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CH. 9 COLLATERAL REMEDIES

§9-1 Post-Conviction Hearing Act

§9-1(a) Generally

United States Supreme Court

Smith v. Bennett, 365 U.S. 708, 81 S.Ct. 895, 6 L.Ed.2d 39 (1961) When a state establishes a post-conviction procedure, it cannot condition its availability on any financial consideration. See also, **Long v. Iowa**, 385 U.S. 192, 87 S.Ct. 362, 17 L.Ed.2d 290 (1966) (state habeas corpus).

Illinois Supreme Court

People v. Veach, 2017 IL 120649 Constitutional claims of ineffective assistance of counsel are forfeited unless raised on direct appeal. Furthermore, procedural default applies to issues which could have been raised on direct appeal, but were not. However, procedural default does not apply to constitutional issues which depend on facts that are not in the record on direct appeal. Such issues may be raised on collateral review.

The Supreme Court rejected the Fourth District Appellate Court's practice of applying a "categorical approach" to determine whether ineffective assistance of counsel claims should be considered on direct appeal. Reviewing courts are required to consider ineffective assistance claims on a case-by-case basis, and to resolve such issues on direct appeal unless the record is insufficient to allow the claim to be considered.

The court rejected the Appellate Court's conclusion that the record was insufficient to resolve defendant's ineffective assistance claim on direct appeal. Defendant claimed that defense counsel was ineffective for stipulating to the admission of recordings of statements by three state witnesses and for agreeing to allow the recordings to be played in their entirety. The Appellate Court found that the record was inadequate to decide the issue because the record did not reflect why defense agreed to have the recordings admitted.

The Supreme Court noted that the record showed that defense counsel wanted to use parts of the recordings for impeachment purposes, and believed that by doing so he would open the door for the State to admit bad character evidence and the witness's prior consistent statements. In addition, defense counsel initially questioned why the entire video should be played for the jury, but acquiesced to the State's response that under the "doctrine of completeness, the entire recording had to be seen by the jury."

People v. Domagala, 2013 IL 113688 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.

People v. Harris, 224 Ill.2d 115, 862 N.E.2d 960 (2007) Post-conviction relief and direct appeal may be pursued simultaneously. The Post-Conviction Hearing Act does not authorize the trial court to either: (1) hold a petition in abeyance while the direct appeal is pending, or (2) dismiss the petition without prejudice and with leave to refile.

People v. Whitfield, 217 Ill.2d 177, 840 N.E.2d 658 (2005) A post-conviction petitioner is entitled to relief only if his petition demonstrates that a substantial deprivation of constitutional rights occurred in the proceedings that produced the conviction or sentence. Issues that could have been raised on direct appeal, but were not, are procedurally defaulted, and issues that have been previously decided are barred by res judicata.

People v. Flowers, 208 Ill.2d 291, 802 N.E.2d 1174 (2003) Even if a withholding order imposed as part of defendant's sentence was void, the trial court lacked authority to reach that issue once it lost jurisdiction over the case. Although a void order may be challenged at any time, "the issue of voidness must be raised in the context of a proceeding that is properly pending in the courts." Thus, "if a court lacks jurisdiction, it cannot confer any relief, even from prior judgments that are void."

People v. Johnson, 205 Ill.2d 381, 793 N.E.2d 591 (2002) The trial court must exercise its authority to order post-conviction discovery cautiously to avoid deflecting attention from the constitutional issues at stake. Discovery should be permitted only if defendant has shown "good cause" in view of the issues raised, 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 identical evidence through other sources. The trial court's denial of post-conviction discovery will be reversed only for an abuse of discretion. See also, **People v. Lucas**, 203 Ill.2d 410, 787 N.E.2d 113 (2002). It is not an abuse of discretion to deny a discovery request which amounts to a "fishing expedition."

Petitioner established good cause for taking deposition of trial counsel; the petition alleged ineffective assistance of trial counsel, the evidence of counsel's misconduct was unknown to petitioner at the time of trial, and trial counsel's interrogatory answers were summarily brief. See also, **People v. Fair**, 193 Ill.2d 256, 738 N.E.2d 500 (2000) (a defendant, who learned after conviction that the trial judge had engaged in an extensive pattern of corruption, was entitled to discover evidence developed by the Cook County State's Attorney, because without the evidence defendant would have been unable to establish a nexus between the judge's conduct and the conviction); **People v. Hickey**, 204 Ill.2d 585, 792 N.E.2d 232 (2001) (trial court did not abuse discretion by denying discovery of evidence that existed at time of trial); **People v. Enis**, 194 Ill.2d 361, 743 N.E.2d 1 (2000) (trial court did not abuse discretion by quashing subpoenas for "entire police file"; request was "little more than a fishing expedition"); **People v. Williams**, 209 Ill.2d 227, 807 N.E.2d 448 (2004) (petitioner failed to show good cause for discovery of the names and addresses of unidentified jurors).

People v. Wilson, 191 Ill.2d 363, 732 N.E.2d 498 (2000) A trial court has discretion to appoint an expert in a post-conviction proceeding, and a court should do so where expert testimony would assist the court in deciding the question before it. Here, the trial court did not abuse its discretion or violate due process by failing to appoint an expert. See also, **People v. West**, 187 Ill.2d 418, 719 N.E.2d 664 (1999); **People v. Richardson**, 189 Ill.2d 401, 727 N.E.2d 362 (2000).

People v. Brisbon, 164 Ill.2d 236, 647 N.E.2d 935 (1995) Where a post-conviction petition is filed in a death penalty case, the trial court must appoint counsel and await a response from the State before ruling. Although the trial court denied defendant's amended petition without waiting for a response from the State, the Court held that such a "minor procedural error" did not require reversal where the State had filed a response to the original petition and the purpose of the statutory scheme - to insure that death penalty defendants receive the assistance of counsel in filing post-conviction petitions - had been served. See also, **People v. Thomas**, 195 Ill.2d 37, 743 N.E.2d 552 (2001) (the trial court erred by dismissing a capital post-conviction petition without determining whether defendant wanted counsel and by summarily dismissing the petition without a responsive pleading from the State).

People v. Hall, 157 Ill.2d 324, 626 N.E.2d 131 (1993) The Post-Conviction Hearing Act does not specifically authorize or prohibit discovery depositions, but leaves requests for depositions to the trial court's discretion. The trial court should consider all the relevant circumstances, including the issues in the post-conviction petition and the availability of the evidence through other sources. See also, **People v. Henderson**, 171 Ill.2d 124, 662 N.E.2d 1287 (1996); **People v. Pecoraro**, 175 Ill.2d 294, 677 N.E.2d 875 (1997).

People v. Gaines, 105 Ill.2d 79, 473 N.E.2d 868 (1984) In cases where a death sentence was imposed, an appeal from a final judgment of the circuit court in a post-conviction proceeding lies directly to the Supreme Court. See also, **People v. Lewis**, 105 Ill.2d 226, 473 N.E.2d 901 (1984).

Illinois Appellate Court

People v. Ross, 2022 IL App (2d) 210068 Defendant filed a post-conviction petition, which he later was given leave to withdraw. Less than one year after withdrawing the petition, defendant filed an amended post-conviction petition. The trial court subsequently summarily dismissed the amended petition, and defendant appealed.

On appeal, defendant challenged the summary dismissal on the basis that it was untimely, among other reasons. The Appellate Court agreed. Defendant had electronically filed his amended petition on September 18, 2020. On January 7, 2021, on its own motion, the circuit court set a status date of January 28, 2021. But, then on January 20, 2021, the circuit court summarily dismissed the amended petition. The circuit court noted that the petition was file-stamped on September 18, 2020, more than 90 days prior, but found that it "was not simultaneously docketed" by the clerk on that date. Instead, the circuit court concluded that the petition was docketed on January 7, 2021. Because the Post-Conviction Hearing Act provides that a petition may be summarily dismissed within 90 days of its "filing and docketing," the circuit court believed its dismissal order was timely.

The Appellate Court was tasked with determining when the amended petition was docketed, which has been held to mean the date on which the petition was entered on the court's official docket for further proceedings. The Appellate Court agreed with defendant that his petition was docketed on September 18, 2020, the same date it was electronically filed. While filing and docketing are not the same thing, they usually occur on the same date, especially since the advent of electronic filing. The filing of defendant's petition here was included in the docket entries in the record on September 18, 2020. This was adequate to consider the petition "docketed" on that date. Accordingly, the circuit court's dismissal order was untimely because it was entered more than 90 days after docketing. The dismissal was vacated, and the matter was remanded for further proceedings.

People v. Hunt, 2022 IL App (4th) 210001 When a defendant withdraws a post-conviction petition, a re-filed petition must be evaluated at the first stage as a newly filed petition, even if the original petition had advanced to the second stage.

Section 122-5 of the Post-Conviction Hearing Act states the trial court “may in its discretion grant leave, at any stage of the proceeding prior to entry of judgment, to withdraw the petition.” The Act does not have a provision on re-filing, but in those circumstances, courts have applied the rules for civil cases. A plaintiff in a civil case “may commence a new action within one year or within the remaining period of limitation, whichever is greater. . . after the action is voluntarily dismissed by the plaintiff.” 735 ILCS 5/13-217. Because section 13-217 refers to a “new action,” courts have held that the subsequent filing is not a continuation of the prior filings.

In this case, defendant’s petition advanced to the second stage before he withdrew his petition pursuant to section 122-5. He re-filed, and the petition was summarily dismissed at the first stage. The Appellate Court rejected his claim that the re-filed petition should have started at the second stage. The petition is a “new action” under section 13-217, and therefore first-stage review was appropriate.

People v. Taylor, 2022 IL App (2d) 190951 After defendant’s direct appeal was dismissed for want of prosecution, he filed a post-conviction petition alleging ineffective assistance of appellate counsel for failing to proceed with the appeal. New appellate counsel then filed an appearance and brief, and the Appellate Court reinstated defendant’s direct appeal. Days later, the trial court *sua sponte* dismissed defendant’s post-conviction petition as moot. Subsequently, defendant filed another post-conviction petition. The trial court dismissed that petition, treating it as a successive petition and finding that defendant had not obtained leave of court to file it.

On appeal, defendant argued that the trial court erred in treating his second petition as a successive petition for purposes of the Act. The Appellate Court agreed. Defendant’s original petition was dismissed as moot, and the Appellate Court concluded that a finding of mootness does not fall within the definition of “frivolous and patently without merit.”

Even if the court’s determination that defendant’s original petition was moot did mean it was frivolous and patently without merit, defendant had not had an opportunity to withdraw that petition because the court *sua sponte* dismissed it as moot just days after defendant’s direct appeal was reinstated. Thus, as in **People v. Sawczenko, 328 Ill. App. 3d 888 (2002)**, a deficiency in the original post-conviction proceedings meant that defendant’s current petition must be considered his first under the Act.

Further, in **People v. Little, 2012 IL App (5th) 100547**, the court held that a first petition filed solely to regain the right to a direct appeal should not have been treated as a post-conviction petition since it was not a true collateral attack on the defendant’s conviction and sentence. Accordingly, a second petition filed following such an initial petition is not treated as a successive petition.

The dismissal of defendant’s petition was reversed, and the matter was remanded for second-stage proceedings because the court had not considered the merits of defendant’s petition within 90 days of its filing.

People v. Gibson, 2018 IL App (1st) 162177 When detectives invoked the Fifth Amendment during an evidentiary hearing on defendant’s torture claim, the circuit court erred in refusing to draw an adverse inference from their silence.

The Illinois Torture Inquiry and Relief Commission (TIRC) had found defendant's claims of abuse by Area 3 officers sufficient to warrant judicial review, and remanded for an evidentiary hearing. The circuit court dismissed the claim. The Appellate Court reviewed defendant's claims that the court erred in refusing to draw adverse inferences from witness silence, and for refusing to admit hearsay, including torture reports.

The Appellate Court first held that TIRC proceedings are civil in nature, and in civil proceedings the court has discretion to draw negative inferences from witness silence. Refusing to do so in this case constituted an abuse of discretion because none of the other State witnesses directly refuted defendant's claims of abuse, and because the integrity of the justice system depends on the integrity of the police officers, particularly in the context of coerced confessions. The police officers' silence in the face of accusations of coercion should have caused the circuit court to take note.

Furthermore, because hearings under the TIRC Act are civil collateral proceedings like post-conviction hearings, the Illinois Rules of Evidence do not apply, and on remand, the circuit court must reconsider its decision to prevent the defendant from admitting hearsay, including the Goldston and Egan-Boyle Reports.

People v. Shief, 2016 IL App (1st) 141022 725 ILCS 5/122-1(b) states that the clerk "shall" docket a post-conviction petition for consideration by the court and "bring the same promptly to the attention of the court." Here, the clerk failed to docket defendant's post-conviction petition and for nine months failed to respond to defendant's inquiries about the status of the petition. Defendant eventually refiled his petition, which was summarily dismissed.

On appeal, defendant argued that the summary dismissal should be reversed and the cause remanded for second-stage proceedings because the clerk failed to promptly docket his petition. The court rejected this argument, finding that the requirement that the petition be promptly docketed is "directory" rather than "mandatory," as the Act contains no language prohibiting further action or specifying a consequence if the clerk does not docket a post-conviction petition in a timely manner, and certainly no suggestion that the petition must be advanced to second-stage post-conviction proceedings.

The court contrasted the statutory language concerning the clerk's duty to docket the petition with 725 ILCS 5/122-2.1, which requires the trial court to conduct a first-stage review of a petition within 90 days and provides that the petition is advanced to second-stage proceedings if the 90-day limit is violated. Section 122-2.1 prescribes a specific consequence if the deadline for trial court action is not met, while §122-1(b) prescribes no such consequence for the clerk's failure to promptly docket a post-conviction petition.

The court acknowledged that even where a provision is directory, the defendant may be entitled to relief if he can demonstrate he was prejudiced by a violation of the provision. Here, however, defendant is not claiming that the delay prejudiced his ability to properly prepare and present his case. Instead, he is arguing only that the unreasonable delay in the consideration of his petition, in and of itself, is sufficiently prejudicial to warrant advancement of his case to second-stage proceedings. The court concluded:

As sympathetic as we are with defendant's claim, and as much as we join him in condemning the unacceptable delay, we do not find this one-year delay sufficient to warrant a vacatur of the dismissal of his post-conviction petition and automatic advancement to second-stage proceedings. In the end, defendant refiled his petition, presented it, and received a fair hearing on the merits; he does not contend otherwise.

The summary dismissal of the post-conviction petition was affirmed.

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

People v. Wingate, 2015 IL App (5th) 130189 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.

People v. Chester, 2014 IL App (4th) 120564 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.

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.

People v. Reid, 2014 IL App (3rd) 130296 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. 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. The 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.

People v. Greco, 2014 IL App (1st) 112582 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.

[People v. Chambers](#), 2013 IL App (1st) 100575 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."

The Appellate Court found that the prohibition against additional filings conflicted with the plain and ordinary language of §22-105. 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.

[People v. Kelley](#), 2013 IL App (4th) 110874 The requirements of [People v. Boose](#), 66 Ill.2d 261, 362 N.E.2d 303 (1977), and Supreme Court Rule 430, regarding the shackling of defendants in court, 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. Instead, the post-conviction court has discretion to order that a defendant be shackled.

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.

[People v. Pinkston](#), 2013 IL App (4th) 111147 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.

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.

People v. Griffin, 2013 IL App (2d) 110631 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.

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.

People v. Cole, 2012 IL App (1st) 102499 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.

People v. Henderson, 2011 IL App (1st) 090923 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.

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.

People v. Macri, 2011 IL App (2d) 100325 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.

People v. Makiel, 358 Ill.App.3d 102, 830 N.E.2d 731 (1st Dist. 2005) The Post-Conviction Hearing Act creates a three-step procedure by which a claim for post-conviction relief in a non-capital case is determined. At stage one, the trial court must determine, without input from the State, whether the petition is frivolous or patently without merit. A petition which is not summarily dismissed as frivolous proceeds to stage two, when counsel is appointed and the State may either answer or move to dismiss. At the second stage, the trial court must determine whether the petition makes a substantial showing of a constitutional violation.

All well-pleaded facts are taken as true at the second stage, and a first or second stage dismissal is reviewed de novo. A petition which is not dismissed at the second stage proceeds to stage three, at which the trial court conducts an evidentiary hearing. A defendant is not entitled to an evidentiary hearing as a matter of right; a hearing is required only where the allegations of the petition, supported by the trial record and accompanying affidavits, make a substantial showing that a constitutional right has been violated.

People v. Butler, 23 Ill.App.3d 108, 318 N.E.2d 680 (5th Dist. 1974) On appeal from dismissal of a post-conviction petition, the court reversed the conviction without remanding the cause for a post-conviction hearing. Because trial counsel's incompetency was confirmed by the trial record, a direct remand would "expedite the handling of petitioner's case."

§9-1(b)

Filing the Petition

§9-1(b)(1)

Who May Petition for Relief

Illinois Supreme Court

People v. Johnson, 2021 IL 125738 Whether an individual has standing to file a post-conviction petition under the Post-Conviction Hearing Act is a proper consideration at the first stage of proceedings. Defendant filed a post-conviction petition challenging his

conviction of unlawful restraint. He had completed his sentence for that offense but was imprisoned for failing to register under the Child Murderer and Violent Offender Against Youth Registration Act (VOYRA), [730 ILCS 154/1](#). The registration requirement was a result of his unlawful restraint conviction, based on the age of the victim. In his petition, defendant alleged that when he pled guilty to unlawful restraint, the age of the victim was not stated in court, he was not advised by the court of his obligation to register under VOYRA, and counsel was ineffective for not informing him about VOYRA's application.

The court affirmed the summary dismissal of defendant's petition on the basis that he lacked standing to seek post-conviction relief from the unlawful restraint conviction. While standing is ordinarily an affirmative defense, the legislature has expressly authorized summary dismissal of post-conviction petitions under the Act's procedural framework. Although the Act does not use the term "standing," it does specifically limit its availability to individuals imprisoned in the penitentiary. And it is well-established that the petitioner must be imprisoned on the challenged conviction, not simply imprisoned for any conviction, to proceed under the Act.

The court held that standing is more like *res judicata* and forfeiture, which involve conclusions of law and are appropriately considered at the first stage of proceedings. Where a petitioner clearly lacks standing, the petition is necessarily frivolous and patently without merit, allowing for summary dismissal. If, on the other hand, a petitioner's standing is unclear, the petition may be advanced for further consideration.

The court rejected the argument that the interrelatedness of defendant's underlying unlawful restraint conviction and current VOYRA failure-to-register conviction conferred standing. While actual incarceration is not always required under the "imprisoned in the penitentiary" language of the Act, defendant's imprisonment here was the result of a collateral consequence of his original conviction, not a direct consequence, and thus did not confer standing for him to challenge the original conviction.

[People v. Gayden, 2020 IL 123505](#) Responding to a call of a man with a gun, police approached defendant's apartment and saw him standing in the open doorway with a shotgun. Defendant tried to close the door, but the officers blocked the door, entered, arrested defendant, and recovered the gun. Defendant was convicted of unlawful use of a weapon. During the course of his appeal, he completed his prison term and his one-year term of MSR. On appeal, defendant alleged ineffective assistance of counsel for failing to file a motion to suppress the gun. Defendant argued that the police entered his home without probable cause or exigent circumstances.

The Appellate Court refused to reach the issue, finding the record did not contain sufficient facts to judge whether or not a motion to suppress would be meritorious. It suggested defendant file his claim in a post-conviction petition. In a rehearing petition, defendant informed the Appellate Court that it's suggested remedy was unavailable, as defendant was no longer in custody and not eligible to file a petition under the Post-Conviction Hearing Act, and asked instead for a remand. The Appellate Court found this request forfeited. Defendant appealed to the Supreme Court, arguing that the record was sufficient to resolve his ineffectiveness claim, but if not, the cause should be remanded for a hearing because he could not file a post-conviction petition.

The Supreme Court affirmed. It held that the record did not contain sufficient information concerning the circumstances of defendant's arrest from which it could determine whether a motion to suppress would have been meritorious. The State had no reason to establish the factual basis that gave the officers probable cause to arrest defendant in the first place, as that information was not necessary to prove defendant's guilt. The arrest

report reveals that officers learned about other circumstances that may have given the officers probable cause and exigent circumstances, including threats to a woman in the apartment with defendant.

The court then rejected defendant's claim that his case should be remanded for a hearing. It held that contrary to defendant's argument, there is not a "hole" in Illinois' appellate procedures, nor does the Post-Conviction Hearing Act's restrictions on who can file a petition create a class of defendants who, because they complete their sentence during the course of their direct appeal, never get a decision on the merits of their undeveloped claims of ineffective assistance of counsel. Rather, the remedy for a defendant in this position is to file a post-conviction petition before his sentence is discharged – even if his direct appeal was pending – in order to preserve his post-conviction claim. Although the court has used its supervisory authority to allow for the filing of a post-conviction in a misdemeanor case, that defendant had no other recourse because the Act does not allow petitions in misdemeanor cases. Here, the defendant did have an available means of recourse, but he failed to take it. For the same reason, the court, with one justice dissenting, rejected defendant's proposal that in these situations, appellate courts should remand for a hearing upon a substantial showing of ineffectiveness.

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

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.

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.

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.

People v. West, 145 Ill.2d 517, 584 N.E.2d 124 (1991) A defendant is entitled to invoke post-conviction relief where he is presently "imprisoned in the penitentiary" or where he has been released after the petition was filed, released on appeal bond following conviction, released under mandatory supervision, or sentenced to probation. Where defendant had completed both a four-year sentence for voluntary manslaughter and the mandatory supervised release period, he could not file a post-conviction petition though the conviction was subsequently used as an aggravating factor at a death penalty hearing. See also, **People v. Correa**, 108 Ill.2d 541, 485 N.E.2d 307 (1985) (defendant was entitled to post-conviction release where he was still serving a term of mandatory supervised release); **People v. Martin-Trigona**, 111 Ill.2d 295, 489 N.E.2d 1356 (1986) (defendant, who was on appeal bond, could file a post-conviction petition); **People v. Pack**, 224 Ill.2d 144, 862 N.E.2d 938 (2007) (finding that a prisoner who is serving consecutive sentences is "imprisoned" under all of the sentences, even if one or more have been completed, and noting that the Post-Conviction Hearing Act is intended to apply to persons whose liberty is "curtailed" by the State when the petition is filed); **People v. Rajagopal**, 381 Ill.App.3d 326, 885 N.E.2d 1152 (1st Dist. 2008) (defendant who completed his probation term before filing a post-conviction petition was not "imprisoned," although he had recently learned that he faced possible deportation because of the conviction; possible implications on defendant's immigration status do not constitute a sufficient "restraint" on liberty to invoke the Post-Conviction Hearing Act).

People v. Warr, 54 Ill.2d 487, 298 N.E.2d 164 (1973) A misdemeanor may institute a proceeding in the nature of a post-conviction petition where he asserts that there was a substantial denial of his constitutional rights in the proceedings that resulted in his conviction. Defendant need not be imprisoned, and the proceeding must be commenced within four months of a guilty plea and six months after trial. See also, **People v. Shanklin**, 304 Ill.App.3d 1056, 711 N.E.2d 796 (4th Dist. 1999) (the trial court properly dismissed a post-conviction petition filed by a misdemeanor probationer 13 months after sentencing).

Illinois Appellate Court

People v. Wilson, 2023 IL App (1st) 220032 The appellate court dismissed defendant's appeal from the denial of leave to file a successive post-conviction petition. The motion for leave to file, and the accompanying petition, as well as the subsequent notice of appeal, were all signed by defendant's wife via her power of attorney. The appellate court concluded that this constituted the unauthorized practice of law and rendered the pleadings a nullity.

The court rejected defendant's argument that the Illinois Power of Attorney Act [755 ILCS 45/1-1, *et seq.*] authorized his wife's conduct here. The Act permits another to act as a decision-making agent as to an individual's property and financial affairs but does not permit a non-lawyer to practice law on behalf of another. Defendant's wife could have obtained the assistance of an attorney for defendant via her power of attorney but could not herself prepare and file legal documents for defendant.

The dissent would have found that the Act allowed defendant's wife to "institute" legal claims for defendant, such as a successive post-conviction petition, and she properly sought to do so by seeking leave to file on defendant's behalf. The dissent would have rejected application of the nullity rule because defendant's wife acted in good faith and her participation was nominal where she simply signed pleadings on defendant's behalf and because the State was not prejudiced since it generally cannot participate at the leave-to-file stage anyhow.

People v. Munz, 2021 IL App (2d) 180873 Defendant filed his post-conviction petition with one day left on his term of mandatory supervised release. The circuit court summarily dismissed, finding that once his MSR term expired, he lacked standing. The Appellate Court affirmed, but did so on substantive grounds, because defendant did have standing. The Illinois Supreme Court has held that section 122-1(a)'s requirement that a petitioner be "imprisoned in the penitentiary" includes MSR. And the fact that he completed MSR prior to a ruling on the petition did not render the petition moot. Section 122-1(a)'s imprisonment requirement applies only to the ability to "institute" proceedings, not to the ability to obtain relief. The Appellate Court declined to follow **People v. Henderson, 2011 IL App (1st) 090923**, which held that completion of MSR rendered post-conviction proceedings moot.

Defendant argued that because the circuit court dismissed his petition due to lack of standing, it failed to comply with the statutory requirement that it determine whether the petition is frivolous or patently without merit within 90 days of filing. The Appellate Court disagreed. In **People v. Johnson, 2021 IL 125738**, the Illinois Supreme Court found "that a lack of standing is more like *res judicata* and forfeiture, which are appropriate bases for first-stage dismissal." Thus, the circuit court satisfied its duty to review the petition within 90 days and determine whether it was frivolous or patently without merit.

The court affirmed the summary dismissal on substantive grounds. Four of defendant's arguments – attacks on the constitutionality of the stalking statute and complaints about trial matters – were either already raised on direct appeal, and thus *res judicata*, or could have been raised, and forfeited. The final claim alleged that his prosecutor should have been disqualified because she was reprimanded by the ARDC for failing to disclose exculpatory information in an unrelated case. But this matter occurred after his conviction, and ultimately no disciplinary action was taken against the prosecutor. Therefore the argument that she should have been disqualified lacked an arguable basis in law, and summary dismissal was appropriate.

People v. Dunn, 2020 IL App (1st) 150198 It was not error to deny leave to file successive post-conviction petition to individual who had completed prison sentence in 2001 and had since been released from parole. The requirement that defendant continue to register as a sex offender did not provide him with standing under the post-conviction hearing act because sex offender registration is a collateral consequence of a conviction and not a direct restraint on defendant's liberty.

People v. Johnson, 2019 IL App (1st) 163169 The trial court did not err in summarily dismissing defendant's post-conviction petition at the first stage of proceedings on the basis that defendant lacked standing to proceed under the Post-Conviction Hearing Act. The Appellate Court held that standing is a proper basis for first-stage dismissal because it is more like waiver and *res judicata* than timeliness. Standing is a matter of substantive merit, not procedural compliance, since a petition filed without standing is necessarily without merit.

Here, defendant lacked standing to file his petition where his current incarceration was not a direct result of the 2007 conviction he sought to challenge in the petition. While defendant was presently serving a term of imprisonment for failing to meet a violent-offender registration requirement that was triggered by the 2007 conviction, registration requirements are not part of the sentence for a conviction. Defendant had completed both his prison sentence and MSR for the 2007 conviction and therefore lacked standing to challenge that conviction in proceedings under the Act.

People v. Coe, 2018 IL App (4th) 170359 A defendant has standing to file a post-conviction petition so long as he is “in custody” at the time the petition is filed. A defendant does not lose standing when he completes his sentence, including MSR, while the petition is still pending. By definition, “standing” means the ability to bring the suit, not the ability to maintain it.

Similarly, a defendant’s post-conviction petition does not automatically become moot where he completes his sentence before the petition is resolved. A defendant’s interest in purging the stigma and disabilities attendant to a criminal conviction remains after release from custody and prevents the petition from being moot.

People v. McDonald, 2018 IL App (3d) 150507 A defendant who timely files a post-conviction petition while in custody is eligible for post-conviction relief, “regardless of whether he is released from custody in the intervening time.” Defendant was in custody when he filed his petition; he had completed his prison sentence but was “violated at the door” because he did not have an acceptable address for MSR. During the pendency of his post-conviction appeal, defendant completed his MSR and was fully discharged from any sentence.

The plain language of the Post-Conviction Hearing Act is silent on whether a defendant loses standing to pursue post-conviction relief once he is discharged from his sentence. Illinois Supreme Court case law is in conflict, with some cases indicating a defendant must be in custody in order to obtain post-conviction relief [**Dale**, 406 Ill. 2d 238 (1950); **Martin-Trigona**, 111 Ill. 2d 295 (1986); **Carrera**, 239 Ill. 2d 241 (2010)] and another allowing a post-conviction petition to proceed even after a defendant’s release [**Davis**, 39 Ill. 2d 325 (1968)]. Applying the rule of lenity, the Appellate Court held that defendant did not lose standing to pursue post-conviction relief when he was discharged.

People v. Glenn, 2018 IL App (1st) 161331 Pursuant to **735 ILCS 5/2-702**, an individual convicted of a felony who has served all or part of a sentence of “imprisonment” may petition for a certificate of innocence if the conviction is reversed and the individual is actually innocent. The Appellate Court looked to the Post-Conviction Hearing Act to construe the meaning of “imprisonment.” Under the Act, any person “imprisoned” in the penitentiary can file a post-conviction petition. “Imprisoned,” as used in the Act, has been interpreted to include those persons serving a sentence of probation. Accordingly, the Court held that “imprisonment” as used in Section 702 includes a sentence of probation. Defendant’s petition for a certificate of innocence was erroneously denied on the basis that she had only been sentenced to probation.

People v. Begay, 2018 IL App (1st) 150446 Where defendant had completed his probation sentence, he lacked standing under the Act to file a petition under even though he was subject to the requirements of the Sex Offender Registration Act. SORA is not punishment and therefore does not constitute “imprisonment” sufficient to bring defendant within the reach of the Act.

People v. Huerta-Perez, 2017 IL App (2d) 161104 A defendant has standing to file a post-conviction petition so long as he is serving “some part of his sentence.” Here, defendant was sentenced to one year of conditional discharge in April 2007 and ordered to return in April 2008. When he did not return, the court extended the term of conditional discharge for one month. When defendant again failed to appear, the State filed a petition to revoke and an

arrest warrant was issued. Eight years later, defendant surrendered on the active warrant and then filed a post-conviction petition. The trial court summarily dismissed the petition because defendant was not “imprisoned” within the meaning of the Post-Conviction Hearing Act. The court also quashed the warrant and dismissed the petition to revoke.

Defendant lacked standing to file a post-conviction petition. Although defendant’s liberty may have been restrained by the arrest warrant and petition to revoke, the Act requires that defendant be serving some form of sentence for the conviction he seeks to challenge in the petition. Here, defendant’s sentence of conditional discharge ended in 2008. Rather than a post-conviction petition, defendant needed only to file a motion to quash the warrant and dismiss the petition to revoke. The Appellate Court affirmed.

People v. Sandoval-Carrillo, 2016 IL App (2d) 140332 Defendant appealed the dismissal of his post-conviction petition in which he argued among other things that his conviction was void because the trial court did not have jurisdiction over his case where the State never charged defendant by indictment or information.

The State argued that defendant, who was still on probation, no longer had standing to file a petition since he had been deported and thus his liberty was no longer curtailed. The court rejected this argument on two grounds.

First, even if defendant did not have standing, the court could still address his argument that his conviction was void. Lack of standing does not deprive a court of jurisdiction and a court may address any voidness argument that it properly before it.

Second, defendant still had standing because he had not already completed his sentence. It is only when a defendant has fully completed his sentence that he no longer has standing. The fact that defendant had been deported did not deprive him of standing under these circumstances.

People v. Stavenger, 2015 IL App (2d) 140885 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.

In re E.W., 2015 IL App (5th) 140341 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.

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.

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.

In re Vincent K., 2013 IL App (1st) 112915 While 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, the court rejected the argument that juvenile proceedings are now akin to criminal proceedings and that the Post-Conviction Hearing Act should therefore apply. 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.

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.

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. Jones, 2012 IL App (1st) 093180 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. Bethel, 2012 IL App (5th) 100330 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.

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.

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.

People v. Henderson, 2011 IL App (1st) 090923 A remedy under the PC 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.

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.

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 judgment. A term of supervision does not constitute a final judgment 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. Steward, 406 Ill.App.3d 82, 940 N.E.2d 140 (1st Dist. 2010) 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.

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. Bocclair**, 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.

People v. Vasquez, 2013 IL App (2d) 120344 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.

[People v. Vinokur, 2011 IL App \(1st\) 090798](#) 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.

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. Bocclair, 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.

[People v. Reyman Clinic Pharmacy, Inc., 246 Ill.App.3d 835, 617 N.E.2d 35 \(1st Dist. 1993\)](#) The Post-Conviction Hearing Act is unavailable to corporate defendants because there is no potential risk of incarceration.

§9-1(b)(2)

Timely Filing Requirement – Generally

Illinois Supreme Court

People v. Lighthart, 2023 IL 128398 Defendant entered a partially negotiated plea to first degree murder and was sentenced to 35 years of imprisonment. Through counsel, defendant filed a timely motion to reconsider sentence, which was denied. She subsequently filed a *pro se* motion to withdraw guilty plea. The trial court “allowed” defendant to file the motion even though more than 30 days had passed since sentencing and ultimately denied the motion. Defendant appealed, and her appeal was dismissed on jurisdictional grounds because she had not filed a proper, timely post-plea motion in compliance with Supreme Court Rule 604(d).

Approximately ten months later, defendant filed a post-conviction petition. That petition was dismissed at the second stage on the ground that it was untimely under **725 ILCS 5/122-1(c)**. At the time her petition was filed, that section provided:

When a defendant has a sentence other than death, no proceedings under this Article shall be commenced more than 6 months after the conclusion of proceedings in the United States Supreme Court, unless the petitioner alleges facts showing that the delay is not due to his or her culpable negligence. If a petition for certiorari is not filed, no proceedings under this Article shall be commenced more than 6 months from the date for filing a certiorari petition, unless the petitioner alleges facts showing that the delay was not due to his or her culpable negligence. If a defendant does not file a direct appeal, the post-conviction petition shall be filed no later than 3 years from the date of conviction, unless the petitioner alleges facts showing that the delay was not due to his or her culpable negligence.

The circuit court concluded that the 6-month limitation period applied because defendant had “filed” a direct appeal, even though it was dismissed for lack of jurisdiction rather than decided on the merits. Defendant’s petition was deemed untimely because it was not filed within six months of the date for filing a cert petition or, in a case like this one where no petition for leave to appeal was filed and thus no due date for a cert petition could be calculated, within six months from the date a PLA would have been due. See **People v. Johnson, 2017 IL 120310** (“inserting” PLA language into the statute due to legislative oversight).

The Supreme Court agreed, holding that even the filing of an ineffective notice of appeal, which results in dismissal for lack of jurisdiction for failing to comply with Supreme Court Rule 604(d), triggers the 6-month limitation period. While the statutory language, “If a defendant does not file a direct appeal,” could be construed to mean either (1) where no notice of appeal is filed or (2) where a notice of appeal is filed but is ineffective, legislative history shows an overall trend of shortening the limitations period. Thus, the Court concluded that the legislature’s intent was for the 3-year period to apply only where no notice of appeal was ever filed. This interpretation also has the benefit of providing a bright-line rule rather than requiring petitioners and courts to differentiate between ineffective and effective notices of appeal.

Here, because defendant had “filed” a notice of appeal, albeit an ineffective one resulting in dismissal, the 6-month limitation period applied. Accordingly, her petition was untimely. But, her untimeliness was excused due to a lack of culpable negligence because the version of Section 122-1(c) in effect at the time the petition was filed referenced only the time for filing a cert petition and made no reference to the later judicially-inserted requirement that a petition be filed within six months of the time for filing a PLA where none was filed. Additionally, at the time Defendant’s petition was filed, the only reported opinion on the

question was [People v. Ross](#), 352 Ill. App. 3d 617 (3d Dist. 2004), which favored her position. Thus, under the unique circumstances of this case, defendant was not culpably negligent for the late filing, and the Court remanded the matter for further proceedings on her petition.

[People v. Johnson](#), 2017 IL 120310 Defendant's conviction and sentence were affirmed on direct appeal on May 7, 2007. Defendant did not file a petition for leave to appeal. He filed a *pro se* post-conviction petition on August 25, 2008. The case was eventually advanced to second-stage proceedings where defense counsel filed a motion to allow the late filing of defendant's petition.

Judge Vecchio granted defendant's motion to file the late petition because defendant had been unaware of the deadline for filing and had relied on the jailhouse lawyer for help. After the case was reassigned to Judge Wilt, the State filed a motion to dismiss arguing that the petition was untimely. Judge Wilt granted the State's motion finding that the petition was untimely.

The Appellate Court affirmed, and the Supreme Court granted leave to appeal. When defendant files a direct appeal but he does not file a petition for certiorari, the Act states that "no proceedings...shall be commenced more than 6 months from the date for filing a certiorari petition." [725 ILCS 5/122-1\(c\)](#). The court found that a literal reading of the statute does not include a deadline for filing a petition where, as here, no leave to appeal is filed. If no appeal is taken to the Illinois Supreme Court, then no cert petition may be filed, and there can be no due date for filing the cert petition. The six-month deadline from the date for filing the cert is therefore never triggered.

The court held that "this literal reading of the statute must yield because it is at odds with the purpose of the statute," which is intended to provide a deadline. To construe the statute as the legislature intended, the court held that it must insert "leave to appeal" language into the statute. Therefore, the court held that the statute provides that a post-conviction petition must be filed within six months of the date for filing a cert petition or a petition for leave to appeal. If defendant does not file a petition for leave to appeal, the six-month time period for filing a post-conviction petition begins to run after the 35 days allowed for filing a petition for leave to appeal. Here, the due date for filing a petition for leave to appeal was June 11, 2007, and thus the due date for defendant's post-conviction petition was six months later on December 11, 2007. Defendant's petition, filed in August, 2008, was untimely.

The court held that the delay in filing the petition was due to defendant's culpable negligence, rejecting defendant's argument that confusion over the statute's deadline and reliance on the advice of a jailhouse lawyer negated his culpability. Ignorance of the law will not provide an excuse for the failure to timely file a petition. And reliance on the advice of jailhouse lawyers is not reasonable and cannot negate culpable negligence. The court found that defendant was culpably negligent since his actions were greater than ordinary negligence and more akin to recklessness.

[People v. Hager](#), 202 Ill.2d 143, 780 N.E.2d 1094 (2002) For purposes of [725 ILCS 5/122-1\(c\)](#), the appellate court erred by finding that the six-month limitation began to run when defendant's convictions were affirmed on direct appeal, although the sentences were vacated and the cause was remanded for resentencing. Under [People v. Woods](#), 193 Ill.2d 483, 739 N.E.2d 493 (2000), a "conviction" is a final judgment that includes both a conviction and a sentence. When the appellate court vacated defendant's sentences on his first direct appeal, he no longer stood "convicted." Because the Post-Conviction Hearing Act provides a remedy

only for "convicted" defendants, the six-month limit could not begin to run until defendant was resentenced in the trial court.

People v. Woods, 193 Ill.2d 483, 739 N.E.2d 493 (2000) Under 725 ILCS 5/122-1(c), which provides that one of the alternatives for the post-conviction statute of limitations is that the action must be "commenced" within "3 years from the date of conviction," a petition is due within three years of the date on which defendant was sentenced.

Illinois Appellate Court

People v. Ross, 2022 IL App (2d) 210068 Defendant filed a post-conviction petition, which he later was given leave to withdraw. Less than one year after withdrawing the petition, defendant filed an amended post-conviction petition. The trial court subsequently summarily dismissed the amended petition, and defendant appealed.

On appeal, defendant challenged the summary dismissal on the basis that it was untimely, among other reasons. The Appellate Court agreed. Defendant had electronically filed his amended petition on September 18, 2020. On January 7, 2021, on its own motion, the circuit court set a status date of January 28, 2021. But, then on January 20, 2021, the circuit court summarily dismissed the amended petition. The circuit court noted that the petition was file-stamped on September 18, 2020, more than 90 days prior, but found that it "was not simultaneously docketed" by the clerk on that date. Instead, the circuit court concluded that the petition was docketed on January 7, 2021. Because the Post-Conviction Hearing Act provides that a petition may be summarily dismissed within 90 days of its "filing and docketing," the circuit court believed its dismissal order was timely.

The Appellate Court was tasked with determining when the amended petition was docketed, which has been held to mean the date on which the petition was entered on the court's official docket for further proceedings. The Appellate Court agreed with defendant that his petition was docketed on September 18, 2020, the same date it was electronically filed. While filing and docketing are not the same thing, they usually occur on the same date, especially since the advent of electronic filing. The filing of defendant's petition here was included in the docket entries in the record on September 18, 2020. This was adequate to consider the petition "docketed" on that date. Accordingly, the circuit court's dismissal order was untimely because it was entered more than 90 days after docketing. The dismissal was vacated, and the matter was remanded for further proceedings.

People v. Lighthart, 2022 IL App (2d) 210197 Defendant entered into a negotiated plea, then filed a motion to reconsider the sentence. After the motion was denied, she filed a notice of appeal, but did not pursue the appeal. She later filed a post-conviction petition alleging ineffective assistance of counsel for failing to file a motion to withdraw the plea.

The circuit court dismissed defendant's post-conviction petition at the second-stage. 725 ILCS 5/122-1(c) states that the petition must be filed within six months of the filing date for a petition for certiorari unless defendant "does not file a direct appeal," in which case defendant has three years from the judgment date. The circuit court found that defendant triggered the six-month deadline by filing a notice of appeal, even if she did not pursue the appeal. Applying the six-month deadline, defendant's petition was untimely.

On appeal, defendant alleged her petition was timely because it was filed before the three-year deadline applicable to defendants who do not file a direct appeal. Defendant argued that her notice of appeal did not constitute a "direct appeal" under section 122-1(c) because she entered a negotiated guilty plea but did not move to withdraw the plea, a

prerequisite for an appeal under Rule 604(d). Defendant relied on [People v. Ross, 352 Ill. App. 3d 617 \(2004\)](#), which applied the three-year deadline under similar facts. The **Ross** Court reasoned that a notice of appeal filed in violation of Rule 604(d) is tantamount to no appeal at all.

The Appellate Court affirmed. In [People v. Byrd, 2018 IL App \(4th\) 160526](#), the court disagreed with **Ross** and ruled that a defendant “files a direct appeal” under section 122-1(c) once defendant files a *notice* of appeal. The **Byrd** court noted that the Supreme Court has previously stated that 122-1(c) imposes “a three-year deadline for filing a petition when no notice of appeal is filed.” It also cited Rule 606(a), which states that a direct appeal is perfected by the filing of a notice of appeal. To require more than the filing a notice of appeal to trigger the six-month window would be to read additional language into section 122-1(c).

[People v. Jones, 2021 IL App \(1st\) 182392](#) Defendant’s post-conviction petition failed to make a substantial showing of prejudice stemming from plea counsel’s erroneous advice about sentencing credit. Defendant pled guilty in exchange for a minimum sentence of two years. He claimed in a post-conviction petition that his attorney assured him he would receive 283 days of credit, but that he later learned the credit had been applied to a prior sentence and would not be applied to the instant case.

The Appellate Court rejected the State’s untimeliness argument, noting the record did not contradict defendant’s claim that he did not learn his attorney’s advice was erroneous until he began serving this sentence, long after the three-year deadline for filing the petition. But it affirmed the second-stage dismissal on the merits. Under [People v. Brown, 2017 IL 121681](#), defendant had to show that absent counsel’s erroneous advice, there was a reasonable probability he would have rejected the plea and gone to trial. Defendant did not make that showing here because he did not outline any potential defenses or weaknesses in the State’s case that would have made it rational for him to go to trial instead of accepting a minimum sentence.

[People v. Simms, 2017 IL App \(2d\) 141251](#) The PCHA gives the trial court discretion to allow the voluntary withdrawal of a petition at any time before it enters judgment. [725 ILCS 5/122-5](#). The voluntary withdrawal of a petition is the equivalent of a voluntary dismissal in a civil case. A defendant may refile and reinstate his petition, but the Act does not provide an explicit time limit for refiling. Where the Act is silent about a procedural matter, courts may look to the Code of Civil Procedure, which allows a plaintiff who voluntarily dismissed an action the right to refile the action within one year. [735 ILCS 5/13-217](#).

On July 7, 2004, defendant moved to withdraw his petition. On July 1, 2014, defendant moved to reinstate his petition. The trial court denied defendant’s motion to reinstate as untimely under what the court believed was a one-year time limit for reinstating a petition.

The Appellate Court held that there is no one-year time limit on seeking to reinstate a petition. Although a defendant may automatically move to reinstate his petition within one year, after the one-year period has passed the trial court has discretion under the Act to allow a defendant to reinstate his petition if he can show that the delay in seeking to reinstate was not due to his culpable negligence. The Act provides time limits on filing petitions and allows a defendant to bypass these limits by showing that he was not culpably negligent. “Logically, the trial court must have the discretion to determine whether this standard has been met” where a defendant files a motion to reinstate beyond the one-year time period.

Since the trial court did not exercise its discretion, the Appellate Court remanded the cause to the trial court to determine if the delay in filing the motion to reinstate was not due to defendant's culpable negligence.

People v. York, 2016 IL App (5th) 130579 Under the Post-Conviction Hearing Act, a defendant may request leave to voluntarily withdraw his petition. 725 ILCS 5/122-5. The Act also gives courts discretion to enter orders allowing parties to amend petitions and file additional pleadings "as shall be appropriate, just and reasonable, and as is generally provided in civil cases." 725 ILCS 5/122-5. Under the Code of Civil procedure, a plaintiff who voluntarily dismisses a pending action may refile that action within one year after it is dismissed. 735 ILCS 5/13-217.

Defendant filed a post-conviction petition that was advanced to the second stage. At that point, defendant voluntarily withdrew his petition. Sixteen months later, he filed a new *pro se* petition raising the same claim in his first petition and asking the court to "set aside" his withdrawal of the earlier petition. The trial court summarily dismissed defendant's new petition.

The Appellate Court reversed. It held that when a defendant waits more than a year to request that his petition be reinstated, the trial court should treat the request in the same way it treats an untimely petition by determining at the second stage whether the delay is due to defendant's culpable negligence. The trial court thus erred in summarily dismissing defendant's petition at the first stage. Additionally, the Appellate Court found that defendant's request to "set aside" his withdrawal could be properly viewed as a motion to reinstate. A motion to reinstate is a pleading other than the original petition under section 122-5, and thus the trial court had discretion to extend the time for filing.

The case was remanded for further proceedings.

People v. Craighead, 2015 IL App (5th) 140468 Defendant filed a *pro se* post-conviction petition in October 2004. The trial court advanced the petition to the second stage after finding that it presented the gist of a constitutional issue. Without objection by the State, counsel sought additional time to file an amended petition. The first amended petition was filed in 2009.

The State then filed a motion to dismiss the petition on grounds of untimeliness, alleging that the deadline for filing a post-conviction petition passed some seven months before the original petition was filed. In 2011, the trial court denied the motion to dismiss. The State did not file a motion to reconsider.

Defense counsel then filed two additional amended petitions, both without objection by the State. Both amended petitions incorporated **Miller v. Alabama**, 567 U.S. ___, 132 S. Ct. 2455 (2012). Defendant also supplemented his petition with **People v. Davis**, 2014 IL 115595, which held that **Miller** applies retroactively to cases on collateral review.

The trial court advanced the issue of the retroactivity of **Miller** to the third stage. At a hearing held in 2014, the trial court found that defendant was entitled to a new sentencing hearing under **Miller** and **Davis**, but that all other issues raised in the amended petition were waived or without merit. The trial court also found that the State's claim concerning the timeliness of the original petition was preserved for appeal.

The Appellate Court determined that the timeliness and retroactivity issues were intertwined and should be considered together. The court noted that the Post-Conviction Hearing Act is to be interpreted liberally to allow issues of constitutional deprivation to be

considered. The court also noted that the State raised a timeliness objection concerning only the original petition and not the amended petitions.

The court concluded that the new substantive rule announced in **Miller** constituted “cause” for failing to raise the issue earlier, and the **Davis** holding concerning retroactivity established prejudice. Thus, even if the trial court should have dismissed the original petition because it was untimely, the final amended petition would have satisfied the cause and prejudice test and permitted defendant to file a successive petition.

People v. Medrano, 2014 IL App (1st) 102440 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.

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.”

People v. Harper, 2013 IL App (1st) 102181 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.

Defendant must 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.

People v. Hansen, 2011 IL App (2d) 081226 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.

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

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."

People v. Brown, 336 Ill.App.3d 711, 784 N.E.2d 296 (1st Dist. 2002) Defendant, who filed a pro se post-conviction petition and explicitly stated that he was doing so in order to have a petition on file before the statute of limitations ran, and who then attempted to file an amended petition and a memorandum of law after the statute of limitations had expired, preserved his rights under the Post-Conviction Hearing Act although he failed to ask for leave to file the amended petition. The amended petition clearly stated the gist of a constitutional issue.

People v. Allen, 322 Ill.App.3d 724, 750 N.E.2d 257 (1st Dist. 2001) The "six months after denial of certiorari" deadline for filing a post-conviction petition (725 ILCS 5/122-1) is not tolled by a motion for rehearing of denial of certiorari.

§9-1(b)(3)

Untimely Filing – Lack of Culpable Negligence

Illinois Supreme Court

People v. Lighthart, 2023 IL 128398 Defendant entered a partially negotiated plea to first degree murder and was sentenced to 35 years of imprisonment. Through counsel, defendant filed a timely motion to reconsider sentence, which was denied. She subsequently filed a *pro se* motion to withdraw guilty plea. The trial court “allowed” defendant to file the motion even though more than 30 days had passed since sentencing and ultimately denied the motion. Defendant appealed, and her appeal was dismissed on jurisdictional grounds because she had not filed a proper, timely post-plea motion in compliance with Supreme Court Rule 604(d).

Approximately ten months later, defendant filed a post-conviction petition. That petition was dismissed at the second stage on the ground that it was untimely under **725 ILCS 5/122-1(c)**. At the time her petition was filed, that section provided:

When a defendant has a sentence other than death, no proceedings under this Article shall be commenced more than 6 months after the conclusion of proceedings in the United States Supreme Court, unless the petitioner alleges facts showing that the delay is not due to his or her culpable negligence. If a petition for certiorari is not filed, no proceedings under this Article shall be commenced more than 6 months from the date for filing a certiorari petition, unless the petitioner alleges facts showing that the delay was not due to his or her culpable negligence. If a defendant does not file a direct appeal, the post-conviction petition shall be filed no later than 3 years from the date of conviction, unless the petitioner alleges facts showing that the delay was not due to his or her culpable negligence.

The circuit court concluded that the 6-month limitation period applied because defendant had “filed” a direct appeal, even though it was dismissed for lack of jurisdiction rather than decided on the merits. Defendant’s petition was deemed untimely because it was not filed within six months of the date for filing a cert petition or, in a case like this one where no petition for leave to appeal was filed and thus no due date for a cert petition could be calculated, within six months from the date a PLA would have been due. See **People v. Johnson, 2017 IL 120310** (“inserting” PLA language into the statute due to legislative oversight).

The Supreme Court agreed, holding that even the filing of an ineffective notice of appeal, which results in dismissal for lack of jurisdiction for failing to comply with Supreme Court Rule 604(d), triggers the 6-month limitation period. While the statutory language, “If a defendant does not file a direct appeal,” could be construed to mean either (1) where no notice of appeal is filed or (2) where a notice of appeal is filed but is ineffective, legislative history shows an overall trend of shortening the limitations period. Thus, the Court concluded that the legislature’s intent was for the 3-year period to apply only where no notice of appeal was ever filed. This interpretation also has the benefit of providing a bright-line rule rather than requiring petitioners and courts to differentiate between ineffective and effective notices of appeal.

Here, because defendant had “filed” a notice of appeal, albeit an ineffective one resulting in dismissal, the 6-month limitation period applied. Accordingly, her petition was untimely. But, her untimeliness was excused due to a lack of culpable negligence because the version of Section 122-1(c) in effect at the time the petition was filed referenced only the time for filing a cert petition and made no reference to the later judicially-inserted requirement that a petition be filed within six months of the time for filing a PLA where none was filed.

Additionally, at the time Defendant's petition was filed, the only reported opinion on the question was [People v. Ross, 352 Ill. App. 3d 617 \(3d Dist. 2004\)](#), which favored her position. Thus, under the unique circumstances of this case, defendant was not culpably negligent for the late filing, and the Court remanded the matter for further proceedings on her petition.

[People v. Johnson, 2017 IL 120310](#) Section 122-1(c) of the Post-Conviction Hearing Act provides for the time limits on filing a post-conviction petition. In situations where the defendant files a direct appeal but he does not file a petition for certiorari in the United States Supreme Court, the Act states that "no proceedings...shall be commenced more than 6 months from the date for filing a certiorari petition." [725 ILCS 5/122-1\(c\)](#).

To construe the statute as the legislature intended, the court held that it must insert "leave to appeal" language into the statute. Therefore, the court held that the statute provides that a post-conviction petition must be filed within six months of the date for filing a cert petition or a petition for leave to appeal.

The court held that the delay in filing the petition was due to defendant's culpable negligence, rejecting defendant's argument that confusion over the statute's deadline and reliance on the advice of a jailhouse lawyer negated his culpability. Ignorance of the law will not provide an excuse for the failure to timely file a petition. And reliance on the advice of jailhouse lawyers is not reasonable and cannot negate culpable negligence. The court found that defendant was culpably negligent since his actions were greater than ordinary negligence and more akin to recklessness.

[People v. Rissley, 206 Ill.2d 403, 795 N.E.2d 174 \(2003\)](#) Defendant's delay in filing his post-conviction petition was not the result of his culpable negligence where his appellate attorney told him that his petition was due within three years of his conviction and submitted an affidavit to this effect. See also, [People v. Hobson, 386 Ill. App. 3d 221, 897 N.E.2d 421 \(1st Dist. 2008\)](#) (applying Rissley to find that defendant was not culpably negligent where defendant's appellate attorney misadvised him concerning the post-conviction statute of limitations, even though appellate counsel did not submit an affidavit corroborating defendant's allegations, as in Rissley). But see, [People v. Lander, 215 Ill.2d 577, 831 N.E.2d 596 \(2005\)](#) (holding that a post-conviction petitioner was not justified in relying on erroneous advice from a prison law clerk concerning the statute of limitations).

Illinois Appellate Court

[People v. Soto and Ayala, 2022 IL App \(1st\) 192484](#) The circuit court erred when it dismissed defendant's post-conviction petition at the second stage. The petition made a substantial showing of actual innocence and trial counsel's conflict of interest.

Co-defendants Soto and Ayala were tried jointly before a single jury and convicted of two murders, attempted murder, and conspiracy to commit murder. They were sentenced to natural life. The State alleged through its primary witness, Wally Cruz, that Ayala ordered a gang hit and that Cruz drove Soto, armed with a handgun, and Palomo, armed with a rifle, to a park where Soto and Palomo fired and killed two people and injured another.

Defendants filed successive petitions in 2015, 33 years after conviction and sentence. Therefore, a majority of the claims were time barred. While Ayala pointed out that he was in solitary confinement 23 hours a day from 1998 through 2012, this did not prevent him from filing several of his claims earlier. However, because the conflict of interest and actual innocence claims relied on new evidence, they were not barred by untimeliness, forfeiture or *res judicata*.

Defendants alleged that trial counsel had a *per se* conflict of interest because he represented Rodriguez, a 16 year-old who was identified by several eyewitnesses as the offender firing the handgun into the park. A *per se* conflict arises when the attorney had or has a tie to a person or entity that would benefit from a verdict unfavorable to the client. This occurs when counsel: (1) has a prior or contemporaneous association with the victim, the prosecution, or an entity assisting the prosecution; (2) contemporaneously represents a prosecution witness; or (3) was a former prosecutor who had been personally involved in the prosecution of the defendant.

Here, Rodriguez did not fit into the first category. [People v. Fields, 2012 IL 112438](#) (potential State witnesses not considered an “entity. . . assisting the prosecution.) But the second category does apply. Defense counsel represented Rodriguez after his arrest in the wake of the shooting, in October, 1991, while at the same time representing defendants. The representation overlapped by 19 days. The Appellate Court found this to be “contemporaneous representation.” And while the State pointed out that Rodriguez never testified for the State, the Appellate Court found that representation of an alternate suspect and named State witness creates sufficient potential conflict so as to fall under the *per se* conflict rule.

The petitions also made a substantial showing of an actual conflict of interest. Notably, counsel never called as witnesses the three people who identified Rodriguez as the shooter. This decision could be a “specific defect” in counsel’s strategy. Although the State offered speculative justifications for the failure to call the witnesses, such as questioning their credibility, the stronger inference is that trial counsel felt some duty of loyalty to Rodriguez. Regardless, these questions are better resolved at an evidentiary hearing.

Finally, the petitions made a substantial showing of actual innocence. They included four affidavits from witnesses whom Cruz alleged were present at the gang meeting where Ayala ordered the hit. All of the witnesses attested that they were not present, and that they were arrested and threatened with prosecution and abuse if they would not admit to being present. These affidavits were newly discovered because one of the witnesses pleaded the fifth before the grand jury, rendering him unavailable, while the others described State coercion and fear of retaliation to explain why they did not come forward earlier. Two additional recantation affidavits from witnesses who did testify at trial were also newly discovered, even though Soto included the information in a prior petition. It would be unfair to attribute this prior knowledge to Ayala, and, regardless, the information was available to neither defendant at the time of trial. Finally, other witness affidavits were considered newly discovered because they implicated Rodriguez, and no amount of due diligence could have compelled their conflicted counsel to call these witnesses at trial.

The new evidence was sufficiently material and conclusive to warrant an evidentiary hearing. Witnesses who would dispute Cruz’s account of the gang meeting where the shooting was supposedly planned, and his claim that the Soto fired the handgun, while at the same time offering multiple accounts of Rodriguez firing the handgun, would place the trial evidence in a different light and undermine the court’s confidence in the judgment of guilt.

[People v. Walker, 2018 IL App \(3d\) 140723-B](#) Defendant’s 2013 post-conviction petition, attacking his 1984 life sentence under **Miller**, was untimely. Defendant, 17 at the time of the offense, and given a discretionary life sentence without parole, could have made his arguments as early as 2005, when the USSC issued its decision in **Roper**, wherein the court recognized the greater rehabilitative potential of juveniles under 18.

People v. Upshaw, 2017 IL App (1st) 151405 Defendant made a sufficient allegation that the eight-month delay in filing his post-conviction petition was not due to his culpable negligence. Defendant submitted DOC records showing that in the six months between the time the petition for leave to appeal was denied and the post-conviction petition was due, the facility in which defendant was incarcerated was on lockdown at least 86 days. The petition alleged that after each lockdown, it took an additional two weeks to get a new library pass. Accepting these allegations as true for purposes of the second-stage proceedings, defendant had at most 27 non-consecutive days of access to the library during the six-month period before his petition was due.

In addition, the institution was on lockdown for at least an additional 60 days during the eight-month period between the due date and the date the petition was filed. Considering the two week delay in regaining library access following each lockdown, defendant had at most 90 non-consecutive additional days of library access before he filed the petition. Defendant also alleged that the lockdowns were not due to his actions.

Under these circumstances, defendant carried his burden of making a substantial showing that the delay in filing the petition was not due to his culpable negligence. Therefore, the petition should have proceeded to a third-stage evidentiary hearing.

People v. Simms, 2017 IL App (2d) 141251 There is no one-year time limit on seeking to reinstate a voluntarily withdrawn petition. Although a defendant may automatically move to reinstate his petition within one year, after the one-year period has passed the trial court has discretion to allow a defendant to reinstate his petition if he can show that the delay in seeking to reinstate was not due to his culpable negligence. The Act provides time limits on filing petitions and allows a defendant to bypass these limits by showing that he was not culpably negligent. “Logically, the trial court must have the discretion to determine whether this standard has been met” where a defendant files a motion to reinstate beyond the one-year time period.

Since the trial court did not exercise its discretion, the Appellate Court remanded the cause to the trial court to determine if the delay in filing the motion to reinstate was not due to defendant’s culpable negligence.

People v. York, 2016 IL App (5th) 130579 A defendant may request leave to voluntarily withdraw his petition. [725 ILCS 5/122-5](#). The Act provides no guidance on how a voluntarily withdrawn petition may be reinstated. The Act does, however, give courts discretion to enter orders allowing parties to amend petitions and file additional pleadings “as shall be appropriate, just and reasonable, and as is generally provided in civil cases.” [725 ILCS 5/122-5](#). Under the Code of Civil procedure, a plaintiff who voluntarily dismisses a pending action may refile that action within one year after it is dismissed. [735 ILCS 5/13-217](#).

Defendant voluntarily withdrew his petition at the second stage. Sixteen months later, he filed a new *pro se* petition raising the same claim in his first petition and asking the court to “set aside” his withdrawal of the earlier petition. The trial court summarily dismissed defendant’s new petition.

The Appellate Court reversed. It held that when a defendant waits more than a year to request that his petition be reinstated, the trial court should treat the request in the same way it treats an untimely petition by determining at the second stage whether the delay is due to defendant’s culpable negligence. The trial court thus erred in summarily dismissing defendant’s petition at the first stage.

People v. Cruz, 2013 IL App (1st) 091944 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. Defendant's claim that he was illiterate did not change this conclusion.

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.

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

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

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.

People v. Paleologos, 345 Ill.App.3d 700, 803 N.E.2d 108 (1st Dist. 2003) A 14-month delay in filing a post-conviction petition was not due to defendant's culpable negligence where the direct appeal presented a "complex consolidated appeal" of nine issues, nine months was required to obtain the record, the direct appeal was not decided until three years after defendant's conviction, and the petition was filed within six months after denial of a petition for leave to appeal.

People v. Walker, 331 Ill.App.3d 335, 772 N.E.2d 758 (1st Dist. 2002) Petitioner's failure or inability to retain counsel to prepare a post-conviction petition does not justify a late filing. Defendant's assertion that a prison lockdown prevented consultation with a prison legal assistant was insufficiently detailed to establish that the untimely filing was not due to the petitioner's culpable negligence. See also, **People v. VanHee**, 305 Ill.App.3d 333, 712 N.E.2d 363 (2d Dist. 1999) (where prison lockdown precludes a "meaningful opportunity" to prepare a timely post-conviction petition, untimely filing is not the result of the defendant's "culpable negligence"; however, the record was insufficient to establish that a lockdown prevented a timely petition); **People v. Scullark**, 325 Ill.App.3d 876, 759 N.E.2d 565 (1st Dist. 2001) (petitioner's allegations -- that he had been placed in segregation by prison authorities, had his petition and other property confiscated, remained in segregation until after the deadline for filing the petition, and had the petition returned only several months later -- established that the late filing was not due to his culpable negligence).

People v. Gardner, 331 Ill.App.3d 358, 771 N.E.2d 26 (1st Dist. 2002) Defendant was not "culpably negligent" for the untimely filing of his post-conviction petition where his claim had been rejected in previous proceedings, but the Illinois Supreme Court issued an opinion modifying the law. "Culpable negligence" is more than "mere negligence" or "negligence of a gross and flagrant character." See also, **People v. Wilburn**, 338 Ill.App.3d 1075, 789 N.E.2d 797 (3d Dist. 2003) (the delay of 16 months between the new decision and the filing of the petition was not so great as to constitute culpable negligence); **People v. Molina**, 379 Ill.App.3d 91, 882 N.E.2d 1212 (1st Dist. 2008) (**People v. Whitfield**, 217 Ill.2d 177, 840 N.E.2d 658 (2005), which held that a defendant who enters a negotiated plea without MSR admonishments is entitled to have his sentence reduced by a term equal to the MSR, did not make a sufficient change in Illinois law to excuse defendant's failure to timely file a post-conviction petition); see also, **People v. Hernandez**, 296 Ill.App.3d 349, 694 N.E.2d 1082 (2d Dist. 1998) (four-year delay in filing post-conviction petition was not due to defendant's culpable negligence where the law of double jeopardy was "evolving").

People v. Scullark, 325 Ill.App.3d 876, 759 N.E.2d 565 (1st Dist. 2001) A petitioner who files an untimely post-conviction petition is not required to allege in the petition that he is not culpably negligent for the late filing. Once the State raises the statute of limitations, defendant may amend the petition to allege a lack of culpable negligence. Here, the court should have treated a motion to reconsider summary dismissal of the petition as a motion to amend, because it contained factual allegations that the untimely filing was not due to defendant's culpable negligence.

People v. Robinson, 324 Ill.App.3d 553, 755 N.E.2d 1034 (2d Dist. 2001) The trial court is under no obligation to search the record for a basis on which to excuse the late filing of a post-conviction petition.

People v. Robinson, 140 Ill.App.3d 29, 487 N.E.2d 1264 (4th Dist. 1986) The court properly dismissed petition as untimely where defendant filed it 16 years after conviction, though at the time of conviction, the statute allowed a petition to be filed within 20 years, because the time period was shortened to 10 years before defendant filed his petition.

§9-1(b)(4)

Treating Petition as Post-Conviction Petition/Recharacterizing Petition

Illinois Supreme Court

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

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.

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.

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

Here, the trial court took six months to recharacterize, as it was 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.

People v. Shellstrom, 216 Ill.2d 45, 833 N.E.2d 863 (2005) Where a pro se pleading alleges a deprivation of constitutional rights that would be cognizable in a post-conviction proceeding, the trial court may treat the pleading as a post-conviction petition even if the petitioner labeled the pleading differently. A trial judge may recharacterize a pleading as a first post-conviction petition only if it: (1) notifies the litigant of the intent to recharacterize; (2) warns the litigant that such recharacterization means that any subsequent post-conviction petition will be subject to the restrictions on successive post-conviction petitions; and (3) provides an opportunity to withdraw the pleading or amend it to include all post-conviction claims. If the court fails to give such notice, the pleading cannot be considered to have been a post-conviction petition for purposes of applying the restrictions on successive post-conviction petitions. Accord, **People v. Pearson**, 216 Ill.2d 58, 833 N.E.2d 827 (2005).

Illinois Appellate Court

People v. Clemons, 2023 IL App (1st) 192169 The trial court erred when it dismissed defendant’s 2-1401 petition on the State’s oral motion to dismiss without first giving defendant an opportunity to respond. But, that error was harmless because defendant’s petition was procedurally barred by the two-year limitations period. But, the matter was remanded for further proceedings where the trial court’s oral pronouncements in dismissing the petition, and the accompanying docket entries, half-sheets, and computer records, sometimes referred to the matter as a “PC” or “post-conviction.” If the court meant to treat the matter as a post-conviction petition, it failed to provide defendant with the required admonishments for recharacterization. And, if it did not intend to recharacterize the petition, the court’s reference to the matter as a PC created an extra hurdle for defendant to clear in the event he attempts to file a post-conviction petition in the future. Accordingly, the appellate court ordered that, on remand, the trial court make clear whether it was treating the petition as a 2-1401 as filed or whether it was recharacterizing defendant’s pleading as a post-conviction petition, in which case it must provide required protections.

People v. Thornton, 2022 IL App (1st) 170677 The trial court did not err when it failed to admonish defendant before recharacterizing his 2-1401 petition as a post-conviction petition. Although **People v. Shellstrom**, 216 Ill. 2d 45 (2005), requires admonishments before *sua sponte* recharacterization, here, defendant requested the recharacterization.

People v. Weber, 2021 IL App (2d) 190841 The circuit court erred when it refused to review the defendant’s 2-1401 petition as a post-conviction petition. Pursuant to section 122-1(d) of the PCHA, a defendant “seeking relief by filing a petition under this Section must specify in the petition or its heading that it is filed under this Section.” If the petition does not include reference to the PCHA in the petition or heading, the circuit court “need not evaluate the petition to determine whether it could otherwise have stated some grounds for relief under this Article.”

Here, defendant titled his filing a petition for relief from judgment under section 2-1401, but included a footnote asking the court to alternatively consider the filing as a post-conviction petition. This satisfied the requirements of section 122-1(d), triggering the court's obligation to determine whether the petition stated grounds for relief under the PCHA.

The State urged the Appellate Court to affirm because the circuit court did consider recharacterizing the petition, but declined to do so, citing the petition's lack of merit. The State, citing [People v. Stoffel, 239 Ill. 2d 314 \(2010\)](#), argued that the decision not to recharacterize is within the court's discretion and not reviewable. The Appellate Court disagreed that the instant case presented a question of "recharacterization." The instant filing did not require recharacterization because it met the requirements of section 122-1(d), and therefore qualified as a post-conviction petition independent of the judge's discretion. In [Stoffel](#), the filing never mentioned the PCHA, and therefore the court had no obligation to treat it as a post-conviction petition. The Appellate Court remanded for second-stage proceedings, as the 90-day deadline for first-stage review had passed.

[People v. Cook, 2019 IL App \(1st\) 161428](#) After filing several, unsuccessful prior appeals and collateral petitions, defendant filed a *pro se* "motion for new trial for newly discovered evidence, State's miscarriage of justice for withholding evidence in defendant's judicial proceeding." The trial court recharacterized this pleading as a successive post-conviction petition, without providing notice to defendant, and denied leave to file. The Appellate Court concluded that the court should have admonished defendant in accordance with **Shellstrom** and **Pearson** before recharacterizing his pleading, regardless of whether the *pro se* pleading was legally cognizable as filed.

[People v. Strickland, 2017 IL App \(4th\) 150714](#) When a court recharacterizes a *pro se* petitioner's pleadings as a post-conviction petition, it must notify the petitioner of its intent, admonish him that any subsequent post-conviction petition will be subject to the restrictions on subsequent petitions, and provide him an opportunity to withdraw or amend the pleadings.

Here, the defendant filed three *pro se* "motions" more than 30 days after sentencing. The court appointed counsel, and the State responded with a motion to dismiss the "petition for post-conviction relief." Appointed counsel then filed a motion to withdraw pursuant to **Pennsylvania v. Finley**. Following a hearing on the pending motions, the court allowed counsel to withdraw, and then found that the defendant failed to make a substantial showing of a constitutional violation and dismissed his petition.

The majority held that the court had not recharacterized the petition until the entry of the dismissal order, at which time the defendant was *pro se* because appointed counsel had been permitted to withdraw. Accordingly, the defendant should have been admonished in accordance with **Shellstrom**.

The matter was remanded with directions that the trial court admonish the defendant pursuant to **Shellstrom**.

[People v. Bland, 2011 IL App \(4th\) 100624](#) 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 must 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 which he intended to file. 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.

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. 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.

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

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.

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

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 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.

People v. Smith, 386 Ill.App.3d 473, 898 N.E.2d 119 (5th Dist. 2008) A trial court's decision regarding recharacterization is reviewed for abuse of discretion.

People v. Spears, 371 Ill.App.3d 1000, 864 N.E.2d 758 (1st Dist. 2007) **Shellstrom**, by its terms, does not apply retroactively. Though the trial court recharacterized defendant's state habeas corpus petition (or alternatively a § 2-1401 petition) as a post-conviction petition, without the due process guarantees discussed in **Shellstrom**, the court considered defendant having filed a post-conviction petition. Thus, when defendant subsequently filed a post-conviction petition, it was considered a successive post-conviction petition subject to the cause-and-prejudice test. See also, **People v. Balle**, 373 Ill.App.3d 1005, 870 N.E.2d 841 (1st Dist. 2007) (petition was considered a successive post-conviction petition and, though petitioner did not show "cause" and "prejudice," the court reached the issue of the habitual criminal sentencing because an unauthorized sentence is void and can be challenged at any time).

People v. McDonald, 373 Ill.App.3d 876, 869 N.E.2d 945 (1st Dist. 2007) Because the Post-Conviction Hearing Act is to be liberally construed to afford a convicted person an opportunity to raise issues concerning the denial of constitutional rights, 725 ILCS 5/122-1(d) requires only that the pro se petitioner indicate in some fashion that the pleading is intended as a post-conviction petition. The petition need not specifically state that it is filed under §122-1. Because the trial court erroneously dismissed the petition based on the failure to note §122-1, the cause was remanded for further proceedings.

People v. Holliday, 369 Ill.App.3d 678, 867 N.E.2d 1016 (4th Dist. 2007) The trial court is not obligated to recharacterize a pleading as a post-conviction petition. A trial court should recharacterize a pro se pleading as a post-conviction petition only in "unusual and compelling circumstances." Here, the trial court did not abuse its discretion by declining to recharacterize a state habeas corpus petition as a post-conviction petition. But see, **People v. Smith**, 386 Ill.App.3d 473, 898 N.E.2d 119 (5th Dist. 2008) (because the pro se §2-1401 petition would have been timely if filed as a post-conviction petition, alleged the deprivation of a constitutional right, and was the only post-trial motion that defendant filed, and because recharacterization was "the only logical construction that would preserve the court's jurisdiction," the trial court abused its discretion by failing to recharacterize the pleading as a post-conviction petition).

People v. Knox, 336 Ill.App.3d 275, 783 N.E.2d 222 (2d Dist. 2003) 725 ILCS 5/122-1(d), which provides that a petition that does not assert in its heading or body to have been filed under the Post-Conviction Hearing Act need not be evaluated to determine whether it could have stated grounds for relief under the Act, was intended to grant the trial court discretion to decide whether to treat an unlabeled filing as a post-conviction petition. Section 122-1(d) does not prohibit the trial judge from considering an unlabeled petition as a post-conviction petition, and therefore does not violate the separation of powers doctrine by infringing on the inherent power of the judiciary.

People v. Cheeks, 318 Ill.App.3d 919, 742 N.E.2d 915 (3d Dist. 2001) Defendant's post-conviction petition, which alleged that his conviction was based on perjured testimony but not that the State knew of the perjury, should have been treated as a §2-1401 petition.

§9-1(c)

Cognizable and Non-Cognizable Claims

§9-1(c)(1)
Deprivation of a Constitutional Right

Illinois Supreme Court

People v. LaPointe, 2023 IL App (2d) 210312 The trial court did not err in denying defendant leave to file a successive post-conviction petition arguing that the juvenile parole statute [730 ILCS 5/5-4.5-115(b)] violates the equal protection because it discriminates between those sentenced before its effective date and those sentenced after. While the parties arguments on appeal focused on whether defendant had established cause and prejudice, the appellate court affirmed on the basis that defendant's claim was not cognizable under the Act. Specifically, the court held that defendant's petition did not assert a denial of any constitutional right "in the proceedings which resulted in his...conviction" in 1978 where he sought to challenge Section 5-4.5.115(b), which was first enacted in 2019. The appellate court concluded that defendant's claim was outside the scope of the Act.

People v. Ross, 229 Ill.2d 255, 891 N.E.2d 865 (2008) A post-conviction petitioner can raise a claim that his trial counsel was ineffective for failing to file a notice of appeal, and if petitioner demonstrates that counsel was ineffective, the post-conviction court may allow petitioner to file a late notice of appeal. See also, **People v. Gutierrez**, 899 N.E.2d 1193, 326 Ill.Dec. 542 (1st Dist. 2008) (the post-conviction court properly granted leave to file an untimely notice of appeal where defendant's family sought to appeal the conviction, the trial court appointed counsel for appeal, but no notice of appeal was filed and defendant was not contacted by appointed counsel; under Ross, the post-conviction court may grant leave to file an untimely notice of appeal where the failure to file a timely notice of appeal is the result of ineffective assistance of counsel).

People v. Shum, 207 Ill.2d 47, 797 N.E.2d 609 (2003) Defendant properly filed a post-conviction petition requesting DNA testing under 725 ILCS 5/116-3, where he could not file a section 5/116-3 motion because he filed the petition and the court dismissed it after section 116-3 had been enacted but before it became effective.

To obtain DNA testing under 725 ILCS 5/116-3, defendant must show that the evidence has been subjected to a chain of custody sufficient to establish that it has not been altered, and the testing must have the scientific potential to produce "new, non-cumulative evidence materially relevant to the defendant's assertion of actual innocence." The trial court erred in denying DNA testing, even though §116-3 was not yet effective (but had been enacted) when defendant filed the post-conviction petition. See also, **People v. Johnson**, 205 Ill.2d 381, 793 N.E.2d 591 (2002) (under 725 ILCS 5/116-3, which went into effect after defendant filed his amended post-conviction petition but before the petition was dismissed, a defendant may move for fingerprint or forensic DNA testing of evidence that was secured in relation to defendant's trial but which was not subjected to testing because the technology in question was not available; defendant's petition made a prima facie case for DNA testing).

People v. Jones, 191 Ill.2d 354, 732 N.E.2d 573 (2000) Defendant's claim that the trial court erred by failing to order a fitness hearing did not present a cognizable constitutional issue, because under **People v. Mitchell**, 189 Ill.2d 312, 727 N.E.2d 254 (2000), due process is not violated merely when the trial court fails to conduct a fitness hearing for a defendant who is on psychotropic medication. See also, **People v. Jones**, 191 Ill.2d 194, 730 N.E.2d 26 (2000)

(defendant could not show that the court's failure to hold a fitness hearing was such a serious error as to violate due process).

People v. Brown, 169 Ill.2d 94, 660 N.E.2d 964 (1995) The State's knowing use of perjury is cognizable under the Act. (Claims of unknowing use of perjury are cognizable under §2-1401 of the Code of Civil Procedure.) To present a constitutional issue, petitioner must allege that the State or its agents either knew the testimony was false, failed to adequately investigate its truthfulness, or failed to correct false testimony once it was given. See also, **People v. Burrows**, 172 Ill.2d 169, 665 N.E.2d 1319 (1996); **People v. Cornille**, 95 Ill.2d 497, 448 N.E.2d 857 (1983) (the State's lack of diligence in examining readily available information regarding a witness's lack of truthfulness perpetrated a fraud on the court); **People v. Hickox**, 229 Ill.App.3d 454, 593 N.E.2d 736 (2d Dist. 1992) (the trial court erred in dismissing defendant's petition, which alleged that his ex-wife coached their daughter to present perjured testimony against him, without an evidentiary hearing; the State here had extensively interviewed the daughter and could be charged with knowledge of substantial fabrication occurring on the eve of trial).

People v. Matthews, 60 Ill.2d 123, 324 N.E.2d 396 (1975) Defendant's claim -- that his guilty plea was made in reliance on a promise that his sentence would be concurrent to an out-of-state sentence (which was illegal) -- was cognizable under the Post-Conviction Hearing Act. But, there was no evidence that the promise was made.

People v. Pier, 51 Ill.2d 96, 281 N.E.2d 289 (1972) The Post-Conviction Act is available to raise constitutional issues which occur in a proceeding to revoke probation.

People v. Barber, 51 Ill.2d 268, 281 N.E.2d 676 (1972) Release from the psychiatric division is not properly sought in a post-conviction petition. 2018 IL App (3d) 160271 Defendant had been convicted of first degree murder in the death of his estranged wife. During the original trial court proceedings, defendant said he had blacked out and could not recall the details of the incident. In a subsequent post-conviction petition defendant claimed actual innocence, asserting that he had recovered memories of the incident which would support either self-defense or reduction to second degree murder based on either mutual combat or unreasonable belief in self-defense. Defendant had been convicted of first degree murder in the death of his estranged wife. During the original trial court proceedings, defendant said he had blacked out and could not recall the details of the incident. In a subsequent post-conviction petition defendant claimed actual innocence, asserting that he had recovered memories of the incident which would support either self-defense or reduction to second degree murder based on either mutual combat or unreasonable belief in self-defense.

Relying on **People v. Williams**, 242 Ill. 197 (1909), the Court held that a defendant's recovered memories do not constitute newly discovered evidence because claims of "forgotten facts" present serious potential for fraud or perjury. Even if recovered memories could qualify as newly discovered evidence, defendant's actual innocence claim was frivolous and patently without merit where other evidence showed that the victim sustained multiple stab wounds even after defendant had disarmed her.

And, reduction from first degree murder to second degree murder does not constitute actual innocence. Citing **People v. Wingate**, 2015 IL App (5th) 130189, the Court concluded that newly discovered evidence must completely exonerate a defendant of the offense in question, as well as all related offenses.

Illinois Appellate Court

People v. Barry, 2023 IL App (2d) 220324 Defendant's post-conviction petition argued that 730 ILCS 5/5-4.5-115(b), violated equal protection because it arbitrarily limited the opportunity for parole to those sentenced on or after June 1, 2019. The appellate court affirmed the second-stage dismissal of the petition.

First, post-conviction proceedings are limited to constitutional violations that occur "in the proceedings which resulted in his or her conviction." 725 ILCS 5/122-1(a)(1). A challenge to section 5-4.5-115(b) does not raise a claim that defendant was denied any constitutional rights in the proceedings that resulted in his conviction or sentence. Thus, the claim was inappropriate for a post-conviction petition.

Nor does the parole statute violate equal protection. The statute did not affect a suspect class and is therefore subject to rational basis scrutiny. Statutes with temporal limitations are rationally related to legitimate goals such as finality and judicial economy. See **People v. Richardson, 2015 IL 118255**.

People v. Bucio, 2023 IL App (2d) 220326 The trial court did not err in dismissing defendant's post-conviction petition alleging that 730 ILCS 5/5-4.5-115(b) violates equal protection. Section 5-4.5-115(b) enables certain prisoners sentenced on or after June 1, 2019, to apply for parole. Defendant argued that it violates equal protection because it denies the same opportunity to prisoners sentenced before June 1, 2019. The appellate court affirmed.

Defendant's challenge to 5-4.5-115(b) was not within the scope of the Post-Conviction Hearing Act. The Act permits a defendant to raise a claim of constitutional error in the proceedings which resulted in his or her conviction, but defendant's claim here arose from a statute passed several years after he was convicted and sentenced. Thus, he had no remedy under the Act.

Further, defendant's conviction was the result of a fully negotiated guilty plea, which acts as both an acceptance of present benefits and a relinquishment of benefits from future changes in the law, even constitutional ones, pursuant to **People v. Jones, 2021 IL 126432**.

People v. Merriweather, 2017 IL App (4th) 150407 Defendant, who was 17 at the time of the offense, was convicted of first degree murder and sentenced to 70 years in prison. Defendant filed a *pro se* motion for leave to file a successive post-conviction petition alleging actual innocence based on newly discovered evidence based on the affidavits of four witnesses. A year later, but before the trial court had ruled on defendant's motion, defendant filed a motion to supplement the record with the affidavit of an additional witness. Over a year after that, the trial court denied the motion to file a successive petition. In making its ruling, the trial court made no mention of the motion to supplement the record.

On appeal, defendant argued for the first time that his sentence was a *de facto* life sentence that was unconstitutional as applied to him. Defendant also argued that the trial court erred in denying his motion to file a successive petition.

The Appellate Court, relying on **Thompson, 2015 IL 118151**, first held that defendant could not raise an as-applied challenge to his sentence for the first time on appeal. As-applied challenges are dependent on the facts and circumstances of each case and thus the appropriate place to raise the issue is in the trial court where the record can be adequately developed. Defendant thus forfeited this issue by failing to raise it in the trial court. The court specifically declined to follow **Nieto, 2016 IL App (1st) 121604**.

Concerning the denial of the motion to file a successive petition, the Appellate Court found that the trial court denied the motion without any mention of, let alone any ruling on,

defendant's motion to supplement the record or the affidavit referenced in that motion. The trial court has discretion to allow amendments to post-conviction petitions at any stage of the proceedings prior to the final judgment. [725 ILCS 5/122-5](#).

Since it was not clear whether the trial court was aware of the motion to supplement, and since the trial court was in the best position to evaluate the merits of defendant's motion, the Appellate Court remanded the cause to the trial court for a ruling on defendant's request to supplement the record and any further proceedings that may be warranted.

People v. Nelson, 2016 IL App (4th) 140168 Defendant argued for the first time on appeal from the second-stage dismissal of his post-conviction petition that he did not receive the correct pre-sentence credit against his sentence. The State argued that sentence credit is a statutory claim that cannot be raised in a post-conviction petition. The Appellate Court agreed that defendant was entitled to the additional credit, but held that it did not have authority to award defendant the credit. The Post-Conviction Hearing Act is jurisdictional in nature limiting the subject matter reviewable under the act to claims of a substantial denial of constitutional rights. [725 ILCS 5/122-1](#). The denial of a statutory right is not cognizable under the act.

People v. Burnett, 2016 IL App (3d) 140837 When defendant pled guilty, the circuit court did not mention or discuss any fines, and neither the sentencing order nor the mittimus included any fines. The deputy circuit clerk later issued a document called the "Case Transactions Summary" which included 11 fines totaling \$1046.50.

On appeal from the first-stage dismissal of his post-conviction petition, defendant argued for the first time that the fines should be vacated. The Appellate Court agreed. The imposition of a fine is a judicial act and the circuit clerk has no authority to impose fines. Fines imposed by the clerk are void from their inception.

The court rejected the State's argument that it lacked jurisdiction to review this claim in an appeal from the dismissal of a post-conviction petition since defendant's claim did not involve a constitutional deprivation cognizable in post-conviction proceedings. The viability of a challenge to a void assessment does not depend on the procedural mechanism used to raise the issue. A void order may be attacked at any time in any court.

People v. Hall, 2014 IL App (1st) 122868 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.

People v. Chambers, 2013 IL App (1st) 100575 On appeal from denial of post-conviction relief, defendant could not 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). 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.

People v. Butler, 2013 IL App (5th) 110282 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.

People v. Toy, 2013 IL App (1st) 120580 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."

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.

People v. Shamlodhiya, 2013 IL App (2d) 120065 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.

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.

People v. Gutierrez, 2011 IL App (1st) 093499 The decision in **Padilla v. Kentucky**, 559 U.S. 356 (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. Here, 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 because he could not 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. 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.

Finally, 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.

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 in a previous post-conviction proceeding. 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. Steward, 406 Ill.App.3d 82, 940 N.E.2d 140 (1st Dist. 2010) 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.

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.

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. Bocclair**, 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.

People v. Rodriguez, 402 Ill.App.3d 932, 932 N.E.2d 113 (1st Dist. 2010) An unreasonable disparity in sentences between non-capital co-defendants is a constitutional claim cognizable under the Post-Conviction Hearing Act. 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*.

People v. Keller, 344 Ill.App.3d 824, 801 N.E.2d 84 (5th Dist. 2003) Under **Rodriguez v. U.S.**, 395 U.S. 327 (1969), a post-conviction petitioner who claims that his right to file a direct appeal has been violated is entitled to reinstatement of the appeal even if he cannot show that there is a meritorious issue). See also, **People v. Koch**, 266 Ill.App.3d 688, 640 N.E.2d 35 (1st Dist. 1994) (under **People v. Moore**, 133 Ill.2d 331, 549 N.E.2d 1257 (1990), where an appeal has been dismissed for lack of prosecution, defendant may obtain review of his direct appeal issues by filing either a motion to reinstate the appeal or a post-conviction petition); **People v. Crete**, 30 Ill.App.3d 545, 332 N.E.2d 145 (2d Dist. 1975) (the proper remedy for a trial court's failure to advise defendant of his right to appeal following conviction, as alleged in defendant's petition, is to allow defendant to proceed with a direct appeal, not to order a new trial).

People v. Scott, 143 Ill.App.3d 540, 493 N.E.2d 27 (1st Dist. 1986) Defendant's allegation

of ineffective assistance of counsel on his direct appeal raised a constitutional question cognizable under the Post-Conviction Hearing Act.

People v. Holman, 12 Ill.App.3d 307, 297 N.E.2d 752 (3d Dist. 1973) The severity of a sentence is not properly raised in a post-conviction petition. See also, **People v. Allen**, 40 Ill.App.3d 972, 353 N.E.2d 342 (1st Dist. 1976) (because sentencing is not a constitutional issue, the court had no authority to reduce defendant's sentence on post-conviction).

§9-1(c)(2)

Actual Innocence (Initial PC)

Illinois Supreme Court

People v. Reed, 2020 IL 124940 A defendant is not foreclosed from asserting an actual innocence claim under the Post-Conviction Hearing Act simply because he pled guilty. To succeed on such a claim, however, a guilty plea defendant must satisfy a higher standard than that established in **People v. Washington**, 171 Ill. 2d 475 (1996) for post-trial actual-innocence claims (that the newly discovered evidence would probably change the result on retrial). Instead, to succeed on a post-plea claim of actual innocence, the defendant must show that the new evidence “clearly and convincingly demonstrates that a trial would probably result in acquittal.”

Applying that standard here, the Supreme Court rejected defendant’s claim of innocence. Reed pled guilty to a charge of armed violence. The factual basis provided that a police officer observed Reed flee from the police and described him as running oddly. The police gave chase, and Reed was located in a bedroom of the house into which he had fled. A shotgun and cocaine were also found in the house, and Reed’s DNA was on the gun.

In his post-conviction petition, Reed asserted that he was actually innocent of armed violence because he did not reside at the home where the gun and drugs were found, did not have actual possession of the gun or drugs, was not linked to the drugs with DNA evidence, and was found in a different room from where the gun was located. The petition was supported by the affidavit of a co-defendant, Davie Callaway, stating that he owned the cocaine, and that Reed had no knowledge of the presence of drugs in the residence. Callaway testified consistently with his affidavit at the evidentiary hearing. The circuit court found Callaway’s testimony not credible and not of such conclusive character as to probably change the result on retrial and denied the petition. And the Supreme Court concluded that the circuit court’s credibility finding was not manifestly erroneous.

People v. Coleman, 2013 IL 113307 As a matter of Illinois constitutional jurisprudence, 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. 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 verdict.

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 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) 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.

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. 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.

Here, the trial court erred by denying post-conviction relief on defendant's claim of actual innocence. The testimony of an 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. 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. Washington, 171 Ill.2d 475, 665 N.E.2d 1330 (1996) A claim of actual innocence based on newly discovered evidence may be raised in a post-conviction petition. Here, the trial court properly granted a new trial where a witness's testimony was newly discovered, material, noncumulative, and of such conclusive character that it likely would have changed the result of the trial. See also, **People v. Barrow**, 195 Ill.2d 506, 749 N.E.2d 892 (2001)

(affidavits from witnesses who had heard the State's informant say that he had lied at defendant's trial to get out of prison and that someone else had actually committed the crime were not of such conclusive character as to likely change the result of the trial); [People v. Gholston](#), 297 Ill.App.3d 415, 697 N.E.2d 375 (1st Dist. 1998) (defendant would not be excluded as participant in crime even if DNA testing excluded him as donor of semen; there was overwhelming evidence that defendant participated in crime as principal and as accomplice).

Illinois Appellate Court

[People v. House](#), 2023 IL App (4th) 220891 Defendant was denied post-conviction relief on his actual innocence claim following a third-stage evidentiary hearing at which three new witnesses testified. He appealed, and the appellate court affirmed.

To succeed on a claim of actual innocence, defendant must present new, material, non-cumulative evidence that is so conclusive that it would probably change the result on retrial. At a post-conviction hearing on a claim of actual innocence, the trial court must evaluate the new evidence along with the trial evidence and determinate the probability of a new outcome if retrial was allowed. In doing so, the trial court necessarily must make credibility determinations. On review, the appellate court must give deference to the trial court's findings and will reverse the trial court's decision only where it is manifestly erroneous, that is only where the opposite conclusion is clearly evident.

Here, the trial court's findings were not against the manifest weight of the evidence. At his trial, defendant was identified by a bystander as the individual who shot and injured a man named Gates. The bystander knew defendant, and also identified him in a photo line up. Additionally, a detective obtained surveillance video of the shooting from a nearby business. The appearance of the shooter on that video matched defendant's appearance on a squad car video recorded during defendant's DUI arrest later that same night.

At the post-conviction hearing, a witness testified that he had encountered the bystander more than a year after the shooting, and the bystander admitted he had falsely implicated defendant. And, two other witnesses testified that they were each present at the scene of the shooting, and defendant did not do it. The court found the first witness not credible, and found that all of the new evidence taken together was not of such conclusive character that it would likely change the result on retrial. The appellate court agreed, noting credibility issues with respect to all three witnesses, including criminal histories, alcohol and drug use, the timing of their coming forward, inconsistencies in their testimony, and the fact that the surveillance video contradicted their versions of events.

[People v. McCoy](#), 2023 IL App (1st) 220148 The trial court erred when it dismissed a post-conviction claim of actual innocence at the second stage. Defendant's murder conviction was predicated solely on eyewitness testimony. Defendant's alleged accomplice provided an affidavit stating that defendant did not participate and naming a third party as the shooter. The circuit court found the affidavit "rebutted by the record" because the accomplice testified at his own trial that he did not participate in the crime.

This finding was improper, because a post-conviction court cannot look to the record of another proceeding to discredit a claim of actual innocence. And while the affidavit conflicted with the eyewitness testimony in the record of defendant's case, a conflict of this nature is not a "positive rebuttal" and is to be expected in cases such as this. The case was remanded for an evidentiary hearing.

People v. Soto and Ayala, 2022 IL App (1st) 192484 The circuit court erred when it dismissed defendant’s post-conviction petition at the second stage. The petition made a substantial showing of actual innocence and trial counsel’s conflict of interest.

Co-defendants Soto and Ayala were tried jointly before a single jury and convicted of two murders, attempted murder, and conspiracy to commit murder. They were sentenced to natural life. The State alleged through its primary witness, Wally Cruz, that Ayala ordered a gang hit and that Cruz drove Soto, armed with a handgun, and Palomo, armed with a rifle, to a park where Soto and Palomo fired and killed two people and injured another.

Defendants filed successive petitions in 2015, 33 years after conviction and sentence. Therefore, a majority of the claims were time barred. While Ayala pointed out that he was in solitary confinement 23 hours a day from 1998 through 2012, this did not prevent him from filing several of his claims earlier. However, because the conflict of interest and actual innocence claims relied on new evidence, they were not barred by untimeliness, forfeiture or *res judicata*.

Defendants alleged that trial counsel had a *per se* conflict of interest because he represented Rodriguez, a 16 year-old who was identified by several eyewitnesses as the offender firing the handgun into the park. A *per se* conflict arises when the attorney had or has a tie to a person or entity that would benefit from a verdict unfavorable to the client. This occurs when counsel: (1) has a prior or contemporaneous association with the victim, the prosecution, or an entity assisting the prosecution; (2) contemporaneously represents a prosecution witness; or (3) was a former prosecutor who had been personally involved in the prosecution of the defendant.

Here, Rodriguez did not fit into the first category. **People v. Fields, 2012 IL 112438** (potential State witnesses not considered an “entity. . . assisting the prosecution.) But the second category does apply. Defense counsel represented Rodriguez after his arrest in the wake of the shooting, in October, 1991, while at the same time representing defendants. The representation overlapped by 19 days. The Appellate Court found this to be “contemporaneous representation.” And while the State pointed out that Rodriguez never testified for the State, the Appellate Court found that representation of an alternate suspect and named State witness creates sufficient potential conflict so as to fall under the *per se* conflict rule.

The petitions also made a substantial showing of an actual conflict of interest. Notably, counsel never called as witnesses the three people who identified Rodriguez as the shooter. This decision could be a “specific defect” in counsel’s strategy. Although the State offered speculative justifications for the failure to call the witnesses, such as questioning their credibility, the stronger inference is that trial counsel felt some duty of loyalty to Rodriguez. Regardless, these questions are better resolved at an evidentiary hearing.

Finally, the petitions made a substantial showing of actual innocence. They included four affidavits from witnesses whom Cruz alleged were present at the gang meeting where Ayala ordered the hit. All of the witnesses attested that they were not present, and that they were arrested and threatened with prosecution and abuse if they would not admit to being present. These affidavits were newly discovered because one of the witnesses pleaded the fifth before the grand jury, rendering him unavailable, while the others described State coercion and fear of retaliation to explain why they did not come forward earlier. Two additional recantation affidavits from witnesses who did testify at trial were also newly discovered, even though Soto included the information in a prior petition. It would be unfair to attribute this prior knowledge to Ayala, and, regardless, the information was available to neither defendant at the time of trial. Finally, other witness affidavits were considered newly

discovered because they implicated Rodriguez, and no amount of due diligence could have compelled their conflicted counsel to call these witnesses at trial.

The new evidence was sufficiently material and conclusive to warrant an evidentiary hearing. Witnesses who would dispute Cruz's account of the gang meeting where the shooting was supposedly planned, and his claim that the Soto fired the handgun, while at the same time offering multiple accounts of Rodriguez firing the handgun, would place the trial evidence in a different light and undermine the court's confidence in the judgment of guilt.

People v. Wilson, 2022 IL App (1st) 192048 Defendant's post-conviction petition made a substantial showing of actual innocence, where it included an exculpatory affidavit from a witness defendant met in the penitentiary. Defendant was convicted of a 2006 murder in a barbershop based on the testimony of two eyewitnesses and a grainy surveillance video of people going in and out of the barbershop. The witnesses alleged defendant entered the barbershop, engaged in an argument with the victim, shot him, and ran off. The video shows people leaving the barbershop, but the faces are not recognizable. The affiant, on the other hand, alleged that he gave a man named Robinson a ride to the barbershop and watched from across the street, through the window, as Robinson shot the victim.

The Appellate Court found the evidence newly discovered, because defendant would not have known that the affiant had seen the murder until he met him in prison. The evidence was material and non-cumulative, as no evidence of Robinson's involvement was introduced at trial. And the evidence was sufficiently conclusive to change the result on retrial, because, accepting the testimony as true, it undermined the eyewitness accounts while still conforming with the surveillance evidence. The video did not capture much of the street and left open the possibility that one of the unidentified individuals in the video was Robinson, after he exited the affiant's car and crossed the street before entering the barbershop. Finally, the account matches that given by Wilson during his custodial interrogation, which was introduced at trial, and wherein he insisted that a third party entered the barbershop and shot the victim. The court ordered an evidentiary hearing to determine whether the affiant is sufficiently credible to warrant a new trial.

People v. Rosalez, 2021 IL App (2d) 200086 Defendant made a substantial showing of actual innocence such that the trial court erred in dismissing his post-conviction petition at the second stage of proceedings. Defendant's petition alleged that a co-defendant, Vilayhong, would testify that he alone committed the drive-by shooting that killed a single individual. Defendant had been convicted of first degree murder for that incident, and Vilayhong's affidavit was contrary to his trial testimony against defendant.

Specifically, Vilayhong, who was a high-ranking member of the same gang as defendant, testified at trial that defendant shot the victim at his direction. Two other witnesses implicated defendant, as well. Vilayhong admitted he had entered into a plea agreement with the State in exchange for his trial testimony against defendant whereby Vilayhong would receive a 20-year sentence for first degree murder. The jury ultimately convicted defendant of first degree murder, but answered in the negative a special interrogatory asking whether defendant personally discharged the firearm which caused the victim's death.

Attached to defendant's post-conviction petition was an affidavit from Vilayhong stating that he had the gun on the night in question, he fired the only shot during the incident, and he instructed everyone else in the vehicle to implicate defendant if questioned about the shooting. Also attached was an affidavit from the vehicle's driver, Perez-Gonzalez, stating that defendant refused Vilayhong's instruction to shoot, so Vilayhong shot the victim

himself. Perez-Gonzalez, and another witness Garza, both averred that they originally had implicated defendant at Vilayhong's direction.

The trial court granted the State's motion to dismiss, concluding that while this evidence was material and non-cumulative, only some of the information was newly discovered and, regardless, it was not of such conclusive character that it was likely to change the outcome at trial. The Appellate Court reversed and remanded for an evidentiary hearing. The evidence was newly discovered because Vilayhong had a fifth amendment right not to incriminate himself and had taken steps to enter a favorable plea agreement under a theory of accountability to avoid principal liability for the offense. Likewise, Perez-Gonzalez had refused to answer any questions at defendant's trial when called by the State, and there was no indication defendant could have learned prior to trial that Vilayhong had told him and Garza to implicate defendant.

When the affidavits were considered alongside the evidence offered at trial, defendant made a substantial showing that the new evidence was of such conclusive character that it was likely to change the outcome. Nobody outside of the vehicle had identified defendant as the shooter, and there were several inconsistencies at trial which raised credibility questions. An evidentiary hearing is required to determine whether the witnesses' recantations are credible enough to warrant a new trial.

People v. Smith, 2021 IL App (1st) 181728 Defendant made a substantial showing of actual innocence sufficient to warrant an evidentiary hearing where defendant supported his petition with the affidavit of one of two shooting victims (McDonald) stating that defendant was not the shooter. McDonald did not testify at trial, but averred that he would have testified if he had known about the trial. According to his affidavit, McDonald was talking with defendant just before the shooting, and someone other than defendant shot him and the other victim.

The trial court held that McDonald's affidavit was not newly discovered evidence because he averred that he told the police at the time that defendant was not the shooter. Thus, the trial court concluded, McDonald's statement would have been disclosed before trial, and defendant could have called him as a witness at trial. The Appellate Court disagreed. McDonald stated he was out of town at the time of trial, and an officer testified at trial that they had been unable to locate McDonald for trial. The court found "no persuasive reason for holding that the defendant should have been able to secure evidence that the State itself tried to secure and failed."

The Appellate Court also found that McDonald's affidavit was of such conclusive character that it would probably change the result on retrial. McDonald had the best opportunity to observe the shooter. The other victim did not make a pretrial identification, but rather only identified defendant in the courtroom, while he was seated at the defense table at trial. And, a bystander who identified defendant as the shooter did not have the best view and described details inconsistent with those provided by other witnesses.

People v. Martinez, 2021 IL App (1st) 190490 The circuit court erred in dismissing defendant's post-conviction petition at the second stage where defendant made a substantial showing that his right to due process was violated due to police misconduct. Defendant supported his petition with evidence that one of the detectives involved in his case (Guevara) had a "well-documented history of influencing and manipulating witnesses" and had engaged in misconduct in defendant's case, specifically. The trial court erred in disregarding Guevara's invocation of the Fifth Amendment privilege when questioned about the instant

matter in a separate legal proceeding. The court should have drawn a negative inference from that invocation.

Defendant also made a substantial showing of actual innocence based on the same evidence supporting his due process claim, as well as expert evidence concerning eyewitness identification. The eyewitness evidence at defendant's trial was the strongest evidence against him, and the proposed expert testimony would have undermined that evidence. Especially when considered with the evidence of police misconduct, the new evidence placed the trial evidence in a different light.

People v. Costic, 2021 IL App (3d) 180618 Defendant, convicted of murder and aggravated battery under the theory that he was accountable for a shooting committed by his brother, alleged actual innocence in a post-conviction petition. The circuit court summarily dismissed the petition. An Appellate Court majority remanded to the second stage.

The petition included an exculpatory affidavit from defendant's brother stating that he fired the gun, that he acted alone, and that he did not tell anyone of his intentions. While the State alleged the evidence was not newly discovered, as defendant had planned on calling his brother at trial, the Appellate Court rejected the argument. The brother had invoked the Fifth Amendment and refused to testify. Evidence known to the defendant but unavailable at trial is "newly discovered" for purposes of an actual innocence claim.

The court further rejected the argument that the affidavit was insufficient because it was executed two years after the brother was convicted of the same offense, when he had "nothing to lose." This argument goes to the weight of the evidence and is inappropriate at the first stage. Finally, the evidence was conclusive enough to alter the outcome, where the State alleged the brothers acted together, but only one witness claimed to glimpse defendant at the scene, whereas two other witnesses saw only the brother.

A dissenting justice noted that defendant was convicted under a theory of accountability, and therefore evidence that he was not the triggerman did not help his claim of innocence. Moreover, the brother's claim that he acted alone was "rebutted" by the one eyewitness who saw the brothers together at the scene.

People v. Robinson, 2021 IL App (1st) 171371 Defendant was convicted of murder based on the eyewitness testimony of a single eyewitness who recanted his testimony after the trial. He filed a post-conviction petition alleging actual innocence. The petition contained the affidavit of a new eyewitness, Thomas, who claimed to have witnessed the shooting and would testify that defendant was not one of the shooters. The circuit court dismissed after an evidentiary hearing, finding Thomas' testimony incredible. In particular, the court found it too convenient that Thomas and defendant were in the same cellblock, spoke to each other for years, and never discussed defendant's case before defendant independently discovered Thomas witnessed the shooting. The court concluded that the petition could not meet the "complete vindication and total exoneration" standard.

The Appellate Court majority remanded with instruction. The parties agreed the evidence was newly discovered, material, and non-cumulative. Thus, the only question was whether the new evidence was so conclusive that it would probably change the result on retrial. On this point, the circuit court's employment of the "complete vindication and total exoneration" contradicted the Illinois Supreme Court's subsequent holding in **People v. Robinson, 2020 IL 123849**. "Where a circuit court has judged evidence under an improper standard of proof, the appropriate remedy is to order a new hearing to be conducted under the proper standard." The case was remanded to a different judge pursuant to Rule 366(a)(5) "out of an abundance of caution."

The dissent would have affirmed, finding the “exoneration” language was merely a reference to the “touchstone” of actual innocence claims, and that viewed in totality, the circuit court’s findings applied the proper analysis and was free from manifest error.

People v. Willingham, 2020 IL App (1st) 162250 Newly discovered evidence of actual innocence does not have to be dispositive in order to be likely to alter the result on retrial. Under **People v. Robinson, 2020 IL 123849**, the Supreme Court made clear that the standard is whether the evidence supporting the post-conviction petition places the trial evidence in a different light and undermines the court’s confidence in the judgment of guilt. Here, the affidavit of a previously unknown bystander, stating that he witnessed the altercation and saw the victim shoot at defendant before defendant returned fire, went to the heart of whether defendant acted in self-defense and, if believed, would place the trial evidence in a different light and undermine confidence in the guilty verdict. While the witness’s affidavit conflicted with other trial testimony, it was not positively rebutted by the record and the court could not resolve the conflict at the second stage of post-conviction proceedings since credibility determinations are improper at that stage.

Defendant’s petition also made a substantial showing of ineffective assistance of trial counsel for failing to call three witness who would have testified that the shooting victim and his fellow gang members were armed on the date of the altercation which led to the shooting. This would have supported defendant’s claim of self-defense. While counsel may ultimately provide strategic reason for not calling the witnesses, an evidentiary hearing is required to resolve that question. Accordingly, defendant made a substantial showing of deficient performance. And, where the witnesses would have provided critical support for defendant’s otherwise uncorroborated version that he acted in self-defense, defendant’s petition also made a substantial showing of prejudice. Accordingly, the dismissal of defendant’s petition was reversed, and the matter was remanded for an evidentiary hearing.

People v. House, 2020 IL App (3d) 170655 Defendant’s post-conviction petition alleging actual innocence should not have been dismissed at the second stage. Defendant provided several affidavits from witnesses, some attesting that he was not the shooter and others casting doubt on the State’s witnesses and investigation. The Appellate Court found the evidence new, because one witness said he was reluctant to come forward earlier while the others did not appear in discovery. Regardless, the question of whether they could be discovered earlier with due diligence was a matter for a third-stage evidentiary hearing. The evidence was also non-cumulative and material, and, given the State’s evidence consisted of an inconclusive surveillance video and a single eyewitness whose credibility was attacked in the petition, conclusive enough to warrant an evidentiary hearing.

People v. Cathey, 2019 IL App (1st) 153118 Defendant filed a petition for relief from judgment alleging that new evidence of police misconduct exonerated him in his drug possession case. The press accounts of Officer Guerrero’s and Officer Martinez’s misconduct were not available to defendant at the time of his direct appeal, and were therefore “newly discovered.” But they were not so conclusive as to warrant a new trial. Defendant had alleged at trial that the officers planted drugs on him. But the misconduct detailed in the new evidence involved gang involvement, robbery, and drug dealing. This misconduct was not sufficiently similar to the misconduct alleged by defendant, and therefore would not likely change the result on retrial.

People v. Shaw, 2019 IL App (1st) 152994 A guilty plea does not categorically preclude a post-conviction claim of actual innocence. Rejecting the holding in **People v. Reed, 2019 IL App (4th) 170090**, the Appellate Court found no reason to prevent those who decide to plead guilty – a decision not always compelled by actual guilt – from presenting persuasive evidence of innocence. The standard for judging an actual innocence claim following a guilty plea, however, must be higher than for an actual innocence claim following trial, due to the greater finality interests inherent in the guilty plea context. The Supreme Court would have to set that standard at a later date, as it would not be appropriate for the Appellate Court to do so.

Here, the Appellate Court found that even employing the traditional standard, defendant’s actual innocence claim failed to make a substantial showing of actual innocence. The claim was based on an affidavit recounting the hearsay statement of the deceased victim in which she admitted to falsely identifying defendant as her attacker. This is not the type of compelling or persuasive evidence required for an actual innocence claim, particularly when measured against the record: a factual basis describing an eyewitness identification of defendant, plus defendant’s confession, and defendant’s agreement to that factual basis during his plea of guilty.

People v. Reed, 2019 IL App (4th) 170090 Rejecting the analysis of **People v. Shaw, 2018 IL App (1st) 152994**, the Appellate Court held that a defendant who pleads guilty cannot raise a freestanding claim of actual innocence without also alleging the plea was involuntary or otherwise unconstitutional. A freestanding claim of actual innocence is incompatible with a guilty plea because it requires non-cumulative evidence that will change the result of a retrial; the “non-cumulative” and “retrial” standards make little sense in the guilty plea context, suggesting they were not developed with guilty pleas in mind. Also, guilty pleas waive all non-jurisdictional claims of error, and a claim of actual innocence is non-jurisdictional. Finally, estoppel should apply because the defendant invited any error by pleading guilty.

People v. Moore, 2018 IL App (3d) 160271 Defendant had been convicted of first degree murder in the death of his estranged wife. During the original trial court proceedings, defendant said he had blacked out and could not recall the details of the incident. In a subsequent post-conviction petition defendant claimed actual innocence, asserting that he had recovered memories of the incident which would support either self-defense or reduction to second degree murder based on either mutual combat or unreasonable belief in self-defense. Defendant had been convicted of first degree murder in the death of his estranged wife. During the original trial court proceedings, defendant said he had blacked out and could not recall the details of the incident. In a subsequent post-conviction petition defendant claimed actual innocence, asserting that he had recovered memories of the incident which would support either self-defense or reduction to second degree murder based on either mutual combat or unreasonable belief in self-defense.

Relying on **People v. Williams, 242 Ill. 197 (1909)**, the Court held that a defendant’s recovered memories do not constitute newly discovered evidence because claims of “forgotten facts” present serious potential for fraud or perjury. Even if recovered memories could qualify as newly discovered evidence, defendant’s actual innocence claim was frivolous and patently without merit where other evidence showed that the victim sustained multiple stab wounds even after defendant had disarmed her.

And, reduction from first degree murder to second degree murder does not constitute actual innocence. Citing **People v. Wingate, 2015 IL App (5th) 130189**, the Court concluded

that newly discovered evidence must completely exonerate a defendant of the offense in question, as well as all related offenses.

People v. Velasco, 2018 IL App (1st) 161683 Defendant's post-conviction petition, containing two new eyewitness accounts identifying a rival gangmember as the offender, and two corroborating hearsay affidavits, made a substantial showing of actual innocence. Although the appellate court would not consider two other affidavits for lack of notarization, and another affidavit did not contain newly discovered evidence, the remaining affidavits (including those containing hearsay, which is admissible in post-conviction hearings), were new, non-cumulative, and so conclusive that it is more than likely that no reasonable juror would find defendant guilty. The new evidence was consistent with the defense theory of a gang-motivated killing and would have supported the otherwise uncorroborated defense at trial. Taking the new accounts as true, they "call into question" the State's theory that defendant, a friend and member of the same gang as the victim, committed the murder.

People v. Shaw, 2018 IL App (1st) 152994 A defendant who pled guilty may bring a freestanding claim of actual innocence in a post-conviction petition, without having to also challenge the knowing and voluntary nature of his plea. The burden to establish such a claim is higher than for an actual innocence claim brought after a trial, however. A guilty plea defendant who brings an actual innocence claim must present a "truly persuasive demonstration of innocence" with "compelling evidence" and must establish the traditional elements of an actual innocence claim by clear and convincing evidence. The clear-and-convincing standard is higher than the typical preponderance standard applied to post-trial actual innocence claims, but is lower than the reasonable-doubt standard. A defendant who pled guilty may bring a freestanding claim of actual innocence in a post-conviction petition, without having to also challenge the knowing and voluntary nature of his plea. The burden to establish such a claim is higher than for an actual innocence claim brought after a trial, however. A guilty plea defendant who brings an actual innocence claim must present a "truly persuasive demonstration of innocence" with "compelling evidence" and must establish the traditional elements of an actual innocence claim by clear and convincing evidence. The clear-and-convincing standard is higher than the typical preponderance standard applied to post-trial actual innocence claims, but is lower than the reasonable-doubt standard.

A persuasive demonstration of innocence with compelling evidence may be satisfied by exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence. Here, defendant presented an affidavit from an individual who said that the now-deceased victim admitted to him that she misidentified defendant and that she actually identified another man as the offender. The affidavit of a non-eyewitness about a conversation with the victim was not compelling evidence of innocence.

People v. Montanez, 2016 IL App (1st) 133726; People v. Serrano, 2016 IL App (1st) 133493 To obtain post-conviction relief due to actual innocence, the petitioner must present new, material, noncumulative evidence of such a conclusive character as to probably change the result on retrial. Whether evidence is conclusive depends on whether it places the trial evidence in such a different light as to undercut confidence in the factual correctness of the verdict. The post-conviction court has wide latitude to receive proof by affidavits, depositions, oral testimony, or other evidence.

Where the only direct evidence of the petitioner's guilt was the testimony of a witness who repudiated his statement in a sworn affidavit and claimed that he had been fed the testimony by a police detective, the claim concerning the detective's actions was corroborated

by other witnesses, and there was no physical evidence connecting defendant to the offense, the petitioner made a sufficient *prima facie* case to withstand the State's motion for a directed finding.

Recantations of trial testimony are to be viewed with suspicion, but are not to be simply dismissed without further analysis. The court noted that there were reasons to be concerned about the veracity of the witness's testimony even at trial, as he was an admitted heroin addict, had a lengthy criminal history, and received a nine-year sentence for four felony cases on which he faced 100 years in prison. In addition, there was evidence that the witness had admitted years earlier that he had testified falsely, and the judge commented at trial that the witness's testimony was crucial for a conviction. The recantation was corroborated by another witness who averred he was coerced to give false testimony against defendant by the same detective.

The court also observed that the trial judge failed to draw an adverse inference from the detective's invocation of the Fifth Amendment when he was testified at the post-conviction hearing. Post-conviction proceedings are civil in nature. While the privilege against self-incrimination may be invoked at a civil proceeding, the trial court may draw an adverse inference that had questions been answered truthfully, the answers would have been damaging to the person invoking the privilege. While the court found that it need not decide whether an adverse inference was warranted in this case, the trial court should have at least considered doing so where the detective failed to answer probative, detailed questions about his conduct in this case.

The trial court also erred by discounting or excluding evidence showing a pattern of similar misconduct by the detective over a period of several years. All of the evidence concerned attempts by the detective to coerce witnesses to make false statements, and many of the persons involved were Hispanics who did not speak fluent English. In addition, there was evidence from a Chicago police detective who worked alongside the detective in question that the detective was willing to procure false identifications.

The Appellate Court stated:

We have before us a recantation from the principal trial witness saying he was coerced by detectives, a partial recantation from the secondary witness (the victim's wife) saying she was misled by investigators, sworn statements from at least 20 individuals claiming that the investigators coerced them in a similar manner, and then the detective under suspicion coming to the hearing and invoking the fifth amendment in response to all of the pointed questions. At this stage in the proceedings, petitioner was required to make out merely a *prima facie* case That has clearly occurred here.

The court also found that on remand, the cause should be assigned to a different judge:

Petitioner offered up an abundance of evidence to support his claim of actual innocence. The trial court turned a blind eye to much of the evidence and also refused to admit probative, admissible evidence that, when evaluated under the proper standard, is damning. Even where the court gave lip service to the standard it was supposed to apply, the court clearly did not adhere to that standard. The post-conviction court gave the impression that it was flatly unwilling to consider the evidence offered by petitioner. . . . Petitioner would be prejudiced were we not to assign the case to a new judge on remand.

The directed finding in favor of the State was vacated and the cause remanded for

further proceedings.

People v. Smith, 2015 IL App (1st) 140494 To obtain an evidentiary hearing on a claim of actual innocence, the petitioner must present newly discovered evidence that vindicates or exonerates him. Evidence is newly discovered if it could not have been discovered before trial even had defendant exercised due diligence. The court rejected the State's argument that evidence is not newly-discovered if, with due diligence, defendant could have discovered it after trial but before the time the evidence was actually discovered.

Newly discovered evidence must do more than merely call into question the sufficiency of the evidence introduced at trial. Instead, the new evidence must be material, non-cumulative, and of such conclusive character as to probably change the result on retrial. Here, an eyewitness's recantation of testimony which inculpated defendant constituted newly discovered evidence. Second, the recantation was material and non-cumulative where the State had no physical evidence linking defendant to the crime, the recantation exonerated defendant and identified a previously unknown shooter, and the recanting witness was the only eyewitness to identify defendant as the shooter. Third, the recantation, if believed, had the capacity to produce a different result. Although recantations are inherently unreliable, credibility determinations are not permitted at second-stage proceedings. Instead, all well-pleaded facts are taken to be true.

The court rejected the State's argument that the conclusive character of the recantation was diminished because the witness failed to aver that he would testify to the facts in his affidavit. The Post-Conviction Hearing Act requires a petitioner to support his claims of constitutional violations with affidavits that "identif[y] with reasonable certainty the source, character, and *availability* of the alleged evidence."

Although the recanting witness did not expressly state that he would testify at a new trial, he indicated his availability by stating that he "wanted to try to help" defendant and by attempting to communicate with defendant's attorney. In addition, because the recantation did not involve any wrongdoing by the witness, it was likely that he would be available at a retrial. Under these circumstances, the witness was not required to also make an affirmative statement that he would testify to the facts contained in the affidavit.

The cause was remanded for a third-stage evidentiary hearing.

People v. Henderson, 2014 IL App (2d) 121219 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."

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.

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.

People v. Griffin, 2013 IL App (2d) 110631 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.

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.

People v. Williams, 2012 IL App (1st) 111145 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.

People v. Parker, 2012 IL App (1st) 101809 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.

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

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.

People v. Lofton, 2011 IL App (1st) 100118 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.

The circuit court erred when it made credibility determinations at the second-stage and dismissed the petition 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. 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. Evidence that someone else was the shooter and that petitioner was not present at the shooting is non-cumulative and material. 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 cause was remanded for an evidentiary hearing.

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

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.

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

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.

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

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

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.

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."

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

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**.

§9-1(d)

Contents of Petition

Illinois Supreme Court

People v. Dupree, 2018 IL 122307 A post-conviction claim of ineffective assistance of counsel for failure to call a witness need not include an affidavit from the uncalled witness in order to comply with the supporting-evidence requirement of Section 122-2. Section 122-2 uses the conjunction “or” in describing the required attachments: “affidavits, records, or other evidence supporting its allegations . . .” Some petitions, such as the instant case, will have sufficient supporting evidence to allow for review of the claim on the merits despite the lack of an affidavit. Here, the Appellate Court erred by upholding the dismissal of the petition based on purported non-compliance with Section 122-2, because, despite the lack of an affidavit, defendant attached police reports documenting the statements of the uncalled witness. A post-conviction claim of ineffective assistance of counsel for failure to call a witness need not include an affidavit from the uncalled witness in order to comply with the supporting-evidence requirement of Section 122-2. Section 122-2 uses the conjunction “or” in describing the required attachments: “affidavits, records, or other evidence supporting its allegations . . .” Some petitions, such as the instant case, will have sufficient supporting evidence to allow for review of the claim on the merits despite the lack of an affidavit. Here, the Appellate Court erred by upholding the dismissal of the petition based on purported non-compliance with Section 122-2, because, despite the lack of an affidavit, defendant attached police reports documenting the statements of the uncalled witness.

The Supreme Court then evaluated the merits of the petition and upheld the dismissal. Here, the uncalled witness was the victim of the armed robbery. He spoke with police and did not identify defendant as the robber, and identified someone other than defendant in a lineup. Yet the Supreme Court found no reasonable likelihood of a different outcome had he been called. His description of the assailant matched the description given by another eyewitness, and his identification of someone else would not have overcome the stronger identification by the primary eyewitness, who appeared to be an accomplice. The

court also found several strategic reasons for not calling the witness, as some details of the statement would have strengthened the State's case.

People v. Allen, 2015 IL 113135 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.

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.

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.

People v. Delton, 227 Ill.2d 247, 882 N.E.2d 516 (2008) The requirement to submit factual documentation is intended to allow objective or independent corroboration of defendant's allegations. Thus, the affidavits and exhibits that accompany a post-conviction petition must identify with reasonable certainty the sources, character, and availability of evidence supporting the allegations. Here, the petition lacked sufficient supporting documentation, did not explain its absence, and did not support an inference that there was an explanation.

People v. Hall, 217 Ill.2d 324, 841 N.E.2d 913 (2005) The failure to attach independent corroborating documentation, or to explain its absence, may be excused where the only other affidavit which defendant could be expected to furnish is that of the attorney whose competence is being challenged. Where the petition and defendant's affidavit implied that the alleged ineffectiveness occurred during private, privileged consultations between defendant and the attorney, it could be reasonably inferred that the only persons present were defendant and the attorney. It could also be inferred that the only possible affidavit other than defendant's would have been that of the attorney. See also, **People v. Rogers**, 372 Ill.App.3d 859, 866 N.E.2d 1256 (2nd Dist. 2007) (the exception applies only where the petition raises a claim which rests solely on communications between defendant and her attorney; while the exception did not apply to a claim that defense counsel failed to investigate the prosecutor's misrepresentation of a witness's expected testimony (because the petitioner could have asked the witness to furnish an affidavit), the exception did apply to a different claim - that defense counsel was ineffective for failing to move to withdraw defendant's guilty plea).

People v. Collins, 202 Ill.2d 59, 782 N.E.2d 195 (2002) The Post-Conviction Hearing Act requires that a post-conviction petition be verified by affidavit and supported by "affidavits, records, or other evidence," or explain why such evidence is unavailable (725 ILCS 5/122-1(b); 122-2). The failure to attach such affidavits or explain their absence justifies summary dismissal. The trial court properly dismissed a pro se post-conviction petition, which alleged that counsel agreed to appeal the conviction but failed to do so, where the petition was unsupported by affidavits, records, or other evidence and failed to offer any explanation for the absence of such documentation. Defendant's sworn verification is not a substitute for the requisite documentation.

The court distinguished **People v. Washington**, 38 Ill.2d 446, 232 N.E.2d 738 (1967) and **People v. Williams**, 47 Ill.2d 1, 264 N.E.2d 697 (1970), where the petitions contained claims arising from conversations between defendants and their attorneys and were supported only by defendants' sworn verifications. In **Washington**, the petition contained an explanation for the failure to support the petition, while in **Williams** the facts of the petition allowed the court to "easily infer" that the only affidavit possible would have been from the attorney whose competence was being challenged. In **Collins**, defendant's petition lacked "even a single allegation" from which an explanation for the failure to provide supporting evidence could be inferred. **People v. Enis**, 194 Ill.2d 361, 743 N.E.2d 1 (2000) Petitioner failed to support petition with an affidavit from the potential witness, whom counsel was allegedly ineffective for failing to call. Without such an affidavit, a reviewing court is unable to determine whether a prospective witness could have provided favorable testimony or information, and therefore cannot review the ineffectiveness claim. Even if an unsworn, unsigned, untitled report identified as "investigation notes" was an adequate substitute for an affidavit, in view of the overwhelming evidence of guilt there was no reasonable probability that the outcome of the trial would have been different had the witness been called.

People v. Gendron, 41 Ill.2d 518, 244 N.E.2d 149 (1969) Petition was properly dismissed where it alleged that the State compelled a witness to testify falsely, but advanced no factual basis for the assertion and no explanation for the lack of supporting documents. But see, **People v. Edsall**, 94 Ill.App.3d 469, 418 N.E.2d 943 (5th Dist. 1981) (the petition was sufficient, though it lacked supporting affidavits, because the petition satisfactorily explained why no affidavits were attached, and letters which were attached constituted evidence in support of the allegations); **People v. Johnson**, 377 Ill.App.3d 854, 879 N.E.2d 977 (5th Dist. 2007) (petition was sufficient where it included photocopies of portions of the trial record, the claims in the petition could be decided on the basis of the record, and the constitutional issue was that appellate counsel was ineffective for not having raised issues on appeal).

People v. Farnsley, 53 Ill.2d 537, 293 N.E.2d 600 (1973) When allegations of perjury are made, the petition or accompanying affidavits should identify the source from which the evidence of perjury would be forthcoming.

People v. Nelson, 45 Ill.2d 1, 257 N.E.2d 104 (1970) Reversed and remanded for affidavits in support of allegation that after proceeding convened, the trial court held an in-chambers conference without allowing defendant to attend.

Illinois Appellate Court

People v. Matthews, 2022 IL App (4th) 210752 The trial court did not err in summarily dismissing defendant's *pro se* post-conviction petition alleging ineffective assistance of counsel for failing to call a witness at trial. Defendant failed to attach an affidavit from the proposed witness, though he stated he intended to obtain and submit her affidavit prior to second stage proceedings. Defendant did not, however, explain why he had not been able to obtain the affidavit, making his case distinguishable from **People v. Bates, 2022 IL App (4th) 210106-U**. Defendant did allege that Covid-19 had limited his access to the law library and hindered his ability to file his petition on time, but did not assert that this prevented him from obtaining the witness's affidavit.

People v. Moore, 2022 IL App (1st) 192290 Defendant was convicted of armed robbery, home invasion, and criminal sexual assault. He subsequently filed a post-conviction petition including a claim that his right to due process was violated by the State's use of perjury at trial, specifically testimony that a mask and the wallet of one of the victims were recovered from defendant. In his petition, defendant cited to an affidavit from a co-defendant, Coleman, stating that the mask and wallet were actually recovered from Coleman, not defendant. Coleman's affidavit was not included in the record, however, and defendant's petition was summarily dismissed.

On appeal, defendant argued that his own affidavit was sufficient corroboration of his claim to allow his petition to advance to the second stage. The appellate court disagreed. The absence of objective or independent corroboration generally is grounds for dismissal of a post-conviction petition. Courts have recognized that a defendant's own affidavit may provide sufficient corroboration in some circumstances – for instance, where the only other affidavit defendant could have furnished was that of his attorney whose ineffectiveness defendant is alleging. But a rule that would allow defendant's own affidavit as an adequate substitute for independent corroboration, as a general rule, would make the corroboration requirement all but meaningless.

Defendant also argued that Coleman's affidavit must have been lost by the clerk's office, through no fault of his own. The Appellate Court concluded that, had the affidavit been attached, defendant's due process claim would have survived summary dismissal. Without the mask and wallet, the State's entire case against defendant was predicated on his flight from police in the vicinity of the offense. None of the victims identified defendant as one of the perpetrators and no physical evidence, apart from the mask and wallet, linked defendant to the crime. Evidence that those items were planted on defendant would have undermined confidence in the verdict. But, because Coleman's affidavit was not in the appellate record and was not mentioned by the circuit court in the summary dismissal order, the appellate court could not reverse the summary dismissal on the merits.

While the Court declined to conclude that Coleman's affidavit existed but had been lost by the circuit court, it did hold that if defendant is able to obtain a new affidavit from Coleman, repeating his claims about the mask and wallet and also stating that he had previously given defendant an affidavit to that effect, that new affidavit would warrant second-stage proceedings on a due process claim raised in a successive post-conviction petition.

People v. Brooks, 2021 IL App (4th) 200573 The circuit court erred when it denied defendant's actual innocence claim at the second stage based on the hearsay nature of defendant's evidence. At the second stage of post-conviction proceedings, all well-pleaded claims must be accepted as true. Here, defendant attached an affidavit from an investigator who averred that he spoke to a woman who had a text message from a man who admitted to

the murder for which defendant had been convicted. The circuit court held that the affidavit was insufficient to support a claim of actual innocence because it was inadmissible hearsay.

The Appellate Court remanded for third-stage proceedings. [Illinois Rule of Evidence 1101\(b\)\(3\)](#) specifically provides that the rules of evidence do not apply to “post-conviction hearings.” At the second stage, this means that all evidence – even hearsay – must be accepted as true for purposes of the actual innocence analysis.

At the third stage, as at a sentencing hearing, Rule 1101(b)(3) means that the trial court may, in the exercise of its discretion, consider any evidence it finds relevant and reliable, regardless of its admissibility under Illinois’ Rules of Evidence. Therefore, any disagreement about the admissibility of the text message should have been reserved for the third-stage evidentiary hearing.

[People v. Borizov, 2019 IL App \(2d\) 170004](#) The circuit court did not err in summarily dismissing defendant’s *pro se* post-conviction petition at the first stage. The petition alleged ineffective assistance of appellate counsel for not raising more of the 31 claims preserved in the post-trial motion. The Appellate Court held that the petition failed to state a gist of a claim because it did not specify which claims appellate counsel failed to raise.

Moreover, the one claim briefed in the instant appeal lacked arguable merit. Defendant alleged that appellate counsel should have argued that a juror was biased because she admitted to knowing family of the victim. But the juror was thoroughly questioned by the court and maintained she could be fair. She was also admonished pursuant to Rule 431(b). Pursuant to Supreme Court authority, there is no implied bias when a juror has a tangential relationship to the victim’s family, and therefore the claim was fanciful.

[People v. Harris, 2019 IL App \(4th\) 170261](#) First-stage dismissal of defendant’s post-conviction petition was upheld. Defendant claimed ineffective assistance of trial counsel for failing to seek a continuance to call two witnesses he believed would support his self-defense claim. Defendant attached “unsigned” affidavits from the two witnesses, as well as his own affidavit summarizing their proposed testimony and stating that he had been unable to obtain the witnesses’ signatures due to his imprisonment.

A petitioner’s imprisonment, alone, cannot excuse the failure to attach supporting material to a post-conviction petition. By statute, the post-conviction remedy is only available to persons “imprisoned in the penitentiary.” [725 ILCS 5/122-1\(a\)](#). The supporting-material requirement would be rendered meaningless if imprisonment alone could excuse it. Defendant did not describe his efforts to obtain signed affidavits or any circumstances beyond his imprisonment which prevented him from obtaining them. Thus, the failure to include supporting material was fatal, and summary dismissal was upheld.

[People v. Walker, 2019 IL App \(3d\) 170374](#) The trial court properly dismissed defendant’s post-conviction petition at the first stage. Defendant alleged that his attorney withheld discovery from him and that as a result he entered into an involuntary guilty plea. The petition, however, lacked documentation in support of a claim that counsel withheld any information helpful to his defense. Also, a decision regarding which discovery items to share with a client is a matter of trial strategy. Here, defendant could not defeat the presumption that counsel’s decision was sound, because he failed to specify how missing discovery would affect his decision to plead guilty.

[People v. Velasco, 2018 IL App \(1st\) 161683](#) Defendant’s post-conviction petition, containing two new eyewitness accounts identifying a rival gangmember as the offender, and

two corroborating hearsay affidavits, made a substantial showing of actual innocence. Although the appellate court would not consider two other affidavits for lack of notarization, and another affidavit did not contain newly discovered evidence, the remaining affidavits (including those containing hearsay, which is admissible in post-conviction hearings), were new, non-cumulative, and so conclusive that it is more than likely that no reasonable juror would find defendant guilty. The new evidence was consistent with the defense theory of a gang-motivated killing and would have supported the otherwise uncorroborated defense at trial. Taking the new accounts as true, they “call into question” the State’s theory that defendant, a friend and member of the same gang as the victim, committed the murder.

People v. Stockton, 2018 IL App (2d) 160353 Claims not included in a post-conviction petition are forfeited under the Post-Conviction Hearing Act. A reference to the Sixth Amendment in defendant’s *pro se* post-conviction petition was inadequate to present a claim of ineffective assistance of appellate counsel. The petition failed to allege any error by appellate counsel, and the right to effective assistance of appellate counsel falls under the 14th Amendment, not the Sixth. The Court rejected defendant’s argument on appeal that her petition stated the gist of a claim of ineffective assistance of appellate counsel.

People v. Niffen, 2018 IL App (4th) 150881 Pursuant to **People v. Edwards**, 197 Ill. 2d 239 (2001), an allegation that defense counsel ignored defendant’s timely request to move to withdraw his guilty plea should be advanced to the second stage. A defendant’s detailed affidavit satisfies Section 122-2 for such claims. In **People v. Delton**, 227 Ill. 2d 247 (2008), the supreme court stated that the inclusion of specific details would tend to corroborate a claim, and here, defendant’s affidavit described a letter he wrote to trial counsel explaining his reasons for wanting to withdraw the plea, and inclusion of the letter itself (which defendant had mailed anyway), would not provide additional corroboration because it would merely be another writing of the defendant.

People v. Cage, 2013 IL App (2d) 111264 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.

People v. Barghout, 2013 IL App (1st) 112373 Defendant’s post-conviction petition raised a meritorious claim that he rejected a plea bargain based on erroneous advice of his trial counsel. 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.

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.

People v. Coleman, 2012 IL App (4th) 110463 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.

The Appellate Court reversed the order summarily dismissing the petition. The petition showed an arguable case of ineffective assistance concerning counsel's agreement to the stipulation that the entire large bag contained cocaine. 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.

The petition also made an arguable **Brady** claim, alleging 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.

People v. Henderson, 2011 IL App (1st) 090923 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."

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.

People v. Smith, 352 Ill.App.3d 1095, 817 N.E.2d 982 (1st Dist. 2004) Petition was legally sufficient, though petitioner failed to attach adequate documentation of his claims, where petitioner had sought leave of the trial court to take deposition of willing State witness Pamela Fish (who allegedly engaged in a pattern of perjury in criminal trials) and tried to subpoena documents from the State's Attorney's Office. Because the State's successful motion to quash both subpoenas prevented defendant from developing a further record, and because Fish's alleged perjury at defendant's trial closely paralleled her allegedly false testimony in another case for which defendant had obtained documentary evidence, defendant made a sufficient allegation of constitutional error to require an evidentiary hearing.

§9-1(e)

First Stage of Post-Conviction Proceedings

§9-1(e)(1)

Summary Dismissal Generally

Illinois Supreme Court

People v. Johnson, 2021 IL 125738 Whether an individual has standing to file a post-conviction petition under the Post-Conviction Hearing Act is a proper consideration at the first stage of proceedings. Defendant filed a post-conviction petition challenging his conviction of unlawful restraint. He had completed his sentence for that offense but was imprisoned for failing to register under the Child Murderer and Violent Offender Against Youth Registration Act (VOYRA), 730 ILCS 154/1. The registration requirement was a result of his unlawful restraint conviction, based on the age of the victim. In his petition, defendant alleged that when he pled guilty to unlawful restraint, the age of the victim was not stated in court, he was not advised by the court of his obligation to register under VOYRA, and counsel was ineffective for not informing him about VOYRA's application.

The court affirmed the summary dismissal of defendant's petition on the basis that he lacked standing to seek post-conviction relief from the unlawful restraint conviction. While standing is ordinarily an affirmative defense, the legislature has expressly authorized summary dismissal of post-conviction petitions under the Act's procedural framework. Although the Act does not use the term "standing," it does specifically limit its availability to individuals imprisoned in the penitentiary. And it is well-established that the petitioner must be imprisoned on the challenged conviction, not simply imprisoned for any conviction, to proceed under the Act.

The court held that standing is more like *res judicata* and forfeiture, which involve conclusions of law and are appropriately considered at the first stage of proceedings. Where a petitioner clearly lacks standing, the petition is necessarily frivolous and patently without merit, allowing for summary dismissal. If, on the other hand, a petitioner's standing is unclear, the petition may be advanced for further consideration.

The court rejected the argument that the interrelatedness of defendant's underlying unlawful restraint conviction and current VOYRA failure-to-register conviction conferred standing. While actual incarceration is not always required under the "imprisoned in the

penitentiary” language of the Act, defendant’s imprisonment here was the result of a collateral consequence of his original conviction, not a direct consequence, and thus did not confer standing for him to challenge the original conviction.

People v. Knapp, 2020 IL 124992 In a 4-2 decision, the Supreme Court upheld the summary dismissal of defendant’s post-conviction petition. The petition alleged that defendant did not voluntarily waive his right to testify at his trial, and that he agreed not to testify only because his attorney had misinformed him that any testimony he gave had to be corroborated. The majority found this claim “positively rebutted” by the record, because when the trial court admonished defendant about his right to testify, defendant agreed to the admonishments (including the statement that the right to testify belonged only to defendant), he asked no questions, and he did not mention his desire to testify or counsel’s advice.

Justice Burke and Justice Neville wrote separately in dissent. Justice Burke pointed out that the majority misinterpreted defendant’s claim by ignoring that the defendant’s claim centered on the attorney’s advice, and nothing about the trial court’s admonishments rebutted that claim. Justice Neville noted that the majority failed to answer the question posed at the first stage, which is merely whether the petition stated the gist of a claim, not whether the claim has substantive merit.

People v. Allen, 2015 IL 113135 Defendant’s petition, which included an exonerating statement by another person claiming responsibility for the crime, was not frivolous and patently without merit. 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.

People v. Perez, 2014 IL 115927 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.

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.” 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.

People v. Hommerson, 2014 IL 115638 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.

People v. Cathey, 2012 IL 111746 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).

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.

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.

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**.

People v. Tate, 2012 IL 112214 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.

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

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.

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.

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

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.

People v. Brooks, 221 Ill.2d 381, 851 N.E.2d 59 (2006) A post-conviction petition may be summarily dismissed as frivolous within 90 days after it is "fil[ed] and docket[ed]." The 90-day requirement is mandatory - failure to rule on a petition within 90 days renders any subsequent summary dismissal void. Defendant's petition was "docketed" when the clerk entered it in the case file and set it for a hearing. See also, **People v. Greer**, 212 Ill.2d 192, 817 N.E.2d 511 (2004).

People v. Robinson, 217 Ill.2d 43, 838 N.E.2d 930 (2005) An order summarily dismissing a post-conviction petition as frivolous or patently without merit "is final and shall be served upon the petitioner by certified mail within 10 days of its entry." Where defendant was able to file a timely notice of appeal, he was not entitled to have his petition docketed for second-stage proceedings although the dismissal order was not served for 12 days because there was no prejudice to defendant.

People v. Boclair, 202 Ill.2d 89, 789 N.E.2d 734 (2002) The Post-Conviction Hearing Act does not authorize the summary dismissal of a post-conviction petition on untimeliness grounds. See also, **People v. Britt-El**, 206 Ill.2d 331, 794 N.E.2d 204 (2002) (**Boclair does not apply retroactively to a post-conviction proceeding, which was summarily dismissed on timeliness grounds several years before Boclair was decided**).

People v. Rivera, 198 Ill.2d 364, 763 N.E.2d 306 (2001) A trial judge may summarily dismiss a non-capital post-conviction petition as frivolous or patently without merit only if all of the issues are frivolous. A post-conviction petition that alleges even a single non-frivolous issue must be docketed in its entirety for the appointment of counsel and further proceedings. See also, **People v. Johnson**, 377 Ill.App.3d 854, 879 N.E.2d 977 (5th Dist. 2007); **People v. Rogers**, 372 Ill.App.3d 859, 866 N.E.2d 1256 (2nd Dist. 2007). But see **People v.**

Simmons, ___ Ill.App.3d ___, ___ N.E.2d ___ (1st Dist. 2009) (No. 1-06-3114, 2/20/09) (Rivera does not apply retroactively to post-conviction determinations made before Rivera was decided).

People v. Rogers, 197 Ill.2d 216, 756 N.E.2d 831 (2001) Summary dismissal is appropriate where a claim is substantively rebutted by the record. See also, **People v. Rogers**, 197 Ill.2d 216, 756 N.E.2d 831 (2001). But see, **People v. Paleologos**, 345 Ill.App.3d 700, 803 N.E.2d 108 (1st Dist. 2003) (summary dismissal is inappropriate where the claim stands uncontradicted; trial court erred in summarily dismissing petition where record did not rebut petition's allegation (that defendant would have accepted plea offer had counsel not misinformed him of the maximum sentence)); **People v. Plummer**, 344 Ill.App.3d 1016, 801 N.E.2d 1045 (1st Dist. 2003) (trial court erred by summarily dismissing a post-conviction petition; allegation that counsel was ineffective for failing to obtain mental health records of the State's principal witness before trial presented the gist of a constitutional issue where that allegation was not contradicted by the record).

People v. Watson, 187 Ill.2d 448, 719 N.E.2d 719 (1999) The 90-day period during which a trial court may dismiss a post-conviction petition as frivolous or patently without merit begins to run anew upon the filing of an amended post-conviction petition. See also, **People v. Volkmar**, 363 Ill.App.3d 668, 843 N.E.2d 402 (5th Dist. 2006) (Watson does not apply where the trial judge failed to summarily dismiss the petition within the 90-day period, but appointed counsel and proceeded to the second stage; once an amended petition is filed by counsel at the second stage, any dismissal should be by the State's motion to dismiss and under the adversarial process, not through summary dismissal by the trial court).

People v. Gaultney, 174 Ill.2d 410, 675 N.E.2d 102 (1996) In determining whether a petition is frivolous and subject to summary dismissal, the trial court alone is to consider whether a petition is frivolous or patently without merit, without pleadings or input from either party. Here, the State's premature filing of a motion to dismiss was harmless because the court did not rely on the motion. See **People v. Ponyi**, 315 Ill.App.3d 568, 734 N.E.2d 935 (1st Dist. 2000) (the trial court erred by entering a summary dismissal order after asking the prosecutor several questions about the law and the facts, and the error was not harmless where the State's input affected the trial court's ruling).

People v. Brisbon, 164 Ill.2d 236, 647 N.E.2d 935 (1995) The trial court is authorized to dismiss a frivolous petition without appointing counsel only where a non-death sentence was imposed. Where a post-conviction petition is filed in a death penalty case, the trial court must appoint counsel and await a response from the State before ruling. (See also §9-1(c)). See also, **People v. Ceja**, 381 Ill.App.3d 178, 886 N.E.2d 387 (2d Dist. 2008) (where defendant filed a post-conviction petition while he was serving a death sentence, the subsequent commutation of his death sentence did not allow the trial court to dismiss the petition as frivolous).

People v. Porter, 122 Ill.2d 64, 521 N.E.2d 1158 (1988) The summary dismissal provision of the Act, which allows the dismissal of "frivolous" or "patently without merit" petitions without the appointment of counsel, was upheld. It does not conflict with Supreme Court Rule 651(c) (Appeals in Post-Conviction Proceedings), violate the separation of powers doctrine, or violate equal protection. Due process does not require the appointment of counsel for post-conviction petitioners. Finally, in dismissing a petition, a judge is not required to enter a written order specifying findings of fact and conclusions of law. See also, **People v.**

Jones, 318 Ill.App.3d 1189, 744 N.E.2d 344 (4th Dist. 2001) (Public Act 83-942, which authorized summary dismissal of post-conviction petitions as frivolous or patently without merit, did not violate the single-subject rule of the Illinois Constitution); **People v. Vilces**, 321 Ill.App.3d 937, 748 N.E.2d 1219 (2d Dist. 2001) (same).

Illinois Appellate Court

People v. Joiner, 2023 IL App (1st) 211553 Although defendant filed his post-conviction petition on July 7, 2021, a majority of the appellate court held that the case was not “docketed” and the 90-day clock (725 ILCS 5/122-2.1), did not begin, until August 4, 2021, when the filing fee was paid. The electronic “case summary” for defendant’s case showed the court received the petition on July 7, 2021, but the clerk noted that the “PC Fee” had not been paid. The next entry, on August 4, 2021, included a note indicating the fee had been paid. Thus, dismissal on November 1, 2021, 89 days after the August 4 docketing, was timely.

Although **People v. Lentz**, 2014 IL App (2d) 130332, held in a similar situation that the initial date the petition was received was the docketing date, the appellate court majority found the situation distinguishable because here it was not clear that the court would have set the matter for further proceedings had defendant not paid the filing fee. Similarly, in **People v. Begay**, 2018 IL App (1st) 150446, the petition was considered docketed the day it appeared on the half-sheet with a hearing date set, while no date was set here. Also, the appellate court noted that an attorney filed defendant’s petition, yet did not enter an appearance until August 4, 2021.

The dissent would have found that the petition was docketed on July 7, 2021, because it was entered on the half sheet on that date, and the Illinois Supreme Court has held that a petition is considered filed and docketed for purposes of the 90-day rule when it is “entered in an official record.” **People v. Brooks**, 221 Ill. 2d 381, 391 (2006).

People v. Herring, 2022 IL App (1st) 210355 Defendant, convicted of a double murder committed at age 19, filed a post-conviction petition alleging his mandatory natural life sentence violated the proportionate penalties clause of the Illinois Constitution. He alleged that the mandatory sentence precluded the court from considering youth as a mitigating factor, which he claimed was constitutionally necessary because he suffered from “impulse control disorders and possibly attention deficit disorder,” and research showed the brain immaturity of emerging adults.

A majority of the appellate court reversed the summary dismissal of the petition, finding the allegations sufficient to state an arguable claim under the proportionate penalties clause. In **People v. Harris**, 2018 IL 121932 and **People v. Thompson**, 2015 IL 118151, the supreme court held that an emerging adult may argue in a post-conviction petition that a life sentence imposed without adequate consideration of youth violates the proportionate penalties clause as applied. Defendant here alleged he was immature and had diminished capacity relating to risk-taking and impulse control. These were not mere conclusory allegations, but even if they were, a first stage dismissal is appropriate only where defendant “can prove no set of facts to support a claim entitling him [or her] to relief.” And while no documentation supported the claims about his intellectual disabilities, it would be unreasonably burdensome to require an inmate to obtain the type of expert opinion required to support these claims. Finally, while the sentencing court claimed to consider all mitigating factors, and knew defendant’s age, this was arguably insufficient given the mandatory nature of the sentence and trial counsel’s concession that the court could not consider defendant’s age.

The dissent would have affirmed, because defendant's references to his diminished capacity, immaturity, and intellectual disability came in the context of a claim that he could not understand the charges. The dissent also would have found the absence of supporting documentation fatal to the petition.

People v. Ross, 2022 IL App (2d) 210068 Defendant filed a post-conviction petition, which he later was given leave to withdraw. Less than one year after withdrawing the petition, defendant filed an amended post-conviction petition. The trial court subsequently summarily dismissed the amended petition, and defendant appealed.

On appeal, defendant challenged the summary dismissal on the basis that it was untimely, among other reasons. The Appellate Court agreed. Defendant had electronically filed his amended petition on September 18, 2020. On January 7, 2021, on its own motion, the circuit court set a status date of January 28, 2021. But, then on January 20, 2021, the circuit court summarily dismissed the amended petition. The circuit court noted that the petition was file-stamped on September 18, 2020, more than 90 days prior, but found that it "was not simultaneously docketed" by the clerk on that date. Instead, the circuit court concluded that the petition was docketed on January 7, 2021. Because the Post-Conviction Hearing Act provides that a petition may be summarily dismissed within 90 days of its "filing and docketing," the circuit court believed its dismissal order was timely.

The Appellate Court was tasked with determining when the amended petition was docketed, which has been held to mean the date on which the petition was entered on the court's official docket for further proceedings. The Appellate Court agreed with defendant that his petition was docketed on September 18, 2020, the same date it was electronically filed. While filing and docketing are not the same thing, they usually occur on the same date, especially since the advent of electronic filing. The filing of defendant's petition here was included in the docket entries in the record on September 18, 2020. This was adequate to consider the petition "docketed" on that date. Accordingly, the circuit court's dismissal order was untimely because it was entered more than 90 days after docketing. The dismissal was vacated, and the matter was remanded for further proceedings.

People v. Torres, 2021 IL App (1st) 200920 Defendant filed a post-conviction petition which was docketed on February 27, 2020. On March 9, the governor of Illinois issued a disaster declaration for the entire state due to the COVID-19 pandemic. Over the subsequent weeks and months, multiple court orders were issued, by both the chief judge of Cook County and the Illinois Supreme Court, regarding court operations designed to limit the spread of COVID-19.

Defendant's petition was summarily dismissed on July 16, 2020. In a written order, the judge included a footnote which stated:

Due to the COVID-19 crisis, the Circuit Court of Cook County closed effective March 17, 2020, for all matters except emergency bond motions. Both the Illinois Supreme Court and Chief Judge of the Cook County Circuit Court entered orders tolling most deadlines. Effective July 6, 2020, the Chief Judge reopened courts in a limited capacity, excluding jury trials, though most matters are still proceeding via remote videoconferencing. Based on these circumstances, this Court is excluding from the 90-day first stage review the period of March 17th - July 5th inclusive.

On appeal, defendant challenged the court's authority to toll the mandatory 90-day deadline under the Post-conviction Hearing Act. The Appellate Court agreed that there had been no order expressly authorizing the tolling of post-conviction deadlines. While the

Supreme Court's March 17, 2020 order permitted chief judges to temporarily modify or suspend deadlines and procedures, Cook County's chief judge had not done so with regard to post-conviction proceedings. Trial judges were still working remotely while the courts were closed to in-person proceedings, and the judge here was not prevented from conducting the first-stage review of defendant's petition which is strictly an administrative function. The judge erred in unilaterally tolling the statutory deadline for initial review of post-conviction proceedings. The Appellate Court reversed and remanded for second-stage proceedings.

People v. Munz, 2021 IL App (2d) 180873 Defendant filed his post-conviction petition with one day left on his term of mandatory supervised release. The circuit court summarily dismissed, finding that once his MSR term expired, he lacked standing. The Appellate Court affirmed, but did so on substantive grounds, because defendant did have standing. The Illinois Supreme Court has held that section 122-1(a)'s requirement that a petitioner be "imprisoned in the penitentiary" includes MSR. And the fact that he completed MSR prior to a ruling on the petition did not render the petition moot. Section 122-1(a)'s imprisonment requirement applies only to the ability to "institute" proceedings, not to the ability to obtain relief. The Appellate Court declined to follow **People v. Henderson, 2011 IL App (1st) 090923**, which held that completion of MSR rendered post-conviction proceedings moot.

Defendant argued that because the circuit court dismissed his petition due to lack of standing, it failed to comply with the statutory requirement that it determine whether the petition is frivolous or patently without merit within 90 days of filing. The Appellate Court disagreed. In **People v. Johnson, 2021 IL 125738**, the Illinois Supreme Court found "that a lack of standing is more like *res judicata* and forfeiture, which are appropriate bases for first-stage dismissal." Thus, the circuit court satisfied its duty to review the petition within 90 days and determine whether it was frivolous or patently without merit.

The court affirmed the summary dismissal on substantive grounds. Four of defendant's arguments – attacks on the constitutionality of the stalking statute and complaints about trial matters – were either already raised on direct appeal, and thus *res judicata*, or could have been raised, and forfeited. The final claim alleged that his prosecutor should have been disqualified because she was reprimanded by the ARDC for failing to disclose exculpatory information in an unrelated case. But this matter occurred after his conviction, and ultimately no disciplinary action was taken against the prosecutor. Therefore the argument that she should have been disqualified lacked an arguable basis in law, and summary dismissal was appropriate.

People v. Haywood, 2021 IL App (1st) 190809 The trial court did not err in summarily dismissing defendant's post-conviction petition. Defendant was 20 years old at the time he committed a murder, and he received a 50-year sentence after pleading guilty to that offense. In his petition, defendant raised a proportionate penalties challenge to his sentence, relying on **Miller v. Alabama, 567 U.S. 460 (2012)** and **People v. Harris, 2018 IL 121932**. The Appellate Court concluded that defendant had failed to adequately support his claim.

Under **Harris**, an emerging adult defendant bears the burden of demonstrating that his particular circumstances fall under **Miller**; his young age, alone, is not enough. Here, defendant cited his young age as well as the fact that his co-defendant, who was also his 17-year-old brother, had been granted a new sentencing hearing after **Miller**. While defendant claimed as additional support that he had no felony criminal history and that his brother was equally culpable for the offense, those claims were clearly refuted by the record and prior

Appellate Court decisions. Accordingly, given the scarcity of support for defendant's proportionate penalties claim, dismissal of his petition was appropriate.

People v. Sanabria, 2021 IL App (1st) 190827 Defendant stated the gist of a claim of ineffective assistance of counsel for failing to pursue his direct appeal even though defendant had absented himself during trial and for several years thereafter. Trial counsel had filed a timely notice of appeal and had represented himself as "counsel of record" at that time. But, counsel never filed the record on appeal or a brief, resulting in the appeal being dismissed for want of prosecution.

The Appellate Court rejected the State's argument that defendant's direct appeal would have been dismissed under the "fugitive dismissal rule," and thus there was no prejudice. The "fugitive dismissal rule" is discretionary; it allows the court to refuse to hear an appeal brought by a fugitive defendant but does not require it. The State's assertion that defendant's appeal would have been dismissed under that rule was without support, especially given that the court's dismissal order referred only to the failure to prosecute the appeal and not the fact that defendant's whereabouts were unknown at the time.

Further, summary dismissal of defendant's *pro se* post-conviction petition was not warranted based on defendant's failure to attach documents or affidavits. Defendant's petition alleged ineffective assistance of counsel for failing to pursue his appeal, which resulted in its dismissal. The record showed that counsel filed a notice of appeal and that the appeal was ultimately dismissed for want of prosecution. Thus, the record supported defendant's petition, even in the absence of an affidavit, such that dismissal based on lack of supporting documentation was inappropriate.

People v. Brewer, 2021 IL App (1st) 182638 At the first stage of post-conviction proceedings, a circuit court must "enter its final written judgment order, specifying findings of fact and conclusions of law, within 90 days." Here, the circuit court orally dismissed the petition as frivolous and patently without merit within 90 days, then continued the matter two weeks, outside the 90-day deadline, "for the filing of the oral ruling." The Appellate Court found the dismissal timely, as context indicated that the court simply meant the transcript of the dismissal would be filed in two weeks. The criminal disposition sheet and certified report of disposition both referenced the date of the oral pronouncement, supporting the court's view that the earlier date controlled.

People v. Costic, 2021 IL App (3d) 180618 Defendant, convicted of murder and aggravated battery under the theory that he was accountable for a shooting committed by his brother, alleged actual innocence in a post-conviction petition. The circuit court summarily dismissed the petition. An Appellate Court majority remanded to the second stage.

The petition included an exculpatory affidavit from defendant's brother stating that he fired the gun, that he acted alone, and that he did not tell anyone of his intentions. While the State alleged the evidence was not newly discovered, as defendant had planned on calling his brother at trial, the Appellate Court rejected the argument. The brother had invoked the Fifth Amendment and refused to testify. Evidence known to the defendant but unavailable at trial is "newly discovered" for purposes of an actual innocence claim.

The court further rejected the argument that the affidavit was insufficient because it was executed two years after the brother was convicted of the same offense, when he had "nothing to lose." This argument goes to the weight of the evidence and is inappropriate at the first stage. Finally, the evidence was conclusive enough to alter the outcome, where the

State alleged the brothers acted together, but only one witness claimed to glimpse defendant at the scene, whereas two other witnesses saw only the brother.

A dissenting justice noted that defendant was convicted under a theory of accountability, and therefore evidence that he was not the triggerman did not help his claim of innocence. Moreover, the brother's claim that he acted alone was "rebutted" by the one eyewitness who saw the brothers together at the scene.

People v. Coats, 2021 IL App (1st) 181731 Defendant stated the gist of a claim of ineffective assistance of trial counsel for failing to call a witness who would have corroborated the defense's version of events, specifically that the gun and drugs were actually recovered from the gangway outside of the apartment and not from the bedroom where defendant was found. The fact that the witness's affidavit did not specifically state that she would have testified at trial was not fatal. At the first stage of post-conviction proceedings, the court can infer the witness's willingness to testify.

Further, while counsel's failure to call the witness might have been a matter of strategy, such considerations are not appropriate at the first stage of post-conviction proceedings. And, defendant was arguably prejudiced where the trial evidence consisted of one witness each for the defense and prosecution, and those witnesses contradicted each other as to where the gun and drugs were found. The dismissal of defendant's post-conviction petition was reversed, and the matter was remanded for second-stage post-conviction proceedings.

People v. Thornton, 2020 IL App (1st) 170677 Defendant's 70-year sentence for first degree murder, subject to day-for-day credit, was a *de facto* life sentence where defendant was 17 years old at the time of the offense. Following **People v. Peacock, 2019 IL App (1st) 170308**, the Appellate Court held that the availability of statutory sentencing credit is irrelevant to the determination of whether a sentence constitutes *de facto* life. Under **Buffer**, that line is drawn at 40 years, which defendant's sentence clearly exceeded. Therefore, the trial court erred in summarily dismissing defendant's post-conviction petition challenging his *de facto* life sentence. Rather than remanding for further post-conviction proceedings on defendant's clearly meritorious claim, the Appellate Court vacated defendant's sentence and remanded for resentencing; the record established that the sentencing judge had made no more than a passing reference to defendant's young age and had not considered youth and its attendant characteristics as required by **Miller**.

People v. Johnson, 2019 IL App (1st) 163169 The trial court did not err in summarily dismissing defendant's post-conviction petition at the first stage of proceedings on the basis that defendant lacked standing to proceed under the Post-Conviction Hearing Act. The Appellate Court held that standing is a proper basis for first-stage dismissal because it is more like waiver and *res judicata* than timeliness. Standing is a matter of substantive merit, not procedural compliance, since a petition filed without standing is necessarily without merit.

Here, defendant lacked standing to file his petition where his current incarceration was not a direct result of the 2007 conviction he sought to challenge in the petition. While defendant was presently serving a term of imprisonment for failing to meet a violent-offender registration requirement that was triggered by the 2007 conviction, registration requirements are not part of the sentence for a conviction. Defendant had completed both his

prison sentence and MSR for the 2007 conviction and therefore lacked standing to challenge that conviction in proceedings under the Act.

People v. Wesley, 2019 IL App (1st) 170442 Although the prosecution improperly urged the jury to consider as substantive evidence a prior inconsistent videotaped statement of one of its witnesses, the Appellate Court upheld the first-stage dismissal of defendant's post-conviction petition alleging prosecutorial misconduct. The court found the error harmless in light of the substantial evidence of guilt. The court rejected the argument that harmless error should not be considered at the first stage, noting that another error had already been found harmless on direct appeal.

People v. Morales, 2019 IL App (1st) 160225 Defendant's post-conviction petition stated an arguable claim of a **Brady** violation where defendant alleged that the prosecution failed to disclose evidence of a deal with an eyewitness, Garcia, in exchange for his testimony against defendant. The petition was supported by a letter from the State's Attorney to INS on Garcia's behalf and a voicemail from Garcia to the State's Attorney threatening to "deny everything" if the State did not assist with his immigration. While neither conclusively established the existence of a deal, both made it at least "arguable" that such a deal existed, which is all that is required to satisfy the first-stage post-conviction standard.

Likewise, it was arguable that an undisclosed agreement with Garcia would have been material to the defense. The materiality standard is similar to the prejudice standard for claims of ineffective assistance of counsel. A defendant need not show that it is more likely than not that he would have received a different verdict with the undisclosed evidence, but rather that in its absence he did not receive a fair trial. Garcia's credibility was critical to the State's case against defendant, so it was at least arguable that evidence of an agreement with the prosecution was material to the defense.

People v. Williams, 2017 IL App (1st) 123357-B Defendant's post-conviction petition was dismissed more than 90 days after it was filed. Defendant did not raise the issue on appeal, however, and appointed counsel filed a motion to withdraw pursuant to **Pennsylvania v. Finley**. The Appellate Court granted the **Finley** motion and affirmed the summary dismissal, finding that the trial court did not err by finding that the petition lacked merit.

Several years later, defendant petitioned for leave to file a successive post-conviction petition. He argued that the trial court's order dismissing his first post-conviction petition was a nullity because it was entered more than 90 days after the petition was filed, and that appellate counsel had been ineffective on direct appeal by failing to raise several issues. The trial court allowed the subsequent post-conviction petition to be filed, but granted the State's motion to dismiss the petition on the grounds that the motion was untimely, *res judicata* and waiver applied, and defendant had not persuaded the court that delays were not due to his culpable negligence.

The Appellate Court affirmed the dismissal of the subsequent post-conviction petition. The court found that the trial court had both subject matter and personal jurisdiction, but entered the dismissal order in violation of the statute. Under **People v. Castleberry**, 2015 IL 116916, an erroneous dismissal by a court with jurisdiction results in a voidable judgment that is not subject to collateral attack. Thus, the untimely summary dismissal was not a nullity and could not be challenged in a subsequent post-conviction petition.

People v. Anderson, 2015 IL App (2d) 140444 Defendant filed an initial post-conviction petition arguing that his trial counsel was ineffective for failing to file a timely notice of appeal. The trial court denied the petition and following an appeal and further proceedings in the trial court, defendant was allowed to file a late notice of appeal. After his direct appeal was affirmed, defendant filed a motion for leave to file a successive post-conviction petition in the trial court, attaching a post-conviction petition alleging various claims. The trial court denied the motion, ruling that defendant had failed to show cause and prejudice.

On appeal, defendant filed a motion for summary remand arguing that since his first post-conviction petition allowed him to file a direct appeal, his second petition should have been treated as an initial petition. Furthermore, since the trial court failed to dismiss his petition as frivolous and patently without merit within 90 days, the cause should be remanded for second-stage proceedings. The State agreed that the second petition should have been treated as defendant's first petition, but argued that since defendant filed a motion for leave to file a successive petition, the petition itself was never filed and the 90-day period never began to run. Accordingly, the cause should be remanded for first-stage proceedings.

The Appellate Court granted defendant's motion in part, issuing a minute order that remanded the cause to the trial court for first-stage proceedings. The trial court dismissed defendant's petition at the first stage as frivolous and patently without merit. On appeal, defendant argued that the trial court's first-stage dismissal was void because it failed to rule on the merits of his petition within 90 days.

The Appellate Court first held that this issue was controlled by the law-of-the-case doctrine. In defendant's prior appeal, he argued that his petition should have been remanded for second-stage proceedings since the trial court had not ruled on his petition within 90 days. The Appellate Court, however, explicitly remanded the case for first-stage proceedings, and by doing so issued a binding decision on the issue currently before the court. Neither of the two exceptions applied: (1) there was no contrary decision from the Illinois Supreme Court; and (2) the court's earlier decision was not palpably erroneous. The Appellate Court thus refused to reconsider the issue.

The court also held that defendant's issue failed on the merits. A successive post-conviction petition is not considered "filed" until leave to file is granted. Here, even though defendant was not required to seek leave to file a successive post-conviction petition, he nonetheless styled his document a motion for leave to file a successive petition. Defendant's petition was therefore not "filed" when he submitted the motion. The trial court denied the motion but did not take any action on the petition itself. It was not until the Appellate Court remanded the cause to the trial court that the petition was effectively filed and the 90-day period began to run. The trial court thereafter timely dismissed defendant's petition.

People v. Alexander, 2014 IL App (2d) 120810 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.

People v. Lentz, 2014 IL App (2d) 130332 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 trial court’s order summarily dismissing defendant’s post-conviction petition was reversed, and the cause was remanded for further proceedings.

People v. White, 2014 IL App (1st) 130007 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. Bowens, 2013 IL App (4th) 120860 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 before a different judge.

People v. Longbrake, 2013 IL App (4th) 120665 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 refile, 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.

People v. Griffin, 2013 IL App (2d) 110631 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.

People v. Perez, 2013 IL App (2d) 110306 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.

People v. Wright, 2013 IL App (4th) 110822 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.

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.

People v. Luciano, 2013 IL App (2d) 110792 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.

People v. Coleman, 2012 IL App (4th) 110463 Defendant's petition made an arguable case of ineffective assistance concerning counsel's agreement to the stipulation that the entire large bag contained cocaine, where attached evidence established that the analyst had not tested each individual bag before commingling. 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.

The court also found that the petition made an arguable **Brady** claim. 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.

People v. King, 2012 IL App (2d) 100801 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. 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.

People v. Couch, 2012 IL App (4th) 100234 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](#).

People v. Little, 2012 IL App (5th) 100547 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.

People v. McCaskill, 2012 IL App (1st) 110174 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.

People v. Trujillo, 2012 IL App (1st) 103212 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.

People v. Stephens, 2012 IL App (1st) 110296 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.

People v. Carballido, 2011 IL App (2d) 090340 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.

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. 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, 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.

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.

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

People v. Vinokur, 2011 IL App (1st) 090798 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. Bocclair**, 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.

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

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

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

People v. Angarola, 387 Ill.App.3d 732, 900 N.E.2d 1281 (2d Dist. 2009) A first-stage summary dismissal of a post-conviction petition may be based on mootness, as well as on res judicata or waiver.

People v. Mack, 336 Ill.App.3d 39, 782 N.E.2d 794 (1st Dist. 2002) A claim of newly discovered evidence establishing actual innocence should not be summarily dismissed; allowing the summary dismissal of petitions alleging actual innocence "could lead to an miscarriage of justice."

People v. Smith, 326 Ill.App.3d 831, 761 N.E.2d 306 (1st Dist. 2001) In determining whether a petition is frivolous and without merit, the trial court must presume the truth of all well-pled facts not rebutted by the record.

People v. Vasquez, 307 Ill.App.3d 670, 718 N.E.2d 356 (2d Dist. 1999) The period in which an appeal is pending from the dismissal of a post-conviction petition as untimely does not toll the 90-day period in which a trial court may dismiss the petition as frivolous or patently without merit. Where the petition was dismissed because it was untimely, without any ruling whether it was frivolous or patently without merit, and the appellate court subsequently held that the petition was timely, the 90-day-period had elapsed.

People v. Woods, 141 Ill.App.3d 1079, 491 N.E.2d 159 (1st Dist. 1986) The trial judge erred by dismissing the petition without entering a written order specifying reasons or giving any other indication of the basis for his decision. Unlike **People v. Cox**, 136 Ill.App.3d 623, 483 N.E.2d 422 (1st Dist. 1985), which held that a written dismissal order was not mandatory, the record shows that the judge neither substantially complied with the statutory directive nor gave any independent consideration with regard to the allegations.

§9-1(e)(2)

Gist of a Constitutional Claim

Illinois Supreme Court

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

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.

People v. Edwards, 197 Ill.2d 239, 757 N.E.2d 442 (2001) The "gist" standard is a low threshold, and requires only "a limited amount of detail." The petition need not set forth the claim in its entirety or include legal argument or citations. See also, **People v. Delton**, 227 Ill.2d 247, 882 N.E.2d 516 (2008) (a *pro se* post-conviction petitioner need present only a limited amount of detail to survive summary dismissal, but is not excused from providing any factual detail at all); **People v. Johnson**, 377 Ill.App.3d 854, 879 N.E.2d 977 (5th Dist. 2007) (a post-conviction petition may be dismissed as frivolous only if a "quick look at the record" shows that the allegations are "absolutely untrue" or without merit).

Also, the court rejected the appellate court's holding that a guilty plea defendant who alleges that trial counsel was ineffective for failing to file a motion to withdraw the plea must allege that there was a basis for such a motion. Under **Roe v. Flores-Ortega**, 528 U.S. 470 (2000), a *pro se* defendant who pleads guilty cannot be required to demonstrate that an appeal would have been successful in order to establish that he was prejudiced by his attorney's failure to pursue a request for an appeal. Where the post-conviction petition alleged that trial counsel ignored defendant's requests to file an appeal, and there was nothing of record to indicate that defense counsel reviewed the plea proceedings or consulted with defendant before deciding not to file a motion to withdraw the plea, the petition made a sufficient allegation of ineffective assistance to survive summary dismissal. The court noted, however, that its holding was limited to a finding that the petition could survive summary dismissal, and should not be interpreted as finding that defendant was entitled to an evidentiary hearing or post-conviction relief.

Illinois Appellate Court

People v. Smith, 2023 IL App (1st) 221496 Where defendant’s *pro se* post-conviction petition alleged appellate counsel’s ineffectiveness, broadly, for not raising a meritorious issue on appeal and separately raised an excessive sentence argument, the appellate court liberally

construed the petition to have raised a claim of ineffective assistance of appellate counsel for not raising an excessive sentence issue on direct appeal. And, the court found that defendant stated the gist of such a claim.

Following a bench trial, defendant had been convicted and sentenced as follows: 50 years of imprisonment for home invasion, 45 years for aggravated kidnaping, and 30 years for aggravated battery with a firearm, all to be served concurrently. The convictions arose out of two separate incidents. In his post-conviction petition, defendant alleged that the sentence was “unusually harsh” and failed to account for defendant’s rehabilitative potential as demonstrated by his employment, community involvement, and role as a caregiver to his father and his nieces. The appellate court concluded that based on these allegations it was arguable that appellate counsel rendered deficient performance in not challenging defendant’s sentence as excessive, and that defendant was prejudiced as a result. The summary dismissal of defendant’s petition was reversed, and the matter was remanded for further post-conviction proceedings.

People v. Myers, 2023 IL App (1st) 210642 In post-conviction proceedings, claims not raised in a petition cannot be argued for the first time on appeal. But, *pro se* petitions should be construed liberally, and the question on appeal from summary dismissal of a *pro se* petition is whether, liberally construed, the petition presents the gist of a constitutional claim. It is not required that the petition have stated the precise legal basis, or each of the legal elements, for the claim.

Here, defendant’s petition alleged ineffective assistance of counsel for failing to “exclude” the testimony of two witnesses. Defendant’s argument on appeal was that he stated the gist of a claim of ineffective assistance based on counsel’s failure to object to the introduction of prior inconsistent statements of those two witnesses as substantive evidence as the prior statements amounted to inadmissible hearsay and did not fit within a statutory exception. While appellate counsel made a more nuanced argument on appeal than defendant had in his *pro se* petition, it was based on a liberal construction of the petition’s allegations and therefore was not improper.

The appellate court agreed that defendant stated this gist of a claim of ineffective assistance of counsel. Counsel was arguably deficient for failing to move to exclude the inadmissible statements, and defendant was arguably prejudiced where the prosecutor relied heavily on those statements to bolster the State’s evidence in what was otherwise a single-eyewitness case. The summary dismissal of defendant’s post-conviction petition was reversed, and the matter was remanded for second-stage proceedings.

People v. Garcia, 2022 IL App (1st) 210040 The trial court did not err in summarily dismissing defendant’s post-conviction petition at the first stage. Defendant claimed that trial counsel was arguably ineffective for failing to investigate and present an exculpatory witness who would have provided a version of events that differed from the version presented by the State’s witnesses at trial, and that the result of the trial would have been different had the witness been called.

At trial, the State’s theory was that defendant was the aggressor in an altercation with the victim, while defendant claimed that he had only intervened to aid the victim who was being beaten by other individuals. The witness’s affidavit indicated that she was at her mother’s apartment, across the street from where the incident occurred, and saw defendant trying to stop two men from beating a third.

The appellate court first noted that defendant did not claim that he told counsel about the witness or that she was otherwise known. Instead, the witness had only come forward

several years later. The court declined to find that counsel was arguably deficient for failing to investigate the previously unknown witness, despite defendant's suggestion that counsel should have discovered the witness's existence through reasonable investigation. And, the court noted that the evidence at defendant's trial was overwhelming and the new witness would not have changed the outcome of the trial. While she averred that she saw defendant intervene in an attack rather than participate in the attack against the victim, the witness's account differed from defendant's own version in multiple respects rather than corroborating it. The dissenting justice would have reversed, noting the low bar for first-stage claims.

People v. Bolanos, 2022 IL App (1st) 200790 The trial court erred in summarily dismissing defendant's post-conviction petition where it stated the gist of a constitutional claim that defendant had been unfit at the time of her guilty plea. Defendant, who had suffered from mental health issues since her mid-teens, pled guilty but mentally ill to the first degree murder of her infant son by stabbing him 44 times. The offense was committed in 2013, when defendant was 21 years old. Defendant was sentenced to 38 years of imprisonment. Evidence at the plea and sentencing established that at least one doctor had found defendant was insane at the time of the offense, but the parties stipulated that defendant was not proceeding on an insanity defense. Defendant's subsequent post-conviction petition alleged that she was incapable of making an informed decision to plead guilty or of properly defending her self because she was still suffering from mental illness at the time of the plea. Defendant had twice been transported to a mental hospital after her incarceration and was presently housed in the mental health unit of Logan Correctional Center. Additionally she had gouged out both of her eyes while incarcerated.

Due process bars prosecution of a person who is unfit. A defendant is unfit where, due to a mental condition, she is unable to understand the nature and purpose of the proceedings or is unable to assist in her defense. Generally, a defendant is presumed fit to stand trial and bears the burden of demonstrating a *bona fide* doubt of her fitness. While no one factor is determinative, relevant factors include a defendant's irrational behavior, her courtroom demeanor, medical opinions as to her competence, and any opinions of defense counsel. Here, defendant's post-conviction contention that she was unfit had an arguable basis in law and fact. The record showed signs that defendant had difficulty following the proceedings on some occasions, and had a history of mental illness. While a single doctor had opined that defendant was fit with medication three years prior to her guilty plea, additional information might have led the doctor to a different opinion by the time of the plea. The court found it relevant that defendant's mental illness was so severe, even while on medication, as to have led her to gouge out her own eyes while subsequently incarcerated. On this record, it could not be said that her claim was frivolous and patently without merit. Accordingly, the dismissal of defendant's post-conviction petition was vacated, and the matter was remanded for second-stage post-conviction proceedings.

People v. Roman, 2022 IL App (1st) 201173 Defendant was convicted of murder and received a 32-year prison sentence. The appellate court reversed and remanded due to an evidentiary error. On remand, defendant pled guilty and received a 24-year term, after being admonished that he faced a 20 to 60-year sentencing range. Defendant filed a post-conviction petition alleging the trial court and counsel misled him as to the potential maximum sentence, rendering his plea involuntary. He pointed out that the trial court could not impose a sentence greater than 32 years on remand unless it was based on post-sentencing conduct. **730 ILCS 5/5-5-4(a)**. The circuit court summarily dismissed.

The Appellate Court reversed. Defendant made an arguable claim of ineffective assistance of counsel. Attorneys have a duty to provide their clients with accurate information about potential sentences. Here, defendant alleged counsel erroneously stated that he faced a sentence 28 years longer than the actual maximum. The claim was to be taken as true, and was not rebutted by the record. In fact, the record showed the trial court stated the maximum was 60 years and counsel did not object. Thus, defendant made an arguable claim of deficient performance.

Defendant also made an arguable claim of prejudice. Defendant alleged that had he known of the actual sentencing range, he would have gone to trial. Under [People v. Hall, 217 Ill. 2d 324, 335 \(2005\)](#), defendant must also claim actual innocence or a plausible defense. A defendant can show prejudice in the plea context using the relative weakness of the State's case based on facts already in the record. Here, the Appellate Court rejected the State's claim that its evidence at trial was overwhelming. Its prior holding said otherwise, as it found the prejudicial gang evidence warranted a new trial. The State's eyewitness testimony was susceptible to attack based on opportunity to observe and lighting conditions. As such, defendant made an arguable claim of prejudice.

Finally, the Appellate Court stressed the low threshold applicable to *pro se* petitions and expressed dismay with the State's "lip service" to this standard, which it recited and proceeded to "rebuff" by making repeated, improper challenges to the credibility of defendant's claims.

[People v. Bush, 2022 IL App \(1st\) 210509](#) The trial court erred in summarily dismissing defendant's post-conviction petition at the first stage. At trial on charges of attempted murder and aggravated battery, defendant had claimed self-defense. The trial judge rejected that claim, based in part of the State's theory that defendant had fled to Las Vegas after the incident, and that his flight was indicative of guilty knowledge. In his post-conviction petition, defendant alleged ineffective assistance of trial counsel for failing to call a witness, his then-girlfriend, who would have contradicted the State's theory as to defendant's reason for being in Las Vegas. In support of this claim, defendant's then-girlfriend provided an affidavit stating that she would have testified that she had received a job offer as a phlebotomist in Las Vegas prior to the charged incident, and that she and defendant had already made plans to travel there. The Appellate Court found this sufficient to state an arguable claim that defense counsel's failure to call defendant's then-girlfriend as a witness at trial was deficient and prejudicial.

The Appellate Court rejected the State's argument that the record contradicted defendant's claim because, at the conclusion of the defense's case at trial, the judge asked defendant whether he agreed with counsel's decision not to call any additional witnesses, and defendant responded, "yes." In reaching this decision, the court rejected [People v. McGee, 2021 IL App \(1st\) 190362-U](#), which the State cited as persuasive authority, where the court found a similar claim contradicted by the record based on defendant's statement that there were no other witnesses he wished to present on his behalf. Here, defendant acknowledged on the record that he had spoken with counsel about one witness and agreed with the decision not to call additional witnesses. The Appellate Court held that this record did not necessarily preclude a finding that defense counsel was deficient in making the decision not to present additional witnesses.

Further, while the girlfriend's affidavit did not specifically state that she was willing to testify to the facts therein, the Appellate Court noted that such a conclusion could be inferred from the fact that she provided an affidavit at all. Accordingly, the matter was reversed and remanded for further post-conviction proceedings.

People v. Hayes, 2021 IL App (1st) 190881-B Defendant was convicted of first-degree murder on the basis of six eyewitness identifications. On direct appeal, defendant alleged the evidence was insufficient, relying on studies showing the effects of weapon focus and witness certitude. The Appellate Court rejected the claim because his attorney did not call an expert at trial.

Defendant filed a post-conviction petition alleging ineffective assistance of trial counsel for failing to call an expert on eyewitness identification. After summary dismissal, the Appellate Court reversed, finding the claim arguable. Defendant's petition was supported by citations of cases and secondary authority discussing weapon focus and the weak correlation between witness certainty and accuracy. These sources made an arguable claim that, even if the identifications were sufficient to support a conviction under a deferential standard of review, the outcome may have been different had they been attacked by an expert witness. Each eyewitness only partially viewed defendant, at night, for a brief amount of time, with particular focus on the gun. Their descriptions varied. No physical evidence or confession linked defendant to the murder. Defendant presented an alibi and his own witnesses. Thus, it was arguable that an expert on eyewitness identifications could have undermined the credibility of the eyewitnesses to the extent that a reasonable probability exists for a different outcome.

In its original decision, the Appellate Court remanded the case to a different judge after finding the circuit court considered matters that should have been reserved for the second stage, namely, whether counsel's decisions stemmed from trial strategy. Pursuant to a supervisory order upon denial of the State's leave to appeal, the Illinois Supreme Court ordered the court to vacate that portion of the opinion.

People v. Thomas, 2022 IL App (1st) 200164 An Appellate Court majority affirmed the summary dismissal of defendant's post-conviction petition. Defendant alleged that his 80-year sentence violated the proportionate penalties clause because he was 18 years-old at the time of the offenses. While defendant cited a doctor's opinion that the brain of an 18 year-old is not fully developed, the petition failed to allege how the specific circumstances of his background entitled him to the protections granted to juveniles pursuant to **Miller**.

A dissenting justice agreed that the petition lacked the requisite factual details to warrant relief, but pointed out that a first stage petition need only set forth the gist of a constitutional claim. The dissent believed that the majority erred in relying on cases upholding the denial of successive petitions. And it failed to consider that the necessary factual details could be developed at the second stage.

People v. Thompson, 2022 IL App (1st) 200463 An Appellate Court majority affirmed the summary dismissal of defendant's post-conviction petition. Defendant alleged that his 80-year sentence for first-degree murder violated the proportionate penalties clause because he was 18 years-old at the time of the offense. But defendant committed the offense before the enactment of truth-in-sentencing laws, so he was eligible for day-for-day sentencing credit and release after 40 years. Because **Buffer** held that a *de facto* life sentence is any term greater than 40 years, defendant here could not complain that he did not receive a meaningful opportunity for release. Nor would the majority consider the three-year term of MSR a part of the sentence. The majority noted that in **Buffer** the defendant received an MSR term as well, but the Supreme Court there did not consider that term in determining the length of defendant's sentence for purposes of **Miller**.

The defendant asked for a remand to the second stage in order to develop additional details in support of his proportionate penalties claim, citing the supreme court's decisions in [People v. Harris, 2018 IL 121932](#), and [People v. House, 2021 IL 125124](#). The majority refused, noting that in both cases the defendants had received a life sentence. Defendant countered that a 40-year sentence imposed on a young adult has a greater chance of being a life sentence than a 40-year sentence imposed on a juvenile, citing [People v. Ruiz, 2020 IL App \(1st\) 163145](#), but the majority declined to follow **Ruiz** and held that it would adhere to **Buffer** even in young adult cases, until the Supreme Court says otherwise.

A dissenting justice pointed out that defendant had already committed an infraction while in prison which could prohibit the awarding of day-for-day credit, meaning he will like spend more than 40 years in prison. In light of this fact, and the contents of the petition, which included several documents demonstrating the neurological differences between young adult brains and adult brains and a mitigation report which detailed specific circumstances and details of defendant's life and upbringing, the dissent would have found an arguable proportionate penalties claim and remanded for second-stage proceedings.

[People v. Little, 2021 IL App \(1st\) 191108](#) Liberally construed, defendant's *pro se* post-conviction petition stated the gist of a claim of ineffective assistance of trial counsel for failing to raise a **Batson** challenge to the State's exclusion of an African American venireperson (ISBN). While defendant's petition named two other jurors but did not mention ISBN, it also stated counsel should have raised a **Batson** challenge based on the removal of "all" African American venirepersons. This was sufficient to encompass defendant's complaint regarding ISBN.

The Appellate Court went on to examine the record and determined defendant could arguably make a *prima facie* showing of discriminatory purpose in the excusing of ISBN, who was the same race as defendant and shared other characteristics with non-African-American jurors who were not removed by the State. The record also showed that of the six African American venirepersons, the State was responsible for excusing 50%, two for cause and ISBN via a peremptory challenge. And, the ultimate makeup of the jury deviated from the makeup of the original venire by 2.5%, which at least arguably permits an inference of discriminatory intent, albeit a slight one. Accordingly, defendant stated the gist of a claim of ineffective assistance of counsel for not objecting under **Batson**.

[People v. Welling, 2021 IL App \(2d\) 170944](#) Defendant forfeited his post-conviction claim of ineffective assistance based on trial counsel's failure to have him examined by a mental health expert. Defendant had been represented by the public defender at trial and had requested and obtained county funds for an investigator and DNA expert during pretrial proceedings. The absence in the record of a similar request for a mental health expert was clear evidence that counsel had not sought an examination for defendant. And, defendant's alcoholism issues, which formed the basis for his post-conviction claim, were apparent on the record. Accordingly, defendant could have raised his claim of ineffective assistance on direct appeal.

Regardless, the court concluded defendant failed to state the gist of a claim. Defendant did not allege that he suffered from a mental illness, but rather asserted insanity based on alcoholism. To support a finding of insanity based on long-term drug or alcohol abuse, a person must suffer "settled" or "fixed" insanity, which means they must also be insane when not under the influence. There was no evidence that defendant suffered such condition here

where his statements and actions after the offense indicated that he knew what he had done was wrong, and he took steps to conceal what he had done.

People v. Resendiz, 2020 IL App (1st) 180821 Defendant alleged in a post-conviction petition that his guilty plea was not knowing and voluntary, because he did not understand English, and his attorney and the interpreter failed to explain “the nature of the plea” or inform him of the need to file a motion to withdraw the plea in order to appeal.

The Appellate Court affirmed the first-stage dismissal. The defendant’s allegations were conclusory and lacked even the minimal amount of detail required at the first stage. Defendant failed to state exactly what about the plea he didn’t understand. The court noted that defendant copied the allegation verbatim from a prior case, with no added details relevant to the instant case. The allegations were also rebutted by the record, which showed that an interpreter was in court with defendant at every appearance over the course of two years, defendant never complained about the interpreter’s capabilities or performance, defense counsel spoke Spanish, and defendant routinely engaged in conversations with the court that illustrated the proceedings were interpreted properly.

People v. Townsend, 2020 IL App (1st) 171024 Trial court erred in summarily dismissing defendant’s petition which stated the gist of a claim of ineffective assistance of counsel for overriding defendant’s desire to proceed to a bench trial rather than a jury trial. The trial record contained no objection by defendant to his counsel’s statement that defendant would proceed to a jury trial. In an affidavit attached to his post-conviction petition, defendant alleged that he told trial counsel he wanted a bench trial, but counsel refused that request. The trial court concluded that the defendant’s claim was meritless because the evidence was overwhelming and he would have been convicted at a bench trial, as well.

The Appellate Court held that defendant is not required to show the probability of a different trial outcome to establish prejudice under **Strickland**. The right to waive a jury trial belongs exclusively to defendant, and prejudice is presumed “if there is a reasonable probability that the defendant would have waived a jury trial.” Defendant’s failure to object to counsel’s statement regarding a jury trial did not affirmatively rebut his claim, consistent with **People v. Barkes**, 399 Ill. App. 3d 980 (2010).

And, while defendant alleged in his petition that he told his public defender about his desire for a bench trial, but did not assert that he renewed that request with subsequently-retained private counsel, that deficiency was not fatal. A defendant need only presented a limited amount of detail to support his claim. The petition still set forth an arguable claim of ineffective assistance.

Finally, the Appellate Court declined defendant’s request for a different judge on remand. While the court erred in basing its ruling on whether a bench trial would have resulted in a different outcome, that was simply a misapplication of the law and did not indicate that the judge was biased against defendant.

People v. Aguilar, 2020 IL App (1st) 161643 Post-conviction petition alleging that defendant was denied his constitutional right to be present when the trial judge pronounced guilt at his bench trial stated the gist of a claim. While defendant was physically present in the courtroom when the judgment was rendered, he had been assisted by an interpreter throughout the proceedings, and the record did not rebut defendant’s assertion that no interpreter was present when the judge pronounced him guilty and admonished him about

sentencing *in absentia*. The absence of an interpreter was particularly concerning where defendant ultimately was sentenced *in absentia*.

People v. Borizov, 2019 IL App (2d) 170004 The circuit court did not err in summarily dismissing defendant's *pro se* post-conviction petition at the first stage. The petition alleged ineffective assistance of appellate counsel for not raising more of the 31 claims preserved in the post-trial motion. The Appellate Court held that the petition failed to state a gist of a claim because it did not specify which claims appellate counsel failed to raise.

Moreover, the one claim briefed in the instant appeal lacked arguable merit. Defendant alleged that appellate counsel should have argued that a juror was biased because she admitted to knowing family of the victim. But the juror was thoroughly questioned by the court and maintained she could be fair. She was also admonished pursuant to Rule 431(b). Pursuant to Supreme Court authority, there is no implied bias when a juror has a tangential relationship to the victim's family, and therefore the claim was fanciful.

People v. Tucek, 2019 IL App (2d) 160788 Defendant's post-conviction petition was properly dismissed at the first stage where his claim of ineffective assistance of counsel did not include the gist of a claim of prejudice. While defendant's petition stated he would not have pled guilty to criminal sexual assault if counsel had explained he might have to serve his MSR term in custody, that allegation alone did not show a reasonable probability defendant would have rejected the plea under the circumstances. Defendant pled guilty to a low-range sentence on a lesser offense, did not have a viable defense, and had no better assurance of serving MSR outside of prison if he had gone to trial. The Appellate Court declined to follow **People v. McDonald, 2018 IL App (3d) 150507**, to the extent it holds that an ineffective assistance claim can survive first stage post-conviction review even if it fails to allege prejudice. Instead, citing **People v. McCoy, 2014 IL App (2d) 100424-B**, the Court held that defendant must state the gist of a claim of *both* prongs of ineffective assistance of counsel at the first stage.

People v. Ramirez-Lucas, 2017 IL App (2d) 150156 Where defendant claimed that he acted in self-defense when he fired a weapon, that claim was uncorroborated at trial, and in his post-conviction petition defendant presented the affidavits of three witnesses who would have corroborated his claims, the petition presented the gist of an arguable claim that trial counsel was ineffective for failing to investigate and present testimony from those witnesses. The court reached this conclusion despite the fact that defendant failed to tell counsel about the three witnesses before trial, as defendant did tell counsel that many people in the bar could support his claim that he was attacked or grabbed before any shots were fired, and the post-conviction petition claimed that defense counsel failed to investigate whether such witnesses actually existed. Because it was at least arguable that defense counsel would have learned the names of the three witnesses had he asked the known witnesses to identify everyone they knew who had been present, the petition was sufficient to move the case to second stage proceedings.

The court rejected the State's argument that defendant was not arguably prejudiced because the proposed testimony of the three witnesses would have been cumulative of defendant's testimony. Evidence is considered cumulative when it adds nothing to what was before the jury. However, evidence is not cumulative if it goes to the ultimate issue of the case or if it corroborates an otherwise uncorroborated defense.

Here, the testimony of the three witnesses would not have been cumulative because

the witnesses would have provided additional details concerning the offense and because the evidence went to the ultimate issue - whether defendant acted in self defense.

The court also held that inconsistencies between the defendant's testimony at trial and the proposed testimony of the three new witnesses did not justify dismissal of the petition at the first stage. Inconsistencies in testimony are not resolved at the first stage of post-conviction proceedings. Instead, such conflicts are resolved at the third stage, should the petition reach that stage, when the trier of fact is able to weigh credibility and determine the weight to be given to evidence.

People v. Romero, 2015 IL App (1st) 140205 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 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. Thomas, 2014 IL App (2d) 121001 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.

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, citing 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.

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.

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.

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 confessor 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.

[People v. Brown](#), 2014 IL App (4th) 120887 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 that he only faced 20-60 years of imprisonment if convicted of both murders. Defendant attached a letter from counsel 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 a second-degree murder instruction. The trial court dismissed defendant's petition as frivolous and patently without merit.

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. 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.

People v. Bowens, 2013 IL App (4th) 120860 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.

People v. Oliver, 2012 IL App (1st) 102531 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.

People v. Cole, 2012 IL App (1st) 102499 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 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.

People v. Dixon, 409 Ill.App.3d 915, 948 N.E.2d 786 (1st Dist. 2011) 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.

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.

People v. Coleman, 2011 IL App (1st) 091005 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. The Appellate Court found the claim forfeited. 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.

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.

People v. Ramirez, 402 Ill. App. 3d 638, 934 N.E.2d 1008 (2d Dist. 2010) 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.

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

People v. Clark, 386 Ill.App.3d 673, 899 N.E.2d 342 (3d Dist. 2008) Defendant's post-conviction petition raised the gist of an ineffective assistance claim where defendant stated that he pleaded guilty because defense counsel misrepresented that he had quashed defendant's outstanding arrest warrants, making him eligible for an impact incarceration program which would have reduced the prison term from eight years to no more than 180

days. Defendant also raised the gist of a second ineffective assistance claim by alleging that an attorney who was substituting for trial counsel erroneously advised defendant that he lacked grounds to file a motion to withdraw the plea.

People v. Brooks, 371 Ill.App.3d 482, 867 N.E.2d 1072 (4th Dist. 2007) Defendant's pro se claim - that the trial court improperly denied a continuance to obtain private counsel - sufficiently alleged the gist of the constitutional issue to survive summary dismissal.

People v. Russell, 345 Ill.App.3d 16, 801 N.E.2d 977 (1st Dist. 2003) Defendant's pro se post-conviction petition was sufficient to withstand summary dismissal where it claimed that at the guilty plea hearing, the trial court failed to advise defendant that he would be required to serve a two-year-period of MSR. The available remedy is not to vacate the MSR period, leaving defendant's sentence intact, but to allow defendant to withdraw his plea and vacate his sentence.

People v. Mendez, 336 Ill.App.3d 935, 784 N.E.2d 425 (3d Dist. 2003) Post-conviction petition presented the gist of a constitutional claim where defendant alleged that his attorney was ineffective for meeting with him on only two occasions and for failing to investigate a potential entrapment defense.

People v. Sawczenko, 328 Ill.App.3d 888, 767 N.E.2d 519 (2d Dist. 2002) Where defendant dismissed his first post-conviction petition after it had been found sufficient to require a hearing on whether there was a bona fide doubt of fitness to stand trial, and the first post-conviction petition alleged not only that defendant was taking psychotropic medication at the time of his plea but also that he had attempted suicide two days before pleading guilty, the trial court erred by summarily dismissing a second petition which attempted to reinstate the first petition and alleged that the withdrawal was due to counsel's failure to provide reasonable assistance and to defendant's "extreme religiousism [sic]." The original petition alleged the gist of a constitutional claim, and defendant's statements concerning post-conviction counsel were sufficient to allege a deficiency in the original proceedings.

People v. Brown, 336 Ill.App.3d 711, 784 N.E.2d 296 (1st Dist. 2002) A pro se post-conviction petition was sufficient to withstand summary dismissal where it claimed that defendant gave trial counsel the name of two alibi witnesses, but counsel failed to interview the witnesses or call them to testify, because it was supported by the witnesses' affidavits and the record suggested no reason that counsel would have refused to present exculpatory evidence. Also, an allegation that trial counsel refused to allow defendant to testify, supported by defendant's affidavit that he told counsel he wanted to testify but the lawyer responded that he did not know whether such testimony would be necessary, alleged the gist of a constitutional issue that defendant was denied his right to testify in his own behalf where the claim was not contradicted by the trial record.

People v. Barksdale, 327 Ill.App.3d 422, 762 N.E.2d 669 (1st Dist. 2001) As to claim that the State violated due process and precluded DNA testing by destroying evidentiary items in violation of a court order, petitioner need not establish, at the first stage, that the State destroyed the evidence in bad faith. Because the uncontradicted allegations of the post-conviction petition stated the gist of a meritorious constitutional claim - that potentially exculpatory evidence had been destroyed despite a court order requiring its preservation and that defendant had thereby been deprived of the opportunity to have DNA testing performed

- the petition was non-frivolous and must be docketed for further proceedings.

People v. Donley, 314 Ill.App.3d 671, 731 N.E.2d 1260 (4th Dist. 2000) Defendant's post-conviction petition alleged the gist of a meritorious claim that the trial judge was observed sleeping for approximately 15 minutes during the trial, despite the strength of the State's case against defendant.

People v. Patton, 315 Ill.App.3d 968, 735 N.E.2d 185 (4th Dist. 2000) The trial court's order summarily dismissing a post-conviction petition was reversed, although defendant "failed to articulate a coherent legal argument" and "inartfully" pled his claim.

People v. Beard, 301 Ill.App.3d 279, 703 N.E.2d 552 (4th Dist. 1998) Petition, which asserted that an informant failed to testify truthfully concerning his expectations of leniency, and that the State failed to correct the untruthfulness, was sufficient to survive dismissal as patently frivolous, especially when considered in conjunction with the trial record.

People v. VonPerbandt, 221 Ill.App.3d 951, 583 N.E.2d 90 (1st Dist. 1991) Only a "minimal amount of specificity is required" for pro se petitions to state the gist of a constitutional claim.

People v. Dredge, 148 Ill.App.3d 911, 500 N.E.2d 445 (4th Dist. 1986) Requiring pro se petitioners to make more than a gist of a meritorious claim would effectively deprive many petitioners of their right to meaningful access to the courts. Defendant's petition, which claimed that defense counsel was ineffective for refusing to allow defendant to testify, stated the gist of a constitutional claim.

§9-1(f)

Second Stage of Post-Conviction Proceedings

Illinois Supreme Court

People v. Agee, 2023 IL 128413 Defendant pled guilty to one count of first degree murder in the strangling death of his ex-girlfriend. He subsequently filed an untimely motion to withdraw plea, which the court recharacterized as a post-conviction petition and docketed for second-stage proceedings. Counsel filed an amended petition, which was dismissed on the State's motion.

On appeal, defendant argued that he had received unreasonable assistance from post-conviction counsel because counsel defectively pled a claim that counsel added in the amended petition. The appellate court held that neither Rule 651(c) nor the Post-Conviction Hearing Act require post-conviction counsel to provide any level of representation, let alone reasonable assistance, in the presentation of new claims not included in the petitioner's original *pro se* petition.

The Supreme Court first clarified that a petitioner is entitled to reasonable assistance of counsel both as to claims raised in the petitioner's *pro se* petition as well as to any claims added by counsel in an amended petition. Here, counsel filed a facially valid Rule 651(c) certificate stating that counsel had consulted with defendant to ascertain his contentions of constitutional deprivation, had reviewed the record, and had made any amendments necessary for adequate presentation of defendant's claims.

The filing of a Rule 651(c) certificate creates a rebuttable presumption that counsel provided reasonable assistance. Defendant argued that the record rebutted that presumption

in this case, however, where counsel added a claim in the amended petition – specifically ineffective assistance of trial counsel for failing to inform defendant of a possible second-degree murder defense – but did not adequately allege the prejudice prong of that claim. The Supreme Court disagreed and found that counsel had shaped defendant’s “vague and inarticulate” *pro se* contentions into a properly-stated legal claim supported by the transcript of defendant’s statement to the police, as well as defendant’s own affidavit which specifically stated the element of prejudice, i.e., that he would not have pled guilty had he “known about the elements of second-degree murder.”

And, defendant failed to make a substantial showing of ineffective assistance of trial counsel. The record rebutted defendant’s claim that counsel failed to advise him about the availability of a second-degree murder defense. A post-plea motion showed that defendant knew about such a defense where defendant alleged that he had not wanted to plead guilty because he believed his actions constituted second-degree murder. Further, defendant could not have established second degree murder, regardless, where the State would have introduced evidence that defendant had actually been stalking the victim, the victim was much smaller than him, and this sort of argument was a regular occurrence between them and not a sudden quarrel arising from some unidentified provocation. Finally, at the plea hearing, defendant confirmed on the record that he knew about his rights to plead not guilty and proceed to trial, that he was pleading guilty voluntarily, and that he had discussed his case thoroughly with his attorneys.

People v. Pingelton, 2022 IL 127680 The supreme court found the circuit court violated due process when it granted the State’s motion to dismiss a post-conviction petition at the second stage without adequate notice. However, any error was harmless due to the frivolousness of the underlying claims.

Defendant filed a post-conviction petition and was appointed counsel. The State moved to dismiss. Two years later, counsel moved to withdraw after concluding that the petition was frivolous. Defendant filed written responses to the motion to withdraw, and counsel filed a reply. The circuit court set the case for a status hearing. On the day of the status hearing, with the attorneys present and defendant participating over telephone, the State argued its motion to dismiss, and “adopted” the arguments in the motion to withdraw. Post-conviction counsel did not respond to the arguments. The court then heard defendant’s and his attorney’s arguments on the motion to withdraw. The circuit court granted the motion to withdraw, and the motion to dismiss.

The supreme court found this procedure violated due process. A circuit court may not “convert a status call to a hearing on the merits without notice to the parties.” Here, the circuit court, on a status date, heard arguments and ruled on both a motion to dismiss and a motion to withdraw. While defendant had already filed written responses to the motion to withdraw, and was able to argue the motion to withdraw at the hearing, he did not argue against the motion to dismiss. Nor could he, as he was still represented by counsel at the time. The lack of a meaningful opportunity to be heard on the motion to dismiss violated procedural due process.

However, due process errors in collateral proceedings are subject to harmless error analysis. The court analogized **People v. Stoecker, 2020 IL 124807**, a 2-1401 appeal involving the same type of error, in which the court found harmless error. The court distinguished **People v. Suarez, 224 Ill. 2d 37 (2007)**, which found *per se* reversible error in a case involving post-conviction counsel’s failure to comply with Rule 651(c). Because this case involved the same type of error as in **Stoecker**, harmless error analysis applied.

The error was harmless because the petition lacked merit. The petition claimed counsel was ineffective for failing to challenge the admissibility of testimony from two doctor witnesses, who examined and described the complainants' injuries. Defendant argued their expert testimony lacked foundation because they were not board-certified gynecologists. The supreme court found adequate support for their expertise in the record, noting they were board-certified in emergency medicine, had personal experience in the subject matter at issue, and were familiar with scientific literature on sexual assault.

People v. House, 2021 IL 125124 Defendant filed a post-conviction petition, alleging: (1) a constitutional challenge to his natural life sentence, imposed for a crime committed at age 19; and (2) actual innocence. The petition was dismissed at the second stage. After the Appellate Court found the sentence violated the proportionate penalties clause and ordered a new sentencing hearing, the Supreme Court vacated the opinion and ordered reconsideration in light of **People v. Harris, 2018 IL 121932**. After considering **Harris**, the Appellate Court found it distinguishable and again remanded for a new sentencing hearing. The State appealed.

The Supreme Court reversed the Appellate Court but remanded the case for second-stage proceedings. First, the Appellate Court's finding of a proportionate penalties violation ran afoul **Harris**, which held that a finding that a statute is unconstitutional as applied can take place only after an evidentiary hearing. Here, as in **Harris**, defendant's petition did not contain any evidence in support of his claim that the evolving science on juvenile maturity and brain development applied to him. Thus, the trial court could not make the factual findings necessary to determine whether he, as a 19 year-old, would be entitled to constitutional protections normally reserved for juveniles. The Appellate Court's belief that the **Harris** holding was limited to as-applied claims on direct review ignores the fact that the key to such claims is the factual development, not procedural posture. The court remanded for new second-stage proceedings to allow defendant to develop the record.

Second, with regard to the actual innocence claim, defendant was entitled to new second stage proceedings because the law has changed since dismissal of his petition. The actual innocence claim was supported by a recantation affidavit. The appellate court affirmed the second-stage dismissal in 2015. Since then, the Supreme Court decided **People v. Robinson, 2020 IL 123849**, which clarified the standards for reviewing actual innocence claims, and **People v. Sanders, 2016 IL 118123**, which reviewed an actual innocence claim premised on recantation. In light of these cases, the State conceded, and the Supreme Court agreed, that new second-stage proceedings were required. Although defendant requested remand to the third-stage due to the improper second-stage dismissal, the court disagreed, as defendant had yet to meet the substantial showing standard that would entitle him to an evidentiary hearing.

Three justices partially dissented, and would have affirmed the dismissal of the proportionate penalties claim without remand for new proceedings. In her own special concurrence/partial dissent, C.J. Burke found that defendant's claim is a facial challenge, where it argues that the statutory scheme requiring a mandatory life sentence precluded the consideration of potentially mitigating circumstances. Such a challenge must fail where the legislature appropriately followed the **Miller** line of cases and drew the line at age 18.

J. Burke and J. Overstreet would have affirmed both because defendant had one opportunity to support his as-applied challenge and failed to do so, and because the determination of a sentencing line between juveniles and adults for mandatory life sentencing is best set as a matter of policy by the legislative branch. These justices noted that

even after **Miller**, in 2019, the legislature provided parole review for certain crimes committed by those under 21 but excluded parole review for those like defendant who were subject to mandatory life sentences.

People v. Sanders, 2016 IL 118123 The trial court's dismissal of a petition without an evidentiary hearing is reviewed *de novo*. A post-conviction petition should be advanced from second stage to third stage proceedings where the allegations of the petition, liberally construed in favor of the petition and taken as true, are sufficient to invoke relief under the Act. The court rejected the State's argument that the trial court must first make a threshold finding that the evidence is trustworthy before it determines whether the petition sets forth a colorable claim of innocence, noting that where the State files a motion to dismiss, all well-pleaded factual allegations are presumed to be true.

Where the trial court had conducted a third-stage evidentiary hearing on a co-defendant's post-conviction petition alleging actual innocence based on the same recanted evidence which defendant presented in his petition, the judge erred at defendant's second-stage proceeding by relying on the credibility findings it made when it rejected the co-defendant's claims. Credibility is not an issue at the second stage of post-conviction proceedings, and the trial court erred both because the factual allegations of the petition are presumed to be true for purposes of the State's motion to dismiss and because the trial court may not consider matters outside the record.

However, the court concluded that defendant failed to show a sufficient case of actual innocence to advance to the third stage. A claim of actual innocence requires the petitioner to show that the evidence is newly discovered, material and not merely cumulative, of such conclusive character that it would probably change the result on retrial, and could not have been discovered earlier through the use of due diligence. Here, the recantation evidence was not of such conclusive character as to probably change the result on retrial because it conflicted with much of the evidence at trial and with other evidence which defendant submitted in support of his post-conviction petition.

People v. Cruz, 2013 IL 113399 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.

People v. Hall, 217 Ill.2d 324, 841 N.E.2d 913 (2005) The dismissal of a post-conviction petition is warranted at the second stage of the proceedings, after counsel has been appointed to assist indigent petitioner in amending the petition, but prior to evidentiary hearing, only when the allegations in the petition, liberally construed in light of the trial record, fail to make a substantial showing of a constitutional violation.

People v. Mahaffey, 194 Ill.2d 154, 742 N.E.2d 251 (2000) A petitioner is entitled to an evidentiary hearing on a post-conviction petition only where the allegations, supported where

appropriate by the trial record or accompanying affidavits, make a substantial showing that defendant's constitutional rights were violated. For purposes of this determination, all well-pleaded facts in the petition and any accompanying affidavits are taken to be true. See also, [People v. Towns](#), 182 Ill.2d 491, 696 N.E.2d 1128 (1998); [People v. Miller](#), 203 Ill.2d 433, 786 N.E.2d 989 (2002).

[People v. Childress](#), 191 Ill.2d 168, 730 N.E.2d 32 (2000) When the State moves to dismiss a post-conviction petition, all "well-pleaded facts that are not positively rebutted by the trial record are to be taken as true." Thus, the court may not engage in fact-finding or credibility determinations and must decide only whether the petition alleges a constitutional deprivation. See also, [People v. Miller](#), 203 Ill.2d 433 (2002) (the State's motion to dismiss the post-conviction petition assumes the truth of the allegations to which it is directed, and questions only their legal sufficiency); [People v. Moore](#), 189 Ill.2d 521 (2000) (the trial court erred in considering the State's counter-affidavits, for in considering a motion to dismiss, the trial court is limited to the allegations of the petition and the original trial record); [People v. Wilson](#), 39 Ill.2d 275 (1968) (a motion to dismiss a post-conviction petition admits the truth of the allegations and questions only their sufficiency)

[People v. Bounds](#), 182 Ill.2d 1, 694 N.E.2d 560 (1998) The trial judge erred by dismissing defendant's post-conviction petition at a status hearing without affording proper notice that a ruling on the merits might be forthcoming. See also, [People v. Kitchen](#), 189 Ill.2d 424, 727 N.E.2d 189 (1999) (due process was violated where the trial court entered an order dismissing a capital defendant's post-conviction petition at a hearing called solely to resolve disputes over a discovery request).

[People v. Griffin](#), 148 Ill.2d 45, 592 N.E.2d 930 (1992) The trial court did not abuse its discretion in dismissing defendant's post-conviction petition without an evidentiary hearing. The petition alleged that a State's witness had committed perjury at trial. Defendant attached to the petition a video recording in which the witness said that he lied at defendant's trial based on information from law enforcement officials, that he lived at State expense in a hotel, and that he had received money from the State. Defendant also attached a transcript of Moore's testimony at another trial, where he said that law enforcement officials paid him to lie at defendant's trial. Judges have broad discretion to determine the type of evidence to be considered, including "affidavits, depositions, oral testimony, or other evidence." The post-conviction judge presided over the trial and could determine Moore's credibility by reviewing the documents supporting the post-conviction petition.

[People v. Cihlar](#), 111 Ill.2d 212, 489 N.E.2d 859 (1986) The trial court erroneously dismissed defendant's petition without an evidentiary hearing because defendant's petition sufficiently alleged the State's use of perjury at his trial.

[People v. Partin](#), 69 Ill.2d 80, 370 N.E.2d 545 (1977) The trial court properly dismissed defendant's post-conviction petition, which alleged that his counsel induced him to enter a plea of "technically guilty" by representing that such a plea would be incompetent.

The petition failed to allege that defendant actually pleaded "technically guilty," and the transcript of the plea proceedings "conclusively established" that defendant entered an ordinary, unequivocal guilty plea. Furthermore, no affidavits were attached to the petition, their absence was not explained, and there was no explanation concerning what benefit

defendant hoped to receive by entering a plea that his attorney allegedly told him was "incompetent."

People v. Simms, 2018 IL 122378 Pursuant to section 122-5 of the PCHA, a petitioner may voluntarily withdraw a post-conviction petition without prejudice. Because the PCHA says nothing further about the rules governing withdrawal and reinstatement, the Code of Civil Procedure governs. Under section 13-217 of the Code, a petitioner has one year, or until the end of any other limitations period, to re-file the withdrawn petition.

The Supreme Court rejected the petitioner's argument that the circuit court has discretion to extend the time to re-file, citing language in section 122-5 which grants circuit courts discretion to extend the time to file any pleading. This language applies only to pleadings "other than the original petition," and is set off from the withdrawal provision. Applying this language to motions to re-file would frustrate the legislative goal of finality. Accordingly, the legislature did not intend to grant discretion to the circuit court to extend the time limits on re-filing withdrawn petitions.

Illinois Appellate Court

People v. Overton, 2023 IL App (4th) 230110 Defendant, who was convicted of murder in 1991, sought leave to file a successive post-conviction petition alleging a **Brady** violation and ineffective assistance of counsel for failing to argue and preserve a claim that the trial court improperly excluded a co-defendant's confession pursuant to **Chambers v. Mississippi**, 410 U.S. 284 (1973). The trial court denied leave, defendant appealed, and the appellate court reversed and remanded in a prior appeal. On remand, appointed counsel filed an amended petition which eliminated the **Chambers** claim but pursued the **Brady** claim. The State filed a motion to dismiss relying in part on documents that were not previously contained in the trial court record and arguing that those documents demonstrated that the **Brady** material had been provided in pretrial discovery. The court granted the State's motion, resulting in the instant appeal.

The appellate court found that the court erred in granting the State's motion to dismiss. With regard to the **Brady** claim, defendant made a substantial showing that photographs and an accompanying police report were exculpatory, impeaching, and material. The photographs showed a scratch on co-defendant Smith's arm, which supported defendant's version of events that he had actually attempted to stop Smith from stabbing the victim and wound up scratching Smith in the process.

Further, the record failed to rebut defendant's claim that the photographs and report were not disclosed prior to trial. In reaching a contrary conclusion, the trial court erroneously relied on documents that were attached to the State's motion to dismiss but that were not part of the record otherwise. It is improper for the State to present new evidence at the second stage of post-conviction proceedings. And it is improper for the court to resolve factual disputes at the second stage. Instead, such matters should be resolved at a third stage evidentiary hearing, and the appellate court remanded the matter for such proceedings. Additionally, the court directed that the trial court allow defendant to file an amended petition pursuing his **Chambers** claim on remand, if he so chooses, and advancing the **Chambers** claim to the third stage, as well.

People v. Moore, 2023 IL App (1st) 220919 The appellate court reversed the circuit court's decision to grant post-conviction relief at the second stage. At the second stage, courts evaluate the legal sufficiency of the pleadings and do not make credibility determinations. If

a petition raises questions of fact, an evidentiary hearing must be held before the petition can be granted.

Here, defendant's ineffective assistance of counsel claim contained factual allegations. He stated in his petition and affidavit that "he wished to pursue all of his appellate rights" and his trial counsel "never discussed" his right to appeal with him. These statements, while taken as true at the second stage, would be subject to dispute at the third stage.

The appellate court would not entertain the State's argument that the circuit court erred in denying its motion to dismiss, as the State does not have the right to appeal such a ruling. The court remanded for an evidentiary hearing.

People v. Rouse, 2022 IL App (1st) 210761 Defendant's post-conviction petition made a substantial showing of ineffective assistance of trial counsel by alleging that counsel interfered with his right to a jury trial and right to testify, and failed to call an exculpatory witness.

Defendant's petition contained his own notarized affidavit stating that he asked to testify at his robbery trial, but that his attorney warned him that doing so would "make her look bad" because they hadn't discussed his testimony. Counsel told him he had to "go along with her on this." Defendant also alleged that his attorney threatened to withdraw if he chose a jury trial. Finally, defendant alleged that his attorney failed to call to the stand his sister, who would have explained why he had a large amount of cash on him at the time of arrest.

The majority first held that the State forfeited two arguments raised for the first time during oral argument: (1) that defendant could not show **Strickland** deficiency and prejudice on the right-to-testify and right-to-jury-trial claims; and (2) that the record rebutted the right-to-testify claim. Neither argument was contained in the State's brief, and although the defendant has the burden of making a substantial showing at the second stage, defendant's opening briefs argued he had under the **Strickland** standard. At that point, the State had to rebut the argument, but instead, the State simply failed to respond. As such, any counter-arguments to these points were forfeited.

Regarding the right to a jury trial, the State argued that the record rebuts defendant's claim because he was admonished and he executed a valid jury waiver. The majority disagreed. The admonishments did not inform him that the right to a jury trial was his alone to make. Thus, the admonishments did not specifically rebut the claim.

As to defendant's right to testify, defendant adequately alleged that his attorney's statements urging him not to testify interfered with his right. And the record supported the claim – after receiving admonishments about his right to testify, defendant informed the court that he would testify, but after an off-the-record discussion with his attorney, defendant stated that he would not be testifying. Taken as true, and in light of the State's failure to raise a counter-argument to the **Strickland** prongs, defendant made a substantial showing.

Finally, defendant made a substantial showing of ineffectiveness for failing to call his sister. Even though defendant did not allege that his sister would testify, this is not an essential allegation if it can be inferred that she would. Although the dissent would have found no prejudice in light of the fact that defendant was identified in a show-up shortly after robbing two people, and had the proceeds of the robbery, and was seen throwing a gun, which was recovered, while being chased by police, defendant challenged all of this evidence at trial and therefore the value of his sister's testimony is a question of fact to be resolved at an evidentiary hearing.

People v. Bass, 2022 IL App (1st) 210249 The circuit court erred in dismissing defendant's post-conviction petition at the second stage where he made a substantial showing of

ineffective assistance of counsel. Specifically, defendant alleged that his counsel failed to consult with him in private at any time prior to trial. Instead, all of their conversations occurred in a holding cell behind the courtroom while other detainees were present. Defendant alleged that this led him to be misinformed regarding critical evidence, which ultimately led him to reject a favorable plea offer.

It is crucial to the attorney-client relationship that a client and his lawyer be able to engage in full and open communication. Indeed, the attorney-client privilege is meant to foster such communication and requires that conversations occur in private. Here, defendant was facing a murder charge, and evidence provided in discovery consisted of surveillance video, phone calls, and text messages, among other things. The presence of other detainees made it impossible for counsel to engage in a meaningful review of the State's evidence with defendant. Thus, counsel's performance in failing to meet privately with defendant was deficient. In reaching this conclusion, the court was careful to note that it was not setting out a categorical rule requiring private consultation in every case.

The court went on to find that defendant also made a substantial showing of prejudice where he alleged that he would have accepted a 20-year plea offer had he not been misadvised of the significance of certain evidence against him. Instead, defendant proceeded to trial and received a 55-year sentence after conviction. While the State argued that the significance of the evidence in question was not material to the plea decision, the appellate court found that such an analysis should be made at an evidentiary hearing rather than at the second stage.

People v. Triplett, 2022 IL App (3d) 200017 Defendant filed a *pro se* post-conviction petition, which the court advanced to second stage. Counsel was appointed and filed an amended petition on defendant's behalf. After the State filed a motion to dismiss, however, defense counsel filed a motion to withdraw as counsel stating that upon investigating the allegations in the State's motion, he found no meritorious claims in defendant's petition.

The court held a single hearing on both defense counsel's motion to withdraw and the State's motion to dismiss. First, in support of his motion to withdraw, counsel argued the specifics as to why defendant's claims were without merit. Defendant responded that he believed his claims had merit and that he needed counsel because he did not know the law. The court then heard the State's argument in support of the motion to dismiss. Defendant was given an opportunity to respond, at which time he stated he felt "railroaded" and misled. At the conclusion of the hearing, the court allowed defense counsel's motion to withdraw and granted the State's motion to dismiss.

The appellate court held that this procedure was improper. By simultaneously hearing and ruling on both motions, the court effectively deprived defendant of an opportunity to respond to the State's motion to dismiss. Under the procedure employed here, however, defendant was still represented by counsel who had moved to withdraw at the time the State's motion to dismiss was heard. That counsel could not effectively advocate for defendant where he had already stated his agreement with the State that defendant's petition was meritless. A defendant cannot be expected to voice his objections while his attorney is actively arguing against his interests. Further, defendant was not provided with proper notice of the State's motion to dismiss where notice of the motion was served on counsel, not defendant, and where defendant was not informed that he would have to argue against the State's motion himself. After granting counsel's motion to withdraw, the court should have afforded defendant an opportunity to either prepare his own response to the State's motion or to obtain new counsel to assist him. The matter was remanded for further post-conviction proceedings.

People v. McCarron, 2022 IL App (3d) 200404 In 2006, defendant was convicted of first degree murder and concealment of a homicidal death in the strangulation of her 3-year-old autistic daughter. At trial, defendant presented an insanity defense, supported by the testimony of two experts that defendant suffered recurrent major depressive disorder. The jury rejected that defense. The Appellate Court affirmed defendant's conviction on direct appeal.

In 2018, defendant filed a *pro se* post-conviction petition, based on a change in the law which gave individuals the right to present a claim based on post-partum depression (PPD) and post-partum psychosis (PPP). Counsel was appointed to represent defendant on the petition and moved for the appointment of experts related to PPP and PPD. The circuit court denied the motion and dismissed defendant's petition, and defendant appealed.

The Appellate Court reversed. The court held that the trial court erred in construing the statutory definition of PPD and PPP as limiting their existence at one year past a defendant's youngest child's birthday. The statutory definitions of PPD and PPP contain general descriptions of how the conditions can present themselves and when they tend to develop. Specifically, PPD "usually occurs during pregnancy and up to 12 months after delivery," and PPP "can occur during pregnancy and up to 12 months after delivery." **725 ILCS 5/122-1(a)(3)**. The court was wrong to interpret the word "occur" as meaning that PPD and PPP both start and conclude within the time frames discussed in the statute. Instead, "occur" refers to when something generally begins or originates. The statutory definitions do not impose a temporal limitation on PPD and PPP in the manner determined by the trial court. Thus, defendant's claim was not barred by the fact that her older daughter's death occurred just over two years after the date of her younger daughter's birth.

The trial court also erred when it held that any evidence of PPD would be cumulative. While defendant's mental health was addressed during trial and sentencing, no evidence was presented that she may have suffered from PPD at the time she killed her daughter. PPD is a particularized form of depression, such that evidence that defendant suffered from PPD would not have been cumulative of the more generalized evidence of depression that the jury did hear.

Dismissal of defendant's petition was reversed, and the matter was remanded for further proceedings, including the appointment of experts as requested in defendant's motion.

People v. Soto and Ayala, 2022 IL App (1st) 192484 The circuit court erred when it dismissed defendant's post-conviction petition at the second stage. The petition made a substantial showing of actual innocence and trial counsel's conflict of interest.

Co-defendants Soto and Ayala were tried jointly before a single jury and convicted of two murders, attempted murder, and conspiracy to commit murder. They were sentenced to natural life. The State alleged through its primary witness, Wally Cruz, that Ayala ordered a gang hit and that Cruz drove Soto, armed with a handgun, and Palomo, armed with a rifle, to a park where Soto and Palomo fired and killed two people and injured another.

Defendants filed successive petitions in 2015, 33 years after conviction and sentence. Therefore, a majority of the claims were time barred. While Ayala pointed out that he was in solitary confinement 23 hours a day from 1998 through 2012, this did not prevent him from filing several of his claims earlier. However, because the conflict of interest and actual innocence claims relied on new evidence, they were not barred by untimeliness, forfeiture or *res judicata*.

Defendants alleged that trial counsel had a *per se* conflict of interest because he represented Rodriguez, a 16 year-old who was identified by several eyewitnesses as the

offender firing the handgun into the park. A *per se* conflict arises when the attorney had or has a tie to a person or entity that would benefit from a verdict unfavorable to the client. This occurs when counsel: (1) has a prior or contemporaneous association with the victim, the prosecution, or an entity assisting the prosecution; (2) contemporaneously represents a prosecution witness; or (3) was a former prosecutor who had been personally involved in the prosecution of the defendant.

Here, Rodriguez did not fit into the first category. [People v. Fields, 2012 IL 112438](#) (potential State witnesses not considered an “entity. . . assisting the prosecution.) But the second category does apply. Defense counsel represented Rodriguez after his arrest in the wake of the shooting, in October, 1991, while at the same time representing defendants. The representation overlapped by 19 days. The Appellate Court found this to be “contemporaneous representation.” And while the State pointed out that Rodriguez never testified for the State, the Appellate Court found that representation of an alternate suspect and named State witness creates sufficient potential conflict so as to fall under the *per se* conflict rule.

The petitions also made a substantial showing of an actual conflict of interest. Notably, counsel never called as witnesses the three people who identified Rodriguez as the shooter. This decision could be a “specific defect” in counsel’s strategy. Although the State offered speculative justifications for the failure to call the witnesses, such as questioning their credibility, the stronger inference is that trial counsel felt some duty of loyalty to Rodriguez. Regardless, these questions are better resolved at an evidentiary hearing.

Finally, the petitions made a substantial showing of actual innocence. They included four affidavits from witnesses whom Cruz alleged were present at the gang meeting where Ayala ordered the hit. All of the witnesses attested that they were not present, and that they were arrested and threatened with prosecution and abuse if they would not admit to being present. These affidavits were newly discovered because one of the witnesses pleaded the fifth before the grand jury, rendering him unavailable, while the others described State coercion and fear of retaliation to explain why they did not come forward earlier. Two additional recantation affidavits from witnesses who did testify at trial were also newly discovered, even though Soto included the information in a prior petition. It would be unfair to attribute this prior knowledge to Ayala, and, regardless, the information was available to neither defendant at the time of trial. Finally, other witness affidavits were considered newly discovered because they implicated Rodriguez, and no amount of due diligence could have compelled their conflicted counsel to call these witnesses at trial.

The new evidence was sufficiently material and conclusive to warrant an evidentiary hearing. Witnesses who would dispute Cruz’s account of the gang meeting where the shooting was supposedly planned, and his claim that the Soto fired the handgun, while at the same time offering multiple accounts of Rodriguez firing the handgun, would place the trial evidence in a different light and undermine the court’s confidence in the judgment of guilt.

[People v. Davis, 2022 IL App \(1st\) 200467](#) The Appellate Court reversed the second-stage dismissal of defendant’s post-conviction petition. Defendant was tried *in absentia* and convicted. Subsequently, he was sentenced *in absentia*, as well. When he was arrested several months later, he filed a *pro se* motion for new trial and sentencing hearing, as well as a notice of appeal. The court appointed counsel on the motion, and counsel ultimately withdrew it. Defendant then filed another *pro se* notice of appeal. Defendant’s appeal was later dismissed due to lack of jurisdiction.

Defendant then filed the post-conviction petition that was the subject of the instant appeal. In his *pro se* petition, defendant alleged, among other things, that trial counsel failed to preserve his right to direct appeal. The Appellate Court agreed that defendant had made a substantial showing of a meritorious claim on this basis.

The record showed that trial counsel had not filed a notice of appeal after defendant was tried and sentenced *in absentia*. And, in his petition, defendant alleged that he told trial counsel he wanted to appeal, an allegation which had to be accepted as true given that the petition was at the second stage of proceedings. While the Appellate Court might have dismissed such an appeal while defendant remained absent, such a dismissal would have been without prejudice and subject to reinstatement upon defendant's request. Instead, the failure to file a notice of appeal resulted in the complete denial of defendant's right to a direct appeal.

The Appellate Court remanded the matter for further post-conviction proceedings in which defendant must show that he either specifically instructed trial counsel to file a notice of appeal, that he demonstrated that he desired to appeal, or that a rational defendant would have wanted to file an appeal because there were nonfrivolous grounds for an appeal.

People v. Watson, 2022 IL App (5th) 190427 When the State fails to file a responsive pleading at the second stage, the circuit court does not err by advancing defendant's petition to the third stage rather than granting relief. The appellate court found no support in the Post-Conviction Hearing Act for defendant's suggestion that the State admits all well-pleaded facts by not responding to the petition. "The State's failure to file a responsive pleading at the second stage of the proceedings has no bearing on the requirement that a petitioner present sufficient evidence of a substantial constitutional violation at the third stage of the proceedings."

For the same reasons, the appellate court rejected defendant's claim that he received unreasonable assistance of PC counsel for failing to file a motion for judgment on the pleadings at the second stage.

People v. Roland, 2022 IL App (1st) 173013 Defendant was convicted of attempt murder for firing a gun at a police officer. Before trial, he was found fit for trial and legally sane at the time of the offense, though evidence showed the evaluating physicians were not able to obtain medical records from multiple institutions that had treated defendant in the past. Defendant testified at trial that he pointed a gun at officers, and fired in the air, in an attempt to commit "suicide by cop."

Defendant's post-conviction petition alleged ineffective assistance of counsel for failing to obtain medical records. The petition alleged he was treated at a mental health center for four years around the time of the offense, and prescribed medication. The circuit court dismissed at the second stage, and an Appellate Court majority reversed. The petition made a substantial showing of unreasonable performance, where defendant attached a document from the hospital, rejecting his request for medical records, that appeared to corroborate his claim that the records do exist. The petition made a substantial showing of prejudice because the records would have supported defendant's defense theory – defendant's inability to form the requisite intent to kill.

The dissent believed that the defense theory was a diminished capacity defense, which does not exist in Illinois, and therefore would have upheld the dismissal.

People v. Williams, 2021 IL App (3d) 190082 The circuit court deprived defendant of his right to procedural due process because it did not provide him with a meaningful opportunity

to be heard in response to the State's motion to dismiss. At the second-stage, post-conviction counsel moved to withdraw, and 10 days before the hearing on the motion, the State filed its motion to dismiss. The court heard and granted both motions at the same time. Defendant indicated that he had not been able to adequately review the State's motion, and had no idea whether he'd be represented by counsel in defending against the motion. Nor could defendant personally respond as long as he was represented by counsel. The circuit court should have ruled on the motion to withdraw first. If it granted the motion, it should have then given defendant adequate time to respond.

Nevertheless, in [People v. Stoecker, 2020 IL 124807](#), the Supreme Court held that a procedural error which denies the defendant a right to respond in a collateral case may be harmless error. Although one justice wrote separately to express her belief that **Stoecker** erred in not finding structural error, the Appellate Court determined the error was harmless beyond a reasonable doubt because defendant's post-conviction claims lacked substantive merit.

[People v. Brooks, 2021 IL App \(4th\) 200573](#) The circuit court erred when it denied defendant's actual innocence claim at the second stage based on the hearsay nature of defendant's evidence. At the second stage of post-conviction proceedings, all well-pleaded claims must be accepted as true. Here, defendant attached an affidavit from an investigator who averred that he spoke to a woman who had a text message from a man who admitted to the murder for which defendant had been convicted. The circuit court held that the affidavit was insufficient to support a claim of actual innocence because it was inadmissible hearsay.

The Appellate Court remanded for third-stage proceedings. [Illinois Rule of Evidence 1101\(b\)\(3\)](#) specifically provides that the rules of evidence do not apply to "post-conviction hearings." At the second stage, this means that all evidence – even hearsay – must be accepted as true for purposes of the actual innocence analysis.

At the third stage, as at a sentencing hearing, Rule 1101(b)(3) means that the trial court may, in the exercise of its discretion, consider any evidence it finds relevant and reliable, regardless of its admissibility under Illinois' Rules of Evidence. Therefore, any disagreement about the admissibility of the text message should have been reserved for the third-stage evidentiary hearing.

[People v. Rosalez, 2021 IL App \(2d\) 200086](#) Defendant made a substantial showing of actual innocence such that the trial court erred in dismissing his post-conviction petition at the second stage of proceedings. Defendant's petition alleged that a co-defendant, Vilayhong, would testify that he alone committed the drive-by shooting that killed a single individual. Defendant had been convicted of first degree murder for that incident, and Vilayhong's affidavit was contrary to his trial testimony against defendant.

Specifically, Vilayhong, who was a high-ranking member of the same gang as defendant, testified at trial that defendant shot the victim at his direction. Two other witnesses implicated defendant, as well. Vilayhong admitted he had entered into a plea agreement with the State in exchange for his trial testimony against defendant whereby Vilayhong would receive a 20-year sentence for first degree murder. The jury ultimately convicted defendant of first degree murder, but answered in the negative a special interrogatory asking whether defendant personally discharged the firearm which caused the victim's death.

Attached to defendant's post-conviction petition was an affidavit from Vilayhong stating that he had the gun on the night in question, he fired the only shot during the incident, and he instructed everyone else in the vehicle to implicate defendant if questioned

about the shooting. Also attached was an affidavit from the vehicle's driver, Perez-Gonzalez, stating that defendant refused Vilayhong's instruction to shoot, so Vilayhong shot the victim himself. Perez-Gonzalez, and another witness Garza, both averred that they originally had implicated defendant at Vilayhong's direction.

The trial court granted the State's motion to dismiss, concluding that while this evidence was material and non-cumulative, only some of the information was newly discovered and, regardless, it was not of such conclusive character that it was likely to change the outcome at trial. The Appellate Court reversed and remanded for an evidentiary hearing. The evidence was newly discovered because Vilayhong had a fifth amendment right not to incriminate himself and had taken steps to enter a favorable plea agreement under a theory of accountability to avoid principal liability for the offense. Likewise, Perez-Gonzalez had refused to answer any questions at defendant's trial when called by the State, and there was no indication defendant could have learned prior to trial that Vilayhong had told him and Garza to implicate defendant.

When the affidavits were considered alongside the evidence offered at trial, defendant made a substantial showing that the new evidence was of such conclusive character that it was likely to change the outcome. Nobody outside of the vehicle had identified defendant as the shooter, and there were several inconsistencies at trial which raised credibility questions. An evidentiary hearing is required to determine whether the witnesses' recantations are credible enough to warrant a new trial.

People v. Plummer, 2021 IL App (1st) 200299 Defendant was found guilty of murder and attempt murder based on a 1991 shooting that occurred when defendant was 15 years old. The evidence against him consisted of a lineup identification and his custodial statement, which was taken at Area 3. Defendant alleged at trial, and in a 1999 post-conviction petition, that during his nearly 40 hours at Area 3, Detective Kill and another detective coerced his confession through threats and physical violence.

In the instant successive petition, defendant alleged: (1) newly discovered evidence showing that Detectives Kill and Boudreau (whom defendant now alleged was the second interrogating detective) were involved in a pattern and practice of torture, physical abuse, and other acts of coercion in Areas 2 and 3 around the time of defendant's interrogation; and (2) the State committed a **Brady** violation when it withheld exculpatory evidence regarding this practice and pattern of torture and physical coercion. Defendant supplemented his **Brady** claim with allegations of an undisclosed federal investigation involving decedent, which would have alerted the defense to an alternate suspect. The circuit court dismissed the petition at the second stage.

The Appellate Court reversed. Defendant's claims were not subject to *res judicata* because they were supported by newly discovered evidence. He cited prior examples of abuse by Detectives Kill and Boudreau, and while several of the examples pre-dated defendant's petition, the reports that documented these complaints and gave them credibility, such as the 2006 Report of the Special Prosecutor, were not produced until years after defendant's initial petition. The new evidence was material and conclusive because the alleged pattern of abuse – which involved the same officers and some of the same techniques defendant cited in his previous testimony and filings – could be used to impeach Detective Kill's credibility and bolster defendant's credibility. This proposed evidence would therefore significantly undercut confidence in the guilty verdict.

The Appellate Court disagreed with the State's claim that the record still showed a voluntary confession. The State noted that defendant confessed to an ASA, not the detectives, and that he stated he was "treated fine." He also had no visible injuries in his mugshots. But

none of these facts conflict with defendant's claim that he was threatened and beat about the abdomen by detectives prior to his meeting with the ASA. The Appellate Court admonished the lower court that "the only thing that is required for a court to reconsider the voluntariness of a confession is a 'pervasive pattern of criminal conduct by police officers.'" Defendant here presented ample evidence of a pattern of systemic abuse by Detectives Kill and Boudreau, and therefore deserved an evidentiary hearing.

The Appellate Court also found a substantial showing of a **Brady** violation. The evidence of the federal investigation was newly discovered where defendant produced an affidavit from another suspect who was interviewed by Detective Kill at the time of defendant's interrogation. The affidavit explained that Kill told the suspect about the investigation into the decedent, who was a drug dealer feuding with an associate against whom he was to testify. Neither defendant nor counsel were at fault for not uncovering this information earlier, as the defense cannot be expected to ask witnesses every perceivable question to elicit information that is not forthcoming.

The information was material and conclusive not only because it gave rise to an alternative suspect, but also because it directly rebutted Detective Kill's testimony that he was not involved in the investigation into the decedent. Evidence of a federal investigation into decedent, which revealed that defendant was a drug dealer who had wronged a fellow dealer, constituted sufficient evidence of an alternate suspect with a strong motive to kill the decedent. Where the evidence was material, favorable to the defense, and not disclosed, an evidentiary hearing was required.

People v. Pingleton, 2021 IL App (4th) 180751 The trial court erred when it granted the State's motion to dismiss defendant's post-conviction petition without providing defendant proper notice that the motion would be heard on the date in question and without giving defendant an opportunity to be heard. Defendant was represented by counsel on the petition, but counsel had filed a motion to withdraw on the basis that defendant's claims were meritless. At a hearing where defendant was present only by telephone, the court allowed counsel's motion to withdraw and the State's motion to dismiss. While it was error to deny defendant notice and an opportunity to be heard on the motion to dismiss, the error was harmless because defendant's petition did not state even the gist of a constitutional claim.

People v. Martinez, 2021 IL App (1st) 190490 The circuit court erred in dismissing defendant's post-conviction petition at the second stage where defendant made a substantial showing that his right to due process was violated due to police misconduct. Defendant supported his petition with evidence that one of the detectives involved in his case (Guevara) had a "well-documented history of influencing and manipulating witnesses" and had engaged in misconduct in defendant's case, specifically. The trial court erred in disregarding Guevara's invocation of the Fifth Amendment privilege when questioned about the instant matter in a separate legal proceeding. The court should have drawn a negative inference from that invocation.

Defendant also made a substantial showing of actual innocence based on the same evidence supporting his due process claim, as well as expert evidence concerning eyewitness identification. The eyewitness evidence at defendant's trial was the strongest evidence against him, and the proposed expert testimony would have undermined that evidence. Especially when considered with the evidence of police misconduct, the new evidence placed the trial evidence in a different light.

People v. McGee, 2021 IL App (2d) 190040 Defendant was found guilty of armed robbery and sentenced to 29 years in prison. He filed a post-conviction petition alleging ineffective assistance of counsel, asserting that trial counsel improperly advised him against accepting a plea offer of 8 years for simple robbery. The circuit court dismissed the petition at the second stage because defendant had not raised the issue in his *pro se* post-trial motion.

The Appellate Court found that defendant made a substantial showing of ineffective assistance of counsel and remanded for an evidentiary hearing. The right to effective assistance of counsel extends to the decision to reject a plea offer, even if the defendant subsequently receives a fair trial. To establish prejudice, a petitioner must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.

Here, defendant's affidavit alleged that he wanted to take the deal, but his attorney told him he would win at trial and that he should reject the offer. Defendant protested, but the attorney told him that she would worry about the legal side of things. These claims were partially corroborated by trial transcripts, which showed defendant complained about disagreements with his attorney at various points in the proceedings. Trial counsel's statement at the **Krankel** hearing that defendant rejected the offers did not positively rebut the allegations that counsel misadvised defendant prior to the rejections. Based on the pleadings, which must be accepted as true, defendant made a substantial showing, and the claim would have to be resolved at an evidentiary hearing.

People v. Myles, 2020 IL App (1st) 171964 Defendant's post-conviction petition made a substantial showing of trial counsel's ineffectiveness for failure to investigate the criminal history of the complainant, and use her pending criminal charges as impeachment evidence.

The complainant had testified that defendant robbed her, while defendant testified that the encounter was a misunderstanding. After conviction, defendant learned that the complainant had federal fraud and bribery charges pending at the time of her testimony. The charges would have been admissible as impeachment evidence. Trial counsel included an affidavit stating that he would have used this evidence had he known of it.

Defendant met the second-stage showing for ineffectiveness where counsel's failure to investigate constituted deficient performance, and prejudice resulted. Credibility was critical to the State's case, and evidence regarding the complainant's pending fraud and bribery charges is the kind of evidence that would tend to show that her testimony might be influenced by interest, bias or a motive to testify falsely. A witness facing pending charges may have an interest or motive to curry sympathy or favor as a crime victim in her case. It did not matter whether the government intended to reduce or dismiss charges, only that the witness had an expectation they might. And cooperation in defendant's criminal case would have been a factor in mitigation according to federal sentencing guidelines.

People v. Willingham, 2020 IL App (1st) 162250 Newly discovered evidence of actual innocence does not have to be dispositive in order to be likely to alter the result on retrial. Under **People v. Robinson, 2020 IL 123849**, the Supreme Court made clear that the standard is whether the evidence supporting the post-conviction petition places the trial evidence in a different light and undermines the court's confidence in the judgment of guilt. Here, the affidavit of a previously unknown bystander, stating that he witnessed the altercation and saw the victim shoot at defendant before defendant returned fire, went to the heart of whether defendant acted in self-defense and, if believed, would place the trial evidence in a different light and undermine confidence in the guilty verdict. While the witness's affidavit conflicted with other trial testimony, it was not positively rebutted by the

record and the court could not resolve the conflict at the second stage of post-conviction proceedings since credibility determinations are improper at that stage.

Defendant's petition also made a substantial showing of ineffective assistance of trial counsel for failing to call three witness who would have testified that the shooting victim and his fellow gang members were armed on the date of the altercation which led to the shooting. This would have supported defendant's claim of self-defense. While counsel may ultimately provide strategic reason for not calling the witnesses, an evidentiary hearing is required to resolve that question. Accordingly, defendant made a substantial showing of deficient performance. And, where the witnesses would have provided critical support for defendant's otherwise uncorroborated version that he acted in self-defense, defendant's petition also made a substantial showing of prejudice. Accordingly, the dismissal of defendant's petition was reversed, and the matter was remanded for an evidentiary hearing.

People v. Saleh, 2020 IL App (1st) 172979 The trial court did not err in dismissing at the second-stage defendant's post-conviction petition claiming ineffective assistance of counsel for failing to call defendant's dentist to support defendant's self-defense claim. The petition was not supported by an affidavit from the dentist. While records from the dentist were attached, along with post-conviction counsel's statement that the dentist refused to provide an affidavit, there was no indication that the dentist would have testified in accord with his records. Also, the records contained inconsistencies, one of which would have supported defendant's version while the other would have contradicted it. Accordingly, even if there was adequate evidence that the defendant would have testified, defendant failed to make a substantial showing of ineffective assistance of trial counsel for not calling him as a witness at trial.

People v. Colasurdo, 2020 IL App (3d) 190356 The Appellate Court agreed with the State that defendant's **Miller** claim could not be resolved because the *pro se* defendant did not include the sentencing transcripts in his post-conviction petition or record on appeal. The court pointed out, however, that defendant's claim was dismissed at the second-stage of post-conviction proceedings, where claims must be accepted as true unless rebutted by the record. Thus, contrary to the State's claim that the lack of record required the court to affirm the dismissal of the petition, the court instead held that the lack of a record should have been construed against the State at the second stage. The court remanded to the third stage, instructing the circuit court to review the transcripts of defendant's sentencing hearing and determine whether the court complied with **Miller**.

People v. Simmons, 2020 IL App (1st) 170650 Defendant made a substantial showing of ineffective assistance of counsel where his post-conviction petition included an affidavit from an exculpatory witness who was never contacted by trial counsel.

The witness' affidavit stated that he observed someone other than defendant committing the murder, and that he told the police and co-defendant's attorney that defendant did not commit the crime. He was listed as a witness in police reports, yet defendant's attorney never contacted him. This deficient performance was prejudicial under the second-stage standard, where the other eyewitnesses had motives to lie, and defendant confessed only after 10 hours of interrogation. The court concluded that if the witness had testified in a manner consistent with his affidavit, a verdict of not guilty would at least be reasonable.

People v. House, 2020 IL App (3d) 170655 Defendant’s post-conviction petition alleging actual innocence should not have been dismissed at the second stage. Defendant provided several affidavits from witnesses, some attesting that he was not the shooter and others casting doubt on the State’s witnesses and investigation. The Appellate Court found the evidence new, because one witness said he was reluctant to come forward earlier while the others did not appear in discovery. Regardless, the question of whether they could be discovered earlier with due diligence was a matter for a third-stage evidentiary hearing. The evidence was also non-cumulative and material, and, given the State’s evidence consisted of an inconclusive surveillance video and a single eyewitness whose credibility was attacked in the petition, conclusive enough to warrant an evidentiary hearing.

People v. Brown, 2020 IL App (1st) 170980 Trial court did not err in granting State’s motion to dismiss defendant’s post-conviction petition at the second stage. On appeal, defendant alleged that he had made a substantial showing of ineffective assistance of counsel based on counsel’s failure to alert the court during trial that defendant observed the prosecutor telling a witness the content of a prior witness’s testimony, thereby violating a court order excluding witnesses. The violation of an exclusion order is reversible error only if the affected party can establish prejudice. The Appellate Court concluded that even assuming defendant’s allegation was true, and even assuming the witness’s testimony would have been excluded, defendant failed to make a substantial showing of prejudice because the outcome would not have been different where the evidence against defendant was overwhelming.

People v. Gunn, 2020 IL App (4th) 170653 In a murder case where the defense argued self-defense or second-degree murder, defense counsel told the jury multiple times during opening statements that defendant would testify and explain why he stabbed the decedent and why he lied to the police during his interrogation. Defense counsel also told the trial court it did not need to read the **Zehr** principle concerning the defendant’s failure to testify, since defendant would in fact be testifying. During trial, however, counsel advised defendant not to testify, and defendant did not take the stand.

After his conviction for first-degree murder, defendant filed a post-conviction petition alleging ineffective assistance of counsel. The Appellate Court reversed the second-stage dismissal of the petition and remanded for an evidentiary hearing. While in an ordinary appeal this type of claim might be rejected as trial strategy, in post-conviction proceedings this assumption is not applicable because the proceeding allows for a defendant to develop a record as to the basis for counsel’s decision. Here, nothing unforeseeable occurred at trial after counsel promised the testimony, and therefore an explanation from counsel should be elicited at an evidentiary hearing.

People v. Hawkins, 2020 IL App (3d) 160682 In **People v. Kelley**, 2013 IL App (4th) 110874, the Appellate Court held that **Boose**’s presumption against shackling was not violated by defendant’s shackling during post-conviction proceedings where the restraints did not impede defendant’s ability to assist counsel. In **People v. Rippatoe**, 408 Ill. App. 3d 1061 (3d Dist. 2011), however, the Appellate Court held that **Boose** does apply in post-trial proceedings where a defendant is proceeding pro se. Here, the State conceded it was error to shackle the pro se defendant during second-stage post-conviction proceedings without conducting a **Boose** hearing.

Because the court had not conducted any sort of **Boose** hearing during the original post-conviction proceedings, the Appellate Court found that remand for a retrospective

Boose hearing would be improper. Instead, the matter was reversed and remanded for new second-stage proceedings.

People v. Dixon, 2019 IL App (1st) 160443 During the second-stage of PC proceedings, the circuit court erred when it deprived the *pro se* petitioner of his trial attorney's case file. The court rejected the State's argument that the file constituted "discovery" or "work product." Documents in the case file were either created by, or turned over to, the defense, so petitioner was not requesting an opposing party's documents. The post-conviction attorney who had previously worked on the case had stated that review of the case file was essential to an amended petition. The Appellate Court remanded for further stage-two proceedings.

People v. Velasco, 2018 IL App (1st) 161683 Defendant's post-conviction petition, containing two new eyewitness accounts identifying a rival gang member as the offender, and two corroborating hearsay affidavits, made a substantial showing of actual innocence. Although the appellate court would not consider two other affidavits for lack of notarization, and another affidavit did not contain newly discovered evidence, the remaining affidavits (including those containing hearsay, which is admissible in post-conviction hearings), were new, non-cumulative, and so conclusive that it is more than likely that no reasonable juror would find defendant guilty. The new evidence was consistent with the defense theory of a gang-motivated killing and would have supported the otherwise uncorroborated defense at trial. Taking the new accounts as true, they "call into question" the State's theory that defendant, a friend and member of the same gang as the victim, committed the murder.

People v. Brown, 2018 IL App (4th) 160288 (9/25/18)

Where a post-conviction petition is advanced, in part, to a third-stage evidentiary hearing and then reassigned to another judge, the new judge has the inherent authority to reconsider, *sua sponte*, the partial denial of the State's motion to dismiss the petition. The Court distinguished **People v. Thompson, 2016 IL App (3d) 140586**, which found error in the judge's *sua sponte* dismissal of a post-conviction petition where the State filed an answer and did not move to dismiss. Here, while the State filed an answer after its motion to dismiss was partially denied, the State originally sought dismissal of the entire petition. The court's inherent authority to reconsider the partial denial of the motion to dismiss was not limited by the State's subsequent filing of an answer.

People v. Guerrero, 2018 IL App (2d) 160920 Defendant's post-conviction petition made a substantial showing of appellate counsel's ineffectiveness. To prove predatory criminal sexual assault alleging digital penetration of the vagina, the State must establish intrusion beyond a reasonable doubt. Here, the complainant's testimony on whether defendant's finger intruded her vagina was ambiguous, and in response to a direct question she denied any intrusion, so appellate counsel was ineffective for not challenging the sufficiency of the evidence on direct appeal.

The remedy for a petition that has made a substantial showing of appellate counsel's ineffectiveness for failure to raise a sufficiency challenge is to grant the same relief that would have been granted on direct appeal. Here, had this issue been raised on direct appeal, the Appellate Court would have reduced the conviction to the lesser-included offense of aggravated criminal sexual abuse, using its authority under Rule 615(b)(3). Although the dissent would require the State to request a reduction, which it had not done here (instead

arguing that the only proper relief would be an evidentiary hearing), the majority believed that judicial economy justified the *sua sponte* reduction to obtain the correct legal result. But as the dissent noted, the “correct legal result” would have been an acquittal, because the State did not provide lesser-included offense instructions.

People v. Johnson, 2018 IL App (5th) 140486 Because the circuit court appointed counsel on defendant’s *pro se* post-conviction petition within 90 days of its filing, the Appellate Court presumed that the circuit court had found the petition not frivolous and patently without merit even though it did not expressly state its findings.

Where a petition is advanced to the second stage on its merits, rather than because the 90-day review period has expired, appointed counsel seeking to withdraw must meet the standard set forth in **People v. Kuehner**, 2015 IL 117695. That is, appointed counsel must demonstrate to the court that its initial determination on the merits was wrong and that the petition is, indeed, frivolous and patently without merit. And, the court must actually evaluate counsel’s assertions and decide that the petition is frivolous before allowing counsel to withdraw. Counsel here did not meet the **Kuehner** standard where she addressed only two of defendant’s five post-conviction claims in her motion to withdraw. And, the record did not show that the circuit court actually considered whether counsel’s assessment of the merits was correct, either.

The Appellate Court reversed and remanded for the appointment of new counsel. On remand, if necessary, new counsel may file a motion to withdraw that meets the **Kuehner** standard.

People v. Cuevas, 2018 IL App (2d) 151100 Defendant made a substantial showing of plea counsel’s ineffectiveness for not filing a motion to reconsider sentence following an open guilty plea, and for not investigating mitigation witnesses. Under **Roe v. Ortega-Flores**, 528 U.S. 470 (2000), an attorney’s ineffectiveness is established when defendant specifically instructs the attorney to perfect his post-plea appeal and counsel fails to do so. However, to establish a substantial showing of such a claim at the second stage, the defendant must corroborate his bare allegation that he asked counsel to move to reconsider and appeal, by explaining the basis for the motion and showing a reasonable probability of its success. Defendant here met that burden by including affidavits from mitigation witnesses who would rebut the aggravation presented by the State at his sentencing hearing. And given defendant’s allegation that counsel knew of but did not contact these witnesses, the petition also made a substantial showing of ineffectiveness based on the failure to investigate the witnesses.

People v. Miller, 2017 IL App (3d) 140977 The trial court was not deprived of its authority to dismiss defendant’s second-stage post-conviction petition where the State captioned its responsive pleading as an answer rather than a motion to dismiss. It is the substance of a pleading, not its caption, that identifies its nature. Here, the State conceded one issue in defendant’s post-conviction petition but challenged the validity of the remaining claims. And the State argued for dismissal of all but one claim at the dismissal hearing. The State’s responsive pleading thus did not merely admit or deny material facts. The trial court was thus empowered to dismiss defendant’s claims.

People v. Schlosser, 2017 IL App (1st) 150355 There is no constitutional right to the effective assistance of counsel in a post-conviction proceeding, but the Post-Conviction

Hearing Act affords petitioners the right to the reasonable assistance of counsel. The court concluded that where it had previously remanded the cause for additional second stage proceedings because appointed counsel failed to provide reasonable assistance, it was error for the trial to appoint the same defense attorney on remand. The cause was remanded for appointment of a different attorney and additional second stage proceedings.

The court also noted that counsel's representation was deficient in several respects, including that there was no indication that counsel communicated with defendant after the original remand and that counsel failed to properly present defendant's claims, properly complete the notice of appeal, and mail defendant a copy of the dismissal order after being ordered to do so by the trial court. The court also said that defendant did not waive the issue by failing to request new counsel on remand where he was not present at any court hearing and may not have known that the same attorney had been reappointed to represent him.

People v. Richey, 2017 IL App (3d) 150321 In **Kuehner**, 2015 IL 117695, a case that involved post-conviction counsel's motion to withdraw at the second-stage of proceedings, the Supreme Court held that when appointed counsel discovers information that would ethically prohibit him or her from presenting defendant's claims to the court, counsel may not simply move to withdraw on the grounds that the claims are frivolous, as the trial court has already ruled to the contrary. Instead, counsel bears the burden of demonstrating why the trial court's assessment was incorrect. Counsel's motion to withdraw must contain at least some explanation as to why the claims in the petition are so lacking in legal and factual support as to compel his or her withdrawal.

Defendant filed a *pro se* post-conviction petition alleging that his trial counsel was ineffective for failing to file a motion to suppress his confession given defendant's history of mental health problems. Specifically, defendant alleged that he was on medication when he confessed and the police told him that unless he cooperated they would not return him to the medical facility where he resided. The trial court dismissed the petition and defendant appealed.

The Appellate Court remanded the case to the trial court for second-stage proceedings. On remand, a psychologist examined defendant but was unable to render an opinion about defendant's ability to knowingly and voluntarily waive his **Miranda** rights. Counsel filed a motion to withdraw stating that because the psychologist could not reach a conclusion about defendant's ability to voluntarily waive **Miranda** rights, there were no valid issues to raise in an amended petition. Defendant stated that all the expert had done was ask questions about **Miranda** warnings, but "that has nothing to do with my argument." The court allowed counsel to withdraw and dismissed defendant's petition.

The Appellate Court held that post-conviction counsel failed to provide an explanation for why the claim in defendant's petition was lacking in legal and factual support. Defendant's sole claim was that trial counsel did not file a motion to suppress statements even though defendant was on medication when he confessed and the police threatened him if he didn't cooperate. Post-conviction counsel pursued a different question, namely whether defendant was capable of waiving his **Miranda** rights. Since counsel did not address the actual argument made by defendant, counsel did not properly explain why he had to withdraw.

The case was remanded for further second-stage proceedings including the appointment of new counsel.

People v. Thompson, 2016 IL App (3d) 140586 The trial court advanced defendant's *pro se* petition to the second stage. Counsel filed an amended petition alleging that defendant's due

process rights were violated when (1) the trial court entered two first degree murder convictions for the murder of one person and (2) the trial court based the sentence on its personal belief that people like defendant don't deserve mercy. The petition also alleged that appellate counsel was ineffective for failing to raise these issues on direct appeal.

The trial court eventually ordered the State to file a motion to dismiss or an answer to defendant's petition. The State filed an answer stating that the court only entered judgment on one count of first degree murder but the judgment order erroneously showed two counts. The State also argued that taken in context, the trial court's statement that people like defendant don't deserve mercy was reasonable and based on the evidence.

After the State filed its answer, the trial court dismissed defendant's petition without holding an evidentiary hearing.

The Appellate Court held that the trial court improperly dismissed defendant's petition at the second stage where the State filed an answer rather than a motion to dismiss. The Illinois Supreme Court has stated that if the State does not file a motion to dismiss a petition at the second stage of proceedings, the State must answer the petition and the proceedings then advance to a third-stage evidentiary hearing. [People v. Pendleton, 223 Ill. 2d 458 \(2006\)](#).

The Appellate Court rejected the State's argument that the trial court must make an independent determination as to whether the petition made a substantial showing of a constitutional violation. Instead, the State must file a motion to dismiss if it wants the trial court to dismiss the petition based on its insufficiency.

The cause was remanded for a third-stage evidentiary hearing.

[People v. Brown, 2016 IL App \(4th\) 140760](#) In the context of a guilty plea, counsel's conduct is deficient if the attorney failed to ensure that the defendant entered a voluntary and intelligent plea. To establish prejudice, it must be shown that had counsel acted reasonably, there was a reasonable probability that defendant would have pleaded not guilty and gone to trial.

Under [People v. Rissley, 206 Ill. 2d 403, 795 N.E.2d 174 \(2003\)](#), a subjective allegation that defendant would not have gone to trial had counsel been competent does not establish prejudice under **Strickland**. Instead, the defendant must either allege a claim of innocence or articulate a plausible defense that could have been raised had he or she opted to go to trial.

Where the petitioner alleged only that he would not have gone to trial had counsel accurately informed him that his sentence was not eligible for day-for-day credit for good behavior, the allegations were insufficient to satisfy **Strickland** and **Rissley**. The trial court's order dismissing the post-conviction petition was affirmed.

[People v. Al Momani, 2016 IL App \(4th\) 150192](#) The circuit court improperly granted the State's motion to dismiss defendant's post-conviction petition before defendant had notice and an opportunity to be heard.

Defendant filed a *pro se* post-conviction petition that was advanced to the second-stage, where counsel filed a supplemental petition. The State filed a motion to dismiss on February 10, 2015. Two days later, the circuit court granted the State's motion.

A fundamental requirement of due process is the opportunity to be heard in a meaningful manner. Here, the circuit deprived defendant of due process by granting the State's motion to dismiss without providing defendant notice and an opportunity to be heard. At the second stage of post-conviction proceedings, the court has no authority under the Act to rule on a motion to dismiss *ex parte* without giving the defendant notice. Since the Act does not

specifically allow such action, the Appellate Court held that the Act requires notice and an opportunity to be heard prior to granting the State's motion to dismiss. This can be satisfied by having a hearing on the motion or allowing defendant to file a written response.

People v. Lamar, 2015 IL App (1st) 130542 (No. 1-13-0542, 11/19/15)

1. At the second stage of post-conviction petition proceedings, the trial court must determine whether the petition and any accompanying documentation make a substantial showing of a constitutional violation. If the petitioner makes a substantial showing that his constitutional rights were violated, the trial court must advance the petition to a third-stage evidentiary hearing.

At the second stage, all well-pleaded facts that are not positively rebutted by the trial record are taken to be true. Dismissal is warranted at the second stage only if the allegations of the petition, liberally construed in light of the trial record, fail to make a substantial showing of a constitutional violation.

A substantial showing of a constitutional violation exists where the allegations of the petition, if proven in an evidentiary hearing, would entitle the petitioner to relief. Because the purpose of a second stage proceeding is to determine whether the petition is legally sufficient, the trial court does not engage in fact-finding or determine credibility.

2. Here, the post-conviction petition made a substantial showing of a constitutional violation. Defendant was convicted after a bench trial. The petition alleged that defendant wanted to appeal, never told defense counsel that he did not want to appeal, and thought that an appeal was pending. In addition, the affidavit attached to the petition stated that because defendant wanted to appeal, he asked counsel to compare the preliminary transcripts to the trial transcripts.

The court concluded that if an evidentiary hearing showed that defendant asked trial counsel to prepare an appeal, counsel's failure to do so would constitute deficient performance. In addition, the prejudice requirement under **Strickland** would be satisfied by the fact that defendant would have had an appeal had counsel provided competent representation. The court noted that unlike a person convicted on a guilty plea, a defendant convicted after a trial need only file a notice of appeal to effect an appeal. Thus, defendant was not required to show that he had meritorious grounds for an appeal.

The court acknowledged that defense counsel denied defendant's claims in a response which counsel made to an ARDC complaint which defendant filed. Such contradictory statements did not positively rebut defendant's allegations, however, and therefore did not justify dismissal at the second stage. Instead, at most the record reveals disputed facts which must be resolved at an evidentiary hearing.

Because the post-conviction petition made a substantial showing of a constitutional violation, the cause was remanded for a third-stage evidentiary hearing.

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

People v. Smith, 2015 IL App (1st) 140494 (No. 1-14-0494, 11/10/15)

1. At the second stage of a post-conviction proceeding, the petitioner obtains a third-stage evidentiary hearing by making a substantial showing of a constitutional violation. The trial court may dismiss a petition at the second stage if, after reviewing the allegations in the petition and liberally construing the trial record, it finds that defendant failed to make a substantial showing of a constitutional violation. The trial court does not engage in fact-finding or credibility determinations at the second stage. Instead, it takes as true all well-pleaded facts not positively rebutted by the record.

To obtain an evidentiary hearing on a claim of actual innocence, the petitioner must

present newly discovered evidence that vindicates or exonerates him. Evidence is newly discovered if it could not have been discovered before trial even had defendant exercised due diligence. The court rejected the State's argument that evidence is not newly-discovered if, with due diligence, defendant could have discovered it after trial but before the time the evidence was actually discovered.

Newly discovered evidence must do more than merely call into question the sufficiency of the evidence introduced at trial. Instead, the new evidence must be material, non-cumulative, and of such conclusive character as to probably change the result on retrial.

2. Here, an eyewitness's recantation of testimony which inculpated defendant constituted newly discovered evidence. First, even with due diligence, defendant could not have discovered a recantation that occurred some 11 years after trial.

Second, the recantation was material and non-cumulative where the State had no physical evidence linking defendant to the crime, the recantation exonerated defendant and identified a previously unknown shooter, and the recanting witness was the only eyewitness to identify defendant as the shooter.

Third, the recantation, if believed, had the capacity to produce a different result. Although recantations are inherently unreliable, credibility determinations are not permitted at second-stage proceedings. Instead, all well-pleaded facts are taken to be true.

3. The court rejected the State's argument that the conclusive character of the recantation was diminished because the witness failed to aver that he would testify to the facts in his affidavit. The Post-Conviction Hearing Act requires a petitioner to support his claims of constitutional violations with affidavits that "identif[y] with reasonable certainty the source, character, and *availability* of the alleged evidence."

Although the recanting witness did not expressly state that he would testify at a new trial, he indicated his availability by stating that he "wanted to try to help" defendant and by attempting to communicate with defendant's attorney. In addition, because the recantation did not involve any wrongdoing by the witness, it was likely that he would be available at a retrial. Under these circumstances, the witness was not required to also make an affirmative statement that he would testify to the facts contained in the affidavit.

The cause was remanded for a third-stage evidentiary hearing.

People v. Tyler, 2015 IL App (1st) 123470 Relaxation of the *res judicata* doctrine was justified by newly discovered evidence that police officers had engaged in a systematic pattern of abusing criminal suspects. In his post-conviction petition, defendant claimed that he was coerced into confessing when he was physically abused by Chicago police detectives. He presented evidence of other cases and reports in which defendants and witnesses alleged that they had been abused by the same detectives who interrogated defendant.

The court concluded that the evidence was newly discovered because many of the allegations did not surface until years after defendant's trial. The court also concluded that evidence of systematic police abuse was material and would likely change the result of a retrial, because it would have undermined the credibility of the officers who claimed that defendant had confessed. For these reasons, *res judicata* did not bar consideration of the voluntariness of defendant's confession.

Furthermore, the petition made a substantial showing of a constitutional violation. The court noted Illinois precedent that a pervasive pattern of criminal conduct by police officers gives reason to reconsider the voluntariness of a confession. Here, the "countless instances of claims of police misconduct" established a "troubling pattern of systematic abuse by the same detectives" who interrogated defendant and called into question whether defendant's confession was the product of physical coercion. Under these circumstances,

there was a sufficient showing of a constitutional violation to justify a third-stage hearing.

The order dismissing the post-conviction petition was reversed and the cause remanded for a third-stage evidentiary hearing.

People v. Jackson, 2015 IL App (3d) 130575 When leave to file a successive petition is granted, the petition is in effect advanced to the second stage of post-conviction proceedings. At the second stage, the State has 30 days to answer or move to dismiss the petition. No further pleadings are permitted “except as the court may order on its own motion or on that of either party.” **725 ILCS 5/122-5.**

Post-conviction defense counsel may not argue against a client’s interests by seeking dismissal of the post-conviction petition. If appointed counsel believes that a post-conviction petition is frivolous and patently without merit, he or she should file a motion to withdraw as counsel instead of asking that the petition be dismissed. If leave to withdraw is granted, the court may appoint new counsel or allow the defendant to proceed *pro se*. It is improper to dismiss a post-conviction petition merely because post-conviction counsel has been allowed to withdraw.

Here, post-conviction defense counsel erred by filing a motion to dismiss the successive post-conviction petition. In addition, the motion could not be deemed to have been filed by the State where the prosecutor did not file any pleading, but merely acquiesced in defense counsel’s motion. Furthermore, because **§5/122-5** and precedent require that a motion to dismiss must be in writing, the prosecutor’s oral statements would have been insufficient to qualify as a motion to dismiss.

Because post-conviction counsel’s motion to dismiss was improper, the trial court’s order dismissing the petition was reversed. The cause was remanded with instructions to allow defendant to proceed *pro se*.

People v. Bolden, 2014 IL App (1st) 123527 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.

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. In discovery, defense counsel requested all physical evidence, but 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. 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. 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. Under these circumstances trial counsel did not make an adequate effort to contact the witnesses or investigate defendant's alibi.

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. No physical evidence connected defendant to the offenses, and the identification of defendant by the only eyewitness had several weaknesses. The order dismissing defendant's second stage post-conviction petition was reversed and the cause remanded for an evidentiary hearing.

People v. Hobson, 2014 IL App (1st) 110585 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.

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*.

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.

People v. Rivera, 2014 IL App (2d) 120884 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.

The 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.

People v. Alexander, 2014 IL App (2d) 120810 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.

People v. Gacho, 2012 IL App (1st) 091675 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.

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.

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.

People v. Gamino, 2012 IL App (1st) 101077 The defendant filed a petition contending that he was represented at trial by an individual who was not a licensed attorney. He appended to his petition a letter from the ARDC indicating that defense counsel had been on interim suspension 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.

People v. Cleveland, 2012 IL App (1st) 101631 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.

Also, 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.

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.

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 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.

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

People v. Williams, 2012 IL App (1st) 111145 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.

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.

Moreover, **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.

Miller is retroactive because it was 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.

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. 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.

[People v. Clark, 2011 IL App \(2d\) 100188](#) Defense counsel has an obligation to investigate a client's potential defense. This obligation requires discussion with the client. 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 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. 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.

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.

[People v. Nitz, 2011 IL App \(2d\) 100031](#) 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.

[People v. Lofton, 2011 IL App \(1st\) 100118](#) 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.

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.

People v. Bland, 2011 IL App (4th) 100624 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 must 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.

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.

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

People v. Stewart, 381 Ill.App.3d 200, 887 N.E.2d 461 (4th Dist. 2008) A post-conviction petition which alleged that counsel erroneously advised defendant concerning the applicable good-time provision, and that defendant would not have pleaded guilty had he been given accurate information, made a sufficient showing of a constitutional violation to require an evidentiary hearing.

People v. Makiel, 358 Ill.App.3d 102, 830 N.E.2d 731 (1st Dist. 2005) The trial judge erroneously dismissed defendant's post-conviction petition without an evidentiary hearing where the record presented unanswered factual questions which could be resolved only at an evidentiary hearing. The petition presented a substantial allegation of ineffective assistance of trial counsel where counsel failed to obtain the testimony of a co-defendant who had been acquitted at a separate trial and who would have rebutted the key State's witness as to whether defendant participated in the offense.

Also, an evidentiary hearing was required to resolve defendant's allegation of ineffective assistance by appellate counsel. The petition made a substantial showing that appellate counsel was ineffective for failing to raise two issues on appeal: (1) that the defense was improperly prohibited from introducing a pending charge against a State's witness for the purpose of showing bias or motive to falsify, and (2) that the defense was improperly prevented from questioning a witness concerning two State's witnesses' reputations for truthfulness and veracity. Because the record created substantial questions as to whether appellate counsel had been ineffective, an evidentiary hearing was required.

People v. Young, 355 Ill.App.3d 317, 822 N.E.2d 920 (2d Dist. 2005) Defendant was entitled to an evidentiary hearing on a claim that he was denied due process when the trial court summarily denied a pro se post-judgment motion without inquiring whether defendant was represented by counsel and, if not, whether he wanted counsel appointed. Upon receiving a pro se motion directed at a guilty plea, the trial court is required to determine whether defendant is represented by counsel, is indigent, and desires counsel.

People v. Dodds, 344 Ill.App.3d 513, 801 N.E.2d 63 (1st Dist. 2003) The court erred in making factual and credibility determinations at the second stage of the proceeding, where the only legitimate issue is whether the petition, trial record, and other materials make a substantial showing of a constitutional violation. "[A] comprehensive review of the evidence to determine the legal significance of the new DNA evidence is not proper at the second stage of post-conviction proceedings; it must be undertaken at a third stage evidentiary hearing."

People v. Johnson, 338 Ill.App.3d 1004, 789 N.E.2d 927 (2d Dist. 2003) Petition's claims (alleging ineffective assistance of counsel) had not been "de facto withdrawn" from the petition by trial counsel's statement that the claims were "factually non-meritorious"; not only was there no clear indication of any intent to withdraw the claims, but because the matter was before the court on the State's motion to dismiss, the truth of the petition's allegations were to be assumed. Thus, "it was improper for counsel to volunteer the information that defendant's father and trial counsel would refute" the claims raised in the petition.

People v. Tate, 305 Ill.App.3d 607, 712 N.E.2d 826 (1st Dist. 1999) Where the post-conviction petition alleged that trial counsel was ineffective for failing to present alibi witnesses, and the witnesses' affidavits indicated that defendant was not at the scene of the

crime, the petition made a sufficient allegation of constitutional error to require an evidentiary hearing.

The court rejected the State's argument that counsel made a strategic decision not to call the witnesses after interviewing two of them and concluding they would not be persuasive. While counsel might have made such a decision, the court could not say as a matter of law that was counsel's reasoning. Thus, the issue could be resolved only after an evidentiary hearing.

People v. Hayden, 288 Ill.App.3d 1076, 692 N.E.2d 688 (5th Dist. 1997) Where the court denies the State's motion to dismiss a post-conviction petition, the trial court may not grant post-conviction relief without giving the State an opportunity to file a response to the petition.

People v. Gibson, 244 Ill.App.3d 700, 612 N.E.2d 1372 (4th Dist. 1993) Defendant's petition alleged the ineffectiveness of his trial attorney for failing to contact a known alibi witness, and was supported by defendant's affidavit (that he told defense counsel about the alibi witness) and the alibi witness's affidavit. Defendant made the necessary showing warranting an evidentiary hearing, for several trial errors had been found harmless on direct appeal because there was overwhelming evidence of guilt, and the evidence might not have been so overwhelming had the alibi evidence been presented.

People v. Almodovar, 235 Ill.App.3d 144, 601 N.E.2d 853 (1st Dist. 1992) Petition made a substantial showing of a violation of defendant's right to the effective assistance of counsel for counsel's failure to move to suppress his confession, thus requiring an evidentiary hearing. Police reports attached to the petition suggested that the police unlawfully arrested defendant. Also, the trial court denied the petition based on its belief that the officers' testimony established that they had probable cause when, in fact, the officers did not testify regarding the circumstances of defendant's arrest. The court also remanded for a hearing on a claim that trial counsel had a conflict of interest because he faced federal tax evasion charges at the time of the trial. Although the mere pendency of criminal charges does not create a conflict of interest, counsel made conflicting statements about his reasons for not filing a motion to suppress and was unable to produce a waiver of the conflict that he claimed defendant had signed

People v. Brumas, 142 Ill.App.3d 178, 491 N.E.2d 773 (3d Dist. 1986) The affidavits attached to defendant's petition and to State's motion to dismiss presented a factual conflict that required an evidentiary hearing; thus, the trial court erred in dismissing the petition.

People v. Carroll, 131 Ill.App.3d 365, 475 N.E.2d 982 (1st Dist. 1985) The court erroneously denied defendant's petition for post-conviction relief; counsel was ineffective where he failed to advise the trial judge that a previous judge had issued a binding ruling on a motion to suppress that was favorable to defendant.

People v. Lovitz, 101 Ill.App.3d 704, 428 N.E.2d 727 (2d Dist. 1981) Defendant's petition contained an affidavit from the firearms expert who testified at defendant's murder, which provided that, due to a design defect the expert discovered after trial, the gun could have accidentally discharged as defendant claimed. The petition raised a constitutional issue, and an evidentiary hearing was required to determine whether the expert's revised opinion might have altered the outcome of the case. Further, an affidavit from trial counsel, which provided that counsel did not have time to prepare for defendant's trial, also required an evidentiary

hearing.

People v. Graham, 48 Ill.App.3d 689, 363 N.E.2d 124 (5th Dist. 1977) Petitioner's affidavit was sufficient to require an evidentiary hearing because it indicated the source, character, and availability of evidence supporting the allegations (that the State obtained his conviction by knowing use of perjury and that the police induced him to refrain from putting on witnesses by promising that they would "take care of him") and specifically identified four persons with information to support the allegation.

People v. Spicer, 42 Ill.App.3d 246, 355 N.E.2d 711 (1st Dist. 1976) An evidentiary hearing was required where defendant's petition, which alleged that a State's witness lied when he denied that the State compensated him in exchange for his testimony, was supported by an affidavit from the witness's attorney acknowledging that a deal had been made. Cause was remanded for an evidentiary hearing at which the State's Attorney, the State's witness, and his attorney "should testify for complete and final resolution of the matter."

People v. Crislip, 20 Ill.App.3d 175, 312 N.E.2d 830 (5th Dist. 1974) Transcript of guilty plea proceedings, where petitioner said that no inducements had been used to obtain his plea, was insufficient to rebut petitioner's post-conviction claim that his guilty plea was coerced by threats of the sheriff's department. If petitioner did plead through fear of the sheriff's department, this would likely impel him to answer negatively when asked whether his pleas were induced. Evidentiary hearing required.

§9-1(g)

Third Stage of Post-Conviction Proceedings – Evidentiary Hearing

Illinois Supreme Court

People v. English, 2013 IL 112890 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*.

People v. Coleman, 2013 IL 113307 A court should grant relief on an actual innocence claim 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.

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 (2009) The court erred in dismissing the petition after evidentiary hearing, and defendant was entitled to a new trial where a witness discovered after the trial would have testified that he was an eyewitness to the crime and that defendant was not present. The witness was newly discovered, the testimony was material and not cumulative, and the new testimony probably would have changed the result on retrial.

People v. Coleman, 206 Ill.2d 261, 794 N.E.2d 275 (2002) A trial court has wide discretion to limit the type of evidence it will admit at a post-conviction evidentiary hearing. Although a post-conviction petitioner has the right to inquire into a witness's bias, interest, or motive to testify falsely, impeachment evidence is admissible only if it gives rise to an inference that the witness has something to gain or lose by his testimony and is not remote or uncertain.

Illinois Appellate Court

People v. House, 2023 IL App (4th) 220891 Defendant was denied post-conviction relief on his actual innocence claim following a third-stage evidentiary hearing at which three new witnesses testified. He appealed, and the appellate court affirmed.

To succeed on a claim of actual innocence, defendant must present new, material, non-cumulative evidence that is so conclusive that it would probably change the result on retrial. At a post-conviction hearing on a claim of actual innocence, the trial court must evaluate the new evidence along with the trial evidence and determinate the probability of a new outcome if retrial was allowed. In doing so, the trial court necessarily must make credibility determinations. On review, the appellate court must give deference to the trial court's findings and will reverse the trial court's decision only where it is manifestly erroneous, that is only where the opposite conclusion is clearly evident.

Here, the trial court's findings were not against the manifest weight of the evidence. At his trial, defendant was identified by a bystander as the individual who shot and injured a man named Gates. The bystander knew defendant, and also identified him in a photo line up. Additionally, a detective obtained surveillance video of the shooting from a nearby business. The appearance of the shooter on that video matched defendant's appearance on a squad car video recorded during defendant's DUI arrest later that same night.

At the post-conviction hearing, a witness testified that he had encountered the bystander more than a year after the shooting, and the bystander admitted he had falsely implicated defendant. And, two other witnesses testified that they were each present at the scene of the shooting, and defendant did not do it. The court found the first witness not credible, and found that all of the new evidence taken together was not of such conclusive character that it would likely change the result on retrial. The appellate court agreed, noting credibility issues with respect to all three witnesses, including criminal histories, alcohol and drug use, the timing of their coming forward, inconsistencies in their testimony, and the fact that the surveillance video contradicted their versions of events.

People v. Harris, 2023 IL App (1st) 221033 Previously, defendant filed a post-conviction petition alleging that his pretrial inculpatory statements were the product of police coercion. Defendant sought a new suppression hearing based on new evidence of a pattern and practice of abuse and torture at Area 2. That petition was denied at a third stage evidentiary hearing, defendant appealed, and the appellate court reversed and remanded the matter for a new suppression hearing.

On remand, the trial court conducted the suppression hearing and denied the motion to suppress defendant's statements but granted defendant a new trial on the basis that he had been prejudiced by the lack of information about the detectives' histories of committing abuse and other misconduct. The State appealed, arguing that the trial court had exceeded its jurisdiction on remand by granting a new trial despite denying the motion to suppress.

Defendant challenged the appellate court's jurisdiction to entertain the State's appeal, arguing that it was an unauthorized interlocutory appeal under Supreme Court Rule 604(a). The State countered that the suppression hearing, and the resulting new trial order, were a

continuation of the underlying post-conviction proceedings and thus Rule 604(d) had no application. The appellate court majority agreed with defendant.

While the trial court denied defendant's motion to suppress on remand, the appellate court's prior ruling which allowed defendant to pursue that motion was an implicit grant of a new trial. The prior appeal concluded the post-conviction proceedings and the remand intended that defendant's convictions would be vacated regardless of the outcome of the suppression hearing. The circuit court's order granting a new trial was not necessary. It also was not a final order and was not the type of interlocutory order from which the State can appeal under Rule 604(a). Thus, the State's appeal was dismissed.

People v. Marcus, 2023 IL App (2d) 220096 Defendant pled guilty but mentally ill to one count of first-degree murder in exchange for the dismissal of other charges and a sentence of 45 years of imprisonment. Subsequently, defendant filed a post-conviction petition alleging ineffective assistance of counsel for pressuring defendant to forego an insanity defense and failing to inform him that two mental health experts opined that an insanity defense was supported. Defendant alleged that he would not have pled guilty and would have insisted on going to trial had he known about the expert opinions. Following an evidentiary hearing, the trial court denied defendant's petition.

In the guilty plea context, counsel renders deficient performance where he fails to ensure that defendant's plea is knowing and voluntary. To establish prejudice, defendant must show that there was a reasonable probability that, absent counsel's deficient performance, he would not have pled guilty and instead would have chosen to proceed to trial.

The trial court's denial of defendant's petition was not manifestly erroneous. Defendant's claim that defense counsel failed to disclose expert opinion on the issue of insanity was contradicted by defense counsel's testimony as well as defendant's own statements, during the plea hearing, that he had reviewed one expert's report, had discussed with counsel his ability to raise an insanity defense, and had chosen not to pursue that defense. Defendant repeatedly confirmed that he understood the court's questions at the plea hearing and did not have any questions of his own. Further, it was not deficient performance for counsel to advise defendant that obtaining an insanity acquittal would be a difficult task. Counsel's advice in that regard was reasonably competent and was not legally erroneous.

Even assuming deficient performance by counsel, defendant failed to establish prejudice. The record overwhelmingly supported the conclusion that defendant did not want to take his case to trial. Counsel discussed the possibility of an insanity defense and had defendant evaluated by two separate experts. But, defendant pushed to have his case resolved in a timely fashion and told the experts that he did not want to go to trial because he wanted to spare his daughter from that process. And, at the plea hearing, the court confirmed that defendant did not wish to raise an insanity defense. Accordingly, the appellate court affirmed the trial court's denial of defendant's petition.

People v. McMillen, 2021 IL App (1st) 190442 The trial court erred in allowing post-conviction counsel's motion to withdraw at the third stage of proceedings based on counsel's oral representation that she was unable to support defendant's claim of involuntary intoxication with expert testimony. Counsel did not file a written motion to withdraw, and defendant was given no notice of counsel's intent to withdraw and no opportunity to respond to counsel's oral motion.

The Appellate Court held that the appropriate procedure would be for counsel to file a motion to withdraw, giving defendant notice and a meaningful opportunity to respond. Further, having survived the State's motion to dismiss at the second stage, defendant should

have had the chance to present proof in support of his claim rather than having his petition dismissed upon counsel's withdrawal. The matter was reversed and remanded for further third stage proceedings, including reappointment of counsel.

People v. Robinson, 2021 IL App (1st) 171371 Defendant was convicted of murder based on the eyewitness testimony of a single eyewitness who recanted his testimony after the trial. He filed a post-conviction petition alleging actual innocence. The petition contained the affidavit of a new eyewitness, Thomas, who claimed to have witnessed the shooting and would testify that defendant was not one of the shooters. The circuit court dismissed after an evidentiary hearing, finding Thomas' testimony incredible. In particular, the court found it too convenient that Thomas and defendant were in the same cellblock, spoke to each other for years, and never discussed defendant's case before defendant independently discovered Thomas witnessed the shooting. The court concluded that the petition could not meet the "complete vindication and total exoneration" standard.

The Appellate Court majority remanded with instruction. The parties agreed the evidence was newly discovered, material, and non-cumulative. Thus, the only question was whether the new evidence was so conclusive that it would probably change the result on retrial. On this point, the circuit court's employment of the "complete vindication and total exoneration" contradicted the Illinois Supreme Court's subsequent holding in **People v. Robinson, 2020 IL 123849**. "Where a circuit court has judged evidence under an improper standard of proof, the appropriate remedy is to order a new hearing to be conducted under the proper standard." The case was remanded to a different judge pursuant to Rule 366(a)(5) "out of an abundance of caution."

The dissent would have affirmed, finding the "exoneration" language was merely a reference to the "touchstone" of actual innocence claims, and that viewed in totality, the circuit court's findings applied the proper analysis and was free from manifest error.

People v. Harris, 2021 IL App (1st) 182172 Trial court erred in denying defendant's post-conviction petition after a third-stage evidentiary hearing. Defendant made a substantial showing that the result of his pretrial suppression hearing would have been different had he been able to impeach the officers who denied using physical coercion with newly discovered evidence showing a pattern and practice of police abuse by some of those same officers.

The court erred in relying on information outside the record to find the officers credible. Specifically, the court found that this was a "heater case" with a great deal of notoriety such that officers would not have jeopardized the prosecution by using coercive tactics. No such evidence had been presented to the court. The matter was remanded for a new suppression hearing.

People v. Brown, 2020 IL App (1st) 190828 At a third stage evidentiary hearing, the burden is on the defendant to show a denial of a constitutional right by a preponderance of the evidence. Here, defendant failed to establish a due process violation based on the court's refusal to allow expert testimony on the reliability of eyewitness identification at defendant's trial. While the sole evidence of defendant's guilt consisted of eyewitness identification testimony, the trial court's decision to bar an eyewitness identification expert was affirmed on direct appeal and was therefore precluded by *res judicata* principles in post-conviction proceedings. **People v. Lerma, 2016 IL 118496**, did not change the law but instead reaffirmed the rule that admission of expert testimony is within the discretion of the trial

court. And, even if **Lerma** was a change, it was not retroactive under **Teague** and could not support a post-conviction claim.

Likewise, defendant did not establish his claim of actual innocence. One of the witnesses he presented in support of that claim was both known to him and available at trial and therefore was not newly discovered. While the witness testified that defense counsel did not call her to testify because she had been present in the courtroom during the trial, she was not precluded from testifying by the court's order excluding witnesses and the record did not show that it was the court who prevented her from testifying. And, the court found the other witnesses not credible and not so conclusive as to probably change the result on retrial.

People v. Shipp, 2020 IL App (2d) 190027 Defendant, who was walking in the snowy street near the reported location of a fight, ran from the police after they tried to stop him. He was arrested and searched. He filed a motion to suppress the gun found during the search, and while the State argued that defendant could have been arrested for walking in the street in violation of a city ordinance, the trial court instead found the arrest justified based on defendant's flight.

In a post-conviction petition, defendant alleged appellate counsel's ineffectiveness for failing to challenge the ruling on the motion to suppress. The circuit court summarily dismissed the petition, and the Appellate Court remanded, finding a gist of a constitutional claim. After further post-conviction proceedings, at which no further evidence was offered, the circuit court granted the petition and remanded for a new trial.

The State argued in the instant appeal that the arrest was justified by the ordinance violation. Defendant argued that the State's argument was precluded by the law-of-the-case doctrine, and that the State forfeited the argument when it failed to raise it in the first appeal. The Appellate Court disagreed, holding that in the post-conviction context, remanding a first-stage dismissal does not decide the issues for purposes of the law-of-the-case doctrine, it merely finds potential merit. Moreover, the State's failure to raise the ordinance issue in the first appeal did not forfeit the argument for the instant appeal, especially since the issue depended on factual determinations not available on a first-stage record.

However, the circuit court did not err in granting the petition. The State's ordinance-violation argument required a showing that walking on the sidewalk was practicable, such that walking on the street was unnecessary. Although the police testified the sidewalks were clear, video of the arrest shows mounds of snow along the sides of the street. Thus, resolution of the issue required a factual determination. Moreover, the State never provided legal arguments as to the definition of "practicable." The State bore the burden of establishing probable cause, and offered insufficient evidence or legal argument to meet its burden.

People v. Pabello, 2019 IL App (2d) 170867 Defendant's post-conviction petition alleging an involuntary **Miranda** waiver was denied after a third-stage evidentiary hearing. Defendant alleged on appeal that he received unreasonable assistance of PC counsel. The Appellate Court affirmed. First, defendant's allegation that counsel violated 651(c) by failing to present additional evidence of defendant's lack of education is misplaced. Counsel here complied with Rule 651(c) at the second stage when he consulted with defendant, examined the trial record, and amended the *pro se* petition as necessary to adequately present defendant's claims. Once the petition was advanced to the third stage, Rule 651(c) no longer applied. Nor was counsel's performance otherwise unreasonable, where additional information about defendant's lack of education would not likely have resulted in a finding that defendant did not knowingly and intelligently waive his **Miranda** rights.

People v. Galvan, 2019 IL App (1st) 170150 Defendant was convicted of committing arson and two counts of first-degree murder in 1986, at the age of 18. His conviction was based on his confession, which he had tried to suppress by alleging coercion by interrogating detectives, including Detective Switski. Defendant filed a successive post-conviction petition alleging actual innocence, and the circuit court granted an evidentiary hearing. At the hearing, several witnesses testified that Switski coerced their confessions around the same time. The circuit court denied the petition, stating that it did not believe any of the witnesses.

The Appellate Court reversed, finding that the question is not whether the witnesses were credible, but whether they would have impeached Switski by showing a pattern of abuse, such that the outcome of the suppression hearing may have been different. Here, the new evidence was conclusive enough to impeach Switski and potentially alter the outcome of the suppression hearing.

People v. Hernandez, 298 Ill.App.3d 36, 697 N.E.2d 1213 (1st Dist. 1998) Generally, an evidentiary hearing should be held when a post-conviction petition presents a question of fact. Where a petition raises questions of perjury and the credibility of a witness's post-trial recantation, however, the trial court may dismiss without an evidentiary hearing if it presided over defendant's trial, "because the trial judge heard the trial testimony and could resolve the questions of fact concerning the reliability of the alleged perjury and recantation" in light of the witness's credibility, the trial record, and the affidavits attached to the petition.

Illinois Supreme Court

People v. Montgomery, 162 Ill.2d 109, 635 N.E.2d 910 (1994) Defendant's petition alleged that the trial court violated due process by renegeing on an ex parte promise to impose a life sentence. The trial court abused its discretion by refusing to allow defendant to cross-examine the trial court and the court reporter. The desired questions "went right to the heart of the controversy" - whether the judge had made an improper promise to impose a life sentence. Because an informed conclusion about the merits of defendant's allegations was impossible without considering the proposed cross-examination, the cause was remanded with instructions to reopen the hearing.

People v. Moore, 60 Ill.2d 379, 327 N.E.2d 324 (1975) The trial court properly denied defendant's post-conviction relief following an evidentiary hearing at which a witness repudiated his identification testimony at trial because the witness's testimony at the hearing "lacked that quantum of credibility" which would permit relief. See also, **People v. Berland**, 115 Ill.App.3d 272, 450 N.E.2d 979 (1st Dist. 1983).

Illinois Appellate Court

People v. Hiatt, 2018 IL App (3d) 160751 Following a guilty plea to possession of a controlled substance, defendant was released on recognizance and subsequently failed to appear at sentencing. He was sentenced in absentia and, after apprehension, filed a post-conviction petition. The trial court did not err in granting granted post-conviction relief on the basis that defendant received ineffective assistance of guilty plea counsel for failing to investigate defendant's fitness to plead.

The Appellate Court upheld the decision to grant relief. Evidence at the evidentiary hearing showed that prior to the plea, counsel was aware of defendant's recent fitness evaluation in an Iowa case. Had counsel reviewed that fitness evaluation, he would have

learned of defendant's mental health history, including diagnoses of PTSD, OCD, ADHD, anxiety, psychosis, and depression. Also, the trial court found defendant's post-conviction testimony credible, specifically that he believed he was released after his plea in order to work as a DEA agent and apprehend "Drug Lords," which led to his traveling to Florida to follow the flow of drugs (and which caused him to miss his sentencing hearing).

People v. Brickhouse, 2018 IL App (3d) 150807 The police arrested defendant and placed him in an interrogation room. While the detective asked defendant to sign a consent form for videotaping the interrogation, defendant stated, "I can't ask for a lawyer?" The detective responded that they would get to that, but that he first needed his consent to record the interrogation. Defendant signed the consent and the detective immediately **Mirandized** defendant. Defendant signed a **Miranda** waiver and gave an exculpatory statement, followed later by two inculpatory **Mirandized** statements.

The circuit court denied defendant's post-conviction claim of ineffective assistance of counsel after an evidentiary hearing. The Appellate Court affirmed. It held that the defendant's statement was ambiguous and not a clear request for counsel, particularly where it was made prior to **Miranda** warnings. Moreover, it found that the detective did not deny counsel, but rather, within 30 seconds, read defendant his **Miranda** rights. The court further found the statement voluntary. The court also held that counsel's decision was strategic where the initial statement was exculpatory and counsel saw no basis for suppressing the latter statements.

People v. Brown, 2018 IL App (4th) 160288 Where a post-conviction petition is advanced, in part, to a third-stage evidentiary hearing and then reassigned to another judge, the new judge has the inherent authority to reconsider, *sua sponte*, the partial denial of the State's motion to dismiss the petition. The Court distinguished **People v. Thompson, 2016 IL App (3d) 140586**, which found error in the judge's *sua sponte* dismissal of a post-conviction petition where the State filed an answer and did not move to dismiss. Here, while the State filed an answer after its motion to dismiss was partially denied, the State originally sought dismissal of the entire petition. The court's inherent authority to reconsider the partial denial of the motion to dismiss was not limited by the State's subsequent filing of an answer.

People v. Williams, 2017 IL App (1st) 152021 At a third-stage evidentiary hearing, the defendant must show by a preponderance of the evidence a substantial violation of a constitutional right. The trial court acts as the trier of fact at the hearing, resolves conflicts in the evidence, and determines the credibility of the witnesses and the weight to be given to the evidence. After a third-stage hearing involving fact-finding and credibility determinations, a trial court's decision will be reversed only if it is manifestly erroneous.

Defendant alleged that his trial counsel was ineffective for failing to call three alibi witnesses. The three alibi witnesses testified at the evidentiary hearing and provided defendant with an alibi. Defendant also testified about his alibi. At the close of defendant's evidence, the trial court granted the State's motion for a directed finding. The court found none of defendant's witnesses credible and concluded there was no reasonable probability that the outcome of trial would have been different if the witnesses had testified about the alibi. On appeal, defendant argued that it was procedurally improper for the trial court to rule in the State's favor without requiring it to present any evidence.

Actions under the Post-Conviction Hearing Act are "civil in character" and courts may enter orders as are "generally provided in civil cases." **725 ILCS 5/122-5**. Under the Code of

Civil Procedure, when a defendant in a bench trial moves for a finding or judgment in his favor, the court must consider witness credibility and the weight and quality of the evidence in ruling on whether the plaintiff failed to make a *prima facie* case. 735 ILCS 5/2-1110. The Appellate Court held that the trial court may utilize section 2-1110 guidelines in ruling on a State's motion for a directed finding in a third-stage post-conviction case.

The Appellate Court held that the trial court in this case properly weighed the totality of the evidence presented, including credibility determinations, and did not err in granting the State's motion for a directed finding.

People v. Serrano, 2016 IL App (1st) 133493; **People v. Montanez**, 2016 IL App (1st) 133726 At an evidentiary hearing on an actual innocence claim, the post-conviction court has wide latitude to receive proof by affidavits, depositions, oral testimony, or other evidence.

Where the trial court grants a directed finding after the petitioner's case is presented at a third-stage evidentiary hearing, the decision is reviewed *de novo*. When presented with a motion for a directed finding, the trial court must construe the evidence in the light most favorable to the nonmovant.

Where the only direct evidence of the petitioner's guilt of murder was the testimony of a witness who repudiated his statement completely in a sworn affidavit and claimed that he had been fed the testimony by a police detective, the claim concerning the detective's actions was corroborated by other witnesses, and there was no physical evidence connecting defendant to the offense, the petitioner made a sufficient *prima facie* case to withstand the State's motion for a directed finding.

The recantation was significantly corroborated by testimony of another witness that he was coerced by the same detective to give false testimony against the defendant and that he received special treatment in prison after he implicated defendant and his co-defendant. The witness also testified that when he decided not to testify falsely, the detective took away his special privileges and again tried to solicit false testimony.

The court also observed that the trial judge failed to draw an adverse inference from the detective's invocation of the Fifth Amendment when he was testified at the post-conviction hearing. Post-conviction proceedings are civil in nature. While the privilege against self-incrimination may be invoked at a civil proceeding, the trial court may draw an adverse inference that had questions been answered truthfully, the answers would have been damaging to the person invoking the privilege. While the court found that it need not decide whether an adverse inference was warranted in this case, the trial court should have at least considered doing so where the detective failed to answer probative, detailed questions about his conduct in this case.

The trial court also erred by discounting or excluding evidence showing a pattern of similar misconduct by the detective over a period of several years. All of the evidence concerned attempts by the detective to coerce witnesses to make false statements, and many of the persons involved were Hispanics who did not speak fluent English. In addition, there was evidence from a Chicago police detective who worked alongside the detective in question that the detective was willing to procure false identifications.

The Appellate Court stated:

We have before us a recantation from the principal trial witness saying he was coerced by detectives, a partial recantation from the secondary witness (the victim's wife) saying she was misled by investigators, sworn statements from at least 20 individuals claiming that the investigators coerced them in a similar manner, and then the detective under suspicion coming to the hearing and invoking the fifth

amendment in response to all of the pointed questions. At this stage in the proceedings, petitioner was required to make out merely a *prima facie* case That has clearly occurred here.

The court also found that on remand, the cause should be assigned to a different judge: Petitioner offered up an abundance of evidence to support his claim of actual innocence. The trial court turned a blind eye to much of the evidence and also refused to admit probative, admissible evidence that, when evaluated under the proper standard, is damning. Even where the court gave lip service to the standard it was supposed to apply, the court clearly did not adhere to that standard. The post-conviction court gave the impression that it was flatly unwilling to consider the evidence offered by petitioner. . . . Petitioner would be prejudiced were we not to assign the case to a new judge on remand.

The directed finding in favor of the State was vacated and the cause remanded for further proceedings.

People v. Whirl, 2015 IL App (1st) 111483 After a motion to suppress his statement was denied, defendant pleaded guilty to murder and armed robbery. He then filed a post-conviction petition which the trial court denied after a third-stage evidentiary hearing.

In the course of finding that the evidence presented at the hearing justified a new hearing on the motion to suppress, the court made two observations.

First, where defendant claimed that newly-discovered evidence established that the officer who interrogated him had engaged in a pattern of abusive tactics when interrogating other suspects, the issue at the third-stage post-conviction hearing was not whether the statement in question was voluntary, but whether the outcome of the suppression hearing would likely have been different had the evidence been presented. The Appellate Court concluded that in this case presentation of the newly-discovered evidence would likely have produced a different ruling on the motion to suppress.

Second, because a post-conviction proceeding is civil in nature, a trial judge is free to draw adverse inferences when a witness exercises his or her Fifth Amendment rights when questioned about probative evidence that has been offered against them. Where the State did not respond to the petitioner's evidence that an officer engaged in a pattern of torturing suspects, that officer's invocation of the Fifth Amendment was significant and should have caused the trial court to draw a negative inference.

The court reversed the order denying post-conviction relief, vacated defendant's guilty plea, and ordered a new suppression hearing.

People v. Carter, 2013 IL App (2d) 110703 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.

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.

People v. Dodds, 344 Ill.App.3d 513, 801 N.E.2d 63 (1st Dist. 2003) Where post-trial DNA testing neither completely exculpates nor inculpates defendant, the appropriateness of post-conviction relief depends on the significance of the test results in light of the evidence at trial. Although an evidentiary hearing is not required whenever post-trial DNA testing is ordered and the post-conviction petition alleges actual innocence, if the test results are at least somewhat favorable to defendant, "an evidentiary hearing is necessary to determine . . . whether the DNA results would or would not likely change the results upon a retrial." Although not completely exculpating defendant, the DNA test results here could have supplied a favorable inference of innocence. Thus, the trial court should have conducted a third-stage evidentiary hearing to determine whether, in light of the evidence, the testing would likely have changed the result of the trial.

People v. Hood, 45 Ill.App.3d 425, 359 N.E.2d 484 (3d Dist. 1977) The trial court applied the wrong standard in denying defendant's petition, which alleged that perjury was committed at defendant's trial, following an evidentiary hearing. The court thought that defendant did not meet his burden of showing that a different result would be likely upon retrial; however, the State, not the defense, has the burden to establish beyond a reasonable doubt that the perjury did not contribute to the conviction once perjury is established.

People v. Allen, 7 Ill.App.3d 249, 287 N.E.2d 171 (4th Dist. 1972) The trial court erred by denying post-conviction relief where the uncontradicted testimony of a psychiatrist at the post-conviction hearing established defendant's lack of capacity to stand trial.

People v. Bain, 10 Ill.App.3d 363, 293 N.E.2d 758 (5th Dist. 1937) Dismissal of a post-conviction petition was improper; the dismissal was in direct opposition to Supreme Court's mandate to hold an evidentiary hearing.

§9-1(h)

Forfeiture and Res Judicata

§9-1(h)(1)

Generally

Illinois Supreme Court

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. Here, 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.

People v. Blair, 215 Ill.2d 427, 831 N.E.2d 604 (2005) A *pro se* post-conviction petition may be summarily dismissed based upon *res judicata* and waiver where the application of those doctrines is clear from the record.

People v. Pitsonbarger, 205 Ill.2d 444, 793 N.E.2d 609 (2002) A post-conviction proceeding allows inquiry only into constitutional issues that were not and could not have been adjudicated on direct appeal. Issues that were raised and decided on direct appeal are barred by *res judicata*, while issues that could have been raised, but were not, are waived. See also, **People v. Henderson**, 171 Ill.2d 124, 662 N.E.2d 1287 (1996).

People v. Tenner, 206 Ill.2d 381, 794 N.E.2d 238 (2002) The collateral estoppel doctrine bars relitigation of an issue already decided in a prior case. Where in his first petition defendant argued that defense counsel was ineffective for failing to seek a psychiatric evaluation for a possible insanity defense and to develop mitigating evidence for sentencing, the collateral estoppel doctrine precluded a subsequent petition arguing that: (1) the trial court erred by failing to hold a fitness hearing despite a *bona fide* doubt of fitness, and (2) defendant was unconstitutionally tried and sentenced while unfit.

The court acknowledged federal authority holding that the prosecution of an actually unfit defendant violates substantive due process, and therefore is not subject to default under the cause-and-prejudice test. The court noted that it has not distinguished between procedural and substantive due process in terms of the cause-and-prejudice-test, and concluded that it need not address the question in this case in light of its ruling that the collateral estoppel doctrine applied.

People v. Whitehead, 169 Ill.2d 355, 662 N.E.2d 1304 (1996) *Res judicata* and waiver doctrines are relaxed in three situations: where required by "fundamental fairness," where the waiver stems from the incompetency of appellate counsel, and where the facts relating to the claim did not appear on the face of the original appellate record.

On direct appeal, defendant had argued that trial counsel was ineffective for "mishandling" a reasonable doubt defense, for failing to investigate and present available evidence, and for failing to act competently at sentencing. The Court held that these issues could not be raised again in post-conviction proceedings, despite the fact that the post-conviction petition contained new affidavits.

People v. Thomas, 164 Ill.2d 410, 647 N.E.2d 983 (1995) A defendant may not "evade" waiver and res judicata "by couching [a post-conviction claim] in the context of ineffective assistance" of counsel, particularly where the underlying issue was raised on direct appeal and there is no explanation for not also raising ineffective assistance of counsel at that time. See also, **People v. Simpson**, 204 Ill.2d 536, 792 N.E.2d 265 (2001) (a petitioner cannot avoid res judicata simply by rephrasing issues previously addressed on direct appeal (as petitioner did here)).

People v. Thomas, 38 Ill.2d 321, 231 N.E.2d 436 (1967) Neither res judicata nor waiver applies to matters outside the record. See also, **People v. Thompkins**, 161 Ill.2d 148, 641 N.E.2d 371 (1994) (allegation of ineffective assistance of counsel was based on facts outside the record); **People v. Orange**, 168 Ill.2d 138, 659 N.E.2d 935 (1995) (same); **People v. Ashford**, 168 Ill.2d 494, 660 N.E.2d 944 (1995) (same); **People v. Lear**, 175 Ill.2d 262, 677 N.E.2d 895 (1997) (same); **People v. Nix**, 150 Ill.App.3d 48, 501 N.E.2d 825 (3d Dist. 1986) (same); **People v. Mahaffey**, 194 Ill.2d 154, 742 N.E.2d 251 (2000) (because newly discovered evidence is clearly outside the trial record, the res judicata and waiver doctrines do not apply). Compare, **People v. Britz**, 174 Ill.2d 163, 673 N.E.2d 300 (1996) (although specific documents in question were not in record on direct appeal, issue was waived where defendant failed to raise same issue on direct appeal based on "several available independent" bases). But see, **People v. Madej**, 177 Ill.2d 116, 685 N.E.2d 908 (1997) (procedural fairness required relaxation of res judicata doctrine where post-conviction record contained substantial new evidence).

Illinois Appellate Court

People v. Weathers, 2015 IL App (1st) 133264 Prior to his trial, defendant initially filed a motion to suppress alleging that his confession was the result of physical coercion by the interrogating officers. But when new counsel appeared for defendant, he withdrew the motion to suppress.

On direct appeal, defendant raised no issue about the confession or counsel's withdrawal of the motion. In his first post-conviction petition, filed in October 2009, defendant argued that trial counsel was ineffective for withdrawing the motion because the police failed to give him **Miranda** warnings.

Defendant filed a *pro se* motion for leave to file a successive post-conviction petition, attaching portions of the 2012 Illinois Torture Inquiry and Relief Commission (TIRC) report which showed that the officers who obtained his confession were involved in a pattern of coercive tactics in many other cases. Defendant argued that this newly discovered evidence supported his claim that trial counsel had been ineffective for withdrawing his motion to suppress, since it showed that his confession had been coerced and he had been deprived of due process.

The trial court denied defendant's motion, holding that the ineffective assistance argument had been previously raised in the first petition and thus was barred by *res judicata*.

On appeal defendant argued that the TIRC report supported his claim that the State violated his due process rights by using a physically coerced confession at his trial. The State argued that defendant forfeited his appellate claim because in his post-conviction petition he framed the issue as ineffective assistance, not a due process violation. The Appellate Court rejected the State's argument. Although the petition was framed as an ineffective assistance claim, it also contended that defendant was subjected to physical coercion and that due

process of law requires the suppression of a coerced confession. Under a liberal construction of the petition, the defendant alleged a due process violation. Accordingly, the claims on appeal were substantially the same as the claims in the petition and were not forfeited.

Defendant also satisfied the cause and prejudice test. The TIRC report was not released until after defendant's initial post-conviction petition had been fully litigated. The report showed that the officers involved in obtaining defendant's confession were also involved in similar coercive tactics in other cases. The court remanded for second stage proceedings.

People v. English, 2011 IL App (3d) 100764 Post-conviction 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.

Defendant's PC claims that his 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*."

People v. Jones, 364 Ill.App.3d 1, 846 N.E.2d 947 (1st Dist. 2005) Post-conviction issues not barred by waiver or *res judicata* where defendant failed to respond to appellate counsel's Anders motion on direct appeal.

§9-1(h)(2) Forfeiture

Illinois Supreme Court

People v. English, 2013 IL 112890 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.

The doctrine of forfeiture is relaxed where the forfeiture stems from the ineffective assistance of counsel. But, 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.

People v. Tate, 2012 IL 112214 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.

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.

People v. Brown, 225 Ill.2d 188, 866 N.E.2d 1163 (2007) An attack on a void judgment can be attacked at any time; it does not depend on the Post-Conviction Hearing Act for its viability. Defendant's transfer from juvenile to criminal court was void, where the statutory provisions pursuant to which defendant's transfer was carried out were enacted as part of the Safe Neighborhoods Act.

People v. Pitsonbarger, 205 Ill.2d 444, 793 N.E.2d 609 (2002) The "cause-and-prejudice" test is used to determine whether issues are waived because they could have been raised on direct appeal and to determine whether, under the "fundamental fairness" exception, claims raised in successive petitions may be considered on their merits. "Cause" is "some objective factor external to the defense that impeded counsel's efforts" to raise the specific claim in question in an earlier proceeding. "Prejudice" occurs where application of the waiver doctrine would preclude consideration of an error that "so infected the entire trial that the resulting conviction or sentence violates due process." But, even where a petitioner cannot show "cause and prejudice," the failure to raise a claim in an earlier petition will be excused if the petition shows actual innocence or, in a death proceeding, that defendant would not have been found death-eligible absent the error.

People v. Harris, 206 Ill.2d 1, 794 N.E.2d 314 (2002) Defendant did not forfeit a **Brady v. Maryland** claim by failing to file a post-sentencing motion. Because the facts relating to the claim did not appear in the original trial record, the forfeiture rule was inapplicable.

People v. Hickey, 204 Ill.2d 585, 792 N.E.2d 232 (2001) The Court reviewed defendant's post-conviction issues as a matter of fundamental fairness, though the direct appeal reflected the factual basis for the issues and defendant did not allege appellate counsel's ineffectiveness for not raising them, because it was impossible for post-conviction counsel to determine whether trial and appellate counsel were ineffective where the trial court denied defendant's discovery request and quashed defense subpoenas. See also, **People v. Hindson**, 319 Ill.App.3d 1, 747 N.E.2d 908 (2d Dist. 2001) (where there was no evidence to sustain a conviction for which a 30-year prison sentence had been imposed, fundamental fairness required relaxation of the waiver doctrine so the issue could be reached in post-conviction proceedings although it had not been raised at trial or on direct appeal).

People v. Evans, 186 Ill.2d 83, 708 N.E.2d 1158 (1999) Trial counsel's ineffective assistance was not waived where the evidence that counsel allegedly failed to present at trial was not included in the record on direct appeal. See also, **People v. Johnson**, 338 Ill.App.3d 1004, 789 N.E.2d 927 (2d Dist. 2003) (the trial judge erred by granting the State's motion to dismiss two post-conviction claims alleging ineffective assistance of trial counsel and finding that the issues could have been raised on direct appeal where both claims depended on facts outside the trial record); **People v. Mauro**, 362 Ill.App.3d 440, 840 N.E.2d 757 (2d Dist. 2005) (advising petitioners to include in their petitions a sentence stating that any potential forfeiture, waiver, or procedural default of any of the issues raised in the petition stem from the ineffectiveness of trial or appellate counsel).

People v. Erickson, 161 Ill.2d 82, 641 N.E.2d 455 (1994) Where misrepresentation in an expert's credentials was revealed on cross-examination, the issue should have been raised on direct appeal and defendant could not raise the issue in post-conviction proceedings even though evidence discovered after the trial indicated that the expert lacked any qualifications at all and that the opinions expressed by the expert at trial had been totally erroneous.

People v. Davis, 156 Ill.2d 149, 619 N.E.2d 750 (1993) The plain-error rule cannot be invoked to save procedurally defaulted claims in post-conviction proceedings. See also, **People v. Coady**, 156 Ill.2d 531, 622 N.E.2d 798 (1993); **People v. Caballero**, 179 Ill.2d 205, 688 N.E.2d 658 (1997).

Defendant forfeited his claim that his trial attorney was ineffective for not objecting to an improper conviction of a lesser-included offense because he did not raise this argument in his pro se post-conviction petition or his counseled amended petition. Defendant could not argue that post-conviction counsel was ineffective for failing to raise an issue, as the right to post-conviction counsel is created by statute and does not involve the Sixth Amendment. However, the Court exercised its supervisory authority and vacated the lesser-included offense. But see, **People v. Coady**, 156 Ill.2d 531, 622 N.E.2d 798 (1993) (declining to exercise supervisory authority to vacate a lesser-included offense where there was only a remote possibility that the erroneous conviction would affect defendant in the future and where the conviction resulted from a negotiated guilty plea from which defendant benefitted).

People v. Gaines, 105 Ill.2d 79, 473 N.E.2d 868 (1984) Defendant's claim concerning the effective assistance of trial counsel was not waived, though the facts supporting the issue appeared on the face of the record, because the trial attorney also handled the direct appeal. "It would be unreasonable to expect appellate counsel to convincingly raise and argue his own incompetency." See also, **People v. Wright**, 189 Ill.2d 1, 723 N.E.2d 230 (1999) (defendant forfeited successive post-conviction issue regarding his appellate counsel's ineffectiveness by not raising it in his first petition; though his counsel on the first post-conviction consulted with defendant's direct appeal attorneys, such consultation would not have prevented post-conviction counsel from arguing that appellate counsel was ineffective).

People v. Logan, 72 Ill.2d 358, 381 N.E.2d 264 (1978) Defendant was not allowed to file an amended post-conviction petition to resolve his claim that a key State witness had lied at his trial because he had failed to avail himself of previous opportunities to litigate the issue.

People v. Sarelli, 55 Ill.2d 169, 302 N.E.2d 317 (1973) A conviction that rests on a statute that has been held invalid must be vacated even where the issue of the statute's constitutionality is raised for the first time in a post-conviction proceeding.

Illinois Appellate Court

People v. Cole, 2023 IL App (1st) 220174 Defendant was convicted of first degree murder for his role in the death of Darryl Green, who was kidnaped for ransom in Illinois and subsequently killed in Indiana. The trial court sentenced defendant to 28 years of imprisonment. On direct appeal, defendant unsuccessfully challenged his sentence as excessive.

Subsequently, defendant filed a post-conviction petition alleging that his murder conviction was void for lack of jurisdiction because the killing occurred in Indiana, not Illinois. The trial court summarily dismissed defendant's petition, and the appellate court affirmed.

A person is subject to prosecution in Illinois for an offense which he commits, either in whole or in part, within the State. Under 720 ILCS 5/1-5, Illinois's criminal jurisdiction statute, an offense is committed partly within Illinois "if either the conduct which is an element of the offense, or the result which is such an element, occurs within the State." Defendant argued that where the decedent's body was found in Indiana, and the evidence was that he was actually killed in Indiana, the State was required, and failed, to prove beyond a reasonable doubt that both the intent to commit the offense and some criminal act in furtherance of that intent was committed in Illinois and thus failed to establish criminal jurisdiction.

The appellate court agreed with the State, however, that defendant had forfeited this claim by not raising it on direct appeal. The criminal jurisdiction statute is simply a grant of authority to the State defining who is lawfully "subject to prosecution" within the State. It is not actually a component of subject matter jurisdiction. Thus, the court rejected defendant's contention that he was not subject to forfeiture concerns because his conviction was void for lack of jurisdiction.

The court went on to note that dismissal of defendant's petition could have been affirmed on the merits, as well. Here, the evidence showed that defendant and his codefendants made multiple calls to the decedent's brother in an effort to negotiate a ransom. When they were unsuccessful, they called the brother and told him to "make arrangements" for his brother and that they would not be calling again. They then drove the decedent to Indiana and killed him. Defendant did not dispute that the intent to kill the decedent was

formed in Illinois, and the act of forcing the decedent into a vehicle and driving toward Indiana, while defendant and his codefendants were armed with weapons, was a criminal act in furtherance of that intent. Accordingly, prosecution in Illinois was proper.

People v. Welling, 2021 IL App (2d) 170944 Defendant forfeited his post-conviction claim of ineffective assistance based on trial counsel's failure to have him examined by a mental health expert. Defendant had been represented by the public defender at trial and had requested and obtained county funds for an investigator and DNA expert during pretrial proceedings. The absence in the record of a similar request for a mental health expert was clear evidence that counsel had not sought an examination for defendant. And, defendant's alcoholism issues, which formed the basis for his post-conviction claim, were apparent on the record. Accordingly, defendant could have raised his claim of ineffective assistance on direct appeal.

Regardless, the court concluded defendant failed to state the gist of a claim. Defendant did not allege that he suffered from a mental illness, but rather asserted insanity based on alcoholism. To support a finding of insanity based on long-term drug or alcohol abuse, a person must suffer "settled" or "fixed" insanity, which means they must also be insane when not under the influence. There was no evidence that defendant suffered such condition here where his statements and actions after the offense indicated that he knew what he had done was wrong, and he took steps to conceal what he had done.

People v. Addison, 2021 IL App (2d) 180545 The Court rejected the State's assertion that a defendant who is tried *in absentia* waives collateral review of any issue that could have been raised during his original trial proceedings had he appeared. The Post-Conviction Hearing Act provides a separate remedy not contingent upon exhaustion of any other remedy. Further, the bulk of defendant's claims in his petition alleged ineffective assistance of counsel, which usually cannot be resolved during trial, but rather are relegated to direct appeal or collateral proceedings.

Defendant was deprived of the reasonable assistance of appointed post-conviction counsel, despite counsel's filing of a Rule 651(c) certificate, where counsel failed to make routine amendments to defendant's petition to overcome forfeiture concerns. Accordingly, remand was required regardless of whether defendant's underlying claims had merit. The reviewing court should not speculate whether defendant's petition would have been dismissed if counsel had adequately performed his duties under Rule 651(c).

People v. Cowart, 2015 IL App (1st) 131073 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.

People v. Weathers, 2015 IL App (1st) 133264 Prior to his trial, defendant initially filed a motion to suppress alleging that his confession was the result of physical coercion by the

interrogating officers. But when new counsel appeared for defendant, he withdrew the motion to suppress.

On direct appeal, defendant raised no issue about the confession or counsel's withdrawal of the motion. In his first post-conviction petition, filed in October 2009, defendant argued that trial counsel was ineffective for withdrawing the motion because the police failed to give him Miranda warnings.

Defendant filed a *pro se* motion for leave to file a successive post-conviction petition, attaching portions of the 2012 Illinois Torture Inquiry and Relief Commission (TIRC) report which showed that the officers who obtained his confession were involved in a pattern of coercive tactics in many other cases. Defendant argued that this newly discovered evidence supported his claim that trial counsel had been ineffective for withdrawing his motion to suppress, since it showed that his confession had been coerced and he had been deprived of due process.

The trial court denied defendant's motion, holding that the ineffective assistance argument had been previously raised in the first petition and thus was barred by *res judicata*.

On appeal defendant argued that the TIRC report supported his claim that the State violated his due process rights by using a physically coerced confession at his trial. The State argued that defendant forfeited his appellate claim because in his post-conviction petition he framed the issue as ineffective assistance, not a due process violation. The Appellate Court rejected the State's argument. Although the petition was framed as an ineffective assistance claim, it also contended that defendant was subjected to physical coercion and that due process of law requires the suppression of a coerced confession. Under a liberal construction of the petition, the defendant alleged a due process violation. Accordingly, the claims on appeal were substantially the same as the claims in the petition and were not forfeited.

Defendant also satisfied the cause and prejudice test. The TIRC report was not released until after defendant's initial post-conviction petition had been fully litigated. The report showed that the officers involved in obtaining defendant's confession were also involved in similar coercive tactics in other cases. The court remanded for second stage proceedings.

People v. Tapia, 2014 IL App (2d) 111314 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. Defendant reviewed the PSI, and 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. Gacho, 2012 IL App (1st) 091675 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.

People v. Harris, 2012 IL App (1st) 092251 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. 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.

People v. Coleman, 2011 IL App (1st) 091005 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]."

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.

People v. Carballido, 2011 IL App (2d) 090340 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.

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 and the court affirmed the summary dismissal of the post-conviction petition.

People v. Rajagopal, 381 Ill.App.3d 326, 885 N.E.2d 1152 (1st Dist. 2008) The State did not forfeit the issue of defendant's standing, although it failed to raise the issue in the trial court in its motion to dismiss the petition.

People v. Brooks, 371 Ill.App.3d 482, 867 N.E.2d 1072 (4th Dist. 2007) General rule that issues that could have been raised on direct appeal but were not are procedurally defaulted does not apply where defendant does not take a direct appeal. See also, **People v. Cowart**, 389 Ill.App.3d 1046, 907 N.E.2d 1 (1st Dist. 2009) (where the only issue raised on direct appeal was whether the cause should be remanded for compliance with Rule 604(d) (requiring certain certifications by defense counsel on a motion to withdraw a guilty plea), and none of the issues raised on post-conviction could have been considered on direct appeal (because defense counsel failed to perform as required by Rule 604(d)), the summary appellate proceeding should not be treated as a "direct appeal"; thus, defendant was in the same position as one who did not appeal at all, and did not waive any issues for post-conviction).

People v. Ledbetter, 342 Ill.App.3d 285, 794 N.E.2d 1067 (4th Dist. 2003) Defendant did not forfeit review of alleged Brady violation (based on State's failure to tender information that a testifying police officer was under investigation for corruption and was eventually convicted of multiple felonies and fired) for not raising issue on direct appeal, where there was no evidence that defendant knew, at the time of his direct appeal, that the officer had been indicted and fired. Also, defendant did not forfeit the Brady issue where his original petition claimed that the State had failed to disclose that the officer had been indicted and fired, but on appeal claimed that the State had failed to disclose that the officer was under

investigation, because these arguments were not substantially different and, regardless, the petition alleged that the investigation had not been disclosed.

People v. Mendez, 336 Ill.App.3d 935, 784 N.E.2d 425 (3d Dist. 2003) Although a guilty plea generally results in waiver of challenges that are not related to the voluntariness of the plea, a guilty plea is voluntary only if it is entered with the assistance of competent counsel. Because defendant sought to challenge his plea due to the ineffectiveness of trial counsel, the guilty plea did not waive the error. See also, **People v. Bowman**, 335 Ill.App.3d 1142, 782 N.E.2d 333 (5th Dist. 2002) (that defendant pled guilty did not preclude him from challenging the voluntariness of his statements to the police in a post-conviction petition); **People v. Brumas**, 142 Ill.App.3d 178, 491 N.E.2d 773 (3d Dist. 1986) (defendant did not waive his contentions by pleading guilty, as defendant's petition challenged the voluntariness of his plea, or by failing to move to vacate his guilty plea, as defendant elected to proceed via post-conviction proceeding, to which Supreme Court Rule 604(d) does not apply); **People v. Young**, 355 Ill.App.3d 317, 822 N.E.2d 920 (2d Dist. 2005) (defendant did not waive claim that counsel's erroneous advice induced defendant to plead guilty by failing to appeal the underlying criminal case, for a claim that a plea is involuntary may be raised for the first time in post-conviction proceedings; also, the trial court may have been partly responsible for defendant's failure to file a timely appeal because the court did not notify defendant that it had denied his motion to withdraw).

People v. Stroud, 333 Ill.App.3d 416, 775 N.E.2d 1038 (3d Dist. 2002) Petitioner's failure to file a motion to withdraw his guilty plea did not forfeit claim that his guilty plea hearing was unconstitutional. Petitioner, who pleaded guilty by closed circuit television, was entitled to have his conviction vacated and the cause remanded for further proceedings.

People v. Vilces, 321 Ill.App.3d 937, 748 N.E.2d 1219 (2d Dist. 2001) New issues may not be raised in a motion to reconsider the trial court's dismissal of a post-conviction petition.

§9-1(h)(3)

Res Judicata

Illinois Supreme Court

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 *de hors* 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.

People v. Kokoraleis, 159 Ill.2d 325, 637 N.E.2d 1015 (1994) Defendant raised issues in post-conviction petition that he had raised on direct appeal to give the court an "opportunity to reconsider" its original disposition and to preserve a claim for federal habeas review. Under the Post-Conviction Hearing Act, an issue cannot be raised merely to allow reconsideration of a prior holding. Also, issues rejected on direct appeal need not be raised on post-conviction to exhaust State remedies for federal habeas, because rejection of the claim on direct appeal permits federal review.

People v. Barrow, 195 Ill.2d 506, 749 N.E.2d 892 (2001) Several arguments concerning trial counsel's effectiveness were res judicata because they merely rephrased unsuccessful arguments that had been made on direct appeal.

People v. Ward, 187 Ill.2d 249, 718 N.E.2d 117 (1999) Res judicata did not apply to issue of counsel's effectiveness, which had been rejected on direct appeal, where defendant submitted witness affidavits that were not part of the original trial record and which could not have been considered on direct appeal.

People v. Rose, 43 Ill.2d 273, 253 N.E.2d 456 (1969) Res judicata does not apply where defendant did not take a direct appeal. See also, **People v. Bonilla**, 170 Ill.App.3d 26, 523 N.E.2d 1258 (1st Dist. 1988).

Illinois Appellate Court

People v. Poole, 2022 IL App (4th) 210347 The appellate court affirmed the second-stage dismissal of a post-conviction petition, rejecting defendant's claims that he made a substantial showing of ineffective assistance of counsel, and that post-conviction counsel violated Rule 651(c) by failing to supplement the petition with additional evidence.

Defendant initially filed a 2-1401 petition alleging he was actually innocent of various firearm offenses based on an affidavit from an eyewitness. At a hearing on the petition, the eyewitness testified that he saw someone other than defendant fire the gun during the incident in question. The trial court denied the petition, finding the testimony "cumulative" and not likely to change the result on retrial.

In the instant post-conviction petition, defendant re-framed the issue by alleging ineffective assistance of counsel for failure to call the eyewitness. After second-stage dismissal, the appellate court affirmed, finding the claim barred by *res judicata*. The court believed that allowing defendant to re-frame the claim in a case with the same dispositive issue – whether the eyewitness testimony would change the outcome – would allow defendant a second bite at the apple. A finding in favor of defendant would lead to “inconsistent findings on the same issue.”

The appellate court then rejected the Rule 651(c) claim. Post-conviction counsel had amended the *pro se* petition to allege ineffective assistance of counsel for failing to call a gunshot residue expert, but did not identify an expert or potential testimony. The appellate court found that post-conviction counsel was not obligated to do so, citing [People v. Nelson, 2016 IL App \(4th\) 140168](#), which held that Rule 651(c) does not require post-conviction counsel “to conduct a search to find an expert witness who would support defendant’s claims.” Although *Nelson* applied to counsel’s duties *vis-a-vis pro se* claims, the appellate court drew this distinction by noting that defendant did raise a general claim of ineffectiveness for failing to call witnesses. Regardless, defendant could not establish the underlying claim because the State’s expert in this case did not find gunshot residue on defendant, so additional expert testimony would not change the result on retrial.

[People v. Tyler, 2015 IL App \(1st\) 123470](#) Because a post-conviction petition is a collateral attack on a judgment, any issue previously raised is barred by *res judicata*. However, the *res judicata* doctrine is relaxed where required by fundamental fairness and where the facts relating to the issue did not appear in the original appellate record. *Res judicata* is also relaxed if the defendant presents substantial new evidence which: (1) could not have been discovered before trial through the exercise of due diligence, (2) is material to the issues and not merely cumulative, and (3) is of such conclusive character that it would probably change the result at a retrial.

The court found that relaxation of the *res judicata* doctrine was justified by newly discovered evidence that police officers had engaged in a systematic pattern of abusing criminal suspects. In his post-conviction petition, defendant claimed that he was coerced into confessing when he was physically abused by Chicago police detectives. He presented evidence of other cases in which defendants and witnesses alleged that they had been abused by the same detectives who interrogated defendant.

The court concluded that the evidence was newly discovered because many of the allegations did not surface until years after defendant’s trial. The court stressed that defense counsel could not have been expected to discover the identities of, and interview, every suspect who had been interrogated by the detectives in question.

The court also concluded that evidence of systematic police abuse was material and would likely change the result of a retrial, because it would have undermined the credibility of the officers who claimed that defendant had confessed. For these reasons, *res judicata* did not bar consideration of the voluntariness of defendant’s confession.

Furthermore, the petition made a substantial showing of a constitutional violation. The court noted Illinois precedent that a pervasive pattern of criminal conduct by police officers gives reason to reconsider the voluntariness of a confession. Here, the “countless instances of claims of police misconduct” established a “troubling pattern of systematic abuse by the same detectives” who interrogated defendant and called into question whether defendant’s confession was the product of physical coercion. Under these circumstances, there was a sufficient showing of a constitutional violation to justify a third-stage hearing.

The order dismissing the post-conviction petition was reversed and the cause remanded for a third-stage evidentiary hearing.

People v. Wright, 2013 IL App (4th) 110822 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.

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.

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.

People v. Miller, 2013 IL App (1st) 111147 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).

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.

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

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

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.

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**.

People v. Reyes, 369 Ill.App.3d 1, 860 N.E.2d 488 (1st Dist. 2006) The factors to be considered in evaluating whether newly discovered evidence is sufficient to justify relaxation of the *res judicata* doctrine are the same as when evaluating whether such evidence justifies a new trial (i.e., the materiality of the evidence, whether the new evidence is conclusive in character, and whether the new evidence could have been discovered through due diligence). However, because the petition need show only the "gist" of a constitutional claim, the petitioner's burden is "necessarily lighter" than would be the case at the second or third stages of post-conviction proceedings.

Defendants claimed that their confessions were the result of physical coercion and presented evidence that the detective in question had engaged in improper techniques to coerce false statements from other criminal suspects over a period of several years. Although

issues concerning the voluntariness of the confessions had been litigated on direct appeal, the new evidence, including abuse occurring several years earlier, was sufficient to relax res judicata concerns. Although much of the evidence existed at the time of defendant's trial, it could not have been discovered because the trial court refused to require production of relevant documents in response to a co-defendant's subpoena and defense counsel could have discovered the evidence only if he had interviewed every person that the officer ever detained.

People v. Gardner, 331 Ill.App.3d 358, 771 N.E.2d 26 (1st Dist. 2002) An issue rejected on direct appeal may be raised again, without being barred by res judicata, where the law on that issue has changed.

People v. Cowherd, 114 Ill.App.3d 894, 449 N.E.2d 589 (2d Dist. 1983) Defendant's post-conviction claim, which he also raised on direct appeal, was not barred by res judicata because the basis of his claim was based on case law that developed after the appellate court affirmed his conviction. See also, **People v. Partee**, 268 Ill.App.3d 857, 645 N.E.2d 414 (1st Dist. 1994) (res judicata did not apply where the relevant case law had changed in at least four significant ways since the direct appeal).

§9-1(i)

Successive Post-Conviction Petition

§9-1(i)(1)

Generally

Illinois Supreme Court

People v. Griffin, 2024 IL 128587 When a circuit court reviews a successive post-conviction petition raising multiple claims, it should advance only those claims that meet the standard for leave to file, and dismiss the rest.

In this case, defendant filed a successive petition raising claims of actual innocence and ineffective assistance of counsel. The circuit court denied the actual innocence claim, and failed to rule on the ineffectiveness claim. The appellate court reversed, finding the defendant's actual innocence claim should have been advanced. Citing **People v. Cathey**, 2012 IL 111746, the appellate court remanded the entire petition to the second stage. The Supreme Court modified that holding. While it agreed the innocence claim should advance, it remanded the case to the circuit court for an initial review of the ineffectiveness claim. Unlike **Cathey**, which involved an initial petition, this case involved a successive petition. Successive petitions are disfavored unless defendant can establish the fundamental fairness exception applies. This exception applies to claims, not petitions. Therefore, defendant's ineffectiveness claim should be advanced along with the innocence claim only if it satisfies the cause-and-prejudice test.

People v. Griffin, 2024 IL 128587 Defendant's successive post-conviction petition asserted actual innocence and ineffective assistance of counsel. The trial court denied leave to file, and the appellate court reversed, finding defendant made a colorable claim of actual innocence. On appeal to the Supreme Court, the State argued that the appellate court erred when it applied the "colorable claim" standard to the actual innocence claim because defendant pled guilty.

The Supreme Court has previously held, in cases where defendant was found guilty after trial, the circuit court should grant leave to file a successive post-conviction when it contains a colorable claim of actual innocence. The defendant must show that the evidence in support of the claim is newly discovered, material, and noncumulative and of such conclusive character that it would probably change the result on retrial. Leave of court should be granted where the petitioner's supporting documentation raises the probability that it is more likely than not that no reasonable juror would have convicted the petitioner in light of the new evidence. [People v. Robinson, 2020 IL 123849](#).

However, the court had not previously addressed whether this standard applies if the defendant pled guilty. In [People v. Reed, 2020 IL 124940](#), the court set a new, higher standard at the third stage for guilty-plea petitioners seeking relief based on actual innocence – a defendant who pleads guilty must provide new, material, noncumulative evidence that clearly and convincingly demonstrates that a trial would probably result in acquittal. The State asked the court to adopt the **Reed** standard at the leave-to-file stage.

The 6-1 Supreme Court majority held that the **Reed** standard does not apply at the leave-to-file stage. Rather, the “colorable claim” standard applies, regardless of whether the petitioner pled guilty or was convicted at trial. The **Reed** standard is not workable at the pleading stage because it requires credibility determinations. On the other hand, the **Robinson** standard does not involve credibility findings and is therefore well-suited for a pleading stage.

The Supreme Court agreed with the appellate court's holding that the actual innocence claim met the **Robinson** standard. The petition included two exculpatory affidavits which the State conceded were new, material, and noncumulative. Taking them as true, they were conclusive enough to probably result in an acquittal. (The court noted the language of **Robinson** – “would probably change the result on retrial” – would have to be altered to “would probably result in an acquittal” if defendant pled guilty.) Even though one affidavit was from an eyewitness whom defendant met in prison, and who could only offer circumstantial evidence that defendant was not the shooter, and the other was based on double-hearsay, and both were contradicted by the proffers at defendant's plea hearing, the majority held these weaknesses were relevant only at an evidentiary hearing, not at the pleading stage.

[People v. Robinson, 2020 IL 123849](#) Several years after he was convicted of first degree murder, defendant sought leave to file a successive post-conviction petition asserting a claim of actual innocence and asserting that another individual, Leonard Tucker, had murdered the victim. Defendant's motion and petition were supported by affidavits from himself and four other witnesses. The trial court denied leave to file, concluding that defendant's girlfriend's alibi affidavit was not newly discovered and that the other three witnesses did not totally vindicate or exonerate defendant because they did not witness the murder or burning of the victim's body, so their affidavits were not of such conclusive character as to probably change the outcome.

The appropriate standard of review for denial of leave to file a successive post-conviction petition is *de novo* because the question is whether, as a matter of law, the petition states a colorable claim. The Supreme Court agreed that defendant's girlfriend's affidavit was not newly discovered. With regard to the remaining affidavits, the court first held that both the trial and appellate courts applied an incorrect standard by requiring “total vindication or exoneration” to support a claim of actual innocence. The appropriate standard

is whether the new evidence places the trial evidence in a different light and undermines confidence in the judgment of guilt.

The Court also held that the Appellate Court erred in affirming the denial of leave to file because defendant's witness affidavits conflicted with the trial evidence. A conflict between the new evidence and the trial evidence is inherent in a claim of actual innocence. While such conflicts may prove fatal at later stages of post-conviction proceedings, the leave-to-file threshold is lower – falling somewhere between the first-stage gist-of-a-claim standard and the second-stage substantial-showing requirement. At the leave-to-file stage, the question is not whether the new evidence conflicts with the trial evidence, but whether the well-pleaded allegations of defendant's petition and supporting affidavits are positively rebutted by the record. The petition and affidavits are positively rebutted only where it is "clear from the trial record that no fact finder could ever accept the truth of that evidence, such as where it is affirmatively and incontestably demonstrated to be false or impossible."

The Court also considered what it means for a petitioner's well-pleaded allegations to be accepted as true, a requirement of the leave-to-file stage. The Court rejected the State's assertion that it means only to presume the witnesses will testify consistently with their affidavits. Instead, the court must presume that the trier of fact would believe the witnesses' testimony. Credibility determinations are not to be made at the leave-to-file stage, but rather only at a third-stage evidentiary hearing.

Applying all of these principles, the Court concluded that defendant's petition and supporting affidavits stated a colorable claim of actual innocence. Each of the new witnesses provided details about events immediately surrounding the murder which supported defendant's claim that he was innocent and Tucker was the actual offender. While the State's trial evidence had consisted largely of defendant's confession, the new witness affidavits, taken as true, were sufficient to require granting leave to file the successive petition. A trier of fact could determine that the new evidence exculpated defendant from any involvement in the offense and refuted the State's evidence at trial.

The three dissenting justices criticized the majority as having abandoned the standard established in [People v. Edwards, 2012 IL 111711](#) ("leave of court should be granted when the petitioner's supporting documentation raises the probability that 'it is more likely than not that no reasonable juror would have convicted him in light of the new evidence'") in favor of a new standard ("whether the new evidence, if believed and not positively rebutted by the record, could lead to acquittal on retrial"). The dissent noted the leave-to-file standard was never meant to be a low threshold but instead was meant to require a showing that a different outcome was "probable," not just that a different outcome "could" result.

[People v. Bailey, 2017 IL 121450](#) The State should have no input into the trial court's decision to allow or deny defendant's motion to file a successive petition. The cause and prejudice determination is a question of law to be decided on the pleadings. The motion is directed to the court and the court must decide the legal question of cause and prejudice. Although the Act does not expressly prohibit the State's input, the Act contemplates that the trial court will conduct an independent determination. Permitting the State to argue against a finding of cause and prejudice when defendant is not represented by counsel is "inequitable, fundamentally unfair, and raises due process concerns."

In the interest of judicial economy, however, the Supreme Court reviewed defendant's motion and determined that despite the error in allowing the State to participate, there was no need for remand. Defendant made no attempt to satisfy the cause and prejudice standard

and there were serious defects in his claim of actual innocence. The court thus affirmed the denial of defendant's motion.

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 be 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.

People v. LaPointe, 227 Ill.2d 39, 879 N.E.2d 275 (2007) A successive petition is not considered "filed" unless leave of the court is granted, even if the document was accepted by the clerk's office. See also, **People v. DeBerry**, 372 Ill.App.3d 1056, 868 N.E.2d 382 (4th Dist. 2007) (trial court should dismiss petition if petitioner files without first obtaining leave, and a reviewing court should not consider the allegations of a successive petition filed without leave, even where the trial court dismissed the petition for reasons other than the failure to obtain leave).

People v. Harris, 224 Ill.2d 115, 862 N.E.2d 960 (2007) A defendant would clearly have "cause" for failing to raise ineffective assistance of appellate counsel in his original post-conviction petition where the statute of limitations ran before the brief on direct appeal had been filed. Thus, defendant would be able to file a successive petition merely by showing that he had a viable issue which caused prejudice. See also, **People v. Langston**, 351 Ill.App.3d 1168, 876 N.E.2d 322 (1st Dist. 2001) (where the statute of limitations requires defendant to file a post-conviction petition before the direct appeal is completed, defendant is allowed to file a subsequent post-conviction petition raising issues that occurred after the deadline for the initial petition).

People v. Caballero, 179 Ill.2d 205, 688 N.E.2d 658 (1997) Subsequent post-conviction petition proper where basis for constitutional claim (that sentence was disparate) did not arise until after previous petition was adjudicated.

People v. Flores, 153 Ill.2d 264, 606 N.E.2d 1078 (1992) Because post-conviction proceedings are limited to constitutional issues occurring at trial or sentencing and there is no constitutional right to counsel at a post-conviction proceeding, a subsequent petition may not raise the effectiveness of the attorney who represented defendant on a prior post-conviction petition. See also, **People v. Szabo**, 186 Ill.2d 19, 708 N.E.2d 1096 (1998). A second petition claiming that appellate counsel was ineffective should be considered unless the claim could have been raised in the first petition. Here, because the same attorney represented defendant both on direct appeal and in the first post-conviction petition, issues

concerning that attorney's effectiveness could not have been raised in prior proceedings. See also, **People v. Erickson**, 183 Ill.2d 213, 700 N.E.2d 1027 (1998).

Illinois Appellate Court

People v. Garrett, 2023 IL App (3d) 210305 While there is no right to counsel at the leave-to-file-stage of successive post-conviction proceedings, a defendant who has counsel is entitled to reasonable assistance from that counsel. In reaching this conclusion, the court applied the rationale of **People v. Johnson**, 2018 IL 122227, and rejected the contrary decision in **People v. Moore**, 2019 IL App (3d) 170485.

Rule 651(c) does not apply at the leave-to-file stage. Instead, the court considers counsel's performance under the general reasonable assistance standard. Here, counsel's performance was not unreasonable despite counsel's failure to allege cause for defendant's failure to raise his successive petition claims in his original petition. Defendant made no argument as to what cause could have been asserted, and the record showed that the issues raised in his successive petition would have been apparent at the time of his original petition was filed.

Further, the court did not err by failing to review defendant's *pro se* motion for leave to file. The court had the discretion to appoint counsel to assist defendant, which it did, and thus counsel's pleading was appropriately considered rather than defendant's *pro se* filing.

People v. Profit, 2023 IL App (1st) 210881 There was no error in denying defendant leave to file a successive post-conviction petition arguing that the 2019 enactment of 730 ILCS 5/5-4.5-115(b) violated defendant's constitutional right to equal protection because it only applies prospectively. The appellate court affirmed, finding that defendant could not meet the prejudice prong of the cause-and-prejudice test for filing a successive petition.

Defendant was 18 years old at the time he committed the offenses of attempt first degree murder and armed robbery, and he was 20 when he was sentenced to a total of 36 years of imprisonment. The offenses occurred in 1998. Section 5-4.5-115(b) provides for parole review after 10 years for persons under 21 years old at the time of commission of an offense other than first degree murder, but it expressly limits its application to persons who are sentenced on or after June 1, 2019.

With regard to defendant's equal protection claim, defendant conceded that no suspect classification was involved, thereby leading to rational basis review. And, the legislature's inclusion of a prospective-only effective date was rationally related to considerations of finality and limited judicial resources. In reaching this conclusion, the court looked to **People v. Richardson**, 2015 IL 118255, which rejected a similar equal protection argument regarding the prospective-only amendment of the Juvenile Court Act to increase the age of juvenile court jurisdiction.

And, the court rejected defendant's reliance on its own prior statements in **People v. Metlock**, 2021 IL App (1st) 170946-U, where it said that the legislature's decision not to make the parole provision retroactive "caused a wide disparity" between those sentenced before and after its effective date and that the court could see "no rational or justifiable reason" for the disparity. With regard to those comments, the court said they were *dicta* and in opposition to **Richardson**.

People v. Miranda, 2023 IL App (1st) 170218-B Defendant's motion for leave to file successive post-conviction petition based on actual innocence and ineffective assistance of counsel was properly denied. The appellate court held that the affidavits from two co-

defendants were cumulative of defendant's own trial testimony concerning his lack of knowledge of the co-defendants' plan. Accordingly, the court concluded it need not consider whether defendant had met the other elements of an actual innocence claim because defendant's claim would fail on the "non-cumulative" element.

Further, the court concluded that defendant could not show cause for not raising in his original post-conviction petition a claim of ineffective assistance of counsel based on trial counsel's failure to call witnesses. Defendant argued that prior post-conviction counsel who "ghost-wrote" his original petition should have included the claim, but neither the Post-Conviction Hearing Act, nor Rule 651(c), require any specific standard of representation by counsel at the first stage of post-conviction proceedings. And, defendant could not show prejudice, regardless, because the witnesses' proposed testimony was only minimally helpful.

Finally, the court noted the importance that parties follow [Illinois Supreme Court Rule 341](#), which sets forth various requirements for briefs filed in the reviewing court. The court specifically criticized the use of smaller-than-12-point font in a footnote, as well as the inclusion in the statement of facts of a 10-page, single-spaced block quote from a prior appellate court opinion.

People v. Flores, 2022 IL App (2d) 210757 The trial court did not err in denying defendant leave to file a successive post-conviction petition. Defendant originally pled guilty to a charge of arson based on the theory that he was accountable for the conduct of fellow gang members. In his successive post-conviction petition, defendant purported to raise claims of actual innocence and ineffective assistance of counsel. The trial court found that defendant had not sought leave to file the petition, as was required, and that regardless his claims were meritless.

After first noting that appellate counsel erroneously characterized the appeal as being from a first-stage summary dismissal as opposed to being from denial of leave to file a successive petition, the court went on to consider the issue that was properly before it – whether defendant's petition presented a colorable claim of actual innocence– and concluded that it did not. First, the court noted that while defendant claimed to be raising actual innocence, his argument actually was that the trial court erred in accepting the factual basis for his plea. Defendant's claim did not rely on any new evidence or anything outside of the record of the plea itself. This was not a constitutional claim proper for a post-conviction petition. And, defendant did not argue that he met the cause-and-prejudice standard for filing a successive petition. Thus he failed to overcome the procedural bar against successive petitions, as well.

People v. Taylor, 2022 IL App (2d) 190951 After defendant's direct appeal was dismissed for want of prosecution, he filed a post-conviction petition alleging ineffective assistance of appellate counsel for failing to proceed with the appeal. New appellate counsel then filed an appearance and brief, and the Appellate Court reinstated defendant's direct appeal. Days later, the trial court *sua sponte* dismissed defendant's post-conviction petition as moot. Subsequently, defendant filed another post-conviction petition. The trial court dismissed that petition, treating it as a successive petition and finding that defendant had not obtained leave of court to file it.

On appeal, defendant argued that the trial court erred in treating his second petition as a successive petition for purposes of the Act. The Appellate Court agreed. Defendant's original petition was dismissed as moot, and the Appellate Court concluded that a finding of mootness does not fall within the definition of "frivolous and patently without merit."

Even if the court's determination that defendant's original petition was moot did mean it was frivolous and patently without merit, defendant had not had an opportunity to withdraw that petition because the court *sua sponte* dismissed it as moot just days after defendant's direct appeal was reinstated. Thus, as in [People v. Sawczenko, 328 Ill. App. 3d 888 \(2002\)](#), a deficiency in the original post-conviction proceedings meant that defendant's current petition must be considered his first under the Act.

Further, in [People v. Little, 2012 IL App \(5th\) 100547](#), the court held that a first petition filed solely to regain the right to a direct appeal should not have been treated as a post-conviction petition since it was not a true collateral attack on the defendant's conviction and sentence. Accordingly, a second petition filed following such an initial petition is not treated as a successive petition.

The dismissal of defendant's petition was reversed, and the matter was remanded for second-stage proceedings because the court had not considered the merits of defendant's petition within 90 days of its filing.

[People v. Zirko, 2021 IL App \(1st\) 162956](#) A defendant has the right to reasonable assistance of post-conviction counsel. Reasonable assistance includes the right to conflict-free representation. Whether an attorney labored under a conflict of interest while representing a defendant is a question of law subject to *de novo* review.

Here, defendant was represented by the same attorney at trial and during post-conviction proceedings in the trial court. That attorney also represented defendant on appeal, until the Appellate Court *sua sponte* raised a concern about whether he had a conflict of interest. In response to the Appellate Court's request for supplemental briefing on the conflict question, defendant requested and was granted new counsel on appeal.

New appellate counsel argued that post-conviction counsel labored under a conflict of interest and provided unreasonable assistance. The Appellate Court rejected defendant's request to create an additional category of *per se* conflicts of interest for situations where the same attorney represents defendant at trial and in post-conviction proceedings and alleges his own ineffectiveness at trial. The court agreed, however, that counsel here labored under an actual conflict of interest. The record demonstrated that counsel failed to support at least one post-conviction claim of ineffective assistance with necessary and available photographic evidence. The court could "conceive of no strategic reason" to raise such an issue and not support it with available evidence. Accordingly, the Appellate Court reversed the second-stage dismissal of defendant's petition and remanded for new second-stage proceedings with new counsel.

[People v. Canas, 2021 IL App \(3d\) 170197](#) The State moved to deny defendant's motion for leave to file a successive post-conviction petition, in direct violation of [People v. Bailey, 2017 IL 121450](#), which forbids the State from participating in what should be an independent assessment by the circuit court. The Appellate Court, following the lead of [People v. Lusby, 2020 IL 124046](#), decided the appropriate remedy for this error was to independently review the defendant's motion for leave to file. After doing so in this case, the Appellate Court agreed defendant failed to establish cause or prejudice. Defendant's claims were conclusory and the only supporting documentation he provided was his own affidavit.

Justice McDade dissented. **Lusby** did not require the Appellate Court to reach the merits, it merely held in a footnote that it is not foreclosed from doing so. But the rationale of judicial economy cited by **Lusby** would not seem to apply to this circumstance due to the voluminous briefing by the parties that would not be necessary if the remedy were an

automatic remand. Further, the majority opinion repeated the error of the circuit court by reaching the merits of the defendant's motion only after reviewing the record in which the State filed and argued its objection. Because an independent assessment was not possible, the only appropriate remedy was remand for a ruling on the motion by a new judge.

People v. Thames, 2021 IL App (1st) 180071 In June 2016, defendant sought leave to file a second successive post-conviction petition raising a single claim, specifically that he was denied due process when a police detective reneged on a promise to treat defendant as a witness and not arrest him if he passed a polygraph examination. Defendant passed the polygraph, but nevertheless he was arrested and charged the next day.

While the motion for leave to file the second successive petition was pending, the court *sua sponte* revisited an issue raised in a prior collateral filing concerning a witness's recantation affidavit. The court said it was granting leave to file a successive petition based on that affidavit. Ultimately, though, the Appellate Court affirmed the denial of the prior collateral filing based on that affidavit, so the circuit court found the issue barred by *res judicata*.

With regard to the due process issue raised in the motion for leave to file successive petition, defense counsel requested a ruling on the question of whether he had established cause and prejudice sufficient to allow filing of a second successive petition. The circuit court, however, considered the due process claim on the merits, found that defendant failed to make a substantial showing of a constitutional violation, and dismissed the petition.

The Appellate Court agreed with defendant that the circuit court had never ruled on the motion for leave to file. Thus, defendant had never actually filed a successive petition raising the claim that he had an enforceable non-prosecution agreement under **People v. Marion, 2015 IL App (1st) 131011**, and dismissal was premature. The court rejected the State's suggestion that the court had implicitly granted leave to file. The fact that the State filed a premature motion to dismiss was not determinative. The circuit court was still required to make an independent cause-and-prejudice determination before proceeding further.

Rather than performing the cause-and-prejudice analysis for the first time on appeal, the Appellate Court reversed and remanded for the circuit court to consider cause-and-prejudice. In doing so, the Appellate Court found that it had no jurisdiction to consider whether the motion for leave to file should be granted since the circuit court had not yet issued a ruling on that motion.

People v. Plummer, 2021 IL App (1st) 200299 Defendant was found guilty of murder and attempt murder based on a 1991 shooting that occurred when defendant was 15 years old. The evidence against him consisted of a lineup identification and his custodial statement, which was taken at Area 3. Defendant alleged at trial, and in a 1999 post-conviction petition, that during his nearly 40 hours at Area 3, Detective Kill and another detective coerced his confession through threats and physical violence.

In the instant successive petition, defendant alleged: (1) newly discovered evidence showing that Detectives Kill and Boudreau (whom defendant now alleged was the second interrogating detective) were involved in a pattern and practice of torture, physical abuse, and other acts of coercion in Areas 2 and 3 around the time of defendant's interrogation; and (2) the State committed a **Brady** violation when it withheld exculpatory evidence regarding this practice and pattern of torture and physical coercion. Defendant supplemented his **Brady** claim with allegations of an undisclosed federal investigation involving decedent,

which would have alerted the defense to an alternate suspect. The circuit court dismissed the petition at the second stage.

The Appellate Court reversed. Defendant's claims were not subject to *res judicata* because they were supported by newly discovered evidence. He cited prior examples of abuse by Detectives Kill and Boudreau, and while several of the examples pre-dated defendant's petition, the reports that documented these complaints and gave them credibility, such as the 2006 Report of the Special Prosecutor, were not produced until years after defendant's initial petition. The new evidence was material and conclusive because the alleged pattern of abuse – which involved the same officers and some of the same techniques defendant cited in his previous testimony and filings – could be used to impeach Detective Kill's credibility and bolster defendant's credibility. This proposed evidence would therefore significantly undercut confidence in the guilty verdict.

The Appellate Court disagreed with the State's claim that the record still showed a voluntary confession. The State noted that defendant confessed to an ASA, not the detectives, and that he stated he was "treated fine." He also had no visible injuries in his mugshots. But none of these facts conflict with defendant's claim that he was threatened and beat about the abdomen by detectives prior to his meeting with the ASA. The Appellate Court admonished the lower court that "the only thing that is required for a court to reconsider the voluntariness of a confession is a 'pervasive pattern of criminal conduct by police officers.'" Defendant here presented ample evidence of a pattern of systemic abuse by Detectives Kill and Boudreau, and therefore deserved an evidentiary hearing.

The Appellate Court also found a substantial showing of a **Brady** violation. The evidence of the federal investigation was newly discovered where defendant produced an affidavit from another suspect who was interviewed by Detective Kill at the time of defendant's interrogation. The affidavit explained that Kill told the suspect about the investigation into the decedent, who was a drug dealer feuding with an associate against whom he was to testify. Neither defendant nor counsel were at fault for not uncovering this information earlier, as the defense cannot be expected to ask witnesses every perceivable question to elicit information that is not forthcoming.

The information was material and conclusive not only because it gave rise to an alternative suspect, but also because it directly rebutted Detective Kill's testimony that he was not involved in the investigation into the decedent. Evidence of a federal investigation into decedent, which revealed that defendant was a drug dealer who had wronged a fellow dealer, constituted sufficient evidence of an alternate suspect with a strong motive to kill the decedent. Where the evidence was material, favorable to the defense, and not disclosed, an evidentiary hearing was required.

People v. Woods, 2020 IL App (1st) 163031 Trial court did not err in denying leave to file successive post-conviction petition alleging proportionate penalties violation where 17-year-old defendant had received 33-year sentence for attempt murder. Sentence was not *de facto* life, and mandatory firearm enhancement did not shock the conscience of the community. At sentencing, the court acknowledged defendant's youth and minimal criminal record but found that his actions warranted a serious sentence. The 33-year sentence allows a meaningful opportunity for rehabilitation and did not violate the proportionate penalties clause.

People v. Smith, 2020 IL App (3d) 170666 The majority and dissent agreed that the circuit court erred when it solicited and granted a State objection to defendant's motion for leave to file a successive post-conviction. The majority held that the better course of action in such

cases is to remand to a different circuit court judge for a ruling on the merits without State participation.

The dissent would have affirmed the dismissal, reasoning that under **People v. Bailey**, 2017 IL 121450, the Appellate Court may rule on the merits of the motion for leave. The dissent rejected the rationale of **People v. Munson**, 2018 IL App (3d) 150544, which held that the Appellate Court may not rule on the merits because it lacks supervisory authority. The dissent believed **Bailey** did not invoke supervisory authority, only judicial economy. But as the majority pointed out, even if **Bailey** did not invoke supervisory authority for its merits ruling, and instead used the same judicial economy rationale that is available in the Appellate Court, it does not follow that an Appellate Court is obligated to rule on the merits. In the majority's view, the best practice is to remand for a new ruling by a judge who has not already been influenced by, and granted, a State objection.

People v. Dolis, 2020 IL App (1st) 180267 The State's participation in proceedings on defendant's motion for leave to file a successive post-conviction petition was error under **People v. Bailey**, 2017 IL 121450. The Appellate Court has split on whether such an error requires an automatic remand. Here, the court sided with those cases holding that remand is not required where a review of defendant's petition indicated that its claims were barred by *res judicata*.

People v. Johnson, 2020 IL App (2d) 170646 The circuit court properly denied defendant's motion for leave to file successive post-conviction petition. While the petition raised both a **Miller** challenge and a proportionate penalties challenge to his 27-year sentence for first degree murder, on appeal defendant argued that the truth-in-sentencing statute – requiring him to serve 100% of his sentence – was unconstitutional on its face and as applied to him.

The Appellate Court rejected the State's argument that defendant's truth-in-sentencing claim was both waived and forfeited. A sentence which violates the constitution can be challenged at any time, and defendant's claim on appeal was that his sentence was unconstitutional based on the reasoning in **Miller**. The court also concluded that the record here was sufficient to review defendant's as-applied challenge even though such challenges generally should be presented in the trial court first.

Ultimately, though, the Appellate Court rejected defendant's claim on the merits. Defendant's 27-year sentence did not bring him under the protections of **Miller** because it was not a *de facto* life term. Further, the record established that the sentencing judge considered defendant's youth and its attendant characteristics, as well as the fact that he was an accomplice and not the principal offender. Finally, the court noted that **People v. Othman**, 2019 IL App (1st) 150823, on which defendant's truth-in-sentencing challenge was based, had since been vacated.

People v. Coffey, 2020 IL App (3d) 160427 In **People v. Bailey**, 2017 IL 121450, the Illinois Supreme Court held that it is improper for the State to provide input during successive post-conviction petition proceedings before leave to file the petition is allowed. Here, the State did not participate at the hearing on the motion for leave to file but did argue against the defendant's motion to reconsider the denial of leave to file. The Appellate Court held that the State's participation was equally improper at the motion to reconsider because the same question was at issue as on the original motion for leave to file. The fact that the public defender represented defendant at the hearing on the motion to reconsider did not excuse the State's participation. **Bailey** is not limited to situations where the defendant is *pro se*. While the Appellate Court concluded that it could conduct an independent review of the trial court's

cause-and-prejudice determination, it instead chose to remand for consideration of the issue without input from the State.

People v. Moore, 2019 IL App (3d) 170485 The Post-Conviction Hearing Act does not provide for the appointment of counsel on a motion for leave to file a successive post-conviction petition. Even where the court appoints counsel on a motion for leave to file, defendant cannot complain that such counsel provided unreasonable assistance. The court rejected defendant's reliance on **People v. Walker**, 2018 IL App (3d) 150527, because that case involved the discretionary appointment of counsel on a 2-1401 petition, not a successive post-conviction petition. The Act "clearly provides that defendant only has the right to the assistance of counsel at the second stage of post-conviction proceedings," so the appointment of counsel here was premature and unsupported by the Act.

People v. Ames, 2019 IL App (4th) 170569 Under **People v. Bailey**, 2017 IL 121450, a trial court errs when it permits the State to have input during the preliminary leave-to-file stage of successive post-conviction proceedings. There is no *de minimis* exception to that rule, and regardless the State's participation in the instant case was not *de minimis* where the prosecutor filed a written objection and presented arguments in person, and where the court adopted the State's reasons for denying leave to file.

There is a split in the Appellate Court as to the proper remedy where the State improperly participates during the preliminary screening, with some courts remanding for consideration of defendant's cause-and-prejudice arguments without State input and others concluding, for the sake of judicial economy, that the reviewing court may consider the merits of defendant's motion for leave to file. The Fourth District chose to follow **People v. Conway**, 2019 IL App (2d) 170196, and consider defendant's motion for leave because it was "reasonably straightforward." Here, defendant failed to show cause why his claim could not have been raised in his initial post-conviction petition where it was based, at least in part, on the original trial record. Leave to file was properly denied.

People v. Conway, 2019 IL App (2d) 170196 Defendant attempted to file a successive PC petition. At an ex parte hearing, the ASA offered his opinion that leave to appeal should be denied because the petition restated matters already dismissed in the previous petition, and that the claims lacked merit. Citing **People v. Bailey**, 2017 IL App (1st) 150070, the Appellate Court held that the circuit court erred when it allowed the State to participate at the leave-to-file stage. It rejected the State's argument that there is a *de minimis* exception to this rule.

The court further held that, as in **Bailey**, it could decide the issue of cause and prejudice based on the record below, rather than remand for a new hearing. It rejected the notion that a ruling on the merits depended on the Supreme Court's supervisory authority, finding **People v. Munson**, 2018 IL App (3d) 150544, which declined such power, to be wrongly decided. The court reviewed the petition and found that it failed to satisfy the cause-and-prejudice test.

People v. Partida, 2018 IL App (3d) 160581 A motion for leave to file successive post-conviction petition should be decided by the Court without input from the State. Here, the State conceded error on appeal where the State had filed a written response to the motion for leave to file, defendant was not present at the hearing on that motion, and the prosecutor was present and noted its written response during that hearing. The State asked the

Appellate Court, however, to affirm the dismissal based on its own review of the merits of the petition. The Appellate Court declined, holding that defendant is entitled to have the circuit court conduct an independent review first.

People v. Baller, 2018 IL App (3d) 160165 (6/27/18) In remanding a successive post-conviction petition for reconsideration at the leave-to-file stage due to improper participation by the State, the Appellate Court offered three interpretations of **People v. Bailey**, 2017 IL 121450. The opinion’s author held, like in **People v. Munson**, 2018 IL App (3d) 150544, that **Bailey** prohibited State input on the question of cause and prejudice, then used its supervisory authority to affirm the denial of leave to file. Because an Appellate Court cannot exercise supervisory authority, remand was required.

The concurring justice believed that the **Bailey** court’s consideration of the petition after reading the State’s appellate briefs violated its own holding requiring an “independent” analysis of the petition. It agreed that remand was appropriate because to affirm after hearing the State’s input would not constitute an “independent” analysis.

The dissenting justice agreed that State participation was improper, but concluded that the Appellate Court may affirm a denial of leave to file when, as here, the petition fails to allege facts showing cause. The dissent disputed the majority’s view that this conclusion depended on the State’s input, noting that it could independently determine that defendant’s claim of ignorance of law is facially insufficient to constitute cause.

People v. Munson, 2018 IL App (3d) 150544 In accordance with **People v. Bailey**, 2017 IL 121450, the circuit court erred in denying a motion for leave to file a successive post-conviction petition because, rather than conducting an independent inquiry, as required by the statute, it allowed the State to participate in the hearing. Although in **Bailey** the Supreme Court then conducted a *de novo* review of the defendant’s cause-and-prejudice claim, and found that he failed to satisfy the test, the Appellate Court, lacking supervisory authority, cannot conduct a similar review. The case was therefore remanded for an independent evaluation of defendant’s motion for leave to file a successive petition.

People v. Merriweather, 2017 IL App (4th) 150407 Defendant, who was 17 at the time of the offense, was convicted of first degree murder and sentenced to 70 years in prison. Defendant filed a *pro se* motion for leave to file a successive post-conviction petition alleging actual innocence based on newly discovered evidence based on the affidavits of four witnesses. A year later, but before the trial court had ruled on defendant’s motion, defendant filed a motion to supplement the record with the affidavit of an additional witness. Over a year after that, the trial court denied the motion to file a successive petition. In making its ruling, the trial court made no mention of the motion to supplement the record.

The Appellate Court found that the trial court denied the motion without any mention of, let alone any ruling on, defendant’s motion to supplement the record or the affidavit referenced in that motion. The trial court has discretion to allow amendments to post-conviction petitions at any stage of the proceedings prior to the final judgment. **725 ILCS 5/122-5**.

Since it was not clear whether the trial court was aware of the motion to supplement, and since the trial court was in the best position to evaluate the merits of defendant’s motion, the Appellate Court remanded the cause to the trial court for a ruling on defendant’s request to supplement the record and any further proceedings that may be warranted.

People v. Williams, 2017 IL App (1st) 123357-B Defendant’s post-conviction petition was dismissed more than 90 days after it was filed. Defendant did not raise the issue on appeal, however, and appointed counsel filed a motion to withdraw pursuant to **Pennsylvania v. Finley**. The Appellate Court granted the **Finley** motion. Several years later, defendant petitioned for leave to file a successive post-conviction petition. He argued that the trial court’s order dismissing his first post-conviction petition was a nullity because it was entered more than 90 days after the petition was filed, and that appellate counsel had been ineffective on direct appeal by failing to raise several issues. The trial court granted the State’s motion to dismiss the petition on the grounds that the motion was untimely, *res judicata* and waiver applied, and defendant had not persuaded the court that delays were not due to his culpable negligence.

The Appellate Court affirmed the dismissal of the subsequent post-conviction petition, finding that where the trial court has jurisdiction an untimely summary dismissal order is not subject to collateral attack.

Jurisdiction consists of subject matter and personal jurisdiction. Subject matter jurisdiction refers to the court’s power to hear and determine cases of the general class to which the proceeding in question belongs, while personal jurisdiction means that the court has power to bring a person into the adjudicative process.

The court found that the trial court had both subject matter and personal jurisdiction, but entered the dismissal order in violation of the statute. Under **People v. Castleberry**, 2015 IL 116916, an erroneous dismissal by a court with jurisdiction results in a voidable judgement that is not subject to collateral attack. Thus, the untimely summary dismissal was not a nullity and could not be challenged in a subsequent post-conviction petition.

People v. Jenkins, 2016 IL App (1st) 133286 Following his conviction, defendant filed a post-conviction petition. The trial court granted the petition and the Appellate Court affirmed and remanded the case to the circuit court for resentencing. After defendant was resentenced, he filed another post-conviction petition in 2012 challenging the effective assistance of counsel at his original trial. The trial court denied defendant leave to file the 2012 petition.

The Appellate Court held that when a post-conviction petition leads to resentencing, a new petition filed after the resentencing should be considered an initial petition, not a successive petition. Here a new judgment was entered when defendant was resentenced. Defendant challenged that judgment for the first time when he filed his petition in 2012. Under the Act, defendant had a right to file a petition challenging the new judgment without first obtaining leave of the court.

People v. Warren, 2016 IL App (1st) 090884-C Defendant was not procedurally barred from raising a **Miller** issue for the first time in an appeal from denial of a motion for leave to file a successive post-conviction petition. First, the “cause and prejudice” standard for successive petitions was satisfied because **Miller** was not available at the time of defendant’s earlier post-conviction proceeding. In addition, a challenge to the constitutionality of a sentencing statute may be raised at any time.

The Appellate Court previously affirmed the trial court’s denial of leave to file a successive post-conviction petition, but the Supreme Court remanded with instructions to vacate the judgment and reconsider the case in light of **Davis**. The Appellate Court concluded that it was authorized to reach not only the sentencing issue involved in **Davis**, but also to reconsider whether the trial court erred by denying leave to file a successive post-conviction petition. The court concluded that because it had vacated the prior judgment in accordance

with the Supreme Court's direction, there would be no final judgment on the non-sentencing issues unless it also considered those issues.

A motion for leave to file a successive petition based upon a claim of actual innocence should be denied only where it is clear from a review of the successive petition and the provided documentation that as a matter of law, the petitioner cannot set forth a colorable claim of actual innocence. Applying *de novo* review, the court concluded that the evidence supporting defendant's claim was newly discovered, material and not merely cumulative, and of such a conclusive character that it would probably change the result at a retrial. Therefore, the defendant adequately pleaded an assertion of actual innocence to justify filing a successive petition.

In the course of its holding, the court acknowledged that affidavits provided by the petitioner were hearsay and that hearsay generally cannot be used to support post-conviction claims. The Supreme Court has held that this rule should not be applied inflexibly, however. Where the affidavits contained facts material to defendant's innocence and alleged that two persons who had confessed to the offense were hostile or unavailable to the petitioner, the court elected to consider the affidavits. The court also noted that the affidavits might be admissible at trial under various hearsay exceptions.

People v. Smith, 2016 IL App (1st) 140887 In a successive post-conviction petition, defendant argued his extended-term sentences were unauthorized by statute and hence void. The trial court denied leave to file the successive petition. On appeal, defendant argued that the trial court improperly dismissed his successive petition since his sentences were void and subject to attack at any time.

After defendant filed his opening brief, the Supreme Court decided **People v. Castleberry**, 2015 IL 116916, abolishing the void-sentence rule. Defendant argued in his reply that since **Castleberry** created a new rule, it should not apply retroactively to cases on collateral review, and thus the void-sentence rule should apply to his case, allowing him to challenge his sentence in a successive petition.

Under **Teague v. Lane**, 486 U.S. 288 (1989), a judicial decision that establishes a new rule applies to all criminal cases pending on direct review, but does not apply (with two exceptions inapplicable here) to cases on collateral review. A decision creates a new rule if the result was not dictated by precedent existing at the time defendant's conviction became final.

The Appellate Court held that **Castleberry** did not create a new rule. Instead it abolished an old rule and thereby reinstated the rule that existed before the void-sentence rule was established by **People v. Arna**, 168 Ill. 2d 107 (1995).

Since **Castleberry** "did not announce a new rule and cannot be applied retroactively," defendant could properly challenge his sentences in a successive post-conviction petition. The court vacated the extended-term portion of defendant's sentences.

People v. Craighead, 2015 IL App (5th) 140468 Defendant filed a *pro se* post-conviction petition in October 2004. The trial court advanced the petition to the second stage after finding that it presented the gist of a constitutional issue. Without objection by the State, counsel sought additional time to file an amended petition. The first amended petition was filed in 2009.

The State then filed a motion to dismiss the petition on grounds of untimeliness, alleging that the deadline for filing a post-conviction petition passed some seven months

before the original petition was filed. In 2011, the trial court denied the motion to dismiss. The State did not file a motion to reconsider.

Defense counsel then filed two additional amended petitions, both without objection by the State. Both amended petitions incorporated [Miller v. Alabama, 567 U.S. ____, 132 S.Ct. 2455 \(2012\)](#), which found that the Eighth Amendment is violated by imposition of a mandatory life sentence without parole on a person under the age of 18 at the time of the offense. Defendant also supplemented his petition with [People v. Davis, 2014 IL 115595](#), which held that Miller applies retroactively to cases on collateral review.

The trial court denied the State's motion to dismiss the third amended petition and advanced the issue of the retroactivity of Miller to the third stage. At a hearing held in 2014, the trial court found that defendant was entitled to a new sentencing hearing under Miller and Davis, but that all other issues raised in the amended petition were waived or without merit. The trial court also found that the State's claim concerning the timeliness of the original petition was preserved for appeal. The court concluded that the new substantive rule announced in Miller constituted "cause" for failing to raise the issue earlier, and the Davis holding concerning retroactivity established prejudice. Thus, even if the trial court should have dismissed the original petition because it was untimely, the final amended petition would have satisfied the cause and prejudice test and permitted defendant to file a successive petition.

[People v. Diggins, 2015 IL App \(3d\) 130315](#) A defendant must obtain leave of the court before he can file a successive post-conviction petition. The court may only grant leave if the defendant demonstrates cause and prejudice. [725 ILCS 5/122-1\(f\)](#). Cause is shown by identifying an objective factor that impeded the defendant's ability to raise the claim in his initial petition.

In [Martinez v. Ryan, 132 S.Ct. 1309 \(2012\)](#), the United States Supreme Court held that when a defendant raises certain ineffective assistance of counsel claims in a federal habeas corpus proceeding, cause may be shown by the lack of counsel during initial collateral proceedings. Here, defendant requested leave to file a successive post-conviction petition alleging in part that his trial counsel was ineffective. As cause for his failure to raise this issue in his initial petition, defendant argued that he did not have counsel during the proceedings on his initial post-conviction proceeding.

The Appellate Court rejected defendant's argument. It held that **Martinez** only applies to federal habeas cases, and does not apply to successive post-conviction petitions in Illinois. Defendants do not have a constitutional right to be represented by counsel in post-conviction proceedings and ineffective assistance of counsel claims can be raised on direct appeal in Illinois.

[People v. Wilson, 2014 IL App \(1st\) 113570](#) 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.

People v. Sutherland, 2013 IL App (1st) 113072 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.

People v. Little, 2012 IL App (5th) 100547 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.

People v. Lofton, 2011 IL App (1st) 100118 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.

The circuit 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.

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. 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. 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.

People v. Anderson, 401 Ill.App.3d 134, 929 N.E.2d 1206 (1st Dist. 2010) 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. 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.

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. 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."

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."

People v. Evans, 405 Ill.App.3d 1005, 939 N.E.2d 1014 (2d Dist. 2010) 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. Anderson, 401 Ill.App.3d 134, 929 N.E.2d 1206 (1st Dist. 2010) 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.

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.

People v. Edgeston, 364 Ill.App.3d 514, 920 N.E.2d 467 (2d Dist. 2009) 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.

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.

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.

The trial court order denying leave to file a successive post-conviction petition was reversed, and the cause was remanded for further proceedings.

People v. Welch, 376 Ill.App.3d 705, 877 N.E.2d 134 (2d Dist. 2007) Defendant could raise, in a successive post-conviction petition, the trial court’s failure to properly admonish him of the MSR term before he pleaded guilty. Because defendant claimed to have learned of the MSR term for the first time while in prison, and there was no evidence that he knew of the issue during the prior post-conviction proceedings, the issue was not defaulted.

People v. Barksdale, 327 Ill.App.3d 422, 762 N.E.2d 669 (1st Dist. 2001) Defendant could file a successive post-conviction petition for DNA testing where DNA testing was not available at the time of defendant’s trial or initial petition. Defendant’s petition was not time barred. Because a convicted defendant may request DNA testing under 725 ILCS 5/116-3 without regard to the post-conviction statute, defendant could raise the same issues even if the post-conviction petition was untimely. See also, **People v. Walker**, 331 Ill.App.3d 335, 772 N.E.2d 758 (1st Dist. 2002) (“[W]e do not believe Apprendi’s unavailability to a petitioner during the applicable filing period, standing alone, constitutes a valid excuse for a belated

filing"); *People v. Dunn*, 306 Ill.App.3d 75, 713 N.E.2d 568 (1st Dist. 1999) (as a matter of fundamental fairness, 725 ILCS 5/116-3(a), which authorizes post-conviction forensic DNA testing, should be applied to post-conviction proceedings that were pending on the effective date of the statute (January 1, 1998)).

§9-1(i)(2)

Cause-and-Prejudice Test

Illinois Supreme Court

People v. Montanez, 2023 IL 128740 Defendant was found guilty of two first-degree murders, and sentenced to natural life in prison. He filed a *pro se* post-conviction petition, which was advanced to the second stage, and was appointed counsel. On December 3, 2015, a civil rights attorney, Candace Gorman, sent defendant a letter. Gorman had been litigating a federal civil rights case against the Chicago Police Department, and had obtained access to certain secret police reports (“street files”) from prior investigations. During her inspection of these files, she found a file related to defendant’s case. In her letter, Gorman informed defendant that she could not share the files directly with him, but that she could give the files to his attorney if he signed an included authorization form.

Defendant, however, moved to represent himself in his post-conviction proceedings and never signed an authorization. In an amended *pro se* petition, defendant included a **Brady** claim pertaining to the street files, which he alleged contained exculpatory evidence that was not disclosed prior to his trial. During the course of the subsequent post-conviction proceedings, defendant filed several pleadings and motions, including a discovery motion concerning a plea agreement with a State witness. None of the pleadings involved the street files claim, nor was the claim argued during the hearing on the State’s motion to dismiss, which was granted, or in defendant’s motion to reconsider.

In February of 2018, while the motion to reconsider was pending, defendant filed an ARDC complaint against Gorman for not sharing her files. Gorman responded that she was bound by a federal court order to release street files only to attorneys. At the hearing on the motion to reconsider, the circuit court agreed to have the State send Gorman a subpoena for the records. The State received defendant’s street files. The State informed the circuit court that it reviewed the street files and found no **Brady** material aside from what was already tendered to the defense before trial. The State tendered one report that was not included in pre-trial discovery, but noted that the information contained therein was already included in other reports.

Defendant objected on the grounds that the court, not the State, should have reviewed the street files. He also alleged that the newly tendered report contained new evidence. He filed a new amended petition based on this alleged discovery violation, but the circuit court dismissed the petition due to defendant’s inability to show that his attorney did not receive the information contained in that report before trial. On appeal, defendant did not raise any issues relating to the street files, and his conviction was affirmed.

Defendant filed a successive petition alleging a **Brady** violation based on the newly tendered report from the street files, as well as the failure of the circuit court to review those files in the prior proceedings. The circuit court denied leave to file, and the appellate court affirmed. The supreme court also affirmed.

In the supreme court, defendant argued that leave to file should have been granted because the State’s failure to disclose his entire street file was a **Brady** violation. The supreme court rejected the claim for two reasons. First, defendant did not raise this specific

Brady claim in his motion for leave to file or in his proposed successive petition. The motion for leave to file and the successive petition itself did not discuss the full street file, but instead focused exclusively on the newly tendered report. Because an appellant has a duty to present issues in the circuit court before raising them on appeal, defendant could not raise an issue relating to the entirety of the street files for the first time on appeal.

Second, defendant could not show cause where the **Brady** claim was previously raised in the prior petition and adversely decided against him by a final dismissal order of the court. The amended initial petition included among its many claims an allegation that the failure to turn over the entire street file was a **Brady** violation. Even though the claim was not mentioned in the circuit court until defendant filed the ARDC complaint and raised it during a hearing on the motion to reconsider, its inclusion in the initial, dismissed petition meant that defendant's current argument was barred by *res judicata*. *Res judicata* prohibits a showing of cause, because "there can be no cause for failing to raise a claim in the initial proceeding when the claim was, in fact, raised in that proceeding." Finally, while defendant argued that his claim also implicated the circuit court's refusal to conduct an *in camera* review, this claim should have been raised in the appeal from the dismissal of the initial petition, when the alleged error occurred.

People v. LaPointe, 2023 IL App (2d) 210312 The trial court did not err in denying defendant leave to file a successive post-conviction petition arguing that the juvenile parole statute [730 ILCS 5/5-4.5-115(b)] violates the equal protection because it discriminates between those sentenced before its effective date and those sentenced after. While the parties arguments on appeal focused on whether defendant had established cause and prejudice, the appellate court affirmed on the basis that defendant's claim was not cognizable under the Act. Specifically, the court held that defendant's petition did not assert a denial of any constitutional right "in the proceedings which resulted in his...conviction" in 1978 where he sought to challenge Section 5-4.5.115(b), which was first enacted in 2019. The appellate court concluded that defendant's claim was outside the scope of the Act.

People v. Clark, 2023 IL 127273 Defendant sought leave to file a successive post-conviction petition challenging his 90-year sentence for murder under the proportionate penalties clause of the Illinois Constitution. Defendant committed the offense in 1993 when he was just 24 years old, and, at sentencing, there was extensive evidence that defendant suffered from fetal alcohol syndrome, antisocial personality disorder, and borderline personality disorder, and that he had the intellectual ability of a 13- or 14-year-old. In his successive petition, defendant asserted that the circuit court failed to give sufficient weight to his intellectual disabilities and his young age as mitigating factors before imposing a *de facto* life sentence.

The Post-Conviction Hearing Act contemplates the filing of a single post-conviction petition unless the petitioner can establish "cause and prejudice" for filing a successive petition. "Cause" is defined as an objective factor that impeded the petitioner's ability to raise the claim at issue in his initial post-conviction proceeding. And, "prejudice" requires a showing that the claim at issue so infected the proceedings that the resulting conviction or sentence violated due process.

Defendant failed to demonstrate cause. He previously raised a challenge to his sentence on direct appeal, where he argued that his sentence was excessive in light of his mental conditions, and he cited the proportionate penalties clause in support of that argument at the time. While defendant relied on the more recent **Miller** line of cases in support of his successive post-conviction claim, the Supreme Court rejected that argument,

citing its recent holding from [People v. Dorsey, 2021 IL 123010](#), that those cases were based on the Eighth Amendment and do not provide cause for a proportionate penalties claim. Further, Illinois law has long recognized the reduced culpability of persons with intellectual disabilities, such that defendant's claim was previously available.

And, defendant's claim would fail as a matter of law even if he could establish cause. Defendant's sentence was discretionary, not mandatory, and the record showed that defendant's intellectual disabilities were the focus of the sentencing hearing. As noted in [People v. Coty, 2020 IL 123972](#), evidence of intellectual disabilities can present a "two-edged sword" at sentencing. On the one hand, such evidence may diminish an individual's culpability for his criminal conduct, while on the other hand it may serve to confirm his future dangerousness. Here, the court properly exercised its discretion in sentencing defendant to 90 years after considering extensive evidence of his intellectual disabilities. Accordingly, defendant could not show prejudice.

Defendant also argued that his status as an emerging adult warranted leave to file his successive post-conviction petition. The court rejected that claim because, as with the intellectual disability claim, defendant had argued on direct appeal that his youth and background warranted a lesser sentence, the **Miller** line of cases did not render his claim "new" for purposes of post-conviction purposes, and he could not establish prejudice where the court imposed a discretionary *de facto* life sentence upon giving considerable weight to the seriousness of the offense and Clark's future dangerousness as a function of his intellectual disabilities.

[People v. Blalock, 2022 IL 126682](#) Defendant sought leave to file a second successive post-conviction petition, alleging that newly discovered evidence demonstrated that the police officers who had interrogated him in 1999 had since been found to have engaged in a pattern and practice of brutality and that his confession was the product of police coercion. The circuit court denied leave to file.

The appellate court affirmed, finding that defendant had not established cause because the factual basis for the claim that his confession was coerced was not the recent finding of police misconduct but rather was his own knowledge that he had been mistreated by the police. Accordingly, the appellate court concluded that there was no objective factor that impeded defendant's ability to raise this claim in his original post-conviction petition because he necessarily would have known that the police had abused him at that time.

The Illinois Supreme Court disagreed with the appellate court's reasoning on cause but affirmed based upon a finding that defendant could not show prejudice. As to cause, the Court noted that the appellate court's decision was "an outlier." The majority of appellate court panels who had considered similar claims had held that newly discovered evidence of police coercion could, depending on the circumstances, provide cause for filing a successive petition. The Court agreed that those decisions were correct.

But, defendant could not satisfy the prejudice prong of the cause-and-prejudice test. The record positively rebutted defendant's claim of coercion, even in light of the new pattern-and-practice evidence. Defendant alleged acts of physical abuse in his successive petition, but the record included defendant's own trial testimony that nobody had threatened him, as well as evidence that he told an assistant state's attorney that he had been treated well. While defendant testified at trial that he had fabricated his statement, he explained that he had done so in an effort to appease the police and prosecutor, not because he had been abused.

[People v. Dorsey, 2021 IL 123010](#) Defendant was sentenced to an aggregate term of 76 years in prison for a murder and two attempted murders committed at age 14. The sentence

was eligible for day-for-day good conduct credit. Defendant filed a successive post-conviction petition, alleging that his sentence violated **Miller v. Alabama**, 567 U.S. 460 (2012). The Appellate Court affirmed the denial of leave to file, finding that defendant's eligibility for day-for-day sentencing credit meant that he did not receive a *de facto* life sentence.

A six member majority of the Supreme Court affirmed. The majority first held that defendant established cause where he could not have raised his claim earlier. Defendant's direct appeal was decided in 2000, and he filed his initial PC in 2005. The instant successive petition was filed in 2014. The appellate court correctly found that the "cause" prong was established where **Miller** set forth a new substantive rule in 2012 and was not available to defendant in his first petition.

The Supreme Court further held, however, that defendant could not establish prejudice because the day-for-day sentencing scheme meant that defendant did not receive a *de facto* life sentence. **Miller** precludes a life sentence for most juveniles without "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." The day-for-day sentencing scheme gives juveniles that meaningful opportunity. It is guaranteed by statute as long as the defendant complies with good conduct rules. By complying with those rules, defendants can earn an opportunity for early release.

Although defendant argued that the loss of good conduct credit for minor violations of prison rules did not mean a juvenile was not mature or rehabilitated, the Supreme Court disagreed. It is in a defendant's power to shorten his sentence by earning good-conduct credit, and earning such credit allows a defendant the opportunity to exhibit maturity and rehabilitation. And while a juvenile may be stripped of good conduct credit without the approval of courts, the court found no distinction between this scheme and a discretionary parole system, which was explicitly endorsed by **Miller**. The Supreme Court found that several regulations ensured that good conduct credit would not be lost without due process, making the system even more favorable to defendants than parole.

The majority further held that even if it accepted defendant's argument regarding day-for-day credit, his claim would fail in light of the Supreme Court's decision in **Jones v. Mississippi**, 593 U.S. ___, (2021). Under **Jones**, a judge who imposes a discretionary life sentence does not need to make an explicit finding of incorrigibility. As long as the judge had the discretion to consider youth and its attendant circumstances, a life sentence was permissible. Here, defendant's mandatory minimum was 32 years, and the sentencing court had the discretion to consider defendant's youth before it chose to impose the 76-year term.

Finally, the majority refused to reach defendant's argument that his sentence violated the proportionate penalties clause of the Illinois Constitution, finding the claim forfeited and barred by *res judicata*. Defendant did not raise the proportionate penalties argument in his petition for leave to file a successive post-conviction petition or in the petition itself, nor did he raise it in his petition for leave to appeal. Although defendant argued he preserved the claim by raising it in the Appellate Court, the Supreme Court found a mere reference to the proportionate penalties clause, without further argument, was insufficient. And because defendant raised a proportionate penalties argument in his direct appeal, the claim was barred by *res judicata* despite the evolution of the law in subsequent years. **Miller's** unavailability prior to 2012 at best deprived defendant of "some helpful support" for his state constitutional law claim, which is insufficient to establish "cause."

The dissent would have found the issue of good-conduct credit a factual question inappropriately resolved at the pleading stage. It further would have adhered to precedents that held sentencing credit controlled by prisons is not a part of the sentence. The dissent pointed out that the range of infractions – including "unauthorized movement," "business

ventures,” and “dangerous written materials” – was so broad and vague that it allowed for arbitrary revocation of credit. Finally, the dissent would have reached the proportionate penalties clause and found it sufficient to reach the second stage, citing the importance of the issue and disagreeing with the majority’s conclusion that the claim was not adequately raised in the Appellate Court.

People v. Jackson, 2021 IL 124818 The circuit court did not err in denying defendant leave to file a successive post-conviction petition arguing that his right to due process was violated by the State’s use of coerced witness statements at trial and that he was actually innocent.

The jury had heard extensive testimony concerning witness coercion at trial and necessarily rejected those claims when it convicted defendant. Attached to Jackson’s successive petition were documents suggesting misconduct in other cases by the same detectives that had been involved in interviewing the witnesses in his case. While new evidence of police misconduct can satisfy the cause-and-prejudice standard for filing a successive post-conviction petition in some cases, it fell short here. The new evidence was not relevant to establishing a pattern and practice of witness intimidation where it consisted of documents relating to civil lawsuits which had not resulted in any finding of wrongdoing by the officers and citizen complaint logs against detectives involved in defendant’s case, none of which involved claims of coercion or intimidation. The Court clarified that evidence of other misconduct is not required to be “strikingly similar” to the misconduct alleged by Jackson, but similarity is a factor to be considered.

The Court also rejected Jackson’s actual innocence claim on the basis that the evidence in support was not newly discovered. Two of the witness affidavits attached to Jackson’s successive post-conviction petition were repetitive of their trial testimony. And, police reports attached to defendant’s pleadings made clear that the third witness had been known to Jackson early in the investigation of the case. Jackson’s own affidavit attached to his first post-conviction petition stated that the witness had been at trial, ready to testify, but had not been called. Accordingly, that witness’s proposed testimony was not new.

People v. Smith, 2014 IL 115946 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.

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.

People v. Davis, 2014 IL 115595 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.

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. **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.

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.”

People v. Evans, 2013 IL 113471 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.

People v. Wrice, 2012 IL 111860 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.

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.

People v. Guerrero, 2012 IL 112020 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."

People v. Brown, 225 Ill.2d 188, 866 N.E.2d 1163 (2007) Defendant failed to establish "cause" for his failure to challenge his sentence in his first post-conviction petition; defendant's challenge to his sentence was predicated on the court's determination that the Safe Neighborhoods Act, which raised the sentencing range, was unconstitutional and of no effect, and it was clear that legal precedent supported defendant's challenge at the time of his first petition.

People v. Pitsonbarger, 205 Ill.2d 444, 793 N.E.2d 609 (2002) 1. The Post-Conviction Hearing Act contemplates the filing of only one post-conviction petition. The "cause-and-prejudice" test is used to determine whether issues are waived because they could have been raised on direct appeal and to determine whether, under the "fundamental fairness" exception, claims raised in successive petitions may be considered on their merits. "Cause" is "some objective factor external to the defense that impeded counsel's efforts" to raise the specific claim in question in an earlier proceeding. "Prejudice" occurs where application of the waiver doctrine would preclude consideration of an error that "so infected the entire trial that the resulting conviction or sentence violates due process." See also, **People v. Hudson, 195 Ill.2d 117, 745 N.E.2d 1246 (2001)** ("actual prejudice" requires a showing that errors "worked to [defendant's] actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions"); **People v. Morgan, 212 Ill.2d 148, 817 N.E.2d 524**

(2004) (to qualify for the "fundamental fairness" exception, a post-conviction petitioner must show both cause for failing to raise the error in a prior proceeding and actual prejudice resulting from the error; defendant did not show that newly-discovered evidence established his actual innocence).

People v. Holman, 191 Ill.2d 204, 730 N.E.2d 39 (2000) Argument that defendant had been denied a fitness hearing while on psychotropic medication was forfeited; defendant could not show "cause" where there was no "objective circumstance that would have prevented defendant's lawyers from raising the same issue" in the "initial post-conviction petition," and could not establish "prejudice" because the failure to request a fitness hearing did not so infect the proceedings as to violate due process.

People v. Hudson, 195 Ill.2d 117, 745 N.E.2d 1246 (2001) "Cause" was shown where the U.S. Supreme Court had not definitely spoken on the issue at the time of defendant's direct appeal.

Illinois Appellate Court

People v. Madison, 2023 IL App (1st) 221360 Post-conviction counsel violated Rule 651(c) by failing to add a verification affidavit to the *pro se* petition. Defendant's petition alleged actual innocence and included an affidavit from a witness, but it lacked the verification affidavit required by 725 ILCS 5/122-1(b). Counsel did not amend the petition, and filed a 651(c) certificate. The circuit court granted the State's motion to dismiss.

The filing of a 651(c) certificate creates a rebuttable presumption that counsel provided reasonable assistance. Here, counsel did consult with defendant and interviewed the witness cited in his petition. But the presumption of reasonable performance was rebutted by counsel's failure to amend the *pro se* petition to include a verification affidavit. The State had explicitly argued that the failure to attach a verification affidavit was reason for dismissal. The circuit court asked post-conviction counsel if she was aware of this deficiency, but her only response was that she believed the petition lacked merit and she had no objection to the State's motion. The circuit court cited the lack of the verification affidavit in dismissing the petition. Thus, counsel performed unreasonably in failing to amend the petition to avoid this procedural deficiency.

Though the State argued on appeal that remand was unnecessary because the substantive claims lacked merit, harmless error analysis does not apply to 651(c) violations, so the appellate court remanded for new second stage proceedings.

People v. Wimberly, 2023 IL App (1st) 220809 In a successive petition, the defendant alleged for the first time that his arrest pursuant to an investigative alert, rather than a warrant, was unconstitutional. The State first argued that defendant could not establish the cause prong of the cause and prejudice test. It noted that the claim was always available to him, and that some justices of the appellate court have voiced concerns about the use of investigative alerts in decisions dating back to 2012. The appellate court disagreed. New decisions can establish cause, and here defendant's initial petition was filed in 2011, before the justices' voiced concern about investigative alerts and, more importantly, before two appellate court decisions, **People v. Bass**, 2019 IL App (1st) 160640, *aff'd in part, vacated in part*, 2021 IL 125434, and **People v. Smith**, 2022 IL App (1st) 190691, which held for the first time that an arrest based on an investigative alert was unconstitutional.

The appellate court would not find prejudice, however. The court agreed with [People v. Braswell, 2019 IL App \(1st\) 172810](#), which declined to follow [Bass](#) and found it wrongly decided. Like [Braswell](#) and the dissent in [Bass](#), the court here found no reason to deviate from the supreme court's holding that the Illinois constitution provides the same protections as the fourth amendment. Under the fourth amendment, an arrest made without a warrant is valid if there is probable cause, regardless of whether that probable cause is attached to an investigative alert. The appellate court found no merit to the [Bass](#) court's belief that the Illinois constitution's requirement of a warrant supported by "affidavit" (rather than the federal constitution's requirement of "oath or affirmation") is a meaningful difference that justifies finding warrantless arrests based on probable cause, but made pursuant to an investigative alert, unconstitutional.

[People v. Vidaurri, 2023 IL App \(1st\) 200857](#) In a successive petition, defendant alleged that his confession was the product of police abuse, primarily by Detective Adrian Garcia. He had alleged in a prior petition that counsel was ineffective for failing to move to suppress the confession, and the State therefore asserted the claim was barred by *res judicata*. Defendant countered that his current claim was supported by new evidence of a pattern and practice of police misconduct. This evidence included affidavits from other victims of abuse, testimony from a lawsuit, a settlement agreement, and a list of several allegations, albeit unfounded, documented by the Citizen's Police Data Project.

Newly discovered evidence of police coercion may provide cause for permitting the filing of a successive post-conviction because such evidence, by its nature, is difficult for *pro se* petitioners to obtain. Here, as in [People v. Blalock, 2022 IL 126682](#), the documents in question were external to the defense, and some were in the custody of the police, who have a direct interest in keeping the information from defendants. Thus, defendant met the cause prong.

Defendant could not show prejudice, however. At the pleading stage, defendant establishes prejudice in a "pattern and practice" claim when: (1) the defendant consistently claims he was tortured; (2) his claims of torture were and always had been similar to other claims depicted in the new evidence; (3) the officers identified in the evidence were the same officers in the defendant's case; and (4) the defendant's allegations were consistent with documented findings of torture against the officers.

Here, the appellate court first found the list of allegations from the CPDP, as well as the evidence about the lawsuit, lacked sufficient detail to be assessed for similarity. As for the remaining evidence, the appellate court found each one individually deficient for several reasons, including a lack of similarity in the details. For example, one former victim of Garcia alleged, as defendant did, that Garcia used coercive techniques while the victim had one hand cuffed to the wall. But other than this "general" similarity, the remaining details of the allegations differed. Importantly, this victim did not allege physical violence, while defendant did.

Another victim's claims were insufficient because five years separated the conduct, the affiant accused "Garcia" without providing a first name, and the types of coercive techniques were not identical where the affiant said he was punched while defendant said he was slapped and defendant alleged sleep deprivation, while the affiant did not.

In sum, the supporting evidence, taken together, did not establish that Garcia engaged in a pattern and practice of abuse where some of the new allegations did not name Detective Garcia, others failed to offer details of his actions, and others lacked sufficient similarity to defendant's allegations of abuse.

People v. Miranda, 2023 IL App (1st) 170218-B Defendant’s motion for leave to file successive post-conviction petition based on actual innocence and ineffective assistance of counsel was properly denied. The appellate court held that the affidavits from two co-defendants were cumulative of defendant’s own trial testimony concerning his lack of knowledge of the co-defendants’ plan. Accordingly, the court concluded it need not consider whether defendant had met the other elements of an actual innocence claim because defendant’s claim would fail on the “non-cumulative” element.

Further, the court concluded that defendant could not show cause for not raising in his original post-conviction petition a claim of ineffective assistance of counsel based on trial counsel’s failure to call witnesses. Defendant argued that prior post-conviction counsel who “ghost-wrote” his original petition should have included the claim, but neither the Post-Conviction Hearing Act, nor Rule 651(c), require any specific standard of representation by counsel at the first stage of post-conviction proceedings. And, defendant could not show prejudice, regardless, because the witnesses’ proposed testimony was only minimally helpful.

Finally, the court noted the importance that parties follow **Illinois Supreme Court Rule 341**, which sets forth various requirements for briefs filed in the reviewing court. The court specifically criticized the use of smaller-than-12-point font in a footnote, as well as the inclusion in the statement of facts of a 10-page, single-spaced block quote from a prior appellate court opinion.

People v. Ford, 2022 IL App (1st) 211538 On appeal from a second-stage dismissal of a successive post-conviction petition, the appellate court remanded the case back to the leave-to-file stage because the record lacked an express finding that the petition satisfied the cause-and-prejudice test. Instead, the record contained a docket entry indicating that the circuit court had “allowed” the petition. “This procedure of allowing the petition and advancing it to the second stage without an express ruling on cause and prejudice was improper, and the post-conviction court was without authority to consider the merits of the petition, which technically still has not been ‘filed,’ without such a determination.”

People v. Montanez, 2022 IL App (1st) 191930 After a file regarding defendant’s case was found in the basement of a Chicago Police Department facility, an Assistant State’s Attorney notified defendant of its existence. The ASA concluded that a police report in the file had not been tendered to defense counsel prior to defendant’s trial, and that report was turned over to defendant. Defendant sought leave to file a successive post-conviction petition raising a **Brady** claim based on the State’s failure to turn over the police report. That motion was denied, and defendant appealed.

On appeal, defendant argued both that the failure to turn over the police report and the failure to disclose the entire basement file violated **Brady**. The Appellate Court first held that the claim regarding the complete basement file was not raised in defendant’s petition and could not be raised for the first time on appeal. Thus, that claim was waived, and the court did not address its merits. As to the **Brady** claim based on police report, the court concluded that defendant could not establish prejudice. Specifically, there was “ample” evidence supporting defendant’s guilt, and the impeachment material contained in the police report was not material to defendant’s guilt or innocence. Accordingly, the trial court did not err in denying leave to file defendant’s successive post-conviction petition.

People v. Zirko, 2021 IL App (1st) 162956 A defendant has the right to reasonable assistance of post-conviction counsel. Reasonable assistance includes the right to conflict-free

representation. Whether an attorney labored under a conflict of interest while representing a defendant is a question of law subject to *de novo* review.

Here, defendant was represented by the same attorney at trial and during post-conviction proceedings in the trial court. That attorney also represented defendant on appeal, until the Appellate Court *sua sponte* raised a concern about whether he had a conflict of interest. In response to the Appellate Court's request for supplemental briefing on the conflict question, defendant requested and was granted new counsel on appeal.

New appellate counsel argued that post-conviction counsel labored under a conflict of interest and provided unreasonable assistance. The Appellate Court rejected defendant's request to create an additional category of *per se* conflicts of interest for situations where the same attorney represents defendant at trial and in post-conviction proceedings and alleges his own ineffectiveness at trial. The court agreed, however, that counsel here labored under an actual conflict of interest. The record demonstrated that counsel failed to support at least one post-conviction claim of ineffective assistance with necessary and available photographic evidence. The court could "conceive of no strategic reason" to raise such an issue and not support it with available evidence. Accordingly, the Appellate Court reversed the second-stage dismissal of defendant's petition and remanded for new second-stage proceedings with new counsel.

People v. Garcia, 2021 IL App (1st) 191820 Defendant did not receive reasonable assistance from post-conviction counsel. Defendant's *pro se* petition alleged that his trial attorney failed to provide effective assistance of counsel where she failed to perfect an appeal from defendant's guilty plea. Appointed post-conviction counsel filed a Rule 651 affidavit but did not amend defendant's petition to include grounds for withdrawal of the plea – a required element of defendant's claim. Counsel also did not supplement the petition with the necessary supporting affidavits. Because counsel advanced the petition, rather than seeking to withdraw on the basis that the petition lacked merit, defendant received unreasonable assistance of counsel for failing to amend and support the petition. The Appellate Court reversed and remanded for appointment of new counsel to amend the petition as necessary and for further proceedings on defendant's petition.

People v. Howard, 2021 IL App (2d) 190695 Defendant failed to establish cause and prejudice for filing a successive post-conviction petition challenging his discretionary life sentence imposed for an offense committed in 1983 when he was 20 years old. Defendant's claim was predicated on the proportionate penalties clause of the Illinois constitution and could have been raised in his initial post-conviction petition given that it was well-established even then that youth was relevant to sentencing. The later emergence of additional support for such a claim, in **Miller** and its progeny, did not establish cause for failing to bring the claim earlier.

Further, defendant's claim, while premised on the proportionate penalties clause, was not a constitutional claim but rather an argument that the court abused its discretion by not giving greater weight to defendant's youth at sentencing. Thus, it was not cognizable in a post-conviction petition. And, regardless, defendant's claim would fail where the sentencing judge considered defendant's youth and rehabilitative potential in imposing a discretionary life sentence. Thus, defendant could not establish prejudice. The court noted that it had rejected similar claims in **People v. LaPointe, 2018 IL App (2d) 160903**, and **People v. Hoover, 2019 IL App (2d) 170070**.

People v. Brandon, 2021 IL App (1st) 172411 The trial court erred in denying defendant leave to file a successive post-conviction petition alleging that his confession to a 1991 murder was coerced. Defendant had previously challenged the confession, unsuccessfully, by alleging physical coercion at the hands of Detectives Ricardo Abreu and Terrance O'Connor, but his successive petition was supported by affidavits from others who attested to similar abuse by these same detectives. Defendant also attached documents regarding the exoneration of another individual – Daniel Taylor – upon proof that he had been abused and framed by these detectives and others at Area 6.

Defendant demonstrated cause for not presenting this evidence earlier where it did not come to light until Taylor's exoneration in 2013. Defendant's prior collateral petitions were filed in 2001 and 2010, when this evidence was unavailable to him. While the other individuals who attested to similar abuse had suffered that abuse well-before 2013, it is illogical to think defendant could have discovered that abuse and obtained their affidavits, on his own. "No reviewing court in Illinois has ever accepted the State's logic that, while the proof may be new, the alleged abuse is old, so the proof came too late...."

To establish prejudice with regard to physical coercion of a confession, the question is whether, taken as true, the new evidence documents abuse similar enough to that alleged by defendant that it may show the officers were acting in conformity with a pattern and practice of behavior. The overall strength of the evidence at trial is irrelevant because the use of a physically coerced confession as substantive evidence of guilty is *never* harmless error. Taken as true, the evidence attached to defendant's petition met the prejudice standard in that it demonstrated a pattern of abuse by the same officers occurring close in time to defendant's own alleged abuse.

The Appellate Court reversed and remanded for the appointment of post-conviction counsel and second-stage proceedings on defendant's coerced-confession claim.

People v. Urzua, 2021 IL App (2d) 200231 Defendant filed a *pro se* post-conviction petition and had counsel appointed. Counsel subsequently filed a 651(c) certificate and a motion to withdraw, citing **People v. Greer**, 212 Ill. 2d 192 (2004), and **People v. Kuehner**, 2015 IL 117695. Defendant then advised the court that he was going to retain private counsel, and the court granted a continuance to allow him to do so. The court also allowed appointed counsel to withdraw. New counsel subsequently appeared and filed an amended petition. The State moved to dismiss, and the court granted the State's motion.

On appeal, defendant argued that he had been denied reasonable assistance of post-conviction counsel where his retained attorneys failed to make routine amendments, properly present his actual innocence claim, and review pertinent transcripts. The State, citing **People v. Thomas**, 2013 IL App (2d) 120646, argued that defendant was not entitled to reasonable assistance from retained counsel where original counsel had complied with both Rule 651(c) and **Greer** and had been allowed to withdraw.

The Appellate Court distinguished **Thomas** and rejected the State's argument. In **Thomas**, new counsel had been appointed to represent the defendant after his original counsel withdrew under **Greer**. Here, on the other hand, there was no indication that the court allowed original post-conviction counsel to withdraw on the basis that the claims lacked merit under **Greer**. Instead, the record showed that counsel was granted leave to withdraw because defendant intended to hire a new attorney.

On the merits, the Appellate Court agreed that retained counsel failed to provide reasonable assistance where counsel did not obtain a properly notarized affidavit from a witness to support defendant's actual innocence claim. Accordingly, the court reversed and

remanded for further second-stage post-conviction proceedings with the appointment of new counsel.

People v. Haines, 2021 IL App (4th) 190612 The Appellate Court affirmed the denial of leave to file a successive petition which alleged that a 55-year sentence for a murder committed at age 18 was unconstitutional. First, the claim was forfeited where defendant did not file a post-sentencing motion in the trial court. Second, defendant could not show cause for failing to raise the issue in his first petition.

While defendant argued that **Miller** had not been decided at the time of his initial petition, defendant's claim did not depend on **Miller**. Defendant was 18 at the time of the murder, and **Miller** applies only to those under age 18. Nor could defendant show cause by relying on **People v. Harris**, 2018 IL 121932. **Harris** found that an 18 year-old may be able to raise a proportionate penalties challenge to a life-sentence based on the discussion of youth and brain research cited in **Miller**. But Illinois courts have long held that a proportionate penalties challenge may be based on inadequate consideration of youth. Although **Harris** made this argument easier, the claim was available at the time of his first petition.

People v. McDonald, 2021 IL App (1st) 190687 The court did not err in denying defendant leave to file his seventh post-conviction petition. Defendant alleged ineffective assistance of counsel for not objecting to his being sentenced as a habitual offender, contending that his prior conviction of deviate sexual assault was not a proper predicate. At the time of sentencing, there was substantial precedent contrary to defendant's position. Thus, counsel was not deficient, and defendant was not prejudiced. The Appellate Court also declined defendant's invitation to find its prior precedent wrongly decided.

People v. Navarro, 2021 IL App (1st) 190483 Defendant's successive post-conviction petition alleged counsel was ineffective for failing to call an expert on eyewitness identification at his murder trial. The Appellate Court affirmed the dismissal, finding defendant failed to show cause as to why he could not have raised this claim on direct appeal.

Defendant argued that his direct appeal occurred prior to **People v. Lerma**, 2016 IL 118476, where the Supreme Court found the trial court abused its discretion in refusing to admit an expert on eyewitness testimony. Defendant alleged this "massive shift" in this area of the law, where the court recognized recent research that offered greater understanding of the weaknesses of eyewitness identifications, explained why he could not raise his claim earlier. The Appellate Court disagreed. The Illinois Supreme Court has long held that eyewitness identification is a proper area for expert testimony. **People v. Enis**, 139 Ill. 2d 264 (1990). Defendant did not need to wait for **Lerma** to support an ineffectiveness claim. And if **Lerma** *did* represent a massive shift in the law, defense counsel could not have been ineffective for failing to call an expert prior to that holding.

People v. Dixon, 2021 IL App (1st) 161641 The trial court erred in denying defendant's motion for leave to file successive post-conviction petition which alleged that detectives at Area 2 police headquarters, operating under Commander Jon Burge, had coerced a witness into falsely identifying him as the murderer. Attached to defendant's petition was a report identifying the detectives in question as having participated in documented cases of abuse, as well as news articles detailing their pattern and practice of misconduct.

Because the extent of the detectives' criminal abuse of suspects did not come to light until after the dismissal of defendant's original post-conviction petition, he established cause for failing to raise his claim earlier. And, defendant demonstrated that he suffered prejudice from the officers' misconduct where the trial court and jury did not hear evidence of the officers' misconduct which would have been relevant, both to potentially suppressing the identification of defendant as the offender and to undermining the credibility of the prosecution's witnesses. The Appellate Court reversed the denial of leave to file and remanded defendant's successive post-conviction petition for further proceedings.

People v. Glinsey, 2021 IL App (1st) 191145 Defendant received a 45-year sentence for a murder committed at age 18. His successive post-conviction petition asserted a proportionate penalties claim. The Appellate Court majority held that the petition satisfied the "very low threshold" for obtaining leave to file a successive petition. Defendant was a mere 11 days past his 18th birthday, was not the main "motivating" actor behind the offense, was convicted under a theory of accountability, and was a member of a gang since age 12 and, thereby, potentially subject to its peer pressure. Although defendant's sentence was discretionary, the sentencing court did not explicitly consider defendant's age or any age-related factors.

The dissent would have found the petition lacked the necessary specific allegations required for an "as-applied" challenge.

People v. Lenoir, 2021 IL App (1st) 180269 The circuit court erred in denying defendant leave to file his successive post-conviction petition challenging the constitutionality of his life sentence. Defendant received a 48-year sentence for a murder committed at age 18. Defendant established cause because he filed his initial petition prior to **Miller**, and before the Illinois Supreme Court suggested in **People v. Harris, 2018 IL 121932** that young adults could attempt to raise a **Miller** claim in a post-conviction petition.

As to prejudice, defendant's case was analogous to **People v. House, 2019 IL App (1st) 110580-B**. Defendant was convicted under a theory of accountability and consistently maintained he merely drove the actual shooters to the scene and did not intend to assist them in a murder. While one co-defendant testified that defendant actively participated by pointing out the victim as a rival gang member, this co-defendant received a favorable plea deal for his testimony. Under these circumstances, defendant established prejudice even considering that his life sentence was discretionary.

A majority of the court upheld the denial of leave to file actual innocence and police coercion claims, finding the affidavits in support of those claims were not newly discovered. The partial dissent disagreed, noting that one of the alibi witnesses explained he was afraid of gang repercussions if he had come forward earlier, and that this is an acceptable explanation for not coming forward earlier under Supreme Court precedent. The partial dissent would have also found the witness who could corroborate the police coercion claim to be newly discovered despite that witnesses' averment that defendant saw him at the police station. The partial dissent believed the court should have taken as true the defendant's assertion that he did not discover this witness until a later FOIA request.

People v. Bland, 2020 IL App (3d) 170705 Defendant established cause for not raising a **Miller** claim on direct appeal or in an earlier post-conviction petition. **Miller** was not decided until 10 years after defendant was convicted, there had been no suggestion that **Miller** could be applied to individuals 18 years of age and older until 2015, and **Miller** was only extended to *de facto* life sentences in 2016. Defendant, who was 19 years old at the time of the offense,

thus had cause for not challenging his 71-year sentence until he sought leave to file a successive post-conviction petition in 2017.

Defendant also established prejudice where his petition alleged he was 19 years old at the time of the offense, was found guilty under a theory of accountability, and had been diagnosed with antisocial personality disorder which included symptoms similar to characteristics of juveniles. The record also failed to show that the trial court considered defendant's youth and its attendant characteristics at sentencing. Accordingly, defendant should have been granted leave to file his successive post-conviction petition.

People v. Gomez, 2020 IL App (1st) 173016 The Appellate Court majority affirmed the denial of leave to file a successive post-conviction petition containing an “emerging adult” proportionate penalties claim. Defendant received a discretionary *de facto* life sentence of 50 years for a murder committed at age 18. The Court found that **People v. Harris, 2018 IL 121932** does not automatically require an evidentiary hearing in emerging-adult cases, only the opportunity to file a post-conviction petition. Defendant attempted to file one here, but failed to establish cause and prejudice. Even if only accountable (the evidence was disputed as to whether or not defendant was the gunman), defendant was with a fellow gang member “hunting down” rivals before killing someone in a “cruel and cold-blooded” fashion. A 50-year sentence under these circumstances was not so cruel or disproportionate so as to shock the moral conscience of the community.

The dissent would have allowed defendant the opportunity to file the petition and attempt to show that his youth, abusive upbringing, and attempts at rehabilitation could amount to a substantial showing of a proportionate penalties claim.

People v. Jackson, 2020 IL App (1st) 143025-B In a successive post-conviction petition, defendant argued his 50-year sentence for murder committed at age 16 violated **Miller**. Upon remand from the Illinois Supreme Court in light of **Buffer**, the Appellate Court held that defendant was entitled to a new sentencing hearing at which the court would be required to consider the **Miller** factors.

People v. Canizalez-Cardena, 2020 IL App (4th) 180212 The circuit court granted leave to file a successive petition, then changed its mind at the second stage, after the State moved to dismiss. It entered an order vacating the prior leave-to-file order, and dismissed the petition. The Appellate Court reversed and remanded for further second-stage proceedings.

Although the general rule holds that a trial court may reconsider prior orders so long as it still has jurisdiction over the case, the general rule did not apply here. First, the State is not allowed to participate in the leave-to-file decision, yet the circuit court vacated its order granting leave to file only after the State moved to dismiss at the second stage. Second, the circuit court relied on flawed reasoning by stating that defendant failed to explicitly request leave to file, which is not necessary.

People v. Johnson, 2020 IL App (1st) 171362 The circuit court erred in denying defendant leave to file his successive post-conviction petition containing an “emerging adult” proportionate penalties claim. Defendant was convicted of murder and given a discretionary life sentence for a crime committed in 1999 at age 19. The Appellate Court first found that defendant established cause. His previous post-conviction petition did raise a **Miller** issue, but the instant petition was filed only after **People v. House 2015 IL App (1st) 110580** offered support for the extension of **Miller** beyond those under 18 through the Illinois

proportionate penalties clause. Thus, defendant's current argument was not yet available until after he already filed his initial petition.

As to prejudice, defendant's eighth amendment challenge could not succeed pursuant to federal authority restricting its protections to juveniles. But his proportionate penalties argument had potential merit. The court refused to distinguish defendant's case from **House** on the basis of his discretionary sentence, finding no relevant distinction between mandatory and discretionary life sentences. The court further found that it would be premature to decide whether the **Miller** factors had already been considered at his sentencing hearing, as defendant at this stage should only be required to plead that the facts of his case warrant their consideration in the first place. Defendant's petition met this standard, and at further post-conviction proceedings the defendant will have to prove both that the **Miller** protections applied to him and that he did not receive them at the initial sentencing hearing.

People v. Ruiz, 2020 IL App (1st) 163145 The circuit court erred in denying defendant leave to file his successive post-conviction petition challenging the constitutionality of his life sentence. Defendant received a 40-year sentence for a murder committed at age 18. The Appellate Court first found that defendant established cause. Defendant was sentenced years before the United States Supreme Court decided **Miller**, and even longer before the Illinois Supreme Court suggested in **People v. Harris, 2018 IL 121932**. that young adults could attempt to show **Miller**'s application to them in post-conviction proceedings.

As to prejudice, defendant's eighth amendment challenge could not succeed pursuant to federal authority restricting its protections to juveniles. But his proportionate penalties argument had potential merit. The court refused to distinguish defendant's case from **People v. House, 2019 IL App (1st) 110580-B** on the basis of his discretionary sentence, finding no relevant distinction between mandatory and discretionary life sentences, or on his greater participation in the offense, noting participation is not a primary focus of **Miller**. The court also rejected the argument that because the 40-year sentence would be permissible on a juvenile without regard to **Miller**, defendant's 40-year sentence could not be unconstitutional. The court reasoned that an 18-year-old defendant who receives a 40-year sentence will not be released until age 58.

Finally, the court refused to consider whether the sentencing court had already sufficiently considered the **Miller** factors, holding that this query is premature and that defendant must first establish that he deserved the protections of **Miller** via the Illinois proportionate penalty clause. Defendant's petition met this pleading standard by setting forth a detailed, well-cited legal argument for why the protections in **Miller**, and in the Illinois cases applying it, should benefit young adults such as himself.

People v. Carrasquillo, 2020 IL App (1st) 180534 The circuit court erred when it denied defendant leave to file his successive post-conviction petition alleging a *de facto* life sentence imposed on an 18 year-old violated the proportionate penalties clause of the Illinois Constitution.

In 1978, defendant was sentenced to 200 to 600 years in prison, with opportunity for parole after 20 years. Because defendant could not have anticipated the **Miller** line of cases at the time of his first post-conviction petition in 1987, he established cause. Defendant also established prejudice. He has already served a *de facto* life sentence under **Buffer**. There was no evidence the trial court considered his youth. Nor was there recourse for defendant to challenge the parole board's repeated denials, and defendant presented sufficient evidence – including the intimidating presence of police officers at his parole hearings – that he would

never be paroled. For these reasons, defendant deserved a chance to develop his claim through post-conviction proceedings.

People v. Ryburn, 2019 IL App (4th) 170779 The circuit court erred when it found defendant's successive post-conviction petition failed to satisfy the cause-and-prejudice test. Defendant had pleaded guilty to three counts of aggravated criminal sexual assault and received three consecutive 20-year sentences. Years later, after filing an ARDC complaint and a FOIA request, he learned that the State initially offered a 24-year total sentence to his attorney, but that his attorney never communicated the offer to him. Defendant's inability to learn about the offer until investigating his own case constituted "cause." He further made a substantial showing of prejudice by meeting the **Frye** test: he alleged that if he had known of the offer he would have accepted it; he provided evidence that the State would not have revoked the offer, because it made clear that the offer stood until the next hearing date; the judge would have accepted the offer as it would have saved time and would save the teenage victim the trouble of testifying; and the end result of the criminal process would have been more favorable.

People v. Johnson, 2019 IL App (1st) 153204 Defendant filed a successive post-conviction petition with an attached exculpatory affidavit from an eyewitness to the shooting. He alleged ineffective assistance of counsel for failing to investigate the witness. The circuit court granted the State's motion to dismiss.

Even though the petition had advanced to the second stage, the State had a right to raise a cause-and-prejudice challenge on appeal, because the trial court never applied the test. A majority of the Appellate Court found that defendant established cause and prejudice. The new exculpatory affidavit became available to defendant only after his direct appeal and first petition. Although defendant knew the affiant was at the scene of the crime, defendant included an affidavit stating that he asked his attorney to investigate witnesses at the scene but that counsel did not do so. Defendant also established prejudice where the affiant stated that he witnessed the shooting and defendant was not one of the shooters. His testimony would contradict the two eyewitnesses at trial and support defendant's theory that their accounts were unreliable.

The court then found that defendant made a substantial showing of ineffective assistance of counsel. Counsel cannot make a sound strategic decision about which witnesses to call if counsel hasn't investigated the witnesses in the first place.

People v. Parker, 2019 IL App (5th) 150192 The trial court erred in denying defendant leave to file a successive petition alleging a **Miller** violation. Defendant pled guilty to first-degree murder, based on accountability, committed at age 16, after the State agreed to a 50-year sentencing cap. Defendant was admonished that the crime carried a sentence up to natural life. He agreed to the cap, pled guilty and received 35 years. In his successive petition, he alleged he received a *de facto* natural life sentence in violation of **Miller**. The circuit court denied leave to file, finding the sentence was not *de facto* life, and that the sentencing court did consider defendant's age in mitigation.

On appeal, defendant conceded that in light of **Buffer**, his sentence is not a *de facto* life sentence. But he argued that his plea was not voluntary where he was not adequately informed of his eligibility for a life sentence or the 50-year cap, neither of which were available absent a finding of incorrigibility. The Appellate Court held that defendant established cause, as his initial petition was filed before **Miller**. It also found prejudice,

because **Buffer** would have established that the State's cap represented a *de facto* life sentence, and defendant could not have knowingly agreed to this plea without understanding that neither the maximum nor the sentencing cap would be available absent a finding of incorrigibility.

People v. Jackson, 2018 IL App (1st) 171773 Defendant argued that the circuit court erred in denying his successive petition alleging actual innocence and cause and prejudice, because it included documents showing a pattern of police misconduct by the officers who took the statements of the eyewitnesses who testified at his trial. These witnesses alleged that the officers used various coercive tactics to elicit their statements, and they recanted the statements at trial. Defendant attached new affidavits from two of these witnesses to the petition, along with a third affidavit from a new exculpatory witness.

The Appellate Court affirmed. New evidence of police misconduct does not support a claim of actual innocence. Rather, such evidence must supplement a separate claim, such as an involuntary confession or violation of due process. Also, the two affidavits from the trial witnesses were cumulative. Finally, the third affidavit was not new, because defendant knew of the witness before trial.

Nor did the petition satisfy the cause-and-prejudice test, because, although new, the evidence of police misconduct was insufficiently connected to what happened in this case. Defendant alleged that the seven officers investigating his case had a history of misconduct, but his documentation did not establish that they had ever worked together in other cases to coerce witnesses, or engaged in a systemic pattern of witness coercion, or participated in misconduct similar to that alleged here. The court concluded that while cause-and-prejudice is a significant hurdle, defendant should not hesitate to file another successive petition if he uncovers more evidence of misconduct.

People v. Williams, 2018 IL App (1st) 151373 Mandatory natural life sentence was unconstitutional as applied to 19-year-old defendant's 1994 conviction of two counts of murder on an accountability theory. The trial court erred in denying leave to file a successive post-conviction petition raising a challenge under **Miller v. Alabama** because **Miller** was not decided until 2012, providing cause for not raising the claim in earlier proceedings. And, defendant established prejudice because his mandatory life sentence violated the proportionate penalties clause of the Illinois Constitution as applied to him.

The Court found defendant's case analogous to **People v. House, 2015 IL App (1st) 110580**, which also involved a 19-year-old defendant. The Court looked at scientific studies and concluded there is "no scientific evidence to support the conclusion that at age 18 a defendant's brain is magically transformed to maturity such that it is different than it was the day before his eighteenth birthday. In fact, the scientific evidence suggests the opposite conclusion." The Court continued, "there is no bright line of demarcation regarding brain maturity between a 17-year-old and an 18- or 19-year-old."

While defendant should have been granted leave to file his successive petition, the Appellate Court found remand for further post-conviction proceedings unnecessary because defendant was entitled to relief on his claim. Defendant's natural life sentence was vacated, and the matter was remanded for resentencing.

People v. Miranda, 2018 IL App (1st) 170218 Defendant's motion for leave to file successive post-conviction petition based on actual innocence and ineffective assistance of counsel was properly denied. Affidavits from two co-defendants were newly discovered because the co-defendants could not have been forced to violate their Fifth Amendment privilege against

self-incrimination at defendant's trial. But the affidavits were cumulative of defendant's own testimony concerning his lack of knowledge of the co-defendants' plan, and while they may have impacted the sufficiency of the State's evidence at trial, they were not so conclusive that they would have been likely to result in total exoneration.

Further, the Appellate Court concluded that defendant could not show cause for not raising a failure-to-call-witnesses claim in his original post-conviction proceedings by blaming prior post-conviction counsel who "ghost-wrote" his original petition. Neither the PC Act, nor Rule 651(c), require any specific standard of representation at the first stage of post-conviction proceedings. And, defendant could not show prejudice, regardless, because the witnesses' proposed testimony was only minimally helpful.

People v. Jackson, 2016 IL App (1st) 143025 In deciding whether a defendant has established cause and prejudice for filing a successive post-conviction petition, the Illinois Supreme Court has held that leave to file a successive petition should be denied when it is clear from a review of the successive petition and documentation submitted by the defendant that the claims fail as a matter of law. **People v. Smith, 2014 IL 115946**. **Smith** left open the question of whether a court could consider the underlying record.

The Appellate Court held that until the Supreme Court resolves this issue, it would rely primarily on the petition and its supporting documentation, and would take judicial notice of its prior opinions and orders, in deciding whether a defendant has established cause and prejudice.

People v. Jones, 2017 IL App (1st) 123371 The circuit court properly denied leave to file a successive post-conviction petition. Defendant was convicted of first-degree murder after confessing he, Melvin Jones, and Travis Ashby all fired shots at the decedent. An initial post-conviction petition, which included an exculpatory statement from Jones, was dismissed at the first stage. In the instant successive petition, defendant produced an exculpatory affidavit from a purported eyewitness, Shaw. Defendant also attached a newspaper article showing that the detectives in his case had been successfully sued in another case for malicious prosecution, with a jury finding the officers falsified a confession in that case. The circuit court denied leave to file, finding Shaw's affidavit was not of such conclusive character to change the result on retrial. The court found the newspaper article hearsay and conclusory.

The Appellate Court affirmed, over dissent. With regard to Shaw's affidavit, the court found it insufficiently exculpatory to change the result on retrial. The court noted that while Shaw averred that he saw Jones shooting the decedent, he did not assert that defendant was not present at the scene. Moreover, the theory that Jones was the only shooter conflicts with the evidence at trial, including defendant's confession, an earwitness who claimed to hear multiple guns being fired, and the ballistics evidence that showed multiple types of guns were fired. Finally, Shaw's affidavit was not sufficiently detailed concerning his vantage point and ability to observe, leaving open the possibility that defendant may have been present even if Shaw did not see him.

As for defendant's allegation against the detectives as supported by the newspaper article, the Appellate Court held that the claim was forfeited. When defendant cited the detectives' prior misconduct in the petition, he did so as part of his actual innocence claim. It was not until appeal that defendant alleged that the evidence provided grounds to grant leave to file for cause and prejudice. Because the cause-and-prejudice argument was not included in the petition, it could not be considered on appeal.

People v. Weathers, 2015 IL App (1st) 133264 Prior to his trial, defendant initially filed a motion to suppress alleging that his confession was the result of physical coercion by the interrogating officers. But when new counsel appeared for defendant, he withdrew the motion to suppress.

On direct appeal, defendant raised no issue about the confession or counsel's withdrawal of the motion. In his first post-conviction petition, filed in October 2009, defendant argued that trial counsel was ineffective for withdrawing the motion because the police failed to give him **Miranda** warnings.

In May 2014, defendant filed a *pro se* motion for leave to file a successive post-conviction petition. Defendant attached portions of the 2012 Illinois Torture Inquiry and Relief Commission (TIRC) report which showed that the officers who obtained his confession were involved in a pattern of coercive tactics in many other cases. Defendant argued that this newly discovered evidence supported his claim that trial counsel had been ineffective for withdrawing his motion to suppress, since it showed that his confession had been coerced and he had been deprived of due process.

The trial court denied defendant's motion, holding that the ineffective assistance argument had been previously raised in the first petition and thus was barred by *res judicata*.

On appeal defendant argued that the evidence in the TIRC report, which was not available when defendant filed his initial post-conviction petition, supported his claim that the State violated his due process rights by using a physically coerced confession at his trial. He therefore established cause because the TIRC report was newly discovered. And he showed prejudice because the use of a physically coerced confession is never harmless error.

The State argued that defendant forfeited his appellate claim because in his post-conviction petition he framed the issue as ineffective assistance, not a due process violation. The Appellate Court rejected the State's argument. Although the petition was framed as an ineffective assistance claim, it also consistently contended that defendant was subjected to physical coercion and that due process of law requires the suppression of a coerced confession. Under a liberal construction of the petition, the court found that defendant alleged a due process violation. Accordingly, the claims on appeal were substantially the same as the claims in the petition and were not forfeited.

The court also found that defendant satisfied the cause and prejudice test. Under section 122-1(f) of the Post-Conviction Hearing Act, a defendant must show cause and prejudice to be granted leave to file a successive post-conviction petition. [725 ILCS 5/122-1\(f\)](#). A defendant shows cause by identifying an objective factor that impeded his ability to raise a claim during his initial post-conviction proceedings. A defendant shows prejudice by demonstrating that the claimed error so infected the trial that the resulting trial or sentence violated due process.

The TIRC report was not released until after defendant's initial post-conviction petition had been fully litigated. The report showed that the officers involved in obtaining defendant's confession were also involved in similar coercive tactics in other cases. Defendant established cause because this evidence was not available for his initial petition.

Defendant also satisfied prejudice because the use of a physically coerced confession is never harmless error. Defendant's petition alleged that he was physically abused prior to giving a confession, facts that must be accepted as true during this stage. These allegations along with the TIRC report satisfy the prejudice requirement.

The court reversed the denial of leave to file a successive petition and remanded for second stage proceedings with the appointment of counsel.

People v. Craighead, 2015 IL App (5th) 140468 The new substantive rule announced in **Miller** constituted “cause” for failing to raise the issue earlier, and the **Davis** holding concerning retroactivity established prejudice. Thus, even if the trial court should have dismissed the original petition because it was untimely, the final amended petition would have satisfied the cause and prejudice test and permitted defendant to file a successive petition.

The court rejected the State’s request to hold its decision in abeyance because the United States Supreme Court has accepted *certiorari* in a case concerning the retroactivity of **Miller**. The court noted that once the Illinois Supreme Court has defined the law concerning any point, the Appellate Court is required to follow that precedent. Because the Supreme Court’s decision in **Davis** is clear, it is binding.

People v. Almodovar, 2013 IL App (1st) 101476 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.

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.

People v. Love, 2013 IL App (2d) 120600 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.

People v. Jones, 2013 IL App (1st) 113263 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.

People v. Nicholas, 2013 IL App (1st) 103202 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.

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.

People v. Edwards, 2012 IL App (1st) 091651 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.

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.

People v. Mitchell, 2012 IL App (1st) 100907 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.

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 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.

The Appellate Court also 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.

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. Williams, 2012 IL App (1st) 111145 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), was not available to defendant when he filed his initial petition, so 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. 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.

People v. Gutierrez, 2011 IL App (1st) 093499 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.

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. **Padilla v. Kentucky**, 559 U.S. ___, 130 S.Ct. 1473 (2010) 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.

People v. Tripp, 407 Ill.App.3d 813, 944 N.E.2d 405 (1st Dist. 2011) 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**.

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. 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**."

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.

People v. Smith, 352 Ill.App.3d 1095, 817 N.E.2d 982 (1st Dist. 2004) Defendant established "cause" for purposes of his successive post-conviction petition where, at the time defendant filed his first petition, he was unaware of a pattern of perjury by the State's expert witness (Pamela Fish). Defendant also established "prejudice." The use of perjury violated due process. Even if Fish's testimony was not, in and of itself, conclusive of defendant's guilt, it was a material factor at trial where the State relied on it to connect defendant to the crime. Thus, defendant's successive petition was improperly dismissed without an evidentiary hearing.

§9-1(i)(3)

Actual Innocence (Successive)

Illinois Supreme Court

People v. Jackson, 2021 IL 124818 The circuit court did not err in denying defendant leave to file a successive post-conviction petition arguing that his right to due process was violated by the State's use of coerced witness statements at trial and that he was actually innocent.

The jury had heard extensive testimony concerning witness coercion at trial and necessarily rejected those claims when it convicted defendant. Attached to Jackson's successive petition were documents suggesting misconduct in other cases by the same detectives that had been involved in interviewing the witnesses in his case. While new evidence of police misconduct can satisfy the cause-and-prejudice standard for filing a successive post-conviction petition in some cases, it fell short here. The new evidence was not relevant to establishing a pattern and practice of witness intimidation where it consisted of documents relating to civil lawsuits which had not resulted in any finding of wrongdoing by the officers and citizen complaint logs against detectives involved in defendant's case, none of which involved claims of coercion or intimidation. The Court clarified that evidence of other misconduct is not required to be "strikingly similar" to the misconduct alleged by Jackson, but similarity is a factor to be considered.

The Court also rejected Jackson's actual innocence claim on the basis that the evidence in support was not newly discovered. Two of the witness affidavits attached to Jackson's successive post-conviction petition were repetitive of their trial testimony. And, police reports attached to defendant's pleadings made clear that the third witness had been known to Jackson early in the investigation of the case. Jackson's own affidavit attached to his first post-conviction petition stated that the witness had been at trial, ready to testify, but had not been called. Accordingly, that witness's proposed testimony was not new.

People v. Robinson, 2020 IL 123849 Several years after he was convicted of first degree murder, defendant sought leave to file a successive post-conviction petition asserting a claim of actual innocence and asserting that another individual, Leonard Tucker, had murdered the victim. Defendant's motion and petition were supported by affidavits from himself and four other witnesses. The trial court denied leave to file, concluding that defendant's girlfriend's alibi affidavit was not newly discovered and that the other three witnesses did not totally vindicate or exonerate defendant because they did not witness the murder or burning of the victim's body, so their affidavits were not of such conclusive character as to probably change the outcome.

The appropriate standard of review for denial of leave to file a successive post-conviction petition is *de novo* because the question is whether, as a matter of law, the petition states a colorable claim. The Supreme Court agreed that defendant's girlfriend's affidavit

was not newly discovered. With regard to the remaining affidavits, the court first held that both the trial and appellate courts applied an incorrect standard by requiring “total vindication or exoneration” to support a claim of actual innocence. The appropriate standard is whether the new evidence places the trial evidence in a different light and undermines confidence in the judgment of guilt.

The Court also held that the Appellate Court erred in affirming the denial of leave to file because defendant’s witness affidavits conflicted with the trial evidence. A conflict between the new evidence and the trial evidence is inherent in a claim of actual innocence. While such conflicts may prove fatal at later stages of post-conviction proceedings, the leave-to-file threshold is lower – falling somewhere between the first-stage gist-of-a-claim standard and the second-stage substantial-showing requirement. At the leave-to-file stage, the question is not whether the new evidence conflicts with the trial evidence, but whether the well-pleaded allegations of defendant’s petition and supporting affidavits are positively rebutted by the record. The petition and affidavits are positively rebutted only where it is “clear from the trial record that no fact finder could ever accept the truth of that evidence, such as where it is affirmatively and incontestably demonstrated to be false or impossible.”

The Court also considered what it means for a petitioner’s well-pleaded allegations to be accepted as true, a requirement of the leave-to-file stage. The Court rejected the State’s assertion that it means only to presume the witnesses will testify consistently with their affidavits. Instead, the court must presume that the trier of fact would believe the witnesses’ testimony. Credibility determinations are not to be made at the leave-to-file stage, but rather only at a third-stage evidentiary hearing.

Applying all of these principles, the Court concluded that defendant’s petition and supporting affidavits stated a colorable claim of actual innocence. Each of the new witnesses provided details about events immediately surrounding the murder which supported defendant’s claim that he was innocent and Tucker was the actual offender. While the State’s trial evidence had consisted largely of defendant’s confession, the new witness affidavits, taken as true, were sufficient to require granting leave to file the successive petition. A trier of fact could determine that the new evidence exculpated defendant from any involvement in the offense and refuted the State’s evidence at trial.

The three dissenting justices criticized the majority as having abandoned the standard established in [People v. Edwards, 2012 IL 111711](#) (“leave of court should be granted when the petitioner’s supporting documentation raises the probability that ‘it is more likely than not that no reasonable juror would have convicted him in light of the new evidence’”) in favor of a new standard (“whether the new evidence, if believed and not positively rebutted by the record, could lead to acquittal on retrial”). The dissent noted the leave-to-file standard was never meant to be a low threshold but instead was meant to require a showing that a different outcome was “probable,” not just that a different outcome “could” result.

People v. Sanders, 2016 IL 118123 Leave to file a successive post-conviction petition based on actual innocence should be denied only where it is clear from a review of the petition and supporting documentation that as a matter of law, the petitioner cannot set forth a colorable claim of actual innocence.

Where a successive petition is filed without seeking leave, the trial court may choose to consider the petition if the supporting documentation supplies an adequate basis to determine whether the petitioner has adequately alleged cause and prejudice or actual innocence. In this case, the court considered the petition and advanced it to the second stage. Thus, although no request for leave to file a successive petition was made, the trial court

exercised its *sua sponte* authority to determine whether the petition should be moved to the second stage.

Where the trial court had conducted a third-stage evidentiary hearing on a co-defendant's post-conviction petition alleging actual innocence based on the same recanted evidence which defendant presented in his petition, the judge erred at defendant's second-stage proceeding by relying on the credibility findings it made when it rejected the co-defendant's claims. Credibility is not an issue at the second stage of post-conviction proceedings, and the trial court erred both because the factual allegations of the petition are presumed to be true for purposes of the State's motion to dismiss and because the trial court may not consider matters outside the record.

However, the court concluded that defendant failed to show a sufficient case of actual innocence to advance to the third stage. A claim of actual innocence requires the petitioner to show that the evidence is newly discovered, material and not merely cumulative, of such conclusive character that it would probably change the result on retrial, and could not have been discovered earlier through the use of due diligence. Here, the recantation evidence was not of such conclusive character as to probably change the result on retrial because it conflicted with much of the evidence at trial and with other evidence which defendant submitted in support of his post-conviction petition.

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

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. "Defendant is not precluded from raising multiple claims of actual innocence where each claim is supported by new discovered evidence."

The trial court erred by denying post-conviction relief on defendant's claim of actual innocence. 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 evidence was material and not cumulative. because it "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 because "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.

People v. Edwards, 2012 IL 111711 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.

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. 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 other affidavit was from 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.” This was newly discovered even though 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.

Illinois Appellate Court

People v. Class, 2023 IL App (1st) 200903 Defendant’s successive post-conviction was erroneously dismissed at the second stage where, taken cumulatively, it made a substantial showing of actual innocence. Defendant had been convicted of murder after a drive-by shooting. His conviction was based almost entirely on the testimony of a single eyewitness, Heather Ambrose, who testified that she drove the vehicle from which defendant fired the fatal shots. No other witnesses identified defendant as the offender, no physical evidence linked him to the crime, and defendant consistently maintained that he was home with his family at the time of the shooting.

To establish an actual innocence claim, the ultimate question is whether the new evidence places the trial evidence in a different light and undermines confidence in the guilty verdict. The new evidence need not be dispositive, only “*conclusive* enough to *probably* change the result upon retrial.” In assessing such a claim, courts should look at the new evidence cumulatively. Here, however, the court took a piecemeal approach, assessing each of defendant’s supporting affidavits individually and concluding that none of them, alone, was sufficient to make a substantial showing of actual innocence.

The appellate court reviewed all of the evidence in the case, “new and old together” and concluded that defendant had made a substantial showing of actual innocence. Attached to defendant’s petition were affidavits from two witnesses who saw the shooting and stated that defendant was not the shooter. And the third said that another man, Salazar, admitted to being the shooter the day after the shooting. While there were some inconsistencies in the new evidence, the trial evidence was not overwhelming and had its own flaws. Considering both the new and old evidence as a whole, defendant met the second-stage actual-innocence standard. Accordingly, the matter was reversed and remanded for an evidentiary hearing before a different judge to determine whether defendant is entitled to a new trial.

People v. Beard, 2023 IL App (1st) 200106 Where a defendant seeks leave to file a successive post-conviction petition on the basis of actual innocence, the relevant inquiry is whether the supporting evidence is newly discovered, material and not merely cumulative, and of such conclusive character that it would probably change the result on retrial. With regard to whether evidence is newly discovered, some courts have erroneously conflated the analysis with the cause analysis for the cause-and-prejudice test. The appellate court clarified here that for evidence to be newly discovered, it must not have been discoverable prior to trial. Cause, on the other hand, focuses on whether the claim could have been included in a prior petition. But, a cause-and-prejudice analysis applies only to claims of trial error and has no place in assessing whether a defendant should be permitted leave to file a successive petition alleging actual innocence.

Here, defendant sought leave to file an actual innocence claim supported, in part, by information which was available to him when he filed his initial post-conviction petition. In that initial petition, defendant had raised actual innocence but he failed to attach supporting affidavits. Thus, the affidavits included with defendant's motion for leave to file a successive petition had never been considered on their merits. Two of the affidavits in question were from co-defendants in this matter and thus were newly discovered because "no amount of diligence could have forced them to testify" at defendant's trial. And, the third was from a witness who did not come into information to support defendant's claim of actual innocence until after defendant had been tried and convicted, and thus her affidavit was also newly discovered.

Regardless, defendant failed to state a colorable claim of actual innocence where the newly discovered evidence was not of such conclusive character as to probably change the result on retrial. Defendant was convicted of aggravated kidnaping on the basis of common-criminal-design accountability. Specifically, defendant knew of his co-defendants' plan to engage in a kidnaping for ransom, and the evidence established that defendant voluntarily attached himself to the criminal activity with knowledge of it. The victims were held in defendant's garage, and defendant admitted retrieving a cell phone for use in making the ransom demand and keeping watch over the victims in the garage while his co-defendants went on an errand. The newly discovered affidavits stating that defendant "didn't have anything to do with planning and pursuing the kidnaping" and that he "had no knowledge or involvement in the crime" were conclusory. Further, active participation is not required where a defendant is part of a common criminal design. Thus, the court did not err in denying defendant leave to file a successive post-conviction petition.

People v. Ruddock, 2022 IL App (1st) 173023 The circuit court properly denied defendant's post-conviction actual innocence claim after an evidentiary hearing. Defendant argued that the court used an incorrect standard when it concluded that his evidence fell short of "the complete vindication and total exoneration that are the hallmarks of an actual innocence claim." The appellate court held, however, that this reference to the obsolete "total exoneration" standard was superseded by the circuit court's recitation of the correct standards elsewhere in its findings. The circuit court twice referred to the lack of a "probability" that the outcome would be different on retrial, accurately conveying the standard recently outlined in **People v. Robinson, 2020 IL 123849**.

Nor did the circuit court err in finding defendant's new evidence failed to meet this standard. The circuit court had found the defense witnesses incredible, and did not believe it was mere coincidence that the defendant happened to encounter an exonerating witness in

prison. The Appellate Court affirmed, holding that these findings, which were based in part on the circuit court's observations of the witness' demeanor, were not manifestly erroneous.

People v. Anderson, 2021 IL App (1st) 200040 Defendant stated a colorable claim of actual innocence such that the trial court erred in denying him leave to file a successive post-conviction petition. Defendant was convicted of murder in the 2008 shooting death of Darryl Hart, arising out of a dispute over whether one of defendant's friends sold drugs on Hart's turf. It was undisputed that defendant was present with two friends, Cooper and Jackson, at the time of the crime. The dispute centered on whether defendant was the shooter. At trial, an eyewitness identified defendant as the shooter. Jackson testified that he did not see the shooting. And, Cooper testified that "nothing happened," but the State introduced Cooper's prior statement and grand jury testimony where he said defendant was the shooter.

The affidavits of two witnesses in support of defendant's motion for leave to file successive petition averred that Cooper was actually the shooter. One of those witnesses said she and a friend were walking toward the bus stop at the time of the shooting, she saw defendant (who she knew and disliked) standing outside of a sandwich shop with several other men, and she saw one of the other men pull out a gun and shoot the victim. She only learned later that defendant was in prison for the shooting, prompting her to come forward. The other witness said he was walking to the sandwich shop when he saw defendant with three other men. He saw Cooper shoot one of the other men. He did not come forward at the time because he disliked defendant.

While defendant's petition couched his claim in terms of ineffective assistance of counsel, his one-line affidavit attached to the petition asserted his actual innocence and the content of both affidavits supported such a claim. Accordingly, the claim was adequately raised and could be considered on appeal.

The State did not dispute that the affidavits were material, and non-cumulative, but argued that they were not newly discovered or of such conclusive character as to probably change the result on retrial. The Appellate Court disagreed. The two new eyewitnesses, if believed, place the trial evidence in a different light. The trial evidence identifying defendant as the shooter was not overwhelming, and the new eyewitnesses both implicated a different individual, who was present at the scene, as the shooter. And, the eyewitnesses were newly discovered where there was no suggestion that defendant had seen either of them in the area at the time of the shooting and both explained that they had not come forward sooner because they did not want to get involved and did not like defendant. Thus, no amount of due diligence could have compelled them to testify at trial, satisfying the newly-discovered prong of the actual innocence analysis.

People v. Ruhl, 2021 IL App (2d) 200402 The State alleged that defendant shot Rick Neubauer as he sat in his car outside the Whiplash bar in Antioch, IL. Defendant and his friend, Raymond Serio, part owner of the Whiplash, then drove Neubauer's car to the gates of the nearby Bristol Renaissance Fair, where defendant shot Neubauer several more times, killing him.

The State's primary evidence derived from the testimony of Neubauer's girlfriend and mother of their child, Denise Schubat. Schubat, a bartender at Whiplash, testified that Serio pursued her romantically. She also knew defendant, whom she described as a close friend of Serio's. In the weeks before the murder, she had heard them talking about killing Neubauer, though she thought they were joking. On the night of the murder they were in the bar at closing time, waiting for Neubauer to pick up Schubat. Serio and defendant were talking in the back, and Schubat noticed that a gun that Serio usually kept behind the bar was missing.

Serio returned to the bar, and Schubat assumed defendant left through the kitchen door. Serio then spoke on the phone, asking if the “green four-door,” which Schubat recognized as Neubauer’s car, was in the parking lot. She heard defendant say “yes” through the phone, then heard Serio instruct defendant to shoot Neubauer. She heard a gunshot, and saw defendant return to the bar with a gun.

Serio would later confess to the crime and be convicted of first-degree murder, though in his telling Schubat was the one who wanted Neubauer dead. He described how defendant shot Neubauer in the Whiplash parking lot, and explained that after defendant shot Neubauer, defendant drove his car to the Renaissance Fair while Serio followed in his own car. Defendant shot him again, and they left in Serio’s car.

The court excluded a **Chambers** statement from Mary McIntosh, in which she alleged that Serio admitted to her that he had shot Neubauer. Serio’s fiancée testified that she drove Serio and defendant to obtain ammunition for a handgun in the weeks prior to the murder. Defendant was convicted of murder.

In the instant successive post-conviction petition, defendant appended three main pieces of evidence: (1) a full confession from Serio, which claimed that defendant had nothing to do with the crime; (2) McIntosh’s statement, which he alleged could meet the **Chambers** test now that Serio was willing to corroborate it; and (3) an affidavit from another woman, Patterson, who averred that Serio had offered to “take care of” Patterson’s abusive boyfriend and knew that Schubat had complained about Neubauer’s failure to pay child support.

The Appellate Court reversed the denial of leave to file, finding defendant’s petition made a colorable claim of innocence. First, it found McIntosh’s statement was newly discovered because it could now meet the **Chambers** test, whereas before Serio’s confession, it was merely inadmissible hearsay. In any event, at the leave-to-file stage, hearsay rules do not apply. The statement was material and non-cumulative as it provided the only evidence that Serio was the shooter. Finally, it was conclusive enough to alter the outcome where it directly rebutted Schubat’s testimony that defendant was the shooter.

Second, the court found the Patterson affidavit newly discovered, material, and non-cumulative, but not of such conclusive character that it would probably change the result on retrial. While Patterson could impeach Schubat’s claim that Neubauer paid child support, this was not a material fact for purposes of determining who committed the crime. Nor was the fact that Serio offered to kill Paterson’s boyfriend material, as Serio did not tell Patterson that he would do so personally.

Finally, Serio’s affidavit was newly discovered because Serio was previously unavailable due to his right against self-incrimination, and despite the fact that 12 years had passed since his conviction, no court has held that an affiant must specify exactly when he decided to make himself available. No amount of diligence can force a witness to violate the right against self-incrimination, and the court would not place the onus on defendant to establish that he tried. Finally, the Serio affidavit was material, non-cumulative, and conclusive. No physical evidence or confession tied defendant to the murder or positively rebuts Serio’s account. And Serio’s claim undoubtedly would put the trial evidence, and Schubat’s testimony in particular, “in a different light that undermines the court’s confidence” in the guilty verdict, as required by [People v. Robinson, 2020 IL 123849](#).

[People v. Williams, 2021 IL App \(1st\) 190239](#) The fact that defendant pled guilty to felony murder did not preclude an actual innocence claim based on newly discovered evidence, in light of [People v. Reed, 2020 IL 124940](#). And an actual innocence claim could properly rest on newly discovered evidence of an affirmative defense such as compulsion. Although the State argued that an affirmative defense is a claim of “legal innocence” and not “factual

innocence,” the Appellate Court rejected this argument. No caselaw supported the notion that an affirmative defense supports only legal innocence, and Illinois courts have repeatedly recognized the viability of an actual innocence post-conviction claim based on newly discovered evidence in support of an affirmative defense.

Pursuant to [Reed](#), “a successful actual innocence claim requires a defendant who pleads guilty to provide new, material, noncumulative evidence that clearly and convincingly demonstrates that a trial would probably result in acquittal.” Here, defendant alleged that he was forced to participate in the crime under threat of death to himself and his mother, made by the head of the Vice Lords gang. He presented three new affidavits documenting this threat, as well as previously filed affidavits from his codefendant and his mother. The three affidavits satisfied the newly discovered evidence requirement because each of the men explained they did not come forward sooner because they feared retaliation from the Vice Lords gang, but that circumstances had changed after the death of the gang leader.

The affidavits were also material and noncumulative, where they documented imminent threats of harm, including defendant having a gun pointed at his head the afternoon of the robbery, and being held at gunpoint as he entered the car used in the robbery. The affidavits therefore provided clear and convincing evidence supporting a defense of compulsion. For purposes of the leave-to-file stage of proceedings, defendant sufficiently set forth a colorable claim of actual innocence and the trial court erred in denying defendant leave to file his successive post-conviction petition.

[People v. Horton, 2021 IL App \(1st\) 180551](#) The trial court did not err in denying leave to file a successive post-conviction petition alleging actual innocence. Defendant failed to present noncumulative evidence in support of his claim, where a witness’s assertion that he gave the shooting victim a gun prior to the shooting was cumulative of defendant’s trial testimony that the victim was armed. The witness’s affidavit corroborated defendant’s trial testimony, which could be a basis to argue reasonable doubt, but that is not the standard for establishing a claim of actual innocence.

Further, defendant’s proposed new evidence was not conclusive. The supporting witness averred that he gave the victim a gun on the night of the shooting, claimed that the victim went to the scene planning to kill defendant, and explained that the reason no gun was found on the victim’s body was because another individual took it and concealed it after the shooting. The proposed new witness was not present at the shooting and did not indicate that the victim displayed or threatened to use the gun during the confrontation with defendant. Thus, the evidence fell short of supporting a claim of self-defense necessary to demonstrate actual innocence.

In reaching its conclusion, the Appellate Court majority relied on two recent unpublished decisions, [People v. Jackson, 2021 IL App \(1st\) 190406-U](#), and [People v. Smith, 2021 IL App \(1st\) 181178-U](#), as persuasive authority under [Illinois Supreme Court Rule 23\(e\)\(1\)](#), as amended effective January 1, 2021.

[People v. Simms, 2021 IL App \(1st\) 161067](#) Defendant was convicted of murder, armed robbery and home invasion, based on evidence showing that he and co-defendant Niles broke into an apartment, then stole property after Niles shot and killed the occupant. Defendant filed a successive post-conviction petition with an affidavit from Niles stating that defendant was “innocent,” that he implicated defendant to the police because of “revenge,” and that defendant was not “involved.”

After initially finding the affidavit insufficiently conclusive to support an actual innocence claim in a successive petition, the Appellate Court reconsidered the case pursuant

to a supervisory order in light of [People v. Robinson, 2020 IL 123849](#). This time, the court remanded for further post-conviction proceedings.

Although the State presented strong evidence of defendant's involvement in the home invasion and murder, including eyewitness testimony placing defendant near the scene, witnesses who tied defendant to the proceeds of the crime, and defendant's own confession, the **Robinson** court held that evidence that conflicts with the newly discovered evidence does not foreclose an actual innocence claim. Here, an affidavit from a codefendant, implicating himself in the offense and exculpating defendant, places the trial evidence in a new light and undermines confidence in the judgment of guilt. As such, second-stage proceedings were required.

[People v. Lenoir, 2021 IL App \(1st\) 180269](#) The circuit court erred in denying defendant leave to file his successive post-conviction petition challenging the constitutionality of his life sentence. Defendant received a 48-year sentence for a murder committed at age 18. Defendant established cause because he filed his initial petition prior to **Miller**, and before the Illinois Supreme Court suggested in [People v. Harris, 2018 IL 121932](#) that young adults could attempt to raise a **Miller** claim in a post-conviction petition.

As to prejudice, defendant's case was analogous to [People v. House, 2019 IL App \(1st\) 110580-B](#). Defendant was convicted under a theory of accountability and consistently maintained he merely drove the actual shooters to the scene and did not intend to assist them in a murder. While one co-defendant testified that defendant actively participated by pointing out the victim as a rival gang member, this co-defendant received a favorable plea deal for his testimony. Under these circumstances, defendant established prejudice even considering that his life sentence was discretionary.

A majority of the court upheld the denial of leave to file actual innocence and police coercion claims, finding the affidavits in support of those claims were not newly discovered. The partial dissent disagreed, noting that one of the alibi witnesses explained he was afraid of gang repercussions if he had come forward earlier, and that this is an acceptable explanation for not coming forward earlier under Supreme Court precedent. The partial dissent would have also found the witness who could corroborate the police coercion claim to be newly discovered despite that witnesses' averment that defendant saw him at the police station. The partial dissent believed the court should have taken as true the defendant's assertion that he did not discover this witness until a later FOIA request.

[People v. Fields, 2020 IL App \(1st\) 151735](#) To support an actual innocence claim, it is the evidence which must be newly discovered, but not necessarily the source of that evidence. Here, although the record showed that defendant knew of the existence of a possible witness prior to trial, defendant alleged in his successive post-conviction petition that the witness had moved out of state before trial and no amount of diligence could have forced her to testify given threats by the police to take her children if she did not implicate defendant. Further, the witness had not recanted her pretrial identification of defendant prior to trial, and defendant had no way to know that the witness's false identification was based on police intimidation. Thus, the witness's affidavit was newly discovered evidence of innocence.

Likewise, taken as true at the second stage of post-conviction proceedings, the affidavits of two witnesses were material, non-cumulative, and of such conclusive character that they could change the result on retrial where the witnesses averred that defendant was not one of the men present at the scene of the shooting, and where their testimony would

have provided independent support for defendant's alibi defense at trial. Accordingly, the matter was reversed and remanded for an evidentiary hearing.

People v. Woods, 2020 IL App (1st) 163031 Self-defense may serve as the basis of a defendant's actual innocence claim in post-conviction proceedings. Here, defendant supported his claim with an affidavit from an individual, Torres, who participated in the incident which led to defendant's conviction of attempt murder. Torres averred that he came out of an alley waving a gun during the incident, which prompted defendant to fire his own gun, striking a police officer. The Appellate Court found that defendant could not have known that Torres was the person he saw with a gun until he received Torres's affidavit sometime after his initial post-conviction petition had been filed, rendering Torres's statements newly discovered evidence.

Further, while defendant and another witness testified about a man with a gun in the alley, Torres provided a first-person account of the incident and directly contradicted the testimony of the State's key witnesses. Thus, Torres's statements were material and not cumulative. Finally, Torres's statements were of such conclusive character as to probably change the result on retrial where Torres admitted waving his gun with the intent of scaring people at the scene of the fight, thereby supporting a claim that defendant acted in self-defense.

People v. Quickle, 2020 IL App (3d) 170281 In a prosecution for multiple theories of murder, the trial court's rejection of a defendant's request for separate jury instructions for each theory is an error that results in the defendant's acquittal of intentional and knowing murder. This error, however, does not make a defendant "actually innocent" of intentional or knowing murder. A post-conviction claim of actual innocence depends on new evidence of factual innocence. The failure to give separate murder instructions does not create factual innocence and will not support an actual innocence claim.

People v. Taliani, 2020 IL App (3d) 170546 The trial court did not err in denying defendant leave to file a successive post-conviction petition claiming actual innocence. Defendant claimed involuntary intoxication from the unwarned side effects of prescribed medications, a defense that was not available at the time of trial but was later recognized in **People v. Hari, 218 Ill. 2d 275 (2006)**. The Appellate Court questioned the propriety of treating a claim of a newly available affirmative defense as a claim of actual innocence, but ultimately concluded that even if it was a proper claim, the evidence here did not warrant leave to file.

Under **Hari**, a claim of involuntary intoxication requires a showing that the condition was involuntarily produced and that it deprived defendant of the substantial capacity to conform his conduct to the requirements of law. While defendant's petition was sufficient on the question of whether his condition was involuntarily produced, it was inadequate on the question of whether his condition rendered him involuntarily intoxicated to the degree that he lacked substantial capacity to conform his conduct to the requirements of the law. Accordingly, the successive petition failed to raise the probability that it is more likely than not that no reasonable juror would have convicted defendant in light of the new evidence.

People v. Miranda, 2018 IL App (1st) 170218 Defendant's motion for leave to file successive post-conviction petition based on actual innocence and ineffective assistance of counsel was properly denied. Affidavits from two co-defendants were newly discovered because the co-defendants could not have been forced to violate their Fifth Amendment privilege against

self-incrimination at defendant's trial. The affidavits were cumulative of defendant's own testimony concerning his lack of knowledge of the co-defendants' plan, however, and while they may have impacted the sufficiency of the State's evidence at trial, they were not so conclusive that they would have been likely to result in total exoneration. Further, the Appellate Court concluded that defendant could not show cause for not raising a failure-to-call-witnesses claim in his original post-conviction proceedings by blaming prior post-conviction counsel who "ghost-wrote" his original petition. Neither the PC Act, nor Rule 651(c), require any specific standard of representation at the first stage of post-conviction proceedings. And, defendant could not show prejudice, regardless, because the witnesses' proposed testimony was only minimally helpful.

People v. Jackson, 2018 IL App (1st) 171773 Defendant argued that the circuit court erred in denying his successive petition alleging actual innocence and cause and prejudice, because it included documents showing a pattern of police misconduct by the officers who took the statements of the eyewitnesses who testified at his trial. The Appellate Court affirmed. New evidence of police misconduct does not support a claim of actual innocence. Rather, such evidence must supplement a separate claim, such as an involuntary confession or violation of due process. Also, the two affidavits from the trial witnesses were cumulative. Finally, the third affidavit was not new, because defendant knew of the witness before trial.

Nor did the petition satisfy the cause-and-prejudice test, because, although new, the evidence of police misconduct was insufficiently connected to what happened in this case. Defendant alleged that the seven officers investigating his case had a history of misconduct, but his documentation did not establish that they had ever worked together in other cases to coerce witnesses, or engaged in a systemic pattern of witness coercion, or participated in misconduct similar to that alleged here. The court concluded that while cause-and-prejudice is a significant hurdle, defendant should not hesitate to file another successive petition if he uncovers more evidence of misconduct.

People v. Brown, 2017 IL App (1st) 150132 The Appellate Court affirmed the denial of leave to file a second successive post-conviction petition alleging actual innocence. The proposed testimony of two new affiants suggesting that defendant's deceased brother committed the shooting was not newly discovered. Defendant had always asserted that his brother committed the crime, and therefore the fact that two close associates of his brother may have had information about the crime should have been discovered earlier.

Even if the evidence was newly discovered, it was not conclusive enough to make it more than likely that no rational juror would find defendant guilty beyond a reasonable doubt. Defendant could not make this showing, which is stronger than the prejudice requirement under **Strickland**, where neither affiant witnessed the actual shooting (one claimed to have seen defendant's brother walking toward the scene with a gun, the second claimed to have seen defendant's brother borrow a gun the night of the offense.) Moreover, this evidence is directly rebutted by the trial record, which included two positive eyewitness identifications of the defendant by witnesses who knew him from the neighborhood. Citing **People v. Sanders, 2016 IL 118123**, the Appellate Court held that because the affiants' factual allegations were directly rebutted by the trial record, it should not accept the allegations as true.

In a dissent, Justice Ellis maintained that the majority *had* made an impermissible credibility determination when it rejected the affiants' affidavits in favor of the trial testimony. The dissent would accept the proposed testimony as true, as the law – including **Schlup v. Delo, 513 U.S. 298 (1995)** – requires, and, given that one affiant saw defendant's

brother borrow a gun, and a second affiant saw defendant's brother approach the scene of the crime with a gun immediately prior to the shooting, no reasonable fact-finder would conclude that the defendant, rather than his brother, committed the crime. The dissent further noted that the majority's reliance on the fact that neither affiant witnessed the actual shooting did not mean that they could not provide evidence of actual innocence, where they both provided compelling circumstantial evidence that defendant's brother committed the shooting.

People v. Warren, 2016 IL App (1st) 090884-C

A motion for leave to file a successive petition based upon a claim of actual innocence should be denied only where it is clear from a review of the successive petition and the provided documentation that as a matter of law, the petitioner cannot set forth a colorable claim of actual innocence. Applying *de novo* review, the court concluded that the evidence supporting defendant's claim was newly discovered, material and not merely cumulative, and of such a conclusive character that it would probably change the result at a retrial. Therefore, the defendant adequately pleaded an assertion of actual innocence to justify filing a successive petition.

In the course of its holding, the court acknowledged that affidavits provided by the petitioner were hearsay and that hearsay generally cannot be used to support post-conviction claims. The Supreme Court has held that this rule should not be applied inflexibly, however. Where the affidavits contained facts material to defendant's innocence and alleged that two persons who had confessed to the offense were hostile or unavailable to the petitioner, the court elected to consider the affidavits. The court also noted that the affidavits might be admissible at trial under various hearsay exceptions.

People v. Jones, 2017 IL App (1st) 123371 The circuit court properly denied leave to file a successive post-conviction petition. Defendant was convicted of first-degree murder after confessing he, Melvin Jones, and Travis Ashby all fired shots at the decedent. An initial post-conviction petition, which included an exculpatory statement from Jones, was dismissed at the first stage. In the instant successive petition, defendant produced an exculpatory affidavit from a purported eyewitness, Shaw. Defendant also attached a newspaper article showing that the detectives in his case had been successfully sued in another case for malicious prosecution, with a jury finding the officers falsified a confession in that case. The circuit court denied leave to file, finding Shaw's affidavit was not of such conclusive character to change the result on retrial. The court found the newspaper article hearsay and conclusory.

The Appellate Court affirmed, over dissent. With regard to Shaw's affidavit, the court found it insufficiently exculpatory to change the result on retrial. The court noted that while Shaw averred that he saw Jones shooting the decedent, he did not assert that defendant was not present at the scene. Moreover, the theory that Jones was the only shooter conflicts with the evidence at trial, including defendant's confession, an earwitness who claimed to hear multiple guns being fired, and the ballistics evidence that showed multiple types of guns were fired. Finally, Shaw's affidavit was not sufficiently detailed concerning his vantage point and ability to observe, leaving open the possibility that defendant may have been present even if Shaw did not see him.

As for defendant's allegation against the detectives as supported by the newspaper article, the Appellate Court held that the claim was forfeited. When defendant cited the detectives' prior misconduct in the petition, he did so as part of his actual innocence claim. It was not until appeal that defendant alleged that the evidence provided grounds to grant leave to file for cause and prejudice. Because the cause-and-prejudice argument was not included in the petition, it could not be considered on appeal.

People v. English, 2014 IL App (1st) 102732-B 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.

People v. Harper, 2013 IL App (1st) 102181 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.

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.

People v. Harper, 2013 IL App (1st) 102181 Defendant was convicted of arson and first-degree murder based largely on his confession, which admitted to starting a fire at a video store. 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.

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.

The new evidence is material and not cumulative. 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.

People v. Wideman, 2013 IL App (1st) 102273 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.

People v. Adams, 2013 IL App (1st) 111081 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.

People v. Williams, 2012 IL App (1st) 111145 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.

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

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.

People v. Starks, 2012 IL App (2d) 110324 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.

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. 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.

§9-1(j) Counsel

§9-1(j)(1) Generally

United States Supreme Court

Pennsylvania v. Finley, 481 U.S. 551, 107 S.Ct. 1990, 95 L.Ed.2d 539 (1987) The requirements of **Anders v. California**, 386 U.S. 738 (1967), do not apply to appeals in post-conviction petitions.

Illinois Supreme Court

People v. Lesley, 2018 IL 122100 The defendant waived, through his conduct, his right to counsel at second stage post-conviction proceedings. After multiple court dates at which appointed counsel and defendant voiced disagreement over the direction of the case, the circuit court allowed counsel to withdraw. The supreme court rejected defendant's argument that the circuit court should have explicitly warned defendant that continued disagreement with counsel would lead to withdrawal. The circuit court had communicated to defendant that his choices were to "work with" counsel, hire private counsel, or proceed *pro se*. Defendant continued to voice dissatisfaction, and tried to hire private counsel but failed to do so. No additional warning were required before allowing appointed counsel to withdraw.

The supreme court further held that defendant's waiver was knowing and voluntary. The circuit court told defendant that he would not receive a new appointed attorney, and that "if he could not get along with appointed counsel, his choice was to hire an attorney or proceed *pro se*." Defendant "made clear" that he did not want to work with appointed counsel and informed the court he would try to hire private counsel. This constituted a knowing waiver, despite the fact that the court never admonished defendant of his right to, and the advantages of, appointed counsel. No caselaw supports the argument that such admonishments are required in post-conviction proceedings, and defendant's reluctance to represent himself showed his awareness of the advantages of representation.

Nevertheless, the court "instruct[ed]" circuit courts "to warn defendants of the consequences of their repeated refusals to work with appointed counsel and the difficulties of self-representation before requiring them to proceed *pro se*."

People v. Cotto, 2016 IL 119006 Resolving a conflict in Appellate Court precedent, the Supreme Court accepted the State's concession that the reasonable assistance standard applies whether counsel is appointed or retained. "Both retained and appointed counsel must provide reasonable assistance to their clients after a petition is advanced from first-stage proceedings."

Here, privately retained post-conviction counsel provided a reasonable level of assistance. Counsel drafted a petition with several claims alleging due process violations and ineffective assistance by trial counsel and appellate counsel. The petition contained several supporting attachments including affidavits and more than 100 pages of transcripts. The petition survived first-stage dismissal but was dismissed at second-stage proceedings.

The only error which defendant alleged on appeal was that retained post-conviction counsel failed to adequately show that the untimely filing of the petition was not due to defendant's culpable negligence. Defendant claimed that he was not responsible for the delay because appellate counsel failed to inform him that the Appellate Court had decided his appeal.

The Supreme Court noted that defendant failed to specify what information was available other than that which was introduced by the post-conviction attorney, and did not disclose when he retained post-conviction counsel. Most importantly, the petition was dismissed not because it was untimely, but on its merits. Under these circumstances, counsel's representation was reasonable.

People v. Kuehner, 2015 IL 117695 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.

[People v. Lander](#), 215 Ill.2d 577, 831 N.E.2d 596 (2005) An indigent defendant is entitled to appointed counsel in post-conviction proceedings only if the petition is not summarily dismissed as frivolous at the first stage of review. Because the right to counsel in post-conviction proceedings is merely statutory, a post-conviction petitioner is entitled only to the "reasonable assistance" of counsel. See also, [People v. Robinson](#), 324 Ill.App.3d 553, 755 N.E.2d 1034 (2d Dist. 2001) (counsel acted unreasonably where he failed to argue that petitioner's severe mental condition excused the untimely filing of a post-conviction petition). [People v. Hardin](#), 217 Ill.2d 289, 840 N.E.2d 1205 (2005) Under [People v. Banks](#), 121 Ill.2d 36, 520 N.E.2d 617 (1987) and [People v. Spreitzer](#), 123 Ill.2d 1, 525 N.E.2d 30 (1988), a per se conflict does not exist when one assistant public defender challenges the effectiveness of another assistant public defender. But, the circumstances of a particular case may create a conflict of interest. Whether the trial court has a duty to inquire as to the possibility of such a conflict is determined on a case-by-case basis, and depends on the type of conflict and the stage at which it is brought to the trial court's attention.

A post-conviction petitioner who shows that a per se conflict existed is entitled to relief even if no prejudice can be shown and the conflict was not brought to the trial court's attention. If no per se conflict of interest exists, but a potential conflict was brought to the court's attention at an early stage of the proceedings, the court must either appoint separate counsel or take adequate steps to assure that the risk of conflict is too remote to warrant separate counsel. Where the trial court fails to take such action, the conviction may be reversed even where there is no showing that counsel's performance was affected by the conflict. If the trial court was not apprised of the potential conflict at an early stage of the proceedings, the conviction will be reversed only upon a showing of an actual conflict of interest which adversely affected counsel's performance. Although defendant is not required to prove that the conflict contributed to his conviction, he must point to some specific defect in counsel's strategy, tactics, or decision making that can be attributed to the conflict.

Assuming no per se conflict, therefore, the trial court must inquire only if the potential conflict is brought to its attention at an early stage of the proceedings. Mere allegations of a conflict are insufficient to trigger a duty by the trial court to inquire. However, where the issue is raised by defendant, only the gist of a conflict need be alleged. Where the alleged conflict involves a public defender challenging the effectiveness of a second public defender, relevant factors include whether the public defenders were trial partners, whether one attorney supervised the other, and whether the size, structure, and organization of the office affected the closeness of their relationship.

People v. Greer, 212 Ill.2d 192, 817 N.E.2d 511 (2004) Post-conviction counsel can withdraw where no meritorious issues can be advanced. Where counsel was required to be appointed because the trial judge failed to address a pro se petition within 90 days of its filing, the trial court did not err by granting counsel's motion to withdraw after counsel was unable to develop any support for the post-conviction issues. But see, **People v. McKenzie**, 323 Ill.App.3d 592, 752 N.E.2d 1256 (3d Dist. 2001) (holding that once a pro se post-conviction petition survives summary dismissal and counsel is appointed, the trial court lacks authority to allow appointed counsel to withdraw on the basis that the petition lacks merit; in so holding, the court overruled several third district decisions). See also, **People v. Sherman**, 101 Ill.App.3d 1131, 428 N.E.2d 1186 (3d Dist. 1981) (the trial court's failure to notify defendant of appointed counsel's motion to withdraw (on grounds that counsel was unable to discover a basis for post-conviction relief) and decision to hold a hearing on the motion, without defendant being present or giving defendant an opportunity to respond, was improper, as it deprived defendant of representation at the hearing).

People v. Turner, 187 Ill.2d 406, 719 N.E.2d 725 (1999) The level of assistance required on a post-conviction petition does not depend on whether a death sentence was imposed. Although a capital defendant has the right to have counsel appointed and the appointment of counsel is discretionary in non-capital cases, "once counsel is appointed, his or her obligations under Rule 651(c) are the same in every case."

People v. Lyons, 46 Ill.2d 172, 263 N.E.2d 95 (1970) Where more than a year passed from the filing of petition to the hearing on motion to dismiss, and defense counsel continued the case six times, it was the trial court's duty to inquire about the cause for delay and reflect this in the record.

Illinois Appellate Court

People v. Bakaturski, 2023 IL App (4th) 220300 The public defender was appointed to assist defendant during second-stage post-conviction proceedings. Counsel filed a motion to withdraw alleging that defendant's claims lacked merit, and the State filed a motion to dismiss the petition. Defendant then sought to proceed *pro se*. The court denied defendant's request but ultimately allowed counsel's motion to withdraw and the State's motion to dismiss. In a prior appeal, the appellate court found that if defendant's request to proceed *pro se* was knowing and voluntary, the court should have allowed it. The court remanded for a hearing on the issue.

On remand, defendant again asked to represent himself and the trial court allowed that request. The court ultimately granted the State's motion to dismiss, and defendant appealed arguing that his waiver of counsel was invalid. Specifically, defendant argued that the court erred when it told him that "the worst that can happen to you in this case is that your post-conviction petition is denied, and the sentence imposed remains in place." Defendant argued that the court should have admonished him that if he succeeded in withdrawing his plea as a result of post-conviction proceedings, he could have been given a longer sentence. The appellate court held, however, that such an admonishment would be akin to Rule 401 admonishments about the minimum and maximum available term of imprisonment, and Rule 401 admonishments are not required for a knowing and voluntary waiver of counsel in post-conviction proceedings.

The court also rejected defendant's argument that he should have been admonished about post-conviction counsel's duties under Rule 651(c) before being allowed to waive counsel. No such admonishments are required. Here, defendant expressly requested to proceed *pro se*, repeatedly stated that he understood the right he was waiving, and never vacillated on his request to represent himself. Defendant's waiver of appointed post-conviction counsel was knowing, voluntary and intelligent.

People v. Young, 2022 IL App (1st) 210534 Defendant's successive petition, which was dismissed at the second stage, did not make a substantial showing that his appellate counsel was ineffective for failing to challenge the sufficiency of evidence on direct appeal. Initially, the State argued the claim was *res judicata* and forfeited because defendant raised the same claim in his initial petition and did not raise it on appeal from the summary dismissal of that petition. Defendant, however, alleged that the failure to raise the issue stemmed from a conflict of interest, stating in an affidavit that he instructed his appellate post-conviction counsel to preserve this issue on appeal, but she responded that she would not allege ineffective assistance against defendant's direct appeal counsel because they were friends.

The appellate court first held that defendant was entitled to conflict-free counsel in post-conviction proceedings, despite the relaxed standards applicable to post-conviction counsel. And it would apply the same actual-conflict analysis to claims of post-conviction counsel conflicts as elsewhere. However, even accepting the allegations about the attorneys' friendship as true, a conflict exists only if the relationship caused a "specific defect" in post-conviction appellate counsel's strategy, tactics, or decision-making. In other words, defendant must show that the claim not pursued "would have been successful." Here, the evidence was sufficient to convict, so defendant could not show prejudice.

People v. Blake, 2022 IL App (2d) 210154 Defendant argued that he received unreasonable assistance of post-conviction counsel where counsel did not advance any of the 10 *pro se* claims raised in defendant's petition and instead filed an amended petition eliminating all of those claims and adding a single new claim which failed to make a substantial showing of a constitutional violation. Counsel filed a Rule 651(c) certificate, creating a presumption of reasonable assistance which was not overcome by the record. Counsel's decision to file an amended petition, even one which omits all of defendant's *pro se* claims, is not presumptively unreasonable. Rather, the determination of unreasonableness depends on the merits of the *pro se* claims. Defendant failed to argue that any of his *pro se* claims had merit, thus his claim of unreasonable assistance failed.

The court also rejected defendant's argument that the 16-year delay between the filing of his *pro se* petition and the filing of the amended petition was further evidence of unreasonable assistance. While the court noted that it was "by no means condon[ing] the delay," the court would not find unreasonable assistance based upon the delay alone.

People v. Bryant, 2022 IL App (2d) 200279 Where post-conviction counsel seeks leave to withdraw based on counsel's conclusion that defendant's claims are frivolous and cannot be ethically advanced, defendant must be given notice of counsel's motion to withdraw and a meaningful opportunity to respond before the court can rule on the motion to withdraw. Here, defendant was not brought to court on the date that counsel's motion to withdraw was considered and granted, and he was not given notice that the merits of his post-conviction petition would be considered on that date, as well. Thus, defendant was deprived of representation at the hearing resulting in dismissal of his petition.

Further, the trial court's order granting counsel's motion to withdraw and dismissing defendant's post-conviction petition on the same date violated [Illinois Supreme Court Rule 13\(c\)](#). [Rule 13\(c\)](#) provides that if an attorney's motion to withdraw is granted, the party has 21 days to secure new counsel or file an appearance.

Finally, the court was critical of the fact that it took more than five years from the date counsel was appointed to the date counsel sought leave to withdraw. The court described this delay as "inexplicable," especially given that counsel's motion to withdraw asserted that almost all of defendant's post-conviction claims were contradicted by the record on direct appeal. The "glacial pace" of proceedings was inconsistent with counsel's duty to provide reasonable assistance.

The order granting counsel's motion to withdraw and dismissing defendant's petition was vacated, and the matter was remanded for further post-conviction proceedings.

[People v. McMillen, 2021 IL App \(1st\) 190442](#) The trial court erred in allowing post-conviction counsel's motion to withdraw at the third stage of proceedings based on counsel's oral representation that she was unable to support defendant's claim of involuntary intoxication with expert testimony. Counsel did not file a written motion to withdraw, and defendant was given no notice of counsel's intent to withdraw and no opportunity to respond to counsel's oral motion.

The Appellate Court held that the appropriate procedure would be for counsel to file a motion to withdraw, giving defendant notice and a meaningful opportunity to respond. Further, having survived the State's motion to dismiss at the second stage, defendant should have had the chance to present proof in support of his claim rather than having his petition dismissed upon counsel's withdrawal. The matter was reversed and remanded for further third stage proceedings, including reappointment of counsel.

[People v. Rouse, 2020 IL App \(1st\) 170491](#) Defendant's waiver of post-conviction counsel was upheld. Although appointed counsel declined to amend defendant's petition or file a written response to the State's motion to dismiss, counsel filed a 651(c) certificate and stated on the record that she was prepared to argue against the State's motion. Defendant was admonished extensively regarding his right to counsel and the standards to which he would be held if he elected to proceed *pro se*. The record demonstrated defendant's knowing and voluntary waiver.

[People v. Partida, 2018 IL App \(3d\) 160581](#) A motion for leave to file successive post-conviction petition should be decided by the Court without input from the State. Here, the State conceded error on appeal where the State had filed a written response to the motion for leave to file, defendant was not present at the hearing on that motion, and the prosecutor was present and noted its written response during that hearing. The State asked the Appellate Court, however, to affirm the dismissal based on its own review of the merits of the petition. The Appellate Court declined, holding that defendant is entitled to have the circuit court conduct an independent review first.

[People v. Harrison, 2018 IL App \(3d\) 150419](#) A defendant has the right to proceed *pro se* in post-conviction proceedings. If a defendant seeks to waive post-conviction counsel after appointment, the court is not required to admonish him in accordance with [Faretta v. California, 422 U.S. 806 \(1975\)](#), or [Illinois Supreme Court Rule 401](#), even where a new trial is possible if defendant is successful on the petition. The Court distinguished [People v.](#)

[Lesley, 2017 IL App \(3d\) 140793](#), where [Rule 401\(a\)](#) admonishments were required for a post-conviction counsel waiver; **Lesley** involved a waiver due to the defendant's misconduct and not an affirmative request to proceed *pro se*, which was at issue here. Likewise, [Rule 401\(a\)](#) admonishments would serve no purpose here because defendant had already been convicted and sentenced and thus was aware of the information contained in such admonishments.

[People v. Johnson, 2017 IL App \(4th\) 160449](#) The Post-Conviction Hearing Act ([725 ILCS 5/122-4](#)) provides that the right to appointed counsel arises only if the petition survives summary dismissal. At second and third stage proceedings, post-conviction petitioners are entitled to the reasonable assistance of counsel.

The court rejected the argument that a petitioner who is able to retain counsel is entitled to the reasonable assistance of such counsel at the summary dismissal stage. The court stressed that the Act does not afford the right to counsel at the summary dismissal stage, and that accepting defendant's argument would lead to disparate treatment because well-off petitioners would receive a higher level of assistance from counsel than indigents.

Because defendant was not entitled to the assistance of counsel at the summary dismissal stage, the trial court properly dismissed his motion to reconsider and his supplemental petition arguing that retained counsel provided "ineffective assistance" by failing to include certain claims in the original petition.

[People v. Richey, 2017 IL App \(3d\) 150321](#) In [Kuehner, 2015 IL 117695](#), the Supreme Court held that when appointed counsel discovers information that would ethically prohibit him or her from presenting defendant's claims to the court, counsel may not simply move to withdraw on the grounds that the claims are frivolous, as the trial court has already ruled to the contrary. Instead, counsel bears the burden of demonstrating why the trial court's assessment was incorrect. Counsel's motion to withdraw must contain at least some explanation as to why the claims in the petition are so lacking in legal and factual support as to compel his or her withdrawal.

Defendant filed a *pro se* post-conviction petition alleging that his trial counsel was ineffective for failing to file a motion to suppress his confession given defendant's history of mental health problems. Specifically, defendant alleged that he was on medication when he confessed and the police told him that unless he cooperated they would not return him to the medical facility where he resided. The trial court dismissed the petition and defendant appealed.

The Appellate Court remanded the case to the trial court for second-stage proceedings. On remand, a psychologist examined defendant but was unable to render an opinion about defendant's ability to knowingly and voluntarily waive his **Miranda** rights. Counsel filed a motion to withdraw stating that because the psychologist could not reach a conclusion about defendant's ability to voluntarily waive **Miranda** rights, there were no valid issues to raise in an amended petition. Defendant stated that all the expert had done was ask questions about **Miranda** warnings, but "that has nothing to do with my argument." The court allowed counsel to withdraw and dismissed defendant's petition.

The Appellate Court held that post-conviction counsel failed to provide an explanation for why the claim in defendant's petition was lacking in legal and factual support. Defendant's sole claim was that trial counsel did not file a motion to suppress statements even though defendant was on medication when he confessed and the police threatened him if he didn't cooperate. Post-conviction counsel pursued a different question, namely whether

defendant was capable of waiving his **Miranda** rights. Since counsel did not address the actual argument made by defendant, counsel did not properly explain why he had to withdraw.

The case was remanded for further second-stage proceedings including the appointment of new counsel.

People v. Malone, 2017 IL App (3d) 140165 Post-conviction counsel is not required to amend a *pro se* petition, and is ethically prohibited from raising post-conviction claims that are frivolous. Where the *pro se* petition raises only frivolous claims, post-conviction counsel has the option of standing on the allegations or withdrawing as counsel. In other words, although counsel may move to withdraw where the allegations of the petition are frivolous, he is not compelled to do so.

Appointed post-conviction counsel provided reasonable assistance, as is required by the Post-Conviction Hearing Act, where he stood on the petition and filed a Rule 651(c) certificate. The petitioner failed to rebut the presumption created by the certificate, and also failed to show how counsel could have improved the petition or that any other grounds for relief existed. In addition, the trial court gave the petitioner an opportunity to make a statement and present any additional evidence at the hearing. Under these circumstances, counsel provided reasonable assistance.

People v. Zareski, 2017 IL App (1st) 150836 The Appellate Court concluded that where a post-conviction petition is filed by privately retained counsel, Rule 651 does not apply. However, under the terms of the Post-Conviction Hearing Act privately retained counsel must provide reasonable assistance. Although “reasonable assistance” has not been fully defined as it relates to private counsel, the court concluded that the determination requires a “**Strickland**-like analysis” which includes an evaluation of prejudice.

Thus, when it is argued that privately retained counsel provided unreasonable assistance by failing to present a particular claim, the court must examine not only whether counsel should have presented the claim but also whether the failure to do so prejudiced defendant. If the potential claim had no merit, the petitioner is not entitled to relief regardless whether the issue should have been presented.

Here, no prejudice resulted from post-conviction counsel’s alleged shortcomings. Therefore, the petitioner was unable to show that privately retained counsel failed to provide reasonable assistance.

People v. Warren, 2016 IL App (1st) 090884-C Affidavits qualified as “newly discovered evidence” although defense counsel at defendant’s first post-conviction proceeding was aware of the affiants and their willingness to testify. The court noted that the attorney retained by defendant for the first post-conviction petition explained during proceedings on that petition that he did not obtain affidavits because the statute of limitations was expiring. However, counsel did not explain why he failed to amend the petitions and supply the affidavits during the four-year period between the filing of the petition and the hearing on the State’s motion to dismiss. In addition, defendant was rebuffed in his effort to obtain new counsel in the first proceeding, and once he was represented by counsel could not present the evidence himself. Under these circumstances, the evidence should be considered to be newly discovered.

The court noted that its holding was confined to the unique instance where defendant retains counsel for the first post-conviction proceeding but that attorney fails to provide reasonable assistance by presenting exculpatory evidence.

The trial court's denial of the motion for leave to file a subsequent post-conviction petition was reversed and the cause remanded for further proceeding.

People v. Gray, 2013 IL App (1st) 101064 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.

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*.

People v. Csaszar, 2013 IL App (1st) 100467 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 provide 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.

People v. Jones, 2013 IL App (1st) 113263 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.

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.

People v. Thomas, 2013 IL App (2d) 120646 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.

[People v. Schlosser, 2012 IL App \(1st\) 092523](#) 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.

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.

[People v. Milam, 2012 IL App \(1st\) 100832](#) 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."

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.

People v. Patterson, 2012 IL App (4th) 090656 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 subject 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.

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.

People v. Profit, 2012 IL App (1st) 101307 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.

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.

People v. Shortridge, 2012 IL App (4th) 100663 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.

People v. Johnson, 401 Ill.App.3d 685 (2d Dist. 2012) 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.

People v. Hernandez, 283 Ill.App.3d 312, 669 N.E.2d 1326 (4th Dist. 1996) Where a post-conviction petitioner makes a colorable claim that his attorney's ineffectiveness deprived him of an appeal, he is entitled to have counsel appointed on the petition without showing that had an appeal been taken, it would have been successful.

§9-1(j)(2)

Reasonable Assistance of Counsel – Illinois Supreme Court Rule 651(c)

Illinois Supreme Court

People v. Huff, 2024 IL 128492 Defendant's post-conviction petition was advanced to the second stage due to the circuit court's failure to act within 90 days. Post-conviction counsel stood on the petition, filed a 651(c) certificate, and did not offer a rebuttal to the State's motion to dismiss. The circuit court granted the State's motion. On appeal, defendant conceded that the petition was frivolous, but argued that post-conviction counsel performed unreasonably by standing on a frivolous petition, because an attorney who doesn't intend to amend a frivolous petition has an obligation to withdraw under **People v. Greer**, 212 Ill. 2d 192 (2004). If counsel withdrew, defendant could either represent himself or hire another attorney.

The supreme court found counsel performed reasonably. The court reaffirmed that under **Greer**, if appointed counsel knows that the petition's claims are frivolous, counsel has an ethical duty to withdraw. But in this case, nothing in the record established that counsel viewed the petition as frivolous. The petition presented a previously rejected **Apprendi** claim, but argued the law had changed in order to avoid *res judicata*. While counsel didn't offer a rebuttal to the motion to dismiss, he did not confess to it either. The court characterized defendant's claim as a "weak legal claim" that was "presented in the best possible legal form." Absent any evidence counsel actually believed the petition to be

frivolous, the court would not impose a duty to withdraw. The court found it unnecessary to decide whether counsel may stand on a *pro se* petition that counsel knows to be frivolous.

People v. Frey, 2024 IL 128644 The supreme court reversed the appellate court’s finding of a 651(c) violation. Defendant’s petition had advanced to the second stage because of a 90-day violation. PC counsel filed a 651(c) certificate and a motion to withdraw. The motion to withdraw addressed the two main claims in the petition, including an ineffectiveness claim, but it did not reference a mention of due process contained on the last page of the *pro se* petition. This latter section argued that the trial court coerced a verdict when it responded to a jury note by denying its request to continue deliberations the next day. The circuit court granted the motion to withdraw and the State’s subsequent motion to dismiss. The appellate court reversed, holding counsel’s motion to withdraw rebutted the presumption of reasonable assistance created by the 651(c) certificate.

The supreme court reversed and affirmed the dismissal of the petition, holding that counsel’s motion was adequate. It explained that it has two rules for reviewing the contents of a motion to withdraw. If, as in **People v. Kuehner, 2015 IL 117695**, the petition advances to the second stage because it was not frivolous, an appointed attorney seeking to withdraw must explain why every claim in the *pro se* petition lacks merit. If not, counsel has performed unreasonably. If, as in **People v. Greer**, the petition advances due to judicial inaction, an appointed attorney seeking to withdraw must also explain why every claim lacks merit; however, if counsel omits a claim, counsel still performed reasonably if the 651(c) certificate and allegation of frivolousness in the motion are not rebutted by the record. “Thus, although counsel’s obligation is the same in either scenario, the consequences of filing a defective motion are potentially different.” Only the **Kuehner** scenario requires automatic reversal.

Here, regardless of how the petition was advanced, counsel’s motion to withdraw fulfilled the obligation to explain why every claim lacked merit. It addressed both of the main claims in the main part of the petition. Although counsel did not acknowledge the jury note as a separate due process claim, the supreme court found the question of whether the *pro se* petition actually raised that claim as a separate due process claim, rather than as part of the main ineffectiveness claim, “ambiguous” because petitioner referred to the jury note within the ineffectiveness section. The court further noted that the petitioner agreed on the record when asked if counsel spoke with him about his claims, and did not state that counsel overlooked any claims. The most natural reading of the petition was that the jury note claim was raised as part of the ineffectiveness claim, and as such, the motion to withdraw covered all of the claims.

People v. Agee, 2023 IL 128413 Defendant pled guilty to one count of first degree murder in the strangling death of his ex-girlfriend. He subsequently filed an untimely motion to withdraw plea, which the court recharacterized as a post-conviction petition and docketed for second-stage proceedings. Counsel filed an amended petition, which was dismissed on the State’s motion.

On appeal, defendant argued that he had received unreasonable assistance from post-conviction counsel because counsel defectively pled a claim that counsel added in the amended petition. The appellate court held that neither Rule 651(c) nor the Post-Conviction Hearing Act require post-conviction counsel to provide any level of representation, let alone reasonable assistance, in the presentation of new claims not included in the petitioner’s original *pro se* petition.

The Supreme Court first clarified that a petitioner is entitled to reasonable assistance of counsel both as to claims raised in the petitioner's *pro se* petition as well as to any claims added by counsel in an amended petition. Here, counsel filed a facially valid Rule 651(c) certificate stating that counsel had consulted with defendant to ascertain his contentions of constitutional deprivation, had reviewed the record, and had made any amendments necessary for adequate presentation of defendant's claims.

The filing of a Rule 651(c) certificate creates a rebuttable presumption that counsel provided reasonable assistance. Defendant argued that the record rebutted that presumption in this case, however, where counsel added a claim in the amended petition – specifically ineffective assistance of trial counsel for failing to inform defendant of a possible second-degree murder defense – but did not adequately allege the prejudice prong of that claim. The Supreme Court disagreed and found that counsel had shaped defendant's "vague and inarticulate" *pro se* contentions into a properly-stated legal claim supported by the transcript of defendant's statement to the police, as well as defendant's own affidavit which specifically stated the element of prejudice, i.e., that he would not have pled guilty had he "known about the elements of second-degree murder."

And, defendant failed to make a substantial showing of ineffective assistance of trial counsel. The record rebutted defendant's claim that counsel failed to advise him about the availability of a second-degree murder defense. A post-plea motion showed that defendant knew about such a defense where defendant alleged that he had not wanted to plead guilty because he believed his actions constituted second-degree murder. Further, defendant could not have established second degree murder, regardless, where the State would have introduced evidence that defendant had actually been stalking the victim, the victim was much smaller than him, and this sort of argument was a regular occurrence between them and not a sudden quarrel arising from some unidentified provocation. Finally, at the plea hearing, defendant confirmed on the record that he knew about his rights to plead not guilty and proceed to trial, that he was pleading guilty voluntarily, and that he had discussed his case thoroughly with his attorneys.

People v. Urzua, 2023 IL 127789 Defendant filed a post-conviction petition raising a claim of newly discovered evidence of actual innocence which was supported by the unnotarized "affidavit" of an individual, Spires, stating that someone other than defendant actually committed the offense. Counsel was appointed and later filed a Rule 651(c) certificate and a motion for leave to withdraw as counsel, citing **People v. Greer**, 212 Ill. 2d 192 (2004). The court allowed counsel to withdraw and granted defendant a continuance to retain new counsel. Retained counsel ultimately stood on the *pro se* petition.

The State filed a motion to dismiss arguing that because Spires's statement was not notarized, the actual innocence claim was inadequately supported. Retained counsel responded that he had "put 30 seconds in looking for Spires" and had found someone with that name in Cook County, and thus defendant's claim could be verified. Counsel also argued that notarization was not necessary because Spires had signed his statement "under penalty of perjury." The court granted the State's motion to dismiss, noting that the lack of notarization on Spires's affidavit was fatal. On appeal, defendant argued that retained counsel failed to provide him with a reasonable level of assistance, and the Court agreed.

First, the Court rejected the premise that the circuit court had ruled on the merits of defendant's petition when it allowed appointed counsel to withdraw. Under **Greer**, where a court grants appointed counsel's request to withdraw without making a specific finding that the petition lacks merit, and where the State has not yet filed an answer or motion to dismiss

the petition, the withdrawal order does not dispose of the petition itself. And, here, the judge specifically granted a continuance in anticipation of defendant hiring new counsel.

Second, while the post-conviction hearing act does not provide a right to have new counsel appointed, defendant's second attorney here was retained, not appointed. Pursuant to [People v. Johnson, 2018 IL 122227](#), "at all stages of post-conviction proceedings, defendants are entitled to a reasonable level of attorney assistance," even where they lack the statutory right to appointed counsel.

Finally, retained counsel failed to provide reasonable assistance where counsel erroneously believed that notarization of the witness's statement was not necessary to survive a motion to dismiss. Given this clear misstatement of law, the presumption of reasonable assistance was rebutted by the record, and the matter was remanded to allow defendant to respond to the State's motion to dismiss.

The dissent agreed that defendant was entitled to reasonable assistance from retained counsel, but concluded that counsel had met that standard here. Specifically, the dissent held that the court could presume that counsel attempted to obtain an affidavit from Spires but was unable to do so and thus counsel "mounted what was presumably the best defense available" when he argued against the affidavit requirement.

[People v. Addison, 2023 IL 127119](#) Defendant filed a *pro se* post-conviction petition asserting more than a dozen claims of constitutional error and alleging that appellate counsel was ineffective for not raising those claims on direct appeal. Counsel was appointed and filed an amended petition advancing five of defendant's claims, but post-conviction counsel failed to include any claims of ineffective assistance of appellate counsel in the amended petition. The State filed a motion to dismiss and argued, among other things, that the claims in the amended petition were forfeited because they could have been raised on direct appeal but were not. Post-conviction counsel did not counter the State's forfeiture arguments, and the trial court granted the State's motion to dismiss.

It is well established that a post-conviction petitioner can avoid forfeiture for not raising claims that were available on direct appeal by arguing ineffective assistance of appellate counsel. Here, however, not only did appointed post-conviction counsel fail to raise appellate counsel's ineffectiveness, she amended defendant's *pro se* post-conviction petition to omit any allegations of ineffective assistance of appellate counsel. By doing so, counsel actually made the *pro se* petition worse and thereby provided unreasonable assistance.

Further, while appointed counsel had filed a Rule 651(c) certificate, a certificate merely creates a rebuttable presumption that counsel provided reasonable assistance. That presumption was overcome here, where the record plainly established counsel's deficient performance. Specifically, counsel identified several claims she believed were worth pursuing but did not include the necessary allegation to overcome forfeiture.

Where post-conviction counsel fails to provide reasonable assistance, remand for compliance with Rule 651(c) is required under [People v. Suarez, 224 Ill. 2d 37 \(2007\)](#). Contrary to the State's assertion, [Suarez](#) is not limited to those situations where counsel does not file a 651(c) certificate. A petitioner who rebuts a certificate is in the same position as if no certificate was filed, and thus there is no reason to treat the two circumstances differently. Where post-conviction counsel fails to carry out the limited duties required by Rule 651(c), remand is required regardless of whether the claims in the petition have merit. It is premature to consider the merits of a defendant's post-conviction claims where counsel has not complied with the obligation to shape those claims into their appropriate form.

People v. Smith, 2022 IL 126940 Once a post-conviction attorney complies with Rule 651(c) and submits a certificate, a newly appointed attorney does not need to establish she also complied with the rule.

Here, defendant's initial attorney amended the *pro se* petition and submitted her certificate. She was eventually replaced by a new attorney who argued at the hearing on the State's motion to dismiss. The new attorney did not file a certificate or otherwise establish her own compliance with Rule 651(c). Defendant asked for a remand, so that the most recent attorney could comply with Rule 651(c).

The Supreme Court disagreed. Rule 651(c) is designed to ensure that post-conviction counsel shapes the *pro se* petition into adequate form so as to present defendant's claims to the court. It would not serve the purpose of the rule to require a second attorney to comply with the rule. Nor does the statutory language, which states that the attorney must amend the petition filed "pro se," apply to a second attorney who is no longer presented with a *pro se* petition, but rather a petition amended by the first attorney.

People v. Custer, 2019 IL 123339 The Supreme Court refused to extend the procedures established in **Krankel** to post-conviction proceedings. Thus, when petitioner complained after the third-stage dismissal of his petition that his post-conviction attorney failed to call a witness, the circuit court was under no obligation to conduct a preliminary inquiry into whether new counsel was necessary to litigate the claim of unreasonable assistance. The limited right to reasonable assistance of post-conviction counsel did not warrant the expenditure of judicial resources that would be required to impose **Krankel** on post-conviction courts.

People v. Johnson, 2018 IL 122227 If defendant is able to retain counsel to prepare and file his post-conviction petition, that counsel must provide a reasonable level of assistance at the first stage of post-conviction proceedings, consistent with what is required of counsel at the second and third stages. Although defendants are not entitled to appointed counsel at the first stage of proceedings, there is no disparity in requiring reasonable assistance on behalf of those defendants who are able to retain counsel. Instead, mandating reasonable assistance at the first stage helps to put defendants who retain counsel on equal footing with *pro se* defendants. A *pro se* defendant can file any claims he chooses in his post-conviction petition, while a defendant with retained counsel is bound by his counsel's actions. If retained counsel fails to include one or more of defendant's claims, defendant can bring that failure to the court's attention through a claim of unreasonable assistance of counsel. Like the *pro se* defendant, the represented defendant then will be able to obtain a first-stage review of all his claims, and counsel will only be found unreasonable if defendant's claims are not frivolous or patently without merit.

People v. Cotto, 2016 IL 119006 Resolving a conflict in Appellate Court precedent, the Supreme Court accepted the State's concession that the reasonable assistance standard applies whether counsel is appointed or retained. "Both retained and appointed counsel must provide reasonable assistance to their clients after a petition is advanced from first-stage proceedings."

Here, privately retained post-conviction counsel provided a reasonable level of assistance. Counsel drafted a petition with several claims alleging due process violations and ineffective assistance by trial counsel and appellate counsel. The petition contained several

supporting attachments including affidavits and more than 100 pages of transcripts. The petition survived first-stage dismissal but was dismissed at second-stage proceedings.

The only error which defendant alleged on appeal was that retained post-conviction counsel failed to adequately show that the untimely filing of the petition was not due to defendant's culpable negligence. Defendant claimed that he was not responsible for the delay because appellate counsel failed to inform him that the Appellate Court had decided his appeal.

The Supreme Court noted that defendant failed to specify what information was available other than that which was introduced by the post-conviction attorney, and did not disclose when he retained post-conviction counsel. Most importantly, the petition was dismissed not because it was untimely, but on its merits. Under these circumstances, counsel's representation was reasonable.

People v. Ligon, 239 Ill.2d 94, 940 N.E.2d 1067 (2010) 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.

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.

People v. Perkins, 229 Ill.2d 34, 890 N.E.2d 398 (2008) The filing of a 651(c) certificate is not conclusive of compliance and can be rebutted.

Rule 651(c) requires a showing that counsel took the necessary steps to secure adequate representation of petitioner's claims, which includes attempting to overcome procedural bars that will result in the dismissal of the petition if not rebutted. Specifically, **Rule 651(c)** requires counsel to amend an untimely pro se petition to allege any facts to show

lack of culpable negligence. Here, counsel fulfilled his obligations. Though he failed to file an amended petition, counsel argued at the post-conviction hearing that defendant's petition should not be dismissed. Even if counsel's argument was not "particularly compelling," there was no indication that there was any available excuse for the late filing.

People v. Suarez, 224 Ill.2d 37, 862 N.E.2d 977 (2007) Non-compliance with [Rule 651\(c\)](#) is not subject to the harmless-error rule. Thus, even if the issue raised in a pro se petition lacks merit as a matter of law, the cause must be remanded for further proceedings where counsel fails to file a [Rule 651\(c\)](#) certificate and does not satisfy the purposes of the rule.

People v. Pendleton, 223 Ill.2d 458, 861 N.E.2d 999 (2006) Post-conviction counsel is not required to advance frivolous or spurious claims. Although counsel is free to conduct a broad examination of the record and raise additional issues, the duty to provide "reasonable" assistance does not carry an obligation to investigate and present claims other than those raised by the pro se petitioner. The appellate court erred by finding that post-conviction counsel rendered unreasonable assistance by failing to raise and argue an issue - improper admonishments under Supreme Court Rule 605(b) - which defendant did not raise in the pro se or amended post-conviction petitions.

People v. Lander, 215 Ill.2d 577, 831 N.E.2d 596 (2005) To assure that a reasonable level of assistance is provided, Supreme Court [Rule 651\(c\)](#) requires the record to show that counsel consulted with defendant to ascertain claims of constitutional violations, examined the record of the trial court proceedings, and made any amendments to the pro se petition necessary to adequately present defendant's contentions. Compliance with [Rule 651\(c\)](#) may be shown by counsel's certificate or by the record itself. See also, **People v. Perkins**, 229 Ill.2d 34, 890 N.E.2d 398 (2008).

Counsel appointed to represent a post-conviction petitioner is required to comply with [Rule 651\(c\)](#) even where there is a question as to whether the petition was timely filed. See also, **People v. Stone**, 364 Ill.App.3d 930, 848 N.E.2d 223 (2d Dist. 2006) (Lander should apply to cases that were on appeal when it was decided).

Where appointed counsel failed to file a [Rule 651](#) certificate and the record failed to demonstrate compliance with the rule, petitioner was not afforded a reasonable level of assistance during post-conviction proceedings. The order dismissing the petition was reversed and the cause remanded for further proceedings.

People v. De La Paz, 204 Ill.2d 426, 791 N.E.2d 489 (2003) Post-conviction counsel did not act improperly by failing to raise issues concerning defendant's mental fitness to participate in post-conviction proceedings. Because the record clearly showed that defendant was able to communicate with counsel, there was no fitness issue to be raised. Thus, counsel did not act unreasonably.

People v. Moore, 189 Ill.2d 521, 727 N.E.2d 348 (2000) A post-conviction attorney has no obligation to locate witnesses who are not specifically identified by the petitioner, or to conduct an investigation to discover witnesses who might be able to support the claims in the petition.

People v. McNeal, 194 Ill.2d 135, 742 N.E.2d 269 (2000) Post-conviction counsel provided a reasonable level of assistance although he: (1) filed an incomplete report from a forensic social worker who referred to other mitigating evidence which could be discovered with additional time, and (2) failed to request a continuance despite the investigator's request for more time.

Counsel filed a 651(c) certificate and amended the petition to add new arguments. Also, no issues regarding mitigating evidence were raised until the third amended post-conviction petition. Further, much of the evidence to which the investigator's incomplete report referred had been introduced at the death hearing, and defendant failed to show that any additional mitigating evidence would likely have resulted in a non-death sentence.

People v. Richmond, 188 Ill.2d 376, 721 N.E.2d 534 (1999) Rule 651(c) applies to any attorney who represents a post-conviction petitioner on a pro se petition, not only to appointed counsel. But, Rule 651(c) applies only where the initial petition is filed pro se, and not where the petition was prepared and filed by counsel.

No certificate was filed here, and the record was insufficient to demonstrate that counsel had performed the duties mandated by the rule. Counsel, who was retained after defendant filed a pro se petition, argued only an issue that is not cognizable in post-conviction proceedings. Also, counsel's references to the facts of the case reflected information that could have been "gleaned from any number of sources" besides the trial record.

People v. Turner, 187 Ill.2d 406, 719 N.E.2d 725 (1999) Rule 651(c)'s requirement that counsel make any amendments "necessary for an adequate presentation of petitioner's contentions" means that counsel must "shape" a pro se petitioner's complaints into "appropriate legal form."

Counsel violated Rule 651(c) where post-conviction counsel did not amend the petition to avoid waiver for failing to raise issues on direct appeal to allege that appellate counsel was ineffective and where counsel did not amend the petition to include necessary elements of two other claims. Also, though counsel asserted at the hearing on the motion to dismiss that defendant's claims were based on evidence outside the record, he failed to attach any affidavits to the petition or explain why affidavits were unavailable. Counsel's performance was so deficient that it amounted to virtually no representation at all, and to "tolerate such inadequate representation would render the appointment of counsel in post-conviction proceedings nothing but 'an empty formality.'" See also, **People v. Kluppelberg**, 327 Ill.App.3d 939, 764 N.E.2d 1182 (1st Dist. 2002) (counsel failed to provide a reasonable level of assistance where he failed to attach to the petition a police report that was in the trial record and which supported the claim that trial counsel was ineffective, and failed to make a routine amendment to the petition to add an allegation that appellate counsel was ineffective for having failed to raise trial counsel's ineffectiveness); **People v. Gonzales**, 14 Ill.App.3d 535, 302 N.E.2d 718 (1st Dist. 1973) (reversed and remanded for appointment of other counsel where pro se petition was filled with conclusory allegations and appointed counsel did not put the pro se petition into proper legal form); **People v. Waldrop**, 353 Ill.App.3d 244, 818 N.E.2d 888 (2d Dist. 2004) (defendant did not receive a reasonable level of assistance where post-conviction counsel failed to attach affidavits to the amended petition because he erroneously believed that affidavits are required only if the petition raises issues concerning the failure to call an alibi witness).

People v. Guest, 166 Ill.2d 381, 655 N.E.2d 873 (1995) Record showed compliance with Rule 651(c), though counsel did not file a certificate. See also, **People v. Yarbrough**, 210 Ill.App.3d 710, 569 N.E.2d 211 (4th Dist. 1991) (counsel satisfied Rule 651(c) where defendant indicated in a letter that he had communicated with counsel, post-conviction counsel amended the pro se petition to include 50 specific allegations, and counsel referred to specific pages of the trial transcript during the hearing). But see, **People v. Terry**, 46 Ill.2d 75, 263 N.E.2d 923 (1970) (order denying defendant's petition for post-conviction relief

reversed because the record did not reflect that either of petitioner's appointed counsel ever consulted with him); **People v. Johnson**, 338 Ill.App.3d 1004, 789 N.E.2d 927 (2d Dist. 2003) (defense counsel failed to file a certificate, and the record did not demonstrate compliance with Rule 651(c) where the only reference to any consultation with defendant was counsel's statement that he had spoken to defendant once on the telephone, "and had no plans 'to go actually to speak to him'"); **People v. Jennings**, 345 Ill.App.3d 265, 802 N.E.2d 867 (4th Dist. 2003) (although it was undisputed that appointed counsel consulted with defendant, compliance with Rule 651 was not established where the record failed to explicitly show that counsel examined the record or made necessary amendments to two claims); **People v. Carter**, 223 Ill.App.3d 957, 586 N.E.2d 835 (4th Dist. 1992) (remanding for a new hearing on a pro se petition where post-conviction counsel failed to file a 651(c) certificate and the record failed to show that counsel consulted with petitioner or read any portions of the record except 13 pages relevant to a motion for continuance); **People v. Treadway**, 245 Ill.App.3d 1023, 615 N.E.2d 887 (2d Dist. 1993) (record failed to show that post-conviction counsel complied with Rule 651(c) where there was no indication that counsel examined the original report of proceedings and where counsel did not adequately amend the petition).

People v. Davis, 156 Ill.2d 149, 619 N.E.2d 750 (1993) Counsel need only examine those portions of the record that relate to the issues raised in the pro se petition. Here, the only issue concerned the prosecutor's undisclosed conversation with a juror, and counsel examined the voir dire and the juror's affidavit. Thus, counsel complied with Rule 651(c).

People v. Johnson, 154 Ill.2d 227, 609 N.E.2d 304 (1993) Although counsel consulted with defendant and reviewed the trial transcript, he failed to make necessary amendments where he never contacted witnesses named in the pro se petition or obtained supporting documents specified in the petition. Because the record clearly establishes that counsel made no effort to obtain evidentiary support for the pro se claims, remandment was required. Although post-conviction counsel must attempt to obtain affidavits from witnesses specifically identified in the pro se petition, there is no obligation to seek supporting evidence from outside the record.

People v. Jones, 48 Ill.2d 410, 270 N.E.2d 409 (1971) Where appointed counsel appeared at hearing on motion to suppress and simply read from the unamended *pro se* petition, which had been inartfully drawn, the dismissal of the petition was reversed.

People v. Ballinger, 53 Ill.2d 388, 292 N.E.2d 400 (1973) Counsel's failure to amend the petition was not incompetent where there were no constitutional issues to be raised.

Illinois Appellate Court

People v. Jean, 2024 IL App (1st) 220807 Defendant was deprived of the reasonable assistance of post-conviction counsel where counsel failed to amend defendant's *pro se* petition to include a proportionate penalties argument and instead only orally argued that claim at the hearing on the State's motion to dismiss. Citing **People v. Schlosser**, 2012 IL App (1st) 092523, and **People v. Kirk**, 2012 IL App (1st) 101606, the court noted that statements at a motion to dismiss hearing do not sufficiently amend the petition and fall below the level of reasonable assistance required by Rule 651(c). Under **People v. Addison**, 2023 IL 127119, post-conviction counsel renders unreasonable assistance where she identifies claims worth pursuing but fails to shape them into proper form. And, while counsel filed a Rule 651(c) certificate, her arguing a claim not included in defendant's petition

contradicted that certificate's assertion that she had made all amendments to the petition that were necessary for adequate presentation of defendant's claims of constitutional deprivation.

The court declined to consider the State's argument that remand was unnecessary because defendant's sentence was the result of a fully-negotiated guilty plea, thereby precluding her from raising a proportionate penalties challenge to her 43-year sentence, of which she must serve 40 years, for offenses committed when she was 15 years old. Where post-conviction counsel fails to satisfy the duties mandated by Rule 651(c), consideration of the merits is premature. The court would not speculate as to how the record or petition might have been developed further had defendant been afforded reasonable assistance. Reversed and remanded for defendant to have the opportunity to re-plead her petition with the benefit of reasonable assistance of counsel.

People v. Janusz, 2024 IL App (2d) 220348 Post-conviction counsel, who had also represented defendant on direct appeal, provided unreasonable assistance at the first stage of post-conviction proceedings. Specifically, counsel failed to include an allegation of his own ineffectiveness necessary to overcome forfeiture as to claims included in the post-conviction petition which were based on matters on the record and thus could have been raised on direct appeal. The appellate court concluded that counsel labored under an actual conflict of interest on these facts. The court vacated the dismissal of defendant's petition and remanded the matter to allow defendant to re-plead his petition either *pro se* or through different counsel.

People v. Nelson, 2024 IL App (5th) 210311 During post-conviction proceedings, defendant was represented by one attorney during second-stage proceedings and subsequently by a different attorney at the third stage. Only the second attorney filed a Rule 651(c) certificate, and that certificate was not filed until after the third-stage hearing. On appeal, the parties agreed that remand was required based on original post-conviction counsel's failure to substantially comply with Supreme Court Rule 651(c) at the second stage. The appellate court disagreed.

While appointed counsel will normally fulfill his or her duties under Rule 651(c) at the second stage, compliance with the rule may also be achieved by appointed counsel at or after third-stage proceedings. The critical question is whether the court was actually presented with, and considered, defendant's claims in proper legal form. In this case, defendant's second post-conviction attorney filed an amended petition which addressed procedural bars that had been raised by the State. And, the State did not file a motion to dismiss that second amended petition. Instead, the court considered the second amended petition on the merits and denied relief. While the court rejected one claim on the basis of *res judicata* and the rest on the merits, defendant failed to explain what his second post-conviction attorney could have done differently to make his claims successful. Accordingly, the record did not rebut second counsel's facially compliant Rule 651(c) certificate, and thus remand was not required.

People v. Quezada, 2024 IL App (2d) 210076-B In its initial decision, the appellate court held that post-conviction counsel did not violate Rule 651(c) by failing to amend a *pro se* petition to address procedural default. It held that counsel was not required to anticipate that the State would raise procedural bars, but could instead wait to address them after the motion to dismiss. The supreme court instructed the court to reconsider in light of **People v. Addison, 2023 IL 127119**.

The appellate court found **Addison** distinguishable and again found counsel performed reasonably. In **Addison**, defendant’s *pro se* petition alleged ineffective assistance of counsel and ineffective assistance of appellate counsel. Post-conviction counsel amended the petition but omitted the appellate counsel claims. When the State argued forfeiture for failure to raise trial counsel’s ineffectiveness on direct appeal, counsel did not amend the petition or otherwise argue that appellate counsel was ineffective for failing to preserve the claim – an argument that would have defeated the State’s forfeiture claim. Unlike **Addison**, post-conviction counsel here “strenuously argued” against the State’s procedural default argument at the hearing on the motion to dismiss. While counsel should have amended the petition to address procedural default, counsel’s oral argument was sufficient to render his performance reasonable. See **People v. Perkins**, 229 Ill. 2d 34, 50-53 (2007).

The appellate court further held, as it did in its original opinion, that defendant’s claim was barred by *res judicata*. Defendant raised the same **Miller** issue in a prior post-conviction petition, and its dismissal was affirmed on appeal. Even though that petition and decision preceded **Buffer**, *res judicata* still applied because the prior decision assumed for the sake of argument that defendant’s 45-year sentence was a *de facto* life sentence, and found that the sentencing court adequately considered the **Miller** factors. Thus, **Buffer**, which merely confirmed that defendant received a *de facto* life sentence, would not have changed the outcome.

People v. Hunt, 2023 IL App (2d) 220153 Defendant’s post-conviction counsel did not perform unreasonably by failing to include an affidavit from defendant, or any other affidavits or evidence, substantiating the claim in defendant’s amended petition that trial counsel rendered ineffective assistance where he unilaterally refused to request an instruction on a lesser included offense. Such supporting documentation was not fatal where the only possible evidentiary support would have been defendant’s own affidavit, which does not satisfy the “objective or independent corroboration” standard, or trial counsel’s affidavit attesting to his own ineffectiveness, which courts do not require. Accordingly, the failure to include supporting documentation for this particular claim did not constitute unreasonable assistance of counsel.

People v. Nesbitt, 2023 IL App (1st) 211301 A defendant does not have a due process right to raise a *pro se* objection to his post-conviction counsel’s Rule 651(c) certificate in the circuit court. Both the federal and Illinois constitutions provide a right to procedural due process, and that right is applicable to post-conviction petitioners. Generally, the right to procedural due process guarantees notice of the proceeding and the opportunity to be heard. It does not, however, include the right for a represented litigant to argue a *pro se* challenge to counsel’s performance at the second stage of post-conviction proceedings. In **People v. Custer**, 2019 IL 123339, the supreme court held that **Krankel**-like proceedings are not required in the post-conviction context. Instead, a defendant may raise such issues on appeal if he is ultimately unsuccessful at the second stage. *De novo* appellate review satisfies procedural due process in this context, as it provides a defendant the full and fair opportunity to be heard on the issue of counsel’s compliance with Rule 651(c).

People v. King, 2023 IL App (1st) 220916 The appellate court affirmed the second-stage dismissal of defendant’s post-conviction petition over his claim that he received unreasonable assistance from post-conviction counsel. The fact that counsel had not previously handled a post-conviction petition did not render her performance automatically unreasonable. And,

while counsel initially failed to file a 651(c) certificate, the appellate court had previously remanded due to that defect, and counsel filed the required certificate on remand in compliance with the rule. Counsel's failure to further amend the petition on remand was not unreasonable. Defendant's *pro se* claims were without merit, and counsel is not obligated to advance frivolous claims or to add new claims.

People v. Coaxum, 2023 IL App (3d) 200018 Defendant filed a *pro se* post-conviction petition raising a claim of actual innocence. The petition was advanced to the second stage after more than 90 days passed without the court dismissing or otherwise ruling on it. Defendant then hired private counsel to represent him on the petition. Subsequently, private counsel told the court that he believed the petition was inadequate and sought to dismiss it on defendant's behalf. The court told counsel he could not do so and needed to either file an amended petition and Rule 651(c) certificate or file a motion to withdraw from the case. Subsequently, the State filed a motion to dismiss the petition, and retained counsel filed a motion to withdraw. Retained counsel did not file a 651(c) certificate. Included in counsel's motion to withdraw were allegations that he and defendant were not in agreement as to how to proceed and also that there had been a lack of payment for counsel's services. Ultimately the court allowed counsel to withdraw and subsequently granted the State's motion to dismiss. Defendant appealed.

Where counsel moves to withdraw from post-conviction representation where the petition has been advanced to the second-stage because no action was taken on it within 90 days, counsel must still "make some effort to explain why defendant's claims are frivolous and patently without merit." This holds true regardless of whether counsel is appointed or retained. Additionally, before being permitted to withdraw, the record must show that counsel complied with his obligations under Supreme Court Rule 651(c) to consult with defendant, examine the record, and make any amendments necessary for adequate presentation of petitioner's claims.

Here, counsel did not file a 651(c) certificate and the record did not otherwise show that he fulfilled his duties under the rule. While counsel commented on the record that he had spoken with defendant, counsel's statements were not specific enough to demonstrate the sort of consultation required by Rule 651(c). Further, counsel did not explain the basis for his belief that defendant's claims were meritless. Counsel also did not indicate that he had reviewed the record.

The appellate court recognized that counsel's motion to withdraw also cited disagreement with defendant about how to proceed, as well as lack of payment. While those may be legitimate grounds for withdrawal, the court remains obligated to ensure that defendant receives a reasonable level of assistance under Rule 651(c). Here, the court should have appointed new counsel to fulfill the obligations of Rule 651(c) before reaching the question of whether defendant's petition should be dismissed or advanced for an evidentiary hearing. Thus, the appellate court reversed the dismissal of defendant's petition and remanded for further proceedings.

People v. James, 2023 IL App (1st) 192232 Defendant alleged that his post-conviction counsel performed unreasonably by failing to make necessary amendments to his petition, despite filing a Rule 651(c) certificate. He first alleged that counsel failed to attach photographs to support his claim of a coerced confession. Although defendant's petition alleged these photographs exist, he did not identify who took them or where they might be, and Rule 651(c) does not require counsel to search outside the record for evidence.

Defendant next alleged that counsel should have added citations to authority to support the *pro se* allegation of ineffective assistance of counsel. Despite recognizing that a lack of legal authority is “not ideal,” and that a petition without citations is not truly in “proper legal form,” an appellate court majority found no authority holding that Rule 651(c) required counsel to amend a *pro se* petition by adding citations to caselaw.

Finally, the majority found that Rule 651(c) imposed no duty on PC counsel to file or argue a response to a State motion to dismiss. If PC counsel finds the petition meritless, she may either withdraw, or stand on the *pro se* petition and inform the court of the reason the petition was not amended. Here, counsel appropriately stood on defendant’s *pro se* allegations and informed the court that she could find no evidentiary support for defendant’s claims, but asked that the petition be advanced to the third stage. This satisfied counsel’s duty under Rule 651(c).

A dissent would have found counsel’s performance unreasonable. Defendant argued that trial counsel was ineffective for failing to call him to testify at trial, and he attached an affidavit with his potential testimony. This was a cognizable claim that was not frivolous on its face, yet it required certain amendments, including citations to caselaw. The dissent saw no justification for standing on such a petition. The dissent also disagreed with the notion that PC counsel may ethically stand on a frivolous petition.

People v. Garrett, 2023 IL App (3d) 210305 While there is no right to counsel at the leave-to-file-stage of successive post-conviction proceedings, a defendant who has counsel is entitled to reasonable assistance from that counsel. In reaching this conclusion, the court applied the rationale of **People v. Johnson, 2018 IL 122227**, and rejected the contrary decision in **People v. Moore, 2019 IL App (3d) 170485**.

Rule 651(c) does not apply at the leave-to-file stage. Instead, the court considers counsel’s performance under the general reasonable assistance standard. Here, counsel’s performance was not unreasonable despite counsel’s failure to allege cause for defendant’s failure to raise his successive petition claims in his original petition. Defendant made no argument as to what cause could have been asserted, and the record showed that the issues raised in his successive petition would have been apparent at the time of his original petition was filed.

Further, the court did not err by failing to review defendant’s *pro se* motion for leave to file. The court had the discretion to appoint counsel to assist defendant, which it did, and thus counsel’s pleading was appropriately considered rather than defendant’s *pro se* filing.

People v. Turner, 2023 IL App (1st) 191503 The appellate court majority rejected defendant’s claims that post-conviction counsel provided unreasonable assistance by failing to supplement the petition with documents that would support his various claims of ineffective assistance of trial counsel, including his claim that counsel prevented him from testifying. The appellate court would not presume that any of the possible supporting documents suggested by defendant would help his case, given that the Rule 651(c) certificate filed by post-conviction counsel created a rebuttable presumption that no further amendments were necessary.

In upholding the dismissal, the appellate court rejected defendant’s reliance on **People v. Jackson, 2021 IL App (1st) 190263**. In **Jackson**, the appellate court remanded a case to the second stage to determine whether PC counsel tried to obtain a specific piece of evidence in support of defendant’s claim. The appellate court here found **Jackson** wrongly decided for several reasons, including its failure to acknowledge the rebuttable presumption.

Disagreeing with defendant's argument that the record here, as in **Jackson**, was "silent" as to PC counsel's efforts, the appellate court noted that a 651(c) certificate does create a record by creating a presumption that counsel considered additional evidence but found it unnecessary. Unless contradictory evidence exists, the presumption remains in tact.

Finally, the majority rejected defendant's argument that PC counsel should have withdrawn rather than stand on issues that, without further documentation, cannot meet the second stage standard. **People v. Greer**, 212 Ill. 2d 192 (2004) does not require withdrawal unless further representation creates ethical issues, and requiring withdrawal raises its own set of concerns, such as making a record of potentially damaging information uncovered by counsel's investigation.

The dissent would have found unreasonable assistance based on the failure to provide defendant's affidavit in support of his claim that his right to testify was "impeded" by trial counsel. The dissent found the admonishments given to defendant about his right to testify were inadequate to capture the pressures he may have been under to not contradict his attorney's advice not to testify. The dissent noted that the ABA recommends much more detailed admonishments in order to truly determine voluntariness.

People v. Perez, 2023 IL App (4th) 220280 Defendant hired counsel to prepare and file a post-conviction petition for him. That petition was dismissed on the State's motion at the second stage, in part based on its untimeliness, and defendant appealed. On appeal, the court agreed that defendant's post-conviction counsel erred in failing to file the petition by the statutory deadline. But, because defendant's post-conviction claims lacked merit, defendant was not prejudiced by that error. Accordingly, counsel did not provide unreasonable assistance, and remand for further second-stage proceedings was not required.

People v. Turner, 2022 IL App (2d) 210753 Defendant did not receive unreasonable assistance of post-conviction counsel where counsel raised a **Miller** claim but failed to raise a proportionate penalties claim to defendant's 60-year sentence for first degree murder committed in 1994 when defendant was 17 years old. The appellate court noted that defendant's 60-year sentence is not a *de facto* life sentence because he is not subject to truth in sentencing. And, the court rejected the contention that the proportionate penalties clause requires consideration of the **Miller** factors for a sentence of less than *de facto* life. Thus, counsel's failure to raise a proportionate penalties claim in the amended petition was not unreasonable.

People v. Poole, 2022 IL App (4th) 210347 The appellate court affirmed the second-stage dismissal of a post-conviction petition, rejecting defendant's claims that he made a substantial showing of ineffective assistance of counsel, and that post-conviction counsel violated Rule 651(c) by failing to supplement the petition with additional evidence.

Defendant initially filed a 2-1401 petition alleging he was actually innocent of various firearm offenses based on an affidavit from an eyewitness. At a hearing on the petition, the eyewitness testified that he saw someone other than defendant fire the gun during the incident in question. The trial court denied the petition, finding the testimony "cumulative" and not likely to change the result on retrial.

In the instant post-conviction petition, defendant re-framed the issue by alleging ineffective assistance of counsel for failure to call the eyewitness. After second-stage dismissal, the appellate court affirmed, finding the claim barred by *res judicata*. The court believed that allowing defendant to re-frame the claim in a case with the same dispositive

issue – whether the eyewitness testimony would change the outcome – would allow defendant a second bite at the apple. A finding in favor of defendant would lead to “inconsistent findings on the same issue.”

The appellate court then rejected the Rule 651(c) claim. Post-conviction counsel had amended the *pro se* petition to allege ineffective assistance of counsel for failing to call a gunshot residue expert, but did not identify an expert or potential testimony. The appellate court found that post-conviction counsel was not obligated to do so, citing [People v. Nelson, 2016 IL App \(4th\) 140168](#), which held that Rule 651(c) does not require post-conviction counsel “to conduct a search to find an expert witness who would support defendant’s claims.” Although *Nelson* applied to counsel’s duties *vis-a-vis pro se* claims, the appellate court drew this distinction by noting that defendant did raise a general claim of ineffectiveness for failing to call witnesses. Regardless, defendant could not establish the underlying claim because the State’s expert in this case did not find gunshot residue on defendant, so additional expert testimony would not change the result on retrial.

[People v. Treadwell, 2022 IL App \(1st\) 191905](#) Defendant was deprived of reasonable assistance of post-conviction counsel where counsel failed to amend his petition to state a claim of ineffective assistance of appellate counsel in order to overcome *res judicata* concerns. On direct appeal, defendant raised an issue of ineffective assistance of trial counsel which alleged that counsel had neglected his case and failed to provide a vigorous defense because counsel was preoccupied with defending himself in pending ARDC proceedings. Defendant’s conviction was affirmed. The amended post-conviction petition filed by counsel merely repeated the direct appeal claim. In defendant’s *pro se* post-conviction pleadings, however, he had alleged that his trial counsel was actually “not allowed to practice law” at the time of his trial. Specifically, trial counsel’s license had been suspended by the Illinois Supreme Court prior to defendant’s trial and, while counsel had sought and obtained a stay of the suspension, he did so only with regard to his need to complete the representation of a client in another case, not defendant.

The appellate court agreed that defendant’s *pro se* allegation of ineffective assistance was a different claim than that advanced on direct appeal and by post-conviction counsel. Post-conviction counsel should have amended the petition to allege that appellate counsel had been ineffective for failing to argue on direct appeal that trial counsel was *per se* ineffective because his law license had been suspended and he was not authorized to represent defendant under the stay of that suspension. The appellate court did not resolve the ultimate question of whether trial counsel was qualified to represent defendant on the date in question, but it did hold that there is a cognizable claim concerning that issue which post-conviction counsel failed to present. The matter was remanded for new second-stage proceedings, including the appointment of new counsel and leave to amend the petition.

[People v. Delgado, 2022 IL App \(2d\) 210008](#) Defendant, through counsel, filed a post-conviction petition alleging that the trial court incorrectly applied a 20-year firearm enhancement to his sentence for attempt murder where, because defendant was a juvenile at the time of the offense, the imposition of the enhancement was discretionary rather than mandatory. Defendant’s petition was summarily dismissed because post-conviction counsel failed to frame the issue as a claim of constitutional deprivation, failed to allege ineffective assistance of appellate counsel in order to avoid forfeiture, and failed to provide support for the claims in the petition.

Privately retained post-conviction counsel must provide a reasonable level of assistance at the first stage of post-conviction proceedings. Here, the appellate court agreed with defendant that his counsel rendered unreasonable assistance by failing to allege ineffective assistance of appellate counsel where the sentencing claim could have been raised on direct appeal. And, a claim of ineffective assistance of appellate counsel is a claim of constitutional deprivation properly brought in a post-conviction petition.

Here, it was arguable that appellate counsel rendered deficient performance by not challenging defendant's sentencing where defendant should have had the right to elect sentencing under 730 ILCS 5/5-4.5-105(b), which was enacted after he committed the offense but prior to his sentencing, and which allows the sentencing court to decline to impose an otherwise mandatory firearm enhancement. And, it was arguable that defendant was prejudiced by appellate counsel's failure where this issue appears to have merit which, if ultimately established, would require a new sentencing hearing. Thus, post-conviction counsel performed unreasonably by failing to frame defendant's claim as one of ineffective assistance of appellate counsel, and the appellate court remanded the matter for further post-conviction proceedings.

People v. Urzua, 2021 IL App (2d) 200231 Defendant filed a *pro se* post-conviction petition and had counsel appointed. Counsel subsequently filed a 651(c) certificate and a motion to withdraw, citing **People v. Greer**, 212 Ill. 2d 192 (2004), and **People v. Kuehner**, 2015 IL 117695. Defendant then advised the court that he was going to retain private counsel, and the court granted a continuance to allow him to do so. The court also allowed appointed counsel to withdraw. New counsel subsequently appeared and filed an amended petition. The State moved to dismiss, and the court granted the State's motion.

On appeal, defendant argued that he had been denied reasonable assistance of post-conviction counsel where his retained attorneys failed to make routine amendments, properly present his actual innocence claim, and review pertinent transcripts. The State, citing **People v. Thomas**, 2013 IL App (2d) 120646, argued that defendant was not entitled to reasonable assistance from retained counsel where original counsel had complied with both Rule 651(c) and **Greer** and had been allowed to withdraw.

The Appellate Court distinguished **Thomas** and rejected the State's argument. In **Thomas**, new counsel had been appointed to represent the defendant after his original counsel withdrew under **Greer**. Here, on the other hand, there was no indication that the court allowed original post-conviction counsel to withdraw on the basis that the claims lacked merit under **Greer**. Instead, the record showed that counsel was granted leave to withdraw because defendant intended to hire a new attorney.

On the merits, the Appellate Court agreed that retained counsel failed to provide reasonable assistance where counsel did not obtain a properly notarized affidavit from a witness to support defendant's actual innocence claim. Accordingly, the court reversed and remanded for further second-stage post-conviction proceedings with the appointment of new counsel.

People v. Collins, 2021 IL App (1st) 170597 Post-conviction counsel substantially complied with Rule 651(c) where he stated on his certificate that he had "examined the report of proceedings." The Appellate Court refused to infer from this language that counsel did not examine the common law record, sentencing hearing, or other files.

People v. Jackson, 2021 IL App (1st) 190263 The Appellate Court could not conclusively determine whether post-conviction counsel provided unreasonable assistance at the second-stage and remanded for further proceedings.

Defendant had been convicted of armed habitual criminal after police found a gun during a **Terry** frisk. The frisk was based on an anonymous tip and the officers' observation of a bulge in defendant's waistband. The latter fact distinguished the case from **Florida v. J.L., 529 U.S. 266 (2000)**, which held a stop cannot be based on an anonymous tip alone. In his post-conviction petition, defendant alleged ineffective assistance of counsel for failing to introduce evidence of the long shirt and baggy jeans he wore at the time of the stop. He alleged that this evidence would undermine the officers' testimony that they were able to see a bulge. Post-conviction counsel filed a 651(c) certificate and an amended petition, which added an affidavit from defendant detailing his complaints to his attorney. The trial court dismissed, finding the petition lacked evidence suggesting the clothing was available to trial counsel.

The Appellate Court held that defendant's allegation of unreasonable assistance of post-conviction counsel was inconclusive. The availability of the clothing to trial counsel remained an open question, and while it would ordinarily hold any deficiencies in the record against the appellant, in this case it was post-conviction counsel who was ultimately responsible. Citing its Rule 615(b) powers, it remanded with instructions to create a record as to what attempts counsel made to determine whether there was a photo of defendant in the clothes he wore when arrested, whether his clothing was inventoried by jail personnel, whether the clothing was in storage, and whether trial counsel had access to the clothing. The Court ordered post-conviction counsel to make a record reflecting her efforts to obtain the clothing, the jail inventory sheet, and any arrest photos and her efforts to document what was, and was not, available to trial counsel at the time of the suppression hearing and trial.

People v. Addison, 2021 IL App (2d) 180545 The Court rejected the State's assertion that a defendant who is tried *in absentia* waives collateral review of any issue that could have been raised during his original trial proceedings had he appeared. The Post-Conviction Hearing Act provides a separate remedy not contingent upon exhaustion of any other remedy. Further, the bulk of defendant's claims in his petition alleged ineffective assistance of counsel, which usually cannot be resolved during trial, but rather are relegated to direct appeal or collateral proceedings.

Defendant was deprived of the reasonable assistance of appointed post-conviction counsel, despite counsel's filing of a Rule 651(c) certificate, where counsel failed to make routine amendments to defendant's petition to overcome forfeiture concerns. Accordingly, remand was required regardless of whether defendant's underlying claims had merit. The reviewing court should not speculate whether defendant's petition would have been dismissed if counsel had adequately performed his duties under Rule 651(c).

People v. Smith, 2020 IL App (1st) 181220 The public defender initially appointed to represent defendant on post-conviction proceedings consulted with defendant, reviewed the record, determined no amendments to defendant's petition were necessary, and filed a Rule 651(c) certificate. That attorney then left the public defender's office and defendant's case was reassigned to another public defender who represented defendant at the hearing on the State's motion to dismiss. The second public defender was not required to independently consult with defendant, review the record, and determine whether amendments to the petition were necessary. She was entitled to rely on prior counsel's certificate and proceed directly to the task of representing defendant at the hearing.

People v. Landa, 2020 IL App (1st) 170851 Post-conviction counsel's certificate stating that he had "communicated" with defendant, "examined the record and transcripts," and "presented the petitioner's claims" substantially complied with Rule 651(c), leading to the presumption that counsel provided reasonable assistance. To overcome that presumption, a defendant must show both the manner in which counsel's performance was deficient and also the prejudice resulting from that deficiency. The court distinguished this situation from that where counsel fails to file any certificate at all (**People v. Suarez, 224 Ill. 2d 37 (2007)**), which requires remand regardless of whether the petition had merit.

Here, defendant established unreasonable performance where, during the several years that defendant's petition was pending, post-conviction counsel failed even to have defendant's supporting affidavit notarized and failed to file a response to the State's motion to dismiss, despite repeatedly stating he would do so. Counsel also stood silent at the hearing on the motion to dismiss, advancing no argument on defendant's behalf. Defendant demonstrated prejudice where he advanced a viable claim of ineffective assistance of trial counsel for failing to investigate and present his alibi defense in his petition. Counsel should have argued that the court was required to accept defendant's petition and supporting affidavits as true where they were un rebutted by the record, a requirement which the court did not seem to understand given its comments in dismissing the petition. The evidence at defendant's trial was closely balanced, and post-conviction counsel's failure to support the petition with argument and defendant's affidavit was unreasonable and prejudiced defendant.

People v. Knight, 2020 IL App (1st) 170550 Defendant alleged in a post-conviction petition that his sentence for murder was unconstitutionally disparate to his co-defendant's sentence, because his co-defendant was the principal and received a significantly shorter sentence. In the original PC proceedings, the State's motion to dismiss inaccurately alleged that defendant's sentences were concurrent and therefore shorter than co-defendant's. PC counsel did not correct the record, so after dismissal, the Appellate Court found counsel's performance unreasonable and remanded the case.

On remand the same attorney was appointed, and at an evidentiary hearing, counsel inaccurately stated that the co-defendant was found accountable for the offense. In fact, at co-defendant's sentencing hearing the court explicitly found co-defendant acted as principal. After denial of the petition, the Appellate Court again remanded, finding counsel's assistance unreasonable. The court ordered the appointment of new counsel on remand and noted that this case provides a clear example of why a finding of unreasonable assistance should generally trigger the appointment of new counsel on remand.

People v. Hawkins, 2020 IL App (3d) 160682 Compliance with Rule 651(c) requires, among other things, that post-conviction counsel examine the entire record in order to adequately present defendant's claims. Post-conviction counsel failed to meet the obligations of Rule 651(c) where the record was unclear as to whether counsel had reviewed an unredacted interrogation video relevant to defendant's claims where that video was not originally part of the appellate court record but instead was filed as a supplement. Because post-conviction counsel had been permitted to withdraw in the trial court, the Appellate Court remanded for new second-stage post-conviction proceedings, including the reappointment of counsel.

People v. Moore, 2019 IL App (3d) 170485 The Post-Conviction Hearing Act does not provide for the appointment of counsel on a motion for leave to file a successive post-conviction petition. Even where the court appoints counsel on a motion for leave to file, defendant cannot complain that such counsel provided unreasonable assistance. The court rejected defendant's reliance on **People v. Walker**, 2018 IL App (3d) 150527, because that case involved the discretionary appointment of counsel on a 2-1401 petition, not a successive post-conviction petition. The Act "clearly provides that defendant only has the right to the assistance of counsel at the second stage of post-conviction proceedings," so the appointment of counsel here was premature and unsupported by the Act.

People v. Pabello, 2019 IL App (2d) 170867 Defendant's post-conviction petition alleging an involuntary **Miranda** waiver was denied after a third-stage evidentiary hearing. Defendant alleged on appeal that he received unreasonable assistance of PC counsel. The Appellate Court affirmed. First, defendant's allegation that counsel violated of 651(c) by failing to present additional evidence of defendant's lack of education is misplaced. Counsel here complied with Rule 651(c) at the second stage when he consulted with defendant, examined the trial record, and amended the *pro se* petition as necessary to adequately present defendant's claims. Once the petition was advanced to the third stage, Rule 651(c) no longer applied. Nor was counsel's performance otherwise unreasonable, where additional information about defendant's lack of education would not likely have resulted in a finding that defendant did not knowingly and intelligently waive his **Miranda** rights.

People v. Fathauer, 2019 IL App (4th) 180241 The trial court did not err in allowing appointed post-conviction counsel's motion to withdraw in accordance with **People v. Kuehner**. To comply with **Kuehner**, counsel must provide some information not apparent on the face of the *pro se* petition that demonstrates each of defendant's claims are frivolous and patently without merit. Here, counsel addressed each of defendant's claims in his motion. Among other things, counsel pointed out that the trial transcript and the Appellate Court's decision on direct appeal showed that defendant's claim of ineffective assistance of counsel for failure to investigate was both meritless and barred by *res judicata* principles. While the transcript and appeal decision were matters of record at the time the court advanced the petition to the second stage, the court's initial review of a *pro se* petition requires only that the court look at the petition. Since the information in the transcript and direct appeal decision was not part of the *pro se* petition, it was properly brought to the trial court's attention and relied upon in counsel's motion to withdraw.

People v. Carrizoza, 2018 IL App (3d) 160051 Post-conviction counsel violated Rule 651(c) by filing a Rule 604(d) certificate, where the certificate did not allege that he consulted with defendant about his allegations of error outside of the plea and sentence, and the record did not show otherwise. A Rule 604(d) certificate avers that counsel consulted with the defendant about contentions of error relating to the entry of a plea and sentence, but here, the *pro se* petition alleged other errors, including challenges to the search and seizure. Thus, while a 604(d) certificate can in some circumstances satisfy Rule 651(c), here it did not. Nor did the record show compliance, as counsel did not detail his consultations with defendant or amend the petition. The Appellate Court remanded for second-stage proceedings including the appointment of new post-conviction counsel.

People v. Dixon, 2018 IL App (3d) 150630 Appointed post-conviction counsel failed to provide a reasonable level of assistance at the second stage. Counsel filed an amended petition with several conclusory claims of ineffective assistance of counsel, with no factual support and no allegations of prejudice, and attached defendant’s 70-page handwritten memo in lieu of notarized affidavits.

People v. Custer, 2018 IL App (3d) 160202 As a matter of first impression, the Appellate Court concluded that a “**Krankel**-like procedure” should apply to *pro se* complaints of unreasonable assistance of post-conviction counsel at the third stage of post-conviction proceedings. The fact that the right to counsel in post-conviction proceedings is statutory, rather than constitutional, does not defeat the usefulness of a **Krankel** inquiry in post-conviction proceedings. Such an inquiry allows the circuit court to appoint new counsel if warranted, develops a record for review, and limits issues on appeal.

Defendant claimed post-conviction counsel provided unreasonable assistance by failing to call a specific witness at the third-stage evidentiary hearing. At a hearing on the motion to reconsider, that same post-conviction counsel stood on defendant’s motion, and the court denied it. The Appellate Court remanded for a **Krankel**-like inquiry to determine if new counsel should be appointed to represent defendant on his claim of unreasonable assistance of post-conviction counsel.

People v. McDonald, 2018 IL App (3d) 150507 (modified on denial of rehearing 2/14/18) A defendant who timely files a post-conviction petition while in custody is eligible for post-conviction relief, “regardless of whether he is released from custody in the intervening time.” Defendant was in custody when he filed his petition; he had completed his prison sentence but was “violated at the door” because he did not have an acceptable address for MSR. During the pendency of his post-conviction appeal, defendant completed his MSR and was fully discharged from any sentence.

The plain language of the Post-Conviction Hearing Act is silent on whether a defendant loses standing to pursue post-conviction relief once he is discharged from his sentence. Illinois Supreme Court case law is in conflict, with some cases indicating a defendant must be in custody in order to obtain post-conviction relief [**Dale**, 406 Ill. 2d 238 (1950); **Martin-Trigona**, 111 Ill. 2d 295 (1986); **Carrera**, 239 Ill. 2d 241 (2010)] and another allowing a post-conviction petition to proceed even after a defendant’s release [**Davis**, 39 Ill. 2d 325 (1968)]. Applying the rule of lenity, the Appellate Court held that defendant did not lose standing to pursue post-conviction relief when he was discharged.

Defendant was denied reasonable assistance of counsel. Defendant’s *pro se* petition stated the gist of a claim based on his not being fully informed of the consequences of his guilty plea, including that his status as a sex offender and lack of a valid address would require him to serve MSR in prison. Post-conviction counsel did not amend the petition to include an allegation of prejudice, i.e. that defendant would not have pled guilty had he been properly admonished. Defendant’s petition was legally insufficient without such an amendment, and counsel’s failure to shape the petition into adequate legal form requires remand regardless of whether the claim raised in the petition has merit. The Appellate Court vacated the denial of the petition and remanded with instructions to file an amended petition.

People v. Shelton, 2018 IL App (2d) 160303 Post-conviction counsel is not relieved of his or her duties under Supreme Court Rule 651(c) by converting defendant’s post-conviction petition into a 2-1401 petition. Because no Rule 651(c) attorney certificate was filed, there

was no presumption that counsel performed reasonably. And, because the pleading was filed more than two years after conviction, counsel needed to allege an exception to the 2-1401 statute of limitations, but failed to do so.

The record showed deficient performance by counsel where there was an available, potentially meritorious claim based upon the court's failure to admonish defendant of the proper term of mandatory supervised release at his plea hearing. Counsel should have raised that claim by amending defendant's post-conviction petition to allege violations of due process and/or ineffective assistance of counsel at the plea hearing, predicated on the deficient MSR admonishment. Further, counsel could have alleged that the failure to raise that claim within the applicable post-conviction petition limitations period was not due to defendant's culpable negligence where the record indicated that defendant only recently learned of the lengthier MSR term.

People v. Johnson, 2018 IL App (5th) 140486 Because the circuit court appointed counsel on defendant's *pro se* post-conviction petition within 90 days of its filing, the Appellate Court presumed that the court had found the petition not frivolous and patently without merit even though the circuit court did not expressly state its findings.

Where a petition is advanced to the second stage on its merits, rather than because the 90-day review period has expired, appointed counsel seeking to withdraw must meet the standard set forth in **People v. Kuehner, 2015 IL 117695**. That is, appointed counsel must demonstrate to the court that its initial determination on the merits was wrong and that the petition is, indeed, frivolous and patently without merit. And, the court must actually evaluate counsel's assertions and decide that the petition is frivolous before allowing counsel to withdraw. Counsel here did not meet the **Kuehner** standard where she addressed only two of defendant's five post-conviction claims in her motion to withdraw. And, the record did not show that the circuit court actually considered whether counsel's assessment of the merits was correct, either.

The Appellate Court reversed and remanded for the appointment of new counsel. On remand, if necessary, new counsel may file a motion to withdraw that meets the **Kuehner** standard.

People v. Wallace, 2018 IL App (5th) 140385 Where appointed post-conviction counsel does not file a Rule 651(c) certificate, there is no presumption that counsel provided reasonable assistance to the petitioner. In the absence of a certificate, reasonable assistance will be found only if the record explicitly shows that counsel fulfilled Rule 651's requirements. Here, counsel's failure to make a routine amendment to the petition to allege ineffective assistance of post-plea and direct appeal counsel, which resulted in the petition's dismissal on forfeiture grounds, deprived defendant of reasonable assistance. The Appellate Court declined to review the underlying merits of the petition, consistent with **People v. Turner, 187 Ill. 2d 406 (1999)**, because the trial court had not yet done so. On remand, new counsel should be appointed. If new post-conviction counsel concludes the petition's underlying claims are without merit, counsel should file a motion to withdraw in compliance with **People v. Kuehner, 2015 IL 117695**, to permit the trial court to reconsider its finding that the petition stated the gist of a claim.

People v. Moore, 2018 IL App (2d) 170120 Where a defendant's post-conviction petition is advanced to the second stage by virtue of the court's failure to act on it within 90 days, any request to withdraw by appointed post-conviction counsel must follow **People v. Greer, 212**

[Ill. 2d 192 \(2004\)](#). Counsel seeking to withdraw should explain why each of defendant's claims lack potential merit. If counsel's motion is deficient, however, leave to withdraw may still be allowed (and affirmed on review) if counsel complied with her obligations under Rule 651(c) and if the record shows that the claims are frivolous and without merit.

Here, counsel's request to withdraw addressed six claims in defendant's *pro se* petition, but failed to acknowledge or address a claim of ineffective assistance of appellate counsel. Because counsel represented that she had addressed "each one" of defendant's claims, but actually failed to address the ineffective assistance claim, the record supported the conclusion that counsel had not complied with her duty under Rule 651(c) to "ascertain" defendant's contentions of constitutional deprivation. Accordingly, the Appellate Court would not assume that the unaddressed claim was in final form and declined to consider the merits of that claim. The Court vacated the order allowing counsel to withdraw and the order dismissing defendant's petition and remanded for further proceedings.

[People v. Johnson, 2017 IL App \(4th\) 160449](#) The Post-Conviction Hearing Act (725 ILCS 5/122-4) provides that the right to appointed counsel arises only if the petition survives summary dismissal. At second and third stage proceedings, post-conviction petitioners are entitled to the reasonable assistance of counsel.

The court rejected the argument that a petitioner who is able to retain counsel is entitled to the reasonable assistance of such counsel at the summary dismissal stage. The court stressed that the Act does not afford the right to counsel at the summary dismissal stage, and that accepting defendant's argument would lead to disparate treatment because well-off petitioners would receive a higher level of assistance from counsel than indigents.

Because defendant was not entitled to the assistance of counsel at the summary dismissal stage, the trial court properly dismissed his motion to reconsider and his supplemental petition arguing that retained counsel provided "ineffective assistance" by failing to include certain claims in the original petition.

[People v. Perry, 2017 IL App \(1st\) 150587](#) Appointed post-conviction counsel failed to provide a reasonable level of assistance when she removed an affidavit that defendant had attached to his petition. Although counsel had good reason to believe the affidavit had been falsified, the reasonable-assistance standard precludes appointed counsel from doing affirmative damage to a client's case, particularly where defendant has no chance to respond. Faced with a petition she believed to be frivolous, appointed counsel had two options: stand on the petition, or move to withdraw and explain her reasons for doing so. The Appellate Court remanded for appointment of counsel and new second-stage proceedings on the original *pro se* petition.

[People v. Malone, 2017 IL App \(3d\) 140165](#) Post-conviction counsel is not required to amend a *pro se* petition, and is ethically prohibited from raising post-conviction claims that are frivolous. Where the *pro se* petition raises only frivolous claims, post-conviction counsel has the option of standing on the allegations or withdrawing as counsel. In other words, although counsel may move to withdraw where the allegations of the petition are frivolous, he is not compelled to do so.

Appointed post-conviction counsel provided reasonable assistance, as is required by the Post-Conviction Hearing Act, where he stood on the petition and filed a Rule 651(c) certificate. The petitioner failed to rebut the presumption created by the certificate, and also failed to show how counsel could have improved the petition or that any other grounds for relief existed. In addition, the trial court gave the petitioner an opportunity to make a

statement and present any additional evidence at the hearing. Under these circumstances, counsel provided reasonable assistance.

People v. Zareski, 2017 IL App (1st) 150836 The Appellate Court concluded that where a post-conviction petition is filed by privately retained counsel, Rule 651 does not apply. However, under the terms of the Post-Conviction Hearing Act privately retained counsel must provide reasonable assistance. Although “reasonable assistance” has not been fully defined as it relates to private counsel, the court concluded that the determination requires a “**Strickland**-like analysis” which includes an evaluation of prejudice.

Thus, when it is argued that privately retained counsel provided unreasonable assistance by failing to present a particular claim, the court must examine not only whether counsel should have presented the claim but also whether the failure to do so prejudiced defendant. If the potential claim had no merit, the petitioner is not entitled to relief regardless whether the issue should have been presented.

Here, no prejudice resulted from post-conviction counsel’s alleged shortcomings. Therefore, the petitioner was unable to show that privately retained counsel failed to provide reasonable assistance.

People v. Schlosser, 2017 IL App (1st) 150355 The court concluded that where it had previously remanded the cause for additional second stage proceedings because appointed counsel failed to provide reasonable assistance, it was error for the trial to appoint the same defense attorney on remand. The cause was remanded for appointment of a different attorney and additional second stage proceedings.

The court also noted that counsel’s representation was deficient in several respects, including that there was no indication that counsel communicated with defendant after the original remand and that counsel failed to properly present defendant’s claims, properly complete the notice of appeal, and mail defendant a copy of the dismissal order after being ordered to do so by the trial court. The court also said that defendant did not waive the issue by failing to request new counsel on remand where he was not present at any court hearing and may not have known that the same attorney had been reappointed to represent him.

People v. Jones, 2016 IL App (3d) 140094 Defendant filed a post-conviction petition which alleged that at his trial for first degree murder, the trial court erred by admitting a redacted version of a videotape of interviews between police and defendant and by restricting the defense from playing the entire videotape. The petition also alleged that the trial court denied a fair trial by allowing the State to introduce the decedent’s autopsy photographs.

After 90 days passed, the petition was advanced to the second stage. Counsel was appointed and filed an amended petition alleging that appellate counsel had been ineffective for failing to challenge the trial court’s evidentiary rulings concerning the autopsy photographs and allowing a redacted version of the defendant’s statements to go to the jury. The amended petition did not mention the un-redacted version of the videotape.

At the second-stage hearing, appointed counsel explained that the ineffective assistance of counsel arguments concerned appellate rather than trial counsel. Counsel argued that the issues had been preserved by trial counsel but not raised on direct appeal.

The Appellate Court found that appointed post-conviction counsel failed to provide a reasonable level of assistance. Appointed counsel is not required to amend the *pro se* petition if the petitioner’s claims are adequately presented, and is required to investigate and present only those claims which the petition raises. However, Rule 651(c) requires that counsel shape

the petitioner's claims into proper legal form and present those claims to the post-conviction court.

The substance of the *pro se* petition's claim was that defendant wanted the jury to see the entire videotape rather than the redacted version introduced by the State. Because trial counsel argued extensively that the omitted statements were necessary to the defense, but failed to present any additional video footage including the purported exculpatory statements which had been omitted from the State's redacted version, the Appellate Court concluded that the *pro se* allegations were sufficient to inform post-conviction counsel that defendant wanted to challenge not only the trial court's evidentiary ruling but also trial counsel's ineffectiveness.

Although counsel appointed in post-conviction proceedings need not comb the record to discern claims which the *pro se* petition did not raise, the petition here identified the specific evidence in question and explicitly argued that the State's redacted evidence failed to show the entire line of questioning or purported exculpatory statements. Defendant also included citations to the record to support his claim. Under these circumstances, the record clearly revealed to appointed counsel that trial counsel failed to present statements which he extensively argued were necessary to the defense.

The matter was remanded for the appointment of new counsel.

People v. Smith, 2016 IL App (4th) 140085 Post-conviction counsel may withdraw from representing a defendant under **People v. Greer**, 212 Ill. 2d 192 (2004) only after counsel has complied with Rule 651(c). A certificate filed pursuant to Rule 651(c) creates a presumption that counsel has complied with the rule. In the absence of such a certificate, the record must contain "a clear and affirmative showing of compliance."

Here counsel filed a motion to withdraw from representing defendant on his post-conviction petition. The trial court allowed the motion to withdraw and granted the State's motion to dismiss the petition. Counsel filed no 651(c) certificate.

The Appellate Court held that the record failed to show that counsel complied with Rule 651(c). Although the record showed that counsel consulted with defendant, it failed to show that counsel consulted with defendant to ascertain his constitutional claims. The court remanded the case for further proceedings.

People v. Russell, 2016 IL App (3d) 140386 Post-conviction counsel is required to investigate and present only claims which the petitioner makes in the *pro se* petition, but must make any amendments that are necessary to adequately present those claims. However, counsel need not make amendments to a *pro se* petition which would merely further a frivolous or patently nonmeritorious claim.

Filing a certificate of compliance with Rule 651(c) creates a presumption that the petitioner received reasonable representation, but that presumption may be rebutted by the record. Whether post-conviction counsel provided a reasonable level of assistance is reviewed *de novo*.

Here, the *pro se* petition alleged that the trial court erred by admitting evidence of other crimes. That issue had been preserved at trial, but was forfeited for post-conviction because appellate counsel did not raise it on direct appeal. The Appellate Court concluded that post-conviction counsel failed to provide reasonable assistance by failing to amend the *pro se* petition to allege ineffective assistance of appellate counsel. "[P]ostconviction counsel's failure to amend the postconviction petition to allege ineffective assistance of counsel . . . contributed directly to the dismissal of the petition without an evidentiary hearing [and]

rebutted the presumption of reasonable assistance created by the filing of the certificate of compliance with Rule 651(c).”

The court rejected the State’s argument that the claim concerning the admission of other crimes was meritless, and that counsel therefore did not act unreasonably by failing to amend the *pro se* petition to allege ineffective assistance of appellate counsel. “[A] defendant is not required to make a positive showing that his counsel's failure to comply with Rule 651(c) caused prejudice.” Instead, remand is required if post-conviction counsel failed to fulfill the duties of Rule 651(c).

The order dismissing the post-conviction petition was reversed and the cause remanded with directions to allow the petitioner an opportunity to replead his post-conviction petition with the assistance of new counsel.

People v. Thompson, 2016 IL App (3d) 150644 The record rebutted the presumption where the post-conviction petition alleged that defendant was unfit to waive his constitutional right to counsel at trial because he had been diagnosed with schizophrenia and institutionalized twice, but counsel did not obtain the relevant mental health records to support the claim.

To provide reasonable assistance, counsel has a minimum obligation to attempt to obtain evidentiary support for the claims raised by the petition. Here, defendant identified the relevant mental health records, some of which had been produced for the trial court by previous counsel. Instead of attempting to obtain the records, post-conviction counsel elected to stand on the *pro se* petition. Because the petition was not supported by evidence, the trial court had no choice but to dismiss it without an evidentiary hearing.

The court rejected the State’s argument that counsel must have reviewed mental health records that had been in the possession of former post-conviction counsel. “The question presented in this appeal is not whether defendant’s former attorney possessed the . . . records, but whether defendant’s current post-conviction counsel reviewed the records.”

The order dismissing the post-conviction petition was reversed and the cause remanded for counsel to complete the duties required by Rule 651(c), including obtaining and reviewing defendant’s pre-trial mental health records and amending the petition as necessary.

People v. Mason, 2016 IL App (4th) 140517 Post-conviction counsel filed a certificate under Rule 604(d) instead of Rule 651(c). The certificate stated that counsel had reviewed defendant’s *pro se* motion, consulted with defendant to ascertain his contentions of error in the plea and sentencing hearings, and determined that no amendments to the motion were necessary to present defendant’s contentions of error in the plea and sentencing proceedings.

The court held that counsel failed to comply with Rule 651(c) since there are noticeable differences between the two rules. Rule 604(d) only requires counsel to consult with defendant and review the records of the plea and sentencing proceedings. By contrast, Rule 651(c) requires counsel to consult with defendant regarding any constitutional issues and review the record of proceedings. Rule 604(d) is thus more limited in scope than Rule 651(c).

Here post-conviction counsel did not merely mislabel the certificate but used language in the body of the certificate that mirrored the precise language of Rule 604(d). Although the claims in the *pro se* petition mostly involved defendant’s guilty plea and sentencing, some claims required counsel to consider records from other proceedings. Thus the certificate failed to show that counsel reviewed the transcripts of all the trial court proceedings or consulted with defendant about issues relating to matters outside the plea and sentencing hearing.

The court remanded the case for further post-conviction proceedings and the appointment of new counsel.

People v. Blanchard, 2015 IL App (1st) 132281 In his *pro se* petition, defendant raised claims relating to the lineup photo and the victim's bank card. Counsel did not file an amended petition raising either of those claims, but did file a Rule 651(c) certificate stating that she: (1) consulted with defendant to ascertain his claims; (2) examined the transcripts and common law record; and (3) and did not need to amend the *pro se* petition since it adequately presented defendant's claims.

Defendant argued on appeal that the certificate did not demonstrate compliance with Rule 651(c) because it did not indicate that counsel examined the trial exhibits which included the lineup photo and the victim's bank card. The court held that although it would not presume that counsel failed to review the exhibits "simply because she failed to mention them explicitly" in her certificate, the court was nonetheless "unable to determine" from counsel's certificate if she examined the trial exhibits.

Supreme Court Rule 324 states that "the record shall be arranged in three sections: the common law record, the report of proceedings, and the trial exhibits." Counsel, however, merely stated that she examined "the transcripts and common law record." Where, as in the present case, the *pro se* petition identifies specific exhibits as basis for the claims, "good practice and completeness calls for the Rule 651(c) certification to address the exhibits for the presumption of compliance to be invoked and for a proper review of defendant's claims" by the court.

The case was remanded for compliance with Rule 651(c) and to allow a supplemental petition to be filed "if requested." The circuit court was directed to reconsider defendant's petition after proper compliance with Rule 651(c).

People v. Rodriguez, 2015 IL App (2d) 130994 Defendant filed a *pro se* post-conviction petition alleging that trial counsel was ineffective for failing to investigate his fitness for trial or request a fitness hearing. The court advanced the petition to the second stage and appointed counsel.

PC Counsel filed an amended petition arguing in a confusing manner two issues that should have been distinct, but counsel conflated together: (1) appellate counsel was ineffective for failing to argue that trial counsel was ineffective for failing to request a fitness examination of defendant; and (2) a *bona fide* doubt existed as to defendant's fitness and due process bars the prosecution of an unfit defendant. The State filed a motion to dismiss arguing that there was no evidence in the trial record that defendant was unfit.

Immediately after the trial court granted the State's motion, counsel moved for the appointment of an expert witness to conduct a retrospective fitness examination of defendant. The trial court allowed counsel to file the motion, but no more proceedings were held on the motion before defendant filed a notice of appeal. Counsel did not file a 651(c) certificate.

On appeal, defendant argued that post-conviction counsel's performance was unreasonable under Rule 651(c) because he failed to provide sufficient support for the second fitness claim: that he had been unfit to stand trial. Specifically, he failed to produce any evidence that defendant had actually been unfit. The State argued that counsel had no obligation to properly present the issue of whether defendant had been tried while unfit since defendant did not raise that specific claim in his *pro se* petition.

The Appellate Court held that the record showed that counsel was aware of the second fitness claim and specifically asked for the appointment of an expert to perform a retrospective fitness evaluation to provide support for the claim. But the issue was never fully explored, let alone properly raised. Because counsel failed to do so, he did not amend

the petition to adequately present defendant's contentions, and thus failed to provide a reasonable level of assistance under Rule 651(c).

People v. Ross, 2015 IL App (3d) 130077 Defendant filed a *pro se* petition alleging that his trial counsel provided ineffective assistance by giving him incorrect sentencing advice before he pled guilty. Defendant supported his claim with a sworn but un-notarized statement attesting that counsel's erroneous advice induced him to plead guilty when he otherwise would have gone to trial.

At the second stage, post-conviction counsel filed an amended petition and incorporated defendant's *pro se* filing, including the un-notarized statement. The State filed an answer containing trial counsel's affidavit which disputed defendant's claim of ineffective assistance, but said nothing about what sentencing advice counsel gave to defendant prior to the guilty plea.

Defendant and trial counsel both testified at a third-stage evidentiary hearing, but neither post-conviction counsel nor the State asked either witness about trial counsel's sentencing advice. The court denied defendant's petition finding that it had "no reason to credit" any of defendant's claims.

The Appellate Court found that post-conviction counsel provided unreasonable assistance by failing to amend the *pro se* petition to include a properly executed affidavit and by failing to question defendant about trial counsel's erroneous sentencing advice. The statement attached to the *pro se* petition was not notarized and thus did not qualify as an affidavit. Accordingly, it had no legal effect and was not sufficient to support defendant's claims. Counsel had an obligation to either prepare an affidavit or to elicit testimony from defendant at the evidentiary hearing that would have supported his claims. By doing neither, counsel provided unreasonable assistance.

People v. Shipp, 2015 IL App (2d) 131309 Although post-conviction petitioners are not entitled to the effective assistance of counsel under the Sixth Amendment, they are statutorily entitled to a reasonable level of assistance by post-conviction counsel at second and third stage proceedings. In addition, Supreme Court Rule 651(c) provides that an attorney who represents a petitioner at the second and third stages must file a certificate indicating that he or she has taken certain steps in the course of the representation.

The court stressed that the right of reasonable representation provided by Rule 651(c) attaches at the second stage of post-conviction proceedings, and does not apply to a petition that is dismissed at the first stage even if the petitioner was represented by counsel. Thus, the court rejected the petitioner's argument that where he was represented by retained counsel at the first stage, that attorney was required to provide reasonable assistance.

People v. Hotwagner, 2015 IL App (5th) 130525 Supreme Court Rule 651(c) imposes specific obligations on post-conviction counsel to insure that counsel provides a reasonable level of assistance. The record must show that counsel: (1) consulted with defendant to ascertain his claims; (2) examined the record of the trial court proceedings; and (3) made all necessary amendments to the *pro se* petition. Counsel may show compliance by filing a certificate.

Counsel was appointed to represent defendant at a third-stage evidentiary hearing. (A different attorney represented defendant at the second stage.) Counsel filed a 651(c) certificate stating that she reviewed all the contents of the court file, investigated defendant's contentions of error, read all the transcripts, and personally corresponded and met with defendant.

On appeal, defendant argued that counsel failed to comply with Rule 651(c) since her certificate did not state that she consulted with defendant about his underlying claims. The Appellate Court rejected this argument. Since counsel was appointed to represent defendant at a third-stage evidentiary hearing, defendant's claims had already been ascertained and there was no need for counsel to consult with defendant about those claims.

Prior counsel who represented defendant at the second stage filed his own 651(c) certificate and stated that he had consulted with defendant about his claims. Prior counsel then shaped the claims into proper legal form and filed an amended petition. Current counsel's role was to argue the merits of defendant's claim, as previously framed by prior counsel, at the evidentiary hearing. There is no obligation under Rule 651(c) for third-stage counsel to duplicate the efforts of second-stage counsel.

People v. Yaworski, 2014 IL App (2d) 130327 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.

People v. Bell, 2014 IL App (3d) 120637 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.

People v. Guzman, 2014 IL App (3rd) 090464 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.

People v. Kuehner, 2014 IL App (4th) 120901 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.

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.

Defendant next 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).

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.

People v. Elken, 2014 IL App (3d) 120580 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.

People v. Anguiano, 2013 IL App (1st) 113458 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.

People v. Thomas, 2013 IL App (2d) 120646 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.

People v. Csaszar, 2013 IL App (1st) 100467 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 provide 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.

People v. Schlosser, 2012 IL App (1st) 092523 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.

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.

People v. Robinson, 2012 IL App (4th) 101048 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.

People v. Profit, 2012 IL App (1st) 101307 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.

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.

People v. Kelly, 2012 IL App (1st) 101521 Petitioner's counsel did not provide 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.

People v. Patterson, 2012 IL App (4th) 090656 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 subject 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.

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.

People v. Kirk, 2012 IL App (1st) 101606 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.

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.

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.

People v. Milam, 2012 IL App (1st) 100832 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.

People v. Nitz, 2011 IL App (2d) 100031 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.

People v. Komes, 2011 IL App (2d) 100014 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 indication 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.

People v. Mendoza, 402 Ill.App.3d 808, 931 N.E.2d 703 (1st Dist. 2010) 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.

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.

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.

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."

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.

People v. Bashaw, 361 Ill.App.3d 963, 838 N.E.2d 972 (2d Dist. 2005) Post-conviction counsel failed to satisfy Rule 651(c) where counsel's certificate stated that she reviewed the

record of proceedings "on appeal," rather than the proceedings from the trial. Although this statement might imply that counsel had reviewed the trial proceedings, which were included in the record on direct appeal, counsel's statements showed that she believed she was not required to review the trial proceedings where the pro se petition challenged the effectiveness of appellate counsel. Also, the certificate was inadequate because it indicated that instead of amending the pro se petition to adequately present defendant's contentions, post-conviction counsel acceded to defendant's wish "to rely on his original post-conviction petition." Whether to file an amended post-conviction petition is a strategic question left to counsel, not a decision for the post-conviction petitioner. Post-conviction counsel who merely relies on defendant's decision not to file an amended petition fails to provide reasonable assistance or to comply with Rule 651(c). Reversal was required although the trial court dismissed the petition based on timeliness rather than the merits. Because a prosecutor may choose to waive the statute of limitations, and because an untimely petition is permitted if defendant shows that the delay was not due to his or her culpable negligence, familiarity with the record and amendment of the pro se petition are critical in order to provide reasonable assistance of counsel.

People v. Peoples, 346 Ill.App.3d 258, 804 N.E.2d 577 (1st Dist. 2003) Post-conviction counsel failed to comply with Rule 651 at second-stage post-conviction proceedings where she responded to the State's motion to dismiss only on the issue of timeliness. Because the State could choose to forfeit any issue concerning timeliness once the petition was amended to raise all petitioner's concerns, post-conviction counsel is required to fulfill her Rule 651(c) responsibilities before the State decides whether to move to dismiss on the ground that the petition was untimely.

People v. Rials, 345 Ill.App.3d 636, 802 N.E.2d 1240 (1st Dist. 2003) Where the pro se post-conviction petition argued only one specific issue - that the sentence was improper under Illinois Supreme Court precedent - and made general allegations that the Fifth, Sixth, Eighth, and Fourteenth Amendments had been violated, appointed counsel did not act unreasonably by failing to amend the petition to raise the absence of an adequate foundation for an expert's opinion.

People v. Rankins, 277 Ill.App.3d 561, 660 N.E.2d 1317 (3d Dist. 1996) Defendant had different appointed attorneys for a hearing on the State's motion to dismiss (which was granted as to some of defendant's claims) and an evidentiary hearing on defendant's post-conviction petition. Neither attorney complied with Rule 651(c). Regarding the first attorney, the record did not show that counsel examined the trial record or consulted with defendant; indeed, counsel failed to even speak at the hearing on the motion to dismiss. As to the second attorney, the record showed only partial compliance with the rule. Counsel indicated that he was generally familiar with the case by referring to the petition and reading portions of it in the record. Counsel's failure to amend the petition did not violate the rule, for defendant never claimed that amendments were necessary. But, because the second counsel never indicated that he had spoken to defendant before the evidentiary hearing, the record failed to show full compliance with Supreme Court Rule 651(c).

People v. Alexander, 197 Ill.App.3d 571, 554 N.E.2d 1078 (2d Dist. 1990) Counsel failed to file a certificate stating that he had examined the record of trial proceedings, as required by Rule 651(c), and there is no showing that he did in fact examine the record. Plus, counsel's

presentation at the hearing on the State's motion to dismiss did not clearly establish that he was familiar with the trial record.

People v. Finklea, 186 Ill.App.3d 297, 542 N.E.2d 454 (2d Dist. 1989) Whether post-conviction counsel consulted with defendant is a factual question to be resolved by the trial court. The cause was remanded for a hearing and finding as to whether counsel complied with Rule 651(c) where defendant contended that post-conviction counsel did not consult with him and counsel represented that he had consulted with defendant.

People v. Seidler, 18 Ill.App.3d 705, 310 N.E.2d 421 (5th Dist. 1974) Denial of post-conviction petition reversed and remanded for appointment of different counsel. Appointed counsel failed to comply with Rule 651(c) where counsel's letter to petitioner made no effort to ascertain petitioner's assertions of deprivation of constitutional rights. It was still necessary for counsel to consult though the same attorney represented petitioner at his plea and at the post-conviction proceeding.

People v. Bonn, 19 Ill.App.3d 443, 311 N.E.2d 766 (5th Dist. 1974) Because appointed counsel prepared an amended petition without the benefit of the record, the cause was remanded with directions that petitioner be immediately provided a free record and that counsel be provided a reasonable time to amend the petition.

§9-1(k)

Change of Judge

Illinois Supreme Court

People v. Wright, 189 Ill.2d 1, 723 N.E.2d 230 (1999) The mere fact that the post-conviction judge has a relationship with someone involved in the case is insufficient to establish bias or to require removal of the judge from the case. To show that a conflict of interest requires recusal, defendant is obligated to make specific allegations or produce evidence showing that the relationship between the attorney and the trial judge prevented the judge from fairly ruling on the post-conviction petition. In the absence of such allegations or evidence, the trial court need not recuse itself.

People v. Joseph, 113 Ill.2d 36, 495 N.E.2d 501 (1986) Ch. 38, ¶122-8, requiring that post-conviction proceedings be conducted "by a judge who was not involved in the original proceeding which resulted in conviction," is unconstitutional, for it violates the separation of powers provision of the Illinois Constitution.

People v. Wilson, 37 Ill.2d 617, 230 N.E.2d 194 (1967) Where petitioner argued that the trial judge improperly induced him to plead guilty, it would be improper for the same judge to conduct the post-conviction hearing. The trial judge should have granted petitioner's motion for a change of venue.

People v. Washington, 38 Ill.2d 446, 232 N.E.2d 738 (1967) Cause remanded for a hearing to determine the truth of defendant's allegation that he had been promised 14 years on a plea of guilty but had received 25 years. A change of venue was required because the judge would be material witness.

Illinois Appellate Court

People v. Vasquez, 307 Ill.App.3d 670, 718 N.E.2d 356 (2d Dist. 1999) A trial judge should recuse himself from hearing a post-conviction petition if he represented the State in the proceedings leading to defendant's conviction. Compare **People v. Eubanks**, 307 Ill.App.3d 39, 716 N.E.2d 1253 (3d Dist. 1999) (trial judge not required to recuse himself where he represented the State during proceedings leading to an unrelated conviction).

People v. Reyes, 369 Ill.App.3d 1, 860 N.E.2d 488 (1st Dist. 2006) Generally, the trial judge who presided over the trial should conduct any post-conviction proceedings, unless defendant would be substantially prejudiced. See also, **People v. Hall**, 157 Ill.2d 324, 626 N.E.2d 131 (1993). To obtain a different judge, the petitioner must demonstrate that the trial judge demonstrated animosity, hostility, ill will, prejudice or arbitrariness. Where the trial judge applied the wrong standard for evaluating new evidence at the summary dismissal stage and appeared to have prejudged the central issue - whether the petitioners were entitled to post-conviction relief - defendants would be substantially prejudiced if the case were heard by the same judge. The cause was remanded with instructions to assign the cause to a new trial judge. See also, **People v. Jones**, 48 Ill.2d 410, 270 N.E.2d 409 (1971) (in absence of bias on the part of the trial judge or unless the judge would be a witness at the hearing, cause on remand will not be reassigned to another judge); **People v. Short**, 66 Ill.App.3d 172, 383 N.E.2d 723 (5th Dist. 1978) (a trial judge should recuse himself when it appears he may be a material witness or that he would have knowledge de hors the record concerning the truth or falsity of the allegations in the petition).

People v. Brown, 2018 IL App (4th) 160288 (9/25/18) Where a post-conviction petition is advanced, in part, to a third-stage evidentiary hearing and then reassigned to another judge, the new judge has the inherent authority to reconsider, *sua sponte*, the partial denial of the State's motion to dismiss the petition. The Court distinguished **People v. Thompson**, 2016 IL App (3d) 140586, which found error in the judge's *sua sponte* dismissal of a post-conviction petition where the State filed an answer and did not move to dismiss. Here, while the State filed an answer after its motion to dismiss was partially denied, the State originally sought dismissal of the entire petition. The court's inherent authority to reconsider the partial denial of the motion to dismiss was not limited by the State's subsequent filing of an answer.

People v. Montanez, 2016 IL App (1st) 133726 To obtain post-conviction relief due to actual innocence, the petitioner must present new, material, noncumulative evidence of such a conclusive character as to probably change the result on retrial. Whether evidence is conclusive depends on whether it places the trial evidence in such a different light as to undercut confidence in the factual correctness of the verdict. The post-conviction court has wide latitude to receive proof by affidavits, depositions, oral testimony, or other evidence.

Where the trial court grants a directed finding after the petitioner's case is presented at a third-stage evidentiary hearing, the decision is reviewed *de novo*. When presented with a motion for a directed finding, the trial court must construe the evidence in the light most favorable to the nonmovant.

Where the only direct evidence of the petitioner's guilt of murder was the testimony of a witness who repudiated his statement completely in a sworn affidavit and claimed that he had been fed the testimony by a police detective, the claim concerning the detective's actions was corroborated by other witnesses, and there was no physical evidence connecting

defendant to the offense, the petitioner made a sufficient *prima facie* case to withstand the State's motion for a directed finding.

Recantations of trial testimony are to be viewed with suspicion, but are not to be simply dismissed without further analysis. The court noted that there were reasons to be concerned about the veracity of the witness's testimony even at trial, as he was an admitted heroin addict, had a lengthy criminal history, and received a nine-year sentence for four felony cases on which he faced 100 years in prison. In addition, there was evidence that the witness had admitted years earlier that he had testified falsely, and the judge commented at trial that the witness's testimony was crucial for a conviction. Under these circumstances, the witness's affidavit recanting his trial testimony undeniably called critical evidence into question.

The recantation was significantly corroborated by testimony of another witness that he was coerced by the same detective to give false testimony against the defendant and that he received special treatment in prison after he implicated defendant and his co-defendant. The witness also testified that when he decided not to testify falsely, the detective took away his special privileges and again tried to solicit false testimony.

An additional witness, the decedent's wife, was not allowed to testify at the post-conviction hearing. However, in an offer of proof counsel indicated that the witness would state that she had not been able to identify defendant's car until it was pointed out by the detective and that he falsely told her that ballistic evidence showed that the car had been used in the murder.

The court also observed that the trial judge failed to draw an adverse inference from the detective's invocation of the Fifth Amendment when he was testified at the post-conviction hearing. Post-conviction proceedings are civil in nature. While the privilege against self-incrimination may be invoked at a civil proceeding, the trial court may draw an adverse inference that had questions been answered truthfully, the answers would have been damaging to the person invoking the privilege. While the court found that it need not decide whether an adverse inference was warranted in this case, the trial court should have at least considered doing so where the detective failed to answer probative, detailed questions about his conduct in this case.

The trial court also erred by discounting or excluding evidence showing a pattern of similar misconduct by the detective over a period of several years. All of the evidence concerned attempts by the detective to coerce witnesses to make false statements, and many of the persons involved were Hispanics who did not speak fluent English. In addition, there was evidence from a Chicago police detective who worked alongside the detective in question that the detective was willing to procure false identifications.

The Appellate Court stated:

We have before us a recantation from the principal trial witness saying he was coerced by detectives, a partial recantation from the secondary witness (the victim's wife) saying she was misled by investigators, sworn statements from at least 20 individuals claiming that the investigators coerced them in a similar manner, and then the detective under suspicion coming to the hearing and invoking the fifth amendment in response to all of the pointed questions. At this stage in the proceedings, petitioner was required to make out merely a *prima facie* case That has clearly occurred here.

The court also found that on remand, the cause should be assigned to a different judge: Petitioner offered up an abundance of evidence to support his claim of actual innocence. The trial court turned a blind eye to

much of the evidence and also refused to admit probative, admissible evidence that, when evaluated under the proper standard, is damning. Even where the court gave lip service to the standard it was supposed to apply, the court clearly did not adhere to that standard. The post-conviction court gave the impression that it was flatly unwilling to consider the evidence offered by petitioner. . . . Petitioner would be prejudiced were we not to assign the case to a new judge on remand.

The directed finding in favor of the State was vacated and the cause remanded for further proceedings.

People v. Serrano, 2016 IL App (1st) 133493 To obtain post-conviction relief due to actual innocence, the petitioner must present new, material, noncumulative evidence of such a conclusive character as to probably change the result on retrial. Whether evidence is conclusive depends on whether it places the trial evidence in such a different light as to undercut confidence in the factual correctness of the verdict. The post-conviction court has wide latitude to receive proof by affidavits, depositions, oral testimony, or other evidence.

Where the trial court grants a directed finding after the petitioner's case is presented at a third-stage evidentiary hearing, the decision is reviewed *de novo*. When presented with a motion for a directed finding, the trial court must construe the evidence in the light most favorable to the nonmovant.

Where the only direct evidence of the petitioner's guilt of murder was the testimony of a witness who repudiated his statement completely in a sworn affidavit and claimed that he had been fed the testimony by a police detective, the claim concerning the detective's actions was corroborated by other witnesses, and there was no physical evidence connecting defendant to the offense, the petitioner made a sufficient *prima facie* case to withstand the State's motion for a directed finding.

Recantations of trial testimony are to be viewed with suspicion, but are not to be simply dismissed without further analysis. The court noted that there were reasons to be concerned about the veracity of the witness's testimony even at trial, as he was an admitted heroin addict, had a lengthy criminal history, and received a nine-year sentence for four felony cases on which he faced 100 years in prison. In addition, there was evidence that the witness had admitted years earlier that he had testified falsely, and the judge commented at trial that the witness's testimony was crucial for a conviction. Under these circumstances, the witness's affidavit recanting his trial testimony undeniably called critical evidence into question.

The recantation was significantly corroborated by testimony of another witness that he was coerced by the same detective to give false testimony against the defendant and that he received special treatment in prison after he implicated defendant and his co-defendant. The witness also testified that when he decided not to testify falsely, the detective took away his special privileges and again tried to solicit false testimony.

An additional witness, the decedent's wife, was not allowed to testify at the post-conviction hearing. However, in an offer of proof counsel indicated that the witness would state that she had not been able to identify the co-defendant's car until it was pointed out by the detective and that he falsely told her that ballistic evidence showed that the car had been used in the murder.

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The trial court also erred by discounting or excluding evidence showing a pattern of similar misconduct by the detective over a period of several years. All of the evidence concerned attempts by the detective to coerce witnesses to make false statements, and many of the persons involved were Hispanics who did not speak fluent English. In addition, there was evidence from a Chicago police detective who worked alongside the detective in question that the detective was willing to procure false identifications.

The Appellate Court stated:

We have before us a recantation from the principal trial witness saying he was coerced by detectives, a partial recantation from the secondary witness (the victim's wife) saying she was misled by investigators, sworn statements from at least 20 individuals claiming that the investigators coerced them in a similar manner, and then the detective under suspicion coming to the hearing and invoking the fifth amendment in response to all of the pointed questions. At this stage in the proceedings, petitioner was required to make out merely a *prima facie* case That has clearly occurred here.

The court also found that on remand, the cause should be assigned to a different judge:

Petitioner offered up an abundance of evidence to support his claim of actual innocence. The trial court turned a blind eye to much of the evidence and also refused to admit probative, admissible evidence that, when evaluated under the proper standard, is damning. Even where the court gave lip service to the standard it was supposed to apply, the court clearly did not adhere to that standard. The post-conviction court gave the impression that it was flatly unwilling to consider the evidence offered by petitioner. . . . Petitioner would be prejudiced were we not to assign the case to a new judge on remand.

The directed finding in favor of the State was vacated and the cause remanded for further proceedings.

§9-1(I) Fitness

Illinois Supreme Court

People v. Williams, 205 Ill.2d 559, 793 N.E.2d 632 (2002) Without deciding whether the trial judge may ever consider evidence and testimony at a post-conviction fitness hearing in ruling on the merits of a post-conviction petition, the court held that it was improper to do so here. At the post-conviction fitness hearing, the trial court precluded defense counsel from questioning experts about defendant's fitness at the time of trial, and limited the scope of the hearing to fitness at the time of the post-conviction proceeding. In ruling on the motion to dismiss the petition, however, the judge "clearly operated under the misapprehension that

there had been a full hearing on fitness at the time of trial. . . .The court cannot operate as if a [full fitness] hearing had been held when it had not."

People v. Johnson, 191 Ill.2d 257, 730 N.E.2d 1107 (2000) A post-conviction petitioner is fit to proceed if he is able to communicate his allegations of constitutional deprivations to counsel. Due to the fundamental differences between a trial and a post-conviction proceeding, the standard of fitness for standing trial does not apply during post-conviction proceedings. A post-conviction petitioner is presumed to be fit. If a bona fide doubt of fitness is raised, the trial court may order a psychological evaluation and hold an evidentiary hearing. Whether there is a bona fide doubt of fitness lies within the discretion of the post-conviction court. See also, **People v. Simpson**, 204 Ill.2d 536, 792 N.E.2d 265 (2001) (trial court did not abuse its discretion by finding that defendant was competent to proceed).

The State bears the burden of proving that a post-conviction petitioner is fit. Here, the trial court's application of an improper burden of proof was not harmless.

People v. Owens, 139 Ill.2d 351, 564 N.E.2d 1184 (1990) Because the trial court did not consider the substance of post-conviction counsel's motion requesting the court to consider defendant's fitness to assist counsel in the post-conviction proceeding, the Court vacated the judgment dismissing the post-conviction petition and remanded the cause to the trial court so that the court could determine whether the facts raise a bona fide doubt as to petitioner's mental ability to communicate with his post-conviction counsel. A post-conviction petitioner "will be considered unfit only if he demonstrates that he, because of a mental condition, is unable to communicate with his post-conviction counsel in the manner contemplated by section 122-4 of the Code of Criminal Procedure and Supreme Court Rule 651."

Illinois Appellate Court

People v. Lezine, 2023 IL App (2d) 220065 Defendant filed a post-conviction petition, and counsel was appointed to represent him after more than 90 days passed without the circuit court taking any action on the petition. Subsequently, defendant was found unfit, and the court ordered the Department of Corrections (IDOC) to provide him with fitness-restoration treatment. IDOC intervened in the proceedings and moved to vacate the treatment order, arguing that the court had no authority to order it to provide fitness-restoration treatment. The trial court denied IDOC's motion, and IDOC appealed.

Relying on **People v. Owens**, 139 Ill. 2d 351 (1990), the appellate court first affirmed that a post-conviction petitioner has the right to fitness proceedings. Such a right is not specifically provided in the Post-Conviction Hearing Act. Instead, it arises out of defendant's right to the reasonable assistance of post-conviction counsel and the obligation imposed on counsel, under Supreme Court Rule 651(c), to consult with defendant to ascertain his contentions of error. The competence required in post-conviction proceedings is lower than that required at trial. A petitioner will be found unfit only if he, because of a mental condition, is unable to communicate with post-conviction counsel concerning his contentions of error.

As for whether the court had the authority to order IDOC to provide fitness-restoration treatment, the court concluded that such authority is implicit under **Owens**. It would be unjust and absurd to hold otherwise given that "serious mental disorders do not usually disappear on their own." Without treatment, there is no realistic probability that a petitioner will regain fitness and be able to proceed with post-conviction proceedings. Accordingly, the appellate court affirmed the order requiring IDOC to provide fitness-restoration treatment. Such treatment should continue until defendant's ability to

communicate with counsel has been restored, with IDOC providing status reports every 90 days until that time.

Additionally, the court directed that post-conviction counsel amend defendant's petition as needed to properly present any claims not dependent on personal information known only to defendant. Those claims may proceed, even while defendant is unfit. And, once defendant is restored to fitness, counsel may present any claims that could not have been presented without communication with defendant.

§9-1(m)

Petitioner Access to Transcripts, Discovery, and Attorney Files

United States Supreme Court

U.S. v. MacCollom, 426 U.S. 317, 96 S.Ct. 2086, 48 L.Ed.2d 666 (1976) Federal statute providing that petitioner is to be given a free transcript to pursue his collateral remedy under **28 U.S.C. 2255** if "the trial judge certifies that the suit or appeal is not frivolous and that the transcript is needed to decide the issue presented" does not violate due process or equal protection. Compare, **Wade v. Wilson**, 396 U.S. 282, 90 S.Ct. 501, 24 L.Ed.2d 470 (1970).

Norvell v. Illinois, 373 U.S. 420, 83 S.Ct. 1366, 10 L.Ed.2d 456 (1962) State may validly deny collateral relief where no trial transcript is available due to the death of the court reporter and where defendant, at time of trial, had a lawyer who was presumably available for a direct appeal "yet failed to pursue an appeal."

People v. Eatmon, 47 Ill.2d 90, 264 N.E.2d 194 (1970) An indigent is entitled to a free trial transcript to enable him to raise all constitutional issues. See also, **People v. Cooper**, 142 Ill.App.3d 223, 491 N.E.2d 815 (4th Dist. 1986).

Illinois Appellate Court

People v. Bonilla, 170 Ill.App.3d 26, 523 N.E.2d 1258 (1st Dist. 1988) An indigent petitioner is entitled to a free transcript only if the petition is not summarily dismissed as frivolous; this aspect of post-conviction law does not violate equal protection or due process. See also, **People v. Brooks**, 58 Ill.App.3d 674, 374 N.E.2d 1066 (1st Dist. 1978) (a free transcript must be supplied in a post-conviction proceeding when requested by counsel for an indigent petitioner and it is irrelevant that the request for a transcript fails to allege any specific constitutional violations); **Lane v. Brown**, 372 U.S. 477, 83 S.Ct. 768, 9 L.Ed.2d 892 (1962) (State may not give the public defender the final decision as to whether a transcript will be available to a criminal defendant who collaterally attacks his conviction).

§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.)

Illinois Supreme Court

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.

[People v. Conick, 232 Ill.2d 132, 902 N.E.2d 637 \(2008\)](#) [735 ILCS 5/22-105](#) provides that where an inmate “files a pleading, motion, or other filing which purports to be a legal document in a case seeking post-conviction relief,” and the trial court finds that the pleading is frivolous, the prisoner must pay the full filing fees and actual court costs. An attempt to file a subsequent post-conviction petition which is found to be frivolous qualifies as a pleading, motion, or other filing seeking post-conviction relief, and therefore is subject to the imposition of filing fees and court costs even where the trial court denies leave to “file” the petition.

[People v. Bennett, 51 Ill.2d 282, 281 N.E.2d 644 \(1972\)](#) A false post-conviction petition may be the basis for direct contempt. See also, [People v. Brown, 30 Ill.App.3d 828, 333 N.E.2d 476 \(2d Dist. 1975\)](#).

Illinois Appellate Court

People v. Ruth, 2022 IL App (1st) 192023 Defendant, currently serving a three-years-to-life term of MSR, filed a section 2-1401 petition arguing the legislature violated the separation powers and proportionate penalties clauses of the Illinois Constitution when it granted the Prisoner Review Board the power to set conditions of MSR and determine the length of an MSR term. The Appellate Court affirmed the dismissal of his petition. The Prisoner Review Board does not unconstitutionally exercise judicial functions. Setting the terms of MSR is akin to the executive function of prison administration, and setting the release date is consistent with the executive's long-recognized ability to bestow grace on parolees who comply with the terms of parole.

The Appellate Court vacated the imposition of \$170 in frivolous filing fees. Defendant's novel claim was not foreclosed by adverse authority and was therefore arguable. His filing was clearly not an attempt at delay, harassment, or waste of judicial resources, but rather a sincere attempt to challenge the complex web of laws giving rise to the imposition of a three-years-to-life MSR term.

People v. Bowman, 335 Ill.App.3d 1142, 782 N.E.2d 333 (5th Dist. 2002) Illinois Supreme Court Rule 137, which provides that the signature of an attorney or party on a pleading constitutes a certificate that he has read the pleading and believes it to be well founded in fact and warranted by law, and that it has not been filed for any improper purpose, applies to proceedings under the Post-Conviction Hearing Act. Here, the trial court did not abuse its discretion by ordering the State to pay attorney's fees of \$1,950, because the prosecutor filed several motions to transfer the proceedings to a different judge and to vacate a discovery order, but never requested hearings and abandoned the motions after causing defense counsel "a great waste of time and effort."

People v. Chacon, 2016 IL App (1st) 141221 735 ILCS 5/22-105(a) provides that the trial court may assess fees against a prisoner who files certain *pro se* pleadings which are frivolous. Under the statute, a filing is frivolous if it lacks an arguable basis in law or fact or is presented for an improper purpose such as harassment or to cause unnecessary delay or needless increases in the cost of litigation.

The Appellate Court concluded that defendant's pleading was not frivolous where at the time he filed a motion challenging his sentence, precedent supported an argument that an MSR term which was not ordered by the trial court could not be added to the sentence by DOC. Although the Illinois Supreme Court subsequently held that the argument lacked merit, an argument that was supported by case law when the motion was filed is not frivolous.

Furthermore, there was no reason to believe that defendant's filing was intended to hinder, delay, or cause an increase in the cause of cost of litigation. The court noted that defendant had filed no other pleadings in the 17 years since his direct appeal.

The order requiring defendant to pay fees was vacated.

People v. Chambers, 2013 IL App (1st) 100575 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.

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.

[People v. Steward](#), 406 Ill.App.3d 82, 940 N.E.2d 140 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.

§9-1(o)

Appellate Concerns

§9-1(o)(1)

Generally

Illinois Supreme Court

[People v. Lyles](#), 217 Ill.2d 210, 840 N.E.2d 1187 (2005) Defendant did not receive reasonable assistance of appellate counsel where, on appeal from the dismissal of a post-conviction petition, counsel failed to file a brief and, after the brief was dismissed for lack of prosecution, failed to file a motion to reinstate within 21 days of the dismissal order. In the exercise of its supervisory authority, however, the court concluded that the appeal should be reinstated. The court rejected the State's contention that defendant should be required to file a successive post-conviction petition arguing that counsel failed to provide reasonable assistance - such a requirement would waste judicial resources when the matter "could so much more simply be resolved by reinstating the first appeal, which was lost through no fault of defendant's."

Illinois Appellate Court

[People v. Brown](#), 2023 IL App (2d) 220334 At the second-stage, the circuit court orally granted the State's motion to dismiss defendant's post-conviction petition. Although the court promised a written order, defendant immediately appealed, and no written order was ever entered. The appellate court affirmed. Defendant filed a successive petition, restating his original **Miller** claim. The circuit court denied leave to file.

On appeal from the successive petition, defendant argued that the case should be remanded because the circuit court failed to file a written order when it dismissed the initial petition. Although he did not raise this claim on appeal from that dismissal, he argued that the prior appeal was void where the circuit court failed to enter a final judgment by entering a written order. The appellate court rejected this argument.

Under Rule 272, if a judgment involves both an oral ruling and a written order, the judgment is final only upon the filing of the written order. Here, although the circuit court indicated it would file a written order, it never did so, meaning the oral ruling was the only judgment. Defendant pointed out that in cases such as [People v. King, 2012 IL App \(2d\) 100801](#), an oral ruling was not considered a final judgment, but the appellate court distinguished **King** because that case involved *ex parte* first-stage summary dismissal followed by a written order. Here, the oral ruling was the only judgment, defendant was present for the ruling, and he filed a notice of appeal directly afterwards. The judgment was sufficiently final to confer jurisdiction upon the appellate court. Therefore the original appeal was not void, and any attack on that dismissal has been forfeited.

[People v. Conway, 2019 IL App \(2d\) 170196](#) Defendant attempted to file a successive PC petition. At an *ex parte* hearing, the ASA offered his opinion that leave to appeal should be denied because the petition restated matters already dismissed in the previous petition, and that the claims lacked merit. Citing [People v. Bailey, 2017 IL App \(1st\) 150070](#), the Appellate Court held that the circuit court erred when it allowed the State to participate at the leave-to-file stage. It rejected the State's argument that there is a *de minimis* exception to this rule.

The court further held that, as in **Bailey**, it could decide the issue of cause and prejudice based on the record below, rather than remand for a new hearing. It rejected the notion that a ruling on the merits depended on the Supreme Court's supervisory authority, finding [People v. Munson, 2018 IL App \(3d\) 150544](#), which declined such power, to be wrongly decided. The court reviewed the petition and found that it failed to satisfy the cause-and-prejudice test.

[People v. Garcia, 2015 IL App \(1st\) 131180](#) (Nos. 1-13-1180 & 1-13-1229 (cons.), modified upon denial of rehearing 2/2/16)

An appeal from a final judgment includes every previous ruling that represents a step in the procedural progression leading to the final judgment and every preliminary decision necessary to the ultimate relief.

Here all but one of defendant's post-conviction claims were dismissed on July 27, 2010 at the second stage of proceedings. The final claim was denied on March 28, 2013 after a third-stage evidentiary hearing. Following that denial, defendant filed a notice of appeal stating that an appeal was being taken from the trial court's order on March 28, 2013, describing it as follows: "Post-conviction petition denied after Stage III hearing."

On appeal defendant challenged the trial court's ruling on an issue that had been dismissed at the second stage. The State argued that the Appellate Court lacked jurisdiction to consider that claim because defendant failed to raise the claim in his notice of appeal by stating that he was appealing the denial of his claim on March 28, 2013 following the third-stage evidentiary hearing. The State argued that defendant affirmatively chose to only appeal the third-stage issue, not the entire judgment.

The court rejected the State's argument. Defendant could not appeal the July 27, 2010 ruling dismissing his claims at the second stage of proceedings until after there was a final and appealable judgment, which only occurred after the outcome of the third-stage hearing. The rules for post-conviction proceedings do not provide for interlocutory appeals, so defendant had to wait until the final judgment disposing of the entire petition before he could appeal.

The July 27, 2010 order partially dismissing defendant's petition and advancing the remaining claim to the third stage was both a step in the procedural progression of his case and a preliminary determination necessary to reach the final judgment. Defendant's notice of appeal thus included both rulings. But the court noted that when a petition raising several factually distinct claims that were not resolved in one hearing, the "better practice would be to specify all of the orders resolving the distinct claims in the notice of appeal."

People v. Anderson, 2015 IL App (2d) 140444 Defendant filed an initial post-conviction petition arguing that his trial counsel was ineffective for failing to file a timely notice of appeal. The trial court denied the petition and following an appeal and further proceedings in the trial court, defendant was allowed to file a late notice of appeal. After his direct appeal was affirmed, defendant filed a motion for leave to file a successive post-conviction petition in the trial court, attaching a post-conviction petition alleging various claims. The trial court denied the motion, ruling that defendant had failed to show cause and prejudice.

On appeal, defendant filed a motion for summary remand arguing that since his first post-conviction petition allowed him to file a direct appeal, his second petition should have been treated as an initial petition. Furthermore, since the trial court failed to dismiss his petition as frivolous and patently without merit within 90 days, the cause should be remanded for second-stage proceedings. The State agreed that the second petition should have been treated as defendant's first petition, but argued that since defendant filed a motion for leave to file a successive petition, the petition itself was never filed and the 90-day period never began to run. Accordingly, the cause should be remanded for first-stage proceedings.

The Appellate Court granted defendant's motion in part, issuing a minute order that remanded the cause to the trial court for first-stage proceedings. The trial court dismissed defendant's petition at the first stage as frivolous and patently without merit. On appeal, defendant argued that the trial court's first-stage dismissal was void because it failed to rule on the merits of his petition within 90 days.

The Appellate Court first held that this issue was controlled by the law-of-the-case doctrine. In defendant's prior appeal, the Appellate Court explicitly remanded the case for first-stage proceedings, and by doing so issued a binding decision on the issue currently before the court. Neither of the two exceptions applied: (1) there was no contrary decision from the Illinois Supreme Court; and (2) the court's earlier decision was not palpably erroneous. The Appellate Court thus refused to reconsider the issue.

The court also held that defendant's issue failed on the merits. A successive post-conviction petition is not considered "filed" until leave to file is granted. Here, even though defendant was not required to seek leave to file a successive post-conviction petition, he nonetheless styled his document a motion for leave to file a successive petition. Defendant's petition was therefore not "filed" when he submitted the motion. The trial court denied the motion but did not take any action on the petition itself. It was not until the Appellate Court remanded the cause to the trial court that the petition was effectively filed and the 90-day period began to run. The trial court thereafter timely dismissed defendant's petition.

People v. Medrano, 2014 IL App (1st) 102440 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."

People v. Barghout, 2013 IL App (1st) 112373 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.

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.

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.

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.

People v. Maclin, 2013 IL App (1st) 110342 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.

People v. Toy, 2013 IL App (1st) 120580 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."

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.

People v. Cole, 2012 IL App (1st) 102499 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.

People v. Little, 2012 IL App (5th) 100547 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.

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.

People v. Clark, 374 Ill.App.3d 50, 869 N.E.2d 1019 (1st Dist. 2007) Where the trial court’s order on a post-conviction petition disposes completely of the petition but orders a new sentencing hearing on one ground, defendant’s notice of appeal from the denial of relief on the remaining grounds is due within 30 days. A notice of appeal filed after the new sentencing hearing is held does not preserve challenges to issues arising from the denial of the rest of

the petition. Because the clerk failed to timely notify petitioner that the court had entered an order and that he had a right to appeal, defendant's untimely notice of appeal should be treated as a petition for leave to file a late notice of appeal, which must be granted although the six-month period for filing a late notice of appeal has expired. See [People v. Fikara](#), 345 Ill.App.3d 144, 802 N.E.2d 260 (2d Dist. 2003).

[People v. Langston](#), 351 Ill.App.3d 1168, 876 N.E.2d 322 (1st Dist. 2001) An order dismissing a post-conviction petition may be affirmed on any basis supported by the record.

[People v. Montgomery](#), 327 Ill.App.3d 180, 763 N.E.2d 369 (1st Dist. 2001) An expert's affidavit could not be considered on appeal from dismissal of a post-conviction petition because it had not been attached to the petition in the trial court. Because the petition was sufficient to withstand summary dismissal, however, defendant would not be precluded from offering the affidavit at the second stage of the proceeding.

§9-1(o)(2)

Standards of Review

Illinois Supreme Court

[People v. English](#), 2013 IL 112890 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*.

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.

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.

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.

People v. Morgan, 212 Ill.2d 148, 817 N.E.2d 524 (2004) Where a trial court has held an evidentiary hearing on a post-conviction petition at which the court was required to consider new evidence and weigh the credibility of witnesses, a reviewing court will disturb the circuit court's judgment only if it is manifestly erroneous. See also, **People v. Thompkins**, 191 Ill.2d 438, 732 N.E.2d 553 (2000); **People v. Childress**, 191 Ill.2d 168, 730 N.E.2d 32 (2000); **People**

v. Sutherland, 194 Ill.2d 289, 742 N.E.2d 306 (2000); *People v. Burrows*, 172 Ill.2d 169, 665 N.E.2d 1319 (1996); see also, *People v. Calhoun*, 351 Ill.App.3d 1072, 815 N.E.2d 492 (4th Dist. 2004) (a decision is manifestly erroneous if it contains error that is "clearly evident, plain, and indisputable").

People v. Moore, 189 Ill.2d 521, 727 N.E.2d 348 (2000) The dismissal of a post-conviction petition without an evidentiary hearing is reviewed de novo. See also, *People v. Childress*, 191 Ill.2d 168, 730 N.E.2d 32 (2000) (the trial court's ruling on a motion to dismiss is reviewed de novo); *People v. Mahaffey*, 194 Ill.2d 154, 742 N.E.2d 251 (2000) (the trial court's denial of an evidentiary hearing is reviewed de novo); *People v. Whitfield*, 217 Ill.2d 177, 840 N.E.2d 658 (2005) (the trial court's dismissal of a post-conviction petition at the second stage, after counsel has been appointed and given an opportunity to amend the pro se petition, is reviewed de novo); *People v. Lander*, 215 Ill.2d 577, 831 N.E.2d 596 (2005); *People v. Edwards*, 195 Ill.2d 142, 745 N.E.2d 1212 (2001); *People v. Coleman*, 183 Ill.2d 366, 701 N.E.2d 1063 (1998).

People v. Harris, 206 Ill.2d 1, 794 N.E.2d 314 (2002) On appeal from the trial court's order granting the State's motion to dismiss, the petition's factual allegations are presumed to be true.

Illinois Appellate Court

People v. Jackson, 2016 IL App (1st) 143025 In deciding whether a defendant has established cause and prejudice for filing a successive post-conviction petition, the Illinois Supreme Court has held that leave to file a successive petition should be denied when it is clear from a review of the successive petition and documentation submitted by the defendant that the claims fail as a matter of law. **People v. Smith**, 2014 IL 115946. **Smith** left open the question of whether a court could consider the underlying record.

The Appellate Court held that until the Supreme Court resolves this issue, it would rely primarily on the petition and its supporting documentation, and would take judicial notice of its prior opinions and orders, in deciding whether a defendant has established cause and prejudice.

People v. Warren, 2016 IL App (1st) 090884-C Defendant was not procedurally barred from raising the issue for the first time in an appeal from denial of a motion for leave to file a successive post-conviction petition. First, the "cause and prejudice" standard for successive petitions was satisfied because **Miller** was not available at the time of defendant's earlier post-conviction proceeding. In addition, a challenge to the constitutionality of a sentencing statute may be raised at any time.

The Appellate Court previously affirmed the trial court's denial of leave to file a successive post-conviction petition, but the Supreme Court denied leave to appeal and remanded the cause with instructions to vacate the judgment and reconsider the case in light of **Davis**. The Appellate Court concluded that it was authorized to reach not only the sentencing issue involved in **Davis**, but also to reconsider whether the trial court erred by denying leave to file a successive post-conviction petition. The court concluded that because it had vacated the prior judgment in accordance with the Supreme Court's direction, there would be no final judgment on the non-sentencing issues unless it also considered those issues.

The court rejected the argument that it was required to adhere to its previous holding on the non-sentencing issues although a majority of the Appellate Court no longer agreed with the earlier holding. Because the Supreme Court gave no specific directions concerning the non-sentencing issues and denial of leave to appeal cannot be interpreted as implicit approval of the lower court's opinion, the Appellate Court concluded that it was required to issue a new opinion on all the issues.

The court rejected the argument that the law of the case doctrine required it to adhere to its prior ruling. The law of the case doctrine applies only where there is a final judgment. Because the previous judgment had been vacated, there was no final judgment on the successive petition.

A motion for leave to file a successive petition based upon a claim of actual innocence should be denied only where it is clear from a review of the successive petition and the provided documentation that as a matter of law, the petitioner cannot set forth a colorable claim of actual innocence. Applying *de novo* review, the court concluded that the evidence supporting defendant's claim was newly discovered, material and not merely cumulative, and of such a conclusive character that it would probably change the result at a retrial. Therefore, the defendant adequately pleaded an assertion of actual innocence to justify filing a successive petition.

In the course of its holding, the court acknowledged that affidavits provided by the petitioner were hearsay and that hearsay generally cannot be used to support post-conviction claims. The Supreme Court has held that this rule should not be applied inflexibly, however. Where the affidavits contained facts material to defendant's innocence and alleged that two persons who had confessed to the offense were hostile or unavailable to the petitioner, the court elected to consider the affidavits. The court also noted that the affidavits might be admissible at trial under various hearsay exceptions.

In a concurring opinion, Justice Gordon stated that because the Illinois Rules of Evidence have been amended and do not now apply to post-conviction hearings, the fact that supporting affidavits contain hearsay should not be considered in determining whether leave to file a subsequent petition should be granted.

The court concluded that the affidavits qualified as "newly discovered evidence" although defense counsel at defendant's first post-conviction proceeding was aware of the affiants and their willingness to testify. The court noted that the attorney retained by defendant for the first post-conviction petition explained during proceedings on that petition that he did not obtain affidavits because the statute of limitations was expiring. However, counsel did not explain why he failed to amend the petitions and supply the affidavits during the four-year period between the filing of the petition and the hearing on the State's motion to dismiss. In addition, defendant was rebuffed in his effort to obtain new counsel in the first proceeding, and once he was represented by counsel could not present the evidence himself. Under these circumstances, the evidence should be considered to be newly discovered.

The court noted that its holding was confined to the unique instance where defendant retains counsel for the first post-conviction proceeding but that attorney fails to provide reasonable assistance by presenting exculpatory evidence.

The trial court's denial of the motion for leave to file a subsequent post-conviction petition was reversed and the cause remanded for further proceeding.

People v. Jones, 2017 IL App (1st) 123371 The circuit court properly denied leave to file a successive post-conviction petition. Defendant was convicted of first-degree murder after confessing he, Melvin Jones, and Travis Ashby all fired shots at the decedent. An initial post-conviction petition, which included an exculpatory statement from Jones, was dismissed at

the first stage. In the instant successive petition, defendant produced an exculpatory affidavit from a purported eyewitness, Shaw. Defendant also attached a newspaper article showing that the detectives in his case had been successfully sued in another case for malicious prosecution, with a jury finding the officers falsified a confession in that case. The circuit court denied leave to file, finding Shaw's affidavit was not of such conclusive character to change the result on retrial. The court found the newspaper article hearsay and conclusory.

The Appellate Court affirmed, over dissent. With regard to Shaw's affidavit, the court found it insufficiently exculpatory to change the result on retrial. The court noted that while Shaw averred that he saw Jones shooting the decedent, he did not assert that defendant was not present at the scene. Moreover, the theory that Jones was the only shooter conflicts with the evidence at trial, including defendant's confession, an earwitness who claimed to hear multiple guns being fired, and the ballistics evidence that showed multiple types of guns were fired. Finally, Shaw's affidavit was not sufficiently detailed concerning his vantage point and ability to observe, leaving open the possibility that defendant may have been present even if Shaw did not see him.

As for defendant's allegation against the detectives as supported by the newspaper article, the Appellate Court held that the claim was forfeited. When defendant cited the detectives' prior misconduct in the petition, he did so as part of his actual innocence claim. It was not until appeal that defendant alleged that the evidence provided grounds to grant leave to file for cause and prejudice. Because the cause-and-prejudice argument was not included in the petition, it could not be considered on appeal.

People v. Rodriguez, 402 Ill.App.3d 932, 932 N.E.2d 113 (1st Dist. 2010) An unreasonable disparity in sentences between non-capital co-defendants is a constitutional claim cognizable under the Post-Conviction Hearing Act.

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*.

People v. Wilburn, 338 Ill.App.3d 1075, 789 N.E.2d 797 (3d Dist. 2003) A reviewing court generally will not disturb the trial court's determination whether a delay was the result of defendant's culpable negligence unless that determination is manifestly erroneous. Where the trial court's decision was the application of the law to the established facts, *de novo* review applies.

People v. Faraone, 316 Ill.App.3d 897, 738 N.E.2d 571 (1st Dist. 2000) The trial court's ruling on a motion for an extension of time to file a post-conviction petition is reviewed *de novo*.

§9-1(o)(3)

Issues Raised for the First Time on Appeal

Illinois Supreme Court

People v. Jones, 211 Ill.2d 140, 809 N.E.2d 1233 (2004) Issues first raised on appeal from the summary dismissal of a post-conviction petition are waived. Review of such issues is inappropriate where the waived issues did not involve conflicts between appellate districts, void judgments, or other "weighty" questions. A pro se petitioner who fails to include an issue

in her initial or amended post-conviction petition may raise that issue in a second post-conviction petition, provided that the "cause and prejudice" test can be satisfied.

See [People v. De La Paz, 204 Ill.2d 426, 791 N.E.2d 489 \(2003\)](#) (stating, it "is only appropriate rarely to exercise our discretion to reach issues not raised in the original or an amended petition, in light of the legislative directive that such issues are waived," and relaxing the waiver doctrine to consider an issue that had not been raised in the post-conviction petition - whether **Apprendi v. New Jersey** applies retroactively -- because the appellate court had issued conflicting opinions and the issue had been raised in at least 54 pending petitions for leave to appeal).

Illinois Appellate Court

[People v. Matthews, 2022 IL App \(4th\) 210752](#) The court vacated as void *ab initio* defendant's 1990 and 1992 convictions for unlawful use of a weapon because they were identical to the version of that offense held facially unconstitutional in [People v. Gamez, 2017 IL App \(1st\) 151630](#). Likewise, the court vacated defendant's 1994 convictions of unlawful use of a weapon by a felon as void because they were predicated on defendant's aforementioned UUW convictions. Finally, the court vacated defendant's armed habitual criminal conviction because one of the predicate offenses on which it was based was defendant's 1994 UUWF conviction. Since the UUWF conviction was being vacated, it could no longer serve as a predicate offense, and thus defendant's AHC conviction could not stand.

The court reached each of these issues despite defendant's failure to raise them in his post-conviction petition because the unconstitutionality of the underlying UUW convictions rendered those convictions, and each of the subsequent offenses based on those convictions, void. While a defendant generally forfeits any issue not included in his post-conviction petition, a voidness challenge may be raised at any time and in any court and is not subject to forfeiture.

On appeal, defendant also challenged his sentence for aggravated discharge of a firearm, arguing that he should be resentenced because the trial court erroneously considered his void UUW convictions in aggravation at sentencing. The appellate court declined to reach that issue, however, because it was not raised in defendant's petition. While a void prior conviction is incompetent evidence at sentencing, it does not render the sentence itself void.

[People v. Montanez, 2022 IL App \(1st\) 191930](#) After a file regarding defendant's case was found in the basement of a Chicago Police Department facility, an Assistant State's Attorney notified defendant of its existence. The ASA concluded that a police report in the file had not been tendered to defense counsel prior to defendant's trial, and that report was turned over to defendant. Defendant sought leave to file a successive post-conviction petition raising a **Brady** claim based on the State's failure to turn over the police report. That motion was denied, and defendant appealed.

On appeal, defendant argued both that the failure to turn over the police report and the failure to disclose the entire basement file violated **Brady**. The Appellate Court first held that the claim regarding the complete basement file was not raised in defendant's petition and could not be raised for the first time on appeal. Thus, that claim was waived, and the court did not address its merits. As to the **Brady** claim based on police report, the court concluded that defendant could not establish prejudice. Specifically, there was "ample" evidence supporting defendant's guilt, and the impeachment material contained in the police

report was not material to defendant's guilt or innocence. Accordingly, the trial court did not err in denying leave to file defendant's successive post-conviction petition.

People v. Anderson, 2021 IL App (1st) 200040 Defendant stated a colorable claim of actual innocence such that the trial court erred in denying him leave to file a successive post-conviction petition. Defendant was convicted of murder in the 2008 shooting death of Darryl Hart, arising out of a dispute over whether one of defendant's friends sold drugs on Hart's turf. It was undisputed that defendant was present with two friends, Cooper and Jackson, at the time of the crime. The dispute centered on whether defendant was the shooter. At trial, an eyewitness identified defendant as the shooter. Jackson testified that he did not see the shooting. And, Cooper testified that "nothing happened," but the State introduced Cooper's prior statement and grand jury testimony where he said defendant was the shooter.

The affidavits of two witnesses in support of defendant's motion for leave to file successive petition averred that Cooper was actually the shooter. One of those witnesses said she and a friend were walking toward the bus stop at the time of the shooting, she saw defendant (who she knew and disliked) standing outside of a sandwich shop with several other men, and she saw one of the other men pull out a gun and shoot the victim. She only learned later that defendant was in prison for the shooting, prompting her to come forward. The other witness said he was walking to the sandwich shop when he saw defendant with three other men. He saw Cooper shoot one of the other men. He did not come forward at the time because he disliked defendant.

While defendant's petition couched his claim in terms of ineffective assistance of counsel, his one-line affidavit attached to the petition asserted his actual innocence and the content of both affidavits supported such a claim. Accordingly, the claim was adequately raised and could be considered on appeal.

The State did not dispute that the affidavits were material, and non-cumulative, but argued that they were not newly discovered or of such conclusive character as to probably change the result on retrial. The Appellate Court disagreed. The two new eyewitnesses, if believed, place the trial evidence in a different light. The trial evidence identifying defendant as the shooter was not overwhelming, and the new eyewitnesses both implicated a different individual, who was present at the scene, as the shooter. And, the eyewitnesses were newly discovered where there was no suggestion that defendant had seen either of them in the area at the time of the shooting and both explained that they had not come forward sooner because they did not want to get involved and did not like defendant. Thus, no amount of due diligence could have compelled them to testify at trial, satisfying the newly-discovered prong of the actual innocence analysis.

People v. Williams, 2021 IL App (1st) 191615 In his *pro se* post-conviction petition, defendant alleged that the State did not prove all of the essential elements necessary to sustain his armed habitual criminal conviction where one of the predicate offenses, aggravated vehicular hijacking, was committed when he was 17 years old, more than 10 years prior, and could not be used under **People v. Montgomery**, 47 Ill. 2d 510 (1971). He also alleged ineffective assistance of trial and appellate counsel for not raising that issue. The trial court summarily dismissed the petition.

On appeal, defendant argued that his petition stated the gist of a claim, not based on **Montgomery's** 10-year rule, but rather because the aggravated vehicular hijacking offense took place when he was a juvenile and therefore was not a proper predicate offense under the reasoning of **People v. Miles**, 2020 IL App (1st) 180736, and **People v. Gray**, 2021 IL App (1st) 191086. The Appellate Court rejected the State's argument that defendant had forfeited

this claim, noting that the ultimate issue of whether trial and appellate counsel were ineffective for failing to challenge his vehicular hijacking as an improper predicate for AHC was raised in the petition, including the fact that he was only 17 years old at the time.

Ultimately, though, the Appellate Court affirmed the summary dismissal of the petition. While the 2014 amendment to the Juvenile Court Act would have brought defendant's vehicular hijacking offense within the jurisdiction of the juvenile court, the amendment expressly stated that it applied to offenses committed "on or after" its effective date. Nothing suggested it would have any bearing on defendant's conviction for aggravated vehicular hijacking committed several years prior. And, before **Miles** was decided, case law "squarely supported the principle that a conviction obtained when a criminal defendant was a minor could be used as a qualifying predicate offense." Thus, defendant did not state the gist of a claim of deficient performance where it would have been reasonable for both trial and appellate counsel not to challenge the use of defendant's vehicular hijacking conviction as a predicate for AHC.

People v. Brown, 2021 IL App (1st) 180991 In 2003, defendant pled guilty to a murder and hijacking committed at age 15. He received concurrent sentences of 30 and 15 years. In a post-conviction petition, defendant alleged that the trial court's plea admonishments misstated the maximum possible penalty as life in prison or the death penalty. The circuit court dismissed the claim at the second stage.

On appeal, defendant alleged that his plea was involuntary because the trial court advised him that he faced a sentence of 20 to 60 years, without informing him that he could not receive a sentence of more than 40 years unless the court found him permanently incorrigible. Defendant cited **People v. Parker, 2019 IL App (5th) 150192**, for the proposition that misinforming a juvenile defendant as to his eligibility for a *de facto* life sentence renders a plea involuntary.

The Appellate Court found this claim waived because it was not included in defendant's petition. The Supreme Court has repeatedly held that a defendant may not raise a new claim for the first time on appeal from the dismissal of a post-conviction petition. The court rejected the argument that **People v. Nieto, 2020 IL App (1st) 121604-B** created an exception to this rule for **Miller** claims. **Nieto** involved an as-applied **Miller** challenge to a 78-year sentence imposed on a juvenile, which had not been raised below because **Miller** and **Buffer** were resolved during the pendency of the appeal. The Appellate Court here did not believe the relaxation of forfeiture in **Nieto** should be extended to the instant case, where defendant did not receive a *de facto* life sentence. Nor did it agree with the dissent's position that the claim could be reached where the admonishment claim in the petition sufficiently preserved the claim. Defendant made clear in his briefs that he sought to raise a new claim based on **Miller** and **Parker**, not the straightforward admonishment claim included in the petition.

People v. Nieto, 2016 IL App (1st) 121604-B Upon conviction for murder and aggravated battery committed at age 17, defendant received an aggregate 78-year term. After dismissal of a post-conviction petition, he raised a **Miller** claim for the first time on appeal. In an initial opinion, the Appellate Court remanded for a new sentencing hearing. The Supreme Court issued a supervisory order, requiring the Appellate Court to vacate the decision and issue a new decision in light of **Buffer** and **Holman**.

The Appellate Court again remanded for resentencing. Initially, the court reiterated that it was excusing defendant's forfeiture. While the supervisory order did not mention

forfeiture, nothing in the caselaw in the four years since the initial opinion changed the court's mind that an as-applied **Miller** claim may be raised for the first time on appeal from the dismissal of a post-conviction petition, as long as the record is sufficiently developed. In fact, **Holman** itself made this rule more explicit.

Buffer confirmed that the court was correct in its first decision, where it held that defendant received a life sentence for purposes of **Miller**. As for **Holman**, and the question of whether the sentencing court sufficiently applied the **Miller** factors, the court again found a need for resentencing. The sentencing court here merely mentioned defendant's "young age" without acknowledging the attendant characteristics of youth.

People v. Allen, 2019 IL App (1st) 162985 . Following denial of leave to file his third successive post-conviction petition, counsel on appeal abandoned defendant's *pro se* claims and instead argued that the delusions expressed therein established that mental illness precluded defendant from meeting the requirements of the Post-Conviction Hearing Act without the assistance of counsel, rendering the Act unconstitutional as applied to him. The Appellate Court, while sympathetic to the argument, found that it was bound to find the issue waived as it was raised for the first time on appeal. See **People v. Jones**, 213 Ill. 2d 498 (2004).

People v. Cruz, 2013 IL 113399 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.

People v. Merriweather, 2017 IL App (4th) 150407 Defendant, who was 17 at the time of the offense, was convicted of first degree murder and sentenced to 70 years in prison. Defendant filed a *pro se* motion for leave to file a successive post-conviction petition alleging actual innocence based on newly discovered evidence based on the affidavits of four witnesses. A year later, but before the trial court had ruled on defendant's motion, defendant filed a motion to supplement the record with the affidavit of an additional witness. Over a year after that, the trial court denied the motion to file a successive petition. In making its ruling, the trial court made no mention of the motion to supplement the record.

On appeal, defendant argued for the first time that his sentence was a *de facto* life sentence that was unconstitutional as applied to him. Defendant also argued that the trial court erred in denying his motion to file a successive petition.

The Appellate Court, relying on **Thompson**, 2015 IL 118151, first held that defendant could not raise an as-applied challenge to his sentence for the first time on appeal. Unlike facial challenges to statutes, as-applied challenges are dependent on the facts and circumstances of each case and thus the appropriate place to raise the issue is in the trial court where the record can be adequately developed. Defendant thus forfeited this issue by failing to raise it in the trial court.

The court specifically declined to follow [Nieto, 2016 IL App \(1st\) 121604](#), which held that courts must overlook the general rule of **Thompson** in cases where a defendant is raising an as-applied challenge to the sentence of a juvenile. The court found that it would be inconsistent to require a fully developed record in adult cases but not in juvenile cases.

The court refused to address defendant's sentencing argument but noted that he might be able to raise this issue in a successive post-conviction petition.

Concerning the denial of the motion to file a successive petition, the Appellate Court found that the trial court denied the motion without any mention of, let alone any ruling on, defendant's motion to supplement the record or the affidavit referenced in that motion. The trial court has discretion to allow amendments to post-conviction petitions at any stage of the proceedings prior to the final judgment. [725 ILCS 5/122-5](#).

Since it was not clear whether the trial court was aware of the motion to supplement, and since the trial court was in the best position to evaluate the merits of defendant's motion, the Appellate Court remanded the cause to the trial court for a ruling on defendant's request to supplement the record and any further proceedings that may be warranted.

[People v. Nieto, 2016 IL App \(1st\) 121604](#) Under the Post-Conviction Hearing Act, any claim not raised in the original or amended post-conviction petition is waived. This rule is more than a suggestion and reviewing courts generally may not overlook forfeiture caused by defendant's failure to raise the issue in his petition.

On appeal from the denial of his post-conviction petition, defendant argued for the first time that his sentence was unconstitutional under **Miller**. Defendant conceded that he did not raise this issue in his petition, but argued that an as-applied constitutional challenge to a sentence can be raised for the first time on appeal.

The Appellate Court examined several cases that followed **Miller** and determined that it could reach defendant's claim. In [People v. Davis, 2014 IL 115595](#), the Illinois Supreme Court held that the sentencing statute mandating life sentences was not facially unconstitutional since it could be validly applied to adults. In [People v. Thompson, 2015 IL 118151](#), the court held that a judgment based on facially unconstitutional statute is void and may be attacked at any time. The same was not true for an as-applied challenge.

But **Thompson** also discussed [People v. Luciano, 2013 IL App \(2d\) 110792](#), which held that an as-applied sentencing challenge by a juvenile could be raised at any time. The Supreme Court did not expressly find that **Luciano** was incorrect in its forfeiture holding, but instead distinguished it on the merits since the defendant in **Thompson** was not a juvenile. The Appellate Court thus concluded that "considered as a whole, **Thompson** implies that courts must overlook forfeiture and review juveniles' as-applied Eighth Amendment challenges under **Miller**."

Additionally, in [Montgomery v. Louisiana, 577 U.S. ___ \(2016\)](#), the United States Supreme Court held that **Miller** announced a substantive rule that barred life sentences for all but the rarest of juvenile defendants, and courts lack authority to leave in place a sentence which violates a substantive rule. **Thompson** and **Montgomery** thus suggest that forfeiture cannot apply to juvenile defendants raising **Miller** claims.

The court addressed defendant's claim and held that the 78-year sentence was unconstitutional as applied to defendant. Although relief following a first-stage dismissal typically involves remand for second-stage proceedings, the proper relief for this claim was to vacate defendant's sentence and remand for resentencing.

[People v. Wallace, 2016 IL App \(1st\) 142758](#) A defendant typically waives on appeal any

claim not raised in his postconviction petition. Until recently, a defendant had been able on appeal to challenge as void a sentence that did not conform to statutory requirements even if he had not raised the issue in his petition. The Illinois Supreme Court, however, abolished the void sentence rule in [Castleberry, 2015 IL 116916](#).

Here defendant argued for the first time on appeal that his negotiated concurrent sentences were void because they were required by statute to be served consecutively. Defendant recognized that **Castleberry** abolished the void sentence rule but argued that it should not apply retroactively to his collateral case. A new rule of criminal procedure generally does not apply to cases on collateral review. A rule is new if it was not dictated by precedent existing at the time defendant's conviction became final.

The court held that **Castleberry** did not announce a new rule. Instead, **Castleberry** merely abolished the prior void sentence rule and reinstated the rule that existed beforehand. **Castleberry** thus applied to this case, making defendant's erroneous sentence merely voidable not void. Defendant was thus barred from challenging his sentence for the first time on appeal from the dismissal of his postconviction petition.

[People v. Burnett, 2016 IL App \(3d\) 140837](#) When defendant pled guilty, the circuit court did not mention or discuss any fines, and neither the sentencing order nor the mittimus included any fines. The deputy circuit clerk later issued a document called the "Case Transactions Summary" which included 11 fines totaling \$1046.50.

On appeal from the first-stage dismissal of his post-conviction petition, defendant argued for the first time that the fines should be vacated. The Appellate Court agreed. The imposition of a fine is a judicial act and the circuit clerk has no authority to impose fines. Fines imposed by the clerk are void from their inception.

The court rejected the State's argument that it lacked jurisdiction to review this claim in an appeal from the dismissal of a post-conviction petition since defendant's claim did not involve a constitutional deprivation cognizable in post-conviction proceedings. The viability of a challenge to a void assessment does not depend on the procedural mechanism used to raise the issue. A void order may be attacked at any time in any court.

The court vacated defendant's fines.

[People v. Williams, 2015 IL App \(1st\) 131359](#) Any claim not raised in the original or amended post-conviction petition is forfeited. [725 ILCS 5/122-3](#). The Appellate Court may not excuse defendant's forfeiture when he argues a contention on appeal that was not made in his petition.

Defendant argued in his *pro se* petition that trial counsel was ineffective for failing to make certain arguments. On appeal, he argued that appellate counsel was ineffective for failing to make those arguments. The Appellate Court held that defendant forfeited his appellate contention because it was not raised in the post-conviction petition. Although both arguments addressed the same subject matter, the petition specifically alleged that "trial counsel" was ineffective, while on appeal defendant specifically alleged that "appellate counsel" was ineffective. Even with a liberal reading of defendant's *pro se* petition, the court could not construe the claim in the petition as the argument raised on appeal.

[People v. Cowart, 2015 IL App \(1st\) 131073](#) 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.

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.

People v. Weathers, 2015 IL App (1st) 133264 Prior to his trial, defendant initially filed a motion to suppress alleging that his confession was the result of physical coercion by the interrogating officers. But when new counsel appeared for defendant, he withdrew the motion to suppress.

On direct appeal, defendant raised no issue about the confession or counsel's withdrawal of the motion. In his first post-conviction petition, filed in October 2009, defendant argued that trial counsel was ineffective for withdrawing the motion because the police failed to give him **Miranda** warnings.

In May 2014, defendant filed a *pro se* motion for leave to file a successive post-conviction petition. Defendant attached portions of the 2012 Illinois Torture Inquiry and Relief Commission (TIRC) report which showed that the officers who obtained his confession were involved in a pattern of coercive tactics in many other cases. Defendant argued that this newly discovered evidence supported his claim that trial counsel had been ineffective for withdrawing his motion to suppress, since it showed that his confession had been coerced and he had been deprived of due process.

The trial court denied defendant's motion, holding that the ineffective assistance argument had been previously raised in the first petition and thus was barred by *res judicata*.

On appeal defendant argued that the evidence in the TIRC report, which was not available when defendant filed his initial post-conviction petition, supported his claim that the State violated his due process rights by using a physically coerced confession at his trial. He therefore established cause because the TIRC report was newly discovered. And he showed prejudice because the use of a physically coerced confession is never harmless error.

The State argued that defendant forfeited his appellate claim because in his post-conviction petition he framed the issue as ineffective assistance, not a due process violation. The Appellate Court rejected the State's argument. Although the petition was framed as an ineffective assistance claim, it also consistently contended that defendant was subjected to physical coercion and that due process of law requires the suppression of a coerced confession. Under a liberal construction of the petition, the court found that defendant alleged a due process violation. Accordingly, the claims on appeal were substantially the same as the claims in the petition and were not forfeited.

The court also found that defendant satisfied the cause and prejudice test. Under section 122-1(f) of the Post-Conviction Hearing Act, a defendant must show cause and prejudice to be granted leave to file a successive post-conviction petition. [725 ILCS 5/122-1\(f\)](#).

A defendant shows cause by identifying an objective factor that impeded his ability to raise a claim during his initial post-conviction proceedings. A defendant shows prejudice by demonstrating that the claimed error so infected the trial that the resulting trial or sentence violated due process.

The TIRC report was not released until after defendant's initial post-conviction petition had been fully litigated. The report showed that the officers involved in obtaining defendant's confession were also involved in similar coercive tactics in other cases. Defendant established cause because this evidence was not available for his initial petition.

Defendant also satisfied prejudice because the use of a physically coerced confession is never harmless error. Defendant's petition alleged that he was physically abused prior to giving a confession, facts that must be accepted as true during this stage. These allegations along with the TIRC report satisfy the prejudice requirement.

The court reversed the denial of leave to file a successive petition and remanded for second stage proceedings with the appointment of counsel.

People v. Douglas, 2014 IL App (4th) 120617 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.

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.

People v. Thomas, 2014 IL App (2d) 121001 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.

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.

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.

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.

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 confessor 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.

The Appellate Court specifically rejected the State's argument that the confessor's perception of the privilege should control whether the privilege applies. Nothing in section 8-803 provides that the confessor'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.

[People v. Medrano](#), 2014 IL App (1st) 102440 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."

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

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.

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.

People v. Avery, 2012 IL App (1st) 110298 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.

People v. Andrews, 365 Ill.App.3d 696, 850 N.E.2d 888 (3d Dist. 2006) The court modified defendant's sentencing credit on appeal from the denial of defendant's post-conviction petition, though defendant's petition did not raise the issue. A sentencing credit involves a right created by statute, defendant was entitled to the credit, and the court had authority under Supreme Court Rule 615(b)(1) to correct a clerical error. Further, under the Post-Conviction Hearing Act, only substantial constitutional violations are to be deemed waived. But see, **People v. Reed**, 335 Ill.App.3d 1038, 782 N.E.2d 955 (4th Dist. 2003) (the denial of sentence credit does not involve a substantial deprivation of a constitutional right and thus cannot be raised in a post-conviction appeal). See also **People v. Uran**, 196 Ill.App.3d 293, 553 N.E.2d 758 (3d Dist. 1990) (whether defendant received proper sentence credit is not a constitutional question, and may not be raised in a post-conviction petition); **People v. Flores**, 378 Ill.App.3d 493, 882 N.E.2d 1051 (2d Dist. 2008) (noting a conflict in appellate court precedent, the court held that a defendant may raise a sentence credit issue for the first time on appeal from dismissal of a post-conviction proceeding).

People v. Sawcenko, 328 Ill.App.3d 888, 767 N.E.2d 519 (2d Dist. 2002) The appellate court could not consider the timeliness of the petition for the first time on appeal where the trial court summarily dismissed the petition without considering its timeliness. But, the State would not be precluded from raising the timeliness issue.

§9-2

Section 2-1401 Petitions (formerly Ch. 110, §72)

§9-2(a)

Generally

Illinois Supreme Court

People v. Stoecker, 2020 IL 124807 Defendant's due process rights were violated by the trial court's granting of the State's motion to dismiss defendant's 2-1401 petition at an *ex parte* hearing just four days after the motion to dismiss was filed. Neither defendant nor his attorney had notice of the hearing.

However, the Court concluded that the due process violation was subject to harmless error review because the lack of notice and reasonable opportunity to respond do not fit within the narrow class of structural errors that are so serious they warrant automatic reversal. And the violation here was harmless where the petition was barred by the statute of limitations, *res judicata*, and forfeiture.

Appointed counsel in 2-1401 proceedings is held to a due diligence standard because the appointment of counsel is wholly discretionary. Due diligence means that “counsel has an obligation, to the best of his or her legal ability, to make a cogent argument in support” of the petition and “to overcome any procedural hurdles where it can legally and ethically be done.” Here, since defendant’s petition did not include an arguably meritorious claim, counsel’s failure to amend it was not a violation of the due diligence standard.

People v. Shinaul, 2017 IL 120162 The Illinois Constitution gives the Appellate Court jurisdiction to hear appeals from all final judgments of the circuit court. *Ill. Const. 1970, art. VI, §6*. A final judgment is a determination by the court on the issues presented by the pleadings “which ascertains and fixes absolutely and finally the rights of the parties in the lawsuit.” A judgment is final and appealable if it concludes the litigation on the merits so that only the execution of judgment remains.

As part of a negotiated guilty plea agreement, defendant pled guilty to one count of aggravated unlawful use of weapons and in exchange the State nol-prossed the eight remaining counts. Years later defendant filed a 2-1401 petition for relief from judgment (**735 ILCS 5/2-1401**) seeking to vacate his conviction since it was void under **Aguilar, 2013 IL 112116**. The State conceded that **Aguilar** voided defendant’s conviction and filed a motion to reinstate some of the charges it had nol-prossed. The circuit court vacated defendant’s conviction and allowed him to withdraw his guilty plea, but denied the State’s motion to reinstate the charges. The State appealed but the Appellate Court ruled that it lacked jurisdiction to consider the State’s appeal.

The Supreme Court disagreed. There were three issues before the circuit court: whether defendant’s conviction should be vacated, whether defendant should be allowed to withdraw his negotiated guilty plea, and whether the State could reinstate the nolle counts. The State’s motion filed in response to defendant’s 2-1401 petition was similar to a counterclaim. Once the circuit court granted defendant’s requested relief, the merits of the State’s motion became pertinent to the outcome of the judgment. The circuit court thus entered a final decision when it denied the motion.

The circuit court’s order left no cause pending or undecided. Once it resolved all pending issues, the case terminated on the merits between the parties, allowing the State to appeal as of right. The Appellate Court thus had jurisdiction to hear the State’s appeal.

People v. Matthews, 2016 IL 118114 Under **Illinois Supreme Court Rule 105**, when a defendant files a 2-1401 petition he must notify the State in person, by mail, or by publication. If by mail, service must be sent by certified or registered mail. Once properly served, the State waives any question about the petition’s sufficiency if it fails to respond within 30 days. Even if the State does not respond, the court may *sua sponte* dismiss a petition that is deficient as a matter of law. But the court may not *sua sponte* dismiss a petition before the 30-day response period expires.

Defendant filed a 2-1401 petition and served the State by regular first-class mail, not certified or registered mail. The circuit court received the petition on April 11, 2012 and docketed the petition on April 23, 2012. The court dismissed the petition on May 24, 2012. On appeal, defendant argued that the court prematurely dismissed the petition because he

did not properly serve the State by certified or registered mail and thus the 30-day period for filing a response never commenced. Defendant also argued that the dismissal order was void because he failed to properly serve the State and thus the circuit court lacked personal jurisdiction over the State. The Supreme Court rejected both arguments.

1. First, the court held that defendant could not benefit from his own failure to comply with the service requirements of [Rule 105](#). A defendant may not ask the trial court to proceed in a certain manner and then argue on appeal that the trial court's action was error. Here, by filing a proof/certificate of service, defendant asked the trial court to proceed as though the State had been properly notified of the proceedings. Defendant was therefore estopped from alleging the trial court erred in acquiescing to this request.

[Rule 105](#) was designed to prevent a litigant from obtaining relief without first giving the opposing party an opportunity to respond. It was not designed to allow a litigant to object to lack of service on behalf of the opposing party. A defendant thus cannot challenge the trial court's order based on his own failure to properly serve the State.

2. Second, the court held that defendant lacked standing to challenge the circuit court's personal jurisdiction over the State. Court's must have both subject-matter and personal jurisdiction to enter a valid judgment. Absent a general appearance, the court acquires personal jurisdiction only by proper service on the parties.

Typically, however, an allegation that the court lacks personal jurisdiction based on improper service is raised by the respondent who did not receive notice of the proceedings. And personal jurisdiction, unlike subject-matter jurisdiction, may be waived. A party may object to personal jurisdiction or improper service only on behalf of itself. Here, only the State had standing to object to the court's lack of personal jurisdiction. Defendant thus could not raise this issue.

The Supreme Court dismissed defendant's 2-1401 petition.

People v. Carter, 2015 IL 117709 Under Supreme Court [Rules 105 and 106](#), a §2-1401 petition must be filed by certified or registered mail. Once notice of the filing has been properly served, the responding party has 30 days to file an answer or otherwise appear. These notice requirements are designed to notify a party of pending litigation in order to secure his appearance and to prevent a litigant from obtaining new or additional relief without first giving the opposing party an opportunity to defend.

In **People v. Vincent**, 226 Ill. 2d 1, 871 N.E.2d 17 (2007), where neither proper service nor actual notice was at issue, the court held that the *sua sponte* dismissal of §2-1401 petitions are proper where the State does not answer or otherwise plead within the 30-day period. By contrast, in **People v. Laugharn**, 233 Ill. 2d 318, 909 N.E.2d 802 (2009), the court concluded that where only seven days had passed since the petition was filed, the trial court erred by entering a dismissal order *sua sponte* because the State did not have the benefit of the 30-day period for responding.

Here, the court found that the record failed to show that defendant failed to properly serve his §2-1401 petition on the State. Defendant attached a certificate of service to the §2-1401 petition, alleging that he had placed the petition in the prison mail system at Menard Correctional Center addressed to the clerk of the court and the state's attorney's office. The petition was stamped "Received" by the circuit clerk on May 15, 2012, and was dismissed by the trial court on July 10 of the same year. The Appellate Court reversed the dismissal order, finding that because there was no indication that defendant had properly served the State, dismissal was not authorized.

The Supreme Court acknowledged that a return-receipt for certified mail is sufficient proof of service by certified mail, but declined to find that the absence of such a receipt

affirmatively establishes that service was by regular mail. Thus, where the proof of service stated only that defendant had placed the petition in the institutional mail to be transmitted by the United States Postal Service, there was no basis to infer that service was by regular mail and therefore did not comply with [Rules 105 and 106](#).

Because the record did not establish that defendant failed to serve the petition on the State by certified or registered mail, the trial court had authority to dismiss the petition once 30 days had passed after the filing date.

People v. Thompson, 2015 IL 118151 A defendant seeking relief under section 2-1401 must ordinarily file the petition within two years of the judgment being challenged. [735 ILCS 5/2-1401\(a\), \(c\)](#). The two-year limitations period, however, does not apply when the petition challenges a void judgment.

Defendant filed an untimely 2-1401 petition 17 years after his conviction and sentence. In his petition, defendant raised several issues challenging his representation at trial. The trial court denied the petition. On appeal, defendant abandoned the claims he raised in his petition and argued instead that the sentencing statute mandating natural life imprisonment (for murdering more than one person) was unconstitutional as applied to him since he was 19 years old at the time of the offense, had no criminal history, and impulsively committed the offense after years of abuse by his father.

Defendant argued that his as-applied constitutional challenge constituted a challenge to a void judgment. Since a voidness challenge can be raised at any time, defendant argued that his claim was excused from the two-year limitations period and could be raised for the first time on appeal from the dismissal of his petition.

The Supreme Court disagreed. A voidness challenge to a final judgment under section 2-1401 is only available in two specific situations. First, a judgment is void where the court that entered the judgment lacked personal or subject matter jurisdiction. Second, a judgment is void when it based on a facially unconstitutional statute that is void ab initio. (A third type of voidness claim, where a sentence does not conform to statutory requirements, was recently abolished in **People v. Castleberry, 2015 IL 116916**.)

Defendant did not rely on either of the two situations where a voidness challenge could be made. He did not argue that the court lacked jurisdiction or that the sentence mandating natural life was facially unconstitutional. Defendant's claim was thus subject to the typical procedural bars of section 2-1401 and could not be raised for the first time on appeal from the dismissal of an untimely 2-1401 petition.

The court specifically rejected defendant's argument that an as-applied constitutional challenge should be treated the same as a facial challenge and be equally exempt from ordinary forfeiture rules. A facial challenge requires a showing that the statute is unconstitutional under any set of facts. An as-applied challenge, by contrast, only applies to the facts and circumstances of the particular case. In the latter case, it is paramount that the record be sufficiently developed in the trial court to establish the necessary facts for appellate review.

People v. Johnson, 2013 IL 114639 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](#).

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. Vincent, 226 Ill.2d 1, 871 N.E.2d 17 (2007) Section 2-1401 (735 ILCS 5/2-1401) is a civil proceeding and is subject to the usual rules of civil practice. Responsive pleadings are not required in §2-1401 proceedings, and the trial court may sua sponte deny relief where, even if all of petitioner's factual allegations are true, there is no legal basis for relief under §2-1401. There are five possible dispositions in §2-1401 litigation: (1) dismissal of the petition; (2) grant of relief on the pleadings; (3) denial of relief on the pleadings; (4) grant of relief after a hearing at which factual disputes are resolved; and (5) denial of relief after such a hearing. The trial judge need not give notice to a pro se litigant that a §2-1401 petition is going to be dismissed *sua sponte*, or provide an opportunity to be heard before entering the dismissal order.

Also, *de novo* review is applied when the trial court grants judgment on the pleadings or dismisses a §2-1401 petition for failure to state a cause of action. Cases holding that the abuse of discretion standard of review applies to such rulings were wrongly decided. The Court limited its holding to situations in which either judgment on the pleadings or a dismissal occurs; it declined to decide what standard should apply where the ruling occurs after an evidentiary hearing.

People v. Pinkonsly, 207 Ill.2d 555, 802 N.E.2d 236 (2003) Without expressing whether the rule that a post-conviction petitioner is entitled to only "reasonable assistance of counsel" applies to §2-1401 petitions, the Court held that counsel's failure to raise certain non-cognizable issues was not unreasonable.

People v. Haynes, 192 Ill.2d 437, 737 N.E.2d 169 (2000) On appeal, the trial court's ruling on a §2-1401 petition will be reversed only for an abuse of discretion. See also **People v. Coleman**, 206 Ill.2d 261, 794 N.E.2d 275 (2002).

Illinois Appellate Court

People v. Sosani, 2022 IL App (1st) 210027 Defendant filed a 2-1401 petition which was dismissed as untimely. While his appeal from that dismissal was pending, the legislature enacted 735 ILCS 5/2-1401(c-5), which provides that any individual may institute 2-1401 proceedings "at any time" if his or her underlying guilty plea "has potential consequences under federal immigration law." Defendant's 2-1401 petition here had alleged, among other things, that he had not understood that his plea might carry permanent immigration consequences.

On appeal, defendant argued that this new provision should apply to his petition. The Appellate Court found that the amendment did not apply retroactively on appeal, noting that in **People v. Hunter**, 2017 IL 121306, the Supreme Court "clearly expressed the doctrine that the role of a court of review is to determine whether the court below was correct, based on the law before it when it entered its judgment." Because this amendment was not available to the circuit court at the time it dismissed defendant's petition, the Appellate Court declined

to consider it. Further, the Appellate Court held that the amendment itself did not express a legislative intent to revive an otherwise time-barred action. Thus, the dismissal of defendant's petition was affirmed.

Defendant also argued that the Appellate Court should consider applying the new statute on appeal because if he simply files a new petition grounded in the same basic facts – which (c-5) would appear to permit based on its “at any time” language – that petition will be barred by *res judicata*. The Appellate Court declined to reach that argument because it was “a hypothetical question upon which we decline to opine.”

People v. Bernard, 2021 IL App (2d) 181055 The trial court erred in failing to recognize that it had the discretionary authority to appoint counsel to represent defendant in 2-1401 proceedings. Where a court erroneously believes it has no discretion, its failure to exercise discretion can itself constitute an abuse of discretion. While such an error does not always require remand, it did here where the Appellate Court could not determine from the record whether appointed counsel would have amended the petition and whether any such amendments might have changed the outcome. Additionally, defendant here proceeded to an evidentiary hearing on the claim in his *pro se* petition, and the Appellate Court recognized that he would likely have benefitted from representation by counsel at that hearing. Accordingly, the Appellate Court reversed and remanded for the trial court to properly exercise its discretion whether to appoint counsel.

People v. Allen, 2020 IL App (3d) 180317 Defendant's 2-1401 petition was dismissed prematurely where defendant was not given an opportunity to respond to the State's motion to dismiss. The premature dismissal violated due process. Following **People v. Bradley, 2017 IL App (4th) 150527**, and **People v. Rucker, 2018 IL App (2d) 150855**, the Appellate Court held that reversal and remand was required even though defendant conceded that his petition lacked substantive merit. The court distinguished **People v. Stoecker, 2019 IL App (3d) 160781**, which applied harmless error review to uphold an improper dismissal, because the defendant in **Stoecker** had unsuccessfully sought collateral relief on six prior occasions.

People v. Whalen, 2020 IL App (4th) 190171 Defendant was convicted of murdering his father in his tavern. The evidence against him consisted primarily of a bloody palm print on a pool cue, circumstantial evidence of motive, and a potential footprint. In a petition for relief from judgment, defendant alleged actual innocence based on new results of DNA testing of various pieces of evidence from the crime scene, all of which excluded defendant, as well as new evidence undermining the palm print testimony (notes of a call log indicating the print expert's opinion was far more equivocal than revealed at trial). The circuit court granted a new trial, finding “this evidence was more likely than not to have affected the jury's determination, and. . . the likelihood of a different result is great enough to undermine the confidence in the outcome of the original trial.”

On appeal, the State first argued that the evidence relating to the palm prints was not newly discovered because it was discovered over two years prior to the filing of the 2-1401 petition. The Appellate Court disagreed, holding that defendant was entitled to rely on this evidence as part of the instant actual innocence claim, even if it was not timely on its own. The claim in the current petition is based largely on the new DNA evidence, and the call notes are relevant to that claim.

The State also argued that the circuit court erred in granting a new trial because the new evidence was insufficient. It noted that defendant's conviction never rested on DNA

evidence, and the absence of his DNA from the crime scene did not exonerate him, particularly where no other suspect's DNA was found. The State also argued that the trial court used an incorrect standard when granting relief, where it equated the phrase "probably change the result" on retrial with a "reasonable probability" the result of a new trial would be different. After finding fault with several of the trial court's factual findings, the Appellate Court ultimately remanded for a new ruling, instructing the trial court to determine whether "it is 'probable' or 'more likely than not' a jury would acquit defendant after a new trial where the new evidence in this case is considered alongside the original trial evidence."

People v. Cathey, 2019 IL App (1st) 153118 Defendant filed a petition for relief from judgment alleging that new evidence of police misconduct exonerated him in his drug possession case. The press accounts of Officer Guerrero's and Officer Martinez's misconduct were not available to defendant at the time of his direct appeal, and were therefore "newly discovered." But they were not so conclusive as to warrant a new trial. Defendant had alleged at trial that the officers planted drugs on him. But the misconduct detailed in the new evidence involved gang involvement, robbery, and drug dealing. This misconduct was not sufficiently similar to the misconduct alleged by defendant, and therefore would not likely change the result on retrial.

People v. Barefield, 2019 IL App (3d) 160516 In light of **N.G.**, defendant's 2-1401 petition raised a valid claim that, if his armed habitual criminal conviction was predicated on a version of aggravated unlawful use of a weapon invalidated by **Aguilar**, his conviction should be reduced. However, defendant's petition did not establish that his AHC conviction was predicated on an unconstitutional AUUW. While appellate counsel provided a copy of the indictment in the predicate case, showing defendant was charged with a count later invalidated by **Aguilar**, he must provide evidence that he was actually convicted of that count. The court remanded for further 2-1401 proceedings, rejecting the dissent's belief that appellant's failure to provide a sufficient record should preclude remand. The court noted that defendant attempted to provide the correct information, and that the state of the law was in flux given that **N.G.** was decided during briefing.

People v. Stoecker, 2019 IL App (3d) 160781 Even if defendant's due process rights were violated by court's conducting *ex parte* hearing on, and granting, State's motion to dismiss defendant's 2-1401 petition just four days after the motion to dismiss was filed, such error is not structural and thus could be found harmless. Here, where the issues in the petition could have been raised in defendant's numerous prior collateral filings and, regardless, were without merit, any error in the court's procedure was harmless. Further, appointed counsel did not provide inadequate assistance; counsel could not have cured any of the defects in defendant's petition.

People v. Rucker, 2018 IL App (2d) 150855 Where the trial court dismissed defendant's *pro se* 2-1401 petition just two weeks after the State filed a motion to dismiss, defendant was deprived of the opportunity to be heard and thus was denied due process. Disagreeing with the analysis of **People v. Smith, 2017 IL App (3d) 150265**, the Appellate Court held that the trial court should have set a hearing and briefing schedule once the State filed its motion to dismiss. While defendant was able to file a motion to reconsider the ruling on the State's motion, this was inadequate to fully protect his rights because he had been denied the initial opportunity to respond to the State's motion. The dismissal was reversed and the matter was

remanded for additional proceedings without consideration of the merits of defendant's claims.

People v. Walker, 2018 IL App (3d) 150527 Although section 2-1401 does not provide for the appointment of counsel, a court has discretion to appoint counsel in such proceedings. Here, the court appointed counsel on defendant's 2-1401 petition which was filed more than 10 years after his conviction. The State moved to dismiss on timeliness grounds, and defendant's counsel filed a response that did not allege an excuse for the late filing. The State's motion was allowed because defendant's petition failed to show an excuse for its untimeliness.

The level of assistance required of appointed counsel in a 2-1401 petition is an open question. Here, the Appellate Court considered reasonable assistance (as in the post-conviction petition context) and due diligence as potential standards. While the Appellate Court was inclined "to find that a section 2-1401 petitioner who is appointed counsel is entitled to reasonable assistance," it ultimately did not resolve the question because counsel's performance was inadequate under either standard.

Here, counsel was aware of available facts that could have been alleged to overcome the procedural bar of untimeliness, but he failed to amend the petition to include them, rendering counsel's assistance unreasonable. Likewise, counsel declined to review the transcripts from the proceedings, despite the judge's suggestion that such review was necessary to assist defendant. While the Supreme Court has not defined the "due diligence" standard, counsel here did not exercise any diligence at all.

Following the logic of **People v Suarez**, 224 Ill. 2d 37 (2007), the Appellate Court declined to reach the merits of defendant's 2-1401 claims because appointed counsel failed to provide adequate assistance. The matter was remanded for further proceedings, including the appointment of new counsel.

People v. Bradley, 2017 IL App (4th) 150527 Due process requires an opportunity to be heard at a meaningful time and manner. A trial court violates due process if it grants a motion to dismiss a complaint without giving the opposing party notice and a meaningful opportunity to be heard.

In April 2015, defendant filed a *pro se* 2-1401 petition for relief from judgment. On May 18, 2015, the State filed a motion to dismiss and on the same day mailed a copy of the motion to defendant who was incarcerated. On May 20, 2015, the trial court dismissed defendant's motion in a written order indicating that it had considered the State's motion and agreed with its arguments.

The Appellate Court held that the trial court denied defendant his right to due process when it granted the State's motion two days after it was filed without allowing defendant notice and a meaningful opportunity to respond. The Appellate Court rejected the State's argument that there was no need to remand the case since the trial court's "procedural error," as the State characterized it, was not prejudicial. Instead, the Appellate Court held that the trial court's failure to afford defendant an opportunity to respond "was inherently prejudicial and undermined the integrity of the proceedings."

The case was remanded for further proceedings on defendant's petition.

People v. Dalton, 2017 IL App (3d) 150213 735 ILCS 5/2-1401 provides a statutory procedure by which a final judgment that was entered more than 30 days but less than two years earlier can be vacated. After notice of a §2-1401 petition has been served, the responding party has 30 days to answer or otherwise plead in response to the petition. If the

opposing party either responds or fails to answer within the 30-day period, the petition is ripe for adjudication.

A court can dismiss a petition despite the lack of a responsive pleading if the petition is deficient as a matter of law. However, the court cannot *sua sponte* dismiss a petition before the 30-day response period expires.

The trial court erred by *sua sponte* dismissing defendant's §2-1401 petition before the expiration of the 30-day period for the State to respond. The court rejected the State's contention that it waived the 30-day period because a prosecutor was present in court when the petition was filed. The 30-day requirement applies unless there is a responsive pleading filed by the State or an express indication on the record of the State's intent to waive the time allotted for a response and consent to an early decision on the merits. Mere silence by the prosecution does not constitute a waiver.

People v. Smith, 2017 IL App (3d) 150265 Defendant filed a *pro se* §2-1401 petition challenging his convictions for aggravated battery with a firearm and being an armed habitual criminal. In response, the State filed a special limited appearance and objected to the trial court's jurisdiction on the ground that defendant had not served his *pro se* petition by certified mail. On the same day, the State filed a combined motion to dismiss the petition, arguing that: (1) the trial court lacked jurisdiction because the State was not properly served, (2) the petition failed to state a cause of action, (3) the issue was barred by *res judicata*, and (4) the petition was untimely.

The trial court held a hearing at which only the prosecutor was present. The trial court dismissed the petition for lack of jurisdiction due to defendant's failure to properly serve the State. In addition, the court made a ruling on the merits and found that the issue was *res judicata* because it had been decided during post-conviction proceedings.

Defendant filed a *pro se* response to the State's motion to dismiss, stating that he was incarcerated and lacked money to send the petition by certified mail. The trial court held a hearing and accepted the response but noted that the petition had already been dismissed.

Defendant then filed a motion to reconsider the dismissal, arguing that he lacked sufficient funds to send the petition by certified mail and requesting that the trial court excuse his failure to comply with the service requirements. Defendant also argued that the trial court erred by going beyond the issue of improper service and finding that the claim was barred by *res judicata*.

The court held a hearing on the motion to reconsider. The State was the only party present. The motion to reconsider was denied.

The Appellate Court held that defendant could not use his own failure to properly serve the State as a ground to challenge the trial court's dismissal order. However, the court also found that the trial judge erred by going beyond the issue of jurisdiction and reaching the merits of the petition.

Once the trial court determines it has no personal jurisdiction, it lacks power to dismiss the petition on the merits. In considering a combined motion objecting the personal jurisdiction and also moving to dismiss on other grounds, the trial must address the jurisdictional issue first. If it finds that there is no personal jurisdiction, it must go no further.

The court acknowledged the difficulty facing an incarcerated individual who is attempting to file a pleading by certified mail, but stressed that the Supreme Court has not elected to provide an impoverishment exception to the requirements of Rule 105, which governs the service of §2-1401 petitions.

The trial court's order dismissing the §2-1401 petition was modified to vacate the finding concerning the merits. The court noted that the defendant may refile his petition, comply with the service requirements, and obtain a hearing on the merits.

People v. Zimmerman, 2016 IL App (2d) 130350 Section 2-1401 (735 ILCS 5/2-1401) provides a civil process for challenging a final judgment that is more than 30 days old. Where §2-1401 is used to challenge a criminal conviction, the State must be served by certified or registered mail.

The trial court may *sua sponte* dismiss a §2-1401 petition on the merits without giving notice or an opportunity to be heard. However, a dismissal on the merits before the State has been properly served is premature.

In **People v. Carter, 2015 IL 117709**, the Supreme Court clarified that a petitioner who seeks to invalidate a *sua sponte* dismissal due to defective service has the burden to provide a record which affirmatively shows that the State was not given proper notice. Defendant satisfied this burden where in his application to sue as a poor person he stated that due to his indigence, the certified mail requirement for serving the State should be waived. Because defendant expressly asked the trial court to waive the certified mailing requirement, the record affirmatively showed that the State was not served by certified or registered mail.

The court rejected the argument that because a prosecutor appeared on multiple occasions when the petition was set for consideration, the State waived the requirement of proper service. The court found that in order to waive proper service, the State must file a specific motion or responsive pleading or make an explicit statement that it is waiving proper service. The court declined to adopt the reasoning of **People v. Ocon, 2014 IL App (1st) 120912**, which concluded that a formal waiver by the State is not required where the State has actual notice of the petition.

Because the State did not enter a motion or responsive pleading or explicitly waive proof of service, the trial court acted prematurely by dismissing the petition although the dismissal occurred some 10 months after the petition was filed. The court noted that the trial court may ask the State on the record whether it is willing to waive service, and thereby give the State an opportunity to expressly waive the improper service.

People v. Vari, 2016 IL App (3d) 140278 The Appellate Court's jurisdiction in civil cases is generally limited to appeals from final judgments. **Ill. Const. 1970, art. VI, §6; Ill. S. Ct. R. 301.** A final judgment is a determination by the court which disposes of all issues between the parties and terminates the litigation. The dismissal of a complaint without prejudice is not a final and appealable order.

Defendant filed an untimely *pro se* 2-1401 petition and served the State by standard United States mail. The State filed a special appearance and argued that the trial court did not have personal jurisdiction over the State because defendant failed to properly serve the State. The trial court granted the State's motion to dismiss on jurisdictional grounds. Defendant appealed.

The Appellate Court dismissed the appeal for lack of jurisdiction. The court held that defendant was not prejudiced by the dismissal and could have refiled immediately with proper service. Defendant's petition was already untimely when he filed it and there is no bar to filing successive 2-1401 petitions. A disposition on the merits of his petition could have been made much sooner if he had simply refiled than if the case had been heard on appeal and then reversed and remanded back to the trial court for further proceedings. Since the trial court's dismissal did not prejudice defendant, it was not a final appealable order.

People v. Donley, 2015 IL App (4th) 130223 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.

People v. Dodds, 2014 IL App (1st) 122268 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*.

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. Kuhn, 2014 IL App (3d) 130092 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.

People v. Carter, 2014 IL App (1st) 122613 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.

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.

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.

People v. Ocon, 2014 IL App (1st) 120912 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.

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.

People v. Maiden, 2013 IL App (2d) 120016 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.

People v. Davis, 2012 IL App (4th) 110305 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.

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."

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. Miller, 2012 IL App (5th) 110201 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.

People v. Moore, 2012 IL App (4th) 100939 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.

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.

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.

People v. Nitz, 2012 IL App (2d) 091165 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.

People v. Prado, 2012 IL App (2d) 110767 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."

People v. Clemons, 2011 IL App (1st) 102329 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.

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.

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.

People v. Wuebbels, 396 Ill.App.3d 763 (4th Dist. 2009) Section 2-1401 of the Code of Procedure establishes a comprehensive statutory procedure under which a final judgment 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.

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.

People v. Serrano, 392 Ill.App.3d 1011, 912 N.E.2d 325 (1st Dist. 2009) 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.

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)).

People v. Gray, 247 Ill.App.3d 133, 617 N.E.2d 217 (1st Dist. 1993) The trial court has jurisdiction to consider a §2-1401 petition even though a direct appeal is pending in the same case. See also, **People v. Alfano**, 95 Ill.App.3d 1026, 420 N.E.2d 1114 (2d Dist. 1981).

People v. Waters, 328 Ill.App.3d 117, 764 N.E.2d 1194 (1st Dist. 2002) To justify relief, a §2-1401 allegation must be proven by a preponderance of the evidence.

§9-2(b)

Availability of Remedy

Illinois Supreme Court

People v. Ligon, 2016 IL 118023 A voidness challenge based on the unconstitutionality of a criminal statute under the proportionate penalties clause may be raised at any time. A motion to vacate a void judgment is properly raised in a petition for relief from judgment under section 2-1401. Here, defendant properly challenged his sentence for aggravated vehicular hijacking with a dangerous weapon other than a firearm (AVH/DW) in a 2-1401 petition by arguing that it violated the proportionate penalties clause because AVH/DW had the identical elements as armed violence with a category III weapon but was punished as a Class X felony with a minimum of seven years imprisonment, while armed violence with a category III weapon was only punished as a Class 1 felony.

People v. Lawton, 212 Ill.2d 285, 818 N.E.2d 326 (2004) A §2-1401 petition may be utilized to raise a claim of ineffective assistance of counsel in Sexually Dangerous Persons proceedings, at least where that claim could not have been raised on direct appeal because the same attorney represented respondent both in the trial court and on appeal. Although §2-1401 does not specifically authorize such actions, fundamental fairness requires that persons who are deprived of their liberty through the Sexually Dangerous Persons Act, and who were represented by one attorney in the trial and reviewing courts, be afforded a process by which to bring charges of ineffective assistance of counsel. But see, **People v. Smith**, 176 Ill.App.3d 132, 530 N.E.2d 1104 (1st Dist. 1988) (the issue of ineffective assistance of trial counsel may not be raised in a §2-1401 proceeding).

People v. Coleman, 206 Ill.2d 261, 794 N.E.2d 275 (2002) To entitle the petitioner to relief, the petition must set forth allegations showing: (1) a meritorious claim or defense, (2) due diligence in presenting the claim or defense in the original action, and (3) due diligence in filing the petition. See also, **People v. Smith**, 188 Ill.App.3d 387, 544 N.E.2d 413 (2d Dist. 1989); **People v. Waters**, 328 Ill.App.3d 117, 764 N.E.2d 1194 (1st Dist. 2002) (defendant acted with reasonable diligence where he did not seek DNA testing of a urine stain until after trial).

People v. Haynes, 192 Ill.2d 437, 737 N.E.2d 169 (2000) A §2-1401 petition for relief from a final judgment permits correction of errors of fact which were unknown to the petitioner and the court, and which if known would have prevented entry of judgement. See also, **People v. Mahaffey**, 194 Ill.2d 154, 742 N.E.2d 251 (2000); **People v. Pinkonsly**, 207 Ill.2d 555, 802 N.E.2d 236 (2003). Section 2-1401 is unavailable for matters "which arise subsequent to . . . rendition" of the judgment. Because a DOC diagnosis of psychosis arose after defendant's conviction, §2-1401 could not be used to argue that newly discovered evidence showed defendant was unfit to stand trial.

People v. Brown, 169 Ill.2d 94, 660 N.E.2d 964 (1995) The State's unknowing use of perjury is cognizable under §2-1401(735 ILCS 5/2-1401). See also, **People v. Gray**, 247 Ill.App.3d 133, 617 N.E.2d 217 (1st Dist. 1993); **People v. Cheeks**, 318 Ill.App.3d 919, 742 N.E.2d 915 (3d Dist. 2001) (a pro se post-conviction petition that alleged that the conviction was based on perjured testimony, but did not allege that the State knew of the perjury, should have been treated as a §2-401 petition). Where perjury is the basis of a §2-1401 petition, defendant must prove that false testimony was willfully and purposefully given, that it was material and not

merely cumulative, and that it probably controlled the determination. Defendant's allegations were sufficient to require a hearing on the petition.

People v. Sanchez, 115 Ill.2d 238, 503 N.E.2d 277 (1986) To warrant relief under §2-1401, a petition must establish grounds for relief and that petitioner was not negligent in failing to raise the ground at trial. See also, **People v. Bracey**, 51 Ill.2d 514, 283 N.E.2d 685 (1972).

People v. Berland, 74 Ill.2d 286, 385 N.E.2d 649 (1979) Issues previously raised at trial or in other collateral proceedings cannot form the basis for §72 (now §2-1401) petitions.

People v. Anderson, 31 Ill.2d 262, 201 N.E.2d 394 (1964) A §72 petition was the proper means to raise defendant's sanity at time of trial when the presence of such a question was unknown to the trial court.

Illinois Appellate Court

People v. Sosani, 2022 IL App (1st) 210027 Defendant filed a 2-1401 petition which was dismissed as untimely. While his appeal from that dismissal was pending, the legislature enacted 735 ILCS 5/2-1401(c-5), which provides that any individual may institute 2-1401 proceedings “at any time” if his or her underlying guilty plea “has potential consequences under federal immigration law.” Defendant’s 2-1401 petition here had alleged, among other things, that he had not understood that his plea might carry permanent immigration consequences.

On appeal, defendant argued that this new provision should apply to his petition. The Appellate Court found that the amendment did not apply retroactively on appeal, noting that in **People v. Hunter**, 2017 IL 121306, the Supreme Court “clearly expressed the doctrine that the role of a court of review is to determine whether the court below was correct, based on the law before it when it entered its judgment.” Because this amendment was not available to the circuit court at the time it dismissed defendant’s petition, the Appellate Court declined to consider it. Further, the Appellate Court held that the amendment itself did not express a legislative intent to revive an otherwise time-barred action. Thus, the dismissal of defendant’s petition was affirmed.

Defendant also argued that the Appellate Court should consider applying the new statute on appeal because if he simply files a new petition grounded in the same basic facts – which (c-5) would appear to permit based on it’s “at any time” language – that petition will be barred by *res judicata*. The Appellate Court declined to reach that argument because it was “a hypothetical question upon which we decline to opine.”

People v. Patel, 2021 IL App (3d) 170337 The circuit erred when dismissed the defendant’s petition for relief from judgment, which raised an actual innocence claim following a guilty plea. In **People v. Reed**, 2020 IL 124940, the Supreme Court held that a post-conviction petitioner may file an actual innocence claim following a guilty plea, and the **Reed** court’s rationale applies to petitions filed under section 2-1401. The defendant must provide new, material, noncumulative evidence that clearly and convincingly demonstrates that a trial would probably result in acquittal. Here, defendant’s petition included a letter from the complainant in a sexual abuse case, attesting that she lied about the incident. This was the type of evidence that satisfied the **Reed** test. Thus, it was sufficient to state a claim and survive a motion to dismiss. The court remanded for a hearing on the petition.

People v. Shelton, 2018 IL App (2d) 160303 Post-conviction counsel is not relieved of his or her duties under Supreme Court Rule 651(c) by converting defendant's post-conviction petition into a 2-1401 petition. Because no Rule 651(c) attorney certificate was filed, there was no presumption that counsel performed reasonably. And, because the pleading was filed more than two years after conviction, counsel needed to allege an exception to the 2-1401 statute of limitations, but failed to do so.

The record showed deficient performance by counsel where there was an available, potentially meritorious claim based upon the court's failure to admonish defendant of the proper term of mandatory supervised release at his plea hearing. Counsel should have raised that claim by amending defendant's post-conviction petition to allege violations of due process and/or ineffective assistance of counsel at the plea hearing, predicated on the deficient MSR admonishment. Further, counsel could have alleged that the failure to raise that claim within the applicable post-conviction petition limitations period was not due to defendant's culpable negligence where the record indicated that defendant only recently learned of the lengthier MSR term.

People v. Dodds, 2014 IL App (1st) 122268 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*.

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. Stone, 2013 IL App (1st) 111344 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.

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.”

People v. Waters, 328 Ill.App.3d 117, 764 N.E.2d 1194 (1st Dist. 2002) To justify a new trial, newly-discovered evidence must not have been known to the petitioner at the time of trial, must not have been capable of being discovered with due diligence, and must be so conclusive as to probably change the result of the trial. Also, newly-discovered evidence must be material and more than merely cumulative. Here, the trial court abused its discretion by denying §2-1401 relief on the ground that the outcome of the trial probably would not have been different had DNA evidence been introduced. See also, **Ostendorf v. International**, 89 Ill.2d 273, 433 N.E.2d 253 (1982); **People v. Howard**, 363 Ill.App.3d 741, 844 N.E.2d 980 (1st Dist. 2006) (to justify relief on grounds of newly-discovered evidence, the evidence must not only have been in existence at the time of the conviction, but must also be relevant to circumstances or conditions which predate the judgment; thus, the trial court lacks jurisdiction to order §2-1401 relief for matters which occur after the judgment).

People v. Garcia, 298 Ill.App.3d 34, 697 N.E.2d 1230 (1st Dist. 1998) In a concurring opinion, Justice McNulty concluded that the Supreme Court's supervisory order in this case overruled **People v. Cole**, 215 Ill.App.3d 585, 575 N.E.2d 10 (3d Dist. 1991) and **People v. Hilliard**, 65 Ill.App.3d 642, 382 N.E.2d 441 (1st Dist. 1978), which held that no evidentiary hearing is required on a §2-1401 petition which "is supported only by an affidavit based on hearsay." Thus, when a criminal defendant "supports a post-conviction petition with evidence that a key witness, out-of-court and not under oath, said that she lied at trial, the trial court must hold an evidentiary hearing to determine whether the witness committed perjury at trial."

People v. Reyman Clinic Pharmacy, Inc., 246 Ill.App.3d 835, 617 N.E.2d 35 (1st Dist. 1993) Although the petition failed to allege petitioner exercised due diligence, this requirement was waived where the petition was neither challenged nor dismissed on that basis. Further, in light of the contention that the trial court lacked in personam jurisdiction, the §2-1401 petition could be construed as a collateral attack on a void judgment, which is not subject to a due diligence requirement.

People v. Smith, 188 Ill.App.3d 387, 544 N.E.2d 413 (2d Dist. 1989) A claim that there were insufficient admonitions regarding the consequences of a guilty plea may not be raised in a §2-1401 motion.

People v. Banks, 121 Ill.App.3d 279, 459 N.E.2d 992 (1st Dist. 1984) Trial counsel did not lack diligence in obtaining statement from an officer who received a phone call from the victim's wife on the night of the shooting, which supported defendant's claim of self defense and indicated that the victim's wife had committed perjury at defendant's trial, where trial counsel was not privy to the operation of the sheriff's department and had no way of knowing that the officer possessed knowledge pertinent to the case.

But, a statement, which provided that victim's husband possessed a gun moments before the shooting, justified a new trial where the only evidence controverting defendant's claim of self-defense was the victim's wife's trial testimony denying that the victim owned the gun that was found at the scene and the victim's son's testimony that he had not seen anything in victim's hand on the night he was killed.

People v. Stevens, 127 Ill.App.2d 415, 262 N.E.2d 286 (1st Dist. 1970) Defendant could not use §72 to contest the validity of the indictment on which his conviction was based. Such petitions may not be used to review questions of fact arising on pleadings or to correct errors of the court on questions of law. Contra, **People v. Stewart**, 3 Ill.App.3d 696, 279 N.E.2d 53 (5th Dist. 1971).

§9-2(c)

Timely Filing Requirement

Illinois Supreme Court

People v. Wells, 2023 IL 127169 Defendant pled guilty to first degree murder in 2001 and received a 40-year sentence. In 2016, the legislature added subsection (b-5) to 735 ILCS 5/2-1401. Under this provision, a person convicted of a forcible felony may petition the trial court for sentencing relief if his or her participation in the offense was related to him or her having been a victim of domestic violence. Defendant filed a 2-1401 petition in 2018, arguing that her husband, who was convicted of the same murder, had physically abused her for years, and that her participation in the murder was due to fear and compulsion.

The State moved to dismiss, and the circuit court granted the motion a week later. The record does not indicate a hearing took place or that defendant was notified of the proceeding. The circuit court concluded that defendant's petition was untimely and that she could not pursue a sentencing reduction because her negotiated plea waived all sentencing challenges. The appellate court reversed, finding a violation of defendant's due process right to respond to the State's motion to dismiss.

The supreme court, with one justice dissenting, reversed the appellate court and dismissed the petition. Although the circuit court violated procedural due process by failing to provide defendant a meaningful opportunity to respond to the State's motion, the violation was harmless because defendant's negotiated guilty plea rendered her ineligible for relief under section (b-5).

The plain language of section (b-5) authorizes only sentencing relief. It has long been established that a defendant who enters into a negotiated plea cannot unilaterally seek sentencing relief. The legislature is presumed to have known this rule when it drafted the statute. Accordingly, the statute must be read to exclude defendants who enter negotiated

pleas. While defendant argued in the alternative that in the case of a negotiated plea, section (b-5) could be construed to allow withdrawal of the plea, this interpretation is not supported by the plain language. The legislative history cited by defendant, including comments by the bill's sponsor that the section applies to "plea deals," was not sufficient to convince the court to "read words into a clear, unambiguous statute." Finally, although the State did not include this argument in its petition for leave to appeal, the failure to include an issue in a PLA is not an absolute, jurisdictional bar, and defendant did not present a compelling reason to apply forfeiture where the issue was "inextricably intertwined" with the due process analysis.

People v. Price, 2016 IL 118613 During trial, the court denied defendant's request for separate verdict forms for each of the State's theories of first degree murder (intentional, knowing, and felony). The jury returned a general verdict finding defendant guilty of first degree murder. Years later, defendant filed an untimely 2-1401 petition arguing that the trial court erred in denying his request for separate verdict forms under **People v. Smith**, 233 Ill. 2d 1 (2009). Defendant further argued that the statutory time bar on 2-1401 petitions did not apply because the instructional error created a void judgment under the void sentence rule. By the time defendant's case reached the Illinois Supreme Court, the Court had abolished the void sentence rule in **People v. Castleberry**, 2015 IL 116916.

Defendant argued that the decision in **Castleberry** should not be applied retroactively to his case, leaving the void sentence rule intact and allowing defendant to raise his issue in an untimely 2-1401 petition. Specifically defendant argued that the rule announced in **Castleberry** did not qualify as a new substantive rule or watershed rule of criminal procedure under **Teague v. Lane**, 489 U.S. 288 (1989) and thus did not apply retroactively.

The Supreme Court rejected defendant's argument and held that **Castleberry** applied retroactively to defendant's case and thus he could not use the void sentence rule as a way to raise his issue in an untimely 2-1401 petition. The Court held that **Teague** did not control the retroactivity question in this case. **Teague's** analysis only applies in situations where a new rule could have made a difference in the outcome of a criminal trial. The rule adopted in **Castleberry**, however, has no effect on the outcome of a trial. Neither the void sentence rule nor its absence impacts the accuracy of a defendant's conviction or the fairness of his trial.

In situations where **Teague** does not apply, the general rule of retroactivity holds that appellate decisions apply to all cases pending when the decisions are announced. **Castleberry** thus applies to defendant's case. Since defendant's 2-1401 petition was untimely and he provided no reason other than the void sentence rule for excusing his failure to timely file the petition, the Court affirmed the judgment of the trial court dismissing defendant's petition.

People v. Coleman, 206 Ill.2d 261, 794 N.E.2d 275 (2002) Fraudulent concealment of grounds for relief tolls the two-year limitation period; to show fraudulent concealment, however, defendant must both allege facts demonstrating that the State affirmatively attempted to prevent the discovery of grounds for relief and establish his own good faith and reasonable diligence. Here, the petition failed to establish that the State fraudulently concealed the grounds for a Batson claim. Because defendant could have discovered the basis for the claim within the statute of limitations, fraudulent concealment was not shown.

People v. Harvey, 196 Ill.2d 444, 753 N.E.2d 293 (2001) The two-year statute of limitations will not be applied where the petition alleges that the challenged judgment is void. Also, the State may waive the statute of limitations. The claim here was considered on its merits where defendant claimed that an extended term was void, and the State conceded that the statute of limitations was inapplicable. See also, **People v. Pinkonsly**, 207 Ill.2d 555, 802 N.E.2d 236 (2003) (the State's failure to raise the statute of limitations in the trial court deprived defendant of the opportunity to amend his petition to establish an exception to the statute of limitations and, thus, constitutes waiver of the statute of limitations issue).

People v. Mahaffey, 194 Ill.2d 154, 742 N.E.2d 251 (2000) A §2-1401 petition must be filed within two years after judgment unless the petitioner is under legal disability or duress or the grounds for relief are fraudulently concealed. A §2-1401 petition was properly dismissed where it was filed six years after conviction, but made no specific argument for tolling the statute of limitations. See also, **People v. Madej**, 193 Ill.2d 395, 739 N.E.2d 423 (2000) (defendant's petition was untimely and no exception to the statute of limitations applied).

People v. Madej, 193 Ill.2d 395, 739 N.E.2d 423 (2000) The fraudulent concealment of rights exception to the timeliness requirement must involve "affirmative acts or representations designed to prevent discovery of the cause of action or ground for relief." The State's failure to notify defendant of his rights under the Vienna Convention did not constitute fraud and did not toll the statute of limitations. See also, **Crowell v. Bilandic**, 81 Ill.2d 422, 411 N.E.2d 16 (1980).

People v. Berland, 74 Ill.2d 286, 385 N.E.2d 649 (1979) The two-year limitation period cannot be avoided by asserting that a second petition is merely a continuation of a previous, timely petition.

Williams v. People, 31 Ill.2d 516, 202 N.E.2d 468 (1964) That petitioner was in custody does not toll the statutory time limit. See also, **People v. Colletti**, 48 Ill.2d 135, 268 N.E.2d 397 (1971).

Illinois Appellate Court

People v. Clemons, 2023 IL App (1st) 192169 The trial court erred when it dismissed defendant's 2-1401 petition on the State's oral motion to dismiss without first giving defendant an opportunity to respond. But, that error was harmless because defendant's petition was procedurally barred by the two-year limitations period. But, the matter was remanded for further proceedings where the trial court's oral pronouncements in dismissing the petition, and the accompanying docket entries, half-sheets, and computer records, sometimes referred to the matter as a "PC" or "post-conviction." If the court meant to treat the matter as a post-conviction petition, it failed to provide defendant with the required admonishments for recharacterization. And, if it did not intend to recharacterize the petition, the court's reference to the matter as a PC created an extra hurdle for defendant to clear in the event he attempts to file a post-conviction petition in the future. Accordingly, the appellate court ordered that, on remand, the trial court make clear whether it was treating the petition as a 2-1401 as filed or whether it was recharacterizing defendant's pleading as a post-conviction petition, in which case it must provide required protections.

People v. Abusharif, 2021 IL App (2d) 191031 Defendant was convicted of the murder of her live-in girlfriend in 2009 and sentenced to 50 years of imprisonment. In December 2017, defendant filed a *pro se* petition seeking sentencing relief under 735 ILCS 5/2-1401(b-5). That provision became effective January 1, 2016, and provides that a defendant may seek resentencing where her participation in a qualifying offense was related to her being a victim of domestic violence, no evidence of domestic violence was presented at the sentencing hearing, defendant was not aware of the mitigating nature of domestic violence when sentenced and could not have learned of it sooner through due diligence, and the new evidence is material, noncumulative, and so conclusive that it likely would have changed the original sentence. Under section 2-1401(c), a petition for relief from judgment must be filed within two years of the entry of the judgment, excluding any time during which the petitioner was under a legal disability or duress or the ground for relief was fraudulently concealed.

Here, defendant's petition was filed well outside of the two-year limitations period. The court rejected defendant's argument that she was under a legal disability prior to the enactment of 2-1401(b-5). Following the reasoning in **People v. Donoho**, 2021 IL App (5th) 190086-U, the court concluded that the statute's time limits would be effectively eradicated if a new statute or amendment was enough to demonstrate legal disability. Further, the legislature did not exempt domestic-violence mitigation claims from the two-year time limit, and a reviewing court should not depart from the plain language of the statute to read into it an exception the legislature did not express. The court affirmed the dismissal of defendant's petition as untimely.

People v. Bowers, 2021 IL App (4th) 200509 Section 2-1401(b-5) was enacted in 2015 and allows incarcerated survivors of domestic violence to petition the trial court for a resentencing hearing, at which the defendant could present mitigating evidence that the victim of the crime had abused the defendant.

Defendant, who was convicted before the enactment of 2-1401(b-5), filed her petition in 2020. The petition was dismissed as untimely, as section 2-1401 contains a two-year limitations period. Defendant argued that the legislature intended to allow subsection (b-5) claims older than two years, given that there was a diligence requirement written into the provision. But the Appellate Court refused to read language into the statute, finding the legislature could have required both diligence and a two-year limitation. The two-year limitations period does not contain an exception for claims filed under subsection (b-5), so the dismissal was affirmed.

People v. Patel, 2021 IL App (3d) 170337 The circuit erred when dismissed the defendant's petition for relief from judgment, which raised an actual innocence claim following a guilty plea. In **People v. Reed**, 2020 IL 124940, the Supreme Court held that a post-conviction petitioner may file an actual innocence claim following a guilty plea, and the **Reed** court's rationale applies to petitions filed under section 2-1401. The defendant must provide new, material, noncumulative evidence that clearly and convincingly demonstrates that a trial would probably result in acquittal. Here, defendant's petition included a letter from the complainant in a sexual abuse case, attesting that she lied about the incident. This was the type of evidence that satisfied the **Reed** test. Thus, it was sufficient to state a claim and survive a motion to dismiss. The court remanded for a hearing on the petition.

People v. Whalen, 2020 IL App (4th) 190171 Defendant was convicted of murdering his father in his tavern. The evidence against him consisted primarily of a bloody palm print on a pool cue, circumstantial evidence of motive, and a potential footprint. In a petition for relief

from judgment, defendant alleged actual innocence based on new results of DNA testing of various pieces of evidence from the crime scene, all of which excluded defendant, as well as new evidence undermining the palm print testimony (notes of a call log indicating the print expert's opinion was far more equivocal than revealed at trial). The circuit court granted a new trial, finding "this evidence was more likely than not to have affected the jury's determination, and. . . the likelihood of a different result is great enough to undermine the confidence in the outcome of the original trial."

On appeal, the State first argued that the evidence relating to the palm prints was not newly discovered because it was discovered over two years prior to the filing of the 2-1401 petition. The Appellate Court disagreed, holding that defendant was entitled to rely on this evidence as part of the instant actual innocence claim, even if it was not timely on its own. The claim in the current petition is based largely on the new DNA evidence, and the call notes are relevant to that claim.

The State also argued that the circuit court erred in granting a new trial because the new evidence was insufficient. It noted that defendant's conviction never rested on DNA evidence, and the absence of his DNA from the crime scene did not exonerate him, particularly where no other suspect's DNA was found. The State also argued that the trial court used an incorrect standard when granting relief, where it equated the phrase "probably change the result" on retrial with a "reasonable probability" the result of a new trial would be different. After finding fault with several of the trial court's factual findings, the Appellate Court ultimately remanded for a new ruling, instructing the trial court to determine whether "it is 'probable' or 'more likely than not' a jury would acquit defendant after a new trial where the new evidence in this case is considered alongside the original trial evidence."

People v. Cathey, 2019 IL App (1st) 153118 The trial court cannot *sua sponte* dismiss a section 2-1401 petition based on untimeliness. Here, defendant filed a petition alleging a one-act/one-crime violation 20 years after the end of the limitations period. The State did not answer the petition and therefore did not raise the affirmative defense of untimeliness. The State's failure to respond constitutes an admission of all well-pleaded facts and that no triable issue of fact exists. Thus, the trial court can *sua sponte* dismiss a section 2-1401 petition where the only issue before the court is whether defendant is entitled to relief as a matter of law. Application of the limitations period, however, requires a court to make fact determinations because exceptions are allowed for delays attributable to disability, duress, or fraudulent concealment.

While the Appellate Court found the defendant's petition set forth a meritorious one-act/one-crime claim under **Crespo** (convictions for both attempt murder and aggravated discharge where State did not apportion gun shots in the indictment), it could not determine whether the claim was forfeited and/or untimely. Defendant alleged that he did not know of the one-act/one-crime rule until just before filing his petition. Because the State did not answer the petition, the trial court made no finding on whether this explanation showed due diligence. The Appellate Court remanded for an evidentiary hearing on the issue of defendant's diligence.

People v. Shelton, 2018 IL App (2d) 160303 Post-conviction counsel is not relieved of his or her duties under Supreme Court Rule 651(c) by converting defendant's post-conviction petition into a 2-1401 petition. Because no Rule 651(c) attorney certificate was filed, there was no presumption that counsel performed reasonably. And, because the pleading was filed more than two years after conviction, counsel needed to allege an exception to the 2-1401 statute of limitations, but failed to do so.

The record showed deficient performance by counsel where there was an available, potentially meritorious claim based upon the court's failure to admonish defendant of the proper term of mandatory supervised release at his plea hearing. Counsel should have raised that claim by amending defendant's post-conviction petition to allege violations of due process and/or ineffective assistance of counsel at the plea hearing, predicated on the deficient MSR admonishment. Further, counsel could have alleged that the failure to raise that claim within the applicable post-conviction petition limitations period was not due to defendant's culpable negligence where the record indicated that defendant only recently learned of the lengthier MSR term.

People v. Mitros, 2016 IL App (1st) 121432 In May 1989, defendant entered an open guilty plea to first degree murder. Defendant stipulated that he was eligible for the death penalty since the murder had occurred during the commission of the felony of residential burglary. The court sentenced defendant to natural life imprisonment. Defendant did not move to vacate his guilty plea and did not file a direct appeal.

In December 2011, defendant filed a 2-1401 petition asserting that his life sentence was void. When defendant committed his offense in 1988, a life sentence could be imposed if the victim was killed in the course of one of the forcible felonies listed in the statute, but residential burglary was not one of the listed felonies. *Ill. Rev. Stat. 1987, ch. 38, ¶ 9-1(b)(6)(c)*. Defendant was thus not eligible for life imprisonment.

The court held that under **Castleberry** defendant's sentence was no longer void and thus he could not challenge his sentence in an untimely 2-1401 petition. The court rejected defendant's argument that **Castleberry** should not apply retroactively to his case. A new rule should almost never be applied retroactively to cases on collateral review. A rule is new if it was not dictated by precedent existing at the time defendant's conviction became final.

The court held that **Castleberry** did not announce a new rule. Instead, **Castleberry** merely abolished the prior void sentence rule and reinstated the rule that existed beforehand. Since **Castleberry** did not announce a new rule, it applied to defendant's collateral case, and prevented him from attacking his improper sentence in an untimely 2-1401 petition.

People v. Dodds, 2014 IL App (1st) 122268 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. Stone, 2013 IL App (1st) 111344 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.

People v. Gray, 2013 IL App (1st) 112572 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.

People v. Hubbard, 2012 IL App (2d) 101158 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.

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.

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 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 judgment 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.

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.

People v. Davis, 2012 IL App (4th) 110305 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.

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.

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 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.”

People v. Donelson, 2011 IL App (1st) 092594 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 unenforceable 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.

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

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.

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.

People v. Serrano, 392 Ill.App.3d 1011, 912 N.E.2d 325 (1st Dist. 2009) 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)).

People v. Wuebbels, 396 Ill.App.3d 763 (4th Dist. 2009) Section 2-1401 of the Code of Procedure establishes a comprehensive statutory procedure under which a final judgment 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.

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.

People v. Smith, 386 Ill.App.3d 473, 898 N.E.2d 119 (5th Dist. 2008) Although the statute of limitations for a §2-1401 petition is two years, jurisdiction in a §2-1401 proceeding does not depend on the statute of limitations. Rather, the statute of limitations is an affirmative defense which the State must assert. Thus, although a §2-1401 petition may be dismissed sua sponte if the claim is without merit, it may not be dismissed sua sponte on the basis of timeliness. Because the State failed to raise the statute of limitations as an affirmative defense, the trial court erred by summarily dismissing a §2-1401 petition that was filed five days after the two-year limitation had run.

§9-3

Mandamus, Prohibition, and Supervisory Orders

§9-3(a)

Mandamus

Illinois Supreme Court

People ex rel. Berlin v. Bakalis, 2018 IL 122435 Frank Gilio entered an open plea to violating an order of protection and was sentenced to 3 years of imprisonment and a year of MSR. When the State later learned that the one-year MSR term was improper and a 4-year MSR term was mandated by statute, the trial court corrected the mittimus to reflect the proper MSR term at the State’s request. The court subsequently vacated that correction in light of **Castleberry**’s abrogation of the void sentence rule, and the State sought a writ of *mandamus*.

Gilio agreed that correction of the MSR term was required but requested a complete resentencing, arguing that the trial judge might have imposed a lesser prison term had he known of the longer MSR requirement. The Supreme Court rejected Gilio’s assertion, noting that the trial court had not indicated a desire to reconsider the prison term when it originally

corrected the MSR term and thus there was no likelihood that the trial court would decrease the prison sentence. *Mandamus* was awarded.

In the *mandamus* action, the State also asked the Supreme Court to announce a new rule that would allow “statutorily unauthorized sentences to be corrected at any time by motion in the circuit court” to “fill the void” from **Castleberry’s** abrogation of the void sentence rule. The Court declined to bypass the normal rulemaking process set out in [Illinois Supreme Court Rule 3](#). Instead, the Court referred the State’s proposal to its rules committee.

Round v. Lamb, 2017 IL 122271 To be entitled to be released from custody pursuant to an order of *habeas corpus*, the petitioner must demonstrate that he or she is incarcerated under a judgment of a court that lacked subject matter jurisdiction or that some occurrence subsequent to the conviction justifies release. To be entitled to an order of *mandamus*, the petitioner must establish a clear right to relief, a clear duty on the part of the official to act, clear authority in the public official to comply with the writ, and that there is no other adequate remedy.

People ex rel Alvarez v. Gaughan, 2016 IL 120110 (No. 120110, 12/1/16)

1. *Mandamus* is an extraordinary remedy used to compel a public official to perform a nondiscretionary official duty. The Supreme Court will award *mandamus* only where there is a clear right to the relief requested, the public official has a clear duty to act, and there is clear authority requiring the official to comply with the writ.

At sentencing, the trial court/respondent refused to apply a mandatory 15-year firearm enhancement to defendant’s sentence. On appeal, the State successfully argued in the Appellate Court that the sentence was void. The Supreme Court however granted leave to appeal in this case and struck down the void judgment rule. **Castleberry, 2015 IL 116916**. The Cook County State’s Attorney then filed a petition for writ of *mandamus* asking the Supreme Court to order the trial court/respondent to impose the mandatory firearm enhancement.

Defendant made three arguments in opposition to the writ of *mandamus*: (1) the writ was barred by *laches*; (2) there was no clear right to relief; and (3) the Cook County State’s Attorney did not have standing to sue in the Supreme Court on behalf of the People of the State of Illinois. The Supreme Court rejected all three arguments.

2. *Laches* is an equitable principal that bars recovery by a party whose unreasonable delay in bringing an action prejudices the opposing party. The party raising *laches* as a bar must show that the delay misled him or caused him to pursue a different course of action.

The court found that there was no indication of delay by the State in this case. The State raised the issue at trial and on appeal under the then-existing void judgment rule. Additionally, defendant suffered no prejudice since he was already serving a lengthy sentence and it was his decision to put the finality of his sentence in question by appealing his conviction and sentence. *Laches* thus did not apply in this case.

3. Under the Unified Code of Corrections a trial court generally may not increase a defendant’s sentence once it is imposed. [730 ILCS 5/5-4.5-50\(d\)](#). Additionally, when a conviction or sentence has been reversed, the trial court may not impose a greater sentence unless it is based on defendant’s conduct after the original sentence was imposed. [730 ILCS 5/5-5-4\(a\)](#). Defendant argued that these two statutory provisions conflicted with the State’s requested relief of an increase in defendant’s sentence and thus the State had no clear right to relief.

The court found that there was no conflict between these two statutes and the State's requested relief. Both statutes were designed to protect a defendant who has successfully challenged his conviction or sentence from a potentially vindictive trial court. Here the State was requesting the imposition of a mandatory sentence. There would thus be no reason for the trial court to be vindictive towards defendant. Additionally, the State was not asking the trial court to increase defendant's sentence. It was asking the Supreme Court to order the trial court to correct the sentence. The State thus had a clear right to its requested relief.

4. The Attorney General is the chief law enforcement officer of the State of Illinois and is afforded broad discretion in the performance of its public duties, including the discretion to institute legal actions. The Attorney General undoubtedly could have instituted the present *mandamus* action. But the Cook County State's Attorney, from whose county the underlying criminal case arose, also had the standing and authority to bring this action. Longstanding case law establishes that the State's Attorney is a constitutional officer with rights and duties "analogous to or largely coincident with" the Attorney General. And none of the statutory provisions enumerating the specific duties of a State's Attorney were meant to be all-inclusive or restrictive, and thus did not deprive by omission the State's Attorney of its standing in this case.

The court awarded the writ of *mandamus* ordering the trial court/respondent to resentence defendant and apply the mandatory firearm enhancement to his sentence.

People ex rel Glasgow v. Carlson, 2016 IL 120544 (No. 120544, 12/1/16)

The Illinois Supreme Court has original jurisdiction to hear *mandamus* cases. *Mandamus* is an extraordinary remedy used to compel a public official to perform a purely ministerial duty where no exercise of discretion is involved. *Mandamus* relief is proper only if the petitioner establishes a clear right to the relief requested, a clear duty on the part of the public official to act, and clear authority on the part of the public official to comply.

The State filed a *mandamus* petition seeking to compel the trial court to vacate its sentencing order, classify defendant's third DUI as a Class 2 felony, and impose a Class X sentence under 730 ILCS 5/5-4.5-95(b). The Supreme Court granted a writ of *mandamus* after finding that the legislature intended to classify aggravated DUI based on a third DUI conviction as a Class 2 felony.

People ex rel Alvarez v. Howard, 2016 IL 120729 (No. 120729, 12/1/16)

1. The Supreme Court has original jurisdiction to hear *mandamus* cases. *Mandamus* is an extraordinary remedy used to compel a public official to perform a purely ministerial duty where no exercise of discretion is involved. A writ of *mandamus* will be awarded only if the petitioner establishes a clear right to the relief requested, a clear duty on the part of the public official to act, and clear authority by the public official to comply with the writ.

A writ of prohibition may be used to prevent a judge from acting where he or she has no jurisdiction or to prevent a judicial act that is beyond the scope of legitimate jurisdictional authority. In order for a writ of prohibition to be issued, four requirements must be met. These requirements include: (1) the action to be prohibited must be judicial or quasi-judicial, (2) the writ must be issued against a court of inferior jurisdiction, (3) the action to be prohibited must be outside either the inferior court's jurisdiction or legitimate authority, and (4) the petitioner must lack any other adequate remedy.

2. Under Illinois retroactivity analysis, the first question is whether the legislature has clearly indicated that an amendment is to be applied retroactively or prospectively. If the legislature failed to express a clear indication of the temporal reach of the statute, Sec. 4 of

the Statute on Statutes (5 ILCS 70/4) provides that procedural changes will be applied retroactively while substantive changes are prospective only. In addition, the Effective Date of Laws Acts, which implements the constitutional directive that the General Assembly provide a uniform effective date for laws passed prior to June 1 of a calendar year, provides an effective date for legislation that does not contain an express effective date.

The court rejected the State's argument that by passing Public Act 99-258 in May 2015 with an effective date of January 1, 2016, the legislature expressed an intention that the legislation be applied prospectively only. Because Public Act 99-258 did not contain any effective date, a January 1 effective date was created by the Effective Date of Laws Act and not by the legislature's express provision. Although an expressly-stated delay in the effective date which is contained within the body of the statute may indicate the legislature's intent that the statute is to be applied prospectively, the same is not true where the act contains no effective date and the delayed effective date is the result of the Effective Date Act.

3. Because the legislature did not set forth an effective date in Public Act 99-258, which raised the automatic transfer age for juveniles to 16 and reduced the number of offenses that qualify for automatic transfer, the question of retroactivity is to be determined under §4 of the Statute on Statutes. Because the issue of juvenile transfer is a procedural issue, under §4 the amendment is to be applied retroactively.

4. The court acknowledged that under §4, even new procedural laws are to be applied retroactively only to the extent that is "practicable." However, the court rejected the argument that it was not "practicable" to provide a transfer hearing where the charge was filed properly under the law in effect at the time of the offense.

"Practicable" does not mean the same thing as "convenient," but instead focuses on whether it is "feasible" to apply a statute retroactively. The court found that it was feasible to provide a transfer hearing even where no such hearing would have been required at the time of the offense. The court also noted that the legislature could have chosen to make the statute apply prospectively only but did not.

The court denied the State's petition for a writ of *mandamus* or prohibition to require the trial court to rescind its order requiring a discretionary transfer hearing.

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. Glasgow v. Kinney, 2012 IL 113197 *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.

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. Devine v. Stralka, 226 Ill.2d 445, 877 N.E.2d 416 (2007) *Mandamus* generally provides affirmative rather than prohibitory relief, but can be used to compel the undoing of an act.

People ex rel. Devine v. Sharkey, 221 Ill.2d 613, 852 N.E.2d 804 (2006) *Mandamus* is not available to allow the State to force trial of a delinquency petition within 120 days.

People ex rel. Birkett v. Jorgensen, 216 Ill.2d 358, 837 N.E.2d 69 (2005) The Illinois Supreme Court has discretionary original jurisdiction in *mandamus* actions. *Mandamus* is an appropriate remedy to enforce mandatory provisions of legislative acts, including the Unified Code of Corrections. Because the trial court lacked discretion to grant a good behavior allowance that would reduce defendant's sentence below the minimum authorized sentence of 180 days, a writ of *mandamus* was issued. See also, **Fitzsimmons v. Norgle**, 104 Ill.2d 369, 472 N.E.2d 802 (1984) (a writ of *mandamus* was issued against a judge who imposed a sentence of probation where a statute precluded such sentence); **People ex rel. Devine v. Stralka**, 226 Ill.2d 445, 877 N.E.2d 416 (2007) (*mandamus* (and prohibition) were appropriate vehicles to challenge the trial court's order vacating the delinquency adjudication, where the court's order lacked statutory authority).

People ex rel. Devine v. Macellaio, 199 Ill.2d 231, 766 N.E.2d 1082 (2002) Where the parties agreed that defendant would be subject to a mandatory natural life sentence if an ongoing appeal of his conviction is unsuccessful, the court retained jurisdiction but conditionally granted a writ of *mandamus*. If the appellate court affirms the conviction, the trial court must vacate the 30-year-sentence for aggravated criminal sexual assault and impose a natural life sentence.

People ex rel. Ryan v. Roe, 201 Ill.2d 552, 778 N.E.2d 701 (2002) The State was entitled to writ of *mandamus* compelling the sentencing court to amend the sentencing order to reflect that truth-in-sentencing applied to defendant's sentence, although the State filed the motion for leave to file *mandamus* complaint nearly three years after defendant was sentenced and though the sentencing order complied with a plea agreement. However, pursuant to its supervisory authority, the Court reduced defendant's sentence.

People ex rel. Waller v. McKoski, 195 Ill.2d 393, 748 N.E.2d 175 (2001) Mandamus is an extraordinary remedy used to enforce, as a matter of right, a public officer's performance of his or her duties where no exercise of discretion is involved. Mandamus is granted only if the plaintiff can establish an affirmative right to relief, a duty on the part of the officer to act, and clear authority in the officer to comply with the writ. Accord, **Holly v. Montes**, 231 Ill.2d 153, 896 N.E.2d 267 (2008). See also, **People v. Madej**, 193 Ill.2d 395, 739 N.E.2d 423 (2000) (mandamus petition denied where defendant failed to establish clear, affirmative right to relief requested); **Daley v. Hett**, 113 Ill.2d 75, 495 N.E.2d 513 (1986); **People v. Latona**, 184 Ill.2d 260, 703 N.E.2d 901 (1998) (the mandamus request was denied where it was unclear from the record that the trial court's credit calculations were incorrect, because the Department of Corrections was unable to demonstrate that it had a "clear right" to have orders granting credit vacated).

People ex rel. Daley v. Limperis, 86 Ill.2d 459, 427 N.E.2d 1212 (1981) Defendants were convicted of delivery of less than 30 grams and sentenced to probation, even though the uncontradicted and stipulated evidence at their bench trials demonstrated that they delivered more than 30 grams (a Class X, non-probationable felony). The Court refused to issue writs of mandamus against the judges to expunge the sentencing orders and resentence defendants for Class X felonies, as the State requested. By convicting defendants of the lesser offenses, the trial judges effectively acquitted them of the greater offenses, and the State cannot appeal an acquittal.

People ex rel. Roberts v. Orenic, 88 Ill.2d 502, 431 N.E.2d 353 (1981) A mandamus action was proper to decide whether the trial court properly denied defendant's pretrial double jeopardy claim, which alleged that the State was barred from retrying defendant after the court had declared a mistrial.

People ex rel. Carey v. Scotillo, 84 Ill.2d 170, 417 N.E.2d 1356 (1981) The Court denied the writs of mandamus, which sought to force the trial judge to enter judgment and sentence on armed violence where defendant was found guilty of aggravated battery, attempt murder, and armed violence and the judge entered judgment and sentence only on the attempt murder charge. Because a direct appeal was pending, it was unclear that the requested relief was necessary or appropriate. Further, issuance of the writ may delay the disposition of the appeal.

People ex rel. Carey v. Cousins, 77 Ill.2d 531, 397 N.E.2d 809 (1979) An original action for mandamus is not appropriate for the determination of factual questions.

People ex rel. Scott v. Kerner, 32 Ill.2d 539, 208 N.E.2d 561 (1965) Mandamus is an appropriate vehicle for the simultaneous determination of issues of statutory constitutionality and the enforcement of rights initially determined to exist in the proceeding awarding the writ.

People ex rel. Bradley v. McAuliffe, 24 Ill.2d 75, 179 N.E.2d 616 (1962) Mandamus is appropriate to correct a ruling by a court which has erroneously assumed jurisdiction it did not possess. See also, **Daley v. Laurie**, 106 Ill.2d 33, 476 N.E.2d 419 (1985); **People ex rel. Daley v. Moran**, 94 Ill.2d 41, 445 N.E.2d 270 (1983). But mandamus may not be used as a substitute for appeal, and will not generally lie to correct judicial error in matters that the

trial court had jurisdiction to decide or to control the exercise of judicial discretion. See also, [Daley v. Laurie](#), 106 Ill.2d 33, 476 N.E.2d 419 (1985).

[People ex rel. Abner v. Kinney](#), 30 Ill.2d 201, 195 N.E.2d 651 (1964) Mandamus is the appropriate remedy to compel the Parole Board to grant a parole hearing to an eligible inmate. See also, [Crump v. Prisoner Review Board](#), 181 Ill.App.3d 58, 536 N.E.2d 875 (1st Dist. 1989) (the Prisoner Review Board's decision denying parole is normally not a proper subject for mandamus relief, because such a decision is discretionary); [Taylor v. Franzen](#), 93 Ill.App.3d 758, 417 N.E.2d 242 (5th Dist. 1981) (mandamus may be used to compel prison officials to follow their internal rules, including regulations regarding disciplinary hearing procedures); [Freeman v. Lane](#), 129 Ill.App.3d 1061, 473 N.E.2d 584 (3d Dist. 1985) (mandamus may be used to determine whether an inmate has been improperly denied good-time credit); [Hanrahan v. Williams](#), 174 Ill.2d 28, 673 N.E.2d 251 (1996) (a common law writ of certiorari, which is addressed to the discretion of the court, is not an appropriate vehicle by which an inmate who has been denied parole may obtain limited review of the parole board's decision).

§9-3(b) Prohibition

Illinois Supreme Court

[People ex rel Alvarez v. Howard](#), 2016 IL 120729 (No. 120729, 12/1/16)

1. The Supreme Court has original jurisdiction to hear *mandamus* cases. *Mandamus* is an extraordinary remedy used to compel a public official to perform a purely ministerial duty where no exercise of discretion is involved. A writ of *mandamus* will be awarded only if the petitioner establishes a clear right to the relief requested, a clear duty on the part of the public official to act, and clear authority by the public official to comply with the writ.

A writ of prohibition may be used to prevent a judge from acting where he or she has no jurisdiction or to prevent a judicial act that is beyond the scope of legitimate jurisdictional authority. In order for a writ of prohibition to be issued, four requirements must be met. These requirements include: (1) the action to be prohibited must be judicial or quasi-judicial, (2) the writ must be issued against a court of inferior jurisdiction, (3) the action to be prohibited must be outside either the inferior court's jurisdiction or legitimate authority, and (4) the petitioner must lack any other adequate remedy.

2. Under Illinois retroactivity analysis, the first question is whether the legislature has clearly indicated that an amendment is to be applied retroactively or prospectively. If the legislature failed to express a clear indication of the temporal reach of the statute, Sec. 4 of the Statute on Statutes ([5 ILCS 70/4](#)) provides that procedural changes will be applied retroactively while substantive changes are prospective only. In addition, the Effective Date of Laws Acts, which implements the constitutional directive that the General Assembly provide a uniform effective date for laws passed prior to June 1 of a calendar year, provides an effective date for legislation that does not contain an express effective date.

The court rejected the State's argument that by passing Public Act 99-258 in May 2015 with an effective date of January 1, 2016, the legislature expressed an intention that the legislation be applied prospectively only. Because Public Act 99-258 did not contain any effective date, a January 1 effective date was created by the Effective Date of Laws Act and not by the legislature's express provision. Although an expressly-stated delay in the effective date which is contained within the body of the statute may indicate the legislature's intent

that the statute is to be applied prospectively, the same is not true where the act contains no effective date and the delayed effective date is the result of the Effective Date Act.

3. Because the legislature did not set forth an effective date in Public Act 99-258, which raised the automatic transfer age for juveniles to 16 and reduced the number of offenses that qualify for automatic transfer, the question of retroactivity is to be determined under §4 of the Statute on Statutes. Because the issue of juvenile transfer is a procedural issue, under §4 the amendment is to be applied retroactively.

4. The court acknowledged that under §4, even new procedural laws are to be applied retroactively only to the extent that is “practicable.” However, the court rejected the argument that it was not “practicable” to provide a transfer hearing where the charge was filed properly under the law in effect at the time of the offense.

“Practicable” does not mean the same thing as “convenient,” but instead focuses on whether it is “feasible” to apply a statute retroactively. The court found that it was feasible to provide a transfer hearing even where no such hearing would have been required at the time of the offense. The court also noted that the legislature could have chosen to make the statute apply prospectively only but did not.

The court denied the State’s petition for a writ of *mandamus* or prohibition to require the trial court to rescind its order requiring a discretionary transfer hearing.

People ex rel. Devine v. Stralka, 226 Ill.2d 445, 877 N.E.2d 416 (2007) A writ of prohibition may be used to prevent a judge from acting without jurisdiction or beyond the scope of his or her authority. A writ of prohibition is appropriate where: (1) the action to be prohibited is judicial or quasi-judicial, (2) the tribunal against which the writ will issue has inferior jurisdiction to that of the issuing court, (3) the action prohibited is outside the court's jurisdiction or beyond its legitimate authority, and (4) the petitioner has no other adequate remedy. Here, prohibition (and mandamus) were appropriate vehicles to challenge the trial court's order vacating the delinquency adjudication, where the court's order lacked statutory authority.

Daley v. Hett, 113 Ill.2d 75, 495 N.E.2d 513 (1986) A writ of prohibition may be issued to prevent a judge from acting where he has no jurisdiction or to prevent an act that is beyond the scope of the judge's legitimate authority.

Maloney v. Bower, 113 Ill.2d 473, 498 N.E.2d 1102 (1986) The Court issued a writ of prohibition barring the chief judge from appointing the public defender for indigents in civil contempt cases, as the judge lacked authority to do so.

§9-3(c)

Supervisory Orders

Illinois Supreme Court

People ex rel. Ryan v. Roe, 201 Ill.2d 552, 778 N.E.2d 701 (2002) The Court used its supervisory authority to reduce defendant's sentence to the statutory minimum, subject to truth-in-sentencing, where neither State nor defendant contemplated truth-in-sentencing requirements when negotiating the guilty plea.

People ex rel. Birkett v. Bakalis, 196 Ill.2d 510, 752 N.E.2d 1107 (2001) Supervisory relief is appropriate only in limited circumstances, and is used primarily to address issues raised

in petitions for leave to appeal where the case does not warrant full briefing and a formal opinion. Supervisory orders are disfavored other than in the context of the leave to appeal docket, and will not be issued unless "the normal appellate process" is inadequate to "afford adequate relief and the dispute involves a matter important to the administration of justice . . . or intervention is necessary to keep an inferior tribunal from acting beyond the scope of its authority."

Baker v. Department of Corrections, 106 Ill.2d 100, 477 N.E.2d 686 (1985) Where the issuance of a writ of mandamus or habeas corpus is not warranted, the Supreme Court may, in an appropriate case, grant the requested relief under the Court's supervisory authority. See also, **Doherty v. Caisley**, 104 Ill.2d 72, 470 N.E.2d 319 (1984). (Note: For a general discussion concerning the nature of supervisory authority, see **McDunn v. Williams**, 156 Ill.2d 385, 620 N.E.2d 385 (1993)).

People ex rel. Carey v. Strayhorn, 61 Ill.2d 85, 329 N.E.2d 194 (1975) The Court used its supervisory power to vacate a discovery order where the trial judge applied a statutory discovery provision that conflicted with Supreme Court Rule 413.

§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.")

Illinois Supreme Court

Round v. Lamb, 2017 IL 122271 To be entitled to be released from custody pursuant to an order of *habeas corpus*, the petitioner must demonstrate that he or she is incarcerated under a judgment of a court that lacked subject matter jurisdiction or that some occurrence subsequent to the conviction justifies release. To be entitled to an order of *mandamus*, the petitioner must establish a clear right to relief, a clear duty on the part of the official to act, clear authority in the public official to comply with the writ, and that there is no other adequate remedy.

Beacham v. Walker, 231 Ill.2d 51, 896 N.E.2d 327 (2008) Habeas corpus permits the release of a prisoner who has been incarcerated under the judgment of a court that lacked subject matter or personal jurisdiction, or where some occurrence subsequent to the prisoner's conviction entitles him to release. Habeas corpus may not be used to review proceedings that do not exhibit one of these defects, even if a denial of constitutional rights is alleged. Although a void judgment may be attacked any time, habeas corpus is not available to review errors which merely render a judgment voidable, unless they are jurisdictional. See also, **People ex rel. Skinner v. Randolph**, 35 Ill.2d 589, 332 N.E.2d 279 (1966); **People ex rel. Lewis v. Frye**, 42 Ill.2d 311, 247 N.E.2d 410 (1969).

A motion to dismiss a petition for habeas corpus raises the issue of the legal sufficiency of the petition on its face. Although the petitioner must allege facts which assert a legally recognized cause of action, an action should not be dismissed unless it is clearly apparent that no set of facts could be proved that would entitle the plaintiff to relief. The trial court's ruling on a motion to dismiss is reviewed de novo.

The trial court properly granted a motion to dismiss a habeas corpus petition which, on its face, demonstrated that defendant was not entitled to relief.

Hennings v. Chandler, 229 Ill.2d 18, 890 N.E.2d 920 (2008) Where complaint for order of habeas corpus is insufficient on its face to warrant any relief, trial court is authorized sua sponte to deny complaint without notice.

Lucien v. Briley, 213 Ill.2d 340, 821 N.E.2d 1148 (2004) A criminal defendant may not bring an Apprendi-based state habeas corpus challenge once his direct appeal has been completed. See also, **Hill v. Cowan**, 202 Ill.2d 151, 781 N.E.2d 1065 (2002) (a State habeas corpus petitioner convicted on a guilty plea waived any Apprendi challenge to an extended-term sentence based on the "exceptionally brutal or heinous behavior" factor).

Schlemm v. Cowen, 323 Ill.App.3d 318, 752 N.E.2d 647 (4th Dist. 2001) State habeas corpus relief is limited to the grounds specified in 735 ILCS 5/10-124, including where: (1) the court exceeded its jurisdiction; (2) the original punishment was lawful but defendant has become entitled to discharge by some subsequent event; (3) the process was defective or unauthorized; (4) the person having custody of the prisoner is not authorized to detain him; (5) the process appears to have been obtained by false pretense or bribery; and (6) there is no general law or criminal conviction authorizing detention.

Norman v. Elrod, 76 Ill.2d 426, 394 N.E.2d 1043 (1979) Habeas corpus was not available to a petitioner who claimed that he was incorrectly advised of the mandatory parole term at his guilty plea. There was no claim that the trial court lacked jurisdiction over the subject matter or over defendant's person. See also, **People v. Reese**, 66 Ill.App.3d 199, 383 N.E.2d 759 (5th Dist. 1978).

Hughes v. Kiley, 67 Ill.2d 261, 367 N.E.2d 700 (1977) Remedy for alleged denial of due process by prosecutor before grand jury, beyond hearing on motion to quash, was not by way of habeas corpus but by direct review. Relief was not appropriate because petitioner failed to attach sufficient records to fully present the issues of law, as is required by Rule 381(a).

People ex rel. Petraborg v. Fields, 14 Ill.App.3d 1025, 303 N.E.2d 160 (1st Dist. 1973) The term "custody" in habeas corpus statute refers to physical control or possession, and is not susceptible to a constructive definition.

People ex rel. Jefferson v. Brantley, 44 Ill.2d 31, 253 N.E.2d 378 (1969) To be entitled to habeas corpus relief, the petitioner must question the validity of his incarceration and, if successful, be entitled to immediate release. See also, **Barney v. Prisoner Review Board**, 184 Ill.2d 428, 704 N.E.2d 350 (1998) (State habeas corpus is not available to prisoner whose mandatory supervised release term was revoked; because time in which petitioner can be detained does not end until the term of mandatory supervised release expires, defendant could not show that he was entitled to release); **Barney v. Prisoner Review Board**, 184 Ill.2d 428, 704 N.E.2d 350 (1998) (state habeas corpus is not available to a prisoner who contends that his mandatory supervised release term was improperly revoked); **Faheem-El v. Klincar**, 123 Ill.2d 291, 527 N.E.2d 307 (1988).

People v. Harris, 38 Ill.2d 552, 232 N.E.2d 721 (1968) The denial of pretrial bail can be challenged by habeas corpus. (Note: Supreme Court Rule 604 now permits bail orders to be appealed before trial.)

People ex rel. Holzapple v. Ragen, 2 Ill.2d 124, 117 N.E.2d 390 (1954) The Supreme Court will not assume jurisdiction of an original habeas corpus petition if an issue of fact is presented.

People ex rel. Titzel v. Hill, 344 Ill. 246, 176 N.E.2d 360 (1931) A prisoner who has served his sentence may use habeas corpus to obtain his discharge from custody. See also, **People ex rel. Gregory v. Pate**, 31 Ill.2d 592, 203 N.E.2d 425 (1964).

Illinois Appellate Court

People v. Rios, 2013 IL App (1st) 121072 *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.

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.

People v. Gersbacher, 4 Ill.App.3d 948, 282 N.E.2d 243 (5th Dist. 1972) Petitioner could not use habeas corpus to obtain sentence credit because he was not entitled to immediate release if successful.

Collins v. Sielaff, 43 Ill.App.3d 1022, 357 N.E.2d 1213 (1st Dist. 1976) Petitioner, who was on parole, could properly bring a habeas corpus action to obtain his final discharge. But see, **People ex rel. Burbank v. Irving**, 108 Ill.App.3d 697, 439 N.E.2d 554 (3d Dist. 1982) (petitioner, who claimed that his request for parole was unreasonably, arbitrarily, and capriciously denied, could not seek relief under the Illinois Habeas Corpus Act).

§9-5

Federal Habeas Corpus

§9-5(a)
Generally

United States Supreme Court

Metrish v. Lancaster, 569 U.S. 351, 133 S.Ct. 1781, 185 L.Ed.2d 988 (2013)

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.

Wood v. Milyard, 566 U.S. 463, 132 S. Ct. 1826, 182 L. Ed. 2d 733 (2012)

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.

Maples v. Thomas, 565 U.S. 266, 132 S.Ct. 912, 181 L.Ed.2d 807 (2012)

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.

Premo v. Moore, 562 U.S. 115, 131 S.Ct. 733, 178 L.Ed.2d 649 (2011)

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.

Harrington v. Richter, 562 U.S. 86, 131 S.Ct. 770, 178 L.Ed.2d 624 (2011)

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.

Florida v. Powell, 559 U.S. 50, 130 S.Ct. 1195, 175 L.Ed.2d 1009 (2010) 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)).

Holland v. Florida, 560 U.S. 631, 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.

Renico v. Lett, 559 U.S. 766, 130 S.Ct. 1855, 176 L.Ed.2d 678 (2010)

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, 562 U.S. 1, 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.

Porter v. McCollum, 558 U.S. 30, 130 S.Ct. 447, 175 L.Ed.2d 398 (2009)

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)).

Beard v. Kindler, 558 U.S. 53, 130 S.Ct. 612 (2009)

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.

Lawrence v. Florida, 549 U.S. 327, 127 S.Ct. 1079, 166 L.Ed.2d 924 (2007) Under federal law, there is a one-year statute of limitations for seeking federal habeas relief from a state court judgment. The statute is tolled while an application for "State post-conviction or other collateral review" is pending. A state application is not "pending" when a state court has entered a final judgment on the matter but a petition for certiorari has been filed with the United States Supreme Court.

Schriro v. Landrigan, 550 U.S. 465, 127 S.Ct. 1933, 167 L.Ed.2d 836 (2007) Even under the AEDPA, the decision whether to grant an evidentiary hearing is left to the sound discretion of the district court. Generally, an evidentiary hearing should be held where it could "enable an applicant to prove the petition's factual allegations, which, if true, would entitle the applicant to federal habeas relief." An evidentiary hearing is not required if the record refutes the applicant's factual allegations or otherwise precludes habeas relief. Here, the district court did not abuse its discretion by denying an evidentiary hearing.

Carey v. Musladin, 549 U.S. 70, 127 S.Ct. 649, 166 L.Ed.2d 482 (2006) The Court has never considered whether the conduct of a private actor could become so inherently prejudicial as to deprive defendant of a fair trial. Instead, the Court's precedent concerns only prejudice created by government-sponsored practices. Thus, the state court did not act contrary to established Supreme Court precedent by holding that defendant was not denied a fair trial for murder where, during trial, members of the decedent's family wore buttons displaying the decedent's image.

Miller-El v. Cockrell, 537 U.S. 322, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003) A habeas corpus petitioner who seeks to appeal from a federal district court's denial or dismissal of a petition must first obtain a certificate of appealability (COA) from a justice of the court of appeals. Only a threshold inquiry into the merits of the claim is considered in determining whether a COA should be issued. A COA should be granted where the prisoner makes a substantial showing that a constitutional right has been denied; the petitioner discharges this burden by showing that reasonable judges could disagree with the district court's resolution of the petition. The petitioner need not show that he will ultimately prevail on the issue. It was error to deny petitioner's application for a COA concerning a Batson issue on the ground that the petitioner had not shown by clear and convincing evidence that the state court's decision was objectively unreasonable. The question at the COA stage of the proceeding is not whether the lower court's rulings were correct, but whether reasonable courts could disagree.

See also, **Tennard v. Dretke**, 542 U.S. 274, 124 S.Ct. 2562, 159 L.Ed.2d 384 (2004) (the petitioner made a substantial showing that a constitutional right had been denied where he contended that the Texas death penalty statute, which requires the sentencing jury to consider two "special issues" (whether defendant's conduct was deliberate and whether

defendant was likely to be dangerous in the future), did not allow the jury to consider evidence of defendant's low intelligence); **Uttecht v. Brown**, 551 U.S. 1, 127 S.Ct. 2218, 167 L.Ed.2d 1014 (2007) (defendant was not entitled to federal habeas relief).

Wiggins v. Smith, 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003) Federal habeas relief is not proper where the lower court's decision was merely incorrect. The "unreasonable application" provision permits habeas corpus relief where a state court identifies proper governing legal principles, but applies those principles in an "objectively unreasonable" manner. See also, **Ward v. Sternes**, 334 F.3d 696(7th Cir. 2003) (Illinois Appellate Court applied appropriate precedent in objectively unreasonable manner where it found that defendant had knowingly and intelligently waived his right to testify); **Yarborough v. Gentry**, 540 U.S. 1, 124 S.Ct. 1, 157 L.Ed.2d 1 (2003) (the state court's finding - that trial counsel afforded defendant effective assistance of counsel - was not an objectively unreasonable application of clearly established precedent).

Bell v. Cone, 535 U.S. 685, 122 S.Ct. 1843, 152 L.Ed.2d 914 (2002) Where a state court has adjudicated the merits of a federal claim arising from a state conviction, federal habeas relief may be granted only if the state court's decision "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)). The "contrary to" and "unreasonable application" exceptions have independent meaning. Relief may be granted under the "contrary to" clause if the state court: (1) applied a rule differently from the governing law set forth in U.S. Supreme Court cases, or (2) decided a case differently than the U.S. Supreme Court has done on materially indistinguishable facts. Relief may be granted under the "unreasonable application" clause if the state court correctly identified the governing legal principle, but unreasonably applied that principle to the facts of a particular case. An "unreasonable" application of a legal principle is not the same as an "incorrect" application.

Here, the State court did not act "unreasonably." See also, **Penry v. Johnson**, 532 U.S. 782, 121 S.Ct. 1910, 150 L.Ed.2d 9 (2001) (where there were substantial differences between this case and **Estelle v. Smith**, 451 U.S. 454 (1981), the Texas court's denial of defendant's Fifth Amendment claim was not "objectively unreasonable"); **Rompilla v. Beard**, 545 U.S. 374, 125 S.Ct. 2456, 162 L.Ed.2d 360 (2005); **Wright v. Van Patten**, 552 U.S. 120, 128 S.Ct. 743, 169 L.Ed.2d 583 (2008) (the Wisconsin Court of Appeals did not make an unreasonable application of clearly established federal law by finding that **Strickland v. Washington**, rather than **United States v. Cronin**, applies to a claim of ineffective assistance based on the fact that defense counsel participated in a plea hearing by speaker phone).

Lockyer v. Andrade, 538 U.S. 63, 123 S.Ct. 1166, 155 L.Ed.2d 144 (2003) "Clearly established Federal" law refers to the holdings, as opposed to the dicta, of the Supreme Court at the time of the state court decision. Because the Court's holdings had been unclear on whether the Eighth Amendment is violated by imposition of a long sentence for relatively minor offenses under a state's three-strike law, the state court ruling - that the Eighth Amendment was not violated by consecutive terms of 25 years to life for the theft of \$150 of videotapes - was not contrary to "clearly established federal law." In view of the lack of clarity in Supreme Court precedent, the only "clearly established law" was that a largely undefined principle of "gross disproportionality" applies to terms of imprisonment.

Also, the state court's affirmance of the sentence did not involve an "unreasonable application" of the "gross proportionality" principle. An "unreasonable application" does not occur merely because the federal court would have disagreed with the state court concerning the merits of an issue. Accord, [Price v. Vincent](#), 538 U.S. 634, 123 S.Ct. 1848, 155 L.Ed.2d 877 (state court decision was not an objectively unreasonable application of clearly established precedent where its holding agreed with "numerous" holdings of other courts on the same issue).

[Daniels v. U.S.](#), 532 U.S. 374, 121 S.Ct. 1578, 149 L.Ed.2d 590 (2001) Under [Curtis v. U.S.](#), 511 U.S. 485 (1994), a defendant sentenced under the Armed Career Criminal Act of 1984 (18 U.S.C. 924(e)) may not collaterally attack the validity of a previous state conviction used to enhance the federal sentence, unless the prior conviction was obtained in a proceeding at which counsel was not appointed for an indigent defendant. The same rule applies where a defendant attempts to use federal habeas corpus to challenge a federal sentence on the ground that prior state convictions used as enhancement were unconstitutionally obtained. There may be "rare cases" in which a federal habeas corpus action will be allowed because defendant, through no fault of his own, had no "actually available" method of reviewing a prior conviction. However, this case did not require it to reach that question.

Accord, [Lackawanna County District Attorney v. Coss](#), 532 U.S. 394, 121 S.Ct. 1567, 149 L.Ed.2d 608 (2001) (applying Daniels to state prisoner attempting to use federal habeas to challenge prior state convictions used to enhance sentence for subsequent crime, where defendant was no longer incarcerated on allegedly unconstitutional conviction).

[Williams v. Taylor](#), 529 U.S. 362, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000) "Under §2254(d)(1)'s unreasonable application clause, a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable.

[Felker v. Turpin](#), 518 U.S. 651, 116 S.Ct. 2333, 135 L.Ed.2d 827 (1996) The Anti-Terrorism and Effective Death Penalty Act of 1996 was upheld against claims that it violates the Constitution by depriving the Supreme Court of original jurisdiction and suspending the writ of habeas corpus. See also, [Lindh v. Murphy](#), 521 U.S. 320, 117 S.Ct. 2059, 138 L.Ed.2d 481 (1997) (Act does not apply retroactively to non-death habeas cases pending on its effective date, but does apply to pending death penalty cases).

[McFarland v. Scott](#), 512 U.S. 849, 114 S.Ct. 2568, 129 L.Ed.2d 666 (1994) Under 21 USC §848, which provides death penalty defendants with the right to legal counsel during federal habeas corpus proceedings, federal courts are authorized to appoint counsel before a federal habeas petition is filed. Thus, a petitioner who seeks counsel to file a federal habeas petition challenging his death sentence is entitled to have counsel appointed without filing a pro se petition that would be subject to dismissal on its merits. Further, once a petitioner under a state death sentence moves for the appointment of counsel for federal habeas, the federal court has discretion to stay the execution.

[Coleman v. Thompson](#), 501 U.S. 722, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991) Federal courts lack authority to review, either on direct review or on federal habeas, state court interpretations of federal law which also rest on a state ground that is both independent of

the federal issue and adequate to support the judgment. Where the last state court decision rests in whole or part on federal law, federal courts will presume that review is permitted unless the state court opinion clearly and expressly indicates that an adequate and independent state ground exists. But, where the state court's decision rests solely on state procedural default, there is no presumption that federal review is available. In such cases, federal habeas is barred unless defendant establishes either cause to excuse the waiver and actual prejudice or that failure to consider the issue will cause a fundamental miscarriage of justice. The Court explicitly overruled the **Fay v. Noia** (372 U.S. 391 (1963)) "deliberate bypass" rule, which arguably applied instead of the "cause and prejudice" standard when defendant did not take a direct appeal.

Herrera v. Collins, 506 U.S. 390, 113 S.Ct. 853, 122 L.Ed.2d 203 (1993) Claims of actual innocence based on newly-discovered evidence should be resolved through State executive clemency and not through federal habeas corpus. Federal habeas corpus lies only for review of independent constitutional violations and not to relitigate guilt or innocence. "Actual innocence" is relevant not as an independent constitutional claim, but only as a basis for obtaining review of another constitutional violation.

Assuming, for the sake of argument, that the Constitution prohibits the execution of a convicted defendant who makes a "truly persuasive" showing of actual innocence in a state which provides no remedy on that basis, the newly-discovered evidence in this case was not sufficiently persuasive to justify relief.

Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979) A state prisoner is entitled to federal habeas corpus relief if, based upon the evidence adduced at trial, no rational trier of fact could have found proof of guilt beyond a reasonable doubt. The "no evidence" rule of **Thompson v. Louisville**, 362 U.S. 199 (1960) is overruled.

Stone v. Powell, 428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976) A state prisoner may not be granted federal habeas corpus relief on Fourth Amendment grounds unless the state denied him a full and fair litigation on the claim in state courts. See also, **Cardwell v. Taylor**, 461 U.S. 571, 103 S.Ct. 2015, 76 L.Ed.2d 333 (1983) (state defendant could not use habeas to challenge admission of confession resulting from unlawful arrest; there is a distinction between a "casual connection claim under the Fourth Amendment" and a voluntariness claim under the Fifth Amendment, which is a proper claim in a habeas petition); **Withrow v. Williams**, 507 U.S. 680, 113 S.Ct. 1745, 123 L.Ed.2d 407 (1993) (Stone does not apply to Miranda issues).

Hensley v. Municipal Court, 411 U.S. 345, 93 S.Ct. 1571, 36 L.Ed.2d 294 (1973) A convicted defendant who is free on his own recognizance is in "custody."

Carafas v. LaVallee, 391 U.S. 234, 88 S.Ct. 1556, 20 L.Ed.2d 544 (1968) Habeas corpus jurisdiction is not defeated by the release of a prisoner before termination of pending proceedings. See also, **U.S. ex rel. Lawrence v. Woods**, 432 F.2d 1072 (7th Cir. 1970).

Peyton v. Rowe, 391 U.S. 54, 88 S.Ct. 1549, 20 L.Ed.2d 426 (1968) A prisoner may attack, by habeas corpus, the second of two consecutive sentences while he is still serving the first. See also, **Garlotte v. Fordice**, 515 U.S. 39, 115 S.Ct. 1948, 132 L.Ed.2d 36 (1995) (state prisoner serving consecutive three-year and life sentences could challenge offense on which

three-year sentence had been imposed, though he had finished that sentence when he filed the habeas petition).

Jones v. Cunningham, 371 U.S. 236, 83 S.Ct. 373, 9 L.Ed.2d 285 (1963) A person on parole is in "custody" for purposes of habeas corpus.

Hohn v. U.S., 524 U.S. 236, 118 S.Ct. 1969, 141 L.Ed.2d 242 (1998) The Supreme Court has jurisdiction to review a court of appeals decision denying an application for a certificate of appealability.

Stewart v. Martinez-Villareal, 523 U.S. 637, 118 S.Ct. 1618, 140 L.Ed.2d 849 (1998) The restrictions on "successive" habeas corpus petitions enacted by the Antiterrorism and Effective Death Penalty Act do not apply to claims that were raised in a prior petition but not decided by the federal court.

Castro v. U.S., 540 U.S. 375, 124 S.Ct. 786, 157 L.Ed.2d 778 (2003) Although federal courts sometimes recharacterize pro se pleadings as federal habeas petitions, recharacterization is improper unless the court first informs the litigant of its intention to recharacterize and that any subsequent habeas petition will be subject to the restrictions applicable to "second or successive" petitions. Also, the court must provide the litigant an opportunity to withdraw or amend the motion.

Other Federal Court

Taylor v. Grounds, 721 F. 3d 809 (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.

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.)

§9-5(b)

Forfeiture, Exhaustion of State Remedies, and Successive Petitions

United States Supreme Court

[Davila v. Davis](#), 137 S. Ct. 2058, 198 L. Ed. 2d 603 (2017)

1. A defendant must exhaust state remedies before he presents his claim to a federal habeas court. A federal court may not review federal claims that were procedurally defaulted in state court. A defendant may overcome this bar if he can show cause to excuse his failure to comply with state procedural rules and actual prejudice resulting from the constitutional error. To establish cause, a defendant must show that some objective factor external to his defense impeded his ability to comply with the state's procedural rules.

Attorney error is an objective external factor providing cause only if that error amounts to a deprivation of the constitutional right to counsel since such error is imputed to the state. Attorney error that does not violate the constitution is attributed to the defendant under principles of agency law. In proceedings where the constitution does not guarantee the assistance of counsel, attorney error cannot provide cause. Attorney error in a state post-conviction proceeding cannot supply cause since the constitution does not guarantee the right to counsel in those proceedings.

In [Martinez v. Ryan](#), 566 U.S. 1 (2012), the Supreme Court created a narrow equitable qualification of the above rule that applies when state law requires defendants to raise claims of ineffective assistance of trial counsel in state collateral proceedings rather than on direct appeal. In those situations, procedural default will not bar a federal habeas claim of ineffective assistance of trial counsel if the default resulted from the ineffective assistance of counsel in the state collateral proceeding.

2. Defendant was convicted of murder for shooting and killing two people. Defendant confessed to the killings but stated that he wasn't aiming at the people he killed but at someone else. The trial court instructed the jury on transferred intent over trial counsel's objection. On direct appeal in state court, appellate counsel did not challenge the transferred intent instruction. In state habeas proceedings, defendant's counsel did not challenge appellate counsel's failure to raise an issue about the transferred intent instruction.

In federal habeas, defendant argued for the first time that appellate counsel was ineffective for failing to challenge the transferred intent instruction. Defendant conceded that he failed to raise his claim in state habeas but argued that **Martinez** should be extended to claims of ineffective assistance of appellate counsel that are procedurally defaulted due to state habeas counsel's ineffectiveness.

3. The Supreme Court disagreed and declined to extend **Martinez** to claims against appellate counsel. **Martinez** was designed to be a narrow exception to the usual rules of procedural default. The criminal trial is the "main event" where defendants' rights are determined and the stakes are highest. The [Martinez](#) decision was premised on the unique importance of trial rights, particularly the right to effective assistance at trial, and thus the exception created by **Martinez** should be limited to errors by trial counsel. Extending it to appellate counsel would turn a narrow exception into a general rule.

Martinez was also premised on the equitable concern, unique to claims against trial counsel, that state courts could deliberately move the trial-ineffectiveness claims outside of the direct-appeal process, where counsel is constitutionally required, and thus significantly diminish defendants' ability to file such claims. No similar concern is present with respect to claims of ineffective appellate counsel which by their very nature cannot be presented until after the direct appeal.

And finally, opening up claims against appellate counsel could flood the federal courts with defaulted claims and constitute a serious intrusion on state sovereignty. Given the high systemic costs, the unique concerns of **Martinez** are not implicated in cases involving appellate counsel.

Trevino v. Thaler, 569 U.S. 413, 133 S. Ct. 1911, 185 L. Ed. 2d 1044 (2013)

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.

Martinez v. Ryan, 566 U.S. 1, 132 S. Ct. 1309, 1311, 182 L. Ed. 2d 272 (2012)

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."

[Smith v. Texas](#), 550 U.S. 297, 127 S.Ct. 1686, 167 L.Ed.2d 632 (2007) Claim that special issues presented to capital sentencing jury prevented the jury from adequately considering mitigating evidence was properly preserved, notwithstanding state court's characterization of claim as challenging a separate error, arising from a supplemental nullification jury instruction. The state court's holding of procedural default was based on its misunderstanding of the case and federal law, and was not an "independent State ground" that barred relief.

[Panetti v. Quarterman](#), 551 U.S. 930, 127 S.Ct. 2842, 168 L.Ed.2d 662 (2007) Under [Ford v. Wainwright](#), 477 U.S. 399 (1986), a state may not carry out a death sentence against an insane prisoner, even one who was found competent to stand trial.

Congress did not intend to apply the general prohibition on successive habeas petitions where a capital defendant challenges his competency to be executed as soon as that issue becomes ripe, even where defendant failed to raise a competency challenge in his initial habeas proceeding challenging the conviction and death sentence.

The Texas courts' failure to follow the minimum procedures mandated by **Ford** - including the right to a fair hearing at which defendant is allowed to present evidence - represented an unreasonable application of clearly established federal law.

House v. Bell, 547 U.S. 518, 126 S.Ct. 2064, 165 L.Ed.2d 1 (2006) A prisoner who asserts that he is innocent of the crime for which he was convicted, as a means of demonstrating cause and prejudice for a waived issue, may bring a federal habeas action if it is more likely than not that no reasonable juror would have voted to convict had the newly available evidence been considered. In making this determination, the habeas court must consider the effect of the newly-discovered evidence in light of all of the evidence that was presented at trial. Although the "actual innocence" exception applies only in "extraordinary" cases, petitioner is required to show only that it is more likely than not that he would have been acquitted by a reasonable jury; he need not establish an "absolute certainty" of acquittal.

Here, defendant presented sufficient new evidence to establish that a reasonable jury would not have convicted him had it considered all the evidence.

The claim of actual innocence did not render defendant's imprisonment and scheduled execution unconstitutional. Although defendant cast considerable doubt of his guilt, he had not made a sufficient showing of actual innocence to satisfy the "extraordinarily high" standard anticipated by **Herrera v. Collins**, 506 U.S. 390 (1993).

Rhines v. Weber, 544 U.S. 269, 125 S.Ct. 1528, 161 L.Ed.2d 440 (2005) A district court has the discretion to enter stay-and-abeyance orders (as in this case, where the court held petition in abeyance while petitioner pursued his unexhausted claims in state court, instead of dismissing the petition or allowing petitioner to withdraw the unexhausted claims). But, considering that the interplay between the limitations period and the requirement that petitioners not be permitted to proceed on mixed petitions had caused grave problems for petitioners and courts, and that stay-and-abeyance orders frustrate AEDPA's twin objectives of encouraging petitioners to first seek relief in state courts and reducing delays, a stay should be granted only upon a showing of good cause for the failure to exhaust and with reasonable time limits on the petitioner's trip to state court and back. A stay should not be granted if the unexhausted claims are plainly meritless or the petitioner has engaged in intentionally dilatory litigation tactics.

Baldwin v. Reese, 541 U.S. 27, 124 S.Ct. 1347, 158 L.Ed.2d 64 (2004) A petitioner does not "fairly present" his claim to a state court where a petition for discretionary state court review fails to expressly refer to the fact that a federal claim is raised, but the state court could have discovered the federal claim by reading a lower court's opinion. A rule requiring state court justices to read documents other than the petition for discretionary review would impose an undue burden on state courts, and is unnecessary because the petitioner need only identify the federal nature of his claim in order to comply with the exhaustion requirement. Defendant's state court petition for discretionary review, which specifically alleged that trial counsel's conduct violated the Federal Constitution, did not exhaust state remedies concerning a claim that appellate counsel was ineffective.

Banks v. Dretke, 540 U.S. 668, 124 S.Ct. 1256, 157 L.Ed.2d 1166 (2004) The court of appeals erred by dismissing, on procedural grounds, a federal habeas corpus petitioner's claims that prosecutors violated *Brady v. Maryland* by withholding information (that a witness was a paid police informant who set up a visit by defendant so police could develop evidence to use against defendant), which could have been used to discredit key witnesses at a murder trial and death penalty sentencing hearing. Where a *Brady* claim is involved, the "cause" and "prejudice" requirements (for failure to exhaust) parallel two of the requirements for the *Brady* claim itself. "Cause" is shown where defendant's failure to raise the claim in state proceedings was due to the prosecution's suppression of relevant evidence, and "prejudice" is

shown where the suppressed evidence is "material" under Brady. Although defendant did not fully develop the evidentiary basis for his Brady claim in state court, he established "cause" for failing to do so where he did not learn of the suppressed evidence until federal habeas proceedings (though the state knew of the information at the time of defendant's trial). The Court found insignificant defendant's failure to request additional investigative resources during state collateral proceedings.

Massaro v. U.S., 538 U.S. 500, 123 S.Ct. 1690, 155 L.Ed.2d 714 (2003) A person convicted of a federal crime does not waive an ineffective assistance of counsel claim by raising it for the first time in a collateral proceeding, even if the issue could have been raised on direct appeal. To raise ineffective assistance of counsel questions on direct appeal, defendants would frequently force such issues to be decided before an adequate record had been developed, and would cause increased inefficiency in reviewing courts. But, ineffective assistance claims may also be raised on direct appeal, for there may be cases where trial counsel's ineffectiveness is so apparent from the record that appellate counsel should raise it or cases where the appellate court addresses the obvious deficiencies sua sponte.

Duncan v. Walker, 533 U.S. 167, 121 S.Ct. 2120, 150 L.Ed.2d 251 (2001) A federal habeas corpus petition is not a "properly filed application for State post-conviction or other collateral review" under 28 USC §224(d)(2), which provides that the statute of limitations for a federal habeas petition is tolled while such an application is pending. Congress intended to provide an incentive to exhaust state remedies before proceeding to federal collateral proceedings, and the statute of limitations is therefore tolled only for post-conviction proceedings that occur under state law.

Edwards v. Carpenter, 529 U.S. 446, 120 S.Ct. 1587, 146 L.Ed.2d 518 (2000) A federal constitutional issue set forth to satisfy the "cause and prejudice" test for claims that have been procedurally defaulted is itself subject to the requirement that constitutional issues must be presented to state courts before they may be raised in federal habeas corpus proceedings. Where defendant alleged that his failure to raise a federal issue in state court was caused by appellate counsel's ineffectiveness, but the ineffectiveness issue had not been raised in state court within the time limits provided by state law, defendant was required to satisfy the "cause and prejudice" standard as to the ineffective assistance claim as well.

Slack v. McDaniel, 529 U.S. 473, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000) Where a petition is dismissed for failure to exhaust state remedies, and the petitioner returns to federal court after exhausting state remedies, the renewed petition is not a "second or successive petition" for purposes of Rule 9(b), which held that a "second or successive petition" alleging new and different grounds may be dismissed if the judge finds that the failure to assert the issues in a prior petition constituted an "abuse of the writ." See also, **Stewart v. Martinez-Villareal**, 523 U.S. 637, 118 S.Ct. 1618, 140 L.Ed.2d 849 (1998) (same).

Williams v. Taylor, 529 U.S. 420, 120 S.Ct. 1479, 146 L.Ed.2d 435 (2000)

1. Under 28 USC §2254(e)(2), as amended by the Antiterrorism and Effective Death Penalty Act, where a federal habeas petitioner "has failed to develop the factual basis of a claim in state court proceedings," an evidentiary hearing is allowed only if: (1) the claim relies on a new rule of constitutional law that was previously unavailable or a factual predicate that could not have been previously discovered through the exercise of due diligence, and (2)

the facts show by clear and convincing evidence that defendant would not have been convicted absent the error.

2. The phrase "the applicant has failed to develop the factual basis of a claim in state court proceedings" was intended to preclude an evidentiary hearing only where the failure to develop the factual basis was the result of a "lack of diligence, or some greater fault, attributable to the prisoner" or his attorney.

3. Here, the record showed a lack of diligence as to a Brady claim, but did not show lack of diligence concerning claims that a juror failed to disclose her possible bias against defendant and the prosecutor failed to disclose his knowledge of the juror's possible bias.

4. Petitioner did not waive the claim by failing to raise it in state court once he learned of it. By the time petitioner's investigator for federal habeas uncovered the information, the state habeas action had been completed.

O'Sullivan v. Boerckel, 526 U.S. 838, 119 S.Ct. 1728, 144 L.Ed.2d 1 (1999)

1. To exhaust state remedies, a state prisoner must give state courts "one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process." An Illinois criminal defendant exhausts state remedies only by presenting his habeas issues in a petition for leave to appeal to the Illinois Supreme Court.

2. A state prisoner need not file repetitive petitions in state court once a petition on the same point has been denied, and need not invoke extraordinary remedies that are alternatives to the standard process of review (at least "where the state courts have not provided relief through those remedies in the past"). Instead, the exhaustion doctrine requires only that state courts be given a fair opportunity to act on a claim.

3. An "unavailable" state remedy need not be exhausted. The court concluded, however, that [Illinois Supreme Court Rule 315\(a\)](#), which specifies considerations used to determine whether to hear a particular case as "a matter of sound judicial discretion," merely sets forth factors that the Illinois Supreme Court may consider in deciding whether to grant leave to appeal. Because the court "is free to take cases that do not fall easily within the description listed in the Rule," the specification of certain factors does not mean that review is "unavailable" where none of the specified factors is present.

Strickler v. Greene, 527 U.S. 263, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999) Defendant showed sufficient "cause" for failing to raise a Brady v. Maryland claim in state collateral proceedings. However, defendant showed insufficient "prejudice" to excuse the default.

Bousley v. U.S., 523 U.S. 614, 118 S.Ct. 1604, 140 L.Ed.2d 828 (1998) "Actual innocence" means "factual innocence," not merely that the evidence was legally insufficient. Because the lower court did not determine whether the petitioner could satisfy the "actual innocence" test, the cause was remanded for a hearing at which the government could present all its evidence concerning defendant's guilt, whether or not it had presented that evidence at the original guilty plea proceeding.

Trest v. Cain, 522 U.S. 87, 118 S.Ct. 478, 139 L.Ed.2d 444 (1997) In a habeas proceeding, the court of appeals is not "required" to raise the issue of procedural default sua sponte. The court declined to consider the circumstances under which the court of appeals should reach an issue of procedural default that has not been raised by the parties.

Lonchar v. Thomas, 517 U.S. 314, 116 S.Ct. 1293, 134 L.Ed.2d 440 (1996) In a capital case, a federal district court may dismiss a first habeas corpus petition only if it can do so on the

merits. Courts lack authority to dismiss a first habeas petition for equitable reasons (i.e., "abuse of the writ"); the authority to dismiss for abuse of the writ applies only where defendant has previously filed at least one habeas petition. It was irrelevant that defendant filed his petition at the "eleventh hour" and only because he hoped to delay his execution. Neither the timing of the petition nor petitioner's motivation is relevant to whether a first habeas petition must be considered. Also, unless the trial court is able to dismiss a first habeas petition on the merits before the petitioner is executed, it is obligated to issue a stay of execution.

Schlup v. Delo, 513 U.S. 298, 115 S.Ct. 851, 130 L.Ed.2d 808 (1995) Where a habeas petitioner claims actual innocence to avoid a finding that constitutional errors have been procedurally defaulted, he needs show only that "it is more likely than not that no reasonable juror would have found [him] guilty" in the absence of the error. See, **Murray v. Carrier**, 477 U.S. 478 (1986). In making this determination, the court may consider relevant evidence that was either excluded or unavailable at trial, and must presume that a reasonable juror would fairly consider all evidence and follow the court's instructions. The Court also stressed that the Carrier standard is not as strict as that applied to reasonable doubt claims (that no reasonable juror could have voted to convict), because under Carrier the court may consider matters of credibility and must focus on the trier of fact's "likely behavior" instead of on whether there is any evidence to support the verdict. Because the lower courts did not apply Carrier to defendant's claims, the Court remanded the cause for further proceedings.

Duncan v. Henry, 513 U.S. 364, 115 S.Ct. 887, 130 L.Ed.2d 865 (1995) To exhaust state remedies on a federal claim, a defendant must "fairly present" the claim to the state courts, so that the prosecution has an opportunity to correct the denial of federal rights. A defendant who raises an issue only in terms of state law does not "fairly present" his federal claims and therefore does not exhaust state remedies.

McCleskey v. Zant, 499 U.S. 467, 111 S.Ct. 1454, 113 L.Ed.2d 517 (1991) The "abuse of the writ" doctrine, which bars a defendant from filing a second habeas corpus petition raising claims that could have been argued in his first petition, applies not only where the claim was actually raised and abandoned in the earlier petition, but also where it was omitted from the first petition through inexcusable neglect. Where a second or subsequent habeas petition is filed, and the prosecution pleads abuse of the writ, petitioner has the burden to show sufficient "cause and prejudice" to excuse his failure to raise the claim earlier. Petitioner in this case could not show sufficient cause to excuse his failure to raise a Massiah issue in his first habeas petition. Although additional factual support was discovered before the second petition was filed, there was a sufficient factual basis to allege the claim in the original petition.

Castille v. Peoples, 489 U.S. 346, 109 S.Ct. 1056, 103 L.Ed.2d 380 (1989) The exhaustion requirement is not satisfied by the presentation of a claim, for the first and only time, to the state's highest court in a petition for discretionary review.

Harris v. Reed, 489 U.S. 255, 109 S.Ct. 1038, 103 L.Ed.2d 308 (1989) The "plain statement" rule applies to federal habeas petitions. Thus, procedural default will not bar consideration of a federal claim on habeas review unless the last state court rendering judgment in the case clearly and expressly stated that the judgment rested on state procedural bar. Here, the state

appellate court did not clearly and expressly rely on waiver as ground for rejecting petitioner's ineffective assistance of counsel claim.

Murray v. Carrier, 477 U.S. 478, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986) An issue not properly raised in state court cannot be raised on federal habeas, unless defendant shows "cause" for the procedural default and "prejudice" from the error. "Cause" ordinarily turns on whether some objective factor external to the defense impeded counsel's efforts to comply with the state's procedural rule. "Objective factors" include the novelty of the claim, interference by officials so as to make compliance with the procedural rule unpracticable, and ineffective assistance of counsel. When the "cause" is ineffective assistance of counsel, that issue must first be presented to the state courts. See also, **Reed v. Ross**, 468 U.S. 1, 104 S.Ct. 2901, 82 L.Ed.2d 1 (1984); **Dugger v. Adams**, 489 U.S. 401, 109 S.Ct. 1211, 103 L.Ed.2d 435 (1989); **Francis v. Henderson**, 425 U.S. 536, 96 S.Ct. 1708, 48 L.Ed.2d 149 (1976) (defendant, who challenged the composition of the grand jury, failed to make the requisite showing to avoid procedural default).

Kuhlmann v. Wilson, 477 U.S. 436, 106 S.Ct. 2616, 91 L.Ed.2d 364 (1986) Federal courts should entertain successive habeas petitions only in "rare instances" when the "ends of justice" so require. The "ends of justice" require that such petitions be considered "only where the prisoner supplements his constitutional claim with a colorable showing of factual innocence." See also, **Woodard v. Hutchins**, 464 U.S. 377, 104 S.Ct. 752, 78 L.Ed.2d 541 (1984); **Sanders v. U.S.**, 373 U.S. 1, 83 S.Ct. 1068, 10 L.Ed.2d 148 (1963).

Murray v. Carrier, 477 U.S. 478, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986) There is an exception to the "cause" requirement "where a constitutional violation has probably resulted in the conviction of one who is actually innocent." The case was remanded to determine whether the undisclosed material would establish defendant's actual innocence. See also, **Smith v. Murray**, 477 U.S. 527, 106 S.Ct. 2661, 91 L.Ed.2d 434 (1986).

Rose v. Lundy, 455 U.S. 509, 102 S.Ct. 1198, 71 L.Ed.2d 397 (1982) A state prisoner may not seek federal habeas relief without exhausting state remedies for all claims made. The district court must dismiss any habeas petition which contains both exhausted and unexhausted claims. Upon dismissal, the petitioner may either exhaust all claims before refiling or refile only on his exhausted claims.

Anderson v. Harless, 459 U.S. 4, 103 S.Ct. 276, 74 L.Ed.2d 3 (1982) Petitioner failed to exhaust state remedies where in state court he challenged a jury instruction only on state grounds, without raising the substance of his federal claims.

Engle v. Isacc, 456 U.S. 107, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982) Petitioners were barred from bringing their claims (that the erroneous jury instructions denied them due process) because they failed to timely object in the state courts and failed to show prejudice. See also, **Wainwright v. Sykes**, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977).

Francisco v. Gathright, 419 U.S. 59, 95 S.Ct. 257, 42 L.Ed.2d 226 (1974) Once state remedies have been exhausted, the cause will not be resubmitted to state courts despite a change in State law that would benefit the petitioner.

Pitchess v. Davis, 421 U.S. 482, 95 S.Ct. 1748, 44 L.Ed.2d 317 (1975) Denial of an extraordinary writ (here, a writ of prohibition) by state court did not exhaust state remedies. The denial of an extraordinary writ does not constitute an adjudication on the merits of the claim presented, and does not bar raising the same claim on direct appeal if respondent is convicted. See also, **U.S. ex rel. Green v. Pate**, 411 F.2d 884 (7th Cir. 1969); **U.S. ex rel. Millner v. Pate**, 425 F.2d 249 (7th Cir. 1970).

Smith v. Digmon, 434 U.S. 332, 98 S.Ct. 597, 54 L.Ed.2d 581 (1978) Federal court erred by assuming that habeas petitioner failed to raise federal constitutional claim in state courts merely because lower court opinion contained no reference to such claim.

Lefkowitz v. Newsome, 420 U.S. 283, 95 S.Ct. 886, 43 L.Ed.2d 196 (1975) Where state law allows a defendant to plead guilty without forfeiting the right to judicial review of certain constitutional issues in state courts, defendant is not foreclosed from pursuing those claims in federal habeas corpus proceedings. **Compare, Tollett v. Henderson**, 411 U.S. 258, 93 S.Ct. 1602, 36 L.Ed.2d 235 (1973). **See also, Menna v. New York**, 423 U.S. 61, 96 S.Ct. 241, 46 L.Ed.2d 195 (1975) (a plea of guilty in State court does not waive double jeopardy); **Blackledge v. Perry**, 417 U.S. 21, 94 S.Ct. 2098, 40 L.Ed.2d 628 (1974) (the entry of a guilty plea to a felony charge did not preclude raising a due process claim in federal habeas corpus proceedings, where the claim went to the very power of the state to bring the petitioner into court to answer the charges against him).

Picard v. Connor, 404 U.S. 270, 92 S.Ct. 509, 30 L.Ed.2d 438 (1971) The substance of all federal habeas corpus claims must first be presented to the state courts. To exhaust state remedies, defendant must have presented to the state courts a specific federal constitutional guarantee as well as a statement of facts that entitle the petitioner to relief. State remedies are not exhausted by presentation of only the facts necessary to state a claim for relief or by making only a general reference to a broad constitutional guarantee (such as due process). See also, **Gray v. Netherland**, 518 U.S. 152, 116 S.Ct. 2074, 135 L.Ed.2d 457 (1996) (to exhaust state remedies defendant must both allege that specific constitutional provision was violated and set forth the facts entitling him to relief; however, State must allege procedural default in federal court to avoid waiving argument).

Brown v. Allen, 344 U.S. 443, 73 S.Ct. 397, 97 L.Ed. 469 (1953) Once a petitioner has presented his claim to the state's highest court on direct appeal, he has "exhausted" state remedies. See also, **U.S. ex rel. Latimore v. Sielaff**, 561 F.2d 691 (7th Cir. 1977); **U.S. ex rel. Williams v. Brantley**, 502 F.2d 1383 (7th Cir. 1974) (petitioner who appealed conviction in Illinois courts exhausted state remedies when post-conviction petition was dismissed on the ground of res judicata; he was not required to appeal the latter ruling). But see, **Nutall v. Greer**, 764 F.2d 462 (7th Cir. 1985) (petitioner did not exhaust state remedies where he failed to file a petition for leave to appeal from the appellate court decision).

§9-5(c)

Procedure

White v. Woodall, 572 U.S. 415, 134 S. Ct. 1697, 188 L. Ed. 2d 698 (2014)

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.

Johnson v. Williams, 568 U.S. 289, 133 S. Ct. 1088, 185 L. Ed. 2d 105 (2013)

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.

Burt v. Titlow, 571 U.S. 12, 134 S. Ct. 10, 187 L. Ed. 2d 348 (2013)

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.

Ryan v. Gonzales, 568 U.S. 57, 133 S. Ct. 696, 184 L. Ed. 2d 528 (2013)

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.

McQuiggin v. Perkins, 569 U.S. 383, 133 S. Ct. 1924, 185 L. Ed. 2d 1019 (2013)

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.

Cullen v. Pinholster, 563 U.S. 170, 131 S. Ct. 1388, 179 L. Ed. 2d 557 (2011)

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.

Fry v. Pliler, 551 U.S. 112, 127 S.Ct. 2321, 168 L.Ed.2d 16 (2007) On federal habeas review, the standard of harmlessness is whether the error "had substantial and injurious effect or influence in determining the jury's verdict." (See **Brecht v. Abrahamson**, 507 U.S. 619 (1993)).

Tyler v. Cain, 533 U.S. 656, 121 S.Ct. 2478, 150 L.Ed.2d 632 (2001) A claim that was not presented in a previous habeas petition must be dismissed unless it: (1) is predicated on newly discovered facts that call into question the accuracy of the guilty verdict, or (2) involves a previously unavailable "new rule" of constitutional law that has been made "retroactive to cases on collateral review by the Supreme Court." A new rule has "been made retroactive to cases on collateral review by the Supreme Court" only where the U.S. Supreme Court has specifically held that the rule is retroactive, either in a single case or in a combination of rulings which "necessarily dictate retroactivity." **Cage v. Louisiana**, 498 U.S. 39 (1990), which held that a jury instruction that was reasonably likely to be interpreted as permitting conviction without proof beyond a reasonable doubt violated the constitution, has not been made retroactive to cases on collateral review.

Slack v. McDaniel, 529 U.S. 473, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000) Habeas corpus appeals initiated after April 24, 1996 - the effective date of the Antiterrorism and Effective Death Penalty Act of 1996 - are subject to the procedural provisions of the act. **Lindh v. Murphy**, 521 U.S. 320 (1997), which held that the AEDPA did not apply to cases filed in district court before the effective date of the Act, concerned only trial court proceedings and did not purport to determine the procedure for appeals.

Slack v. McDaniel, 529 U.S. 473, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000) Where the district court denies a federal habeas corpus petition on procedural grounds, without reaching the underlying constitutional issue, a certificate of appealability should be issued where the petitioner shows that: (1) "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right," and (2) "jurists of reason would find it debatable whether the district court was correct in its procedural ruling." See also, **Banks v. Dretke**, 540 U.S. 668, 124 S.Ct. 1256, 157 L.Ed.2d 1166 (2004) (the lower courts erred by denying defendant a certificate of appealability because the issue in question was one on which reasonable jurists could disagree).

Thompson v. Keohane, 516 U.S. 99, 116 S.Ct. 457, 133 L.Ed.2d 383 (1995) State court "in custody" determinations (i.e., determinations regarding whether defendant was in custody

for Miranda purposes) are not factual findings entitled to a presumption of correctness. In the context of [28 U.S.C. §2254\(d\)](#), the only factual issues entitled to a presumption of correctness are those concerning "basic, primary, or historical facts"; in other words, facts "in the sense of a recital of external events and the credibility of their narrators." Where an issue involves questions of law or "mixed" questions of law and fact, as with "in custody determinations," no presumption of correctness attaches to state court findings and such determinations must be independently reviewed (though a presumption of correctness applies to the trial court's findings regarding the circumstances of the interrogation).

[O'Neal v. McAninch](#), 513 U.S. 432, 115 S.Ct. 992, 130 L.Ed.2d 947 (1995) A habeas corpus petitioner does not bear the burden to establish that constitutional error was prejudicial; instead, reversal is required unless the error had no "substantial and injurious" effect on the verdict. In the rare case in which the district judge's evaluation of the error is "so evenly balanced that he feels himself in virtual equipoise as the harmlessness of the error," habeas corpus relief must be granted.

[Parke v. Raley](#), 506 U.S. 20, 113 S.Ct. 517, 126 L.Ed.2d 391 (1992) Due process does not prohibit a state from requiring that the defense rebut a presumption of validity concerning prior convictions introduced to impose an enhanced sentence.

[Withrow v. Williams](#), 507 U.S. 690, 113 S.Ct. 1745, 123 L.Ed.2d 407 (1993) The district court erred by granting habeas relief on an issue that was never raised or argued by the parties.

[Keeney v. Tamayo-Reyes](#), 504 U.S. 1, 112 S.Ct. 1715, 118 L.Ed.2d 318 (1992) The 'deliberate bypass' standard does not apply when determining whether a habeas petitioner is entitled to an evidentiary hearing. Instead, petitioner must establish sufficient cause to excuse the failure to develop the record and actual prejudice resulting from that failure. The "cause and prejudice" standard serves the same purposes in this situation as where a state claim has been waived.

Also, the "fundamental fairness" exception applies to the cause-and-prejudice standard, so that a habeas petitioner may obtain an evidentiary hearing if a fundamental miscarriage of justice would otherwise result.

Finally, because there is no federal constitutional right to the effective assistance of counsel in state collateral proceedings, an attorney's poor performance in developing the record in state court will not be "cause" for purposes of requiring a federal hearing.

[Wainwright v. Witt](#), 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985) The presumption of correctness as to state court findings on factual issues applies to findings in regard to juror qualifications. See also, [Patton v. Yount](#), 467 U.S. 1025, 104 S.Ct. 2885, 81 L.Ed.2d 847 (1984).

[Miller v. Fenton](#), 474 U.S. 104, 106 S.Ct. 445, 88 L.Ed.2d 405 (1985) The voluntariness of a confession is not an issue of fact that is entitled to a presumption of correctness, but is instead a legal question calling for independent consideration by the federal habeas court.

[Maggio v. Fulford](#), 462 U.S. 111, 103 S.Ct. 2261, 76 L.Ed.2d 794 (1983) State court determination that defendant was competent to stand trial was "fairly supported by the

record," and federal court's conclusion to the contrary was improper, for the federal court erroneously substituted its judgment as to credibility of witnesses for that of the state court.

Sumner v. Mata, 449 U.S. 539, 101 S.Ct. 764, 66 L.Ed.2d 722 (1981) Requirement that federal courts explain their reasons for not presuming the correctness of state court factual findings applies to such findings of state trial and reviewing courts.

U.S. v. MacCollom, 426 U.S. 317, 96 S.Ct. 2806, 48 L.Ed.2d 666 (1976) Statute providing that petitioner is to be given a free transcript if "the trial judge certifies that the suit or appeal is not frivolous and that the transcript is needed to decide the issue presented" upheld.

Browder v. Department of Corrections, 434 U.S. 257, 98 S.Ct. 556, 54 L.Ed.2d 521 (1978) Federal rules of civil procedure, which require a notice of appeal to be filed within 30 days of final judgment unless rehearing is requested within 10 days, apply to habeas corpus proceedings.

Harris v. Nelson, 394 U.S. 286, 89 S.Ct. 1082, 22 L.Ed.2d 281 (1969) Though the rules of civil procedure do not apply to habeas corpus proceedings, federal courts may fashion appropriate modes of procedure by analogy to existing rules.

Other Federal Court

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.

§9-5(d)

Effect of Decisions and Retroactivity

United States Supreme Court

Montgomery v. Louisiana, 136 S. Ct. 718, 193 L. Ed. 2d 599 (2016), as revised (Jan. 27, 2016)

Under **Teague v. Lane**, 49 U. S. 288 (1989), a new constitutional rule of criminal procedure applies to final convictions only if the rule is a "watershed rule of criminal procedure" which implicates the fundamental fairness and accuracy of criminal proceedings. However, courts must give retroactive effect to new substantive rules of constitutional law. Substantive rules include rules which forbid criminal punishment of certain primary conduct as well as those which prohibit a certain category of punishment for a class of defendants because of their status or offense.

Although **Teague** arose in the context of a federal *habeas corpus* proceeding, when a new substantive rule of constitutional law controls the outcome of a case the States are constitutionally required to give retroactive effect to that rule in State collateral proceedings. The court stressed that substantive constitutional rules place certain persons or punishments beyond the State's criminal enforcement power, and that by definition a conviction or sentence is unlawful where it is created by an unconstitutional provision.

Welch v. United States, 578 U.S. ___, 136 S. Ct. 1257, 194 L. Ed. 2d 387 (2016)

Under **Teague**, new constitutional rules of criminal procedure do not as a general matter apply retroactively to cases that are on collateral review when the new rules were announced. New substantive rules, however, do generally apply retroactively. "A rule is substantive rather than procedural if it alters the range of conduct or the class of persons that the law punishes." This includes rules that narrow the scope of a criminal statute or that place particular conduct or persons beyond the State's power to punish. A procedural rule, by contrast, alters the permissible methods for determining whether a defendant's conduct is punishable.

In **Johnson v. United States**, 576 U.S. ___, 135 S.Ct. 2551, 192 L.Ed.2d 569 (2015), the court held that certain provisions of the Armed Career Criminal Act, under which a defendant could receive a much longer sentence, were unconstitutionally void for vagueness. Defendant was sentenced under those provisions, but his conviction became final before **Johnson** was decided, forcing defendant to attack his sentence in a collateral proceeding.

The court held that **Johnson** applied retroactively to defendant's case. By striking down the relevant provisions of the act, **Johnson** changed the substantive reach of the act. Before **Johnson**, a defendant who violated the relevant provisions of the act faced a sentence of 15 years to life. After **Johnson**, a defendant guilty of the same conduct would only face up to 10 years in prison. Even with the use of impeccable fact-finding procedures, the greater sentence could no longer be imposed. **Johnson** thus involved a new substantive rule, and as such applies retroactively to cases on collateral review.

Chaidez v. United States, 568 U.S. 342, 133 S. Ct. 1103, 185 L. Ed. 2d 149 (2013)

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**.

Danforth v. Minnesota, 552 U.S. 264, 128 S.Ct. 1029, 169 L.Ed.2d 859 (2008) **Teague** applies only to federal habeas corpus proceedings. **Teague** does not restrict a state court from applying a broader rule of retroactivity by choosing to apply "new" federal rules in state court proceedings. The remedy a state court chooses to provide for violations of the Federal Constitution is primarily a question of state law. The Minnesota Supreme Court erred by finding that it lacked authority to apply *Crawford v. Washington* more broadly than the United States Supreme Court has done in federal habeas proceedings.

Teague v. Lane, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989) "[H]abeas corpus cannot be used . . . to create new constitutional rules of criminal procedure unless those rules would be applied retroactively to all defendants on collateral review through one of the two exceptions": (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 new procedures without which the likelihood of an accurate conviction is seriously diminished. See also, **Bousley v. U.S.**, 523 U.S. 614, 118 S.Ct. 1604, 140 L.Ed.2d 828 (1998) (**Teague** by definition applies only to new procedural rules).

Whorton v. Bockting, 549 U.S. 406, 127 S.Ct. 1173, 167 L.Ed.2d 1 (2007) A "new" rule generally applies only to cases that were still on direct review when the new rule was announced. But, a "new" rule applies to a collateral proceeding if either of two exceptions applies. The first exception permits retroactive application of a "new" rule that places a class of private conduct beyond the power of the State to proscribe or addresses a "substantive categorical guarante[e] accorded by the Constitution." The second exception is for "watershed rules of criminal procedure" which implicate the fundamental fairness and accuracy of the criminal proceeding.

To qualify for the "watershed" exception, a "new" rule must: (1) be necessary to prevent an impermissibly large risk of inaccurate convictions, and (2) "alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding." To satisfy the latter requirement, the new rule must constitute a "previously unrecognized bedrock procedural element that is essential to the fairness of a proceeding."

Crawford v. Washington does not apply retroactively on collateral review -- **Crawford** is not essential to avoid the possibility of an inaccurate verdict and did not "alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding."

Horn v. Banks, 536 U.S. 266, 122 S.Ct. 2147, 153 L.Ed.2d 301 (2002) Under **Caspari v. Bohlen**, 510 U.S. 383 (1994), if the prosecution argues that under **Teague** a particular defendant is not entitled to the benefit of a new rule of constitutional law, the federal habeas court must resolve that claim before considering the merits of the issue.

Penry v. Lynaugh, 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989) New rules will not be applied or announced in habeas proceedings unless they fall into one of the two exceptions set out in **Teague**. See also, **Allen v. Hardy**, 478 U.S. 255, 106 S.Ct. 2878, 92 L.Ed.2d 199 (1986); **Butler v. McKeller**, 494 U.S. 407, 110 S.Ct. 1212, 108 L.Ed. 347 (1990); **Saffle v. Parks**, 494 U.S. 484, 110 S.Ct. 1257, 108 L.Ed.2d 415 (1990); **Sawyer v. Smith**, 497 U.S. 227, 110 S.Ct. 2822, 111 L.Ed.2d 193 (1990).

Lambrich v. Singletary, 520 U.S. 518, 117 S.Ct. 1517, 137 L.Ed.2d 771 (1997) To determine whether a "rule" is new under **Teague**, a three-step analysis is required. First, the court must determine the date on which defendant's conviction became final. It must then "survey the legal landscape as it then existed" and determine whether a state court considering defendant's claim "at the time his conviction became final would have felt compelled by existing precedent to conclude that the rule [he] seeks was required by the constitution." If a state court would not have felt "compelled" to adopt the holding when defendant's conviction became final, the rule is "new" for **Teague** purposes. Once the court determines that

petitioner seeks the benefit of a "new" rule, it must consider whether the relief sought falls within one of the two narrow exceptions to the **Teague** doctrine.

Graham v. Collins, 506 U.S. 461, 113 S.Ct. 892, 122 L.Ed.2d 260 (1993) A holding is a "new rule" where it is not "dictated" by precedent existing at the time the conviction became final. Therefore, unless "reasonable jurists" would have felt compelled to accept defendant's claim at the time of his conviction, the holding is a "new rule." Here, the Court did not consider defendant's argument because the holding defendant seeks would constitute a "new rule" under **Teague**. Further, none of the **Teague** exceptions (for rules which decriminalize a certain class of conduct, prohibit the imposition of capital punishment on a particular class, or concern "watershed rules of criminal procedure") is involved in this case. See also **People v. Moore**, 177 Ill.2d 421, 686 N.E.2d 587 (1997) (the mere existence of contrary precedent does not necessarily mean that a rule is "new" for **Teague** purposes; a question is not susceptible to debate among reasonable minds merely because a court has adopted an illogical and unreasonable interpretation of the law).

Schrior v. Summerlin, 542 U.S. 348, 124 S.Ct. 2519, 159 L.Ed.2d 442 (2004) Where a conviction has become final, new substantive rules generally apply retroactively. But, a "new" procedural rule applies retroactively to a final conviction only if it involves a fundamental process without which the likelihood of an accurate verdict is seriously diminished.

O'Dell v. Netherland, 521 U.S. 151, 117 S.Ct. 1969, 138 L.Ed.2d 351 (1997) "[W]e will not disturb a final state conviction or sentence unless it can be said that a state court, at the time the conviction or sentence became final, would have acted objectively unreasonably by not extending the relief later sought in federal court."

Schiro v. Farley, 510 U.S. 222, 114 S.Ct. 783, 127 L.Ed.2d 47 (1994) The Court declined to consider the State's argument (that granting relief would violate **Teague**), which the State did not raise in the district court, the court of appeals, or in its brief in opposition to certiorari. In so doing, the Court noted that it relies "heavily on the submissions of the parties at the petition stage" and "grant[s] certiorari in the expectation of being able to decide that issue."

Caspari v. Bohlen, 510 U.S. 383, 114 S.Ct. 948, 127 L.Ed.2d 236 (1994) While a federal court is not required to raise **Teague sua sponte**, a **Teague** issue that is raised by the prosecution must be resolved before the merits of the case may be reached.

Illinois Supreme Court

People v. Smith, 2015 IL 116572

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.

[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)).

[People ex rel. Madigan v. Snyder, 208 Ill.2d 457, 804 N.E.2d 546 \(2004\)](#) Defendants who had received federal habeas corpus relief in death cases and who were awaiting resentencing were under "death sentences" and therefore subject to the governor's clemency powers. A federal court that issues a writ of habeas corpus has no authority to revise or modify a state court judgment, and can merely order that the petitioner be released unless the state undertakes appropriate proceedings to correct federal constitutional violations in the proceedings that led to the conviction or sentence. The same is true even if the federal court's order erroneously stated that it was "vacating" the sentence.

[People v. Hickey, 204 Ill.2d 585, 792 N.E.2d 232 \(2001\)](#) The new Supreme Court Rules for capital trial proceedings do not, by their terms, apply retroactively to cases in which convictions were entered before the rules became effective. In addition, because the new rules do not establish a constitutional standard, retroactive analysis under **Teague** is inapplicable.

[People v. Hudson, 195 Ill.2d 117, 745 N.E.2d 1246 \(2001\)](#) Because judicial opinions announcing new constitutional rules in criminal cases are retroactive to all cases pending on direct review at the time the new rule was declared, and defendant's petition for writ of certiorari was pending when [J.E.B. v. Alabama, 511 U.S. 127 \(1994\)](#) was decided, defendant was entitled to have J.E.B. applied to his case. See also [People v. Ford, 198 Ill.2d 68, 761 N.E.2d 735 \(2001\)](#) (Apprendi is applicable to cases that were on direct appeal when Apprendi was decided by the United States Supreme Court; defendant was entitled to application of Apprendi although he raised the issue for the first time in an untimely petition for rehearing in the appellate court).

Illinois Appellate Court

People v. Smith, 2016 IL App (1st) 140887

1. The post-conviction hearing act typically contemplates the filing of only one petition. The court may normally only allow a defendant to file a successive petition if he demonstrates cause and prejudice. [725 ILCS 5/122-1](#). But under the void-sentence rule, a sentence which is not authorized by statute is void and may be subject to collateral attack at any time.

2. In a successive post-conviction petition, defendant argued his extended-term sentences were unauthorized by statute and hence void. The trial court denied leave to file the successive petition. On appeal, defendant argued that the trial court improperly dismissed his successive petition since his sentences were void and subject to attack at any time.

After defendant filed his opening brief, the Supreme Court decided **People v. Castleberry**, 2015 IL 116916, abolishing the void-sentence rule. Defendant argued in his reply that since **Castleberry** created a new rule, it should not apply retroactively to cases on collateral review, and thus the void-sentence rule should apply to his case, allowing him to challenge his sentence in a successive petition.

3. Under **Teague v. Lane**, 486 U.S. 288 (1989), a judicial decision that establishes a new rule applies to all criminal cases pending on direct review, but does not apply (with two exceptions inapplicable here) to cases on collateral review. A decision creates a new rule if the result was not dictated by precedent existing at the time defendant's conviction became final.

The Appellate Court held that **Castleberry** did not create a new rule. Instead it abolished an old rule and thereby reinstated the rule that existed before the void-sentence rule was established by **People v. Arna**, 168 Ill. 2d 107 (1995).

Since **Castleberry** “did not announce a new rule and cannot be applied retroactively,” defendant could properly challenge his sentences in a successive post-conviction petition. The court vacated the extended-term portion of defendant's sentences.

People v. Cashaw, 2016 IL App (4th) 140759 Under **Teague v. Lane**, 489 U.S. 288 (1989), new rules of criminal procedure generally do not apply retroactively to final convictions and hence cannot be used in a postconviction attack on a conviction that became final prior to the announcement of the new rule. Illinois has adopted the **Teague** rule to govern retroactivity in State collateral proceedings.

Teague's purpose is to protect the State's interest in final judgments. **Teague** thus only applies when a defendant seeks to overturn his conviction by retroactively applying a new rule that is favorable to him. Under **Teague**, the State, but not the defendant, may object to the application of a new rule to a case on collateral review.

The court held that **People v. Castleberry**, 2015 IL 116916, applied retroactively to defendant's postconviction case for two reasons. First, **Castleberry** did not announce a new rule. Instead, it merely abolished the void sentence rule and thereby reinstated the rule in effect before the void sentence rule was created. Second, in this case defendant sought to prevent the application of a new rule to a collateral proceedings not to preserve the finality of a judgment, but to disturb its finality. A defendant cannot use **Teague** to argue that a new rule should not apply when the defendant is seeking to overturn a judgment.

The court thus concluded that although defendant's fine would have been considered void prior to **Castleberry**, once the rule in **Castleberry** applied to his case, the fine was no longer void and could not be challenged in a successive collateral proceeding.

People v. Greco, 2014 IL App (1st) 112582 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.

People v. Johnson, 2013 IL App (5th) 110112 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 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.’”

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. 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.

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.

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.

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.

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**.

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.

People v. Edgeston, 396 Ill. App. 3d 514, 920 N.E.2d 467 (2d Dist. 2009)

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. Rodriguez, 355 Ill.App.3d 290, 823 N.E.2d 224 (2d Dist. 2005) Defendant, a juvenile, was tried as an adult in 1993 under 705 ILCS 5/5-4(7)(a), which has since been repealed and which then provided for mandatory transfer, in part, if the offense occurred on a "public way" within 1,000 feet of a school. On direct appeal, defendant argued that the crime did not occur on a "public way," but the court rejected his argument. Years later, the court decided **People v. Dexter**, 328 Ill.App.3d 583, 768 N.E.2d 753 (2d Dist. 2002), which limited the definition of "public way" and supported defendant's contention on direct appeal. Dexter applies retroactively. A decision that narrows the applicability of a substantive criminal statute will have full retroactive effect in collateral proceedings. As it applies to §5-4(7)(a), Dexter narrows the range of persons who can be prosecuted for manufacture or delivery of a controlled substance and should be fully retroactive. Also, application of Dexter's definition of "public way" to §5-4(7)(a) renders defendant's conviction void. Finally, although res judicata would ordinarily bar defendant's claim, fundamental fairness required that res judicata be relaxed under these circumstances.

People v. Kizer, 318 Ill.App.3d 238, 741 N.E.2d 1103 (1st Dist. 2000) A state conviction becomes final, for purposes of retroactivity analysis (under **Teague**), when direct appeals to state courts have been exhausted and the time for seeking certiorari has elapsed (or a certiorari petition has been denied). A rule could be considered "new" if there was a "significant difference of opinion in the lower courts before the rule was established." If the rule in question was handed down before the conviction became final, it is not "new" and should have been applied in the first instance. Therefore, it is to be applied on collateral review. If the rule is "new," it applies to collateral review only if it: (1) places "an entire category of primary conduct beyond the reach of the criminal law," or (2) involves a "watershed" rule of criminal procedure that is necessary to assure that the proceeding is fundamentally fair.

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.”

§9-6

Post-Trial Forensic Testing (725 ILCS 5/116-3)

Illinois Supreme Court

People v. Washington, 2023 IL 127952 Under Illinois law, an individual may obtain a certificate of innocence where he proves, by a preponderance of the evidence, that: (1) he was convicted of and imprisoned for a felony and served at least part of the sentence; (2) his conviction was subsequently reversed or, if a new trial was ordered, he was found not guilty on retrial or was not retried and the charge was dismissed; (3) he is innocent of the charged offense; and (4) he “did not voluntarily cause or bring about his...conviction.” **735 ILCS 5/2-702**. A person who obtains a certificate of innocence may then seek compensation from the State by filing an action in the Illinois Court of Claims.

At issue here was whether defendant voluntarily brought about his murder conviction where he gave a signed confession to Chicago police after a lengthy interrogation and later pled guilty, but subsequently had his conviction vacated and charges dismissed on the State’s motion. Defendant argued that his guilty plea and confession were attributable to police coercion and thus were not voluntary. The circuit court denied defendant’s request for a certificate of innocence, and the appellate court affirmed, on the basis that a petitioner who pled guilty had caused or brought about his conviction and thus could not qualify.

The Supreme Court reversed and held that there is no categorical bar precluding petitioners who plead guilty from receiving a certificate of innocence. The plain language of the statute contains no such blanket prohibition, but instead focuses on a petitioner’s voluntary conduct. There is no impediment to obtaining a certificate of innocence where the petitioner was coerced into confessing or pleading guilty.

The Court went on to find that defendant met his burden here. Voluntariness is to be determined on a case-by-case basis, looking at the totality of the circumstances. Here, the State did not participate in the certificate-of-innocence proceedings below, leaving defendant’s evidence of abuse and coercion un rebutted. And, the record included evidence of similar abusive conduct by the same detectives in more than 20 other cases. Accordingly, the totality of the circumstances showed that defendant’s confession was not voluntary, nor was his subsequent guilty plea, and thus he established that he “did not voluntarily cause or bring about” his conviction. The Court remanded to the circuit court with directions to grant a certificate of innocence.

People v. Grant, 2022 IL 126824 Illinois law provides criminal defendants with a statutory right to post-conviction forensic testing. **725 ILCS 5/116-3**. Section 116-4(a) furthers this right by stating that in certain cases, such as the criminal sexual assault case at issue here, law enforcement agencies “shall preserve” physical evidence if it is reasonably likely to contain forensic evidence and was secured in relation to a trial. Section 116-4(b) provides that after conviction, the law enforcement agency “shall” securely retain the evidence until the completion of the sentence. While Section 116-4 does not contain a remedy for a violation of these provisions, Section 33-5(a) of the Criminal Code makes the intentional violation of Section 116-4(a) a Class 4 felony.

Here, law enforcement unintentionally disposed of a hair which defendant sought to test in a post-conviction 116-3 motion. The appellate court majority, finding the provisions of Section 116-4 mandatory rather than directory, noted that the criminal penalties do not benefit a defendant harmed by a 116-4 violation, and concluded that the legislature must have intended a remedy for the defendant. The appellate court determined that the only possible remedy would be a new trial at which the jury would be instructed that it could consider the destruction of evidence against the State.

The supreme court reversed the appellate court, finding a new trial is not an appropriate remedy for a violation of Section 116-4. The court first noted that a maxim of statutory construction prohibits courts from adding provisions to a statute or otherwise “fixing” perceived legislative oversights. The court also acknowledged the rules of statutory construction allow a court to reference other, related statutes elsewhere in the code, such as Section 33-5(a).

The parties agreed that Section 116-4 was mandatory. They also agreed that a legislative remedy for a violation of Section 116-4 was found in Section 33-5(a). But defendant argued that Section 33-5(a) was an insufficient remedy because it did nothing to remedy the harm to a defendant, for whom a violation of 116-4 means the permanent deprivation of his right to forensic testing and ultimately the ability to prove innocence. Defendant argued that the government’s noncompliance with a mandatory statutory command must result in “the unconditional consequence of invalidating the governmental action to which the command relates,” which in this case would be the entry of conviction which triggered the requirements of 116-4.

The Supreme Court rejected defendant’s claim. It held that the case could be resolved by the plain language of the statutes, which create a mandatory obligation in Section 116-4 and a remedy in Section 33-5(a). “Had the legislature intended to impose the consequence of a vacatur of the conviction—or any other consequence—for violations of section 116-4, it would have done so.” The cases on which defendant relied for the notion that any consequence should invalidate the governmental action to which the command relates, involved circumstances where the legislature failed to provide any remedy at all for a mandatory statute. Moreover, the preservation of evidence post-trial is not a procedural step in the government’s act of obtaining a conviction. Failure to comply with the preservation requirement cannot invalidate a conviction, because the conviction did not depend on the preservation requirement.

Justice Neville dissented, finding the majority erred when it referenced Section 33-5(a) because separate, related statutes should only be referenced when the statute in question – here, Section 116-4(a) – is ambiguous. Because the majority found Section 116-4(a) unambiguous, it could not look to other statutes to interpret its remedy. The dissent rejected the idea that criminal liability for law enforcement acts as a “remedy” for a 116-4(a) violation, because it does nothing to compensate the defendant, whose rights 116-4(a) seeks to protect. The dissent urged the legislature to amend Section 116-4(a) to provide a remedy for the defendant.

People v. Palmer, 2021 IL 125621 To obtain a certificate of innocence under [735 ILCS 5/2-702](#), a defendant must prove by a preponderance of the evidence that, *inter alia*, he is “innocent of the offenses charged in the indictment or information.”

Here, petitioner was convicted of murder as principal. After DNA results showed another offender was involved in the killing of the victim, the State moved to vacate defendant’s murder conviction and dismissed the charges. Defendant moved for a certificate of innocence. The State protested, citing other evidence, including circumstantial evidence

and physical evidence, suggesting defendant may have acted as an accomplice. The State argued that petitioner must prove his innocence of first degree murder as both principal and accomplice because accountability is not a separate offense but rather an alternative manner of proving a criminal defendant guilty of the same offense.

The Supreme Court disagreed. Because the word “offenses” is modified by the phrase “charged in the indictment or information,” the legislature intended that a petitioner establish his or her innocence of the offense on the factual basis charged in the indictment or information. Here, the allegations in the indictment made clear that the State charged defendant as the principal offender and the State’s evidence and arguments at trial made clear that its theory was that defendant acted alone. The principles of judicial estoppel prevent the State from changing its theory at this point in the proceedings. Therefore, by proving by a preponderance of the evidence that he was not the principal offender, defendant was entitled to a certificate of innocence.

People v. Stoecker, 2014 IL 115756 At defendant’s trial for first degree murder and aggravated criminal sexual assault, the State presented DNA evidence based on PCR testing. More than 10 years after his conviction, defendant moved under [725 ILCS 5/116-3](#) to obtain Y-STR testing. Defendant alleged that Y-STR testing allows resolution of a mixed sample from male and female DNA, and had the potential to exclude him as the source of the male DNA recovered from the victim. However, defendant did not assert that Y-STR testing provided a reasonable likelihood of producing more probative results than the PCR testing that had been done for the trial, as is required by §116-3(a)(2). Defendant argued that there is no meaningful distinction between subsections (a)(2) and (c)(1), because new, noncumulative evidence that is materially relevant to an assertion of actual innocence necessarily utilizes a method that provides a reasonable likelihood of more probative results.

The court rejected defendant’s argument, concluding that a defendant who seeks testing under §116-3 is required to satisfy (a)(2) by alleging that the new testing provides a reasonable likelihood of more probative results. Because the legislature added (a)(2) several years after §116-3 was enacted, it is presumed to have intended to change the law and not to add a section that was essentially identical to an existing provision of the statute. The court concluded that the legislature intended that movants who are seeking retesting of previously tested evidence must carry a higher burden than persons who seek to test previously untested evidence, and must show that the additional testing is likely to produce more probative results.

Because defendant failed to allege that the Y-STR testing had the potential to produce more probative evidence than the previously performed testing, he failed to meet the pleading requirements for obtaining new DNA testing.

Even had the pleading requirements of the statute been satisfied, there would have been an insufficient basis for the trial court to find that defendant had satisfied the (c)(1) requirement by showing that Y-STR testing had the scientific potential to produce new, noncumulative evidence that was relevant to a claim of actual innocence. The DNA testing performed at the time of the trial indicated that the profile generated by the testing would be expected to occur in one of approximately 1.1 trillion Caucasians. Given such decisive DNA test results at trial, there was no likelihood that additional testing under the Y-STR method would result in defendant being exonerated, at least where there was no indication of some inaccuracy in the original testing.

The trial court’s denial of defendant’s motion for additional DNA testing was affirmed.

People v. O’Connell, 227 Ill.2d 31, 879 N.E.2d 315 (2007) [725 ILCS 5/116-3](#) authorizes

fingerprint or forensic testing which was not available at trial if the defendant makes several showings, including that identity was an issue at trial. The court concluded that the plain language of §116-3 precludes motions for DNA testing by persons who were convicted on guilty pleas.

Trial court's denial of motion for §116-3 testing is reviewed *de novo*.

People v. Brooks, 221 Ill.2d 381, 851 N.E.2d 59 (2006) The trial court did not err by denying defendant's motion for DNA testing of a vaginal swab; the motion asserted only that the testing had not been performed at the time of trial, without asserting that the relevant technology was unavailable. The court noted that several judicial holdings at the time of defendant's trial had found that the testing in question was generally accepted by the scientific community; "if the requested test was not done on the genetic samples . . . the reason . . . was not because the technology for the testing was unavailable at the time of defendant's trial."

People v. Johnson, 205 Ill.2d 381, 793 N.E.2d 591 (2002) Where 725 ILCS 5/116-3 became effective after defendant filed his amended post-conviction petition but before the petition was dismissed, the defense motion made a *prima facie* case for DNA testing of a rape kit where it alleged that identity was the central issue at trial and that the rape kit had been subjected to a secure chain of custody. Although defendant failed to present any evidence concerning the location of the kit since trial, the court found that evidence on that point would not be available to the defendant because the kit likely remained in the custody of the circuit clerk.

In addition, defendant established that the test results had the potential to produce "materially relevant" evidence of innocence. Under **Savory**, evidence is "materially relevant" where it tends to "significantly advance" a claim of actual innocence. The proposed testing clearly satisfied this test - defendant was not seeking to merely impeach the State's evidence from trial, but to present previously unavailable evidence about the genetic identity of the person who committed the crime. In addition, the State presented a largely circumstantial case at trial, and defendant made no admissions placing himself at the scene of the crime. See also, **People v. Hockenberry**, 316 Ill.App.3d 752, 737 N.E.2d 1088 (2d Dist. 2000) (defendant failed to establish a *prima facie* case that identity was an issue on home invasion where at trial he admitted that he entered residence and the complainant testified that he did so without consent; however, identity was issue as to aggravated criminal sexual assault where defendant claimed that he had no sexual contact with the complainant but physical evidence suggested that the complainant engaged in sexual activity with someone).

People v. Savory, 197 Ill.2d 203, 756 N.E.2d 804 (2001) 725 ILCS 5/116-3 provides that physical evidence may be tested where such testing was not available at the time of trial. To obtain testing, the defendant must present a *prima facie* case that: (1) identity was an issue at trial, (2) the evidence has been subjected to a chain of custody sufficient to establish that it has not been replaced or altered, and (3) the testing both employs a scientific method generally accepted within the relevant scientific community and "has the scientific potential to produce new, noncumulative evidence materially relevant to the defendant's assertion of actual innocence."

The court rejected the Appellate Court's finding that §116-3 authorizes testing only where a result favorable to the defense will, in and of itself, completely vindicate the defendant of the crime. In light of the specific language chosen by the legislature, a motion

for testing must be granted where the results will "significantly advance" a claim of innocence. The court rejected the argument that comments by the sponsor of the legislation creating §116-3 could be read to justify a more restrictive legislative intent than that suggested by the plain and unambiguous language chosen by the legislature.

Here, defendant could not establish that the test results would significantly advance his claim of innocence. The evidence in question - the source of blood stains on trousers defendant was wearing at the time of the offense - was "only a minor part of the State's evidence."

The trial court's denial of a motion for scientific testing under §116-3 is an appealable "order" under Supreme Court Rule 2(b)(2). See also, [People v. Kliner](#), 203 Ill.2d 402, 786 N.E.2d 976 (2002) (trial court's order granting a motion to allow DNA testing under 725 ILCS 5/116-3, even if a final order, may not be appealed by the prosecution; State appeal from an order granting a motion for post-trial DNA testing is not permitted by Supreme Court Rule 604 or any other provision); [People v. Shum](#), 207 Ill.2d 47, 797 N.E.2d 609 (2003) (an order denying a request for DNA testing is reviewed *de novo*).

Illinois Appellate Court

[People v. Fair](#), 2024 IL 128373 Defendant was arrested for an armed robbery and murder, was interrogated at Area 2, and made statements implicating himself and two others. Prior to trial, he filed a motion to suppress statements, alleging "physical, mental, and psychological coercion" and denial of counsel, but counsel later withdrew the motion without a hearing. Defendant was convicted of murder. On direct appeal, and again in post-conviction proceedings, defendant alleged ineffective assistance of trial counsel for failing to proceed on the motion to suppress or object to admission of his statements at trial. Both were unsuccessful.

Defendant subsequently brought a claim of torture before the Illinois Torture Inquiry and Relief Commission (TIRC) Act ([775 ILCS 40/1](#), *et seq.*), alleging that during his interrogation he was kicked, threatened with being shot, kept awake, chained to a wall, denied asthma medication and food, and denied a lawyer for a period lasting more than 30 hours. Defendant claimed that ultimately he simply repeated what the police told him to say, but he refused to sign the written statement prepared by the prosecutor following his interrogation.

TIRC found sufficient credible evidence of torture to refer the case for judicial review. The circuit court held a hearing and denied relief, concluding that defendant had failed to provide sufficient evidence of torture and finding that the prosecutor who testified to recording defendant's unsigned, written statement was "extremely" credible.

The appellate court affirmed, accepting defendant's claim that he was kicked by a detective, but concluding that allegations he was denied sleep, medication, and food were insufficient. The court held that being denied counsel was "not a consequence of torture" and was not properly considered in TIRC proceedings. Given the prosecutor's credible testimony, the court found that the State met its burden to show the statement was not the product of torture.

The Supreme Court affirmed, as well. The standard of review of TIRC judicial proceedings on appeal is whether the circuit court's decision was manifestly erroneous. The circuit court judge is in a superior position to evaluate credibility because the judge sees and hears witness testimony in person. Accordingly, the court's determinations will only be reversed if they contain an error that is "clearly evident, plain, and indisputable."

Under the plain language of the Act, the circuit court must decide whether the petitioner has shown by a preponderance of the evidence that (1) torture occurred and (2) resulted in a confession that was (3) used to obtain a conviction. The circuit court does not assess the voluntariness of the statement or consider whether other constitutional claims are established. The Court specifically overruled [People v. Wilson, 2019 IL App \(1st\) 181486](#), which had adopted a contrary standard.

While TIRC is concerned only with claims of torture, the circuit court must still consider the totality of the circumstances in evaluating such claims. The court's review is not limited only to acts of physical abuse. Rather, the court should also consider any alleged violations that would not necessarily qualify as torture if viewed alone. Additionally, the Court noted, courts should be mindful of the history of police torture in Chicago that led to creation of the TIRC procedure in analyzing torture claims.

Applying these standards, the Supreme Court found that the circuit court did not commit manifest error in denying defendant's torture claim. The circuit court made credibility determinations after seeing and hearing witness testimony, putting it in a superior position to do so. The Court declined to disturb those determinations on the record presented here. Accordingly, the denial of defendant's TIRC claim was affirmed.

A dissent agreed with the majority's determination of the applicable standards but would have found manifest error in the circuit court's findings. The dissent noted that defendant testified to abusive behavior by four detectives over the course of a 30-hour custodial interrogation. None of those detectives testified, leaving defendant's claims un rebutted and unimpeached. The dissent would have drawn a negative inference from the detectives' failure to come forward to rebut defendant's claims. Further, records from other cases established that one of the detectives was a known torturer. Additionally, the dissent noted that the prosecutor who did testify was not present during any of the police interrogation and thus was incompetent to testify to whether defendant had been tortured.

[People v. Muhammad, 2023 IL App \(1st\) 220372](#) The Illinois Torture Inquiry and Relief Commission Act ("the Act") establishes a procedure for the investigation and determination of claims of torture by convicted individuals. A claim of torture is an assertion that the person was tortured into confessing to the crime for which he or she was convicted where "the tortured confession was used to obtain the conviction" and where there is some credible evidence that torture occurred. 7725 ILCS 40/5(1). Claims brought under the Act are first reviewed by an eight-member commission and, if at least five of the eight members conclude by a preponderance of the evidence that there is sufficient evidence of torture, the commission refers the matter to the circuit court for further review. The circuit court then conducts an evidentiary hearing, similar to a third-stage post-conviction petition hearing, unless it finds that the commission's determination was against the manifest weight of the evidence.

Here, the commission advanced defendant's claim for a court hearing, but the circuit court declined to hold a hearing. Instead, the court terminated the proceedings based upon its conclusion that defendant's statement, which was used against him at trial, was not a "confession," and thus not subject to challenge under the Act, because defendant's statement did not admit his guilt. Rather, defendant stated that he was a gang member, denied knowledge of the murder at issue, and admitted that he knew there was an arrest warrant for him when he fled the state. On appeal, defendant challenged the court's failure to hold an evidentiary hearing.

The Act does not define "tortured confession." The commission, by virtue of its rule-making authority, has defined "tortured confession" as "any incriminating statement, vocalization or gesture alleged by police or prosecutors to have been made by a convicted

person” that the person alleges was the result of torture. Thus, while a confession is traditionally understood to mean an admission of guilt, it is much broader under the Act, essentially including any statements that can be used against a defendant. The appellate court found the commission’s definition reasonable and thus, defendant’s statement to the police qualified as a “tortured confession” despite the fact that he did not admit guilt. Accordingly, the court reversed and remanded for an evidentiary hearing.

Additionally, the commission included a possible **Brady** violation in its hearing referral, noting that it had uncovered evidence that the State failed to disclose during defendant’s original trial proceedings, specifically that defendant had participated in several lineups in which multiple witnesses did not identify him. The appellate court concluded that this was “closely tethered” to defendant’s torture claim and thus was a proper subject for the evidentiary hearing, as well.

Finally, the court, over a dissent, agreed with defendant’s argument that the special prosecutor (Milan) appointed for the TIRC proceedings had an actual conflict of interest requiring his removal. At the time of defendant’s original prosecution, Milan was supervisor of the Felony Review Unit in the Cook County State’s Attorney’s Office that charged defendant with first degree murder. That is, Milan initiated the original criminal prosecution at issue here. In TIRC proceedings, Milan would have the power to decide whether to dismiss defendant’s case, reprosecute him, or move to terminate the TIRC proceedings, and to exercise those powers Milan would have to judge the validity of his own original decision to prosecute, thereby resulting in an actual conflict. And, while defendant initially had requested Milan’s appointment as special prosecutor, this could not be deemed invited error given that Milan’s actual conflict was a fundamental error that would undermine confidence in the outcome of the proceedings. Indeed, the initial conflict of the State’s Attorney’s Office which led to Milan’s appointment as special prosecutor actually applied to Milan, himself, given his former position with that office.

People v. Hilton, 2023 IL App (1st) 220843 As the court held in **People v. Warner**, 2022 IL App (1st) 210260, a certificate of innocence will issue under section 2-702 only if the petitioner is innocent of all of the charges contained in the indictment. This is true even where the State nol-prossed the remaining charges at some point in the proceedings. Although the appellate court in **People v. Smith**, 2021 IL App (1st) 200984, suggested otherwise, it did so in *dicta*, and **Warner** chose not to follow this *dicta* once it fully analyzed the issue. Because defendant here was charged with three counts of aggravated unlawful use of a weapon, and innocent of only one, the existence of the remaining two charges, albeit nol-prossed, preclude a certificate of innocence.

People v. Anderson, 2023 IL App (1st) 200462 Defendant submitted a claim under the Torture Inquiry and Relief Commission (TIRC) Act alleging that his convictions in two cases resulted from inculpatory statements which were coerced by police torture during his custodial interrogation in 1991. The Commission found sufficient evidence of torture to refer the matter to the circuit court for judicial review, but the court denied defendant any relief.

The appellate court disagreed with the circuit court and went on to reverse defendant’s convictions and remand for new trials with the exclusion of defendant’s inculpatory statements. The appellate court first found that the trial court failed to apply the proper initial inquiry to defendant’s claim, specifically whether defendant showed that newly discovered evidence would likely have altered the result of a suppression hearing. While the court cited the correct standard, it improperly focused on whether it believed defendant’s torture allegations. Here, defendant satisfied his burden by presenting ample evidence of a

pattern and practice of abuse by the officers in question – including testimony of two individuals who had been tortured by some of the same officers during the same time frame, as well as documentary evidence in the form of affidavits, deposition transcripts, expert reports, and more, describing the abuse and torture of a number of other individuals at the hands of the same officers.

Additionally, the trial court improperly concluded that pattern-and-practice evidence was irrelevant to defendant’s claim. As the appellate court noted, such evidence is “certainly relevant to show a pattern of abuse and coercion by the accused detectives.” And, here, the evidence was sufficient to meet defendant’s burden that it would likely have resulted in suppression of his custodial statements. Even those prior allegations that were deemed unfounded by the Office of Professional Standards were relevant to defendant’s TIRC claim where those allegations were sufficiently similar to defendant’s alleged abuse.

And, the State failed to meet its burden to prove that defendant’s statements were, in fact, voluntary. The detectives involved in defendant’s interrogations were well-known to the court, having been subject to numerous previous complaints of coerced confessions, including confessions which were later shown to be demonstrably false. Thus, the trial court’s determination that the officers were credible when they denied abusing defendant, in the face of voluminous evidence of a pattern and practice to the contrary, was against the manifest weight of the evidence.

People v. Pursley, 2022 IL App (2d) 210558 The trial court’s decision whether to grant a certificate of innocence is generally reviewed for an abuse of discretion. Here, however, the appellants argued that review should be *de novo* because the court held only a nonevidentiary hearing on defendant’s petition. The appellate court rejected this argument, noting that the trial court had also presided over the third-stage post-conviction evidentiary hearing, as well as defendant’s retrial. Accordingly, the court considered not only documentary evidence but also live and stipulated testimony from the prior proceedings, and thus abuse-of-discretion review was proper.

The appellate court affirmed the trial court’s granting of a certificate of innocence here. After key ballistics evidence from defendant’s original trial was discredited in collateral proceedings, defendant was granted a new trial and was acquitted. Ballistics evidence at defendant’s retrial established that the gun in question could not have been the murder weapon. While the State suggested that the gun may have been altered after the murder, or that another gun that was recovered from defendant’s girlfriend’s apartment could have been used, this was nothing more than speculation and did not undermine defendant’s claim of innocence.

People v. Brown, 2022 IL App (4th) 220171 Defendants, who pled guilty to aggravated unlawful use of a weapon (AUUW) in 2006 and 2012, were not entitled to certificates of innocence after those convictions were vacated in light of **People v. Aguilar, 2013 IL 112116**. Defendants were innocent of AUUW, given that the relevant statutory provision was facially unconstitutional. But, each defendant had additional charges dismissed as part of a plea agreement. Under **735 ILCS 5/2-702(g)(3)**, a petitioner must prove that he or she is “innocent of the offenses charged in the indictment or information or his or her acts or omissions charged in the indictment or information did not constitute a felony or misdemeanor against the State.” Thus, the petitioner must be innocent of all charged offenses, not just the offense for which he or she was incarcerated, in order to obtain a certificate of innocence. Because defendants made no attempt to demonstrate their innocence of the dismissed charges, the trial court properly denied their petitions for certificates of innocence.

People v. Morrow, 2022 IL App (1st) 200388 725 ILCS 5/116-3 allows for “forensic DNA testing...on evidence secured in relation to the trial” which resulted in defendant’s conviction. The appellate court first rejected the State’s assertion that this language precludes a defendant from seeking forensic comparison analysis of evidence obtained after a trial. As the court observed, the statute goes on to provide for comparison analysis of genetic marker groupings to those of defendant, those maintained in the ISP database, and to “other forensic evidence.” Under the plain language of the statute, then, comparison analysis is not limited to evidence collected in relation to the alleged offense.

Here, defendant sought to compel a trial witness to produce a DNA standard for comparison with evidence recovered from the crime scene. The witness originally told police she had been engaged in oral sex with the victim just prior to his murder and had seen defendant, who was both her boyfriend and pimp at the time, commit the offense. At trial, however, she denied having been with the victim or defendant on the night of the murder. The plain language of 116-3 permits a DNA comparison against a third-party standard, so long as defendant can satisfy the other requirements of the statute. The court concluded, however, that defendant could not compel the witness to provide a buccal swab for such a comparison as there is no provision under the statute for the discovery of evidence possessed by a third party.

Likewise, defendant did not show “good cause” to compel the witness to produce a DNA sample under general discovery rules. The witness was not willing to cooperate voluntarily, and defendant could not show more than a slight probability that the evidence he sought would support his claim of innocence where any DNA non-match would at best have bolstered the witness’s testimony on a collateral issue. Compelling a witness to provide a DNA sample against her will is a significant intrusion and is not warranted where it has minimal exculpatory value. Accordingly, the trial court did not abuse its discretion in denying defendant’s request for further forensic testing under Section 116-3.

People v. Warner, 2022 IL App (1st) 210260 Defendant pled guilty to one count of aggravated unlawful use of a weapon (AUUW) in exchange for the dismissal of various other charges and an agreed-upon sentence of one year of imprisonment. Subsequently, defendant’s AUUW conviction was vacated because it was based on a portion of the AUUW statute found unconstitutional in **People v. Aguilar**, 2013 IL 112116. Defendant then sought a certificate of innocence pursuant to 735 ILCS 5/2-702. The circuit court denied that request, and the appellate court affirmed.

To be entitled to a certificate of innocence under section 2-702, a petitioner must establish his innocence of the “offenses charged in the indictment or information.” While the certificate-of-innocence statute also references the “offenses for which he or she was incarcerated,” the subsections in which that language appears relate to who may request a certificate of innocence. The sections which more broadly reference the “offenses charged” are sections which set forth the pleading and burden requirements for the petition to be granted. Accordingly, a petitioner may seek a certificate of innocence for the offense(s) for which he was incarcerated but must establish his innocence of all of the offenses with which he was charged in order to be successful.

Here, only the offense to which defendant pled guilty and one other count were rendered constitutionally infirm under **Aguilar**. While the State did not seek to reinstate the dismissed counts after defendant’s conviction of AUUW was vacated, it could have because four of the charged offenses remained legally viable. And defendant did not meet his burden of pleading and proving his innocence of those counts, thus he failed to establish his innocence

of all of the charged offenses. Thus, the circuit court did not err in denying his request for a certificate of innocence.

People v. Johnson, 2022 IL App (1st) 201371 The Torture Inquiry and Relief Commission Act (TIRC Act) (775 ILCS 40/1, *et seq.*) establishes a procedure to investigate and determine factual claims of torture. TIRC is an independent commission tasked with inquiring into claims of torture and preparing written reports of its recommendations to the trial court at the completion of each inquiry. If a majority of TIRC's members conclude there is sufficient evidence of torture to merit judicial review, the matter is referred to the chief judge with supporting findings of fact and record.

Here, TIRC reviewed defendant's claim and found sufficient credible evidence of torture to warrant judicial review. Given that finding, the trial court was required to conduct an evidentiary hearing unless the court explicitly concluded that TIRC's finding was against the manifest weight of the evidence. At the conclusion of the evidentiary hearing, the circuit court should then make independent factual findings as to whether torture actually occurred.

The circuit court is not required to defer to TIRC's determinations on purely legal questions, however. Thus, the court properly reviewed, *de novo*, the questions of whether defendant's guilty plea barred relief under the TIRC Act and whether defendant's confession was "used to obtain the conviction" within the TIRC Act's definition of a claim of torture. But, the court erred in finding that defendant's plea barred relief under the TIRC Act where the plea was entered prior to enactment of the TIRC Act. Defendant's plea could not waive his right to assert a claim under the TIRC Act, where that right did not come into existence until later. The court also erred in finding that defendant's confession was not "used to obtain the conviction." While defendant's confession was not introduced into evidence at trial, it had some role in the conviction in that it deterred defendant from testifying in his own defense.

The Appellate Court also concluded that the trial court erred in denying defendant's motion for substitution of judge as of right under 735 ILCS 5/2-1001(a)(2). Under that provision, a party in a civil action is entitled to one substitution of judge as of right if a motion to substitute is presented before trial or hearing begins and before the judge has ruled on any substantial issue in the case. The trial court held that this provision did not apply in TIRC proceedings. As a matter of first impression, the Appellate Court concluded that judicial review of a TIRC decision is a civil action implicating Section 2-1001(a)(2). The TIRC Act provides for judicial review equivalent to an administrative proceeding, and the Code of Civil Procedure applies to administrative review absent express language to the contrary. Defendant's motion for substitution was proper and was timely filed where the judge had been involved in discussions of discovery and case management, but had not yet made a substantive ruling in the case. The matter was remanded for assignment to a new judge to conduct further proceedings under the TIRC Act, including an evidentiary hearing.

People v. Terrell, 2022 IL App (1st) 192184 After having his convictions reversed on appeal on the basis that the State had not met its burden of proving defendant's guilt beyond a reasonable doubt, he petitioned the circuit court for a certificate of innocence. The circuit court denied the certificate, concluding that defendant had not established by a preponderance of the evidence that he was innocent of the offenses charged.

On appeal, defendant argued that the trial court had applied the wrong standard, resulting in the loss of his presumption of innocence. The Appellate Court rejected this contention. Proceedings under the certificate of innocence statute are civil in nature and do not carry the presumption of innocence that is present in criminal proceedings. The certificate of innocence statute specifically provides that the burden of proof is on the defendant to prove

by a preponderance of innocence that he is innocent. Defendant here failed to meet that burden, and the Appellate Court affirmed.

People v. Smith, 2021 IL App (1st) 200984 Petitioner was not entitled to a certificate of innocence under [735 ILCS 5/2-702](#). While defendant's armed habitual criminal conviction was vacated due to the unconstitutionality of one of the qualifying offenses, defendant was also convicted of unlawful use of a weapon by a felon – another charge in the indictment – for the same conduct.

The court rejected the State's argument that defendant was not wholly innocent of the AHC charge because it was valid at the time of conviction. But it agreed with the State that the valid guilty finding of UUW/F precluded a COI. Although this conviction was merged and vacated on appeal pursuant to the one-act/one-crime doctrine, the statute required defendant to show he was "innocent of the offenses charged in the indictment or information." The decision to vacate the UUW/F conviction on one-act/one-crime grounds did not render defendant innocent of the charge.

People v. McIntosh, 2021 IL App (1st) 171708 The circuit court erred in denying defendant a certificate of innocence ("COI"). Under [735 ILCS 5/2-702](#), a COI shall issue when a defendant proves his or her innocence by a preponderance of the evidence. The circuit's decision is reviewed under the manifest weight of the evidence standard.

Here, defendant presented recantation testimony from all three of the eyewitnesses who identified him. He also showed that the car used by the offender, as described by these witnesses, matched the description of another suspect's car, not defendant's, and that this other suspect's fingerprints were linked to the crime while defendant's fingerprints were not found. Although recantation testimony is inherently suspect, the recantations here were consistent and mutually reinforcing. There remained no evidence against defendant, with significant evidence pointing to another suspect. The State did not oppose the COI. The COI should have issued.

People v. Rodriguez, 2021 IL App (1st) 200173 Denial of certificate of innocence was not error. While the State agreed to vacate defendant's 20-year-old convictions of first degree murder and attempt murder, an eyewitness had identified defendant as the perpetrator and had never recanted that identification. Thus, defendant failed to establish by a preponderance of the evidence that he was actually innocent.

Defendant argued that the eyewitness identification should be disregarded because it was contradicted by another eyewitness who had originally implicated defendant but later recanted and because it was obtained by a police detective (Guevara) who was known to have engaged in misconduct in several cases. The decision whether to grant a certificate of innocence is left to the discretion of the trial court, and accordingly is reviewed for an abuse of discretion. The court did not abuse its discretion here where the non-recanting eyewitness provided credible testimony at trial and where there was no basis to infer that Detective Guevara had committed misconduct here despite his well-documented history of witness intimidation in other cases.

The Appellate Court also rejected defendant's assertion that he was entitled to a certificate of innocence pursuant to [730 ILCS 5/5-5-4\(c\)](#) because "his innocence was established in post-conviction proceedings." Defendant did not make this argument in the trial court, and thus it was forfeited. And, regardless, defendant's conviction was vacated by agreement in the post-conviction proceedings; the court did not enter an order finding that defendant had established actual innocence.

People v. Washington, 2020 IL App (1st) 163024 Defendant who had confessed and pleaded guilty was not entitled to a certificate of innocence. He could not meet his burden of establishing that he did not “cause or bring about his or her conviction” under [735 ILCS 5/2-702\(g\)\(4\)](#) where the court found his testimony that his confession was the result of police coercion not credible and uncorroborated. The dissenting justice would have reversed the denial of a certificate of innocence, noting that other witnesses also testified about police coercion, and two officers invoked their Fifth Amendment privilege when questioned about coercion in civil proceedings related to this matter.

People v. Hood, 2020 IL App (1st) 162964 A petitioner seeking a certificate of innocence must, *inter alia*, prove by a preponderance of the evidence that he or she did not commit the charged offense or offenses. The term “actual innocence,” as used in post-conviction proceedings, has no applicability in the context of a certificate of innocence proceeding. A circuit court’s determination as to whether a petitioner has proven innocence is reviewed for an abuse of discretion.

Here, petitioner alleged that he did not commit the robbery or murder. Governor Quinn commuted his sentence and the State subsequently agreed to vacate his conviction and dismiss the charges, establishing the first and second elements under sections 2-702(g)(1), (2). These facts did not, however, prove that petitioner was innocent under section 2-702(g)(3). The Appellate Court instead looked to the defendant’s uncontested testimony at the hearing on the petition for a certificate of innocence, as well as the affidavits attached to his petition.

The circuit court abused its discretion when it denied the certificate. The petitioner’s testimony, proclaiming his innocence of the offenses, was un rebutted. The circuit court improperly judged the credibility of the affidavits. It also took judicial notice of prior testimony, despite the fact that no party offered that testimony into evidence. And the circuit court did not consider the fact that the State, which did not even contest the petition, offered no evidence refuting defendant’s innocence claim. Likening the proceeding outlined in the Act to a civil proceeding, the Appellate Court found that the circuit court should have treated the petition as a motion for summary judgment, and, as it was uncontested, should have granted the petition, as would be the case in civil court. The case was remanded for the issuance of a certificate of innocence.

People v. Grant, 2020 IL App (3d) 160758 In a prior appeal, defendant successfully argued for DNA on a hair recovered from the complaining witness in defendant’s sexual assault case. On remand, it was discovered that the forensic evidence in defendant’s case had been destroyed in 2007 pursuant to a Peoria Police Department policy. Defendant sought a new trial or judgment notwithstanding the verdict, arguing that the State had failed in its duty to preserve evidence, and the circuit court denied that motion, finding that the police had not acted in bad faith.

The Appellate Court reversed. Under [725 ILCS 5/116-4](#), the State is required to retain forensic evidence in sexual assault cases until the defendant has completed his sentence, including mandatory supervised release. The court concluded that this statute is mandatory, not merely directory, noting that rules that require government officials to act in a certain manner and are intended for the protection of public citizens are traditionally mandatory. Section 116-4 protects individuals by ensuring that forensic evidence will be available for potential future testing, with the goal of reducing the number of wrongfully convicted persons in prison. The court found it unlikely that the legislature would provide a right to forensic

testing, require that evidence be preserved in order to allow individuals to exercise that right, but not intend an individual have any recourse if the evidence is not preserved.

While [720 ILCS 5/33-5](#) provides a criminal consequence (Class 4 felony) for failure to comply with the preservation requirements of Section 116-4, the appellate court found that to be a non-existent remedy for an individual who is denied access to testing. Here, the court found that the only remedy available was to reverse defendant's conviction and remand for a new trial. The court noted that on retrial, defendant should be entitled to an instruction allowing jurors to draw a negative inference from the State's failure to preserve the evidence in question, in accordance with [Arizona v. Youngblood](#), 488 U.S. 51 (1988).

The dissenting justice agreed that Section 116-4 is mandatory, but would have concluded that the remedy is limited to pursuit of criminal charges under Section 33-5. The dissent also disagreed with the majority's conclusion that the **Youngblood** instruction should be given, noting that there had been no showing of bad faith on the part of the State.

[People v. Moore](#), 2020 IL App (1st) 190435 An individual is entitled to a certificate of innocence under [735 ILCS 5/2-702](#) only where he establishes his innocence of all offenses charged, not just some. Here, while defendant established his innocence of being an armed habitual criminal, his convictions of robbery and aggravated fleeing were proper. And, while defendant spent more time in prison than he should have due to the improper AHC conviction, his remedy did not lie in obtaining a certificate of innocence.

[People v. Palmer](#), 2019 IL App (4th) 190148 The denial of a certificate of innocence is reviewed for an abuse of discretion. To obtain a certificate, an individual must show by a preponderance of the evidence that: (1) he was convicted of one or more felonies, sentenced to a term of imprisonment, and served at least part of that sentence; (2) the conviction was reversed or vacated and dismissed, that he was found not guilty at a re-trial, or that the statute was held unconstitutional; (3) that he is innocent of the crime charged; and (4) that he did not voluntarily cause his own conviction.

The third factor, innocence of the offense charged, is not limited to the theory the State charged and pursued at trial. Here, post-conviction DNA testing demonstrated defendant was not the principal offender and led to reversal and remand for a new trial, at which point the State dismissed the charges. Defendant did not prove by a preponderance that he was innocent of being an accomplice, however, so the trial court did not abuse its discretion in denying defendant's request for a certificate of innocence.

[People v. Harper](#), 2019 IL App (4th) 180160 Defendant failed to make *prima facie* showing that identity was an issue at trial where defendant had testified at trial and did not deny killing his wife. Instead, his defense was involuntary intoxication, provocation, and self-defense.

Defendant's DNA motion followed four unsuccessful post-conviction petitions and a direct appeal. Criticizing defendant's "repetitive and futile" filings, the Court reminded the circuit court of its statutory authority to collect funds from defendant's commissary to cover court costs, pursuant to [735 ILCS 5/22-105\(a\)](#). The Court also ordered defendant to show cause why it should not impose sanctions under Rule 375(b) and ordered the clerk not to accept any further appeals from defendant until the question of sanctions had been resolved.

[People v. LaPointe](#), 2018 IL App (2d) 160432 Defendant's request for testing on items found at the crime scene should have been granted. The request was not barred by *res judicata* despite defendant's prior claim of actual innocence having been rejected in a previous post-

conviction petition. A claim of actual innocence is a different cause of action than a request to test evidence.

Defendant satisfied the requirement of [725 ILCS 5/116-3](#) as amended in 2014, where fingerprint and DNA testing on items found at the scene of the murder had the potential to provide new noncumulative evidence that would raise a reasonable probability of acquittal had the results been available before he pleaded guilty and had he proceeded to trial. AFIS fingerprinting and DNA testing were not available at the time of the 1978 plea, the defendant showed a chain of custody based on the trial court's impoundment order, and despite defendant's incriminating statements, in a case with no eyewitnesses and one potential alternative suspect, "it is far from inconceivable that one or more of the tests could produce material results. We resolve any lingering doubts about the scope of section 116-3 on the side of more probative evidence."

People v. Grant, 2016 IL App (3d) 140211 Defendant was convicted of aggravated sexual assault. At trial, defendant testified that he did not commit the offense. Instead, another person residing in the same house committed the offense. Following his conviction, defendant filed a motion for forensic testing on a hair found on the victim. This evidence had been collected prior to trial but never tested. The trial court denied defendant's motion.

On appeal, the State defended the trial court's dismissal by arguing that (1) identity was not at issue during trial; and (2) testing would not produce evidence materially relevant to actual innocence. The Appellate Court rejected both of these arguments.

First, the court held that identity had been an issue at trial. In the context of a 116-3 motion, identity is at issue if it was disputed at trial as to whether defendant or someone else committed the offense. A defendant makes the requisite *prima facie* showing by denying at trial that he committed the offense.

Here defendant put identity at issue during trial by testifying that he did not commit the offense. The court specifically rejected the State's argument that identity was not at issue because there was overwhelming evidence of defendant's guilt. The amount of evidence presented by the State has no bearing on whether identity was at issue during trial. The only question is whether, as here, defendant denied committing the offense.

Second, the court held that testing had the potential to produce materially relevant evidence of defendant's actual innocence. Evidence is materially relevant if it significantly advances defendant's claim of actual innocence. No physical evidence linking defendant to the offense was introduced at trial. Thus if the hair found on the victim did not match defendant's DNA profile, "that result would stand alone, rather than being weighed against other forensic evidence against defendant." And if the hair matched the DNA of the person defendant claimed was the true perpetrator, it would significantly bolster defendant's case.

Although the State was correct that a non-match would not completely exonerate defendant, it was arguable that such a result would advance defendant's claim of actual innocence.

The cause was remanded for further forensic testing.

People v. Perez, 2016 IL App (3d) 130784 Defendant was convicted of predatory criminal sexual assault. After trial he filed a motion for forensic testing on blood and hair found on two pairs of the victim's underwear. The trial court denied the motion. The Appellate Court reversed the trial court and held that defendant was entitled to forensic testing.

First, defendant made a *prima facie* case that identity was at issue in his trial. During trial, defendant questioned the physical evidence linking him to the offense and the credibility of the victim. The court held that the question of whether identity was an issue

was unrelated to the strength of the State's evidence. Defendant's denial at trial that he committed the offense is enough to place identity in issue. The court also held that identity may be placed in issue even if defendant does not testify.

Defendant also made a *prima facie* showing that there was a sufficient chain of custody since the evidence has remained in the State's control since trial. Even though a number of people handled the evidence before it was turned over to the police, the chain of custody requirement does not apply to evidence before it is taken into custody.

Finally, the tests have the potential to produce new, non-cumulative material evidence relevant to Defendant's actual innocence. A result that did not match defendant or the victim would be quite relevant since it would be antithetical to the State's theory that defendant alone assaulted the victim.

People v. Kines, 2015 IL App (2d) 140518 Defendant was convicted of a 1988 first degree murder based on being accountable for strangling the victim with the sleeve of a blouse. Defendant was identified as being one of three offenders by an 11-year old acquaintance. At trial, defendant denied being involved.

In 2002, defendant filed an initial petition for DNA testing of the blouse sleeve, the victim's clothing and other evidence recovered at the scene pursuant to [725 ILCS 5/116-3](#). At that time, the DNA testing statute required defendant to show that the requested testing was not available at the time of trial. 116-3(a). The trial court denied defendant's petition on the basis that the requested testing had been available at the time of trial, and the Appellate Court affirmed.

Defendant filed a second petition for DNA testing in 2013. By this time, the DNA testing statute had been amended to only require defendant to show that the evidence was not subject to the testing now requested. 116-3(a)(1). The statute also required defendant to make a *prima facie* showing that identity was an issue at trial and the evidence tested was subject to a chain of custody. 116-3(b). The court must allow testing if the testing procedure is generally accepted in the scientific community and the "result of testing has the scientific potential to produce new, non-cumulative evidence materially relevant to defendant's actual innocence even though the result may not completely exonerate him." 116-3(c).

The trial court denied defendant's second petition finding that it was (1) barred by *res judicata* and (2) even if another person's DNA were found on the evidence, "it would not change the evidence indicating" defendant's guilt.

The Appellate Court held that defendant's second petition was not barred by *res judicata*. *Res judicata* is an equitable doctrine that bars relitigation of issues that were raised and adjudicated, or could have been raised and adjudicated, in a prior proceeding. But *res judicata* is "first and foremost an equitable doctrine which may be relaxed where justice requires." A well-established exception to the doctrine exists where the earlier judgment was "plainly inconsistent with the equitable implementation of a statutory scheme."

The statutory scheme here, 116-3(a), had changed in a dispositive manner between the first and second petitions. The statute applicable to the first petition required a showing that the testing procedures were unavailable at the time of trial, a showing defendant could not make. The statute applicable to the second petition merely required a showing that the evidence had not been previously subject to the testing procedures, a showing defendant could make. Given the change in the statute, the court declined to hold that the earlier decision constituted a *res judicata* bar against filing the second petition.

The court also found that defendant presented a *prima facie* case that identity was an issue at trial and the evidence was subject to a chain of custody to ensure its integrity. 116-

3(b). At trial defendant argued that he was mistakenly identified as one of the perpetrators, making identity an issue. And defendant was excused from establishing a chain of custody since the evidence was admitted at his trial and presumably “would have remained within the custody of the circuit court clerk.”

And finally the court found that the DNA testing is generally accepted within the scientific community and has the potential to produce new, noncumulative evidence materially relevant to defendant’s claim of actual innocence. 116-3(c). Evidence is materially relevant if it tends to significantly advance a claim, and need not completely exonerate defendant.

The State’s primary evidence came from the witness who identified defendant and he made inconsistent statements to the police. The court found that it could not “dismiss the very real possibility that DNA testing might result in a viable third-party suspect,” and thus significantly advance defendant’s claim of innocence even if it did not completely exonerate him.

The cause was remanded for DNA testing.

People v. Smith, 2014 IL App (1st) 113265 The Appellate Court held that defendant satisfied the requirements of 116-3 and was entitled to DNA testing on two items of clothing, a gray sweatshirt and gloves, that were connected to the offense. The court first rejected the State’s argument that defendant was not entitled to testing because he failed to show that DNA testing was unavailable at the time of trial. Although a prior version of the statute placed this limitation on testing, the current version allows testing if the evidence at issue was not subjected to testing at the time of trial, with no need to show that the type of testing was unavailable. Since the State conceded that the clothing was not previously tested, defendant was not required to show that DNA testing was unavailable at trial.

The parties agreed that identity was an issue at trial and that the evidence was subject to a proper chain of custody. The State, however, argued that defendant failed to show that testing had the potential to produce evidence materially relevant to a claim of actual innocence. Evidence is materially relevant to a claim of actual innocence if it tends to significantly advance that claim. It does not need to completely exonerate defendant. In deciding this issue, courts may consider the trial evidence as well as the evidence to be tested.

At defendant’s trial for first degree murder, two eyewitnesses identified him as the offender, and both said the offender was wearing a gray sweatshirt. One of the eyewitnesses identified a van as the getaway vehicle, and later that day, when the police stopped a van matching the description of the vehicle, they saw a gun “come flying” out the rear passenger window. They then found defendant sitting on a gray sweatshirt in the rear passenger seat. Three other men were in the van, including Lorenzo Banks in the front passenger seat. The owner of the van testified that he loaned the van to Banks on the day of the offense.

When the police processed the van they recovered gloves inside a pouch of the gray sweatshirt. Two cartridge cases found at the scene matched the gun thrown out of the van. Gunshot residue tests were negative for defendant and inconclusive for Banks.

Defendant testified that on the day of the offense, he ran into Banks and another friend, and accepted their invitation to drink with them in their van. They drove around listening to music until the police stopped them. Defendant then saw Banks throw a gun, which he had never seen before, out the front passenger window. Defendant was sitting on a gray sweatshirt, but it did not belong to him. Defendant argued that Banks was the shooter, pointing out that Banks borrowed the van in question, defendant saw Banks throw the gun out the van’s window, and Banks’ gunshot residue test was inconclusive.

The court held that in light of the trial evidence, testing the sweatshirt and gloves had the potential to produce material evidence of actual innocence. Defendant made no inculpatory statements and neither eyewitness was previously acquainted with defendant. The two articles of clothing were a central focus of the trial, especially where the absence of gunshot residue was explained by the existence of the gloves.

Although the sweatshirt and gloves were not intimate objects and thus could have contained another person's DNA through casual contact, defendant's argument also centered on the absence of his own DNA from the items. If the testing revealed that defendant's DNA was not present, but Banks was, it would strongly support his theory that Banks was the shooter, and thereby advance his claim of actual innocence.

The case was remanded for DNA testing.

People v. Patterson, 2012 IL App (4th) 090656 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 subject 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.

People v. Roza, 2012 IL App (2d) 100308 The tissue/blood samples found under the murder victim's fingernails were never tested and therefore could be tested pursuant to §116-3(a).

Samples of blood found at the scene and on defendant's jacket were previously subjected to DNA testing. The court rejected defendant's request that the samples be subjected to DNA-STR testing because DNA-STR testing was available at the time of defendant's trial. Although the Illinois State Police crime lab did not use DNA-STR testing at the time of defendant's trial, the standard is not whether the lab that tested the evidence employed that method of testing, but whether it was scientifically available.

To be entitled to the fingernail testing, defendant must also demonstrate that the result of such testing "has the scientific potential to produce new, noncumulative evidence materially relevant to the defendant's assertion of actual innocence even though the results may not completely exonerate the defendant." 725 ILCS 5/116-3(c)(1). Materially-relevant evidence is that which tends to significantly advance a claim of actual innocence. The determination of whether such evidence would be materially relevant requires an evaluation of the trial evidence and the evidence that the defendant seeks to acquire through the testing. The strength of the State's evidence is not a hurdle that the defendant must overcome to meet the requirements of the statute.

The evidence at the murder trial showed that a violent struggle occurred in which the victim sustained multiple types of trauma as well as defensive wounds. It was not inconceivable that the victim could have gotten the blood or skin of his assailant under his fingernails while trying to protect himself from the attack. If DNA found under his nails did not match defendant's, such evidence would advance defendant's claim of actual innocence. If it matched the DNA of a third person whom defendant testified he saw make a bloody exit from the victim's bedroom on the day of the murder, it would have even greater significance. Therefore, defendant was entitled to testing of the evidence.

The statute also allows for comparison analysis of genetic marker groupings of recovered evidence to those of "other forensic evidence" as well as to those of qualifying persons maintained by the Illinois State Police pursuant to 730 ILCS 5/5-4-3. This testing would not have been available to a defendant at the time of trial because §116-3 is a post-trial remedy that does not apply to trial.

Defendant alleged in his §116-3 motion that the third person he saw exiting the victim's bedroom had submitted to DNA testing pursuant to §5-4-3 while he was in prison, and a private investigator had collected samples of the DNA of that person's roommate and paramour. The Appellate Court agreed that there was no reason not to compare the existing DNA evidence of these two men to the fingernail evidence as defendant alleges those men were actually involved in the murder and those results could be materially relevant to defendant's claim of innocence. "Based upon the totality of the present record, we need not wait for another motion to request such comparison testing at a later date."

People v. Pursley, 407 Ill.App.3d 526, 943 N.E.2d 98 (2d Dist. 2011) Integrated Ballistic Integrated System (IBIS) is a database consisting of digital images of ballistic evidence gathered by law enforcement pursuant to criminal investigations. IBIS allows law enforcement agencies to acquire digital images of markings recovered from crime scenes and test evidence and compare those images against earlier entries in IBIS. If a high-confidence match emerges, firearm examiners confirm the match by comparing the original evidence using a microscope.

As with fingerprint and DNA evidence, a defendant may move for post-conviction IBIS testing of evidence that was secured in relation to the trial resulting in his conviction. 725 ILCS 5/116-3.

Under subsection (a) of 116-3, defendant is entitled to IBIS testing if the evidence was either: (1) not subject to IBIS testing at the time of trial; or (2) although previously subject to

testing, can be subjected to additional testing utilizing a method that was not scientifically available at the time of trial that provides a reasonable likelihood of more probative results. [725 ILCS 5/116-3\(a\)\(1\) and \(2\)](#). Defendant need not satisfy both alternatives (1) and (2). The court rejected the State's interpretation of the statute that would require defendant to satisfy alternative (2) because the State had tested the ballistics evidence at the time of defendant's trial.

Even if defendant were required to satisfy both alternatives, because the IBIS database was not in existence at the time of defendant's trial, defendant has satisfied alternative (2). It does not matter that the technology utilized by IBIS was in existence at the time of defendant's trial.

The parties do not dispute that the requirement of a *prima facie* case set forth in subsection (b) of 116-3 was met. [725 ILCS 5/116-3\(b\)\(1\) and \(2\)](#) (identity was the issue in the trial that led to the conviction, and the evidence to be tested has been subject to a chain of custody sufficient to establish that it has not been substituted, tampered with, replaced, or altered in any material aspect).

Under subsection (c) of 116-3, defendant is entitled to testing if: (1) the testing has the scientific potential to produce new, noncumulative evidence that is materially relevant to the defendant's assertion of actual innocence, even though the results may not completely exonerate the defendant; and (2) the testing employs a generally accepted scientific method. The second factor is not in dispute.

After reviewing the evidence at trial, the court determined that the defendant was entitled to testing under subsection (c). The best outcome for defendant from IBIS testing would be a determination that the crime scene evidence matched evidence of another crime that occurred after the police confiscated defendant's gun. At defendant's trial, a prosecution expert testified that the crime scene evidence matched bullets test-fired from defendant's gun. A defense expert testified that there were dissimilarities between the test-fired evidence and the crime scene evidence that excluded defendant's gun as the murder weapon. Two eyewitnesses gave descriptions of the offender that were inconsistent in some respects, and neither identified defendant. A witness testified that defendant had confessed his responsibility for the murder to him, but he also admitted receiving a monetary reward for this information, and had charges pending against him at the time of defendant's trial. Defendant's girlfriend gave the police a statement implicating defendant in the murder, but repudiated this statement at trial, claiming it was coerced, and testified in support of defendant's alibi defense. Even though the State's case was not completely dependent on the ballistics evidence, much of the State's remaining evidence was circumstantial. Defendant did maintain his innocence and new evidence would have the potential to significantly advance his claim of innocence. The court noted that it only held that defendant was entitled to testing. To obtain any substantive relief, defendant would have to prevail in a post-conviction proceeding.

The circuit court had denied testing, reasoning that even if IBIS testing were performed, a hands-on comparison would have to follow any high-confidence match, and such hands-on testing had been conducted prior to trial. Any testing that would be performed following a high-confidence match would not be identical to the testing that had been performed, however, as it would involve additional crime scene evidence and possibly test evidence of another weapon found in the IBIS database.

With respect to the State's argument that an IBIS search was a fishing expedition, the court observed:

[T]he legislature obviously believes otherwise since it amended the statute to specifically allow for IBIS testing. Even if we agreed with the State, we cannot render the statute

meaningless. Whether IBIS is a “forensic test” or and “investigative tool,” as the State argues, the legislature has decided that a defendant satisfying the statutory requirements may seek postconviction IBIS testing. The pros and cons of the IBIS system as argued by the State are irrelevant because section 116-3 has already been amended to include IBIS testing, rightly or wrongly.

People v. Slover, 2011 IL App (4th) 100276 725 ILCS 5/116-3 authorizes post-conviction forensic testing when several requirements are met, including that the testing has the scientific potential to produce new, noncumulative evidence that is materially relevant to an assertion of actual innocence. Generally, *de novo* review is applied to the trial court’s disposition of a §116–3 motion.

The Appellate Court held, however, that *de novo* review was inappropriate where the trial court conducted an evidentiary hearing on the motion and based its ruling in part on its assessment of witness credibility. Finding that review of a §116-3 proceeding in which an evidentiary hearing was held is analogous to review of a third stage post-conviction proceeding, the court held that the same “manifestly erroneous” standard of review should be utilized. The court also noted that in this case the conclusion would be the same under either the “manifestly erroneous” standard or the two-part standard of review urged by the defendant, which would have reviewed the trial court’s factual findings under the manifest weight of the evidence standard but applied *de novo* review to the judge’s ultimate ruling.

A ruling is manifestly erroneous only if it contains error that is clearly evident, plain, and indisputable. The court concluded that the trial judge did not commit manifest error by concluding that the fingerprint testing which the defendants requested lacked the scientific potential to produce new, noncumulative evidence that was materially relevant to an assertion of actual innocence. Two experts testified at the evidentiary hearing; the defense expert testified that a partial print was suitable for testing with modified procedures, while the State’s expert testified that the print was not suitable for testing and that the modified procedures suggested by the defense expert were “contrary to her training.” The trial court “executed its function” by resolving the conflict in the testimony, and did not commit manifest error by concluding that the State’s expert was more credible.

The court’s denial of defendant’s §116-3 motion was affirmed.

People v. Barrow, 2011 IL App (3d) 100086 The statute permitting post-conviction forensic testing is silent regarding whether witnesses may be called to testify at a hearing on such a motion. **725 ILCS 5/116-3**. Because it is not the prerogative of courts to read into a statute limitations that the legislature chose not to include, the statute does not prohibit the use of witnesses, even though the statute does not expressly permit their use.

The circuit court did not err in denying testing that the defendant requested of the clothes of the deceased and a seat cushion used to muffle the gunshot to the head of the deceased. There was no likelihood that the offender’s DNA was on the clothing or the cushion absent evidence of a struggle. There was no evidence of a struggle, only that the premises were ransacked in an attempt to locate valuables. The court rejected defendant’s argument that the items should be tested to determine whether stains found on the items had any evidentiary value. The statute does not provide a general means to discover evidence.

Section 116-3 allows for performance of fingerprint, Integrated Ballistic Identification System, or forensic DNA testing. The plain language of the statute does not allow for comparison testing of shoe prints.

Moreover, even where the statute does authorize testing, defendant must show that the evidence was not subject to the testing he requests at the time of trial, or that, although

previously tested, the evidence can now be subject to testing using a method not available at the time of trial. The shoe-print evidence was subject to some testing prior to trial, and defendant did not demonstrate that there was further testing that could be performed that was not available at trial.

People v. Bailey, 386 Ill.App.3d 68, 897 N.E.2d 378 (1st Dist. 2008) 1. The trial court has authority to *sua sponte* deny a §116-3 motion where the requesting party is not entitled to relief as a matter of law. The trial court's decision to *sua sponte* dismiss a §116-3 motion is reviewed de novo. The trial court acted appropriately by *sua sponte* denying a §116-3 motion where defendant could not make a *prima facie* case that relief was authorized.

2. 725 ILCS 5/116-3 does not impose a limitation on the number of motions which can be filed. Thus, although defendant elected not to appeal the denial of his first §116-3 motion, he could appeal from the denial of a second, similar motion filed approximately one year later.

People v. Boatman, 386 Ill.App.3d 469, 898 N.E.2d 277 (4th Dist. 2008) Public Act 95-688 (eff. 10/23/07) amended 725 ILCS 5/116-3(a) to provide that a defendant is eligible for post-conviction DNA testing where: (1) such testing was not performed at trial, or (2) additional testing methods have become available since the defendant's trial. Because the hearing on defendant's motion occurred after October 23, 2007, the trial court should have applied the amended version of §116-3(a) although defendant's conviction occurred before the effective date of the amendment.

People v. Sanchez, 363 Ill.App.3d 470, 842 N.E.2d 1246 (2d Dist. 2006) The trial court erred by denying defendant's motion for post-trial DNA testing in an ex parte hearing at which the State made unsworn representations about whether the evidence to be tested was still available. The court held that if a motion for post-trial DNA testing is sufficient on its face to satisfy the requirements of the statute, the defendant is entitled to notice and an opportunity to respond to the State's allegations about the existence and condition of the evidence for which testing is sought. The court also noted that the trial court has authority to allow limited discovery concerning the "chain of custody requirement" for a §116-3 motion.

The court distinguished **People v. Franks**, 323 Ill.App.3d 660, 752 N.E.2d 1274 (5th Dist. 2001), in which the trial court denied a petition that was "wholly insufficient on its face to satisfy the requirements" of 725 ILCS 5/116-3, and **People v. Stevens**, 315 Ill.App.3d 781, 733 N.E.2d 1283 (4th Dist. 2000), in which the trial court denied a motion for DNA testing based on the pleadings and the trial transcript.

People v. Gibson, 357 Ill.App.3d 480, 828 N.E.2d 881 (4th Dist. 2005) The trial judge erred by denying defendant's motion for DNA testing of the evidence used at defendant's trial for home invasion, rape, deviate sexual assault, burglary and felony theft. Testing performed at the time of trial on blood and semen recovered at the home were consistent with defendant's blood type, but did not conclusively establish him as the perpetrator.

First, identity was a central issue at trial - defendant consistently maintained his innocence, the victim identified defendant only through hypnotically refreshed testimony which was subsequently held to have been improperly admitted, and the only other testimony identifying defendant was given by a co-defendant. Defendant did not contest whether the crimes occurred or raise an affirmative defense which would have eliminated identity as an issue, and argued at trial that he was not the perpetrator.

The DNA testing had the potential to produce new, non-cumulative evidence which was materially relevant to defendant's assertion of actual innocence. The complainant testified that of the three intruders, only the individual wearing white gloves assaulted her anally. The State's theory at trial was that defendant had been the intruder in the white gloves. A DNA test of a rectal swab taken from the complainant would significantly advance defendant's claim of actual innocence if it failed to show a DNA match with the defendant.

The State waived several other arguments by failing to raise them in the trial court, including that the motion for forensic testing was deficient because it failed to specify the type of DNA test to be performed, did not include any support for the allegation that DNA testing was unavailable at the time of trial, and made only a bare allegation that the requested testing employed a scientific method generally accepted within the relevant scientific community.

People v. Schutz, 344 Ill.App.3d 87, 799 N.E.2d 930 (1st Dist. 2003) The court rejected the State's argument that §116-3 authorizes testing only if the defendant is incarcerated at the time of the request.

However, where the evidence which the defendant seeks to have tested has been destroyed, the trial court is not necessarily required to hold a hearing to determine whether that destruction was in bad faith. Although defendant contended in his motion that the practice of the Chicago Police Department was to retain evidence in murder cases indefinitely, he did not contend that an order requiring preservation of the evidence had been entered or that the evidence had been destroyed in bad faith. Under such circumstances, the motion for testing was properly denied because defendant could not make a *prima facie* showing that the evidence had been subjected to a sufficient chain of custody. The court contrasted this situation to **People v. Barksdale**, 327 Ill.App.3d 422, 762 N.E.2d 669 (1st Dist. 2001), in which the defendant established that the State had destroyed evidence despite an order requiring its preservation.

People v. Henderson, 343 Ill.App.3d 1108, 799 N.E.2d 682 (1st Dist. 2003) Section 116-3 does not establish a time limit for filing an appropriate motion once the technology in question has become available. Thus, where DNA testing was not available at defendant's trial, relief was not precluded by the fact that such testing had been available for some 15 years before defendant filed a §116-3 motion. See also, **People v. Price**, 345 Ill.App.3d 129, 801 N.E.2d 1187 (2d Dist. 2003) (defendant's motion was not untimely because it was not filed within the statute of limitations for a post-conviction petition; §116-3 does not contain a specific time limit within which testing must be requested, and the applicable legislative history does not suggest an intention to impose the time limitations of the Post-Conviction Hearing Act).

Where the record showed that the evidence had been impounded by the circuit clerk's office, the court rejected the State's argument that defendant could not make a *prima facie* case that the evidence had been subject to a sufficient chain of custody.

The DNA testing requested by the motion had the scientific potential to produce "materially relevant" evidence concerning an assertion of actual innocence. Although there was overwhelming evidence of defendant's guilt, the proposed testing need not completely vindicate the defendant in order to satisfy the "materially relevant" standard. In other words, if the testing would "significantly advance" a claim of actual innocence, the §116-3 motion should be granted.

Nor was denial of the motion justified merely because there were multiple offenders and defendant was tried both as a principal and an accomplice. First, defendant claimed that

he had not been involved in the offense, and made no admissions of conduct that would have justified a finding that he was accountable even if the DNA testing was negative. Second, although it "may be much more difficult to successfully analyze 'mixed samples' (those containing genetic materials from more than one person) . . . , it is not impossible."

The court added that any concern about "mixed samples" would not apply to at least one piece of evidence - blood stains on defendant's pants which, according to the evidence at trial, resulted from a cut on the victim's hand. "Whether the stains were caused by the victim appears to be a question which is easily solved with today's technology."

People v. Price, 345 Ill.App.3d 129, 801 N.E.2d 1187 (2d Dist. 2003) The trial court erred by denying defendant's motion for §116-3 testing. To determine whether evidence is "materially relevant" to a claim of actual innocence, the court must consider the evidence at trial and the importance of the evidence to be tested. Although the exculpatory potential of a favorable test result is to be considered, the likelihood of a favorable result is not an appropriate factor in determining whether to order testing. In other words, if testing has the potential to produce materially relevant evidence, it should be authorized no matter "how slight the chance that it will, in fact, yield a favorable result."

Although the evidence against defendant was "certainly compelling," a favorable DNA test could significantly advance defendant's claim of actual innocence. Because multiple perpetrators were involved, it was possible that defendant may have committed the crime even if DNA tests revealed a non-match with the sample. Even with multiple offenders, however, a non-match "would nonetheless support defendant's position that he did not engage in a sexual act" with the complainant.

The chain of custody was sufficient to establish that the evidence had not been altered; the samples were placed in the custody of the clerk of the circuit court after trial and submitted to the Appellate Court as part of the record on appeal. The court noted that under **People v. Johnson**, 205 Ill.2d 381, 793 N.E.2d 591 (2002), the defendant's failure to establish the whereabouts of evidence does not preclude a §116-3 motion where the samples have been in the safekeeping of the State.

Although it found that defendant had made a *prima facie* case concerning chain of custody, the court noted that on remand the State could attempt to establish that the evidence had been altered or tampered with.

Section 116-3 authorizes only testing which was unavailable at the time of trial. The court concluded that two of the five tests requested by the defendant were available at the time of trial, and were generally accepted in the scientific community at that time. Thus, those tests were unavailable under §116-3.

Because it was unclear whether the remaining three tests were available at the time of trial, the cause was remanded for the trial judge to determine that question.

Although the defendant has no statutory right to counsel under §116-3, the trial court may appoint an attorney if the assistance of counsel is necessary to assure meaningful access to the courts.

People v. Pursley, 341 Ill.App.3d 230, 792 N.E.2d 378 (2d Dist. 2003) The court rejected the argument that §116-3 authorized a motion for ballistic testing. Limiting §116-3 to forensic DNA and fingerprint testing does not violate equal protection and due process. The limitation bears a rational relationship to a legitimate state goal - the legislature may have restricted testing to genetic materials "because the reliability of such tests has been established."

People v. Love, 312 Ill.App.3d 424, 727 N.E.2d 680 (2d Dist. 2000) A defendant has no right to the effective assistance of counsel on a motion for DNA testing under 725 ILCS 5/116-3. Because there is no constitutional or statutory right to the assistance of counsel for purposes of a §116-3 motion, defendant cannot challenge the performance of an attorney whom the trial court chooses to appoint.

The court also rejected the argument that a §116-3 movant is entitled to a "reasonable" level of assistance.

People v. Rokita, 316 Ill.App.3d 292, 736 N.E.2d 205 (5th Dist. 2000) In denying a motion for DNA testing, the trial judge erred by considering the potential effect of the test results on the overall sufficiency of the evidence to convict. "[T]he ultimate impact of the new, noncumulative evidence on the defendant's conviction is not relevant to the determination of whether a defendant is entitled to such testing."

The court rejected the State's argument that a §116-3 motion is appropriate only in connection with a timely post-conviction petition, and is barred once post-conviction relief has been denied or the statute of limitations has expired. Neither the plain language of §116-3 nor the act's legislative history suggest that the legislature intended to impose any time limit on the ability to move for DNA testing that was unavailable at the time of trial.

People v. Stevens, 315 Ill.App.3d 781, 733 N.E.2d 1283 (4th Dist. 2000) 725 ILCS 5/116-3, which under certain circumstances authorizes a defendant to obtain DNA testing which was not available at the time of trial, does not mandate a hearing before the trial court rules on the motion. But see, **People v. Dodds**, 344 Ill.App.3d 513, 801 N.E.2d 63 (1st Dist. 2003) (although an evidentiary hearing is not necessarily required whenever post-trial DNA testing is ordered and the post-conviction petition alleges actual innocence, when the test results are at least somewhat favorable to the defendant "an evidentiary hearing is necessary to determine . . . whether the DNA results would or would not likely change the results upon a retrial").

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