to afford finality to state court judgements. One such rule provides that a federal court will not review the merits of federal constitutional claims which the State courts declined to hear because the petitioner failed to abide by a state procedural rule. Thus, the state court's invocation of a procedural default rule to deny review of a prisoner's claims precludes federal review of that claim if the state procedural rule is a non-federal ground which is adequate to support the judgment, firmly established, and consistently followed.

The doctrine of procedural default does not bar review of a defaulted claim, however, where the prisoner can show "cause" for the default and "prejudice" from a violation of federal law. In **Coleman v. Thompson**, 501 U.S. 722 (1991), the Supreme Court noted that as a matter of fairness, an attorney's errors during a direct appeal may serve as "cause" to excuse a procedural default. **Coleman** also found, however, that an attorney's errors during collateral proceeding, where there is no constitutional right to counsel, do not constitute "cause" for excusing a default.

2. The Supreme Court concluded that where state law prohibits an issue concerning ineffective assistance of trial counsel from being raised on direct appeal, and requires that such issues be raised for the first time in State collateral proceedings, the petitioner shows "cause" for failing to raise the issue in state courts where he demonstrates either that: (1) he did not have counsel for his initial state collateral review, or (2) that his attorney at his initial state collateral review was ineffective under **Strickland**. The court stressed that its holding was based on equitable considerations and was not a matter of constitutional law. Furthermore, the court declined to consider the issue left open by **Coleman** - whether there is a federal constitutional right to the effective assistance of counsel in a collateral proceeding

which represents the first opportunity under state law for the defendant to present a constitutional claim.

3. In dissent, Justices Scalia and Thomas stated that the majority's "equitable" rule cannot be limited to claims of ineffective assistance of trial counsel, which are no different from "other cases in which initial state *habeas* will be the first opportunity for a particular claim to be raised."

Trevino v. Thaler, ___ U.S. ___, ___ S.Ct. ___, ___ L.Ed.2d ___ (2013) (No. 11-10189, 5/28/13)

1. In reviewing the constitutionality of State convictions, a federal court will not consider the merits of federal constitutional claims which the State courts declined to hear because the petitioner failed to abide by a State procedural rule. Thus, the State court's finding of procedural default precludes federal review of that claim so long as the State procedural rule which was defaulted is a non-federal ground which is adequate to support the ruling, firmly established, and consistently followed.

This doctrine does not bar review of a defaulted claim if the prisoner can show "cause" for the default and "prejudice" from the federal constitutional violation. In **Coleman v. Thompson**, 501 U.S. 722 (1991), the Supreme Court held that as a matter of fairness, an attorney's error on direct appeal may serve as "cause" to excuse a procedural default. However, because there is no constitutional right to counsel on collateral review, **Coleman** held that attorney error during collateral proceedings does not constitute "cause" for excusing a default.

In **Martinez v. Ryan**, 566 U.S. 1 (2012), the court recognized an exception to the **Coleman** rule where State law requires that the issue of ineffective assistance of trial counsel be raised in State collateral proceedings rather than on direct appeal. Under such circumstances, "cause" for failing to raise the issue in State court may be shown where the defendant did not have counsel for his initial State collateral review or where his attorney at that review was ineffective under **Strickland**.

2. Here, the court concluded that the **Martinez** exception applied where a State purported to permit ineffective assistance of trial counsel to be raised on direct appeal, but by practice made it "virtually impossible for appellate counsel to adequately present" such issues until collateral proceedings. The court noted that Texas courts have repeatedly held that the trial record rarely contains the information necessary to assert a claim on ineffective assistance of trial counsel, and that procedures to permit the record to be expanded are usually unsuccessful in time for direct appeal. Thus, under Texas practice, a State *habeas corpus* action is usually necessary to gather the evidence necessary to evaluate ineffective assistance of counsel claims. The Supreme Court concluded that because Texas practice in effect requires defendants to raise trial counsel's ineffectiveness on collateral review, the **Martinez** exception applies. Thus, a Texas litigant may show "cause" for a State default where he shows either that he did not have counsel for state collateral review or that his attorney was ineffective.

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§9-5(c)
Procedure

Burt v. Titlow, __ U.S. __, 2013 WL 5904117 (No. 12-414, 11/5/13)

1. When a federal habeas petitioner challenges the factual basis for a state court decision rejecting a claim, the federal court may overturn the state court judgment only if it

was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. 28 U.S.C. §2254(d)(2). A state court factual determination is not unreasonable merely because the federal habeas court would have reached a different result.

There is also a highly deferential standard for reviewing claims of legal error by state courts. A writ of habeas corpus may issue only if the state court's decision was contrary to, or involved an unreasonable application of, clearly established federal law as determined by the United States Supreme Court. 28 U.S.C. §2254(d)(1).

2. The state court's factual finding that defense counsel advised defendant to withdraw her guilty plea based on defendant's assertion of her innocence was not unreasonable. Defendant passed a polygraph exam, and discussed her case with a jailer who advised her not to plead guilty if she was not guilty. This set in motion defendant's decision to retain new counsel on the eve of the trial of her co-defendant at which she was to testify and self-incriminate as part of the plea agreement. Defendant maintained her innocence at trial after her plea was withdrawn.

The state court was aware of new counsel's representation to the court that withdrawal of the plea was based on the length of the sentence offered by the prosecution. This statement was not inconsistent with defendant's assertion of her innocence. A defendant convinced of her innocence may be more likely to drive a hard bargain with the prosecution before pleading guilty.

Viewing the record as a whole, the court of appeals set aside a reasonable state court determination in favor of its own debatable interpretation of the record.

3. The court of appeals concluded that counsel was ineffective because the record contained no evidence that he gave constitutionally adequate advice on whether to withdraw the guilty plea. The absence of evidence cannot overcome the strong presumption established by **Strickland v. Washington** that counsel's conduct falls within the wide range of reasonable professional assistance.

The only fact offered in support of the court's conclusion that counsel was ineffective was his failure to retrieve defendant's file from her prior attorney before withdrawing the guilty plea. But the record does not indicate how much he was able to glean about defendant's case from other sources. Counsel was entitled to rely on defendant's admission in open court that her prior attorney had explained that the State's evidence would support a first-degree murder conviction to conclude that defendant wanted to withdraw her plea despite her understanding of the strength of the prosecution's case.

Cullen v. Pinholster, ___ U.S. ___, 131 S.Ct. 1388, ___ L.Ed.2d ___, 2011 WL 1225705 (2011) (No. 09-1088, 4/4/11)

A federal court may not grant *habeas corpus* relief to a state-court prisoner unless the state court's adjudication of the prisoner's federal constitutional claim: "1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States, or 2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. §2254(d).

Review under §2254(d)(1) is limited to the record before the state court that adjudicated the claim on its merits. State-court decisions are measured against the Supreme Court's precedents as of the time that the state court renders its decision. It would make no sense to ask federal courts to analyze whether a state court's adjudication resulted in a decision that unreasonably applied federal law to facts not before the state court.

Johnson v. Williams, 568 U.S. ___, ___ S.Ct. ___, ___ L.Ed.2d ___, 2013 WL 610199 (No. 11-465, 2/20/13)

1. AEDPA restricts the circumstances under which a federal habeas court may grant relief to a state prisoner whose claim has been "adjudicated on the merits" in state court. To grant relief, the adjudication of the claim must have either resulted in a decision that was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. §2254(d).

2. When a federal claim has been presented to a state court and the state court has denied relief, it may be presumed that the state court adjudicated the claim on its merits in the absence of any indication or state-law procedural principles to the contrary. **Harrington v. Richter**, 562 U.S. ___, 131 S.Ct. 770, ___ L.Ed.2d ___ (2011). This same rebuttable presumption applies when the state court issues a decision that addresses some issues, but does not expressly address the federal claim in question.

It is not the uniform practice of busy state courts to discuss every single claim to which a defendant makes even a passing reference. In some circumstances, a line of state precedent fully incorporates a related federal constitutional right and a state court may consider its discussion of state precedent as sufficient to cover the federal claim. A state court may not regard a fleeting reference to the federal constitution or federal precedent as sufficient to raise a separate federal claim. A state court may view the federal claim as too insubstantial to merit discussion. Therefore no sound reason exists not to apply the **Richter** presumption where the state court rejects a federal claim without expressly addressing it.

Creation of an irrebuttable presumption that the state court adjudicated the federal claim on its merits is not warranted. A generalization that state courts never overlook federal claims is incorrect as an empirical matter. AEDPA permits *de novo* review of a federal claim when the evidence leads very clearly to the conclusion that the federal claim was overlooked in state court.

The presumption that the state court rejected defendant's federal claim on its merits was not rebutted in this case. The state court cited to a state court decision that included a lengthy discussion of federal cases addressing the federal claim. The cited decision understood that it was deciding a question with federal constitutional dimensions. Throughout the state court proceedings, defendant treated her state and federal claims as interchangeable, so it is hardly surprising that the state courts did so as well. Defendant never petitioned the state court for rehearing on the ground that it had failed to adjudicate her federal claim on the merits.

McQuiggin v. Perkins, ___ U.S. ___, ___ S.Ct. ___, ___ L.Ed.2d ___, 2013 WL 2300806 (No. 12-126, 5/28/13)

Under AEDPA, a state prisoner has one year to file a federal petition for habeas corpus, starting on the date on which the judgment became final by the conclusion of direct review or the expiration for the time for seeking such review. If the petition alleges newly-discovered evidence, the filing deadline is one year from "the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence." 28 U.S.C. §§2244(d)(1)(A) and (d)(1)(D).

Neither the one-year statute of limitations nor the due-diligence exception applies where petitioner makes a convincing showing of actual innocence as a gateway to consideration of the merits of a constitutional claim in a first federal habeas petition. This

conclusion is consistent with the Court's recognition of a miscarriage-of-justice exception to excuse various procedural defaults where the petitioner makes a credible gateway showing of actual innocence. This exception requires petitioner to demonstrate that it is more likely than not that no reasonable juror would have convicted the petitioner in light of the new evidence. Nothing in §2244(d)(1) counters courts' equitable authority to invoke the miscarriage-of-justice exception to overcome expiration of the statute of limitations.

While habeas petitioners who assert convincing actual-innocence claims need not demonstrate due diligence to overcome the bar of a statute of limitations, unexplained delay in presenting new evidence is relevant to whether actual innocence has been convincingly shown. Taking account of delay in that context, rather than as a threshold inquiry, is tuned to the rationale of the miscarriage-of-justice exception – ensuring that federal constitutional errors do not result in the incarceration of innocent persons.

Ryan v. Gonzales, ___ U.S. ___, ___ S.Ct. ___, ___ L.Ed.2d ___ (2013) (No. 10-930, 1/8/13)

1. The incompetence of a state prisoner does not require suspension of the prisoner's federal habeas corpus proceedings. No statute directs federal courts to stay proceedings when habeas petitioners are found to be incompetent.

2. There is no right to competence that flows from a federal statute guaranteeing state capital prisoners the right to federally-funded counsel in habeas proceedings. If the right to counsel carried with it an implied right to competence, then the right to competence at trial would flow from the Sixth Amendment right to counsel, rather than the right to due process. The criminal trial of an incompetent defendant violates due process, not the Sixth Amendment, even though the benefits flowing from the right to counsel at trial can be affected if an incompetent defendant is unable to communicate with counsel. Given the backward-looking, record-based nature of most federal habeas proceedings, habeas counsel can generally provide effective representation to a habeas petitioner regardless of the petitioner's competence. There is no reason to assume that Congress intended to depart from this constitutional analysis and create a right to competence within the statutorily-created right to counsel.

3. Nor can the right to competence be found in a federal statute providing for competency proceedings in a federal prosecution prior to sentencing or after the commencement of probation or supervised release. By its terms, the statute does not apply to state prisoners.

4. Courts do have the power to issue stays where a stay would be a proper exercise of discretion. Where petitioner's claims are record-based or resolvable as a matter of law, the district court does not abuse its discretion in denying a stay.

Even assuming that a petitioner who is incompetent has a claim on which extrarecord evidence might be relevant, granting an indefinite stay is inappropriate and inconsistent with AEDPA's objective of encouraging finality. If the claim could substantially benefit from petitioner's assistance, the district court should take into account whether petitioner will regain competence in the foreseeable future. Where there is no reasonable hope of competence, a stay is inappropriate.

White v. Woodall, ___ U.S.___, ___ S. Ct. ___, ___ L.E.2d ___, (2014) (12-794, 4/23/14)

1. A federal court is permitted to grant habeas relief on a claim already adjudicated on the merits in State court only if the State court adjudication resulted in a decision that was contrary to or involved an unreasonable application of clearly established federal law as determined by the United States Supreme Court. "Clearly established federal law" includes

only the "holdings, as opposed to the *dicta*," of Supreme Court decisions. To constitute an "unreasonable application of" a Supreme Court holding, the State court holding must be "objectively unreasonable" and not merely wrong.

To obtain habeas relief on a State conviction, the prisoner must show that the State court's ruling on the federal claim was so lacking in justification that the existence of an error is beyond any possibility of "fairminded disagreement." The court stressed that it has not adopted a rule that the standard for federal habeas relief is satisfied where a State court acted unreasonably by refusing to extend a governing legal principle to a new context in which it should apply.

2. The Kentucky Supreme Court concluded that the Fifth Amendment does not require the trial court to instruct the jury at a death penalty hearing that no adverse inference is to be drawn from the defendant's failure to testify. The U.S. Supreme Court held that the State court's interpretation was not contrary to the actual holding of any U.S. Supreme Court case, and concerned an issue which was left open by those decisions. Thus, the federal district court erred by granting habeas relief.

Griffin v. Pierce, 622 F.3d 831 , 2010 WL 3655899 (7th Cir. 2010)

A federal court may grant habeas relief only if the state court's adjudication of the federal constitutional claim was contrary to or involved an unreasonable application of clearly established federal law as determined by the Supreme Court, or was based on an unreasonable determination of the facts in light of the evidence presented. 28 U.S.C. § 2254(d). A state court unreasonably applies federal law if it identifies the correct legal principle but unreasonably applies it to the facts of the case, or unreasonably refuses to extend a principle to a context in which it should apply. A state court decision involves an unreasonable determination of the facts if it rests upon fact-finding that ignores the clear and convincing weight of the evidence.

1. With respect to defendant's claim that the prosecution obtained his conviction through the use of false testimony that a representative of the prosecution knew to be false, the court concluded that defendant could not demonstrate that there was a reasonable likelihood that the false evidence could have affected the jury's judgment. Even discounting the testimony of the prosecution witness who testified falsely regarding the consideration for his testimony, defendant's conviction was secure. Defendant made a court-reported confession testified to by both the court reporter and an Assistant State's Attorney, who also testified to a consistent oral confession made to him by the defendant. Defendant's refusal to sign the court-reported statement was of little consequence. There was an audiotape of a conversation between the witness and the defendant in which the defendant confessed. The Assistant State's Attorney testified that he overheard that conversation. Although the tape recording was unintelligible at the time of the habeas proceeding, there was no evidence that it was unintelligible at the time of the state court proceedings.

2. The state court unreasonably concluded that defendant was not prejudiced by his attorney's failure to conduct any investigation into mitigation in preparation for defendant's capital sentencing hearing. Had the attorney conducted the investigation, the sentencing court would have learned about aspects of defendant's background that the Supreme Court has declared relevant in assessing a defendant's moral culpability: his father's alcoholism and abusiveness; his mother's absence from the home and the circumstances of her death, as well as how it affected him, including increasing mental abuse from his father; his diagnosis of schizophrenic reaction chronic undifferentiated type with suicidal tendencies; details of his mental health and drug addition; his suicide attempts and attempts at self-mutilation; and

his good acts of caring for dying and ill family members, including his father.

The state Supreme Court concluded that there was no reasonable probability that the mitigating evidence would have persuaded the sentencing court not to impose the death penalty. It was unclear how much weight that court gave to the sentencing court's statement that the mitigating evidence would not have changed the sentence, but the sentencing court's statement is not conclusive. The question is not whether a particular judge would have imposed a different sentence, but whether there is a reasonable probability that the sentence would have been different, based on an objective evaluation of the evidence.

The state Supreme Court also failed to evaluate the totality of the mitigating evidence against the aggravation, focusing only on the seriousness of the offense, the corroboration of the confession, and defendant's lengthy criminal history. The Supreme Court's assessment that the mitigating evidence was not inherently mitigating and cumulative of the pre-sentence investigation report, which was incomplete and misleading, was unreasonable.

(Defendant was represented by Staff Attorney Gregory Swygert, Capital Post-Conviction Unit.)

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§9-5(d)
Effect of Decisions and Retroactivity

Chaidez v. United States, ___ U.S. ___, ___ S.Ct. ___, ___ L.Ed.2d ___, 2013 WL 610201 (No. 11-820, 2/20/13)

A case announces a new rule inapplicable to convictions that were final when the rule was announced if it breaks new ground or imposes a new obligation. **Teague v. Lane**, 489 U.S. 288 (1989). To put it differently, a case announces a new rule when the result was not dictated by precedent existing at the time the defendant's conviction became final. A holding is not so dictated unless it would have been apparent to all reasonable jurists.

A case does not announce a new rule when it merely applies a principle governing a prior decision to a different set of facts. A court will rarely state a new rule for **Teague** purposes when all that it does is apply a general standard to the kind of factual circumstances that the standard was meant to address.

Padilla v. Kentucky, 559 U.S. 356 (2010), which held that the Sixth Amendment requires defense attorneys to inform non-citizen clients of the deportation consequences of guilty pleas, announced a new rule. **Padilla** did not merely apply the general standard of **Strickland v. Washington**, 466 U.S. 668 (1984), to a different factual situation.

Before deciding whether the failure to provide advice about deportation consequences fell below **Strickland**'s objective standard of reasonableness, **Padilla** considered the threshold question whether advice about deportation was categorically removed from the scope of the Sixth Amendment. **Padilla** had to develop new law establishing that the Sixth Amendment applied before it could assess the performance of Padilla's lawyer under **Strickland**. Because **Padilla** asked *whether* the **Strickland** test applied before asking *how* it applied, the Court's answer required a new rule. **Padilla** answered a question about the Sixth Amendment's reach that had been left open and in a way that altered the law of most jurisdictions. No existing

precedent dictated the answer. **Padilla**'s holding would not have been, and in fact was not, apparent to all reasonable jurists prior to the decision in **Padilla**.

People v. Morris & Holborow, 236 Ill.2d 345, 925 N.E.2d 1069 (2010)

The court held that **People v. Whitfield**, 217 Ill.2d 177, 840 N.E.2d 658 (2005), created a "new" rule for purposes of retroactivity analysis. Thus, **Whitfield** can not be applied to cases in which the conviction became final before the **Whitfield** rule was announced.

The court also noted that a reviewing court should not announce a "new" rule on collateral review if the rule will not be applied to the defendant in that case and to all others who are similarly situated. Because **Whitfield's** conviction was final when the was issue raised in post-conviction proceedings, "a better course in **Whitfield** would have been to forego the announcement of a new rule . . . ." (See **APPEAL**, §2-6(e)).

(Defendant Morris was represented by Assistant Defender Rebecca Levy, Chicago.)

(Defendant Holborow was represented by Assistant Defender Michael Delcomyn, Springfield.)

People v. Smith, 2015 IL 116572 (No. 116572, 2/5/15)

1. Under **Teague v. Lane**, 489 U.S. 288 (1989), a "new" rule of criminal procedure applies to cases which were final when the new rule was announced only if the rule: (1) places certain kinds of primary, private individual conduct beyond the power of the criminal lawmaking authority to proscribe, or (2) requires the observance of procedures that are implicit in the concept of ordered liberty. Although **Teague** involved federal constitutional principles, the same analysis applies to non-constitutional rules.

A "new" rule is one which breaks new ground or imposes a new obligation on a State or the federal government. A rule is "new" when it is not dictated by precedent which existed when the conviction became final. A rule is "dictated by precedent" only if it would have been "apparent to all reasonable jurists."

2. In **People v. White**, 2011 IL 109616, the Supreme Court held that where the factual basis for a plea agreement is accepted by the trial court and establishes that the defendant is subject to a mandatory sentencing enhancement, the court must impose the mandatory enhancement even if the plea agreement provides otherwise. The court concluded that **White** created a "new" rule because it had been uncertain whether the trial court was required to give effect to a factual basis which would necessitate the imposition of a sentencing enhancement if the parties had agreed not to seek the enhancement.

The court concluded that **White** did not place primary, private individual conduct beyond the power of the criminal lawmaking authority to proscribe or require the observance of procedures which are implicit in the concept of ordered liberty. Therefore, **White** did not apply retroactively.

The trial court's order dismissing defendant's post-conviction petition was affirmed.

(Defendant was represented by Assistant Defender Mario Kladis, Ottawa.)

People v. Burns, 405 Ill.App.3d 40, 933 N.E.2d 1208 (2d Dist. 2010)

In **People v. Morris**, 236 Ill.2d 345, 925 N.E.2d 1069 (2010), the Illinois Supreme Court held that its decision in **People v. Whitfield**, 217 Ill.2d 177, 840 N.E.2d 658 (2005), did not apply retroactively to convictions that were final prior to December 20, 2005, the date that **Whitfield** was announced. Because defendant pled guilty in May 2006, **Whitfield** applied to his post-conviction claim.

(Defendant was represented by Assistant Deputy Defender Paul Glaser, Elgin.)

People v. Cathey, 406 Ill.App.3d 503, 942 N.E.2d 1 (1st Dist. 2010)

1. The doctrine of *res judicata* applies if: (1) there was a final judgment on the merits rendered by a court of competent jurisdiction; (2) there is an identity of cause of action; and (3) there is an identity of parties or their privies. Separate claims will be considered the same cause of action for purposes of *res judicata* if they arise from a single group of operative facts, regardless of whether they assert different theories of relief. An otherwise barred claim may proceed under a fundamental-fairness exception if the law has changed on defendant's rejected claim since the direct appeal was decided.

On direct appeal, defendant argued that the trial court improperly admitted defendant's prior conviction to impeach his testimony per **People v. Montgomery**, 47 Ill.2d 510, 268 N.E.2d 695 (1971). On post-conviction, defendant argued that the court abused its discretion and infringed on defendant's right to testify when it failed to rule on defendant's motion to exclude his prior conviction until after he testified per **People v. Patrick**, 233 Ill.2d 62, 908 N.E.2d 1 (2009). The court held that these theories were different but arose from the same group of operative facts, and therefore *res judicata* applied. The court concluded that **Patrick**, decided after defendant's direct appeal was final, adopted a new rule, but did not apply the fundamental fairness exception as it held that **Patrick** did not apply retroactively to convictions that were final when **Patrick** was decided.

2. Generally, new rules of criminal procedure will not be applied retroactively to convictions that were final when the new rule was adopted. **Teague v. Lane**, 489 U.S. 288 (1989). A case announces a new rule if the result was not dictated by precedent at the time that the defendant's conviction became final. The key consideration is whether the court considering the claim would have felt compelled by existing precedent to conclude that the rule was required by the constitution.

Patrick announced a new rule. Although Appellate Court decisions predating **Patrick** are consistent with that decision, there was a difference of opinion in the lower courts that was resolved by **Patrick**. **Patrick** did not merely apply earlier decisions to a different set of facts.

3. Non-retroactivity may be the basis for a first-stage dismissal. Unlike timeliness, non-retroactivity is a substantive defect in the petition, rather than a procedural defect in the manner in which it was filed.

The court affirmed the first-stage dismissal of defendant's post-conviction claim based on **Patrick**.

(Defendant was represented by Assistant Defender Sean Southern, Chicago.)

People v. Dorsey, 404 Ill.App.3d 829, 942 N.E.2d 535 (4th Dist. 2010)

The rule announced in **People v. Whitfield**, 217 Ill.2d 177, 840 N.E.2d 658 (2005), is a new rule that applies retroactively only to cases where the conviction was not final when **Whitfield** was announced. A conviction is final when a direct appeal is exhausted by either the denial of a petition for *certiorari* or the expiration of the time within which a petition could be filed.

Defendant's direct appeal was pending in the Appellate Court when **Whitfield** was decided and therefore he was entitled to the application of that rule to his post-conviction claim.

(Defendant was represented by Assistant Defender Ryan Wilson, Springfield.)

People v. Edgeston, ___ Ill.App.3d ___, 920 N.E.2d 467 (2d Dist. 2009) (No. 2-07-1195, 11/24/09)

1. Generally, only one post-conviction petition is permitted. A successive post-conviction

petition may be allowed, however, if the petitioner demonstrates "cause" for failing to raise the claim in a prior post-conviction proceeding and "prejudice" resulting from that failure. "Cause" exists where an objective factor impeded the petitioner's ability to raise the specific claim during a prior proceeding. "Prejudice" is shown by demonstrating that an error that was not raised in the first proceeding so infected the trial that the conviction or sentence violates due process.

The "cause and prejudice" test is inapplicable to a subsequent post-conviction petition raising a claim of actual innocence.

2. Under Illinois and federal law, a court decision which narrows the application of a substantive criminal statute is applied retroactively to convictions in which the direct appeal has been exhausted. **People v. Childress**, 158 Ill.2d 275, 633 N.E.2d 635 (1994), which held that residential burglary and burglary are mutually exclusive offenses and that burglary is not a lesser included offense of residential burglary, narrowed the applicability of the burglary statute. Thus, it should be applied retroactively in collateral proceedings.

In the course of its opinion, the court noted that the **Teague v. Lane** standard for determining retroactivity applies only to procedural rules. **Teague** does not alter the general rule that a narrowing interpretation of statutory criminal liability is substantive, and applies retroactively.

3. Because **Childress** applies retroactively and would have precluded defendant's conviction for felony murder based on residential burglary, defendant's successive post-conviction petition raised a claim of actual innocence. Therefore, he was not required to meet the "cause and prejudice" test.

4. Defendant did not waive his right to file a successive petition although he had raised the same claim in a prior petition, which he agreed to withdraw in return for post-conviction relief in another case. As part of the agreement, defendant also agreed not to file any appeals concerning the first petition.

The court acknowledged that a waiver of the right to raise a post-conviction issue would be enforceable if entered knowingly and voluntarily. However, because defendant alleged that post-conviction counsel gave erroneous advice concerning the applicability of a death sentence in the second case, the waiver could not be deemed knowing and voluntary in this case.

Furthermore, a plea agreement containing an appeal waiver is voidable if there is no consideration. The consideration which defendant received for waiving his right to seek post-conviction relief – avoidance of a death sentence in the second case – was illusory because it was dictated by the applicable caselaw:

> In return for accepting a conviction that had no legal basis, defendant obtained the "benefit" of avoiding a death sentence that rested solely on the unsupportable conviction. He could have obtained this benefit without entering into the Agreement; all he had to do was seek relief in this case. By entering into the Agreement, defendant surrendered something for nothing.

The trial court order denying leave to file a successive post-conviction petition was reversed, and the cause was remanded for further proceedings.

(Defendant was represented by Deputy Defender Chuck Schiedel, Supreme Court Unit.)

People v. Greco, 2014 IL App (1st) 112582 (No. 1-11-2582, 5/12/14)

In **Padilla v. Kentucky**, 559 U.S. 356 (2010), the Supreme Court held that counsel is deficient if he does not inform defendant that a guilty plea may have immigration consequences. In **Chaidez v. United States**, ___ U.S. ___, 133 S.Ct. 1103 (2013), however,

the Court (utilizing the test of **Teague v. Lane**, 489 U.S. 288 (1989)) held that the ruling in **Padilla** did not apply retroactively to cases on collateral review.

Here, defendant argued that despite **Chaidez**, **Padilla** should apply retroactively to his post-conviction claim that counsel was ineffective for failing to inform him of the immigration consequences of his guilty plea. Defendant relied on **Danforth v. Minnesota**, 522 U.S. 264 (2008), where the Supreme Court held that state courts are not bound by **Teague's** retroactivity analysis. Defendant argued that Illinois courts should not feel bound by **Chaidez**, but should instead follow the pre-**Chaidez** decision in **People v. Gutierrez**, 2011 IL App (1st) 093499, which held that **Padilla** does apply retroactively to cases on collateral review.

The Appellate Court rejected defendant's argument, holding that Illinois courts use **Teague's** retroactivity analysis and agreeing with "the well-reasoned decision" in **Chaidez**. Accordingly, defendant's post-conviction claim relying on **Padilla** was properly dismissed.

(Defendant was represented by Assistant Defender Brian Koch, Chicago.)

People v. Gutierrez, ___ Ill.App.3d ___, ___ N.E.2d ___ (1st Dist. 2011) (No. 1-09-3499, 6/30/11)

1. Whether or not a constitutional rule of criminal procedure is fully retroactive depends, in the first instance, on whether the decision announces a new rule or merely expands upon existing precedent. A case announces a new rule when it breaks new ground or imposes a new obligation on the state or federal government. It fails to announce a new rule if the result was dictated by precedent existing at the time defendant's conviction became final. A decision that applies an established general rule to a new set of facts is not a new rule. **Teague v. Lane**, 489 U.S. 288 (1989).

Implicit in the rules of retroactivity is the principle that *habeas corpus* cannot be used as a vehicle to create a new constitutional rule of criminal procedure unless that rule would be applied to all defendants on collateral review through one of the two **Teague** exceptions (either placing certain kinds of primary, private individual conduct beyond the power of the criminal law-making power to proscribe, or requiring the observance of procedures implicit in the concept of ordered liberty). Therefore, the issue of retroactivity should be decided as a threshold question before addressing the underlying merits of a constitutional claim.

Notwithstanding the apparent novelty of its holding, the decision in **Padilla v. Kentucky**, 559 U.S. ___, 130 S.Ct. 1473, ___ L.Ed.2d ___ (2010), that counsel has a duty to inform the defendant of the deportation consequences of his guilty plea, applies retroactively to convictions that were final when **Padilla** was decided. First, it can be inferred from the **Padilla** court's failure to address retroactivity as a threshold matter when the case came before the court from state post-conviction review, that the court did not intend to announce a new rule. Second, **Padilla** merely applied **Strickland v. Washington**, 466 U.S. 669 (1984), and expanded it to include counsel's obligation to inform a defendant of possible deportation. "A decision that applies an established general rule (**Strickland**) to a new set of facts (deportation) is not a new rule." Additionally, the **Padilla** court acknowledged that its holding would undermine the finality of convictions obtained by guilty pleas, but noted that it had dismissed similar concerns in **Hill v. Lockhart**, 474 U.S. 52 (1985), where it had applied **Strickland** to a claim that counsel had failed to advise defendant regarding his parole eligibility when he pleaded guilty, again without deciding the threshold question of retroactivity.

2. The Post-Conviction Hearing Act contemplates the filing of only one post-conviction petition. Successive petitions are governed by 725 ILCS 5/122-1(f), which provides that the

court may grant defendant leave to file a successive petition only if he demonstrates cause for his failure to bring the claim in the initial petition and prejudice resulting from that failure. "Cause" is defined as any objective factor external to the defense that impeded the defendant's ability to raise the claim in the initial post-conviction proceeding. "Prejudice" is defined as an error so infectious to the proceedings that the resulting conviction violates due process.

Defendant filed a successive petition claiming that his counsel was ineffective in failing to notify him that his guilty plea would subject him to deportation, and that had he been provided that information, he would have gone to trial because the evidence against him was not overwhelming.

Defendant established cause for his failure to raise this claim in his previous petition where he was unaware of the deportation consequences of his plea, even though he did not provide the date on which he became aware of that consequence, particularly where defendant's previous petition was *pro se* and denied at the first stage.

Defendant did not establish prejudice under the cause-and-prejudice test because he could not establish prejudice under the second prong of **Strickland v. Washington**, 466 U.S. 668 (1984). In the guilty plea context, to establish prejudice under **Strickland**, defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial. Whether the alleged error was prejudicial depends largely whether it was likely that defendant would have succeeded at trial. The evidence of defendant's guilt was overwhelming in that he was identified by an eyewitness as the offender, he admitted accountability in a videotaped statement, and the gun used in the offense was recovered in connection with an unrelated case involving defendant, and defendant's palm print and DNA were found on the gun. Therefore, he has not shown that he would have succeeded at trial.

3. A claim that the court failed to inform defendant at the time of his guilty plea that if he is not a citizen, deportation may be a consequence of his conviction, as required by 725 ILCS 5/113-8, is not a constitutional claim cognizable in a post-conviction proceeding. **People v. Delviller**, 235 Ill.2d 507, 922 N.E.2d 330 (2009), holding that due process does not require that the court admonish defendant of the collateral consequences of a guilty plea such as deportation, was not effectively overruled by **Padilla v. Kentucky**, 559 U.S. ___, 130 S.Ct. 1473 (2010). **Padilla** concluded that the direct/collateral consequences distinction is ill-suited to evaluating a claim of ineffective assistance of counsel, but did not reject the direct/collateral distinction in determining whether a guilty plea is knowingly and voluntarily entered.

(Defendant was represented by Assistant Defender Rebecca Levy, Chicago.)

People v. Johnson, 2013 IL App (5th) 110112 (No. 5-11-0112, 10/9/13)

Once a new rule is applied to a defendant in the case announcing the new rule, evenhanded justice requires that it be applied retroactively to all who are similarly situated.

Miller v. Alabama, 567 U.S. ___, 132 S. Ct. 2455 (2012), held that imposition of a mandatory sentence of life imprisonment without the possibility of parole on an offender who was under the age of 18 at the time of the offense violates the federal constitution. **Jackson v. Hobbs**, a companion case to **Miller,** involved a defendant who challenged the constitutionality of his sentence on state collateral review after his conviction was final. The Supreme Court effectively retroactively applied **Miller** to the companion case when it ordered Jackson's sentence vacated.

Defendant, who was 16 at the time of the offense, filed a post-conviction petition challenging the constitutionality of his mandatory natural life sentence, which became final prior to the decision in **Miller**. Concurring with the reasoning of the First District in **People**

v. Williams, 2012 IL App (1st) 111145, the Fifth District concluded that since the Supreme Court had applied **Miller** to its companion case of **Jackson**, it would be cruel and unusual to not apply **Miller** retroactively to defendant.

People v. Luciano, 2013 IL App (2d) 110792 (No. 2-11-0792, 3/14/13)

1. At the first stage in the post-conviction process, the trial court reviews the defendant's petition on its own, without the input of the parties. The court may review the court file, transcripts, and any Appellate Court actions. The court must liberally construe the petition and treat allegations of fact as true so long as they are not affirmatively rebutted by the record.

Defendant claimed that his trial and appellate counsel were ineffective in failing to move to dismiss his 2007 murder charges because they were subject to compulsory joinder to weapons charges to which he had pleaded guilty in 1991. He contended that the murder charges were known to the prosecutor in 1991 because the prosecution had information from a confidential informant that defendant had both passed out the weapons and issued instructions for the shooting, and it had used his involvement in the murder as aggravation at his sentencing on the weapons charges.

The State contended it only suspected defendant's involvement in the shooting. Witnesses had lied to the police during the 1991 investigation and it was only when witnesses decided to cooperate with the authorities that the State was able to prosecute in 2007.

The Appellate Court acknowledged that the record contained information contrary to defendant's theory of the case; it also contained information supporting it. Because the record did not completely contradict defendant's allegations, it cannot be said that defendant's theory of the case is indisputably meritless. Considering the petition and the record together demonstrates the existence of a factual issue that could not appropriately be resolved at first stage. Therefore, the petition should have advanced to second stage.

2. New constitutional rules are generally not applied retroactively to convictions that were final when the new rule was announced. Two exceptions exist: (1) where the rule places certain kinds of primary, private individual conduct beyond the power of the criminal-law-making authority to proscribe, or (2) where the rule requires observance of those procedures that are implicit in the concept of ordered liberty. The first exception encompasses new substantive rules that limit the persons or conduct that constitutionally may be subject to a certain penalty, or that limit the penalty to be applied to a certain defendant.

Finding the reasoning of **People v. Morphin**, 2012 IL App (1st) 103568, persuasive, the Appellate Court concluded that the holding of **Miller v. Alabama**, 567 U.S. ___, 132 S. Ct. 2455, ___ L.Ed.2d ___ (2012), that persons under age 18 may not be subject to mandatory natural-life imprisonment, is a substantive rule that is fully retroactive. **Miller** could be read to announce a procedural rule requiring that youth-related mitigation be considered before sentencing any minor to natural life imprisonment. But it was substantive because it required the court to consider a sentencing range broader than that required by statute for minors convicted of first-degree murder, categorically broadening the sentencing range for minors.

The Appellate Court vacated defendant's sentence and remanded for a new sentencing hearing at which the court could consider "all permissible sentences and is not limited to the sentence of life without parole." The option of life without parole was "still on the table," although "its imposition should be uncommon because [as **Miller** states] it will be the 'rare juvenile offender whose crime reflects irreparable corruption.'"

(Defendant was represented by Assistant Defender Jonathan Yeasting, Chicago.)

People v. Morfin, 2012 IL App (1st) 103568 (No. 1-10-3568, 11/30/12)

New constitutional rules of criminal procedure are generally not applied retroactively to convictions that were final when the new rule was announced. Two exceptions exist: (1) where the rule places certain kinds of primary, private individual conduct beyond the power of the criminal-law-making authority to proscribe, or (2) where the rule requires observance of those procedures that are implicit in the concept of ordered liberty. The first exception encompasses new substantive rules that limit the persons or conduct that constitutionally may be subject to a certain penalty.

Miller v. Alabama, 567 U.S. ___, 132 S. Ct. 2455, ___ L.Ed.2d ___ (2012), holds that persons under age 18 may not be subject to mandatory natural-life imprisonment, and is therefore a fully retroactive substantive rule. **Miller** mandates a sentencing range broader than that provided by statute by requiring Illinois courts to hold a sentencing hearing for every minor convicted of first-degree murder at which a sentence other than natural life must be available for consideration. The Supreme Court's application of **Miller** to a companion case before the court on state collateral review supports the conclusion that there is no impediment to retroactive application of **Miller**.

Sterba, J., specially concurred. New substantive rules are fully retroactive because they necessarily carry a significant risk that a defendant faces a punishment that the law cannot impose. **Miller** is a new substantive rule because it prohibits the mandatory imposition of a life sentence on juveniles, even though it does not prohibit life imprisonment in every case.

(Defendant was represented by Assistant Defender Heidi Lambros, Chicago.)

People v. Sanders, 393 Ill.App.3d 152, 911 N.E.2d 1096 (1st Dist. 2009)

People v. Strain, 194 Ill.2d 467, 742 N.E.2d 315 (2000), which provides that a trial judge must inquire about the potential gang bias of veniremembers where gang related evidence is integral at trial, constituted a "new" rule which could not be applied retroactively on collateral review. Furthermore, a post-conviction petition filed the year after **Strain** was decided, but eight years after defendant was convicted, was untimely.

The Appellate Court acknowledged that its rulings conflicted with **People v. Gardner**, 331 Ill.App.3d 358, 771 N.E.2d 26 (1st Dist. 2002), which held that a defendant could obtain retroactive relief on a post-conviction petition based on **Strain** although the ordinary statutory period for filing such a petition had expired. The Appellate Court stated "that as much as we respect the opinions of the **Gardner** court we cannot align ourselves with its analysis on these matters."

(This summary was written by Deputy State Appellate Defender Daniel Yuhas.)

People v. Santana, 401 Ill.App.3d 663, 931 N.E.2d 273 (2d Dist. 2010)

In **People v. Morris**, 236 Ill.2d 345, ___ N.E.2d ___ (2010), the Supreme Court held that its decision in **People v. Whitfield**, 217 Ill.2d 177, 840 N.E.2d 658 (2005), does not apply retroactively to convictions that were final when **Whitfield** was announced. **Whitfield** held that a defendant may seek reduction of his sentence of imprisonment by the length of the applicable MSR (mandatory supervised release) term, where the court fails to admonish him that his sentence includes the MSR term when he enters a negotiated plea of guilty.

Upon remand from the Supreme Court for reconsideration in light of **Morris**, the court held:

1. Defendant's assertion of his **Whitfield** claim in a 2-1401 petition was untimely because 735 ILCS 5/2-1401 provides that such petitions must be filed within two years of the date of judgment. The judgment was not void and subject to attack at any time because mere

absence of the MSR admonition did not deprive the court of the authority to sentence defendant.

2. By statute (725 ILCS 5/122-1(d)), the circuit court was not required to recharacterize the 2-1401 petition as a post-conviction petition. The court declined to follow **People v. Smith**, 386 Ill.App.3d 473, 898 N.E.2d 119 (5th Dist. 2008), finding it questionable authority and distinguishable, because the petition in **Smith** would have been timely if considered as a post-conviction petition, whereas the petition at bar was timely whether considered as a post-conviction or a 2-1401 petition.

3. Because defendant's conviction was final when **Whitfield** was announced in that he had taken no direct appeal, defendant was not entitled to application of **Whitfield**.

The court affirmed the dismissal of the 2-1401 petition.

(Defendant was represented by Assistant Defender Yasemin Eken, Elgin.)

People v. Tripp, 407 Ill.App.3d 813, 944 N.E.2d 405 (1st Dist. 2011)

1. Leave to file a successive post-conviction petition is conditioned on satisfaction of the cause-and-prejudice test. 725 ILCS 5/122-1(f). To establish cause, petitioner must identify an objective factor that impeded his ability to raise a specific claim during his initial post-conviction proceeding. To establish prejudice, petitioner must show that the claim that he did not raise in the initial proceeding so infected the proceeding that his resulting conviction violated due process.

Petitioner failed to satisfy the cause-and-prejudice test based on his claim that his pre-trial motion to suppress should have been granted in light of **Arizona v. Gant**, __ U.S. __, 129 S.Ct. 1710, ___ L.Ed.2d ___ (2009). Because **Gant** was not decided until nine years after defendant's initial post-conviction petition, an objective factor impeded defendant's ability to raise the issue in his initial petition. Petitioner cannot establish prejudice, however, because **Gant** is a new rule of criminal procedure that does not apply retroactively to convictions that were final when **Gant** was announced. Even if **Gant** did apply retroactively, petitioner was not prejudiced. **Gant** would not bar admission of the seized evidence because on direct appeal the Appellate Court found that probable cause to search the vehicle existed independent of any search incident to arrest that would have been illegal post-**Gant**.

2. New constitutional rules of criminal procedure do not apply to convictions that were final when the new rule was announced. A case announces a new rule when it breaks new ground or imposes a new obligation on the states or federal government. A decision constitutes a new rule unless a state court considering the claim at the time the conviction became final would have felt compelled by existing precedent to conclude that the rule was required by the constitution.

Two exceptions to this rule of non-retroactivity exist: (1) the new rule places certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe; or (2) the new rule requires the observance of those procedures that are implicit in the concept of ordered liberty. Under this second exception, the new rule must represent a watershed rule of criminal procedure implicit in the concept of ordered liberty and central to the accuracy of the conviction. It is not enough that the new rule is based on a bedrock right or is fundamental in the abstract sense. It must constitute a previously-unrecognized bedrock procedural element that is essential to the fairness of a proceeding.

Gant constitutes a new rule. Prior to **Gant**, police were permitted to search the passenger compartment of an arrestee's automobile contemporaneous to an arrest, so long as the arrestee was a recent occupant of the vehicle. In contrast, **Gant** limits an officer's ability to search a vehicle incident to a recent occupant's arrest to where: (1) the arrestee is within

reaching distance of the passenger compartment at the time of the search; or (2) it is reasonable to believe that the vehicle contains evidence of the offense of the arrest.

Neither exception to the rule of non-retroactivity applies to **Gant**. **Gant** does not legalize primary, private individual conduct and does not reinterpret a statute. While important, **Gant** is not a watershed rule of criminal procedure implicit in the concept of ordered liberty. It merely introduced a new rule regarding the already-existing limitations placed on officers when conducting a search incident to an arrest.

(Defendant was represented by Assistant Defender Rachel Moran, Chicago.)

People v. Williams, 2012 IL App (1st) 111145 (Nos. 1-11-1145 & 1-11-2251 cons., modified 12/12/12)

1. An evidentiary hearing is warranted on a post-conviction claim where the allegations in the petition, supported where appropriate by the trial record or accompanying affidavits, make a substantial showing that the constitutional rights of the defendant have been violated. At the motion-to-dismiss stage, all well-pleaded facts that are not positively rebutted by the trial record are to be taken as true. Review of the trial court's dismissal of a petition without an evidentiary hearing is *de novo*.

A claim of actual innocence requires a showing of newly-discovered evidence that was not available at defendant's original trial and that defendant could not have discovered sooner through diligence, that is noncumulative and material, and that is of such conclusive character that it would probably change the result on retrial.

Defendant was entitled to an evidentiary hearing on his actual-innocence claim. Defendant's evidence of his innocence was newly-discovered. His co-defendants and his alibi witness were previously uncooperative with the defendant. Another witness who identified defendant could not be located until well after trial. Defendant attested that this evidence was not known to him before trial and to his difficulties in communicating while in the prison system. Therefore, defendant has shown that his allegations are based on newly-discovered evidence.

The newly-discovered evidence is also material, noncumulative, and would probably change the result of defendant's trial. The co-defendants attested that they each told the police that the police had the wrong man, that they did not know the defendant, and that their descriptions of the fifth perpetrator did not match the defendant. The witness who identified defendant to the police had no knowledge that defendant was involved in the crimes. None of this evidence was before the jury. The only evidence linking the defendant to the crimes was his confession. A co-defendant who testified at another co-defendant's trial never identified defendant as one of the offenders. Therefore, defendant was entitled to an evidentiary hearing.

2. Only one post-conviction petition may be filed by a petitioner without leave of court. Leave may be granted upon a showing of cause for the failure to bring the claim in the initial post-conviction proceeding and prejudice resulting from that failure. Cause is shown by identifying an objective factor that impeded the ability to raise the claim during the initial proceeding. Prejudice is shown by demonstrating that the claim so infected the trial that the resulting conviction or sentence violates due process.

Miller v. Alabama, 567 U.S. ___, 132 S.Ct. 2455, ___ L.Ed.2d ___ (2012), held that mandatory life imprisonment without the possibility of parole for offenders under the age of 18 violates the Eighth Amendment. Because **Miller** was not available to defendant when he filed his initial petition, defendant has satisfied the cause element of the cause-and-prejudice test for his Eighth Amendment claim. Defendant has also demonstrated prejudice because **Miller** applies retroactively to his case. The sentencing court did not graduate and proportion

punishment for defendant's crime considering his status as a juvenile at the time of the offense, violating the Eighth Amendment's prohibition against cruel and unusual punishment.

3. Generally, new rules of criminal procedure do not apply retroactively to convictions that are final when the new rule is announced except: (1) if the rule places certain kinds of primary, private individual conduct beyond the power of the criminal-law-making authority to proscribe; or (2) if the rule requires the observance of those procedures that are implicit in the concept of ordered liberty. This second exception is limited to watershed rules of criminal procedure without which the likelihood of an accurate conviction is seriously diminished.

The Appellate Court concluded that **Miller** was such a watershed rule that requires observance of procedures implicit in the concept of ordered liberty. **Miller** not only changed procedures but made a substantial change in the law in holding under the Eighth Amendment that the government cannot constitutionally apply a mandatory sentence of life without parole for homicides committed by persons under the age of 18. Life without parole is justified only where the State shows that it is an appropriate and fitting punishment regardless of the defendant's age.

The Appellate Court found it instructive that the companion case to **Miller** involved a life-without-parole sentence that was final. Notwithstanding its finality, the Supreme Court effectively applied **Miller** retroactively to the companion case. Once a new rule is applied to the defendant in a case announcing the new rule, evenhanded justice requires that it be applied retroactively to all who are similarly situated. It would be cruel and unusual punishment to only apply the principle of **Miller** to new cases.

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