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Impact of Recent Decisions upon Proceedings under the Post-Conviction Hearing Act

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I. INTRODUCTION

The Illinois Post-Conviction Hearing Act[1] ("the Act") consists of seven sections and takes up exactly one and one half pages of text in the standard statute textbooks. Despite its brevity, the Act has been the subject of an incredible number of cases in recent years. Illinois courts of review have attempted to clarify the many standards and procedural safeguards set forth in the Act. The language in some of the decisions of the Illinois Supreme Court, however, has led to conflicting interpretations of the standards and procedures of the Act by Illinois appellate courts. These conflicting interpretations, in turn, have increasingly burdened the trial courts, which must often review a defendant's post-conviction claim years after his or her original conviction.

This Article will attempt to analyze the impact of recent court decisions upon proceedings under the Act. This Article will focus on the Act itself and the case law interpreting the standards and procedures

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1. The Illinois Post-Conviction Hearing Act, 725 ILL. COMP. STAT. 5/122-1 to 122-8 (2000).

set forth in the Act.[2] The authors will attempt to clarify apparent conflicts in the case law and suggest a framework for analyzing cases in this area.[3] This Article will also discuss the procedural stages under the Act[4] and how the doctrines of res judicata and waiver affect the courts' review of post-conviction petitions.[5] Finally, this Article will discuss several recurring issues that are routinely raised by defendants seeking post-conviction relief.[6]

II. OVERVIEW OF THE ACT

The Illinois Post-Conviction Hearing Act provides a mechanism by which those under criminal sentence in Illinois can assert that their convictions were the result of a substantial denial of their rights under the United States Constitution, the Illinois Constitution, or both.[7] "Post-conviction relief is a collateral proceeding, not an appeal from the underlying judgment."[8] "All issues decided on direct appeal are *res judicata*, and all issues that could have been raised in the original proceeding but were not are waived."[9]

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2. *See infra* Parts II–III (providing an overview of the Act and the timeliness requirement as set forth in the Act). Other avenues of collateral review such as state habeas corpus (735 ILL. COMP. STAT. 5/10-101 (2000)) and relief under section 2-1401 of the Code of Civil Procedure (735 ILL. COMP. STAT. 5/2-1401 (2000)) are not discussed in this Article.

3. *See infra* Part II.D (suggesting a framework for analyzing post-conviction case law).

4. *See infra* Parts IV–VI (examining the three stages in post-conviction hearings).

5. *See infra* Part VII (discussing the issues of res judicata, waiver, and successive petitions in post-conviction hearings).

6. *See infra* Part VIII (highlighting recurring issues in post-conviction proceedings).

7. 725 ILL. COMP. STAT. 5/122-1(a) (2000); People v. Rivera, 763 N.E.2d 306, 308 (Ill. 2001). See also *People v. West*, which states:

> To invoke post-conviction relief, the statutory language requires that an individual be "imprisoned in the penitentiary." However, as has been determined by this court, actual incarceration is not a strict prerequisite. This language has been held to include defendants who have been released from incarceration after the timely filing of their petition (People v. Davis (1968), 39 Ill. 2d 325, 235 N.E.2d 634), released on appeal bond following conviction (People v. Martin-Trigona (1986), 111 Ill. 2d 295, 95 Ill. Dec. 492, 498 N.E.2d 1356), released under mandatory supervision (People v. Correa (1985), 108 Ill. 2d 541, 92 Ill. Dec. 492, 428 N.E.2d 1356), and sentenced to probation (People v. Montes (1980), 90 Ill. App. 3d 355, 45 Ill. Dec. 639, 412 N.E.2d 1158).

People v. West, 584 N.E.2d 124, 125 (Ill. 1991).

8. People v. Montgomery, 763 N.E.2d 369, 372 (Ill. 2001) (citing People v. Evans, 708 N.E.2d 1158, 1161 (Ill. 1999)).

9. *Id.* (citing People v. Whitehead, 662 N.E.2d 1304, 1311–12 (Ill. 1996)). There are circumstances, however, where the waiver rule will be relaxed. *See infra* Part VII (discussing waiver).

A. Commencement and Review of a Post-Conviction Proceeding

The filing of a petition in the circuit court in which the original proceeding took place commences post-conviction proceedings under the Act.[10] "The petition must clearly set forth the respects in which the petitioner's constitutional rights were violated."[11] "The petition shall have attached thereto affidavits, records, or other evidence supporting its allegations or shall state why the same are not attached."[12]

After the post-conviction petition is filed, the Act provides for three levels, or stages, of review. In the first stage of review, the court may summarily dismiss a petition of a non-capital defendant within ninety days if the petition is "frivolous or is patently without merit."[13] If the petition is not summarily dismissed, the court dockets the petition and proceeds to the second stage.[14]

At the second stage, counsel is appointed on behalf of indigent petitioners to review and, if necessary, to amend the petition. The State must file an answer or move to dismiss the petition within thirty days (or within such further time as the court may set) from the date the case was docketed pursuant to section 122-2.1(b).[15] The court must then determine whether the petition and the accompanying documentation set forth a substantial showing of a constitutional violation.[16] If the court determines that the petition does not make a substantial showing of a constitutional violation, the court may dismiss the petition during this second stage.[17] If a substantial showing is made, the petition then advances to the third stage, where the circuit court conducts an evidentiary hearing to determine the merits of the petitioner's claim.[18]

"If the trial court dismisses the petition or denies post-conviction relief at any stage, the defendant may appeal."[19] The standard of review for summary dismissals is de novo.[20] The manifest error standard,

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10. 725 ILL. COMP. STAT. 5/122-1; People v. Coleman, 701 N.E.2d 1063, 1071 (Ill. 1998).

11. *Coleman*, 701 N.E.2d at 1071; *see also* 725 ILL. COMP. STAT. 5/122-2 (stating the requirements for a post-conviction petition).

12. 725 ILL. COMP. STAT. 5/122-2.

13. *Id.* § 5/122-2.1(a)(2); *Coleman*, 701 N.E.2d at 1071.

14. 725 ILL. COMP. STAT. 5/122-2.1(b).

15. *Id.* § 5/122-5; *see also id.* § 5/122-2.1(b) (mandating that a court order a "petition to be docketed for further consideration in accordance with" section 122-5 if the petition is not dismissed).

16. *Id.* § 5/122-2.1(b).

17. *Coleman*, 701 N.E.2d at 1071.

18. 725 ILL. COMP. STAT. 5/122-6; *see also* People v. Gaultney, 675 N.E.2d 102, 106 (Ill. 1996) (explaining the three stages of a post-conviction proceeding).

19. *Gaultney*, 675 N.E.2d at 106–07.

20. People v. Barrow, 749 N.E.2d 892, 902 (Ill.), *cert. denied*, 534 U.S. 1067 (2001).

however, is applicable when reviewing orders granting or denying relief are made after an evidentiary hearing.[21] The State may appeal the granting of a defendant's petition for post-conviction relief, as it is a final judgment on a civil matter.[22]

B. Miscellaneous Provisions of the Act

1. Presence of the Defendant

Section 122-6 of the Act provides: "In its discretion the court may order the petitioner brought before the court for the [post-conviction] hearing."[23] The decision to have an inmate present at the hearing on his petition for post-conviction relief is within the sound discretion of the hearing judge, and only a clear abuse of discretion or the application of impermissible legal standards will justify reversal of such a decision.[24]

2. Post-Conviction Judge

Originally, section 122-8 ostensibly required that the judge who reviewed the petition for post-conviction relief be someone other than the judge who presided at the original proceedings.[25] In 1986, the Illinois Supreme Court found this provision to be unconstitutional.[26] Today, the same judge who presided over the defendant's trial should hear his post-conviction petition, unless it is shown that the defendant would be substantially prejudiced.[27] Thus, defendants do not have an absolute right to substitution of a judge at a post-conviction proceeding, but rather they must show that they will be substantially prejudiced if the motion for substitution is denied.[28]

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21. *See Coleman*, 701 N.E.2d at 1073; *see also* People v. Scott, 742 N.E.2d 287, 293 (Ill. 2000) (applying the manifestly erroneous standard to uphold a post-conviction judge's ruling), *cert. denied*, 534 U.S. 873 (2001).

22. People v. Andretich, 614 N.E.2d 489, 491 (Ill. App. Ct. 3d Dist. 1993).

23. 725 ILL. COMP. STAT. 5/122-6.

24. People v. Collins, 619 N.E.2d 871, 874 (Ill. App. Ct. 3d Dist. 1993).

25. 725 ILL. COMP. STAT. 5/122-8 (1984) ("All proceedings under this Article shall be conducted and all petitions shall be considered by a judge who was not involved in the original proceeding which resulted in conviction.").

26. People v. Joseph, 495 N.E.2d 501, 507 (Ill. 1986) (holding section 122-8 of the Post-Conviction Hearing Act unconstitutional).

27. People v. Madej, 685 N.E.2d 908, 931 (Ill. 1997), *overruled by* People v. Coleman, 701 N.E.2d 1063, 1071 (Ill. 1998) (holding that the standard of review is now plenary); *see also* People v. Wright, 723 N.E.2d 230, 239–40 (Ill. 2000) (explaining when a judge must recuse himself in a post-conviction proceeding), *overruled by* People v. Boclair, 202 Ill. 2d 89 (2002) (holding that a circuit court may summarily dismiss untimely petitions in the initial phase of post-conviction hearing).

28. People v. Steidl, 685 N.E.2d 1335, 1346 (Ill. 1997).

C. Legislative History of Section 122-2.1: 1983 and 1989

In 1983, the General Assembly enacted Public Act 83-942, amending the Post-Conviction Hearing Act by adding section 122-2.1.[29] The amendment added the first level of review, the summary dismissal stage. Public Act 83-942 provides:

> (a) Within 30 days after the filing and docketing of each petition, the court shall examine such petition and enter an order thereon pursuant to this Section. If the court determines the petition is frivolous or is patently without merit, it shall dismiss the petition in a written order, specifying the findings of fact and conclusions of law it made in reaching its decision. Such order of dismissal is a final judgment and shall be served upon the petitioner by certified mail within 10 days of its entry.
>
> (b) If the petition is not dismissed pursuant to this Section, the court shall order the petition to be docketed for further consideration in accordance with sections 122-4 through 122-6.
>
> (c) In considering a petition pursuant to this Section, the court may examine the court file of the proceeding in which the petitioner was convicted, any action taken by an appellate court in such proceeding and any transcripts of such proceeding.[30]

The Illinois General Assembly amended the newly created section 122-2.1 in 1989.[31] As a result of the 1989 amendment, the statute now

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29. Act of Nov. 23, 1983, Pub. Act 83-942, § 122.21, 1983 Ill. Laws 6200, 6201 (codified as amended at 725 ILL. COMP. STAT. 5/122-2.1 (2000)).

30. *Id.*

31. Act of Sept. 1, 1989, Pub. Act 86-655, § 122-2.1, 1989 Ill. Laws 3588, 3588 (codified as amended at 725 ILL. COMP. STAT. 5/122-2.1 (2000)). Public Act 86-655 amended section 122-2.1 as follows:

> (a) Within 30 days after the filing and docketing of each petition, the court shall examine such petition and enter an order thereon pursuant to this Section.
>
> ***(1) If the petitioner is under sentence of death and 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. If appointment of counsel is so requested, the court shall appoint counsel if satisfied that the petitioner has no means to procure counsel.***
>
> ***(2) If the petitioner is sentenced to imprisonment and*** if the court determines the petition is frivolous or is patently without merit, it shall dismiss the petition in a written order, specifying the findings of fact and conclusions of law it made in reaching its decision. Such order of dismissal is a final judgment and shall be served upon the petitioner by certified mail within 10 days of its entry.
>
> (b) If the petition is not dismissed pursuant to this Section, the court shall order the petition to be docketed for further consideration in accordance with Sections 122-4 through 122-6.
>
> (c) In considering a petition pursuant to this Section, the court may examine the court file of the proceeding in which the petitioner was convicted, any action taken by an appellate court in such proceeding and any transcripts of such proceedings.

provides that the trial court must appoint counsel to assist a petitioner in preparing a petition if the petitioner lacks funds to procure counsel and the post-conviction petitioner is under a sentence of death.[32] "The amendment also created section 122-2.1(a)(2), which currently provides that if a petitioner is sentenced to imprisonment and the trial court determines that the petition is 'frivolous' or 'patently without merit,' the trial court shall dismiss the petition."[33]

The Illinois Supreme Court discussed the import of the 1983 amendment in *People v. Rivera*.[34] In *Rivera*, the court noted that, after the 1983 amendment, petitioners were no longer entitled to the assistance of counsel in drafting their post-conviction petitions.[35] When a petitioner, whether under sentence of death or not, filed a post-conviction petition, the trial court was directed to determine whether the petition was "frivolous" or "patently without merit."[36]

The Illinois Supreme Court also recently addressed a constitutional challenge to the 1983 and 1989 amendments in *People v. Boclair*.[37] In *Boclair*, the defendants challenged Public Act 83-942 as violating the single subject rule of the Illinois Constitution.[38] The defendants based their claim on the title of Public Act 83-942, which indicates it relates to

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Id. (emphasis in original to indicate amendments to section 122-2.1).

32. 725 ILL. COMP. STAT. 5/122-2.1(a)(1) (2000); People v. Rivera, 763 N.E.2d 306, 309 (Ill. 2001). The *Rivera* court discussed the importance of the 1989 amendment. The court stated:

> Therefore, after January 1, 1990, a trial court could no longer dismiss a capital litigant's petition on the basis of frivolity. However, noncapital litigants still had to survive the trial court's frivolity determination in order to further proceed under the Act and to receive the appointment of counsel if the petitioner lacked funds to procure counsel.

Rivera, 763 N.E.2d at 309; *see also* People v. Brisbon, 647 N.E.2d 935, 938 (Ill. 1995) (discussing the Act's differing procedures for prisoners sentenced to death and those sentenced to imprisonment).

33. *Rivera*, 763 N.E.2d at 309; *see also* 725 ILL. COMP. STAT. 5/122-2.1(a)(2) (allowing dismissal of a frivolous or patently meritless petition if the petitioner is sentenced to imprisonment).

34. *Rivera*, 763 N.E.2d at 309.

35. *Id.*

36. *Id.* The *Rivera* court went on to note:

> Thus, the biggest change wrought to the Act by virtue of the 1983 amendment was that counsel was appointed to an indigent petitioner only *after* the court initially reviewed the petition and only if the court did not dismiss the petition on the ground of frivolity. Also, the State was permitted to answer or move to dismiss the petition only after the court made an order pursuant to section 122-2.1.

Id.

37. People v. Boclair, 202 Ill. 2d 89 (2002).

38. *Id.* at 108; *see also* ILL. CONST. 1970 art. IV, § 8(d) (requiring that "[b]ills, except bills for appropriations and for the codification, revision, or rearrangement of laws, shall be confined to one subject").

matters of criminal justice and correctional facilities.[39] The defendants argued that criminal justice and correctional facilities were two separate subjects and, therefore, could not be addressed in one act.[40] Every Illinois appellate court panel that had considered the issue had rejected similar arguments.[41]

The Illinois Supreme Court similarly rejected this argument.[42] The court stated that the subject of criminal justice and correctional facilities both relate to the proper subject of the criminal justice system.[43] The court went on to conclude that "the definition of 'criminal justice system' includes substantive criminal law, as well as all matters concerning corrections."[44]

D. Suggested Framework for Analyzing Post-Conviction Case Law

The 1983 and 1989 amendments to the Post-Conviction Hearing Act radically changed how the courts address newly filed petitions by requiring courts to dismiss frivolous or meritless petitions. When reviewing summary dismissals entered pursuant to these amendments, the analysis employed by opinions written prior to the existence of the amendments may not be particularly illuminating. Consequently, the authors believe that opinions issued prior to the 1983 amendments are of limited value.

By their very nature, post-conviction proceedings are extremely fact-intensive. As a result, many of the decisions of Illinois courts of review facially appear to be in conflict with one another. With this in mind, the best way to analyze any factual situation facing a trial court in a post-conviction proceeding is to rely on the language of the statute and to keep in mind the procedural position or stage that the case is in when the trial court is reviewing the petition. The procedural position of the case and the language of the pertinent section of the Act will determine the analysis employed by a court reviewing the decision made by a trial court.

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39. *Boclair*, 202 Ill. 2d at 109 (noting that the title of Public Act 83-942 is "An Act in relation to criminal justice and correctional facilities").

40. *Id.*

41. *Id.* at 108 (citing People v. Sharpe, 749 N.E.2d 432, 434 (Ill. App. Ct. 3d Dist. 2001); People v. Vilces, 748 N.E.2d 1219, 1226 (Ill. App. Ct. 2d Dist. 2001)); People v. Dorris, 746 N.E.2d 303, 307–08 (Ill. App. Ct. 4th Dist. 2001); People v. Roberts, 743 N.E.2d 1025, 1037 (Ill. App. Ct. 1st Dist. 2000).

42. *Boclair*, 202 Ill. 2d at 113–14.

43. *Id.* at 110.

44. *Id.* at 112–13 (citing People v. Dixon, 721 N.E.2d 1172, 1177 (Ill. App. Ct. 4th Dist. 1999)); *Dorris*, 746 N.E.2d at 307.

In addition, it is important to remember that the 1989 amendment, adding section 122-2.1(a)(1), does not allow the trial court to summarily dismiss capital cases.[45] Since the majority of post-conviction petitions reviewed by the Illinois Supreme Court are capital cases, most of these cases are dismissed at the second stage in the trial courts. The authors believe the applicability of these cases to the summary dismissal stage is questionable unless the Illinois Supreme Court specifically addresses section 122-2.1(a)(2), relating to summary dismissal.[46] Decisions addressing dismissals at the second stage should not be relied upon when considering the appropriateness of summary dismissals entered prior to counsel being appointed for the petitioner. Accordingly, when this Article cites an Illinois Supreme Court case in its discussion of summary dismissals, it will note whether the case was a capital or a non-capital case.[47]

III. SECTION 122-1(C): TIMELINESS

The Post-Conviction Hearing Act sets forth time limits within which a defendant must file his or her original petition. Section 122-1(c) provides:

> No proceedings under this Article shall be commenced more than 6 months after the denial of a petition for leave to appeal or the date for filing such a petition if none is filed or more than 45 days after the defendant files his or her brief in the appeal of the sentence before the Illinois Supreme Court (or more than 45 days after the deadline for filing of the defendant's brief with the Illinois Supreme Court if no brief is filed) or 3 years from the date of conviction, *whichever is sooner*, unless the petitioner alleges facts showing that the *delay was not due to his or her culpable negligence.*[48]

"The statute of limitations applicable to the defendant is the statute in effect at the time he filed his post-conviction petition."[49]

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45. 725 ILL. COMP. STAT. 5/122-2.1(a)(1) (2000); *see supra* note 32 and accompanying text (discussing that the statute provides for those sentenced to death the opportunity to have counsel appointed at this stage before summary dismissal).

46. *See* People v. Coleman, 701 N.E.2d 1063, 1070–71 (Ill. 1998) (addressing section 122-2.1(a)(2) in a capital case).

47. Indications of whether the case is capital or non-capital will be in the form of a parenthetical.

48. *Coleman*, 701–71 N.E.2d at 1070 (emphasis added).

49. People v. Allen, 750 N.E.2d 257, 259 (Ill. App. Ct. 1st Dist. 2001) (citing People v. Bates, 529 N.E.2d 227, 228–29 (Ill. 1988)). In addition to which statute of limitations is applicable, *People v. Allen* also discussed the effect of the United States Supreme Court's denial of a defendant's petition for writ of certiorari and whether the petition for rehearing on the denial of certiorari begins the limitations period. *Id.*; *see also* People v. Reed, 706 N.E.2d 1059, 1060–61

The Supreme Court of Illinois has recently addressed the issue of when the time period commences under section 122-1(c). In *People v. Hager*,[50] the defendant was convicted of two counts of aggravated criminal sexual assault against two victims less than thirteen years of age and sentenced to two consecutive forty-year terms of imprisonment in 1991.[51] In 1994, the appellate court affirmed the convictions but remanded the case for resentencing.[52] On remand, the circuit court resentenced the defendant to two consecutive thirty-five year terms of imprisonment.[53] The appellate court affirmed the new sentences in February 1997.[54]

In October 1997, the defendant filed a pro se post-conviction petition alleging a violation of his constitutional rights at trial.[55] "[The trial] court summarily dismissed [the] defendant's petition, finding it to be 'without merit.' The appellate court affirmed the dismissal . . . but not on the basis that the petition was patently without merit. Instead, the appellate court determined that [the] defendant's petition was not filed timely."[56]

In reaching this conclusion, the appellate court held that the six-month limitation period applied and began to run following the defendant's first appeal in 1994.[57] "The appellate court determined that it did not matter if [the] defendant was not technically or finally 'convicted' until . . . 1997, when the appellate court affirmed the sentences . . . ."[58] "[T]he appellate court concluded that [the] defendant could have raised nonsentencing issues, including the issue raised in the case, in a post-conviction petition while 'the sentencing issue was being resolved in the trial court.'"[59]

The Illinois Supreme Court rejected the appellate court's analysis and held that the limitation period did not begin to run until after the defendant's sentences were vacated in the first appeal.[60] In reaching this conclusion, the court looked at its prior decision in *People v.*

(Ill. App. Ct. 3d Dist. 1999) (discussing the limitation period set forth in the Post-Conviction Hearing Act).

50. People v. Hager, 780 N.E.2d 1094 (Ill. 2002).
51. *Id.* at 1095.
52. *Id.* at 1094.
53. *Id.*
54. *Id.*
55. *Id.* at 1095.
56. *Id.* (citation omitted).
57. *Id.*
58. *Id.* at 1095–96.
59. *Id.* at 1096.
60. *Id.* at 1097.

Woods,[61] holding that the word "conviction," as used in the Post-Conviction Hearing Act, "is a term of art, which means a final judgment that includes both a conviction *and* a sentence."[62] Because the appellate court vacated the defendant's sentences in 1994, he did not stand "convicted" for purposes of the Post-Conviction Hearing Act.[63]

The Illinois Supreme Court has also addressed the issue of whether the timeliness provisions of section 122-1(c) are jurisdictional or whether they are akin to a statute of limitations period, which can be waived. In *People v. Wright*,[64] the court held that "the time limitation found in section 122-1[(c)] . . . has more in common with statutes of limitations than it does with statutes conferring jurisdiction."[65] The timing requirements are in the nature of a limitation provision that can be waived through procedural default.[66] By failing to raise a timing issue in the trial court, the State waived its right to argue that the defendant's petition was untimely.[67]

A. Waiving the Timeliness Requirement: What Constitutes "Lack of Culpable Negligence"?

A petitioner who does not file his or her petition within the limitation period set forth in section 122-1(c) must show the "delay was not due to his or her culpable negligence."[68] To show the absence of culpable negligence, a petitioner must allege facts justifying the delay.[69] Lack of

61. People v. Woods, 739 N.E.2d 493 (Ill. 2000).

62. *Hager*, 780 N.E.2d at 1097 (citing *Woods*, 739 N.E.2d at 496).

63. *Id.* at 1097. The court remanded the case, instructing the appellate court to "limit its discussion to determining whether, aside from its timeliness, defendant's petition '[was] frivolous or . . . patently without merit.'" *Id.* (quoting 725 ILL. COMP. STAT. 5/122-2.1(a)(2) (2000)). The Illinois Supreme Court restricted the appellate court's consideration in light of the supreme court's decision in *People v. Boclair*, decided that same day. *Id.* (discussing People v. Boclair, 202 Ill. 2d 89 (2002)). *Boclair* held that the Act does not permit the summary dismissal of a post-conviction petition during the first stage of post-conviction review on the ground that the petition is untimely. *Boclair*, 202 Ill. 2d at 99; *see also infra* notes 74–106 and accompanying text (discussing the first stage of review).

64. People v. Wright, 723 N.E.2d 230 (Ill. 1999), *overruled by Boclair*, 202 Ill. 2d at 99 (overruling the portion of *Wright* that a circuit court may summarily dismiss untimely petitions in the initial phase of a post-conviction hearing).

65. *Id.* at 235.

66. *Id.* at 236.

67. *Id.*

68. 725 ILL. COMP. STAT. 5/122-1(c) (2000); *see supra* note 48 and accompanying text (providing the statutory text of the timeliness requirement).

69. People v. Bates, 529 N.E.2d 227, 230 (Ill. 1988).

culpable negligence is difficult to establish.[70] Further, a trial court's determination of whether the delay was due to a defendant's culpable negligence will only be reversed if the determination is manifestly erroneous.[71]

In *People v. Boclair*, the Illinois Supreme Court rejected a claim that the phrase "culpable negligence" is unconstitutionally vague.[72] In *Boclair*, the court looked at dictionary definitions and prior case law and concluded that the "'culpably negligent' standard . . . contemplates something greater than ordinary negligence and is akin to recklessness."[73]

B. May the Court Summarily Dismiss a Petition as Untimely at the First Stage?

In recent years, an issue has arisen as to whether a trial court may summarily dismiss a petition during the first stage of review merely because the petition is untimely. In *People v. Wright*, after holding that the State waived its right to contest the timeliness of a petition, the Illinois Supreme Court went on to state: "In reaching this conclusion, we caution that we are not limiting the trial court's ability, during the court's initial review of noncapital petitions . . . to dismiss the petition

70. People v. Burris, 734 N.E.2d 161, 163 (Ill. App. Ct. 2d Dist. 2000); People v. Perry, 687 N.E.2d 1095, 1097 (Ill. App. Ct. 1st Dist. 1997) ("Freedom from culpable negligence is very difficult to establish.").

71. People v. Caballero, 688 N.E.2d 658, 662 (Ill. 1997); People v. Van Hee, 712 N.E.2d 363, 366 (Ill. App. Ct. 2d Dist. 1999) (stating the manifestly erroneous standard). There is a split in authority among the districts of the appellate court as to whether the defendant's lockdown status in prison may be evidence that some delay may not be the result of the defendant's culpable negligence. *Van Hee*, 712 N.E.2d at 366; People v. Mitchell, 696 N.E.2d 365, 367 (Ill. App. Ct. 3d Dist. 1998) (holding that the court should determine whether the lockdown "deprived the defendant of a meaningful opportunity to prepare his petition in a timely fashion"). *But see* People v. McClain, 684 N.E.2d 1062, 1065 (Ill. App. Ct. 4th Dist. 1997) (holding that "a prison 'lockdown,' restricting an inmate's access to the prison law library, does not constitute a legitimate excuse for the inmate's not filing a postconviction petition in a timely fashion" because "the petitioner-inmate need only plead sufficient *facts* from which the trial court could find a valid claim of deprivation of a constitutional right"); *see also* People v. Tooley, 766 N.E.2d 305, 308 (Ill. App. Ct. 3d Dist. 2002) ("A defendant's allegation that he lacked access to a law library is insufficient to prove lack of culpable negligence."); People v. Scullark, 759 N.E.2d 565, 578 (Ill. App. Ct. 1st Dist. 2001) ("[W]here segregation is at issue, the petitioner must allege that his placement in segregation was through no fault of his own."); People v. Lee, 688 N.E.2d 673, 674 (Ill. App. Ct. 3d Dist. 1997) (holding that lack of access to a law library is not enough to prove absence of culpable negligence).

72. People v. Boclair, 202 Ill. 2d 89, 105–07 (2002) (discussing the difficulty in establishing a lack of culpable negligence).

73. *Id.* at 105 (holding that the term "culpably negligent" is not unconstitutionally vague).

as untimely."[74] This language resulted in a conflict among the districts of the appellate court on the issue of whether trial courts could summarily dismiss a petition as being untimely at the first stage of the post-conviction proceeding.[75]

The Illinois Supreme Court resolved this conflict in *People v. Boclair*.[76] In *Boclair*, the court held that the Act does not authorize the dismissal of a post-conviction petition during the initial stage based on timeliness.[77] In reaching its conclusion, the court looked at the language of sections 122-2.1(a)(2) and 122.5 of the Act. The court stated that a plain reading of section 122-2.1(a)(2) authorizes the dismissal of a post-conviction petition only if the petition is deemed frivolous or patently without merit, not if it is untimely filed.[78] The legislature provided in section 122-5 that the State may file a motion to dismiss if the petition is not timely filed.[79] By addressing timeliness and frivolousness in separate provisions of the Act, the legislature plainly intended to draw a distinction between these two flaws of post-conviction petitions.[80]

The court then determined that the matter of timeliness should be left for the State to assert during the second stage of post-conviction proceedings.[81] The authors note that section 122-5 provides in part: "The court may in its discretion make such order as to . . . extend[] the time of filing any pleading *other than the original petition*, as shall be appropriate, just and reasonable and is generally provided in civil cases."[82] This language seems to lend support to the argument that a

74. People v. Wright, 723 N.E.2d 230, 237 (Ill. 2000); *see also Boclair*, 202 Ill. 2d at 105–07 (discussing the conflicting interpretations this language has generated).

75. For cases holding that a trial court could summarily dismiss a post-conviction petition as being untimely at the first stage, see, for example, *People v. Gunartt*, 763 N.E.2d 862 (Ill. App. Ct. 1st Dist. 2002), *People v. Cruz*, 755 N.E.2d 90 (Ill. App. Ct. 1st Dist. 2001), *People v. Stewart*, 762 N.E.2d 604 (Ill. App. Ct. 1st Dist. 2001), *People v. Lopez*, 740 N.E.2d 1179 (Ill. App. Ct. 1st Dist. 2000), *People v. Harden*, 737 N.E.2d 306 (Ill. App. Ct. 4th Dist. 2000), and *People v. Boclair*, 726 N.E.2d 1166 (Ill. App. Ct. 4th Dist. 2000), *rev'd*, 202 Ill. 2d 89 (2002). But see *People v. Johnson*, 727 N.E.2d 1058 (Ill. App. Ct. 5th Dist. 2000), and *People v. McCain*, 727 N.E.2d 383 (Ill. App. Ct. 5th Dist. 2000), for cases holding that a trial court could not summarily dismiss a post-conviction petition as being untimely at the first stage.

76. *Boclair*, 202 Ill. 2d at 108.

77. *Id.* at 102. The court went on to state: "To the extent that our opinion in *Wright* may be read as holding the contrary to be true, we now expressly overturn that portion of the *Wright* decision." *Id.* at 99.

78. *Id.* at 102; *see also supra* notes 31–36 and accompanying text (discussing the language of section 122-2.1(a)(2)).

79. 725 ILL. COMP. STAT. 5/122-5 (2000).

80. *Boclair*, 202 Ill. 2d at 102.

81. *Id.*

82. 725 ILL. COMP. STAT. 5/122-5 (emphasis added).

trial court does not have discretion to extend the time periods set out in section 122-1. In a special concurrence in *Boclair*, Justice Freeman suggested that the state legislature should clarify whether trial courts should be able to summarily dismiss petitions based on timeliness.[83]

On the same day the court issued its opinion in *Boclair*, it also issued its opinion in *People v. Hager*.[84] In *Hager*, the trial court summarily dismissed a defendant's petition on the grounds that the petition was patently "without merit."[85] The appellate court affirmed the summary dismissal based on the fact that the petition was untimely.[86] The Illinois Supreme Court reversed the appellate court and remanded the case but ordered the appellate court to limit its decision on remand to determining whether the defendant's petition was "frivolous or patently without merit" under section 122-2.1(a)(2).[87] Based on the decision in *Boclair*, the appellate court was precluded from considering the issue of timeliness.[88] Based on the decision in *Hager*, it would appear that the appellate court is also precluded from considering the issue of timeliness on its own, absent a motion to dismiss by the State and a ruling by the trial court.

In *People v. Britt-El*,[89] also issued on the same day as *Boclair*, the court held that the holding in *Boclair* was not to be retroactively applied to a case on collateral review.[90] The dissent pointed out, however, that this issue was not addressed in the *Boclair* opinion itself.[91] Consequently, *Boclair* should be applied retroactively.[92]

It should be noted that *Boclair*'s prohibition against dismissing petitions due to timeliness applies only to first stage summary dismissals. If the trial court dismisses the petition at the second stage, *Boclair* will not apply.[93]

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83. *Boclair*, 202 Ill. 2d at 119 (Freeman, J., specially concurring).

84. People v. Hager, 780 N.E.2d 1094 (Ill. 2002).

85. *Id.* at 1094.

86. *Id.*

87. *Id.* at 1097.

88. *Id.*

89. People v. Britt-El, No. 89837, 2002 WL 1988167 (Ill. Aug. 29, 2002).

90. *Id.* at *6.

91. *Id.* at *7 (Harrison, C.J., dissenting).

92. *Id.* (Harrison, C.J., dissenting).

93. People v. Turner, No. 1-00-3452, 2003 WL 168446, at *3 (Ill. App. Ct. 1st Dist. Jan. 24, 2003).

IV. THE FIRST STAGE: SUMMARY DISMISSAL

A. Statutory Requirements

Within ninety days after the filing and docketing of a post-conviction petition, the court shall examine the petition to determine if it is frivolous or patently without merit.[94] At the summary dismissal stage, all well-pleaded facts that are not positively rebutted by the original trial record are to be taken as true.[95] If the court finds that "the petition is frivolous or is patently without merit, it shall dismiss the petition in a written order, specifying the findings of fact and conclusions of law it made in reaching its decision."[96] An order of dismissal is a "final judgment and shall be served upon the petitioner by certified mail within 10 days of its entry."[97] The standard of review for dismissals at the first stage is de novo.[98]

In considering a petition during the first stage, "the court may examine the court file of the proceeding in which the petitioner was convicted, any action taken by an appellate court in such proceeding and any transcripts of such proceeding."[99] Section 122-1(a)(2) does not contemplate any responsive pleadings by the State at this time.[100] The Act also does not contemplate the partial summary dismissal of some claims at the first stage.[101] Where the circuit court determines that only some of the claims of a non-capital defendant's petition are frivolous or patently without merit, the court should proceed to the second stage and

94. 725 ILL. COMP. STAT. 5/122-2.1(a)(2) (2000).

95. People v. Coleman, 701 N.E.2d 1063, 1071 (Ill. 1998) (capital case). *People v. Coleman* was a capital case, but the Supreme Court specifically addressed section 122-2.1(a)(2). *See id.*

96. 725 ILL. COMP. STAT. 5/122-2.1(a)(2).

97. *Id.*

98. People v. Barrow, 749 N.E.2d 892, 902 (Ill. 2001) (capital case) (citing *Coleman*, 701 N.E.2d at 1075). Although *People v. Barrow* was a capital case, the de novo standard of review for summary dismissals applies to both First and Second Stage dismissals.

99. 725 ILL. COMP. STAT. 5/122-2.1(c).

100. *Coleman*, 701 N.E.2d at 1071. Although section 122-5 specifically contemplates that the State may file a motion to dismiss or an answer only after the trial court has made its first stage independent evaluation to determine frivolity, the mere premature filing of a motion or responsive pleading in the first stage does not necessarily prevent the judge from conducting an independent evaluation. *See* People v. Gaultney, 675 N.E.2d 102, 107 (Ill. 1996) (non-capital case); People v. Ponyi, 734 N.E.2d 935, 939 (Ill. App. Ct. 1st Dist. 2000).

101. People v. Rivera, 763 N.E.2d 306, 310–11 (Ill. 2001) (non-capital case) (stating that the legislative history spoke of "ending with finality those petitions which in their *totality* are frivolous and patently without merit" is not served by granting partial summary dismissals).

counsel should be appointed to represent the defendant and review the petition as a whole.[102]

As discussed *supra*, the court need not appoint counsel for an indigent, non-capital defendant at the summary dismissal stage.[103] Rather, counsel must only be appointed after the court initially reviews the petition and only if it does not dismiss the petition on the ground of frivolity.[104] If the petitioner is indigent and under sentence of death, however, he may request appointment of counsel, and "the court shall appoint counsel if satisfied that the petitioner has no means to procure counsel."[105] If the petition is not dismissed, "the court shall order the petition to be docketed for further consideration in accordance with Sections 122-4 through 122-6."[106]

B. The Ninety-Day Rule

The trial court must make its determination at the summary dismissal stage within ninety days after the filing and docketing of the petition.[107] The court in *People v. Vasquez*[108] stated that "[t]he 90-day provision of section 122-2.1(a) is mandatory rather than discretionary, and a trial court's failure to act within the 90-day period requires the court to docket the petition for further proceedings under sections 122-4 through 122-6 of the Act."[109] The time period commences when the case is docketed on the call of any trial court with jurisdiction over such a

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102. People v. Montgomery, 763 N.E.2d 369, 376 (Ill. App. Ct. 1st Dist. 2001) (citing *Rivera*, 763 N.E.2d at 834). The court in *People v. Montgomery* also held that, pursuant to *Rivera*, if the appellate court finds that any allegation of a multiple-claim, first-stage post-conviction petition is not frivolous or patently without merit, the entire petition is remanded to the trial court for appointment of counsel. *Id. But see* People v. Rogers, 756 N.E.2d 831, 834 (Ill. 2001) (non-capital case) (affirming the appellate court, which had affirmed the trial court's summary dismissal of some of the defendant's claims, but remanding the case for further proceedings on defendant's claims that his appellate attorney was ineffective for failing to raise the issue that certain counts of his indictment were based on a single authority; rather than rely on *Rivera* and remand the case to the trial court in its entirety, the Illinois Supreme Court affirmed the dismissal of some of the counts).

103. *Rivera*, 763 N.E.2d at 309; *see supra* Part II.A (noting that a court can summarily dismiss a non-capital defendant's post-conviction motion and that counsel must be appointed if the court does not dismiss the motion); *see also infra* notes 171–85 and accompanying text (discussing summary dismissal).

104. *Rivera*, 763 N.E.2d at 309.

105. 725 ILL. COMP. STAT. 5/122-2.1(a)(1) (2000).

106. *Id.* § 5/122-2.1(b).

107. *Id.* § 5/122-2.1(a) ("Within 90 days after the filing and docketing of each petition the court shall examine such petition and enter an order thereon pursuant to [Section 122-2.1].").

108. People v. Vasquez, 718 N.E.2d 356 (Ill. App. Ct. 2d Dist. 1999).

109. *Id.* at 358; *see also* People v. Smith, 726 N.E.2d 776, 779 (Ill. App. Ct. 1st Dist. 2000) ("Illinois case law provides that the statutory time limit of 90 days is mandatory.").

petition, even though the judge is not the original trial judge.[110] The filing of a notice of appeal does not toll or extend the ninety-day deadline.[111] When a defendant amends his original petition, however, the ninety-day period is calculated from the filing of the amended petition.[112]

If the court's order of dismissal is reversed on appeal, the State may still file a motion to dismiss at the second stage upon remand.[113] Similarly, there is no automatic right to an evidentiary hearing upon remand from a reversal at the first stage.[114] Consequently, in reversing the summary dismissal of a petition, courts of review should remand the case to the second stage.[115]

C. Requirements Under Sections 122-1 and 122-2

1. Statutory Requirements

Section 122-1 provides that a petition filed under the Act must be verified,[116] and it "must specify in the petition or its heading that it is

110. People v. Green, 563 N.E.2d 61, 65 (Ill. App. Ct. 1st Dist. 1990) ("While it may be practical for the post-conviction petition to be heard by the original trial court judge because he or she is familiar with the case . . . the statute's purpose, i.e., to insure that post-conviction petitions are expeditiously reviewed, is served by holding that the 30 day period begins when the case is docketed on the docket call of any trial court with jurisdiction.").

111. *Vasquez*, 718 N.E.2d at 358; People v. Dauer, 687 N.E.2d 1188, 1190 (Ill. App. Ct. 4th Dist. 1997).

112. People v. Watson, 719 N.E.2d 719, 720 (Ill. 1999) (non-capital case for post-conviction purposes).

113. 725 ILL. COMP. STAT. 5/122-5 ("Within 30 days after the making of an order pursuant to subsection (b) of Section 122-2.1, or within such further time as the court may set, the State shall answer or move to dismiss."); *see also* People v. Montgomery, 763 N.E.2d 369, 377 (Ill. App. Ct. 1st Dist. 2001) (stating that if a case is remanded to the trial court for further proceedings in accordance with sections 122-4 through 122-6 of the Act, the State will then be given the opportunity to answer or otherwise plead).

114. The defendant is not entitled to an evidentiary hearing as of right. An evidentiary hearing is warranted only if the defendant has made a substantial showing, based upon the record and supporting affidavits, that his or her constitutional rights were violated. People v. Turner, 719 N.E.2d 725, 730 (Ill. 1999) (capital case). Although *People v. Turner* was a capital case, the standard for granting an evidentiary hearing is the same in all cases. *See* People v. Mahaffey, 742 N.E.2d 251 (Ill. 2000) (capital case) (holding that an evidentiary hearing is warranted only where the allegations for the post-conviction petition make a substantial showing that a defendant's constitutional rights have been violated), *cert. denied*, 534 U.S. 1029 (2001); People v. Orange, 749 N.E.2d 932 (Ill. 2001) (capital case) (holding that an evidentiary hearing is warranted on a post-conviction petition if the allegations support a theory that a defendant's constitutional rights have been violated).

115. *See* People v. Edwards, 757 N.E.2d 442, 453 (Ill. 2001) (non-capital case).

116. 725 ILL. COMP. STAT. 5/122-1(b) ("The 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.").

filed under this Section."[117] A proceeding under the Act "may not be commenced on behalf of a defendant who has been sentenced to death without the written consent of the defendant, unless the defendant . . . is incapable of asserting his or her own claim" because of a mental or physical condition.[118]

Section 122-2 specifies what must be contained in the petition.[119] The petition must "clearly set forth the respects in which petitioner's constitutional rights were violated."[120] "The petition shall have attached thereto affidavits, records, or other evidence supporting its allegations or shall state why the same are not attached."[121] Additionally, section 122-3 provides that "[a]ny claim of substantial denial of constitutional rights not raised in the original or an amended petition is waived."[122]

2. What Constitutes a Frivolous or "Patently Without Merit" Petition?

The Illinois Supreme Court has recently discussed the standard to apply in determining whether a petition is frivolous or patently without merit. In *People v. Edwards*,[123] the court reversed a trial court's summary dismissal of a petition.[124] The court held that a petition "is frivolous or patently without merit only if the allegations in the petition, taken as true and liberally construed, fail to present the 'gist of a constitutional claim.'"[125] The "gist" standard is "a low threshold," in which the petitioner need only present a limited amount of detail and need not set forth the claim in its entirety.[126] Legal arguments or citations to legal authorities need not be included in the petition.[127]

The *Edwards* majority also rejected the reasoning in *People v. Lemons*[128] and other appellate court cases, which held that a pro se defendant must plead sufficient *facts* from which "the trial court could find a valid claim of deprivation of a constitutional right" in order to

117. *Id.* § 5/122-1(d).
118. *Id.* § 5/122-1(e).
119. *Id.* § 5/122-2.
120. *Id.*
121. *Id.*
122. *Id.* § 5/122-3; *see also infra* Part VII (discussing waiver).
123. People v. Edwards, 757 N.E.2d 442 (Ill. 2001) (non-capital case).
124. *Id.* at 443.
125. *Id.* at 445 (citing People v. Gaultney, 675 N.E.2d 102, 106 (Ill. 1996) (non-capital case)).
126. *Id.* (citing *Gaultney*, 675 N.E.2d at 107).
127. *Id.*
128. People v. Lemons, 613 N.E.2d 1234 (Ill. App. Ct. 4th Dist. 1993) (noting that a pro se defendant alleged her trial attorney had coerced her into pleading guilty and accepting too long a sentence).

satisfy the "gist" standard.[129] The majority went on to say that "'the sufficient facts' test used in *Lemons* and other appellate decisions is at odds with this court's holdings and should be avoided."[130] The *Edwards* court then limited its holding to the specific issue before it, that is, whether the circuit court erred in dismissing the defendant's petition at the first stage of the proceedings.[131]

Justice Fitzgerald, in his concurrence in *Edwards*, had some practical advice for trial courts when approaching first stage summary dismissals:

> Where doubt exists regarding dismissal at the first stage, the trial court should not hesitate to allow the claim to proceed to the second stage, where counsel may amend the petition and craft a more proper pleading for the court's review. If the petition is dismissed at the second stage of the proceedings, a reviewing court is presented with more adequately pleaded facts. Conversely, if the defendant is granted an evidentiary hearing, the defendant will obtain that which by law is his right. At present, this solution serves both the ends of justice and judicial economy.[132]

It should be noted that *Edwards* did not change the Supreme Court's analysis of 122-2.1(a)(2) issues. It relied on its prior decisions in *People v. Gaultney*[133] and *People v. Porter*,[134] both non-capital cases.[135] It, however, *did* direct trial courts and the appellate court not to follow the holding in *Lemons* and its progeny.[136] Thus, *Edwards* should be cited whenever a court or a party analyzes the standard for determining whether a post-conviction petition is frivolous or patently without merit.

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129. *Edwards*, 757 N.E.2d at 446.

130. *Id.* at 445–46.

131. *Id.* at 453. The court stated:

> We do not hold that defendant is entitled to an evidentiary hearing. To merit an evidentiary hearing on his claim that he told his trial counsel to file a motion to withdraw his guilty plea and that counsel was constitutionally ineffective for failing to do so, defendant will have to make a substantial showing to that effect. *See Coleman*, 183 Ill. 2d at 381. Such a showing will necessarily entail some explanation of the grounds that could have been presented in the motion to withdraw the plea. Since defendant will be at the second stage of the post-conviction proceedings and will be represented by an attorney, rather than proceeding *pro se*, this will not present an unreasonable burden.

Id.

132. *Id.* at 460 (Fitzgerald, J., specially concurring).

133. People v. Gaultney, 675 N.E.2d 102 (Ill. 1996) (non-capital case).

134. People v. Porter, 521 N.E.2d 1158 (Ill. 1998) (non-capital case).

135. *Edwards*, 757 N.E.2d at 445 (relying on the "gist" standard).

136. *Id.* at 445–46.

3. Failure to Attach Affidavits, Records or Other Evidence and the Sufficiency of Supporting Documentation[137]

Under Section 122-2, the post-conviction petition must have attached "affidavits, records, or other evidence supporting its allegations or shall state why the same are not attached."[138] Failure to attach the necessary affidavits, records, or other evidence, or explain their absence, is fatal to a post-conviction petition[139] and by itself justifies the petition's summary dismissal.[140]

In *People v. Collins*, the Illinois Supreme Court affirmed the circuit court's summary dismissal of a pro se defendant's post-conviction petition because the defendant failed to comply with the affidavit requirement set forth in section 122-2.[141] The defendant had attached only a "verification" affidavit to his petition.[142] The majority in *Collins* held that this affidavit satisfied the requirement of section 122-1(b) that post-conviction petitions must be verified by affidavit, but it was insufficient to satisfy the requirements of section 122-2.[143] The majority explained that the sworn verification confirmed that the allegations in the petition were brought truthfully and in good faith.[144] The "affidavits, records, or other evidence" described in section 122-2, "by contrast, show[] that the verified allegations are capable of objective or independent corroboration."[145]

In a strongly worded dissent, written upon denial of petition for rehearing, Justice McMorrow argued that the holding in *Collins* was in conflict with the subsequent holding in *Boclair*.[146] Justice McMorrow also argued that the cases relied on by the majority were "manifestly distinguishable."[147] Justice McMorrow stated:

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137. Although this Part is included under the heading of "First Stage Summary Dismissal," the reasoning applies equally to Second Stage Proceedings. The authors will also discuss the applicability of this Part to Second Stage Proceedings. *See infra* Part V.B (discussing the standard for reviewing dismissals that occur during the second stage of trial).

138. 725 ILL. COMP. STAT. 5/122-2 (2000).

139. People v. Collins, 782 N.E.2d 195, 198 (Ill. 2002) (non-capital case) (citing People v. Turner, 719 N.E.2d 725, 730 (Ill. 1999) (capital case)), *reh'g denied*, 782 N.E.2d 195, 203 (Ill. 2002).

140. *Id.* (citing People v. Coleman, 701 N.E.2d 1063, 1071 (Ill. 1998) (capital case)).

141. *Id.* at 200. Furthermore, the defendant had alleged in his post-conviction petition that his court-appointed attorney had failed to comply with his request to file an appeal of his plea of guilty. *Id.* at 196.

142. *Id.*

143. *Id.* at 199.

144. *Id.*

145. *Id.*

146. *Id.* at 203 (McMorrow, J., dissenting).

147. *Id.* at 209 (McMorrow, J., dissenting).

> *[People v.] Jennings*[148] . . . predates the addition of section 122-2(2) to the Act. The petitioner in *Jennings* was represented by counsel and summary dismissal was not a possibility. *[People v.] Turner*[149] and *[People v.] Coleman*[150] are death penalty cases. There is no summary dismissal for post-conviction petitions filed in capital cases. *See* 725 ILCS 5/122-2.1(a)(1) (West 2000). It is plainly inappropriate to rely on these decisions in this case, which is concerned solely with the requirements a noncapital post-conviction petition must meet at the summary dismissal stage.[151]

The dissent went on to cite the holding in *People v. Williams*[152] as support for reversing the summary dismissal.[153] The dissent stated that because *Williams* predates section 122-2.1(2), it suffers from the same deficiency as *Jennings*.[154] Further, while *Coleman* was a capital case, the Illinois Supreme Court specifically addressed section 122-2.1(2) in that case.[155] Justice McMorrow's dissent certainly highlights the problems faced by the courts and the parties when they cite cases in support of their position.

The Illinois Supreme Court has consistently ruled that dismissal at the second stage is justified when the defendant fails to attach supporting documentation.[156] In *People v. Johnson*,[157] the court rejected a defendant's post-conviction claim that his attorney's failure to call a witness constituted ineffective assistance of counsel.[158] The defendant's petition did not contain an affidavit from the witness that trial counsel had failed to call, which rendered any further consideration of the claim unnecessary.[159]

Likewise, the court upheld the trial court's dismissal of a petition at the second stage in *People v. Guest*,[160] where a defendant failed to

148. People v. Jennings, 102 N.E.2d 824 (Ill. 1952) (non-capital case).

149. People v. Turner, 719 N.E.2d 725, 725 (Ill. 1999) (capital case).

150. People v. Coleman, 701 N.E.2d 1063, 1066 (Ill. 1998) (capital case).

151. *Collins*, 782 N.E.2d at 209 (McMorrow, J., dissenting).

152. People v. Williams, 264 N.E.2d 697 (Ill. 1970) (non-capital case).

153. *Collins*, 782 N.E.2d at 209 (McMorrow, J., dissenting).

154. *Id.*; *see also supra* Part II.C (discussing the legislative history of the Act and its adoption into law).

155. *Coleman*, 701 N.E.2d at 1071.

156. As noted in Part II.C, *supra*, many of the cases reviewed by the Illinois Supreme Court are capital cases dismissed at the second stage. Although the legal underpinnings of these decisions apply to first stage dismissals, the practitioner should carefully read the facts of each case to determine if it is applicable to his or her particular situation.

157. People v. Johnson, 700 N.E.2d 996 (Ill. 1998) (capital case).

158. *Id.* at 1011–12.

159. *Id.* at 1004.

160. People v. Guest, 655 N.E.2d 873 (Ill. 1995) (capital case).

submit affidavits of his proposed witnesses.[161] Addressing the defendant's claim of ineffective assistance of counsel, the court said that a defendant must introduce affidavits from those individuals who would have testified in order to support a claim based on counsel's failure to investigate and call witnesses.[162] The court said it could not determine whether the witnesses could have provided any information or testimony favorable to a defendant without affidavits.[163] The court held that in *Guest*, "[b]ecause the defendant has failed to submit affidavits from these proposed witnesses, we will not consider them further."[164]

The Illinois Supreme Court has also consistently upheld the dismissal of post-conviction petitions at the second stage when the record from the original trial proceedings contradicts the defendant's allegations and supporting documentation attached to the petition.[165] Whether a trial court may summarily dismiss a post-conviction petition because the record from the original trial proceedings contradicts the defendant's allegation has been the subject of some disagreement. Since the court's decision in *People v. Boclair*, several petitions for rehearing have been filed, arguing that *Boclair* prohibits trial courts from considering anything other than allegations in the petition at the summary dismissal stage. This argument is based on the following language from Justice Kilbride's opinion in *Boclair*:

> The circuit court is required to make an independent assessment in the summary review stage as to whether the allegations in the petition, liberally construed and taken as true, set forth a constitutional claim for relief. The court is further foreclosed from engaging in any fact finding or any review of matters beyond the allegations of the petition. *People v. Coleman*, 183 Ill. 2d 366 (1998).[166]

This language is in apparent conflict with section 122-2.1(c) of the Act, which addresses summary dismissals, and provides: "In considering a petition pursuant to this Section, the court may examine the court file of the proceeding in which the petitioner was convicted, any action taken by an appellate court in such proceeding and any transcripts of such proceedings."[167]

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161. *Id.* at 883.

162. *Id.*

163. *Id.* (citing People v. Ashford, 520 N.E.2d 332, 340 (Ill. 1998) (capital case)).

164. *Id.* (citing People v. Thompkins, 641 N.E.2d 371, 378 (Ill. 1994) (capital case)).

165. *See* People v. Coleman, 701 N.E.2d 1063, 1072 (Ill. 1998) (capital case); *see also* People v. Miller, No. 89408, 2002 WL 31839183, at *11 (Ill. Dec. 19, 2002) (capital case) (finding that the record contradicted the capital defendant's allegations that his trial counsel failed to explain that a natural life sentence was the most lenient sentence he could receive).

166. People v. Boclair, 202 Ill. 2d 89, 99 (2002) (capital case).

167. 725 ILL. COMP. STAT. 5/122-2.1(c) (2000).

In *Boclair*, the Illinois Supreme Court affirmed the holdings in *People v. Johnson* and *People v. McCain*.[168] The appellate court in both *Johnson* and *McCain* commented that the trial court did not find that the post-conviction petitions in question were frivolous or patently without merit.[169]

Section 122-2.1(c) is not mentioned in the *Boclair*, *Johnson*, or *McCain* decisions. *Boclair* and *McCain*, however, both cite to *People v. Coleman*[170] for the proposition that trial courts are "foreclosed from engaging in any fact finding or any review of matters beyond the allegations of the petition."[171] In fact, *Coleman* also held that "this court has consistently upheld the dismissal of a post-conviction petition when the allegations are contradicted by the record from the original trial proceedings."[172]

Prior to the decision in *Coleman*, the Illinois Supreme Court upheld the summary dismissal of a post-conviction petition at the first stage in *People v. Ramirez*.[173] The court held that the trial court could rely solely on the record before it, even though the defendant's allegations related to an off-the-record discussion involving issues addressed by the trial court when the defendant accepted his guilty plea.[174]

Subsequent to its decision in *Coleman*, the Illinois Supreme Court in *People v. Rogers*[175] affirmed the summary dismissal of a post-conviction petition that claimed that the defendant was not advised of the possibility of consecutive sentencing.[176] The transcript of the plea contradicted this claim.[177] The Illinois Supreme Court said, "We have consistently upheld the dismissal of a post-conviction petition when the record from the original trial proceedings contradicts the defendant's allegations."[178]

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168. *Boclair*, 202 Ill. 2d at 104; People v. Johnson, 727 N.E.2d 1058 (Ill. App. Ct. 5th Dist. 2000); People v. McCain, 727 N.E.2d 383 (Ill. App. Ct. 5th Dist. 2000).

169. *Johnson*, 727 N.E.2d at 1060; *McCain*, 727 N.E.2d at 385.

170. People v. Coleman, 701 N.E.2d 1063 (Ill. 1998) (capital case).

171. *Boclair*, 202 Ill. 2d at 99; *McCain*, 727 N.E.2d at 385.

172. *Coleman*, 701 N.E.2d at 1072.

173. People v. Ramirez, 642 N.E.2d 1224, 1230 (Ill. 1994) (non-capital case).

174. *Id.* at 1228. The defendant in *Ramirez* had also been given opportunities to air his claim at the sentencing hearing on the motion to withdraw his plea, and he failed to do so. *Id.* at 1227.

175. People v. Rogers, 756 N.E.2d 831 (Ill. 2001) (non-capital case).

176. *Id.* at 836.

177. *Id.* at 834.

178. *Id.* (citing People v. Coleman, 701 N.E.2d 1063, 1072 (Ill. 1998) (capital case); People v. Jones, 361 N.E.2d 1104 (Ill. 1977) (non-capital case)).

Section 122-2.1(c) was discussed and analyzed by the Illinois Supreme Court quite recently in *People v. Rivera*.[179] In *Rivera*, the court held that the trial courts may not summarily dismiss only certain claims in a post-conviction petition.[180] If there are *any* valid claims asserted in a petition, counsel must be appointed to review the entire petition.[181] In discussing the basis for this holding, Justice Freeman looked at the legislative history of section 122-2.1:

> Representative Johnson also spoke of how the amendment contemplated a procedure 'where a quick look at the record in the case will show that the petition is *absolutely* untrue. There is no need to go to the expense of appointing a court appointed lawyer, of bringing the individual back from the penitentiary. It only addresses *that type of petition*.' (Emphasis added.) 83d Ill. Gen. Assem. House Proceedings, June 21, 1983, at 89 (statements of Representative Johnson). As these comments reveal, the sponsors spoke of ending with finality those petitions which in their *totality* are frivolous and patently without merit. Partial summary dismissals, as allowed in this case by the circuit court, do not further these legislative goals.[182]

The appellate court has also recently addressed the direction found in section 122-2.1(c) that a trial court may consider the court file, the action of the appellate court, and the trial court proceedings when deciding whether to summarily dismiss a post-conviction petition.[183] "Those records should be examined to determine whether the allegations are positively rebutted by the record. That determination will assist the trial court in resolving the issue as to whether the petition is frivolous or patently without merit."[184] These holdings are based on the language in *Coleman*. "At the dismissal stage of a post-conviction proceeding, all well-pleaded facts *that are not positively rebutted by the original trial record* are to be taken as true."[185]

Based on all of the above, the authors believe section 122-2.1(c) is still in effect, despite the contrary language in *Boclair*. Consequently, trial courts and courts of review may still consider the court file, any appellate court decision in the case, and the proceedings in the trial court when determining whether to summarily dismiss a post-conviction petition.

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179. People v. Rivera, 763 N.E.2d 306, 308 (Ill. 2001) (non-capital case).

180. *Id.* at 310–11.

181. *Id.* at 310.

182. *Id.* at 311.

183. People v. Smith, 761 N.E.2d 306, 315 (Ill. App. Ct. 1st Dist. 2001); People v. Montgomery, 763 N.E.2d 369, 373–74 (Ill. App. Ct. 1st Dist. 2001).

184. *Smith*, 761 N.E.2d at 315; *Montgomery*, 763 N.E.2d at 374.

185. People v. Coleman, 701 N.E.2d 1063, 1073 (Ill. 1998) (capital case) (emphasis added).

V. THE SECOND STAGE: PROCEEDINGS ON THE PETITION

A. Statutory Requirements

If the petition is not dismissed during the first stage, pursuant to section 122-2.1, and the defendant requests appointment of counsel, the court shall appoint counsel during the second stage if satisfied that the petitioner has no means of procuring counsel.[186] Section 122-5 requires the State to either answer or move to dismiss the petition within thirty days after the petition is docketed pursuant to section 122-2.1(b), or within such further time as the court may set.[187] The State's failure to seek dismissal, based on res judicata, of some issues in the defendant's post-conviction petition does not automatically entitle the defendant to an evidentiary hearing on those issues where, at the hearing on the petition, the State requested dismissal of the petition in its entirety, thus expanding on the relief originally requested.[188] In the event that the State's motion to dismiss is filed and denied, the State must file an answer within twenty days after the court's denial.[189]

The court may "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."[190] If the petitioner fails to raise a claim of substantial denial of constitutional rights in the original or amended petition, the claim is waived.[191]

Where the State seeks dismissal of a petition instead of filing an answer, its motion to dismiss assumes the truth of the allegations to which it is directed and questions only their legal sufficiency.[192] Furthermore, an order granting the State's motion to dismiss is a final judgment subject to de novo review.[193]

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186. 725 ILL. COMP. STAT. 5/122-4 (2000).

187. *Id.* § 5/122-5.

188. People v. Thompkins, 641 N.E.2d 371, 376 (Ill. 1994) (capital case).

189. 725 ILL. COMP. STAT. 5/122-5.

190. *Id.*

191. *Id.* § 5/122-3; *see also infra* Part VII (discussing waiver).

192. People v. Ward, 718 N.E.2d 117, 123 (Ill. 1999) (capital case).

193. 725 ILL. COMP. STAT. 5/122-7; *see also* People v. Barrow, 749 N.E.2d 892, 902 (Ill. 2001) (capital case) ("A circuit court's dismissal of a post-conviction petition without a hearing will be reviewed *de novo*.").

B. What Is the Standard for Granting an Evidentiary Hearing?

A defendant is not entitled to an evidentiary hearing as of right. The mere allegation of a constitutional violation is insufficient to justify an evidentiary hearing on a post-conviction petition, and a petitioner is entitled to an evidentiary hearing only if he or she has made a substantial showing, based on the record and supporting affidavits, that his or her constitutional rights were violated.[194] In determining whether to grant an evidentiary hearing, "all well-pled facts in the defendant's petition and any accompanying affidavits are taken as true."[195] Nonfactual and nonspecific assertions that merely amount to conclusions, however, are insufficient to require a hearing under the Act.[196]

1. Cases Affirming Dismissal Without an Evidentiary Hearing

The Illinois Supreme Court has applied these standards in a number of recent decisions where it affirmed the trial courts' dismissal at the second stage. In *People v. Burt*, the court affirmed the dismissal of a petition without an evidentiary hearing.[197] In *Burt*, the defendant was charged with murder and armed robbery of two individuals.[198] During the course of the jury trial, the defendant pled guilty just prior to the State resting its case.[199] The case proceeded to sentencing and the defendant was sentenced to death.[200]

In his amended post-conviction proceeding, the defendant claimed there was a bona fide doubt as to his fitness to stand trial and that his attorney was incompetent for not requesting a fitness hearing during trial.[201] In support of this claim, he contended that his decision to change his plea to guilty midway through trial was irrational and illustrated that his "will had become flattened" and "his desire for self-preservation disappeared."[202]

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194. People v. Orange, 749 N.E.2d 932, 939 (Ill. 2001) (capital case); People v. Mahaffey, 742 N.E.2d 251, 261 (Ill. 2000) (capital case); People v. Turner, 719 N.E.2d 725, 730 (Ill. 1999) (capital case). All of these are capital cases, but the standard for granting an evidentiary hearing is the same in all cases.

195. People v. Burt, No. 86898, 2001 WL 1243631, at *3 (Ill. Oct. 18, 2001) (capital case) (citing People v. Towns, 696 N.E.2d 1128, 1133 (Ill. 1998) (capital case)).

196. *Id.* (citing People v. Coleman, 660 N.E.2d 919, 933 (Ill. 1995) (capital case)).

197. *Id.* at *10.

198. *Id.* at *2.

199. *Id.*

200. *Id.* at *3.

201. *Id.*

202. *Id.* at *5.

In affirming the dismissal of a petition without an evidentiary hearing, the court relied upon the transcript of the defendant's plea in finding that the assertion in his petition, that his will was "flattened," was untrue.[203]

Similarly, in *People v. Edwards*, the court affirmed the dismissal of the defendant's petition without an evidentiary hearing, where the capital defendant alleged his trial counsel was ineffective for failing to impeach several witnesses with certain information.[204] The court found that the amended petition, which presented those issues in summary fashion and then cited a lengthy summary of the police investigation, did not make a substantial showing of a violation of the defendant's constitutional rights.[205]

In *People v. Simpson*,[206] the Illinois Supreme Court affirmed the dismissal of a capital defendant's petition at the second stage.[207] In *Simpson*, the court addressed the scope of the new Illinois Supreme Court Rules governing death penalty cases. The majority held that the new Illinois Supreme Court rules would not be applied retroactively and they were not intended to overrule well-established constitutional guaranties regarding the right to self-representation.[208]

2. Cases Reversing the Trial Court's Order Dismissing the Petition Without an Evidentiary Hearing[209]

In *People v. Harris*,[210] the defendant alleged that his trial counsel was ineffective during the capital sentencing hearing because he failed to investigate and present evidence in mitigation.[211] In support of his claim, the defendant relied upon his trial attorney's affidavit wherein the attorney admitted that he negligently failed to investigate or present evidence in mitigation, even though trial counsel submitted seventeen letters from the defendant's family and friends during the sentencing

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203. *Id.* at *6.

204. People v. Edwards, 745 N.E.2d 1212, 1227 (Ill.) (capital case), *cert. denied*, 534 U.S. 1023 (2001).

205. *Id.*

206. People v. Simpson, Nos. 85084 & 86926, 2001 WL 1136728 (Ill. Sept. 27, 2001) (capital case).

207. *Id.* at *20.

208. *Id.* at *16–17; *see also* People v. Jackson, No. 88474, 2001 WL 1632291 (Ill. Dec. 20, 2001) (capital case) (applying the old supreme court rules governing capital cases even though the new rules had been adopted).

209. *See infra* Part VII (discussing additional case law relating to the legality of a trial court's dismissal of a petition without an evidentiary hearing).

210. People v. Harris, No. 89796, 2002 WL 1340896 (Ill. June 20, 2002) (capital case).

211. *Id.* at *1.

hearing.[212] The Illinois Supreme Court reversed the trial court's summary dismissal of the petition and remanded the case for an evidentiary hearing on this issue.[213] The court applied the standard for determining ineffective assistance of counsel set forth in *Strickland v. Washington*[214] and concluded, "We cannot say that the mitigation evidence contained in the post-conviction record could not have altered the determination that there was no evidence that mitigated against the imposition of the death sentence."[215]

Similarly, in *People v. Orange*,[216] the defendant's post-conviction petition claimed that his attorney was ineffective at sentencing.[217] Orange's attorney did not present any mitigation witnesses at the sentencing hearing because he felt there was "a lack of a significant criminal history on the part of this defendant."[218] In support of his ineffective assistance of counsel claim, the defendant attached affidavits of eighteen relatives, friends, and employers "who, if contacted, would have testified to positive traits and actions of the defendant despite an abusive and violent upbringing."[219] The defendant also submitted a deposition of defense counsel, wherein the defense counsel admitted that he did not investigate and present mitigating witnesses because he felt it would be fruitless.[220]

The Illinois Supreme Court reversed the trial court's summary dismissal of the defendant's post-conviction petition and remanded the cause for an evidentiary hearing.[221] The court stated that at the hearing that the trial court must determine "whether defense counsel acted in conformity with defendant's wishes or if his client's reluctance was a

212. *Id.* at *12. In his affidavit, counsel admitted that he "never seriously considered that [the defendant's] case was a death penalty case in the sense that it never occurred to [him] that a death sentence might actually be imposed." *Id.* at *13. The affidavit went on to say, "I never investigated [the defendant's] case to develop evidence for purposes of a capital sentencing hearing. . . . [M]y failure to investigate was based entirely upon my own feeling that [the defendant's] case didn't merit imposition of the death penalty . . . ." *Id.*

213. *Id.* at *17.

214. Strickland v. Washington, 466 U.S. 668 (1984); *see also infra* Part VIII.A.1 (discussing in more detail the *Strickland* standard and its application to trial sentencing errors).

215. *Harris*, 2002 WL 1340896, at *15.

216. People v. Orange, 659 N.E.2d 935 (Ill. 1995) (capital case).

217. *Id.* at 939.

218. *Id.* at 948.

219. *Id.*

220. *Id.* at 949. Defense counsel also admitted he did not attempt to contact any mitigation witnesses, claiming that he acted in conformity with the defendant's wishes because "it was his 'impression' that the defendant 'was not about to humble himself.'" *Id.*

221. *Id.* at 951.

result of counsel discouraging his client from presenting any mitigating witnesses."[222]

VI. STAGE THREE: THE EVIDENTIARY HEARING

A. Statutory Requirements

At the evidentiary hearing, "the court may receive proof by affidavits, depositions, oral testimony, or other evidence."[223] If the court rules in the defendant's favor, "it shall enter an appropriate order with respect to the judgment or sentence in the former proceedings, and such supplementary orders as to rearraignment, retrial, custody, bail, or discharge as may be necessary and proper."[224] As previously noted, the decision to have the defendant present at the hearing is within the sound discretion of the hearing judge, and only a clear abuse of discretion or application of impermissible legal standards will justify reversal.[225] In addition, even though section 122-8 of the Act provides that the petition be reviewed by a judge other than the one who presided at the original trial, this provision was found to be unconstitutional in *People v. Joseph*.[226]

An order granting or denying relief after an evidentiary hearing is a final judgment on the petition and is subject to review "in a manner pursuant to the rules of the Supreme Court."[227] The standard of review of a ruling by a court in a post-conviction proceeding in which an evidentiary hearing was held is the manifestly erroneous standard.[228]

In *People v. Johnson*, the Supreme Court affirmed the trial court's dismissal of some of the capital defendant's post-conviction claims and the denial of other claims.[229] The court first looked at section 122-6 and held that "this proceeding was a section 122-6 hearing even though

222. *Id.* at 950.

223. 725 ILL. COMP. STAT. 5/122-6 (2000).

224. *Id.*

225. *Id.*; People v. Collins, 619 N.E.2d 871, 873 (Ill. App. Ct. 3d Dist. 1993) (affirming the trial court's order requiring the Illinois Department of Corrections to transport the inmate to the county for the hearing and vacating the portion of the trial court's order remanding the defendant inmate to the county sheriff because courts were without authority to transfer inmates from one facility to another).

226. 725 ILL. COMP. STAT. 5/122-8; People v. Joseph, 495 N.E.2d 501, 507 (Ill. 1986) (non-capital case).

227. 725 ILL. COMP. STAT. 5/122-7.

228. People v. Scott, 742 N.E.2d 287, 293 (Ill. 2001) (capital case), *cert. denied*, 534 U.S. 873 (2001).

229. People v. Johnson, No. 89910, 2002 WL 31839199, at *1 (Ill. Dec. 19, 2002) (capital case).

no live testimony was presented."[230] The court then held that, while it would review de novo the claims dismissed by the trial court, the court would review the defendant's claims as to his fitness to plead guilty and the performance of trial counsel under a manifestly erroneous standard, as these claims were denied following the section 122-6 hearing.[231]

The State's substantive right to appeal from the granting of a defendant's petition for post-conviction relief is unaffected by Supreme Court Rule 604(a), which does not allow the state to appeal interlocutory rulings in criminal cases that do not effectively result in dismissal of charges.[232] Even though criminal procedural rules apply to appeals from post-conviction proceedings, the grant of a post-conviction petition is a final judgment on a civil matter that the State may appeal.[233] If the trial court dismisses the petition or denies post-conviction relief at any stage, the defendant may appeal.[234]

B. Discovery

In a post-conviction proceeding, the trial court has inherent authority to order discovery based on, "among other relevant circumstances, the issues presented in the post-conviction petition, the scope of discovery sought, [and] the length of time between the conviction and the post-conviction proceeding."[235] The taking of discovery depositions for a post-conviction proceeding is neither authorized nor prohibited by the Post-Conviction Hearing Act.[236] Instead, it is a matter within the trial judge's inherent authority.[237] In deciding whether to authorize the taking of depositions, the trial court should consider the burden that the deposition would impose on the opposing party and the witness.

The Illinois Supreme Court recently issued a cautionary note to trial courts when ruling on discovery issues. In *People v. Johnson*, the court

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230. *Id.* at *4; *see also* 725 ILL. COMP. STAT. 5/122-6 (mandating that a trial court may "receive testimony by affidavits, depositions, oral testimony, or other evidence" and has the discretion to determine whether to bring a petitioner before the court for a hearing).

231. *Johnson*, 2002 WL 31839199, at *5 ("We will give some deference to the circuit court in acknowledgment of its familiarity with petitioner's case and particularly with the professional performance of trial counsel.").

232. People v. Andretich, 614 N.E.2d 489, 491 (Ill. App. Ct. 3d Dist. 1993); *see also* ILL. SUP. CT. R. 604(a)(1) ("[T]he State may appeal only from an order or judgment the substantive effect of which results in dismissing a charge . . .; arresting judgment . . .; quashing an arrest . . .; or suppressing evidence.").

233. *Andretich*, 614 N.E.2d at 491.

234. People v. Rovito, 762 N.E.2d 641, 645 (Ill. App. Ct. 1st Dist. 2001).

235. People v. Pecoraro, 677 N.E.2d 875, 892–93 (Ill. 1997) (capital case).

236. People v. Henderson, 662 N.E.2d 1287, 1303 (Ill. 1996) (capital case).

237. *Id.*

said the trial court must exercise its authority to order discovery with caution, as "a defendant may attempt to divert attention away from constitutional issues which escaped earlier review by requesting discovery."[238] In addition, "the trial court should allow discovery only if the defendant has shown 'good cause,' and should consider 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 on any witnesses, and the availability of evidence through other sources."[239] The court indicated it would reverse a trial court's denial of discovery at the post-conviction stage only for an abuse of discretion.[240]

VII. RES JUDICATA, WAIVER, AND SUCCESSIVE PETITIONS

A. Res Judicata and Waiver

As mentioned earlier, "[a]ny claim of substantial denial of constitutional rights not raised in an original or amended petition is waived."[241] Furthermore, a "defendant waives a post-conviction issue if the issue is not raised in the original or amended post-conviction petition."[242]

In the context of post-conviction proceedings, "[w]aiver is a rule of administrative convenience, not a jurisdictional or absolute bar to procedurally defaulted claims."[243] Strict application of the waiver rule to bar the presentation of issues in a post-conviction proceeding "may be relaxed in certain instances, including when the factual insufficiency

238. People v. Johnson, No. 85134, 2002 WL 592153, at *14 (Ill. Apr. 18, 2002) (capital case) (citing People v. Hickey, No. 87286, 2001 WL 1137273, at *5 (Ill. Sept. 27, 2001) (capital case)) (modified on denial of rehearing May 29, 2002); *see also* People v. Enis, 743 N.E.2d 1, 30–31 (Ill. 2000) (capital case) (concluding that a defendant's post-conviction subpoena of his police file, which the police withheld during trial, in an effort to discover exculpatory evidence "was little more than a fishing expedition" because the defendant did not argue during trial that either a discovery violation or a *Brady* violation had occurred).

239. *Johnson*, 2002 WL 592153, at *14 (citing People *ex rel.* Daley v. Fitzgerald, 526 N.E.2d 131, 135 (Ill. 1988) (non-capital case)); *see also* People v. Fair, 738 N.E.2d 500, 504 (Ill. 2000) (capital case) ("[T]he circuit court should allow discovery only after the moving party demonstrates 'good cause' for a discovery request.").

240. *Johnson*, 2002 WL 592153, at *14. The court further noted: "A trial court does not abuse its discretion in denying a discovery request which ranges beyond the limited scope of a post-conviction proceeding and amounts to a 'fishing expedition.'" *Id.* (citing *Enis*, 743 N.E.2d at 30–31); *see also* People v. Lucas, No. 89458, 2002 WL 31839191, at *13 (Ill. Dec. 19, 2002) (capital case) (upholding the trial court's order refusing to grant further discovery to the defense).

241. 725 ILL. COMP. STAT. 5/122-3 (2000); *see also* text accompanying note 122 (quoting 725 ILL. COMP. STAT. 5/122-3).

242. People v. Barrow, 749 N.E.2d 892, 912 (Ill. 2001) (capital case).

243. People v. Hawkins, 690 N.E.2d 999, 1004 (Ill. 1998) (capital case).

of the record on appeal prevented an appellant from raising an issue before the reviewing court."[244] This exception is triggered "when the evidentiary basis for the claim lies outside the record, and not by the mere failure of the party to present or raise a claim."[245] "The doctrines of *res judicata* and waiver . . . will be relaxed in post-conviction proceedings in three situations: where fundamental fairness so requires; where the alleged waiver stems from the incompetence of appellate counsel; or where the facts relating to the claim do not appear on the face of the original appellate record."[246]

Even though there are situations where the doctrines of res judicata and waiver will be relaxed, these doctrines are still viable and strictly applied today. In *People v. Scott*,[247] the Illinois Supreme Court held that in a proceeding under the Act the doctrine of waiver barred consideration of claims of instructional errors that could have been, but were not, raised on direct appeal.[248] Similarly, in *People v. McNeal*,[249] a claim by a capital murder defendant that a decision by the Illinois Supreme Court in a separate case, suppressing his co-defendant's confession, required suppression of the evidence in his own case, could not be raised for the first time on appeal from a denial of the defendant's post-conviction petition.[250]

An important issue that remains unresolved is whether appellate counsel may raise issues on appeal that the pro se petitioner did not raise before the trial court. Courts of review are often confronted with this issue because appellate counsel is routinely appointed to represent pro se petitioners after the summary dismissal of their petitions. In *People v. Bates*,[251] the First District rejected the State's argument that a defendant could not raise for the first time on appeal that he was improperly admonished pursuant to Illinois Supreme Court Rule 605(b) before he pled guilty.[252] The authors, however, believe that *Bates* is

244. *Id.*

245. *Id.*

246. People v. Mahaffey, 742 N.E.2d 251, 261 (Ill. 2000) (capital case).

247. People v. Scott, 742 N.E.2d 287, 292 (Ill. 2000) (capital case), *cert. denied*, 534 U.S. 873 (2001).

248. *Id.* at 292.

249. People v. McNeal, 742 N.E.2d 269 (Ill. 2001) (capital case).

250. *Id.* at 275.

251. People v. Bates, 751 N.E.2d 180 (Ill. App. Ct. 1st Dist. 2001) (non-capital case).

252. *Id.* at 183–84; *see also* ILL. SUP. CT. R. 605(b) (enumerating the steps a defendant who has entered a non-negotiated plea of guilty must take to exercise the right to appeal).

applicable only in cases where the record indicates that a defendant was not properly admonished pursuant to Rule 605(b).[253]

By considering issues raised for the first time on appeal, the appellate court undermines the authority of the trial court to review the petition and, if the petition fails to allege a substantial denial of the defendant's constitutional rights, to summarily dismiss the petition under section 122-2.1(a)(2). The appellate court would be treating these issues as if the trial court had summarily dismissed them, even though they were never presented to the trial judge.

In his special concurrence in *Boclair*, Justice Freeman suggested that the legislature amend the Act to "allow a trial judge to dismiss a petition, without prejudice, for lack of timeliness. In that way, a petitioner would be able to amend the petition to include the necessary allegations concerning the lack of culpable negligence."[254] In Justice McMorrow's special concurrence in *Boclair*, she opined that the majority in *Collins* should have allowed the defendant

> the opportunity to amend his post-conviction petition with an explanation for why an additional affidavit was unavailable. [Illinois] case law would permit such an amendment. *See People v. Watson*, 187 Ill. 2d 448 (1999). Nevertheless, th[e] court held that the defendant's petition should be finally dismissed.[255]

In his special concurrence in *Boclair*, Justice Thomas responded to Justice McMorrow:

> [A] petition that does *not* meet these requirements—as to either the necessary allegations or the necessary affidavits—is *not sufficient* to invoke the Act . . . .
>
> In *Collins*, the court correctly held that, in determining whether a post-conviction petition is frivolous or patently without merit, the trial court *may* consider whether the proffered petition is in fact a 'petition' as defined by the Act.[256]

The authors believe that if a petition that does not allege a substantial violation of constitutional rights is not sufficient to invoke the Act, and the petitioner's appellate counsel concedes as much by not reasserting

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253. *See* People v. Jamison, 690 N.E.2d 995, 997–98 (Ill. 1998) (capital case) (requiring remand due to the judge's failure to comply with Rule 605(b)). *Contra* People v. Burton, 703 N.E.2d 49, 57–58 (Ill. 1998) (capital case). In *People v. Burton*, the court held the circuit court's failure to give the warnings required under Rule 605(b) was harmless because the circuit court had the opportunity to consider the defendant's motion to withdraw his guilty plea and sentence. *Id.*

254. People v. Boclair, 202 Ill. 2d 89, 117 (2002) (Freeman, J., specially concurring) (non-capital case).

255. *Id.* at 125 (McMorrow, J., specially concurring).

256. *Id.* at 139 (Thomas, J., specially concurring).

on appeal any of the grounds raised in the petition, the appellate court should not find that the trial court erroneously dismissed the petition. Rather, the court should affirm the dismissal. This position is supported by the recent decision in *People v. Britt-El*. In *Britt-El*, the defendant filed a second post-conviction petition, which presented many claims that were not raised in the defendant's first post-conviction petition.[257] The court noted that, "[i]n his brief before th[e] court, defendant [did] not mention the additional claims raised in his second post-conviction petition nor [did] he argue that these claims were excused from the waiver provision of section 122-3."[258] The court said it could find no reason "why the additional claims could not have been included in the defendant's first petition."[259] Consequently, the claims in the defendant's second petition, which were not included in his first petition, were waived.[260]

The authors believe that it is significant that Britt-El's first post-conviction petition was filed pro se. The Illinois Supreme Court limited its review to consideration of those claims of ineffective assistance of trial counsel, which were raised in both the defendant's first and second post-conviction petitions, even though the first post-conviction petition was filed pro se.[261] This strict application of the waiver language in section 122-3 makes clear that any claim not raised in the original or amended petition is waived, whether the new claim is raised for the first time in a successive petition or on appeal, even if the original petition was filed pro se.

B. Successive Petitions

Where a claimed error could not have been presented in an earlier proceeding, there is a potential that a second or subsequent post-conviction petition may be filed.[262] The Illinois Supreme Court comprehensively addressed successive post-conviction petitions in *People v. Pitsonbarger*.[263] In *Pitsonbarger*, the Illinois Supreme Court held that section 122-3 of the Act expressly requires courts to apply the

257. People v. Britt-El, No. 89837, 2002 WL 1988167, at *1 (Ill. Aug. 29, 2002) (non-capital case).

258. *Id.* at *4.

259. *Id.*

260. *Id.*

261. *Id.* (citing People v. Pitsonbarger, No. 89368, 2002 WL 1038729, at *12–13 (Ill. May 23, 2002) (capital case)).

262. People v. Flores, 606 N.E.2d 1078, 1083 (Ill. 1992) (capital case), *cert. denied*, 510 U.S. 831 (1993).

263. People v. Pitsonbarger, No. 89368, 2002 WL 1038729 (Ill. May 23, 2002) (capital case).

procedural bar of waiver when reviewing claims asserted in a successive post-conviction petition.[264] This statutory bar may only be relaxed when fundamental fairness requires it.[265] In determining whether fundamental fairness requires that a claim raised in a successive petition be considered on its merits, the courts must apply the "cause-and-prejudice test."[266] The court explained: "we reiterate that 'cause' in this context refers to any objective factor, external to the defense, which impeded the petitioner's ability to raise a specific claim in the initial post-conviction proceeding,"[267] and the "[p]rejudice, in this context, would occur if the petitioner were denied consideration of an error that so infected the entire trial that the resulting conviction or sentence violated due process."[268] As with the constitutional test for ineffective assistance of counsel,[269] both elements of the cause-and-prejudice test must be met in order for the petitioner to prevail.[270]

The court pointed out that section 122-3 of the Act provides that "'any claim' not raised in the original or an amended petition is waived."[271] Consequently, the court held that "a petitioner must establish cause and prejudice as to each individual claim asserted in a successive petition."[272] This requirement means that a petitioner must show how the deficiency in the first post-conviction proceeding affected his ability to raise each specific claim. The court also held that even if a petitioner cannot show cause and prejudice, "his failure to raise a claim in an earlier petition will be excused if necessary to prevent a fundamental miscarriage of justice."[273] To invoke this exception to the waiver rule of section 122-3, though, "[a] petitioner must show actual innocence, or, in the context of the death penalty, he must show that but for the claimed constitutional error he would not have been found eligible for the death penalty."[274]

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264. *Id.* at *1, *11.

265. *Id.* at *10 (citing *Flores*, 606 N.E.2d at 1085).

266. *Id.* at *6.

267. *Id.* at *8.

268. *Id.* at *10 (citing *Flores*, 606 N.E.2d at 1090).

269. Strickland v. Washington, 466 U.S. 668, 687 (1984); *see also infra* Part VIII.A (discussing ineffective assistance of counsel).

270. *Pitsonbarger*, 2002 WL 1038729, at *14.

271. *Id.* at *9.

272. *Id.*

273. *Id.* at *7.

274. *Id.*; *see* People v. Hudson, 745 N.E.2d 1246, 1251 (Ill. 2001) (capital case) (citing Sawyer v. Whitley, 505 U.S. 333, 348 (1992)).

VIII. RECURRING ISSUES IN POST-CONVICTION PROCEEDINGS

The Act and the case law limit, to some degree, the number of issues a petitioner can raise in a post-conviction petition. The Act limits the petitioner to claims involving a "substantial denial" of the petitioner's rights under the United States Constitution, the Illinois Constitution, or both.[275] Also, as mentioned above, "[a]ll issues decided on direct appeal are *res judicata*, and all issues that could have been raised in the original proceeding but were not are waived."[276] Despite these limitations, a number of recurring issues are raised in post-conviction proceedings. This Part will analyze recurring and unresolved issues that have recently been addressed by the Supreme Court.

A. Ineffective Assistance of Counsel

1. Ineffective Assistance of Trial Counsel

The most common issue raised in post-conviction petitions is the claim of ineffective assistance of counsel. This Sixth Amendment claim pervades almost every petition filed in the trial courts and almost every opinion issued by our courts of review. "Ineffective assistance of trial counsel claims in post-conviction petitions are judged [by] . . . the standard set forth by the United States Supreme Court in *Strickland v. Washington*."[277] This standard is the same standard used to analyze ineffective assistance of counsel claims made on direct review.

In *People v. Coleman*, the Illinois Supreme Court discussed *Strickland* in the context of post-conviction proceedings.[278] To prevail on an ineffective assistance of counsel claim, the defendant first must establish that his attorney's performance was deficient in that "counsel made errors so serious that counsel was not functioning as 'counsel' guaranteed the defendant by the Sixth Amendment."[279] "A defendant must overcome the strong presumption that the challenged action or inaction was the product of sound trial strategy and not of incompetence."[280] For example, "[w]hether defense counsel's failure to investigate amounts to ineffective assistance is determined by the value

275. 725 ILL. COMP. STAT. 5/122-2 (2000).

276. People v. Montgomery, 763 N.E.2d 369, 372 (Ill. App. Ct. 1st Dist. 2001) (citing People v. Whitehead, 662 N.E.2d 1304, 1311 (Ill. 1996) (capital case)); *see also supra* text accompanying note 9 (quoting *Montgomery*).

277. People v. Coleman, 701 N.E.2d 1063, 1079 (Ill. 1998) (capital case) (citing Strickland v. Washington, 466 U.S. 668 (1984)).

278. *Coleman*, 701 N.E.2d at 1079.

279. *Id.* (citing *Strickland*, 466 U.S. at 687).

280. *Id.* (citing People v. Barrow, 549 N.E.2d 240, 240 (Ill. 1989) (capital case)).

of the evidence that was not presented at trial and the closeness of the evidence that was presented."[281]

Addressing the second prong in *Strickland*, the *Coleman* court stated that "a defendant must demonstrate that, but for defense counsel's deficient performance, the result of the proceedings would have been different."[282] Although both prongs of the *Strickland* test must be met before a defendant can succeed on a claim of ineffective assistance of counsel, the court in *Coleman* went on to note that "[c]ourts, however, may resolve ineffectiveness claims under the two-part *Strickland* test by reaching only the prejudice component, for lack of prejudice renders irrelevant the issue of counsel's performance."[283]

The cases addressing the issue of ineffective assistance of trial counsel are fact specific. When analyzing the case law in this area, the practitioner should keep in mind the strength or weakness of the State's case as well as the stage at which the post-conviction petition was disposed of in the trial court.[284] The practitioner should also look at the sufficiency of the documentation supporting the allegations when reviewing these decisions.[285]

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281. *Montgomery*, 763 N.E.2d at 374; People v. Smith, 761 N.E.2d 306, 328 (Ill. App. Ct. 1st Dist. 2001).

282. *Coleman*, 701 N.E.2d at 1079 (citing *Strickland*, 466 U.S. at 694). The court reviewed trial counsel's performance in *Coleman* and remanded the case for an evidentiary hearing on the issue of whether counsel's failure to interview a witness was sufficiently deficient under *Strickland*. *Id.* at 1079–80. The court went on to reject a second claim of ineffective assistance of counsel where the petition alleged counsel failed to investigate the circumstances of a related shooting. *Id.* at 1080. The court held defendant could not establish the requisite prejudice under *Strickland*, so there was no need to determine whether defendant satisfied the deficiency prong of *Strickland*. *Id.*

283. *Id.* at 1079 (citations omitted).

284. *See, e.g.*, *Montgomery*, 763 N.E.2d at 375. In *People v. Montgomery*, the court reversed the summary dismissal at the first stage based on allegations of ineffective assistance of counsel for failure to investigate and present expert evidence that the victim died not from strangulation but from a seizure. *Id.* The court based its decision on the "value of the evidence and the closeness of the case." *Id.* *But see* People v. Smith, 745 N.E.2d 1194 (Ill. 2000) (capital case). In *People v. Smith*, the court held that the petitioner made an insufficient showing to warrant an evidentiary hearing on his claim that, but for his trial counsel's failure to present evidence of other mitigating factors, defendant would not have been sentenced to death. *Id.* at 1211. The court reasoned that counsel presented a complete picture of defendant's upbringing and a detailed picture of the defendant's good behavior and adjustment to incarceration. *Id.* The additional proffered evidence, even if true, would have had minimal impact on sentencing. *Id.*; *see also* People v. Peeples, No. 83783, 2002 WL 1340876, at *38 (Ill. June 20, 2002) (capital case) (upholding the trial court's dismissal of defendant's ineffective assistance of counsel's claims at the second stage).

285. *See, e.g.*, People v. Edwards, 745 N.E.2d 1212 (Ill. 2001) (capital case), *cert. denied*, 534 U.S. 1023 (2001). In *People v. Edwards*, the court held that an evidentiary hearing was not warranted on allegations that trial counsel was ineffective for failing to impeach several witnesses with certain information. *Id.* at 1227. The court reasoned that the amended petition presented

2. Ineffective Assistance of Appellate Counsel

The *Strickland* two-prong test also applies to claims of ineffective appellate counsel.[286] A defendant must allege facts showing the failure to raise an issue was objectively unreasonable and that counsel's decision prejudiced the defendant.[287] If the underlying issue is without merit, however, a defendant has suffered no prejudice.[288]

In *People v. Johnson*, the court held that appellate counsel's choices regarding which issues to pursue are normally entitled to substantial deference.[289] The court reasoned that appellate counsel need not brief every conceivable issue and may refrain from developing issues without merit because the defendant suffers no prejudice under *Strickland*.[290] The court, however, went on to say that "the prejudice inquiry requires [the court] to examine the merits of the claims not raised by appellate counsel."[291]

In *People v. Simpson*, the Supreme Court considered allegations in a post-conviction petition that a police officer committed perjury before the grand jury, at both a motion to suppress and at trial.[292] The court first agreed with the State that, as all of the testimony in question was contained in the record on direct appeal, "each of these claims could have and should have been raised on direct appeal. Thus, these claims are waived."[293] The court continued by saying that "fundamental fairness" may require that the principles of waiver be relaxed.[294] The court explained that in order to invoke the fundamental fairness exception, the defendant must satisfy a "cause and prejudice" test by objectively showing that his defense counsel's efforts to raise the claim

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those issues in summary fashion and then cited a lengthy summary of the police investigation. *Id.* Therefore, the petition did not make a substantial showing of a constitutional violation. *Id.*

286. People v. Rogers, 756 N.E.2d 831, 835 (Ill. 2001) (non-capital case).

287. *Id.*

288. *Id.*

289. People v. Johnson, No. 85134, 2002 WL 592153, at *13 (Ill. Apr. 18, 2002) (capital case) (citing People v. Mack, 658 N.E.2d 437, 441 (Ill. 1995) (capital case)).

290. *Id.* (citing People v. Simms, 736 N.E.2d 1092, 1107 (Ill. 2000) (capital case); People v. Easley, 736 N.E.2d 975 (Ill. 2000) (capital case)).

291. *Id.*

292. People v. Simpson, No. 85084, 2001 WL 1136728, at *6 (Ill. Sept. 27, 2001) (capital case).

293. *Simpson*, 2001 WL 1136728, at *6; *see also* People v. West, 719 N.E.2d 664, 669–70 (Ill. 1999) (capital case) (holding that any issues that could have been raised on direct appeal are procedurally defaulted if not raised).

294. *Simpson*, 2001 WL 1136728, at *6.

on direct review were impeded and that the error so infected the entire trial that the defendant's conviction violated due process.[295]

The "cause and prejudice" test to review claims of ineffective assistance of appellate counsel raised in an initial post-conviction petition is also the test used to review whether a claim not raised in an initial petition can be raised in a successive petition.[296] The authors believe that the "cause and prejudice" test should be applied whenever a court must determine whether to invoke the fundamental fairness exception to a waived claim.

The Illinois Supreme Court has also held that a public defender may be appointed as post-conviction counsel even if the pro se petition asserts that the public defender at trial or on appeal was incompetent.[297] In *People v. Johnson*, the Illinois Supreme Court rejected a capital defendant's claims that he received ineffective assistance where only one lawyer represented him and that he was prejudiced by the lack of a mitigation expert's report.[298] The court rejected the defendant's claim that "a public defender who is appointed by a majority of circuit judges operates under an inherent conflict of interest."[299] The court continued, "Petitioner has not cited a single case from Illinois or elsewhere in which a public defender or other court-appointed attorney was deemed to be operating under an inherent conflict of interest merely because his paycheck comes from county coffers."[300]

3. Ineffective Assistance of Post-Conviction Counsel

A defendant is not constitutionally entitled to effective assistance of counsel at a post-conviction proceeding but is, however, entitled to a reasonable level of assistance pursuant to the Act.[301] Allegations by a petitioner of post-conviction counsel's failure to provide reasonable

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295. *Id.* (citing People v. Franklin, 656 N.E.2d 750, 758 (Ill. 1995) (capital case)); People v. Mahaffey, 742 N.E.2d 251, 262 (Ill. 2000) (capital case).

296. *See* People v. Pitsonbarger, No. 89368, 2002 WL 1038729, at *6–7 (Ill. May 23, 2002) (capital case); *see also supra* Part VII.B (discussing successive petitions).

297. People v. Banks, 520 N.E.2d 617, 621 (Ill. 1987) (non-capital case). The court in *People v. Banks* held that there was no per se conflict of interest for one member of the public defenders office to assert the ineffective assistance of counsel of another member. *Id.* The issue of whether an allegiance to the public defenders office resulted in a conflict of interest had to be decided on a case-by-case basis. *Id.*; *see also* People v. Tenner, 677 N.E.2d 859, 869 (Ill. 1997) (capital case) (holding that, absent evidence of an actual conflict, there is no conflict of interest because appellate counsel and trial counsel both worked for the Cook County Public Defender's office).

298. People v. Johnson, No. 89910, 2002 WL 31839199, at *15 (Ill. Dec. 19, 2002) (capital case).

299. *Id.* at *15.

300. *Id.* at *15–16.

301. People v. Guest, 655 N.E.2d 873, 887 (Ill. 1995) (capital case).

assistance at a prior post-conviction proceeding do not present a constitutional basis upon which relief can be granted under the Act.[302] In *People v. Johnson*, post-conviction counsel filed an affidavit as a supplemental record in the appeal.[303] In the affidavit, it was unequivocally established that counsel made no effort to investigate the claims raised in the defendant's post-conviction petition or to obtain affidavits from any of the witnesses specifically identified in defendant's pro se petition.[304] The Illinois Supreme Court held that post-conviction counsel failed to provide a reasonable level of assistance by not attempting to contact and obtain affidavits of identified witnesses in support of the post-conviction petition.[305] The court reversed the trial court's determination that the petition did not warrant an evidentiary hearing due to the absence of supporting affidavits.[306]

Illinois Supreme Court Rule 651 governs appeals in post-conviction proceedings and imposes additional requirements for post-conviction attorneys.[307] The court in *People v. Turner* interpreted Rule 651.[308] In *Turner*, the court held that there is no requirement that post-conviction counsel amend a petitioner's pro se petition, but Rule 651(c) does require appointed counsel to make any amendments necessary for an adequate presentation of the petitioner's claims.[309] Cases, however, have also held that Rule 651(c) applies only to "*pro se* petitions which may need modification by appointed counsel and that there is no

302. People v. Jones, 747 N.E.2d 1074, 1078 (Ill. App. Ct. 1st Dist. 2001).

303. People v. Johnson, 609 N.E.2d 304, 311 (Ill. 1993) (capital case).

304. *Id.*

305. *Id.* at 314.

306. *Id.* at 313.

307. ILL. SUP. CT. R. 651(c). Rule 651(c) provides:

> Upon the timely filing of a notice of appeal in a post-conviction proceeding, if the trial court determines that the petitioner is indigent, it shall order that a transcript of the record of the post-conviction proceedings, including a transcript of the evidence, if any, be prepared and filed with the clerk of the court to which the appeal is taken and shall appoint counsel on appeal, both without cost to the petitioner. *The record filed in that court shall contain a showing, which may be made by the certificate of petitioner's attorney, that the attorney has consulted with petitioner either by mail or in person to ascertain his contentions of deprivation of constitutional right, has examined the record of the proceedings at the trial, and has made amendments to the petitions filed* pro se *that are necessary for an adequate presentation of petitioner's contentions.*

Id. (emphasis added).

308. *See* People v. Turner, 719 N.E.2d 725, 728–30 (Ill. 1999) (capital case).

309. *Id.* at 729. *Turner* also held that the requirement under Rule 651(c), that counsel consult with the petitioner, may be satisfied even if they only meet once. *Id.* at 728.

comparable coverage for professionally drafted post-conviction petitions."[310]

B. Lack of Fitness Hearing as a Basis for Post-Conviction Relief

The Illinois Supreme Court has recently addressed the issue of whether the lack of a fitness hearing was cognizable in a post-conviction proceeding. In *People v. Burt*, the defendant argued that the record at trial established a bona fide doubt as to his fitness to stand trial.[311] Consequently, he argued his attorneys were ineffective for failing to request a fitness hearing.[312] The court rejected the petitioner's claim that his trial counsel was incompetent for failing to ask for a fitness hearing.[313] The court looked at its previous holding on the issue in *People v. Mitchell*.[314] The majority in *Mitchell* reasoned that because defendant's right to a section 104-21(a) fitness hearing is statutory and not constitutional, failure to receive a fitness hearing is not a constitutional deprivation.[315] As such, failure to receive a section 104-21(a) fitness hearing is not cognizable in a petition for post-conviction relief unless it is framed in the context of ineffective assistance of counsel.[316]

The court in *Burt* also explained that for a defendant to prevail on a claim that his trial counsel's failure to request a fitness hearing amounted to incompetence of counsel, the "defendant must show that facts existed at the time of his trial that would raise a *bona fide* doubt of his ability to understand the nature and purpose of the proceedings and to assist his defense."[317] Relevant factors for a court to consider when determining whether a bona fide doubt exists include the defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on the defendant's competence to stand trial.[318] The defendant is entitled to post-conviction relief "only if he shows that the trial court

310. *See, e.g.*, People v. Johnson, 732 N.E.2d 100, 109–10 (Ill. App. Ct. 1st Dist. 2000) (non-capital case) (affirming trial court's summary dismissal of defendant's post-conviction petition holding that it was beyond the scope of Rule 651(c)).

311. People v. Burt, No. 86898, 2001 WL 1243631, at *4 (Ill. Oct. 18, 2001) (capital case).

312. *Id.* at *4.

313. *Id.* at *5.

314. *Id.* at *4 (citing People v. Mitchell, 727 N.E.2d 254 (Ill. 2000) (capital case)).

315. *Mitchell*, 727 N.E.2d at 267.

316. *Burt*, 2001 WL 1243631, at *4 (citing *Mitchell*, 727 N.E.2d at 269).

317. *Id.* at *5 (quoting People v. Easley, 736 N.E.2d 975, 985 (Ill. 2000) (capital case)).

318. *Id.* (citing *Easley*, 736 N.E.2d at 986).

would have found a bona fide doubt of his fitness and ordered a fitness hearing if it had been apprised of the evidence now offered."[319]

Finally, counsel's alleged failure to amend a previous post-conviction petition to include the allegation of petitioner's lack of fitness, due to the ingestion of psychotropic drugs at or near the time of trial and sentencing, does not support a claim under the Post-Conviction Hearing Act based on ineffective assistance of counsel.[320] This holding resulted because the alleged failure did not occur in the proceedings that resulted in the conviction and was thus beyond the scope of the Act.[321]

C. Actual Innocence and DNA

In *People v. Johnson*, the Illinois Supreme Court addressed the issue of actual innocence claims and DNA in the context of post-conviction petitions.[322] In *Johnson*, the capital defendant appealed the dismissal of his first amended petition without an evidentiary hearing.[323] The court held that "[a] claim of actual innocence based on newly discovered evidence may be raised in a post-conviction petition."[324] The newly discovered evidence, however, must, in fact, be new, material, noncumulative, and so conclusive that it would probably change the result at retrial.[325] The court went on to say that the defendant in that case had not provided evidence of actual innocence.[326] Rather, the defendant had asserted that DNA testing would have provided such evidence.[327] The court then addressed the issue of whether DNA testing can be granted as post-conviction relief when it was unavailable

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319. *Id.* (quoting *Easley*, 736 N.E.2d at 985 (citing People v. Johnson, 700 N.E.2d 996, 1005 (Ill. 1998) (capital case); People v. Eddmonds, 578 N.E.2d 952, 956–57 (Ill. 1991) (capital case)).

320. People v. Jones, 747 N.E.2d 1074, 1078 (Ill. App. Ct. 1st Dist. 2001); *see also* People v. Barrow, 749 N.E.2d 892, 912 (Ill.) (capital case) (holding that a defendant's contention that he was entitled to a fitness hearing due to use of psychotropic drugs during a trial could not provide a basis for post-conviction relief), *cert. denied*, 534 U.S. 1067 (2001); People v. Jones, 730 N.E.2d 26, 28–29 (Ill. 2000) (capital case) (holding a defendant's post-conviction petition to be procedurally defaulted).

321. *Jones*, 747 N.E.2d at 1078.

322. People v. Johnson, No. 85134, 2002 WL 592153, at *4–5 (Ill. Apr. 18, 2002) (capital case).

323. *Id.* at *1.

324. *Id.* at *5; *see* People v. Washington, 665 N.E.2d 1330, 1337 (Ill. 1996) (non-capital case) (holding that newly discovered evidence going to defendant's innocence is cognizable as a matter of Illinois constitutional jurisprudence); *see also* People v. Bull, 705 N.E.2d 824, 840 (Ill. 1998) (capital case) ("An important goal of the criminal justice process is the protection of the innocent accused against an erroneous conviction.").

325. *Johnson*, 2002 WL 592153, at *5 (citing People v. Molstad, 461 N.E.2d 398, 401 (Ill. 1984) (non-capital case)).

326. *Id.*

327. *Id.*

at trial.[328] Consequently, the court granted defendant's DNA request based on statutory grounds and remanded the case for further proceedings.[329]

In *People v. Harris*, the defendant argued that he was entitled to an evidentiary hearing on his claim of actual innocence.[330] The defendant based his claim upon the affidavits of two co-defendants who said that the defendant was not present at the time of the crime and that they conspired to frame the defendant.[331] The Illinois Supreme Court affirmed the circuit court's dismissal of the defendant's claim of actual innocence without an evidentiary hearing.[332] The court first held that the affidavits of the defendant's brothers were not "newly discovered evidence" because the defendant was the source of this information, and it could have been discovered sooner.[333] The court then addressed the co-defendants' affidavits and held that, in light of the overwhelming evidence of guilt, the affidavits of the co-defendants were not of such a conclusive character that they would have probably changed the outcome on retrial.[334]

D. Witness Recantations, Undisclosed Benefits, and the Knowing Use of Perjured Testimony

Generally, a witness's recantation of his or her prior testimony is regarded as inherently unreliable, and a court will not grant a new trial on that basis except in extraordinary circumstances.[335] In addition,

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328. *Id.*

329. *Id.* at *5–7. The United States Constitution provides access to exculpatory evidence on collateral review. *See* Kyles v. Whitley, 514 U.S. 419, 421 (1995) (holding that petitioner's claim is cognizable in a federal *habeas corpus* proceeding). *See generally* Brady v. Maryland, 373 U.S. 83 (1963). We need not reach the constitutional issue, however, because 725 ILL. COMP. STAT. 5/116-3 provides an answer to the defendant's request. People v. Dunn, 713 N.E.2d 568, 571 (Ill. App. Ct. 1st Dist. 1999).

330. People v. Harris, No. 89796, 2002 WL 1340896, at *2 (Ill. June 20, 2002) (capital case).

331. *Id.* Co-defendants had given detailed statements to the police shortly after their arrest, implicating themselves and identifying defendant as the shooter. *Id.* Defendant also based his claim on the affidavits of his brothers who stated that defendant was at home with them at the time of the shooting. *Id.*

332. *Id.*

333. *Id.*

334. *Id.*

335. People v. Steidl, 685 N.E.2d 1335, 1345 (Ill. 1997) (capital case); *see also* People v. Nash, 222 N.E.2d 473, 478 (Ill. 1966) (non-capital case) (finding a trial judge's rejection of a witness's recanted testimony when considering a motion for a new trial to be justified because the recanting affidavit was "evasive, self-contradicting, unresponsive and in many respects highly improbable"); People v. Caldwell, 579 N.E.2d 16, 19 (Ill. App. Ct. 1st Dist. 1991) (rejecting a defendant's contention that the trial judge abused his discretion when he denied the defendant a new trial despite a witness's recanted testimony).

recantation evidence, standing alone, does not rise to the level of a constitutional violation that would entitle the petitioner to post-conviction relief.[336] There are circumstances, however, where a witness's recantation may be the basis for post-conviction relief.

If a recantation contains allegations that a witness did not truthfully testify regarding whether he or she received consideration in exchange for his cooperation with the prosecutor, and the prosecutor allowed the perjured testimony to go uncorrected, a defendant is entitled to an evidentiary hearing to substantiate these allegations. The seminal case in this area is *Napue v. Illinois*.[337] In *Napue*, the principal state witness testified that he had received no promise of consideration in return for his testimony.[338] The witness, however, in fact had been promised such consideration, and the prosecutor did nothing to correct this false testimony.[339] The United States Supreme Court reversed the conviction and held that the defendant was entitled to post-conviction relief.[340] The Court further held that the knowing use of false evidence to obtain a conviction is a violation of the Fourteenth Amendment's due process clause.[341] The same principle applies where the State, although not soliciting the false testimony, allows such testimony to go uncorrected.[342] These principles apply even where the witness's false testimony goes only to the witness's credibility.[343] Illinois courts have

336. *See* People v. Brown, 660 N.E.2d 964, 970 (Ill. 1995) (non-capital case) ("In the absence of an allegation of the knowing use of false testimony, or at least some lack of diligence on the part of the State, there has been no involvement by the State in the false testimony to establish a violation of due process. Without such involvement, the action of a witness falsely testifying is an action of a private individual for which there is no remedy under the due process clause." (citation omitted)).

337. Napue v. Illinois, 360 U.S. 264 (1959).

338. *Id.* at 265.

339. *Id.*

340. *Id.* at 272.

341. *Id.* at 269.

342. *Id.*

343. *Id.* The court stated:

> First, it is established that a conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment. The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears.
>
> The principle that a State may not knowingly use false evidence, including false testimony, to obtain a tainted conviction, implicit in any concept of ordered liberty, does not cease to apply merely because the false testimony goes only to the credibility of the witness. . . . "It is of no consequence that the falsehood bore upon the witness" credibility rather than directly upon defendant's guilt.

Id. (citations omitted).

consistently applied the reasoning in *Napue*.[344] The courts have also applied *Napue* to undisclosed monetary compensation and other benefits.[345]

As noted earlier, in the absence of an allegation of the knowing use of false testimony, or at least some lack of diligence on the part of the State, there is no due process violation.[346] Further, the Illinois Supreme Court has held that the mere allegation of a State's witness receiving consideration is not enough to require an evidentiary hearing.[347] If the petitioner can establish that an agent or representative of the State had such knowledge, however, then a due process violation may be established.[348] If the petitioner fails to raise the issue of knowing use of perjured testimony in his original or amended petition, the issue is waived.[349] Under the Post-Conviction Hearing Act, the plain error rule may not be invoked for the defendant's failure to raise the issue.[350]

IX. CONCLUSION

This Article has attempted to analyze how recent decisions of the courts of review in Illinois have impacted the standards and procedures employed under the Post-Conviction Hearing Act. When analyzing cases interpreting the Act, practitioners should not only focus on the facts of the case but also consider the procedural stage at which the case

344. *See* People v. Olinger, 680 N.E.2d 321, 331 (Ill. 1997) (capital case). The court in *People v. Olinger* remanded the case for an evidentiary hearing to determine whether the State's witness testified falsely when he said he was only given immunity on one case. *Id.* at 331–32. But see *People v. Lucas*, where the court cited the overwhelming evidence in holding that "the instant case does not present facts which demonstrate that there is a reasonable likelihood that the false testimony affected the judgment against him." People v. Lucas, No. 89458, 2002 WL 31839191, at *11 (Ill. Dec. 19, 2002) (capital case). "Because defendant did not establish materiality, the circuit court correctly dismissed the defendant's claim without an evidentiary hearing." *Id.*

345. *See* People v. Steidl, 685 N.E.2d 1335, 1345 (Ill. 1997) (capital case) (remanding the case for an evidentiary hearing where the State witness's recantation disclosed that the witness had received relocation money after the trial when the witness had testified at trial she did not know of or expect a reward in the case); People v. Truly, 741 N.E.2d 1115, 1127 (Ill. App. Ct. 1st Dist. 2000) (remanding for an evidentiary hearing to determine whether the State's witness was promised an airline ticket and/or dismissal of pending charges in exchange for her testimony).

346. *See supra* note 336 and accompanying text (discussing the reasoning in *People v. Brown*).

347. People v. Miller, No. 89408, 2002 WL 31839183, at *2 (Ill. Dec. 19, 2002) (capital case).

348. *See* People v. Ellis, 735 N.E.2d 736, 741 (Ill. App. Ct. 1st Dist. 2000).

349. People v. Patterson, 735 N.E.2d 616, 645 (Ill. 2000) (capital case); People v. Moore, 727 N.E.2d 348, 360 (Ill. 2000) (capital case).

350. People v. Heirens, 648 N.E.2d 260, 267 (Ill. App. Ct. 1st Dist.), *appeal denied*, 657 N.E.2d 630 (Ill. 1995).

was disposed and the language of the pertinent section of the Act. The practitioner should remember that many of the cases cited in support of the position taken in an opinion addressed issues arising in procedural stages different than that of the case on appeal. This difference occurs because the Act treats capital cases differently from cases where the defendant was sentenced to a term of imprisonment. Similarly, cases decided before the effective date of section 122-2.1, requiring the trial court to review all petitions and to dismiss those which are frivolous or patently without merit, are of little value when reviewing summary dismissals. Finally, the practitioner should look at the type of documentation the defendant attached in support of his or her post-conviction petition. A careful reading of the cases, noting the distinctions mentioned above, will clarify many apparent conflicts in the case law.

The Illinois Supreme Court has addressed many of these conflicts in recent years. The court has clarified the different standards of review for summary dismissals (de novo) and dismissals after evidentiary hearings (manifestly erroneous); what constitutes a 'conviction' for purposes of the period of limitations for section 122-1(c); and, most recently, the impropriety of summarily dismissing a petition as untimely without a motion by the State asserting these grounds. It is abundantly clear, however, that, while the Illinois Supreme Court has addressed many issues arising under the Post-Conviction Act, the justices are sharply divided in their analyses and suggested solutions. Thus, they will undoubtedly address the Act in many more cases in the near future.

Similarly, the appellate courts have issued many decisions analyzing issues under the Act, and this veritable flood of cases will continue unabated for the foreseeable future. If the trial courts in Illinois and the attorneys who practice before them are to have any hope of addressing these cases in a timely and consistent manner, they must keep abreast of the cases issued by courts of review in Illinois. Hopefully, this Article will be of some assistance in carrying out this Herculean task.