"Last Chance" State Judicial Review in Criminal Cases - Illinois' Collateral Attack Remedies: A Call for a Principled Jurisprudence

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A number of post-conviction remedies are available to a defendant after a judgment of conviction has been entered in an Illinois criminal case. Where a defendant has entered a plea of guilty to a charge and the court has entered judgment thereon, the defendant can move to vacate the plea at the trial court level within thirty days of sentencing on grounds that the plea was not voluntary and intelligent. Moreover, where the judgment of conviction follows a trial, the defendant may challenge his conviction under one or more of the Illinois post-trial motions. If the trial court did not have jurisdiction over the matter in question, the defendant must file in the trial court a post-trial "motion in arrest of judgment" within thirty days following entry of the verdict. If some type of procedural irregularity tainted the verdict, the defendant must file a "motion for a new trial" at the trial court level within thirty days of entry of the verdict. In addition,
if the evidence did not warrant a jury's guilty verdict, a "motion for judgment of acquittal notwithstanding the verdict," based upon an insufficiency of evidence claim, should be advanced in the trial court.6

Assuming the defendant's conviction withstands attack at the trial court level, the defendant may also directly attack his conviction on appeal.7 Where the defendant has entered a plea of guilty and filed an unsuccessful motion to vacate the plea, he can appeal the trial court's decision not to set aside the plea.8 Where the defendant has been found guilty at trial, he also has a right to appeal.9 The defendant can raise on appeal any error that occurred at the trial court level, whether pre-trial,10 trial,11 or post-

defendant alleged that juror during voir dire concealed friendship with members of local police force); evidentiary problems at trial, e.g., People v. Eddington, 129 Ill. App. 3d 745, 770-71, 473 N.E.2d 103, 120-21 (4th Dist. 1984) (admission of hearsay and other errors required reversal for new trial); improper cross-examination by prosecution, e.g., People v. Hawkins, 61 Ill. 2d 23, 329 N.E.2d 221 (1973) (repeated cross-examination of alibi witness concerning her presence at an earlier juvenile court proceeding in which other witnesses testified to a different alibi required new trial); government witness misconduct, e.g., People v. Cornille, 95 Ill. 2d 497, 448 N.E.2d 857 (1983) (witness' false testimony about his qualifications as expert chemist required new trial); improper jury instructions, e.g., People v. Santiago, 108 Ill. App. 3d 787, 439 N.E.2d 984 (1st Dist. 1982) (failure of trial judge to instruct jury on lesser included offense of involuntary manslaughter during murder trial required new trial); judicial misconduct during jury deliberations, e.g., People v. Santiago, 108 Ill. App. 3d 787, 439 N.E.2d 984 (1st Dist. 1982) (coercing verdict from deadlocked jury required new trial); and newly discovered evidence that comes to light after trial, e.g., People v. Hughes, 11 Ill. App. 3d 224, 296 N.E.2d 643 (2d Dist. 1973) (newly discovered evidence of accomplice that tended to exonerate defendant from burglary charge warranted new trial).

6. People v. Van Cleve, 89 Ill. 2d 298, 432 N.E.2d 837 (1982) (after trial court denied defendant's motion for directed verdict at close of the evidence and jury found defendant guilty, trial court properly granted defendant's motion for judgment of acquittal notwithstanding verdict even though motion was not explicitly provided for by statute since it was similar in substance to statutory motion for directed verdict and state cannot appeal trial court's acquittal that was based on insufficiency of evidence).

Of course, the motion for judgment of acquittal (commonly referred to as a motion for directed verdict), Ill. Rev. Stat. ch. 38, para. 115-4(k) (1987), is most likely to be granted at the close of the state's evidence or at the close of all evidence. See People v. Alfano, 81 Ill. 2d 434, 401 N.E.2d 554 (1980) (following defendant's successful motion for judgment of acquittal after state failed to present evidence supportive of charges, judgment of acquittal not appealable by state).

Another possible post-trial motion is the motion to vacate a conviction which arose out of the same physical act as a greater offense of which the defendant was convicted. See People v. King, 66 Ill. 2d 551, 561, 363 N.E.2d 838, 844 (1977) (dicta); People v. Pearson, 108 Ill. App. 3d 241, 439 N.E.2d 31 (4th Dist. 1982) (because criminal damage to property conviction arose out of same physical act as reckless conduct conviction, court must vacate former conviction).

8. Id. at paras. 604(d), 605(b).
9. Id. at paras. 605(a), 606.
10. See, e.g., People v. Weaver, 90 Ill. App. 3d 299, 412 N.E.2d 1353 (2d Dist. 1980) (state's failure to comply with discovery order reversible error).
These errors could involve state or federal constitutional issues, statutory rights, or evidentiary problems. In any event, it is incumbent that the appeal be filed within thirty days of sentencing.

Assuming the defendant did not appeal in timely fashion or failed to raise specific issues in his appeal, his last possible opportunity for review of potential errors in the Illinois courts lies in the various collateral attack remedies: statutory habeas corpus, statutory coram nobis, and the Post-Conviction Hearing Act. But, in spite of these remedies, a perusal of the Illinois case law addressing collateral attacks reveals the existence of a complex labyrinth of rules and, in effect, barriers to meaningful relief through collateral attack. Indeed, the granting of collateral relief to defendants is a rarity. More significant, however, is the inconsistent use of these collateral attack vehicles by the Illinois courts. And, most troublesome, is the lack of well developed principles and standards that would have the effect of offering clear guidance to practitioners and courts entertaining such claims as to where and when collateral relief is appropriate. The purpose of this Article is to examine the maze that the Illinois courts have created in this connection, criticize the jurisprudence (or lack of it) that surrounds these so-called remedies, and offer suggestions that might elevate this law from the complex quagmire in which it now resides.

Specifically, Parts I, II, and III of this Article discuss and criticize the Illinois courts' interpretation and application of statutory habeas corpus, statutory coram nobis, and the Post-Conviction Hearing Act respectively.

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12. See, e.g., People v. Smothers, 70 Ill. App. 3d 589, 388 N.E.2d 1114 (5th Dist. 1979) (trial judge's consideration of defendant's lifestyle and prior arrests not resulting in conviction was error and, accordingly, sentence reduced to time served).
14. See, e.g., People v. Sutherland, 128 Ill. 121114 (4th Dist. 1984) (failure to personally admonish defendant about consequences of guilty plea violative of Illinois Supreme Court Rule 402 and requires reversal); People v. Weaver, 90 Ill. App. 3d 299, 412 N.E.2d 1353 (2d Dist. 1980) (state's failure to comply with rules of discovery requires reversal).
18. Id. at para. 2-1401.
Part IV suggests jurisprudential doctrines and principles that the Illinois courts should use in collateral attack decisions to guide trial court judges, petitioners, and their attorneys. Part V recommends that the Illinois legislature replace the three existing Illinois collateral attack remedies with one enactment addressing post-appeal remedies for those convicted of criminality. The Article concludes by offering a single, comprehensive post-conviction collateral attack statute for consideration.

I. HABEAS CORPUS

Illinois habeas corpus is a constitutionally guaranteed right which is statutorily preserved and governed by the Illinois Habeas Corpus Act (the "Habeas Act"). The Habeas Act operates as a post-conviction collateral attack on original court judgments and provides a remedy to individuals who are unlawfully imprisoned or deprived of their liberty. The only remedy available to a successful petitioner, found unlawfully restrained, is immediate release from custody. Although one of the major purposes of federal habeas corpus is to release individuals unlawfully detained, the basis for such a determination is considerably broader than under Illinois habeas corpus. While federal habeas corpus protection as originally enacted concentrated solely on whether the confinement was a result of a conviction in a court that had no competent jurisdiction, in 1915 the United States Supreme Court ruled that the writ of habeas corpus would lie where "the judgment under which the prisoner is detained is shown to be absolutely void for want of jurisdiction in the court that pronounced it, either because such jurisdiction was absent at the beginning or because it was lost in the course of the proceedings." Accordingly, if a prisoner could demonstrate that his constitutional rights were infringed during the judicial proceedings, the writ of habeas corpus would issue since the "court's jurisdiction at the beginning" was "lost" during the trial proceedings. Examples of such a "loss" of jurisdiction have included cases where a trial judge tolerated a

22. Id. at para. 10-102.
27. Frank v. Mangum, 237 U.S. 309, 327 (1915) (emphasis added) (claim of mob dominated trial considered and rejected).
mob dominated atmosphere surrounding the trial in violation of due process, 29 or where the judge failed to provide the accused appointed counsel at his federal trial in violation of the sixth amendment. 30 Thus, by stretching the jurisdictional question to ""fictional extremes,"" 31 the Court transformed federal habeas corpus into a vehicle that would recognize not only true jurisdictional problems, but also ""those exceptional cases where the conviction has been in disregard of the constitutional rights of the accused . . . ."" 32 Accordingly, today, this federal collateral attack remedy is available to an individual who shows that the original judgment resulting in imprisonment violates the laws of the United States or the Constitution. 33 Federal habeas corpus, therefore, operates as a remedy to state prisoners who successfully attack the constitutionality of their custody. 34 In contrast, although the Illinois Habeas Corpus Act lists seven causes for which a state prisoner may be released from custody, 35 Illinois case law holds that

32. Waley, 316 U.S. at 105.
35. ILL. REV. STAT. ch. 110, para. 10-124 (1987), in part, provides:
   If it appears that the prisoner is in custody by virtue of process from any court legally constituted, he or she may be discharged only for one or more of the following causes:
   1. Where the court has exceeded the limit of its jurisdiction, either as to the matter, place, sum or person.
   2. Where, though the original imprisonment was lawful, nevertheless, by some act, omission or event which has subsequently taken place, the party has become entitled to be discharged.
   3. Where the process is defective in some substantial form required by law.
   4. Where the process, though in proper form, has been issued in a case or under circumstances where the law does not allow process to issue or orders to be entered for imprisonment or arrest.
   5. Where, although in proper form, the process has been issued in a case or under circumstances unauthorized to issue or execute the same, or where the person having the custody of the prisoner under such process is not the person empowered by law to detain him or her.
   6. Where the process appears to have been obtained by false pretense or bribery.
   7. Where there is no general law, nor any judgment or order of a court to authorize the process if in a civil action, nor any conviction if in a criminal proceeding. No court, on the return of a habeas corpus, shall, in any other matter, inquire into the legality or justice of a judgment of a court legally constituted.

Id.
this remedy is available only to an individual who successfully shows that either: 1) the original judgment resulting in incarceration is void, that is, rendered by a court lacking personal or subject matter jurisdiction over the defendant; or, 2) something has occurred since the original lawful incarceration that entitles the prisoner to release. Unlike federal habeas corpus, therefore, the Illinois remedy is not available to a state prisoner who alleges that the original court judgment deprived him of his constitutional rights.

A. Grounds For Illinois Habeas Corpus Relief

The limited scope of Illinois habeas corpus review is demonstrated by the Illinois courts' interpretations of the statute, which have designated only the two previously stated reasons for granting relief—jurisdictional defects rendering the original judgment void and subsequent events warranting release from custody. Moreover, the narrow scope of the remedy becomes more apparent when one examines the case law to determine exactly what facts a court will consider sufficient to demonstrate the existence of such a jurisdictional defect or subsequent event. The case law clearly demonstrates that petitioners very rarely obtain relief under Illinois habeas corpus and, accordingly, it becomes quite obvious just what allegations are not considered jurisdictional defects or subsequent events. These court decisions, however, do not provide the same degree of clarity or definitiveness as to what allegations will meet the statutory grounds for release from custody.

1. Jurisdictional Defects Resulting in a Void Judgment

a. Defective charging instrument

The existence of a defective charging instrument is one of the few situations where Illinois courts may find a resulting lack of trial court jurisdiction to render a judgment. A defective indictment or one containing false information is considered void and, therefore, any judgment based on such a defective charge is also found to be void, that is, rendered by a court lacking personal or subject matter jurisdiction over the defendant. Accordingly, a petitioner incarcerated following a void judgment is a proper candidate for state habeas corpus relief.

The mere technical insufficiency of a charging instrument, however, will not render the instrument, and thus the judgment, void. Technical insufficiencies are considered by the courts to be merely formal and not juris-

dictional defects. Accordingly, such insufficiencies are not appropriate for consideration under habeas corpus proceedings. Moreover, the Illinois courts have read this technicality exception quite broadly. For example, in *People ex rel. Miller v. Twomey,* the petitioner was indicted for murder, incarcerated, and subsequently filed a petition for habeas corpus relief. The petitioner claimed that his incarceration was unlawful because the indictment was void. The indictment did not state that the deceased was an "individual" or a "human being." The court held that where the indictment states the name of the person killed, it implies that the deceased was a human being and that the specific words "individual" or "human being" are not necessary. Accordingly, the court found that this indictment was not defective and the petitioner was not entitled to habeas corpus relief.

Similarly, in *People ex rel. Goznelli v. Brantley,* the petitioner was convicted for forgery, imprisoned, and sought habeas corpus relief. The petitioner alleged that the indictment charging him was void because it violated an Illinois statute requiring that the relevant criminal statute be cited in the indictment. The court, however, held that the indictment was sufficient to charge an offense even though it did not cite the specific statutory provision violated. The court reasoned that this defect was merely a technical and not a jurisdictional defect which would entitle the petitioner to habeas corpus relief.

More limiting were the applications in *People ex rel. Palmer v. Twomey,* and *People ex rel. Skinner v. Randolph,* where the court refused to even address the petitioners' claims of defective indictments. In *Palmer,* the petitioner had been convicted of theft and sentenced to the penitentiary. He charged in his petition that his imprisonment was unlawful because two of the three counts of the indictment were not signed by the grand jury foreman and he also alleged various constitutional violations. The court, however, rejected these violations as a whole, without ever specifically addressing the claim of a defective charging instrument. In *Skinner,* the petitioner had been convicted of murder. He challenged the conviction,

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40. 2 Ill. App. 3d 757, 277 N.E.2d 151 (3d Dist. 1971).
41. Id. at 759, 277 N.E.2d at 153.
42. *Id.* See also *Brantley,* 7 Ill. App. 3d at 559, 288 N.E.2d at 93 (charging instrument was not void because it did not state that a "human being had been killed" and in addition, resulting allegation of void judgment was frivolous).
43. 49 Ill. 2d 383, 275 N.E.2d 396 (1971).
44. *Id.* at 385-86, 275 N.E.2d at 398.
46. 53 Ill. 2d 479, 292 N.E.2d 379 (1973).
47. 35 Ill. 2d 589, 221 N.E.2d 279 (1966).
49. *Id.* at 481-84, 292 N.E.2d at 381-82.
alleging that the indictment was defective and claiming various constitutional violations as well.\textsuperscript{50} The court simply held that these allegations were not appropriate for determination in a habeas corpus proceeding.\textsuperscript{51}

Finally, the Illinois Supreme Court has shed further light on the breadth of the technicality exception in the area of appeals. In \textit{People v. Gilmore},\textsuperscript{52} the court stated, in a case on direct appeal, that the Illinois "statutory scheme shows clearly that failure to charge an offense does not . . . serve to deprive the circuit court of jurisdiction."\textsuperscript{53} Rather, the court held that jurisdiction was conferred by section 9 of article VI of the Illinois Constitution which provides the circuit courts with "original jurisdiction of all justiciable matters."\textsuperscript{54} The court explained that a defendant has the opportunity to move to dismiss the charge prior to trial under section 114-1(a) of Chapter 38 on the ground that the charge does not state an offense,\textsuperscript{55} and the option of raising the same issue in a post-trial motion in arrest of judgment under section 116-2 of Chapter 38.\textsuperscript{56} Failure to set out a charge exactly in accordance with Illinois law, which requires 1) the name of the offense; 2) a citation to its statutory provision; and, 3) a recitation of the nature and the elements of the charge,\textsuperscript{57} could not be raised for the first time on appeal so long as the charge apprises the accused sufficient to allow him to "[1) prepare his defense and [2) plead] a resulting conviction as a bar to future prosecution arising out of the same conduct."\textsuperscript{58} In other words, the \textit{precise} statutory requirements regarding framing a charge against a defendant usually will be waived unless raised at the trial court level.\textsuperscript{59}

Obviously, if the defendant cannot raise the sufficiency of the charge on direct appeal unless the charge is so faulty that it creates problems in raising a defense at trial or in post-conviction double jeopardy claims, it is highly doubtful that a defendant could raise such issue in a post-trial collateral attack. Indeed, in \textit{People ex rel. Dorsey v. Morris},\textsuperscript{60} the Illinois appellate court interpreted \textit{Gilmore} as prohibiting state habeas corpus relief where a theft indictment which failed to describe in any way the allegedly stolen property "was adequate to apprise the accused of the nature of the charge and to act as a bar to subsequent jeopardy."\textsuperscript{61}

In conclusion, the case law reveals that a charging instrument containing a mere "technical" defect cannot be challenged on habeas corpus. The

\textsuperscript{51} \textit{Id.} at 590, 221 N.E.2d at 281.
\textsuperscript{52} 63 Ill. 2d 23, 344 N.E.2d 456 (1976).
\textsuperscript{53} \textit{Id.} at 27, 344 N.E.2d at 459.
\textsuperscript{54} \textit{Id.} at 26, 344 N.E.2d at 458 (quoting \textit{ILL. CONST.} art VI, § 9).
\textsuperscript{55} \textit{Id.} at 28, 344 N.E.2d at 459 (quoting \textit{ILL. REV. STAT.} ch. 38, para. 114-1(a) (1987)).
\textsuperscript{56} \textit{Id.} (quoting \textit{ILL. REV. STAT.} ch. 38, para. 116-2 (1987)).
\textsuperscript{57} \textit{Id.} at 29, 344 N.E.2d at 460 (quoting \textit{ILL. REV. STAT.} ch. 38, para. 111-3 (1987)).
\textsuperscript{58} \textit{Id.}
\textsuperscript{59} \textit{Id.} at 27-29, 344 N.E.2d at 459-61.
\textsuperscript{60} 37 Ill. App. 3d 632, 347 N.E.2d 175 (3d Dist. 1976).
\textsuperscript{61} \textit{Id.} at 635, 347 N.E.2d at 177.
Gilmore doctrine suggests that a defect will be viewed as technical so long as the charge apprises the defendant sufficiently to allow him to prepare a defense and ward off possible subsequent prosecutions for the same criminal activity. Dictum in these cases implies that, should the charging instrument not forewarn the accused about the nature and elements of the charge with enough specificity to allow him to offer a defense or attack a successive prosecution, habeas corpus would be available. However, as the case law reveals, this seldom occurs.

The differential treatment of defective charging instruments raised for the first time before a reviewing court, where relief will not be granted so long as the charge allows for preparation of a defense and successive prosecution challenges,62 and those raised in the trial court on a motion to dismiss63 or on a motion in arrest of judgment,64 where the state's argument that the defendant's demand for "technical niceties"65 regarding the charge will be rejected and defense relief granted,66 has never been adequately explained by the courts. In People v. Lutz,67 the Illinois Supreme Court stated that claims regarding the inadequacy of a charging instrument raised in a motion in arrest of judgment should not be evaluated under the Gilmore test, which concentrates on the ability to prepare a defense and defend challenges to successive prosecutions.68 Rather, strict pleading requirements should be demanded since otherwise the statutory framework will be "rendered meaningless or superfluous."69 Furthermore, toleration of lenient pleading requirements would be at odds with the "well settled principles of law" that require "a criminal or penal statute . . . to be strictly construed in favor of an accused . . . ."70 Why the principle of strict statutory construction and the principle of lenity toward defendants should have less operational effect before a court of appeal or in a court entertaining a collateral attack has not been articulated.

b. Excessive sentence

Two early Illinois Supreme Court cases addressed the issue of whether an original court judgment imposing an "excessive sentence" on a petitioner

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64. People v. Lutz, 73 Ill. 2d 204, 383 N.E.2d 171 (1978).
65. Id. at 209, 383 N.E.2d at 172.
66. Id. at 209-13, 383 N.E.2d at 172-74 (in part, quoting plaintiff's briefs).
67. 73 Ill. 2d 204, 383 N.E.2d 171 (1978).
68. Id. at 210-11, 383 N.E.2d at 173.
69. Id. at 212, 383 N.E.2d at 174 (quoting People ex rel. Barrett v. Barrett, 31 Ill. 2d 360, 364-65, 201 N.E.2d 849, 851 (1964)).
70. Id. at 213, 383 N.E.2d at 174 (quoting People v. Eagle Food Centers, Inc., 31 Ill. 2d 535, 539, 202 N.E.2d 473, 475 (1964)).
is void, thereby entitling the petitioner to habeas corpus relief. These decisions laid the basis for the excessive sentence law. In this context, an “excessive sentence” appears to include only those sentences not permitted by the sentencing provisions authorized by statute.

In People ex rel. Wakefield v. Montgomery, decided in 1937, the petitioner was convicted of statutory rape and sentenced to the penitentiary for an indeterminate period of one year to life. He sought habeas corpus relief, alleging that his sentence was excessive because he should have been sentenced to a determinate instead of an indeterminate term of imprisonment. The petitioner contended that the original court judgment was void because the court had no jurisdiction to enter an indeterminate sentence against him. The Illinois Supreme Court stated that the test to be applied in determining whether an excessive sentence renders a judgment of conviction void is “whether or not the sentence is of a different character than that authorized by law to be imposed for the crime of which the accused has been found guilty.” The court found that, although the petitioner was entitled to a determinate rather than an indeterminate term of imprisonment, the sentence imposed was not different in character from that to which he was entitled. The original judgment, therefore, was merely erroneous and not void, and the petitioner was not entitled to habeas corpus relief.

The court, however, reached a somewhat different result in its 1926 decision, People ex rel. Carlstrom v. Eller. In that case, the petitioner, having been convicted of the crime of libel, was imprisoned and fined in violation of the statutory penalty which was a fine or imprisonment, but not both. He had paid the fine and sought habeas corpus relief from the unlawful imprisonment. The court held that the original judgments of conviction and sentence were not void because the trial court had personal and subject matter jurisdiction over the petitioner to render the verdict and at least part of the sentence. The court stated that the sentence was “merely excessive” and not entirely erroneous. Once the sentence which legally could be imposed was served, however, the remaining portion of the sentence was void. Here, the petitioner had paid the fine, his term of

72. 365 Ill. 478, 6 N.E.2d 868 (1937).
73. Id. at 479, 6 N.E.2d at 868.
74. Id. at 480, 6 N.E.2d at 869 (quoting People v. Kelly, 352 Ill. 567, 568, 186 N.E. 188, 189 (1933)).
75. Id. at 481, 6 N.E.2d at 869.
76. Id.
77. 323 Ill. 28, 153 N.E. 597 (1926).
78. Id. at 31-32, 153 N.E. at 599.
79. Id. at 32, 153 N.E. at 599.
80. Id. at 33-34, 153 N.E. at 599-600.
imprisonment was rendered void, and he was entitled to habeas corpus relief.\(^{61}\)

In a more recent case, \textit{People ex rel. Starks v. Frye},\(^{82}\) the state's highest court considered the propriety of extending habeas corpus relief where a trial court had improperly imposed consecutive sentences and the defendant had already served that portion of his sentence that was properly imposed. The defendant had pleaded guilty to two indictments, each charging reckless homicide, following a traffic mishap where two persons were killed. He was sentenced to consecutive prison sentences even though Illinois law disallowed consecutive sentences where the offenses arose out of the same conduct. After he had served the minimum sentence on the first indictment, he sought habeas corpus relief.\(^{63}\) The court held that, because the defendant had already "satisfied the sentence which was legally imposed and the State is in the posture of seeking what may be legally regarded as excessive punishment," he was entitled to discharge.\(^{64}\) In this case, as in \textit{Eller},\(^{65}\) the court granted habeas corpus relief, not because the original judgment of conviction was void, but because the remainder of the sentence, at the time of the collateral attack, was not authorized by law and, hence, void. It should be noted, however, that the court in \textit{Starks} offered no explanation as to why the defendant was entitled to release from custody after only having served the minimum sentence in circumstances where the trial court had ordered a minimum and maximum sentence, with the actual period of confinement to be determined by the parole board.\(^{66}\)

In conclusion, where a court enters a judgment of conviction and, thereafter, imposes a sentence in excess of that authorized by the penal code, neither the verdict nor the sentence are considered void and, consequently, are not open to immediate collateral attack. In other words, the sentence is not \textit{per se} invalid, rather the legitimate portion of the sentence remains valid and only the unauthorized part is "excessive" and, accordingly, "void." Furthermore, \textit{Montgomery} stresses that the excessive portion of the sentence is not open to collateral attack until the legitimate portion of the sentence has been satisfied. In effect, \textit{no} portion of the sentence is viewed as void until the legitimate part of the sentence has been served. It would appear, then, that a sentence would be open to immediate collateral attack only where it was \textit{totally} at odds with the sentencing provisions. For example, if a trial court erroneously imposed a sentence of imprisonment where the appropriate punishment was by fine only, immediate discharge obviously would be in order.

\(^{81}\) \textit{Id.}
\(^{82}\) 39 Ill. 2d 119, 233 N.E.2d 413 (1968).
\(^{83}\) \textit{Id.} at 121, 233 N.E.2d at 414.
\(^{84}\) \textit{Id.} at 122, 233 N.E.2d at 414.
\(^{85}\) \textit{People ex rel. Carlstrom v. Eller}, 323 Ill. 28, 153 N.E. 597 (1926).
\(^{86}\) 39 Ill. 2d at 121, 233 N.E.2d at 414.
The Illinois courts’ approach to excessive sentences can be criticized on two grounds. First, where a judge imposes a sentence that exceeds the court’s statutory authority, that sentence is invalid. Creating a line of demarcation as the courts have done between “void” sentences and “merely excessive” sentences is largely a matter of semantics. If the sentence is excessive, it is unauthorized. If it is unauthorized, it is invalid. If it is invalid, it is void. And, if it is void, it should be open to attack at any time. Second, it seems fundamentally unfair that a habeas corpus petitioner and the petitioned court are deprived of the opportunity to correct an erroneous sentence until after the petitioner has commenced to serve the invalid portion of his sentence. If one considers the normal delays in filing a petition for relief, affording the respondent state an opportunity to reply to the petition, and the court’s review and resolution of the matter, the petitioner will likely remain incarcerated for some period of time wholly unauthorized by law. It would be more logical if the petitioned court could review an alleged invalid sentence immediately following its challenge and, if warranted, rule the sentence invalid and order an immediate resentence.

In any event, it should be understood that sentences prohibited by the federal constitution’s prohibition against cruel and unusual punishment or by the Illinois constitution presumably will not be addressed under state habeas corpus. Since the Illinois Post-Conviction Hearing Act was designed to address substantial deprivations of federal and state constitutional rights, claims of unconstitutional excessive sentences would be more logically addressed under that enactment. Furthermore, because habeas corpus relief entitles a defendant to immediate release, it will be unavailable to a defendant who merely requests that his sentence be reduced.


88. Ill. Const. art. 1, § 11: “All penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship.” See, e.g., People v. Dandridge, 9 Ill. App. 3d 174, 292 N.E.2d 51 (4th Dist. 1973) (sentence violative of Ill. Const. Art. 1, § 11).


90. People v. Gersbacher, 4 Ill. App. 3d 948, 282 N.E.2d 243 (5th Dist. 1972) (habeas corpus unavailable where petitioner claimed he was entitled to sentence credit, since if successful, he would not be entitled to release). See infra notes 136-40 and accompanying text for a discussion of People ex rel. Yoder v. Hardy, 116 Ill. App. 3d 489, 451 N.E.2d 965 (5th Dist. 1983) (holding that “good-time” credits should be counted in determining whether sentence has expired). See also People ex rel. Stringer v. Illinois Prisoner Review Bd., 163 Ill. App. 3d 1100, 517 N.E.2d 283 (3d Dist. 1987) (petitioner’s parole revocation by prisoner review board not cognizable under habeas corpus since parole status simply is alternative sentence and not the equivalent of immediate discharge that follows granting of habeas corpus relief); infra notes 141-45 and accompanying text (decision to grant parole is not a subsequent occurrence warranting release from custody because sentence would not have expired and petitioner would not be entitled to immediate release).
2. Non-Jurisdictional Defects

Illinois courts frequently have denied habeas corpus petitions simply because they did not allege jurisdictional defects in the original trial court judgment. The courts usually have reasoned that judgments rendered by courts with personal and subject matter jurisdiction over the defendants were valid and, accordingly, that the petitioners were not entitled to habeas corpus relief because their incarceration was not unlawful. The results in these cases, however, are not supported by indepth analysis or sound doctrine. In fact, there does not appear to be any developed doctrine, principle, or theory to explain these decisions. The opinions are most often brief and to the point: the petitioner's claim simply does not raise a jurisdictional defect rendering the original judgment void.

91. See, e.g., People v. Reese, 66 Ill. App. 3d 199, 383 N.E.2d 759 (5th Dist. 1978) (failure to admonish defendant about mandatory parole term before accepting his guilty plea does not involve a jurisdictional question entitling defendant to habeas corpus relief).
92. See, e.g., id.
93. See, e.g., Hughes v. Kiley, 67 Ill. 2d 261, 367 N.E.2d 700 (1977) (habeas corpus relief unavailable where defendant challenged indictment on ground of prosecutorial misconduct before grand jury). The Hughes court reasoned:

The remedy of habeas corpus is available in a limited number of situations including obtaining the release of a prisoner incarcerated by a trial court without subject matter jurisdiction or personal jurisdiction over the defendant or where a post-conviction occurrence entitles a prisoner to release. A review of claims which are nonjurisdictional in nature is not available by means of habeas corpus even though a denial of constitutional rights is involved.

... When petitioning for a writ of habeas corpus from this court, the petitioner has the responsibility for attaching all lower court records and other pertinent materials that will fully present the issues of law as required by Supreme Court Rule. Thus our inability to ascertain whether Judge Porter fully examined the due process issue raised by the defendant-petitioner must rest with the defendant-petitioner. Regardless, his remedy beyond the hearing on the motion to quash [the indictment] is not by way of habeas corpus but by way of direct review.

Id. at 267-68, 367 N.E.2d 702-03 (citations omitted). In this case, the court makes no effort to explain: 1) why constitutional claims are not cognizable under habeas corpus; and, 2) why relief from defendant's claim of prosecutorial misconduct before the grand jury which indicted him was an issue that apparently could not be raised under any collateral attack vehicle.
94. See supra note 93.
95. See, e.g., Norman v. Elrod, 76 Ill. 2d 426, 394 N.E.2d 1043 (1979) (per curiam) (failure to admonish defendant about mandatory parole term before accepting his guilty plea does not entitle defendant to habeas corpus relief). The Norman court reasoned as follows:

Petitioner seeks a writ of habeas corpus, claiming that he was incorrectly advised at the time of his plea of guilty that there would be no mandatory parole term following the expiration of his sentence. No claim is made that the trial court lacked jurisdiction over the subject matter or over defendant's person, and habeas corpus is not available. The motion by petitioner for leave to file a petition for an original writ of habeas corpus is denied, without prejudice to the right of petitioner to file a post-conviction petition in the trial court. Motion denied.

Id. at 427, 394 N.E.2d at 1043 (citations omitted). See also People ex rel. Lewis v. Frye, 42
In any event, there are a number of different claims that the Illinois courts categorically have determined are not of a jurisdictional nature. For example, in *People v. Goulet*, the petitioner was convicted of robbery on a negotiated guilty plea and sought habeas corpus relief, alleging that the trial court did not have jurisdiction to convict him because of improper venue. The court held that the Illinois legislature has drawn a distinction between venue and jurisdiction in the Code of Criminal Law and Procedure and in its Committee Comments and, therefore, venue is not a jurisdictional matter. Accordingly, the original judgment of conviction was not void and the petitioner was not entitled to habeas corpus relief.

Another case distinguishing between jurisdictional and non-jurisdictional matters is *People ex rel. LaPlaca v. Sielaff*. The petitioner in that case was convicted of conspiracy to commit murder and filed for habeas corpus relief, alleging that the trial court lost jurisdiction to enter a judgment and sentence against him because the jury returned inconsistent verdicts as to the petitioner and his co-conspirator. The indictment had charged both defendants with murder and conspiracy to commit murder. Further, the indictment alleged that only the co-conspirator had committed an overt act in furtherance of the conspiracy. However, the jury found the petitioner only guilty of conspiracy and the co-conspirator only guilty of murder. The jury had returned blank verdict forms on the co-conspirator's charge of conspiracy. The petitioner contended that even though the trial court originally had personal and subject matter jurisdiction over him, the court lost this jurisdiction on the conspiracy charge because the co-conspirator was in essence acquitted of conspiracy which negated the existence of any conspiracy. In other words, if the alleged co-conspirator was not guilty of conspiracy, the petitioner was not guilty as well due to the bilateral nature of a conspiracy. The court, however, held that even though the trial court may have erred in entering a judgment against the petitioner, such an error would not render the judgment void. The trial court still had jurisdiction to enter a judgment and sentence on a verdict that was based on a valid charging instrument. The petitioner was not unlawfully incarcerated and, thus, not entitled to habeas corpus relief. Therefore, while inconsistent verdicts for co-conspirators may result in negating the existence

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96. 52 Ill App. 3d 609, 367 N.E.2d 1045 (4th Dist. 1977).
97. Id. at 611, 367 N.E.2d at 1047.
98. Id. at 611, 367 N.E.2d at 1047-48.
100. Id. at 760-61, 348 N.E.2d at 517.
101. Id. at 761, 348 N.E.2d at 517-18.
102. Id. at 762, 348 N.E.2d at 518.
103. Id.
of proof of all necessary elements of the crime charged, such a claim does not allege a jurisdictional defect in the original court judgment.104

The court in People ex rel. Bassin v. Israel105 also held that a petitioner did not allege a jurisdictional defect in his habeas corpus petition. In that case, the petitioner had negotiated a plea of guilty for attempt to commit voluntary manslaughter and subsequently claimed that the trial court was without jurisdiction to convict him because such a crime did not exist in Illinois.106 The court, however, did not discuss why a conviction for a nonexistent crime107 was not a jurisdictional defect in the original court judgment. The court simply explained that the petitioner was not entitled to habeas corpus relief because he had pled guilty to a lesser offense and, thus, "received the benefit of his bargain."108

Finally, in People ex rel. Lewis v. Frye,109 the petitioner alleged that he was entitled to habeas corpus relief and that the trial court judgment against him was void because he was denied a hearing to determine his sanity, there was a bona fide doubt of his sanity, the state had not proved his sanity beyond a reasonable doubt, and his counsel was incompetent. The court simply recited the grounds under which a petitioner is entitled to habeas corpus relief and held that these allegations were not jurisdictional defects rendering the trial court judgment void.110

3. Subsequent Events Warranting Release from Custody

In the habeas corpus claims discussed in the previous sections, the petitioner alleging a jurisdictional defect in the original court judgment against him is claiming that the judgment was null and void and that his

104. Id.
105. 31 Ill. App. 3d 744, 335 N.E.2d 53 (5th Dist. 1975).
106. Id. at 746, 335 N.E.2d at 54.
107. Cases decided before and after Bassin clearly hold that attempted voluntary manslaughter is not an offense in Illinois. People v. Reagan, Ill. App. 3d 945, 444 N.E.2d 742 (3d Dist. 1982), aff'd, 99 Ill. 2d 238, 457 N.E.2d 1260 (1983) (no attempted voluntary manslaughter can legally exist where unreasonable self defense claim asserted by defendant); People v. Weeks, 86 Ill. App. 2d 480, 230 N.E.2d 12 (2d Dist. 1967) (no attempted manslaughter can legally exist where defendant kills in heat of passion). While this author has criticized these decisions since logically it appears such a crime could exist, see J. Decker, Illinois Criminal Law: A Survey of Crimes and Defenses 167-68 (1986), the Illinois courts' definitive rejection of such reasoning raises serious questions about the integrity of Bassin.
108. 31 Ill. App. 3d at 748, 335 N.E.2d at 57.
110. Id. at 313, 247 N.E.2d at 411. In addition, the Illinois Supreme Court noted that petitioner's allegations did not claim the occurrence of an event subsequent to conviction that would warrant release from custody. Id. The court, similar to its finding that no jurisdictional defect in the original court judgment was shown, did not give any rationale for its decision.
The petitioner claiming that there has been an occurrence following his conviction and confinement warranting his release, however, acknowledges that the trial court had personal and subject matter jurisdiction to render its verdict and, thus, the resulting confinement was lawful. Such a petitioner, instead, is claiming that there has been some occurrence subsequent to his lawful custody that now warrants his immediate release.

In addressing this ground for release under the Illinois Habeas Corpus Act, the courts over time and in very limited areas, have more consistently and analytically presented their rationale for granting or denying relief. The courts have held that there has been a subsequent event after lawful custody entitling the petitioner to release from such custody in two clearly articulated situations: 1) when a petitioner’s sentence has been served; and, 2) when there has been an unwarranted delay in the execution of a sentence. Moreover, unlike cases addressing the validity of original judgments, the courts have progressively developed these holdings to better provide petitioners with guidance and notice as to when their claims will be granted or denied.

In other areas the courts, similar to their findings related to jurisdictional defects, have provided no meaningful guidance as to what constitutes a subsequent event within the meaning of the Illinois Habeas Corpus Act. For example, the petitioner in People ex rel. Swiderski v. Brierion was released on parole after serving part of his sentence pursuant to a guilty plea for armed robbery. He was subsequently reincarcerated for a parole violation and filed for habeas corpus relief, alleging that he was not admonished prior to pleading guilty that his sentence included a mandatory

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111. See, e.g., People ex rel. LaPlaca v. Sielaff, 38 Ill. App. 3d 760, 348 N.E.2d 516 (5th Dist. 1976) (claim that jury verdicts were inconsistent and, accordingly, trial court lacked subject matter jurisdiction to enter judgment considered and rejected as non-jurisdictional claim); People ex rel. Bassin v. Israel, 31 Ill. App. 3d 744, 335 N.E.2d 53 (5th Dist. 1975) (claim that trial court’s acceptance of plea of guilty to attempted voluntary manslaughter constituted plea to nonexistent crime and, accordingly, judgment of conviction was not supported by court’s subject matter jurisdiction considered and rejected as non-jurisdictional claim).

112. See, e.g., People ex rel. Titzel v. Hill, 344 Ill. 246, 176 N.E. 360 (1131) (prisoner’s discharge ordered where prisoner convicted and sentenced by trial court which had jurisdiction but where prisoner had already served his sentence).

113. Id. at 251, 176 N.E. at 362-63.

114. See, e.g., id. ("[w]here a judgment of conviction is valid, a person imprisoned under it is entitled to be set at liberty on habeas corpus if the judgment, by reason of any matter ex post facto, has ceased to be operative").


118. 65 Ill. App. 3d 153, 382 N.E.2d 628 (1st Dist. 1978).
period of parole. The court noted that the supreme court rule requiring such an admonishment was enacted after the petitioner pled guilty and thus did not apply in this situation. The petitioner noted that two subsequent federal court decisions had held it unfair to reincarcerate a prisoner for parole violations without previous admonishment as to a mandatory parole term. The petitioner claimed that these cases constituted an occurrence subsequent to his lawful confinement warranting habeas corpus relief. The court denied the petitioner relief and simply stated that the federal cases were only advisory, were not similar to the case at bar, and were not the type of subsequent occurrences that the Illinois courts previously had considered under the Habeas Corpus Act. Such cursory reviews have limited the types of subsequent events sufficient for habeas corpus relief to the two discussed above.

Having thus set forth the two types of subsequent events where the Illinois courts have provided some meaningful guidance, it is helpful to examine each more closely.

a. Expiration of lawful period of confinement

In *People ex rel. Castle v. Spivey*, the Illinois Supreme Court held that expiration of a petitioner's maximum sentence is the occurrence of a subsequent event warranting release from lawful custody. In *Castle*, a circuit court judge had discharged two state prisoners, sentenced to life imprisonment, from custody pursuant to their habeas corpus petitions. The Illinois Supreme Court held, however, that the prisoners had not served their legal maximum terms of confinement and, thus, the circuit court judge's orders for release were null and void. Nonetheless, had the prisoners either served their full sentences or had the sentences been terminated by law through, for example, a pardon or commutation, then habeas corpus relief would have been appropriate.

The *Castle* holding has been extended to cases where petitioners have sought release from custody while committed to the Department of Mental Health and Developmental Disabilities. For example, in *Raimondo v. Pav*

\[119. \text{Id. at 153, 382 N.E.2d at 629.} \]
\[120. \text{Id. at 154, 382 N.E.2d at 629.} \]
\[121. \text{Id.} \]
\[122. \text{Id.} \]
\[123. \text{Id. at 154, 382 N.E.2d at 629-30. See also supra notes 109-10 and accompanying text (court holds petitioner's claims are not jurisdictional defects or subsequent events and gives no rationale for its decision).} \]
\[124. \text{10 Ill. 2d 586, 141 N.E.2d 321 (1957).} \]
\[125. \text{Id. at 593, 141 N.E.2d at 325. See also People ex rel. Titzel v. Hill, 344 Ill. 246, 251, 176 N.E. 360, 362-63 (1931) (discharge ordered where accused already served sentence).} \]
\[126. \text{10 Ill. 2d at 596, 141 N.E.2d at 326.} \]
\[127. \text{Id. at 592, 141 N.E.2d at 324; People ex rel. Gregory v. Pate, 31 Ill. 2d 592, 595, 203 N.E.2d 425, 427 (1964).} \]
the petitioner was found not guilty of rape and armed robbery by reason of insanity. The petitioner subsequently was committed to the Department of Mental Health pursuant to the Unified Code of Corrections and the Mental Health Code. During his custody, both statutes were revised and the petitioner alleged that his lawful period of confinement had expired under any version of the statutes. The court stated that if this allegation was proved, then it was an event subsequent to the original lawful confinement which would entitle the petitioner to habeas corpus relief. The circuit court, however, had entertained the petitioner's habeas corpus petition by conducting a new sentencing hearing and applying the revised statutes. Accordingly, the appellate court reversed the circuit court and remanded the case for a determination as to whether the petitioner remained in lawful custody.

Similarly, the petitioner in *Lee v. Pavkovic* was found not guilty of murder by reason of insanity and filed a petition for habeas corpus relief, also alleging that his lawful period of confinement in the Department of Mental Health had expired. The petitioner claimed that the trial court had retroactively applied the revised Uniform Code of Corrections and the Mental Health Code to calculate his term of confinement. The appellate court held that the petitioner was within the Department of Mental Health's lawful custody when he filed his petition and that the trial court properly denied his petition for habeas corpus relief. Nonetheless, the court noted that, had his term of original, lawful confinement expired, the petitioner would have been entitled to release under the Illinois Habeas Corpus Act.

The Illinois courts' rule that expiration of a petitioner's lawful period of confinement constitutes an occurrence subsequent to the confinement which warrants habeas corpus relief, was further extended in *People ex rel. Yoder v. Hardy* to include a petitioner's claim that his good-time credits had been improperly revoked. In that case, the petitioner was serving a four year prison term for aggravated battery and, although this initial term had expired, he remained in custody because the Department of Corrections Adjustment Committee extended his term and revoked two years of his good-time credits for disciplinary reasons. The court agreed with the petitioner that the Department had violated its own administrative regulations when it revoked the credits because it had failed to provide

129. Id. at 227, 437 N.E.2d at 713.
130. Id. at 227-28, 437 N.E.2d at 713.
131. Id. at 229, 437 N.E.2d at 714.
132. Id. at 233-34, 437 N.E.2d at 716-17.
134. Id. at 446, 456 N.E.2d at 627.
135. Id. at 444, 456 N.E.2d at 625.
137. Id. at 490-91, 451 N.E.2d at 966.
him an adequate hearing process. In response, the court ordered the credits reinstated and applied to the petitioner's sentence. This resulted in the expiration of his sentence, entitling him to habeas corpus relief.

The major inquiry in all of these cases focuses on whether or not the petitioner has served his legal term of confinement. If he has, then an occurrence subsequent to his lawful custody exists within the meaning of the Illinois Habeas Corpus Act and he is entitled to release from custody. Based on this rationale, a petitioner is not entitled to habeas corpus relief simply because his request for parole is denied. In People ex rel. Burbank v. Irving, for example, the court held that habeas corpus is not a proper remedy for a prisoner whose request for parole has been denied, even if such denial is unreasonable, arbitrary, or capricious. The court based its holding on the fact that a decision to grant parole is not a subsequent occurrence warranting discharge from custody. The court reasoned that, even if parole had been granted, the petitioner's sentence would not have expired because parole is "simply an alternative method by which he may complete his sentence." Granting parole, therefore, does not entitle a petitioner to immediate discharge, which is the only relief available under the Illinois Habeas Corpus Act.

The courts in Burbank and subsequent cases also appear to have based their holdings that parole decisions are not properly raised under the Illinois Habeas Corpus Act, on the deference due to prisoner review board decisions. The court in Burbank, for example, noted that the decision to grant or deny parole to a prisoner is under the unreviewable discretion of the

138. Id. at 494-95, 451 N.E.2d at 968-69.
139. Id. at 495, 451 N.E.2d at 969.
140. Id. at 496, 451 N.E.2d at 969.
142. Id. at 701, 439 N.E.2d at 557.
143. Id. at 701, 439 N.E.2d at 556.
144. Id. at 702, 439 N.E.2d at 557. See also Newsome v. Hughes, 131 Ill. App. 3d 872, 874-75, 476 N.E.2d 478, 480 (4th Dist. 1985) (petitioner challenging revocation of mandatory supervised release not entitled to habeas corpus since under supervised release, sentence has not expired and petitioner thus could not be released).
145. 108 Ill. App. 3d at 701-02, 439 N.E.2d at 557.
146. See, e.g., Outlaw v. O'Leary, 161 Ill. App. 3d 218, 222, 514 N.E.2d 208, 211 (3d Dist. 1987) (Illinois Prisoner Review Board has great discretion in parole decisions and judicial review of these decisions is narrow); People ex rel. Stringer v. Illinois Prisoner Review Bd., 163 Ill. App. 3d 1100, 1102, 517 N.E.2d 283, 284 (3d Dist. 1987) (revocation of prisoner's parole is not an occurrence subsequent to lawful custody warranting habeas corpus relief and prison review board has authority to revoke parole and reconfine petitioner); Newsome v. Hughes, 131 Ill. App. 3d 872, 874-76, 476 N.E.2d 478, 480-81 (4th Dist. 1985) (petitioner on mandatory supervised release not entitled to habeas corpus relief and statutory law does not require specific charges accompany a warrant when supervised release revoked and petitioner reincarcerated). See also People ex rel. Castle v. Spivey, 10 Ill. 2d 586, 594-95, 141 N.E.2d 321, 326 (1957) (in habeas corpus proceeding, the court will not substitute its judgment or discretion for that of the parole board's officers).
prisoner review board and, therefore: "[f]or a court to order a habeas corpus discharge . . . on the basis of an erroneous or inequitable denial of parole, would exceed its authority under the Habeas Corpus Act and constitute an exercise of clemency, a function vested in the executive, not judicial branch."

With respect to this category of cases, it is important to recognize that the court is not granting relief because the sentencing court imposed an unauthorized or "void" sentence at the outset. Instead, relief is afforded to meritorious defendants because some intervening circumstance followed a lawful sentence that now warrants the petitioner's release. Thus, where the petitioner has completed his lawful sentence, has been pardoned, or enjoys the benefit of a retroactive change in the sentencing law, and, for whatever reason, the correctional authorities continue custody, he is being released because of this "subsequent event," not on "excessive sentence" grounds.

b. Delay in execution of sentence

The Illinois courts have examined a number of factors to determine whether a delay between pronouncing and imposing a petitioner's sentence constitutes an occurrence subsequent to the lawful confinement warranting habeas corpus relief. People ex rel. Millet v. Woods is the leading Illinois case in this area and dealt with a petitioner who was convicted of voluntary manslaughter, sentenced, and released on bond pending appeal. The appellate court affirmed his conviction and denied his motion for rehearing. The Illinois Supreme Court denied his petition for leave to appeal and for reconsideration of this denial. Thereafter, five years passed between the time the supreme court's mandate was issued to the appellate court and the time the appellate court's mandate was spread of record in the trial court. The petitioner surrendered himself and then filed a petition for habeas corpus relief, relying on the five year delay. The supreme court noted that an unreasonable delay between pronouncing and imposing a sentence may be an occurrence subsequent to the lawful sentence which warrants relief under the Habeas Corpus Act. The court stated that a decision to grant such relief requires a case-by-case analysis, and the court must consider the reasons for the delay. Applying this test, the Millet court considered the delay to be extraordinary and unexplained by the state

148. Id. at 702, 439 N.E.2d at 557.
149. 55 Ill. 2d 1, 302 N.E.2d 32 (1973).
150. Id. at 2, 302 N.E.2d at 33.
151. Id.
152. Id. at 2, 302 N.E.2d at 33.
153. Id. at 3, 302 N.E.2d at 33.
154. Id. at 4, 302 N.E.2d at 34.
because, until the state completed the process of spreading the appellate court’s mandate in the circuit court, the petitioner could not be held responsible for any delay that occurred.\textsuperscript{155} The court also noted that the petitioner had led a law-abiding and productive life since his conviction, and “his incarceration ... would not well serve the principles of fundamental justice or [his] rehabilitation.”\textsuperscript{156} Accordingly, the court concluded that the petitioner was entitled to habeas corpus relief.

An Illinois appellate court was confronted with a similar set of facts in \textit{People v. Ripa},\textsuperscript{157} where a petitioner was convicted of various drug offenses, sentenced, and released on bond pending appeal. His conviction was affirmed and he sought habeas corpus relief on the ground that there had been an eighteen and one half month delay between the appellate court’s affirmance and the filing of the mandate with the trial court.\textsuperscript{158} The court noted the similarities between the case at bar and \textit{Millet}, stating that the only difference was the length of the delay.\textsuperscript{159} The court in \textit{Millet}, however, had not specified an acceptable length of delay and the appellate court thus referred to \textit{Millet}’s directive to consider the circumstances in each case when deciding whether to grant or deny habeas corpus relief.\textsuperscript{160} The court directed the petitioner’s release from custody and, in reaching this decision, appeared to consider one factor not discussed in \textit{Millet}. Evidence was presented to show that the petitioner was prepared to surrender himself when he learned that his appeal was denied. His attorney, however, advised him to wait until he was notified by the state.\textsuperscript{161} The court noted that this was in keeping with local practice and that the state had not filed a motion for an order directing the petitioner to surrender until the appellate court’s mandate was spread of record in the trial court.\textsuperscript{162} In this proceeding, moreover, the state had not suggested that the petitioner had an independent obligation to surrender himself.\textsuperscript{163}

The court, in \textit{People v. Bartlett},\textsuperscript{164} also addressed the petitioner’s degree of responsibility for surrendering himself to the authorities in considering his petition for habeas corpus relief. In doing so, the \textit{Bartlett} court limited the rule in \textit{Ripa}. In \textit{Bartlett}, the petitioner presented evidence that showed he was aware that he had lost his appeal, but that his attorney told him he would “take it up further” and he was unaware that he should surrender himself to serve his sentence.\textsuperscript{165} The case, therefore, was factually similar

\textsuperscript{155} \textit{Id.} at 4-5, 302 N.E.2d at 34.
\textsuperscript{156} \textit{Id.} at 5, 302 N.E.2d at 34.
\textsuperscript{157} 115 Ill. App. 3d 1, 449 N.E.2d 977 (2d Dist. 1983).
\textsuperscript{158} \textit{Id.} at 2, 449 N.E.2d at 978.
\textsuperscript{159} \textit{Id.} at 5, 449 N.E.2d at 979.
\textsuperscript{160} \textit{Id.} at 4, 449 N.E.2d at 979.
\textsuperscript{161} \textit{Id.} at 3, 449 N.E.2d at 978.
\textsuperscript{162} \textit{Id.} at 2-5, 449 N.E.2d at 978-79.
\textsuperscript{163} \textit{Id.} at 5, 449 N.E.2d at 979.
\textsuperscript{164} 123 Ill. App. 3d 172, 462 N.E.2d 956 (2d Dist. 1984).
\textsuperscript{165} \textit{Id.} at 174, 462 N.E.2d at 957.
to Ripa. The court, however, distinguished Ripa, noting that the attorney's statement in Bartlett was not as definitive as Mr. Ripa being told to wait until notification before surrendering. The court also stated that waiting for notification did not appear to be local practice in Bartlett's case and that one of the petitioner's bail conditions was that he surrender himself if his conviction was affirmed. In reaching its decision to deny habeas corpus relief, the court also noted that the petitioner's life style had not changed to the same positive degree after his conviction as had the petitioner's in Ripa. The court, however, did not offer specific comparisons between these two life styles which would have provided guidance to future petitioners as to how the courts will treat this factor in deciding whether to grant or deny habeas corpus relief.

Finally, in the consolidated cases of Walker v. Hardiman and Stokes v. Elrod, the Illinois Supreme Court clarified both the issue of the petitioner's responsibility for surrendering himself once his appeal has been denied and the issue of when any delay in the process of spreading the record is attributable to the petitioner. Walker was convicted of armed robbery and burglary, his conviction was affirmed, and the appellate court's mandate was spread of record in the circuit court within one month after his petition for leave to appeal was denied. Walker did not surrender himself to the authorities, even though he was notified that his conviction had been affirmed one month after the mandate was spread in the circuit court. He was arrested four and one half years later so that he could begin serving his sentence. Stokes was convicted of armed violence and attempted murder, his conviction was affirmed, and the appellate court's mandate was spread of record in the circuit court within one year after his petition for leave to appeal was denied. Stokes also did not surrender himself, even though he was promptly notified of the court's decision, and was arrested three years later.

The Court denied the petitioners' habeas corpus relief, holding that both mandates were spread of record within a reasonable period of time. The court also stated that the Code of Criminal Procedure specifically directs defendants on bail to surrender once their judgments are affirmed and that the state is not responsible for notifying defendants that they must surrender:

166. Id. at 175, 462 N.E.2d at 958-59.
167. Id. at 175-76, 462 N.E.2d at 959.
168. Id. at 175, 462 N.E.2d at 958.
170. Id. at 414-15, 507 N.E.2d at 850.
171. Id. at 415-16, 507 N.E.2d at 850.
172. Id. at 417, 507 N.E.2d at 851.
173. Id. at 417-18, 507 N.E.2d at 851.
174. Id. at 421, 507 N.E.2d at 853.
175. Id. at 424, 507 N.E.2d at 854-55.
who has had the privilege of remaining free on bond while his appeal is pending."\textsuperscript{176} The court also held that the three year and four and one half year delays between denial of the petitioners’ leave to appeal and their arrests were attributable to the petitioners: \textsuperscript{177} "[w]e also believe that our decision in this case will now make it clear that once the State moves to have the appellate court mandate spread of record in the circuit court, and the defendant is so notified, any delay in surrendering will be attributable to the defendant."\textsuperscript{178}

Both petitioners presented evidence supportive of the fact that they had lived productive, law-abiding lives since their convictions.\textsuperscript{179} The court did not consider this factor in determining whether they were entitled to habeas corpus relief, and noted that Millet was dispositive as to the facts in Walker and Stokes.\textsuperscript{180} The Court, however, did not address the fact that, in Millet, it had strongly considered the petitioner’s post-conviction life style in deciding to grant habeas corpus relief.

\textbf{B. Procedural Barriers To Illinois Habeas Corpus Relief}

The purpose of the Illinois Habeas Corpus Act is to provide a remedy to individuals who are illegally imprisoned or restrained of their liberty,\textsuperscript{181} and the Habeas Act specifies limited grounds for which a petitioner may be granted relief and released from custody.\textsuperscript{182} Illinois courts consistently have held that, in keeping with the purpose and requirements of the Habeas Act, this collateral remedy only is available to correct errors of a jurisdictional nature which render a subsequent commitment void.\textsuperscript{183} The writ of

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176. Id. at 424, 507 N.E.2d at 855.
177. Id. at 424, 507 N.E.2d at 854.
178. Id. at 424, 507 N.E.2d at 855.
179. Id. at 416-18, 507 N.E.2d at 851-52.
180. Id. at 420-21, 507 N.E.2d at 853. \textit{See also} Crump v. Lane, 117 Ill. 2d 181, 184-85, 510 N.E.2d 893, 895 (1987) (petitioner not entitled to habeas corpus relief because six year delay between when leave to appeal was denied and when he began serving his sentence was attributable to the petitioner. His life style since his conviction, even if exemplary, would not have affected the court’s decision in light of \textit{Walker}).

Traditionally, allegations of an unreasonable denial of bail or excessive bail could be addressed through a petition for habeas corpus relief. People ex rel. St. George v. Woods, 47 Ill. 2d 261, 265 N.E.2d 164 (1970); People v. Harris, 38 Ill. 2d 552, 232 N.E.2d 721 (1967); People ex rel. Sammons v. Snow, 340 Ill. 464, 173 N.E. 8 (1930). Such allegations are no longer considered by the courts on collateral attack and Supreme Court Rule 604(c), Ill. Rev. Stat. ch. 110A, para. 604(c) (1987), is now the sole avenue for challenging a denial of bail or seeking a reduction or modification of bail ordered or conditions surrounding bail. People v. Saunders, 122 Ill. App. 3d 922, 927-28, 461 N.E.2d 1006, 1011 (2d Dist. 1984).
habeas corpus, therefore, is neither available to correct erroneous judgments, nor a substitute for direct appeal. Thus, in reviewing a petition for habeas corpus relief, the courts do not consider factual issues or circumstances surrounding the offense. The Habeas Act does not specify a time limit during which a petitioner is obligated to file a petition for relief, nor does it limit habeas corpus review to certain categories of offenses, such as felonies. Accordingly, this remedy is available to felons and misdemeanants anytime they can prove a jurisdictional defect in the original court judgment or a subsequent event occurring after a lawful judgment.

In interpreting the Habeas Act, the Illinois courts also have held that, because a petition for relief is reviewed in a civil proceeding for the purpose of enforcing the right of personal liberty and not relitigating issues related to the original conviction, the petitioner is not entitled to appointed counsel during a habeas corpus proceeding. In addition, a petition for habeas corpus relief may be dismissed without a hearing if it does not sufficiently allege a jurisdictional defect in the original court judgment or an event subsequent to the original judgment warranting release from custody.

The procedural issues that have been most frequently addressed by the Illinois courts are: 1) the Habeas Act's standing requirement; and, 2) whether a petition incorrectly labelled as a request for habeas corpus relief instead should be examined under a more appropriate statutory provision. These issues will now be examined.

1. Custody Requirement

The Habeas Corpus Act states that "every person imprisoned or otherwise restrained of his or her liberty . . . may apply for habeas corpus . . . ." The Illinois appellate courts have inconsistently interpreted this language when determining whether a petitioner has standing to seek relief. At issue is whether the statute requires a petitioner be in actual physical custody before the courts will consider his request for release.

The third district, in *People ex rel. Williams v. Morris*, and the first district, in *People ex rel. Petraborg v. Fields*, held that the statutory

184. *Baker*, 106 Ill. 2d at 106, 477 N.E.2d at 689; *Carbona*, 53 Ill. App. 3d at 1025, 369 N.E.2d at 199; *Bassin*, 31 Ill. App. 3d at 745, 335 N.E.2d at 55; *Rose*, 33 Ill. 2d at 456-57, 211 N.E.2d at 687.

185. *Bassin*, 31 Ill. App. 3d at 745, 335 N.E.2d at 55; *Rose*, 33 Ill. 2d at 456-57, 211 N.E.2d at 687.


language requires a petitioner to be under actual physical restraint before he has standing to seek habeas corpus relief. The petitioner in *Williams* was on parole and alleged that his sentence had expired because he had not been given proper credit for time spent incarcerated prior to his conviction.\(^{192}\) The court noted that, although a parolee technically remains in legal custody until his sentence expires, because the petitioner was not in actual custody and was at liberty, "there [was] little sense in directing a writ of habeas corpus to a parole officer . . . whose only authority to take physical custody of the parolee [was] dependant upon that parolee's breaching of a condition of his parole."\(^{193}\) The court thus affirmed the trial court's dismissal of the parolee's petition on the ground that he did not have standing to seek relief.\(^{194}\) The petitioner in *Petraborg* sought relief from a detainer warrant filed against him by the parole board while he was in federal custody, alleging that the warrant was void and his Illinois sentence had expired.\(^{195}\) The court held that because the petitioner was in the physical custody of federal authorities, and not Illinois authorities, he did not have standing to seek habeas corpus relief.\(^{196}\) The court explained that, "because a petition for habeas corpus is literally a request for the production of the body, we believe the term 'custody' as used in the statute refers to physical control or possession and may not be considered as a concept which is susceptible to a constructive definition."\(^{197}\)

Nonetheless, in *Collins v. Sielaff*,\(^{198}\) the first district held that a parolee was sufficiently restrained of his liberty to be entitled to seek habeas corpus relief. The petitioner parolee alleged that credit had not been properly applied to his sentence and that he was entitled to complete discharge because his sentence had expired. The court concluded that the conditions of parole imposed on a parolee place him within the category of persons who are restrained of liberty for the purpose of seeking habeas corpus relief.\(^{199}\) The court, in reaching its decision, referred to *People ex rel. Bassin v. Israel*\(^{200}\) where the fifth district also held that a paroled petitioner was entitled to seek habeas corpus relief because a parolee remains in legal custody and the restrictions inherent in such custody are sufficient to invoke habeas corpus review.\(^{201}\)

The Illinois Supreme Court finally addressed this issue as it related to a petitioner released on bail in the 1981 decision of *Creek v. Clark*.\(^{202}\) The

\(^{192}\) *Williams*, 44 Ill. App. 3d at 40, 357 N.E.2d at 852.

\(^{193}\) Id. at 40-41, 357 N.E.2d at 852.

\(^{194}\) Id. at 41, 357 N.E.2d at 853.

\(^{195}\) *Petraborg*, 14 Ill. App. 3d at 1025-26, 303 N.E.2d at 161.

\(^{196}\) Id. at 1027, 303 N.E.2d at 161.

\(^{197}\) Id. at 1026, 303 N.E.2d at 161.

\(^{198}\) 43 Ill. App. 3d 1022, 357 N.E.2d 1213 (1st Dist. 1976).

\(^{199}\) Id. at 1023-24, 357 N.E.2d at 1214.

\(^{200}\) 31 Ill. App. 3d 744, 335 N.E.2d 53 (5th Dist. 1975).

\(^{201}\) Id. at 745, 335 N.E.2d at 55.

\(^{202}\) 88 Ill. 2d 54, 429 N.E.2d 1199 (1981).
court held that the petitioner, who had been indicted for reckless homicide and was free on bail, did not have standing under the Illinois Habeas Corpus Act. The court reasoned that the statutory language required that a petitioner be under actual physical restraint because "a person at large . . . already enjoys the liberty which is normally sought by the writ of habeas corpus. Moreover, it is futile to order a party . . . to produce the 'body' of one not in his physical custody."

In spite of Creek, interpretation of this standing requirement appears to remain unsettled. The fifth district, in People ex rel. Yoder v. Hardy, which was decided after Creek, held that a petitioner serving a mandatory supervised release was entitled to seek habeas corpus relief when he alleged that his good conduct credit was improperly revoked. The court explained that the action was not moot because, if the petitioner proved his allegation, he might be entitled to an earlier termination of such supervision. Yoder thus appears to contradict Creek because any distinction drawn between the level of custody present in mandatory supervised release and parole is spurious at best.

It is noteworthy that federal habeas corpus petitioners are likewise faced with a custody requirement. Nonetheless, in Jones v. Cunningham, the United States Supreme Court ruled that a person on parole is in custody for purposes of the federal enactment. The Court pointed out that, "besides physical imprisonment, there are other restraints on a man's liberty, restraints not shared by the public generally, which have been thought sufficient in the English-speaking world to support the issuance of habeas corpus." While the Court conceded that custody originally had been interpreted as actual physical confinement, the writ of habeas corpus had "grown to achieve its grand purpose—the protection of individuals against erosion of their rights to be free from wrongful restraints upon their liberty." While a later Supreme Court opinion intimated that the

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203. Id. at 61, 429 N.E.2d at 1202.
204. Id. at 61, 429 N.E.2d at 1201-02. The petitioner cited a number of federal cases in support of his argument that a person on bail has standing to seek habeas corpus relief. The court stated that these cases were brought under the federal habeas corpus statute, 28 U.S.C. §§ 2241-55 (1987), and therefore, were not controlling on the interpretation of the Illinois Habeas Corpus Act. 88 Ill. 2d at 60-61, 429 N.E.2d at 1202.
206. Id. at 492, 451 N.E.2d at 967.
209. Id. at 243.
210. Id. at 240.
211. Id. at 243. See also Hensley v. Municipal Court, 411 U.S. 345 (1973) (petitioner's release upon own recognizance pending execution of his sentence satisfied "custody" requirement of 28 U.S.C. § 2254).
mere existence of collateral or civil consequences that follow a conviction\(^{213}\) may not constitute a significant restraint on liberty that would trigger the custody requirement, the Court specifically has recognized that where custodial sanctions might be anticipated in the future\(^ {214}\) or, are at least a possibility, as where a petitioner's parole might be revoked,\(^ {215}\) "custody" exists for purposes of federal habeas corpus. Most important, these interpretations of the federal habeas corpus custody requirement elevate substance above form in that they provide "swift judicial review of allegedly unlawful restraints on liberty" that might occur in the future.\(^ {216}\) This immediate resolution of the matter serves the interest of avoiding the inequity of forcing a meritorious petitioner to wait for relief until after his placement in confinement begins to move the often slow wheels of the administration of criminal justice. Furthermore, this approach recognizes, as in the possible case of a petitioner who previously has served a brief period of incarceration followed by a parole term, that the "petitioner should not be thwarted . . . simply because the path of litigation has been so long . . . that he has [already] served his sentence."\(^ {217}\) Finally, where a defendant is convicted of a serious offense, such as a felony, but is released on probation, it would seem very inappropriate to throw the artificial barrier of custody in the petitioner's path to possible relief, where conceivably the trial court was wholly without jurisdiction in the matter and the court's judgment thus was void. By insisting on a strict interpretation of custody, the Illinois courts may in effect prevent the writ of habeas corpus from meeting, to borrow from the language of the United States Supreme Court, its "grand purpose."\(^ {218}\)

2. Mislabelled Habeas Corpus Petition

The Habeas Corpus Act states that, where the petitioner is entitled to relief but "has sought the wrong remedy, the court shall permit the pleadings to be amended . . . and shall grant the relief to which the [petitioner] is entitled on the amended pleadings or upon the evidence."\(^ {219}\) Prior to 1973, the Illinois courts held that a petition incorrectly labelled

\(^{213}\) See Decker, Collateral Consequences of a Felony Conviction in Illinois, 56 CHI.-KENT L. REV. 731 (1980), for a review of collateral consequences, such as the loss of the right to hold public office or collect pension benefits, that follow an Illinois felony conviction.

\(^{214}\) Hensley v. Municipal Court, 411 U.S. 345 (1973) (petitioner on recognizance awaiting execution of sentence in custody); Braden v. 30th Judicial Cir. Ct., 410 U.S. 484 (1973) (detainer in first state on a pending felony charge creates custody as to that charge even though defendant incarcerated in second state); Peyton v. Rowe, 391 U.S. 54 (1968) (when petitioner, serving first of two consecutive sentences, is challenging second sentence, he is in custody).


\(^{216}\) Peyton, 391 U.S. at 63.

\(^{217}\) Carafas v. LaVallee, 391 U.S. 234, 240 (1968).

\(^{218}\) Jones, 371 U.S. at 243.

\(^{219}\) ILL. REV. STAT. ch. 110, para. 10-121 (1987).
as a request for habeas corpus relief could be considered under a more appropriate statutory provision, but that the courts were not required to do so.\footnote{220} For example, in \textit{People ex rel. Haven v. Macieiski},\footnote{221} the petitioner requested habeas corpus relief, but alleged constitutional violations surrounding his plea of guilty to aggravated battery. The Illinois Supreme Court noted that the petition did not allege that the trial court lacked personal or subject matter jurisdiction over the petitioner or that there had been an occurrence subsequent to his conviction warranting his release from custody.\footnote{222} The court held that the petitioner should have brought his petition under the Post-Conviction Hearing Act and that the trial court \textit{could} have treated the petition as such, but was not required to do so.\footnote{223} The court thus affirmed the trial court’s dismissal of the petitioner’s request for habeas corpus relief.\footnote{224}

The Illinois Supreme Court similarly held in \textit{People ex rel. Lewis v. Frye}\footnote{225} that, where the petitioner sought habeas corpus relief but alleged constitutional violations surrounding his plea of guilty to incest, the trial court could have treated the petition under the Post-Conviction Hearing Act, which was the more appropriate remedy, but that it was not required to do so.\footnote{226} Since the petition did not allege appropriate grounds for habeas corpus relief, the court affirmed the trial court’s decision to dismiss the petition.\footnote{227}

This rule, moreover, was followed in the intermediate appellate courts, albeit with some hesitation. For example, the petitioner in \textit{People v. Cobb}\footnote{228} acknowledged that his \textit{pro se} petition for habeas corpus relief was defective because it alleged constitutional violations related to pre-trial and trial procedures prior to his conviction for rape and aggravated kidnapping. He argued that, because he had filed an obviously mislabelled petition while without representation by counsel, the court should have considered the petition under the more appropriate Post-Conviction Hearing Act.\footnote{229} The appellate court held that the petition did not allege grounds for habeas corpus relief, that the trial court was not required to consider the petition as one for post-conviction relief, and, therefore, that the trial court had properly dismissed the petition.\footnote{230} The court appeared to base its decision

\footnotesize{\begin{itemize}
\item 221. \textit{Id.} at 398, 231 N.E.2d at 434.
\item 222. \textit{Id.} at 398, 231 N.E.2d at 434.
\item 223. \textit{Id.}
\item 224. \textit{Id.}
\item 225. 42 Ill. 2d 58, 245 N.E.2d 483 (1969).
\item 226. \textit{Id.} at 60, 245 N.E.2d at 484-85.
\item 227. \textit{Id.} at 60, 245 N.E.2d at 485.
\item 228. 8 Ill. App. 3d 1081, 290 N.E.2d 610 (2d Dist. 1972).
\item 229. \textit{Id.} at 1082, 290 N.E.2d at 611.
\item 230. \textit{Id.} at 1083, 290 N.E.2d at 611-12.
\end{itemize}}
in part on the fact that the petitioner was entitled to amend his petition and refile for relief under the Post-Conviction Hearing Act.\textsuperscript{231} Thus, the court believed that the petitioner was not prejudiced in any way by the dismissal of his habeas corpus petition. Whether the Cobb court would have reached a different conclusion had prejudice been present, however, was not clear.

Any appellate court developments, however, were cut short in 1973 when the Illinois Supreme Court reversed its previous rulings and held, in \textit{People ex rel. Palmer v. Twomey},\textsuperscript{232} that a petition incorrectly labelled as a request for habeas corpus relief should be considered under a more appropriate statutory provision if it alleges grounds for relief cognizable under that provision.\textsuperscript{233} The court based its decision on its previous ruling in \textit{People v. Slaughter},\textsuperscript{234} which addressed the quality of appointed counsel in Post-Conviction Hearing Act proceedings. The \textit{Slaughter} court had noted that many post-conviction petitions were filed \textit{pro se} and that adequate representation was necessary to amend such petitions to more sufficiently present a petitioner's allegations of a constitutional violation.\textsuperscript{235} As a result, the \textit{Slaughter} court held that the Post-Conviction Hearing Act requires appointed counsel and the opportunity to amend or withdraw a petition for relief.\textsuperscript{236} The court in \textit{Palmer} stated that a petitioner proceeding \textit{pro se} is as likely to select the wrong collateral attack remedy as he is to file an inadequate post-conviction petition.\textsuperscript{237} In keeping with the philosophy of \textit{Slaughter} and to preserve judicial economy, trial courts, therefore, must now consider mislabelled habeas corpus petitions under any other statutory provision that appropriately may apply to a petitioner's allegations.\textsuperscript{238}

Although the majority of mislabelled habeas corpus petitions alleged constitutional deprivations and instead should have been brought under the Post-Conviction Hearing Act, the \textit{Palmer} holding is not limited to mislabelled petitions where Post-Conviction Hearing Act relief more appropriately applies. The appellate decisions after \textit{Palmer}, however, have placed limits on its effect. In \textit{Graham v. Klinicar},\textsuperscript{239} the petitioner sought habeas corpus relief for constitutional violations related to parole procedures. The trial court dismissed the petition because it did not allege

\begin{itemize}
  \item \textsuperscript{231} \textit{Id.} at 1083, 290 N.E.2d at 612.
  \item \textsuperscript{232} 53 Ill. 2d 479, 292 N.E.2d 379 (1973).
  \item \textsuperscript{233} \textit{Id.} at 484, 292 N.E.2d at 382.
  \item \textsuperscript{234} 39 Ill. 2d 278, 235 N.E.2d 566 (1968).
  \item \textsuperscript{235} \textit{Id.} at 285, 235 N.E.2d at 569.
  \item \textsuperscript{236} \textit{Id.}
  \item \textsuperscript{237} 53 Ill. 2d at 484, 292 N.E.2d at 382.
  \item \textsuperscript{238} \textit{Id.} \textit{See also} \textit{People v. Carbona}, 53 Ill. App. 3d 1022, 1025, 369 N.E.2d 197, 199 (1st Dist. 1977) (defendant appealing from denial of motion for new trial did not specify procedural basis of motion and court independently considered petition under Post-Conviction Hearing Act after determining habeas corpus and coram nobis were inappropriate remedies based on allegations in the petition).
  \item \textsuperscript{239} 163 Ill. App. 3d 1091, 517 N.E.2d 606 (3d Dist 1987).
\end{itemize}
grounds for habeas corpus relief and the petitioner appealed, contending that the trial court should have considered his petition as requesting a writ of mandamus.240 The appellate court cited the Illinois Habeas Corpus Act as allowing a petitioner the opportunity to amend a mislabelled petition if the court determines he is entitled to another type of relief, and noted that a writ of mandamus was available to remedy constitutional violations related to parole procedures.241 The court held, however, that the parole procedures in question did not constitute constitutional deprivation and, in addition, the petitioner had improperly sought leave to amend. The trial court, therefore, properly had dismissed the petition and was not obligated to consider it as a request for a writ of mandamus.242 As to the constitutional violations, the court reasoned that, although a writ of mandamus was available to remedy the violations alleged, the facts in this case did not amount to such violations.243 The court thus appeared to interpret the Habeas Corpus Act as requiring the mislabelled petition on its face to sufficiently allege violations warranting a different remedy, and that amending the petition would merely change its label and not its content. The Graham court, however, did not explain how the petitioner's request for leave to amend was improper, or why the burden was on the petitioner to properly seek leave before the court should consider a mislabelled petition under a more appropriate statutory remedy.

Similar to Graham, People ex rel. Petraborg v. Fields,244 also was decided after Palmer. The appellate court in Petraborg appeared to interpret the Palmer holding as applicable only to those situations where a petitioner files his petition pro se and also thereafter does not obtain counsel. The trial court dismissed the petition for habeas corpus relief and the petitioner alleged on appeal that the court should have regarded the petition as one for a writ of mandamus because it was filed pro se and he was unfamiliar with the law.245 The appellate court disagreed and did not reconsider the petition under the more appropriate remedy because the petitioner was appointed counsel shortly after the pro se petition was filed.246 The court stated that counsel had time to amend the petition but apparently chose not to do so.247

The courts' holdings in Graham and Petraborg illustrate the contrast between the Illinois courts' approach to reviewing a petition under the Habeas Corpus Act versus the Post-Conviction Hearing Act where peti-

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240. Id. at 1092, 517 N.E.2d at 607.
241. Id.
242. Id. at 1092-93, 517 N.E.2d at 607.
243. Id.
245. Id. at 1027, 303 N.E.2d at 161.
246. Id.
247. Id.
tions, especially those filed pro se, are liberally construed. The Illinois Supreme Court, in Palmer, took notice of this difference when it stated that the philosophy of Slaughter should be followed and mislabelled habeas corpus petitions must be considered under more appropriate statutory remedies. The court did not, however, clearly discuss that this also means that petitions be liberally construed when determining whether more applicable remedies exist, and the appellate courts since Palmer have not interpreted or extended Palmer to philosophically treat habeas corpus petitions in the same manner as petitions filed under the Post-Conviction Hearing Act.

C. Critical Summary

A review of the Illinois case law involving habeas corpus petitions reveals the existence of several requirements or conditions that serve as barriers to gaining meaningful collateral review of possible errors at the trial court level. First, the Illinois courts insist that habeas corpus only is an appropriate remedy where the error in question would entitle the accused to immediate discharge from custody. For example, where a defendant is sentenced to a more extensive term of imprisonment than that authorized by law or where he wrongfully is denied good-time credit or release on parole, the error may remain unchecked because in none of these situations is the defendant invariably entitled to immediate, unconditional release. Second, some Illinois cases demand that the defendants be in actual, physical custody before habeas corpus review is made available. Thus, if a trial court judgment otherwise was void for complete want of subject matter jurisdiction, a defendant would be barred from relief if he had been sentenced only to probation or given a fine. Accordingly, by mechanically reciting that the petitioner 1) would not be entitled to immediate release if some form of relief were granted, or 2) is not in custody, the actual merits of his claim are never addressed through habeas corpus review.

While the case law does claim to afford relief from judgments of courts lacking jurisdiction, the Illinois courts' narrow view of jurisdiction represents a third obstacle to effective relief. The Illinois courts have refused to follow the step of federal habeas corpus which holds that 1) jurisdiction may be "lost" during the course of trial court proceedings, and 2) deprivation of constitutional rights is cognizable under habeas corpus. Further, Illinois habeas corpus is interpreted as extending only to judgments which

248. People v. Slaughter, 39 Ill. 2d 278, 285, 235 N.E.2d 566, 569-70 (1968) (fundamental fairness requires incoherent pro se post-conviction petition be reconsidered after counsel appointed and petition amended); People v. Williams, 11 Ill. App. 3d 275, 277, 296 N.E.2d 617, 617 (5th Dist. 1973) (pro se motion to vacate judgment and sentence to be liberally construed and reconsidered under Post-Conviction Hearing Act after counsel appointed and petition amended).

are completely void. Thus, where the charging instrument, although statutorily defective, provides some semblance of notice to the defendant about the nature of the charge, it is not void. Similarly, where a sentence not authorized by law is imposed, it is not necessarily void so long as some aspect of the sentence remains valid.

The last major objection that can be directed at much of the habeas corpus case law is the stark absence of jurisprudential principles that might be articulated to justify the application of some of these rules. For example, while the case law is replete with references to the proposition that habeas corpus is available only where the defendant is entitled to immediate, unconditional discharge from custody, no effort is made to explain why this is the case. If a petitioner, for example, was sentenced to twenty years and only ten years of incarceration were permitted by law, it makes little sense to estop the petitioner from raising, and the reviewing court from considering, the matter until the invalid term has become operable. No consideration is given, in such a case, to the uncertainties and resultant anxieties suffered by the defendant. No consideration is given, in such a case, to the usual delays in bringing this matter to a speedy and correct resolution and the resultant languishing of the petitioner in confinement while the merits of the possible illegal confinement continue. Rather, the rule is stated, but no justification for the rule is articulated.

II. Coram Nobis

While the writ of habeas corpus originated to address circumstances where a court had exceeded its jurisdiction in detaining a person, the common law writ of coram nobis (or writ of error coram nobis) developed to correct erroneous factual determinations by lower courts. Initially, the writ of coram nobis evolved to fill a gap because trial courts were not authorized to correct their own factual findings and reviewing courts were limited to consideration of only alleged mistakes of law. Thus, at common law, coram nobis review of factual errors eventually complemented habeas corpus consideration of legal errors. For example, the writ of coram nobis was deemed an appropriate remedy to challenge the conviction of an insane person, where the trial court had not properly recognized this fact, or to challenge the guilty plea of an accused that had been entered out of fear of mob violence, a fact that might also have eluded the trial court. Accordingly, the writ of coram nobis, a post-conviction remedy with ancient historical roots, became the foundation for a second major device to

251. Id. at 1012-13.
252. Id.
253. Id.
collaterally attack a final judgment of conviction in many state courts where a petitioner had no opportunity of raising his claim at trial.\textsuperscript{255}

Meanwhile, at the federal level, the writ of coram nobis came to have limited importance earlier in this century primarily because of the dramatic expansion of federal habeas corpus which took cognizance of all federal constitutional claims raised in both federal and state proceedings.\textsuperscript{256} Indeed, several developments led some to believe that the writ of coram nobis had been abolished in federal court.\textsuperscript{257} In 1954, however, the United States Supreme Court in \textit{United States v. Morgan},\textsuperscript{258} made clear that a federal district court was empowered to issue the writ of coram nobis pursuant to the federal All-Writs Act.\textsuperscript{259} The Court, however, cautioned that "[c]ontinuation of litigation after final judgment and exhaustion of waiver of any statutory right of review should be allowed through this extraordinary remedy only under circumstances compelling such action to achieve justice\textsuperscript{260}" where an error "of the most fundamental character" has occurred.\textsuperscript{261} Thus, where a petitioner demonstrated that his 1977 federal mail fraud conviction was based on government proof that he defrauded persons of nonproperty rights,\textsuperscript{262} an interpretation of the statute the United States Supreme Court discredited in a 1987 decision,\textsuperscript{263} the writ of error coram nobis was employed by a district court to vacate his conviction.\textsuperscript{264} In another case, where a petitioner showed his mail fraud conviction was faulty because the government had not proved a relationship between his use of the mail and an alleged fraudulent scheme, the federal appellate court granted his petition for coram nobis relief and reversed his conviction.\textsuperscript{265} And, where another petitioner proved a co-defendant's conviction had been obtained


\textsuperscript{256} W. LaFave & J. Israel, \textit{supra} note 31, at 1013. The authors also pointed out that the development of the motion for a new trial, which allowed the trial court to reconsider its own factual findings, and the expanded availability of counsel, which made it more difficult to excuse the defense's failure to bring a factual error to the attention of the trial court, contributed to the demise of the writ of coram nobis. \textit{Id.}


\textsuperscript{258} 346 U.S. 502 (1954).

\textsuperscript{259} \textit{Id.} at 511. Section 1651 of the All Writs Act states: "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a) (1966).

\textsuperscript{260} 346 U.S. at 511.

\textsuperscript{261} \textit{Id.} at 512.


\textsuperscript{263} McNally v. United States, 479 U.S. 1005 (1987) (federal mail fraud statute prohibits defrauding people of their property interests but does not refer to depriving the citizenry of the intangible right to good government).

\textsuperscript{264} \textit{Mandel}, 672 F. Supp. at 878.

\textsuperscript{265} \textit{United States v. Travers}, 514 F.2d 1171 (2d Cir. 1974).
contrary to applicable law and reversed on appeal, a district court granted the petitioner's request for coram nobis relief since his judgment of conviction had been obtained under the same circumstances as the co-defendant and his failure to appeal on the same grounds as the co-defendant. In any event, it is not required that the petitioner be in custody nor is it required that he raise a constitutional irregularity before federal coram nobis relief can be granted.

In Illinois, what may be fairly described as statutory coram nobis, provides a defendant with a second basis for collaterally attacking a final judgment of conviction. The Illinois legislature abolished the writ and codified this remedy in 1871. Following a number of statutory re-enactments, coram nobis commonly became known as a section 72 motion, and is now codified in the Code of Civil Procedure under chapter 110, section 2-1401. Changes in each enactment primarily were procedural and not substantive, and, therefore, the purpose of this remedy and the grounds for relief basically have remained the same.

The statute itself does not specify the requirements a petitioner must meet before he is entitled to relief. The Illinois courts have interpreted the statute and developed the law in this area. In developing this law, the courts have relied on earlier case law addressing relief under the common law writ and subsequent legislative enactments. The Illinois courts con-

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267. Chavez v. United States, 447 F.2d 1373 (9th Cir. 1971).
268. United States v. Travers, 514 F.2d 1171 (2d Cir. 1974).
273. See Ill. Rev. Stat. ch. 110, para. 2-1401 (1987). The pertinent part of this statute reads as follows:
(a) Relief from final orders and judgments, after 30 days from the entry thereof, may be had upon petition as provided in this Section. Writs of error coram nobis and coram vobis, bills of review and bills in the nature of bills of review are abolished. All relief heretofore obtainable and the grounds for such relief heretofore available, whether by any of the foregoing remedies or otherwise, shall be available in every case, by proceedings hereunder, regardless of the nature of the order or judgment from which relief is sought or of the proceedings in which it was entered. There shall be no distinction between actions and other proceedings, statutory or otherwise, as to availability of relief, grounds for relief or the relief obtainable.
Id.
sistent have held that collateral attack relief from a conviction under statutory coram nobis only is available if a petitioner shows: 1) that some error of fact existed in the original trial proceedings that did not appear on the record and was not known to the trial court; and, 2) that if such a fact would have been known at the time of judgment, the judgment would not have been entered. Thus, coram nobis relief is not available to attack errors of law committed by the trial court. As a remedy, the courts will vacate the original judgment of conviction if the petitioner successfully makes the requisite showing.

In determining whether to vacate a petitioner's judgment of conviction under statutory coram nobis, the Illinois courts frequently begin their analysis by reciting the maxim that this post-conviction remedy invokes a court's equitable powers, which should prevent enforcement of a judgment that is unfair or unjust. In one case, the Illinois Supreme Court went so far as to state that this maxim is a guiding principle in the administration of statutory coram nobis. However, similar to Illinois habeas corpus, the grounds under which statutory coram nobis relief may be granted are narrow, and such relief is rarely granted. The articulated grounds for relief under statutory coram nobis are substantially more specific than those required for obtaining habeas corpus relief. In addition, whereas the courts under the Illinois Habeas Corpus Act simply find that most petitioners' claims do not allege a jurisdictional defect in the original trial court judgement or a subsequent event warranting release from custody, the courts addressing claims under statutory coram nobis frequently hold that, even though a petitioner's claim does allege an error of fact in the original trial court proceeding that was unknown to the court at the time judgment was entered, the petitioner still is not entitled to relief.

When reviewing the case law in this area, it is difficult to find the courts invoking their equitable powers to ensure fairness and justice. Instead, technicalities associated with statutory coram nobis frequently are used to deny a petitioner relief. Furthermore, the courts have developed a number of escape hatches to deny relief, even though the requisite error of fact is alleged and proved. The courts often hold that: the factual error is not material to the outcome of the case; the factual error merely constitutes cumulative evidence and the petitioner would have been convicted regardless

279. Ostendorf, 89 Ill. 2d at 285, 433 N.E.2d at 258.
of the error; or the petitioner was negligent or did not exercise due diligence in not identifying the error prior to the entry of judgment. Each of these reasons for denying relief under statutory coram nobis will be explored following a discussion of the grounds for granting relief.

In any event, statutory coram nobis is a rarely sought post-conviction remedy, perhaps because of the specificity of the grounds for relief and the correspondingly infrequent occurrence of situations that constitute such grounds. It should be noted, however, that the incidence of both Illinois habeas corpus and statutory coram nobis petitions has decreased significantly since the Illinois legislature enacted the Post-Conviction Hearing Act in 1949, which is a more comprehensive collateral attack remedy addressing the more frequent allegations of constitutional violations.

A. Grounds For Illinois Statutory Coram Nobis Relief

The Illinois courts have articulated four major factual errors entitling a petitioner to a vacated judgment of conviction, provided that these facts were unknown to the trial court during the original proceedings: 1) the petitioner was incompetent during the trial proceedings or when entering a plea or was an infant not properly represented; 2) the conviction was obtained by duress or fraud; 3) the conviction was based on perjured testimony; or, 4) newly discovered evidence would alter the outcome of the proceedings. Because of the specificity of these areas, it is relatively clear when a petitioner is or is not alleging appropriate grounds for relief under statutory coram nobis. However, it should be remembered as previously noted, that the courts have formulated a number of reasons for denying relief, even though the alleged factual error exists.

1. Incompetency and Infancy

If a petitioner was incompetent during the trial proceedings or when entering a plea, or was an infant not properly represented and the trial court was unaware of this fact, the Illinois courts consistently have held that the requisite factual error exists and relief under statutory coram nobis is appropriate. The case law addressing this type of factual error, however, is neither plentiful nor particularly current. The courts also have provided very little guidance in the way of governing principles, and, given the nature of statutory coram nobis, the case law addressing this type of alleged factual error (as is the case with the majority of factual errors alleged under statutory coram nobis) has predictably focused on which version of the facts the court will accept. Three key cases help illustrate the operation of the incompetency and infancy principle.

First, in *People v. McLain*, the petitioner was convicted of armed robbery. Following his arrest for this crime, but prior to arraignment, he was held in the county jail where he tried to hang himself. He was adjudged mentally ill in a civil commitment hearing and was committed to the state hospital. Upon release two and one half months later, the petitioner was arraigned, charged, and subsequently found guilty of armed robbery.

Neither the petitioner nor his attorney requested a hearing to determine his competency to stand trial and the judge was unaware that he had a prior history of mental illness. The petitioner filed a petition for relief under statutory coram nobis and alleged that if the court had been aware of his prior mental illness, a bona fide doubt as to his sanity would have been raised and a hearing ordered to determine his competency to stand trial. The court noted that this issue appropriately was raised under statutory coram nobis. The court considered the evidence which supported the petitioner's claim, vacated the conviction, and ordered a new trial.

Second, the petitioner in *People v. Owens* pled guilty to aggravated battery and was sentenced to three years probation. No inquiry was made into his mental competence at that time. One week after the petitioner pled guilty and was sentenced, he was arrested for armed robbery and the court ordered that he be examined to determine his mental fitness to stand trial on the armed robbery charge. The psychiatric report indicated that the petitioner was suffering from severe organic brain damage, acquired during a head injury five years prior to his arrest. The petitioner later alleged, in his petition for relief under statutory coram nobis, that his conviction and sentence for the first crime should be vacated because he was unable to understand the nature of the proceedings against him and was unable to assist in his defense at the time he entered his guilty plea. The court

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284. 37 Ill. 2d 173, 226 N.E.2d 21 (1967).
285. *Id.* at 175, 226 N.E.2d at 23.
286. *Id.* at 176-77, 226 N.E.2d at 23.
287. *Id.* at 177, 226 N.E.2d at 23.
288. *Id.* at 174-75, 226 N.E.2d at 22.
289. *Id.* at 178, 226 N.E.2d at 24.
290. *Id.* at 177-80, 226 N.E.2d at 24-25. *See also* People v. Harris, 113 Ill. App. 3d 663, 447 N.E.2d 941 (1st Dist. 1983) (petitioner's sentence vacated pursuant to petition for relief under statutory coram nobis because the trial court judge learned of petitioner's mental illness for the first time at his sentencing hearing when his attorney informed the judge that petitioner was not present because he had attempted suicide both before and after trial); People v. Samman, 408 Ill. 549, 97 N.E.2d 778 (1951) (petitioner entitled to relief under statutory coram nobis because he was adjudged insane 10 years prior to present conviction, insanity finding had not been changed by judicial process, and trial court was unaware of the insanity finding when it entered the judgment of conviction for the current offense).
292. *Id.* at 159, 372 N.E.2d at 858.
293. *Id.* at 159, 372 N.E.2d at 858-59.
294. *Id.* at 159, 372 N.E.2d at 859.
noted that statutory coram nobis was the appropriate remedy for the petitioner and ordered his aggravated battery conviction vacated.\textsuperscript{295} The court reasoned that the petitioner was found unfit to stand trial shortly after he had entered a guilty plea on the earlier offense and that this unfitness was due to brain disease suffered prior to either offense.\textsuperscript{296} Therefore, the trial court could not have been aware of the petitioner’s incompetency at the time it accepted his guilty plea on the aggravated battery charge. If the court had been aware of this fact, it would have had a bona fide doubt as to the petitioner’s fitness to enter a plea.\textsuperscript{297}

Finally, in \textit{Chmielewski v. March},\textsuperscript{298} a civil judgment was entered against the petitioner for becoming intoxicated and assaulting the plaintiff. The petitioner filed a petition under statutory coram nobis and alleged that a judgment should not have been entered against him because he was a minor and a guardian \textit{ad litem} had not been appointed to assist him.\textsuperscript{299} The court agreed that relief under statutory coram nobis was the appropriate remedy and vacated the petitioner’s judgment.\textsuperscript{300} The court noted that, due to his infancy, the trial court should have appointed a guardian \textit{ad litem} to protect the minor defendant’s interests.\textsuperscript{301}

2. Fraud and Duress

The Illinois courts have held that a petitioner who proves that his conviction was obtained pursuant to duress or fraud is entitled to a vacated judgment under statutory coram nobis, provided that the trial court was unaware of the fact of the duress or fraud before the judgment was entered.\textsuperscript{302} However, the case law demonstrates that the fraud or duress must be quite extreme before the courts will grant coram nobis relief. For example, in \textit{People v. Dugan}\textsuperscript{303} the petitioner alleged that his guilty plea to burglary was a result of entrapment, deception, force, and duress. The petitioner presented facts showing that the local police chief repeatedly taunted him until he complied with the police chief’s demand to commit a burglary with suspects that the police chief was in the process of investigating.\textsuperscript{304} Upon apprehension by the police, the petitioner was to sign a
confession and plead guilty to the burglary charge. In return, the state was to agree to a sentence of probation for the petitioner. The petitioner followed this plan but the state did not agree to probation and he was sentenced to prison. The trial court dismissed the petitioner's coram nobis petition without a hearing. The Illinois Supreme Court, however, found that a conviction actually based on duress or fraud appropriately should be vacated under coram nobis and held that this petitioner had made out a prima facie case of fraud and was entitled to a hearing where the trial court would address his request for relief.

Similarly, in *Thompson v. People,* the petitioner was convicted of keeping a house of ill fame and subsequently sought coram nobis relief. The petitioner alleged that after his trial he discovered that the two witnesses he wished subpoenaed were not served because the local sheriff and state's attorney intentionally had attempted to suppress evidence favorable to him. The petitioner presented facts that the sheriff and state's attorney not only did not serve the subpoenas, but also threatened the witnesses and told them to leave town until the trial was completed. Accordingly, the coram nobis petition alleged that the petitioner was convicted pursuant to fraud and duress by the sheriff and state's attorney. The Illinois Supreme Court stated that the allegations were properly reviewable under statutory coram nobis and held that the petitioner was entitled to an evidentiary hearing.

In *People v. Hammond,* however, the Illinois appellate court held that the petitioner's statutory coram nobis claim that his conspiracy conviction was obtained by fraud and duress did not rise to a level warranting relief. The petitioner presented facts that the state's attorney's intentional and deliberate violations of court discovery orders resulted in his conviction which was thereby obtained through fraud and duress. The state's attorney repeatedly had failed to inform the petitioner of the whereabouts of the prosecution's key witness. It also was alleged that, because of the prosecutor's delays in bringing this matter to trial, two defense witnesses had died and one had left the state. The petitioner discovered after his trial that the state's attorney had intentionally withheld information about the state's key witness. The petitioner claimed that this delayed his trial to his prejudice and prevented him from interviewing the state witness prior to trial which subsequently hampered his impeachment efforts of this

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305. *Id.* at 445, 82 N.E.2d at 483-84.
306. *Id.* at 445, 82 N.E.2d at 484.
307. *Id.* at 447, 82 N.E.2d at 484-85.
308. 410 Ill. 256, 102 N.E.2d 315 (1951).
309. *Id.* at 258-59, 102 N.E.2d at 317.
310. *Id.* at 259, 102 N.E.2d at 317.
311. *Id.* at 263, 102 N.E.2d at 318-19.
312. 105 Ill. App. 3d 175, 433 N.E.2d 1329 (4th Dist. 1982).
313. *Id.* at 186, 433 N.E.2d at 1333-36.
314. *Id.* at 182, 433 N.E.2d at 1332-33.
The court noted that the petitioner's claim appropriately was brought under statutory coram nobis. The court, however, held that, because the petitioner had sufficient information about the state's witness for impeachment purposes, the alleged fraud did not necessarily cause his conviction. The court cited Thompson and a number of similar cases and stated that in those cases there was a much greater threat of conviction pursuant to the alleged fraud than in this case. Furthermore, it stated that there was nothing in the record to support the defendant's claim that the loss of the three defense witnesses undermined his right to a fair trial. Accordingly, the court held that the petitioner was not entitled to coram nobis relief.

3. Perjury

Early Illinois case law held that the existence of perjured testimony at trial did not constitute grounds for relief under statutory coram nobis. For example, in People v. Touhy, the petitioner was convicted of kidnapping and after judgment was entered he learned that the state's principal witness admitted to falsely identifying him as the kidnapper. He petitioned for coram nobis relief and the Illinois Supreme Court denied his petition, holding that the ancient writ of error coram nobis, and thus, its statutory counterpart, were not intended to address a claim of a conviction based on perjured testimony.

More recently, however, the courts have determined that a conviction based on perjured testimony may properly be vacated under statutory coram nobis. The courts, however, have not provided a rationale for either rejecting or accepting the existence of perjured testimony as grounds for coram nobis relief. In People v. Alfano, for example, the petitioner was convicted of arson and arson with intent to defraud an insurer. He petitioned for coram nobis relief and alleged that the state's expert witness had testified falsely as to his expertise and qualifications. The court noted that statutory coram nobis affords a remedy to obtain relief from a conviction based on perjured testimony, even if the state was unaware that the testimony was false. The court held that the trial court should not have dismissed the petition without an evidentiary hearing, and vacated the judgment of conviction.

315. Id. at 182, 433 N.E.2d at 1330-32.
316. Id. at 183, 433 N.E.2d at 1332-34.
317. Id. at 183, 433 N.E.2d at 1335.
318. Id. at 183, 433 N.E.2d at 1335.
319. Id. at 184, 433 N.E.2d at 1335-36.
320. 397 Ill. 19, 72 N.E.2d 827 (1947).
321. Id. at 25, 28, 72 N.E.2d at 831, 832.
323. Id. at 1028-29, 420 N.E.2d at 1116.
324. Id. at 1030, 420 N.E.2d at 1118.
325. Id. at 1027, 420 N.E.2d at 1119.
Similarly, in *People v. Banks*, the petitioner was convicted of murder and sought coram nobis relief when he discovered information that suggested that a state's witness had given perjured testimony at his trial regarding the weapon used to kill the victim. The reviewing court stated that the petitioner's claim was properly brought under statutory coram nobis. The court vacated the petitioner's judgment of conviction and held that the trial court should have conducted an evidentiary hearing to address the petitioner's alleged factual errors.

Nonetheless, in *People v. Dotson*, the court held that the petitioner was not entitled to coram nobis relief, even though the petition alleging a conviction based on perjured testimony appropriately was brought under statutory coram nobis. The petitioner was convicted of aggravated kidnapping and rape and the victim later recanted her testimony and admitted to giving perjured testimony at trial. In denying the petitioner's relief, the court reasoned that recanted testimony inherently is unreliable and the petitioner had not sufficiently corroborated the victim's admission with additional evidence. Thus, although an allegation of perjured testimony may be properly brought under statutory coram nobis, when the claim is supported by a confession of perjury, the petitioner must sustain a higher burden of proof and produce additional evidence to support his claim before relief under statutory coram nobis will be granted.

4. Newly Discovered Evidence

Similar to the early Illinois case law addressing coram nobis relief for a conviction allegedly based on perjured testimony, until recently, the courts had held that the existence of evidence discovered following a judgment of conviction that arguably would have altered the outcome of the trial is not appropriately considered under statutory coram nobis. While the majority of coram nobis petitions alleged that newly discovered evidence must warrant a vacated judgment of conviction, the reviewing courts consistently had held that this fact was not sufficient for relief. Other than pointing to the fact that newly discovered evidence was not a basis for relief under

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327. Id. at 287, 459 N.E.2d at 998.
328. Id. at 289, 459 N.E.2d at 1000.
330. Id. at 426, 516 N.E.2d at 719, 722.
331. Id. at 424-25, 516 N.E.2d at 721-22.
the common law writ of error coram nobis, the courts provided no rationale for this decision.

Then, in its 1982 decision in *Ostendorf v. International Harvester Company*, the Illinois Supreme Court reversed its previous rulings and held that the existence of newly discovered evidence can be the basis for relief under statutory coram nobis. The only rationale given by the court for the reversal was that, in all of the earlier cases, the courts never explicitly stated that newly discovered evidence could not be the basis for coram nobis relief, but that relief was denied in those cases because the petitioner had not exercised due diligence in discovering the evidence earlier or the new evidence was not material to the outcome of those cases.

Interestingly, the case most frequently cited by the courts addressing coram nobis petitions which raise this issue, *People v. Touhy*, specifically states that newly discovered evidence is not a basis for relief. Moreover, neither the petitioner's due diligence nor the materiality of the evidence was at issue in that case. Given the Illinois courts' lack of rationale for denying newly discovered evidence as grounds for relief, and the Illinois Supreme Court's lack of rationale for accepting newly discovered evidence as grounds for relief and its inaccurate reading of earlier case law, the permanence of the *Ostendorf* holding is questionable. Furthermore, it is surprising that the Illinois Supreme Court departed from years of precedent with so little analysis.

B. Materiality, Cumulative Evidence, Negligence, And Due Diligence

Coram nobis relief frequently is unavailable as a collateral attack remedy to petitioners, even if a petitioner proves the existence of a factual error such as incompetency, duress, fraud, perjured testimony, or newly discovered evidence, and that this error was unknown to the court at the time judgment was entered. In addition to requiring that a coram nobis petition allege factual error within one of the four subject matter categories outlined above, the Illinois courts also have created two other requirements: 1) the factual error in question must be a fact that could have altered the outcome of the trial; and, 2) the petitioner's own negligence must not be the reason that this factual error was not raised prior to the entry of judgment.

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334. 89 Ill. 2d 272, 433 N.E.2d 253 (1982).
335. Id. at 283-84, 433 N.E.2d at 257-58.
336. Id. at 283, 433 N.E.2d at 257-58.
337. 397 Ill. 19, 28, 72 N.E.2d 827, 830-31. See also *People v. Freeman*, 26 Ill. App. 3d 443, 447, 326 N.E.2d 207, 210 (1st Dist. 1974) (due diligence and materiality not at issue and the court noted that the rule is that "newly discovered evidence cannot be the basis for relief under [statutory coram nobis]").
Although these requirements are a logical extension of the purpose of statutory coram nobis and are of practical importance, the courts all too frequently appear to use the requirements as an escape hatch for denying what otherwise would be proper coram nobis relief. Even when the materiality of the evidence presented and the petitioner's due diligence in obtaining the evidence are at issue in a case, and the court nonetheless grants relief, it is unclear as to why the court decided as it did when compared to similar cases where the courts denied relief. In short, there does not appear to be a common logic or approach that flows through the case law and explains the courts' decisions.

1. Materiality and Cumulative Evidence

The requirement that the alleged factual error must be a fact that could have prevented the court from entering a judgment of conviction has been interpreted as meaning that the fact must be material to the outcome of the trial and must not merely constitute cumulative evidence. The absence of proof addressing this requirement is a common defect and one that the state will often focus on in its response to a petition for coram nobis relief. Correspondingly, it is the most frequent basis upon which the courts deny relief. For example, in People v. Hammond, the petitioner located a defense witness after the judgment of conviction was entered and he had been unable to locate the witness prior to that time. He sought coram nobis relief and alleged that this witness' testimony would have prevented the judgment of conviction from being entered against him. The witness was to offer testimony that would have impeached the credibility of the prosecution's principal witness. The court denied the petitioner coram nobis relief and held that the new defense witness' testimony would not have been material to the outcome of the case, but would have merely constituted cumulative evidence. The court found that the testimony of the prosecution's principal witness had been sufficiently impeached at trial through cross-examination.

Another example of the cumulative evidence doctrine is found in People v. Berland. In that case, the petitioner was convicted of arson with intent to defraud an insurer. He sought coram nobis relief alleging that after the judgment of his conviction was entered, he became aware that the prosecution's witnesses had made statements prior to trial that were inconsistent with their trial testimony. He further alleged that the identification procedures used prior to trial by the state were conducted incorrectly and that all of these facts, had they been known at the time of trial, would have

340. Id. at 186, 433 N.E.2d at 1336.
341. Id. at 186, 433 N.E.2d at 1337.
342. Id.
343. 74 Ill. 2d 286, 385 N.E.2d 649 (1979).
prevented the judgment of conviction from being entered against him.\(^{344}\) The court, however, disagreed and held that the petitioner was not entitled to coram nobis relief because the alleged factual errors merely constituted cumulative evidence and would not have altered the outcome of the trial.\(^{345}\)

Finally, in *People v. Stewart*,\(^{346}\) the petitioner was convicted of armed robbery and sought coram nobis relief after he became aware of facts that showed that his attorney planned the robbery and instructed the co-defendant to leave town. The petitioner argued that the attorney's actions prevented the co-defendant from testifying at trial as to the petitioner's innocence.\(^{347}\) The court denied the petitioner coram nobis relief and held that, even if the alleged factual errors were true, this would not have altered the outcome of the trial because eyewitnesses had positively identified the petitioner.\(^{348}\)

2. *Due Diligence and Negligence*

Even if a coram nobis petitioner proves the existence of a factual error that was unknown to the court prior to the entry of a judgment, and even if this factual error would have altered the outcome of the trial and not merely constituted cumulative evidence, the petitioner still may be denied a vacated judgment under statutory coram nobis. In addition to meeting the requirements previously discussed, a petitioner must show that he used due diligence in determining the existence of a factual error prior to the entry of the judgment and that he was not negligent in either failing to discover the error earlier or in bringing the error to the court's attention. The cases, however, present some disagreement as to when a lawyer's negligence should be imputed to a coram nobis petitioner.

For example, in *People v. Banks*,\(^{349}\) the petitioner sought coram nobis relief and alleged that, following his conviction for murder, he became aware that a state's witness had falsely testified at trial regarding the murder weapon. He learned of this fact through a letter sent to his attorney by a county sheriff who discussed a conversation that he had had with the

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344. *Id.* at 315, 385 N.E.2d at 662-63.
345. *Id.* at 316, 385 N.E.2d at 663.
347. *Id.* at 345, 383 N.E.2d at 1182.
348. *Id.* at 347, 383 N.E.2d at 1184. See also *People v. Wade*, 51 Ill. App. 3d 721, 366 N.E.2d 528 (5th Dist. 1977) (petitioner convicted of murder was not entitled to coram nobis relief where state pursued a "single gunman" theory and co-defendant was subsequently convicted of the murder; co-defendant's conviction constituted cumulative evidence because co-defendant testified as a witness at petitioner's trial in support of petitioner); *In re Pyles*, 40 Ill. App. 3d 221, 351 N.E.2d 893 (3d Dist. 1976) (physician's deposition testimony, not pursued at trial, that evidence of minor's injuries may have been due to circumstances other than parental neglect did not entitle petitioner to coram nobis relief because this information was not material to the outcome of the case in light of other evidence supporting court's finding of parental neglect).
state's witness immediately following the murder. The content of this conversation was contradictory to the testimony later given by this witness at trial.\textsuperscript{350} The sheriff sent the letter to the petitioner's attorney subsequent to reading an article about the case in a newspaper. The trial court denied the petitioner coram nobis relief, stating that the petitioner's attorney did not exercise due diligence and could have discovered the information prior to entry of the judgment.\textsuperscript{351} The appellate court vacated the petitioner's conviction and held that the attorney had no way of knowing that the sheriff existed and possessed information pertinent to the case.\textsuperscript{352} The court noted that even the most diligent attorney could not have discovered this information prior to trial.\textsuperscript{353} However, the court implied that had the attorney been negligent, the petitioner's coram nobis relief would have been properly denied.

Even more to the point is \textit{People v. Hammers},\textsuperscript{354} where the petitioner was convicted of murder and later alleged, in his coram nobis petition, that he had obtained evidence which would show that another person committed the murder. This evidence consisted of admissions by the other person to three people that he had committed the murder.\textsuperscript{355} The trial court denied the petitioner coram nobis relief and stated that the petitioner had been negligent in not presenting at trial the defense that another person murdered the victim,\textsuperscript{356} although there was some evidence that it was the petitioner's attorney who had not presented the defense, contrary to the petitioner's wishes.\textsuperscript{357}

However, in \textit{People v. McManus},\textsuperscript{358} the court granted the petitioner coram nobis relief when it was shown that the petitioner's attorney had been negligent in not pursuing an appeal of the petitioner's delivery of cocaine conviction.\textsuperscript{359} Notice of appeal had been filed but was dismissed when the petitioner and his attorney failed to attend the scheduled hearing. The petitioner later learned that his attorney had not pursued the appeal, even though he told the petitioner that he had.\textsuperscript{360} The appellate court held that the petitioner was entitled to coram nobis relief because, if these facts had been known to the court, it would not have entered an order dismissing

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\textsuperscript{350}. & \textit{Id.} at 288, 459 N.E.2d at 993, 997-98. \\
\textsuperscript{351}. & \textit{Id.} at 288, 459 N.E.2d at 999. \\
\textsuperscript{352}. & \textit{Id.} \\
\textsuperscript{353}. & \textit{Id.} \\
\textsuperscript{354}. & 48 Ill. App. 3d 1023, 363 N.E.2d 914 (4th Dist. 1977). \\
\textsuperscript{355}. & \textit{Id.} at 1026-27, 363 N.E.2d at 916-17. \\
\textsuperscript{356}. & \textit{Id.} at 1025, 363 N.E.2d at 915-16. \\
\textsuperscript{357}. & \textit{Id.} at 1028, 363 N.E.2d at 918. \textit{See also In Re Pyles, 40 Ill. App. 3d 221, 351 N.E.2d 893 (3d Dist. 1976)} (physician's deposition testimony was not introduced at trial and contradicted the physician's trial testimony; petitioner not entitled to coram nobis relief because this contradictory testimony could have been introduced at trial through cross-examination). \\
\textsuperscript{358}. & 66 Ill. App. 3d 986, 384 N.E.2d 568 (3d Dist. 1978). \\
\textsuperscript{359}. & \textit{Id.} at 990-91, 384 N.E.2d at 572-73. \\
\textsuperscript{360}. & \textit{Id.} at 987, 384 N.E.2d at 570. \\
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the appeal. The court reasoned that the petitioner had been deprived of his right to appeal because of circumstances beyond his control and, even though his attorney was at fault, the petitioner himself was not at fault.

C. Procedural Barriers To Illinois Statutory Coram Nobis Relief

Illinois statutory coram nobis is a narrow collateral attack remedy that only is available to an individual who shows that an error of fact existed in the original trial proceedings that did not appear on the record and was not known to the trial court judge, and that the judgment of conviction would not have been entered if this error of fact had been known. Thus, statutory coram nobis is not available to correct errors of law. Nor is coram nobis available to reconsider a petitioner's guilt or innocence and, thus, as with all collateral attack remedies, it is not a substitute for direct appeal. A coram nobis petition and a direct appeal, therefore, are not conflicting avenues of relief and both can proceed simultaneously, or one avenue can follow the other. Coram nobis relief is limited, however, by the doctrines of waiver and res judicata. Statutory coram nobis is not available to review claims which could have been presented to the trial court or on direct appeal, and such claims which might have been raised, but were not, are deemed waived. In addition, a petitioner is precluded from raising in a coram nobis petition errors of fact previously raised and decided at trial or at other proceedings.

Although statutory coram nobis is civil in nature, it is available to attack criminal judgments of convictions. A coram nobis petition begins a new civil action and is not a continuation of the original case. Therefore, a finding and judgment are entered independent of the original judgment of conviction, and the coram nobis finding does not affect enforcement of the original judgment of conviction. Because statutory coram nobis proceedings are civil in character, a petitioner must prove his allegations

361. Id. at 988-89, 384 N.E.2d at 571.
362. Id. at 990-91, 384 N.E.2d at 572.
365. Berland, 74 Ill. 2d at 314, 385 N.E.2d at 662.
368. Berland, 74 Ill. 2d at 314-15, 385 N.E.2d at 662.
370. ILL. REV. STAT. ch. 110, para. 2-1401(b) (1987); People v. Touhy, 397 Ill. 19, 25, 72 N.E.2d 827, 831 (1947).
371. ILL. REV. STAT. ch. 110, para. 2-1401 (d) (1987).
by a preponderance of the evidence\textsuperscript{372} and either the petitioner or the state may appeal the court's finding.\textsuperscript{373}

Statutory coram nobis requires that a petition be supported and accompanied by affidavits.\textsuperscript{374} The Illinois Supreme Court has held that, where supporting and opposing affidavits controvert one another, an evidentiary hearing must be held to determine whether coram nobis relief is warranted.\textsuperscript{375} The court also has noted that, in the absence of such contradictory affidavits, a judgment may be entered on the basis of the affidavits without an evidentiary hearing.\textsuperscript{376} However, no other Illinois precedents discuss whether and when a coram nobis petitioner is entitled to an evidentiary hearing to determine if relief is warranted.

A coram nobis petition can attack either a misdemeanor or a felony conviction, and custody is not a prerequisite for relief.\textsuperscript{377} In addition, there is no obligation to exhaust any other possible remedy.\textsuperscript{378} The Illinois courts have held that an incorrectly labelled coram nobis petition, if it contains allegations that are cognizable under the Illinois Habeas Corpus Act or Post-Conviction Hearing Act, should be addressed under the more appropriate collateral attack remedy.\textsuperscript{379}

Statutory coram nobis requires that a petition be filed within two years of the original judgment of conviction.\textsuperscript{380} The statute also notes that legal disability, duress, or fraudulent concealment of evidence will toll the two year statute of limitations.\textsuperscript{381} The application of this two year limitation period is the procedural issue most frequently addressed by a reviewing court after a petitioner's request for coram nobis relief has been denied at the trial level.

The Illinois Supreme Court consistently has held that imprisonment does not constitute legal disability or duress.\textsuperscript{382} Therefore, an imprisoned petitioner is not entitled to an extension of the two year period equal to the time of incarceration.\textsuperscript{383} Thus, barring the existence of fraudulent concealment or duress, an imprisoned petitioner must file a coram nobis petition

\textsuperscript{373.} People v. Touhy, 397 Ill. 19, 26, 72 N.E.2d 827, 831 (1947).
\textsuperscript{374.} Ill. Rev. Stat. ch. 110, para. 2-1401(b) (1987).
\textsuperscript{376.} Id.
\textsuperscript{378.} Id.
\textsuperscript{380.} Ill. Rev. Stat. ch. 110, para. 2-1401(c) (1987).
\textsuperscript{381.} Id.
\textsuperscript{382.} Williams v. People, 31 Ill. 2d 516, 517, 202 N.E.2d 468, 469 (1964); Morgan v. People, 16 Ill. 2d 374, 378, 158 N.E.2d 24, 26 (1959); People v. Rave, 392 Ill. 435, 444, 65 N.E.2d 23, 28 (1946).
\textsuperscript{383.} Williams, 31 Ill. 2d at 517, 202 N.E.2d at 469; Morgan, 16 Ill. 2d at 378, 158 N.E.2d at 26; Rave, 392 Ill. at 444, 65 N.E.2d at 28.
within two years of the original judgment of conviction for the petition to be considered by the Illinois courts.

The two year statutory period is suspended, however, where it is determined that a petitioner was incompetent to stand trial or to enter a plea. The Illinois Supreme Court has held that incompetency constitutes a legal disability within the meaning of statutory coram nobis and that the statute of limitations will not begin to run until a petitioner is adjudged competent.

D. Critical Summary

Similar to Illinois habeas corpus, statutory coram nobis presents several barriers to a petitioner who seeks collateral review of a final judgment of conviction. First, the grounds for relief under statutory coram nobis not only are extremely narrow, but the Illinois courts' interpretation of earlier case law regarding these grounds fails to provide a petitioner with consistency, guidance, or comfort. The case law addressing a petitioner's claim that he was incompetent during the trial proceedings or when entering a plea, or was a minor not properly represented, is scarce and not current. Furthermore, for a petitioner to gain relief because his conviction was obtained pursuant to duress or fraud, he must show that the fraud or duress was extreme and obvious. In addition, the case law addressing issues of perjured testimony or newly discovered evidence is inconsistent, and the analysis and rationale are superficial. Second, the courts all too frequently resort to the escape hatches of materiality and due diligence and deny a petitioner relief, even when a factual error existed that was unknown to the trial court at the time judgment was entered.

Statutory coram nobis does present a more principled method of analyzing whether collateral relief is warranted when compared to the state habeas corpus vehicle. Nonetheless, statutory coram nobis has its limitations. In addition to the multiple substantive barriers to relief, the Illinois courts' coram nobis jurisprudence presents several conceptual and procedural shortcomings. First, the courts state that a guiding premise in their application of statutory coram nobis is that their equitable powers should be invoked to prevent enforcement of a judgment of conviction that is unfair or unjust. While no one can quarrel with this general assertion, the case law provides no further refinement of, or principles useful in assessing, what factual errors invariably will render a judgment unfair or unjust. For instance, one principle that might be articulated to cover all petitions of this nature is that the equitable powers of the court will be exercised whenever a factual error occurred which casts some doubt on whether the petitioner committed the crime in question or, alternatively, whenever such

error might have altered the outcome of the proceeding. While such a statement is at the heart of many of the coram nobis decisions, this concept is not apparent in various other instances. To illustrate, if a petitioner seeking coram nobis relief presents newly discovered evidence in circumstances where he was inept in not raising the evidence in the trial court prior to entry of the judgment of conviction, he will be denied relief because of his failure to employ due diligence even though the evidence in question might have altered the outcome of the trial court proceedings. In this situation, it is questionable as to whether a just or fair result has been achieved given the nature of the penal sanction. If correct resolution of the fact of guilt or innocence is the primary focus of these inquiries, dismissing a petitioner's claim due to his negligence in not raising it earlier appears to elevate form over substance.

An additional criticism that arises from the courts' routine recital that equitable relief will be afforded petitioners where "unjust or unfair" judgments have been entered, is that such a statement, which is frequently dicta, may raise false hopes in the minds of unrepresented inmates and inexperienced attorneys. Considering the rarity with which these petitions for relief are granted, it might be appropriate for the courts to refer to this collateral remedy as an "extraordinary remedy" that is only available where an error of "the most fundamental character" has occurred, consistent with the manner in which the federal courts characterize the federal coram nobis protection.86

Moreover, in certain instances, the courts considering coram nobis petitions inappropriately have based their decisions on only those facts existent in the trial court record and denied hearings where new facts outside the record might have been raised, even though these facts might have altered the outcome of the cases. In People v. Hammond,87 for example, the court dismissed without a hearing the petitioner's claims that possible intentional delays by the state resulted in the loss of three defense witnesses, two who died and one who left the state.88 Even though the latter witness was available later to testify at an evidentiary hearing,89 the petition was dismissed. The court asserted that the petitioner's claim—that the prosecutor's intentional delays contributed to the loss of the witness—was nothing more than speculation.90 The court held that nothing in the trial court record supported these claims.91

If the thrust of coram nobis protection is to have any meaning, matter outside the trial court record must be considered. And the only way in

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86. See supra notes 258-61 and accompanying text.
88. 105 Ill. App. 3d at 182, 433 N.E.2d at 1333-34.
89. Id. at 178, 433 N.E.2d at 1331.
90. Id. at 182, 433 N.E.2d at 1334.
91. Id.
which matter outside the trial court record can be considered in conjunction with the petition for coram nobis relief is to afford the petitioner an opportunity to make a record at an evidentiary hearing involving the claim for collateral relief. The failure to provide a hearing gives the appellate court an opportunity to consider whether the petitioner's claims truly are speculative or, alternatively, are claims which raise serious questions about the petitioner's guilt.

A perusal of the coram nobis case law, as illustrated by *Hammond* and *People v. Dotson*, reveals that as a practical matter, the petitioned court normally assumes the fact finding process at the trial court level was reliable. Returning to the assertion that well defined principles governing coram nobis case law are non-existent, it must be posited that if the petitioned courts normally are relying on the integrity of the trial court's factual determination, the courts should articulate this reality in their decisions by stating that there exists a legal presumption of factual correctness in the trial court proceedings.

Finally, the coram nobis case law reflects inconsistent applications of certain doctrines. For instance, in *People v. Hammers*, the petitioner was denied coram nobis relief because of his negligence in bringing to the attention of the trial court the admission of a person to three witnesses that this person, rather than the petitioner, actually had committed the crime in question. This negligence was imputed to the petitioner personally even though there existed some evidence that his attorney had not presented this defense at trial, contrary to the petitioner's wishes. Meanwhile, in *People v. McManus*, the court granted coram nobis relief after concluding that the petitioner's failure to appeal was attributable to the petitioner's attorney and not to the petitioner personally. In both cases, the omissions were the fault or decision of the attorney, but in one case fault was imputed to the petitioner and, in the other, to the attorney. Thus, in connection with the due diligence/negligence barrier to coram nobis relief, it remains unclear as to whether or not a petitioner is vicariously responsible for his attorney's failure to properly raise an issue.

### III. Post-Conviction Hearing Act

The Post-Conviction Hearing Act provides the third method for collaterally attacking a final judgment of conviction in the Illinois courts. This Act is the most broad and comprehensive of the Illinois collateral attack

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remedies and is designed to provide relief to an individual who shows that his state or federal constitutional rights were substantially violated during the proceedings which resulted in his conviction.\textsuperscript{396}

There are two explanations as to why this collateral attack remedy is more comprehensive than either statutory habeas corpus or statutory coram nobis. First, the purpose of the Post-Conviction Hearing Act is to address denials of state or federal constitutional rights.\textsuperscript{397} The grounds for relief, therefore, are more broad-based than either the jurisdictional defects or subsequent events addressed by habeas corpus or the factual errors addressed by coram nobis. In addition, the Illinois courts' interpretation and application of statutory habeas corpus and statutory coram nobis make the grounds for relief under those two collateral attack remedies even more narrow than an initial reading of either act might suggest. On the other hand, constitutional rights violations encompass a wider array of factual events and legal issues. Furthermore, there is a more uniform consensus in federal and state courts as to what events constitute such violations and, therefore, the Illinois courts are not able to limit the scope of this mode of relief to the same degree as they do the statutory coram nobis and habeas corpus doctrines.

Second, the Post-Conviction Hearing Act was enacted by the Illinois legislature in 1949 specifically to address the inadequacies in the nature and application of both statutory habeas corpus and statutory coram nobis.\textsuperscript{398} Prior to this time, it had become increasingly apparent that these two Illinois post-conviction remedies were extremely limited, not only in terms of their grounds for relief, but also in terms of the Illinois courts' consistent resorts to the technical trappings of each remedy to deny petitioners relief.\textsuperscript{399} Consequently, petitioners did not have an adequate post-conviction procedure through which to present claims of constitutional rights violations.\textsuperscript{400} Petitioners were left with only federal habeas corpus as the method by which to pursue such claims.\textsuperscript{401} This solution, however, was both inadequate and practically unworkable. The federal district courts became saturated with an increasing number of petitions for federal habeas corpus relief, all requesting review of state court convictions.\textsuperscript{402} In addition,

\textsuperscript{396} See id. at para. 122-1.

\textsuperscript{397} See id.


\textsuperscript{399} Slaughter, 39 Ill. 2d at 283-84, 235 N.E.2d at 568-69; Leighton, supra note 254, at 568-70.

\textsuperscript{400} Leighton, supra note 254, at 567. See Slaughter, 39 Ill. 2d at 284, 235 N.E.2d at 569.

\textsuperscript{401} Leighton, supra note 254, at 567-68; Comment, Practice and Procedure, supra note 398, at 129.

\textsuperscript{402} Slaughter, 39 Ill. 2d at 283, 235 N.E.2d at 568; Leighton, supra note 254, at 567; Comment, Practice and Procedure, supra note 398, at 129.
federal court jurisdiction to review these federal habeas corpus petitions is limited to cases where state court remedies have been exhausted.\textsuperscript{403} This jurisdictional requirement resulted in the federal courts more closely examining the availability and adequacy of state court remedies.\textsuperscript{404}

In 1947, Justice Rutledge noted the ineffectiveness and technical trappings of the Illinois post-conviction remedies in his concurring opinion in \textit{Marino v. Ragen}.\textsuperscript{405} The petitioner in \textit{Marino} filed for federal habeas corpus relief and alleged a variety of constitutional violations in the trial court proceeding that resulted in his murder conviction. Justice Rutledge wrote a forceful concurrence, in which he chastised the Illinois courts and legislature for not providing petitioners with post-conviction remedies that would effectively address constitutional rights violations.\textsuperscript{406} The Illinois legislature responded by enacting the Post-Conviction Hearing Act,\textsuperscript{407} and thus provided an additional collateral relief vehicle to a petitioner who shows a substantial deprivation of any constitutional right that occurred in the original trial proceedings.

Even though the grounds for relief under the Post-Conviction Hearing Act are broader and more comprehensive than those under Illinois habeas corpus or Illinois coram nobis, this does not mean that a petitioner has a greater opportunity of ultimately obtaining collateral attack relief under the Post-Conviction Hearing Act. The Illinois courts, in determining whether relief is warranted under the Act, continue to frequently deny petitioners

\begin{footnotesize}
\begin{enumerate}
\item Slaughter, 39 Ill. 2d at 283, 235 N.E.2d at 568. For an extended discussion of the exhaustion of state remedies, see Comment, \textit{Practice and Procedure, supra} note 398, at 150-55.
\item Slaughter, 39 Ill. 2d at 283, 235 N.E.2d at 568.
\item 332 U.S. 561, 563-70 (1947) (Rutledge, J., concurring). Justice Rutledge stated: The trouble with Illinois is not that it offers no procedure. It is that it offers too many, and makes them so intricate and ineffective that in practical effect they amount to none. The possibility of securing effective determination on the merits is substantially foreclosed by the probability, indeed the all but mathematical certainty, that the case will go off on the procedural ruling that the wrong one of several possible remedies has been followed. Id. at 565.
\item Id. at 563-70 (Rutledge, J., concurring). More specifically, Rutledge complained: The Illinois scheme affords a theoretical system of remedies. In my judgment it is hardly more than theoretical. Experience has shown beyond all doubt that, in any practical sense, the remedies available there are inadequate. Whether this is true because in fact no remedy exists, or because every remedy is so limited as to be inadequate, or because the procedural problem of selecting the proper one is so difficult, is beside the point. If the federal guarantee of due process in a criminal trial is to have real significance in Illinois, it is imperative that men convicted in violation of their constitutional rights have an adequate opportunity to be heard in court. This opportunity is not adequate so long as they are required to ride the Illinois merry-go-round of habeas corpus, coram nobis, and the writ of error before getting a hearing in federal court. Id. at 569-70.
\item Slaughter, 39 Ill. 2d at 284, 235 N.E.2d at 569; Leighton, \textit{supra} note 254, at 570-71.
\end{enumerate}
\end{footnotesize}
relief. Three major reasons are given by the courts for this result: 1) the petitioner did not prove that the alleged constitutional deprivation substantially violated his constitutional rights;\textsuperscript{408} 2) the alleged deprivation did not involve a constitutional right;\textsuperscript{409} and, 3) the doctrines of waiver and res judicata prevented the petitioner from obtaining relief.\textsuperscript{410}

The case law in this area has occasionally provided a more in-depth analysis than the case law addressing relief under statutory habeas corpus or statutory coram nobis. Constitutional issues, of course, more readily lend themselves to intricate analysis. Notwithstanding, consistent with habeas corpus and coram nobis, petitioners are rarely granted collateral attack relief under the Post-Conviction Hearing Act.

\textit{A. Existence Of A Constitutional Right}

A petitioner seeking relief under the Post-Conviction Hearing Act must show that his state or federal constitutional rights were substantially violated during the proceedings that resulted in his conviction.\textsuperscript{411} Before determining whether a petitioner has sufficiently proved a substantial constitutional violation, however, a more basic issue must be addressed. If the petitioner does not even have a constitutional right to whatever he is alleging has been violated, then any further inquiry under the Post-Conviction Hearing Act is irrelevant.

The Illinois courts frequently have denied petitioners relief under the Act simply by determining that there is no constitutional right involved in the petitioner's claim. This is a separate issue from whether the petitioner's federal or state constitutional rights were substantially violated. Thus, a petitioner must point to the breach of a constitutional guarantee before he is entitled to any relief under the Post-Conviction Hearing Act.

\textit{1. Statutory Rights and Violations}

The Illinois Supreme Court consistently has held that statutory rights do not confer constitutional rights and the existence of a statutory violation

\textsuperscript{408} See, e.g., People v. Stewart, 121 Ill. 2d 93, 520 N.E.2d 348 (1988) (claim of unconstitutional application of death penalty did not sufficiently allege substantial constitutional deprivation).

\textsuperscript{409} See, e.g., People v. Radford, 53 Ill. 2d 120, 290 N.E.2d 212 (1972) (erroneous statutory interpretation does not result in the substantial denial of constitutional rights for which the Post-Conviction Act provides a remedy).

\textsuperscript{410} See, e.g., People v. Mendedolt, 91 Ill. App. 3d 239, 414 N.E.2d 893 (2d Dist. 1980) (failure to raise ineffective counsel claim in earlier proceedings precluded petitioner from raising claim on appeal of denial of post-conviction petition).

\textsuperscript{411} "Any person imprisoned in the penitentiary who asserts that in the proceedings which resulted in his conviction there was a substantial denial of his [constitutional] rights . . . may institute a proceeding under this Article." ILL. REV. STAT. ch. 38, para. 122-1 (1987).
in and of itself, therefore, does not rise to the level of a constitutional violation.\textsuperscript{412} The Illinois courts use this rationale to deny petitioners relief under the Post-Conviction Hearing Act most often when the allegations focus on rights and violations associated with: 1) arrests and detention; 2) guilty pleas; 3) time lapses between formal charges and the beginning of trial proceedings; and, 4) sentencing hearings.

\textbf{a. Arrests and detention}

Even though the Illinois Supreme Court has held that statutory rights alone do not confer constitutional rights, the state's highest court has not always been clear as to why a particular petitioner's allegations only address statutory violations with no constitutional rights implicated, or which statutory right instead of a constitutional right is even being examined. This most often occurs when a petitioner seeking relief under the Post-Conviction Hearing Act alleges the existence of an illegal arrest and detention. For example, in \textit{People v. Orndoff},\textsuperscript{413} the petitioner was convicted of burglary and larceny. He later filed for relief under the Post-Conviction Hearing Act and alleged, \textit{inter alia}, that he had been illegally arrested and detained and that the indictment charging him had been defective. The Illinois Supreme Court simply noted that these allegations pertained to statutory rights, not constitutional rights, and that relief under the Post-Conviction Hearing Act is limited to proved allegations of constitutional violations.\textsuperscript{414} The court denied the petitioner relief without any further explanation.\textsuperscript{415}

Similarly, in \textit{People v. French},\textsuperscript{416} the petitioner was convicted of armed robbery and in his petition under the Post-Conviction Hearing Act he alleged, \textit{inter alia}, that his arrest was unconstitutional. The court cited \textit{Orndoff} and held, with no discussion, that the petitioner was not entitled to relief because allegations of statutory violations pertaining to an arrest and detention prior to the return of an indictment do not implicate a constitutional violation and thus are not cognizable under the Post-Conviction Hearing Act.\textsuperscript{417}

These decisions are bothersome for two reasons. First, the court never stated what statute these allegations referred to. Second, claims of illegal arrests and detention obviously involve fourth amendment rights. Perhaps a collateral attack on a judgment of conviction is not the most appropriate time to raise such claims for the first time, but these claims do implicate

\textsuperscript{412} See, e.g., People v. Radford, 53 Ill. 2d 120, 290 N.E.2d 212 (1972) (alleged erroneous interpretation of probation statute does not involve a substantial constitutional right).
\textsuperscript{413} 39 Ill. 2d 96, 233 N.E.2d 378 (1968).
\textsuperscript{414} \textit{Id.} at 98-99, 233 N.E.2d at 380.
\textsuperscript{415} \textit{Id.} at 99, 233 N.E.2d at 380-81.
\textsuperscript{416} 46 Ill. 2d 104, 262 N.E.2d 901 (1970).
\textsuperscript{417} \textit{Id.} at 107, 262 N.E.2d at 903-04.
constitutional violations and the Illinois Supreme Court's blanket statement that they do not is inaccurate.

b. Guilty pleas

The Illinois courts also have held that, because statutory rights do not confer constitutional rights, noncompliance with Supreme Court Rule 402, governing guilty pleas, does not alone result in a constitutional violation. Rule 402 requires that a judge admonish a defendant as to various consequences of pleading guilty to a charge prior to accepting a guilty plea and entering a judgment of conviction. The purpose of Rule 402 is to determine whether a defendant made a knowing and intelligent guilty plea.

Although a defendant does not have a constitutional right to be admonished, as required by Rule 402, he does have a constitutional right to have his guilty plea refused unless it is knowing and intelligent. Thus, a petitioner who seeks relief under the Post-Conviction Hearing Act and alleges that his constitutional rights were substantially violated by a judge's failure to admonish him correctly, as required by Rule 402, must show that noncompliance with Rule 402 resulted in his guilty plea not being knowing and intelligent.

For example, in People v. Krantz, involving two consolidated cases, both petitioners sought relief under the Post-Conviction Hearing Act and alleged that their constitutional rights were violated because the judges had accepted their guilty pleas without properly admonishing them as required by the Rule. The first petitioner claimed that prior to entering his guilty plea for forgery, the judge did not adequately inform him of the nature of the charge against him and did not ensure that he understood the nature of this charge. During the guilty plea proceeding, the trial court had asked the petitioner if he understood that he was charged with forgery and the state's attorney had clearly outlined the evidence the state had against the petitioner. Before denying the petitioner relief under the Post-Conviction

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419. See, e.g., People v. Gardner, 8 Ill. App. 3d 588, 289 N.E.2d 638 (5th Dist. 1972) (where petitioner was not asked whether he understood his right to an indictment prior to pleading guilty, petitioner's claim only alleged a statutory violation, not a constitutional violation).
423. People v. Weathers, 83 Ill. App. 3d 451, 453, 404 N.E.2d 1011, 1012 (3d Dist. 1980). See also People v. Akers, 137 Ill. App. 3d 922, 484 N.E.2d 1160 (4th Dist. 1985) (guilty plea entered in reliance upon the state's unfulfilled promises or a judge's misrepresentations is not voluntary, and if such circumstances exist, a petitioner has a claim cognizable under the Post-Conviction Hearing Act); People v. Crislip, 20 Ill. App. 3d 175, 312 N.E.2d 830 (5th Dist. 1974) (petitioner states a claim for relief under the Post-Conviction Hearing Act where he shows that his guilty plea was coerced by police threats).
425. Id. at 189, 190, 317 N.E.2d at 561, 563.
Hearing Act, the Illinois Supreme Court noted that Rule 402 required only substantial compliance with its provisions and the Rule has been adequately followed if an ordinary person would understand the nature of the charge against him in a similar situation.\textsuperscript{426} The court held that the trial court had substantially complied with Rule 402; the petitioner did not show that his guilty plea was not knowing and intelligent and, thus, he was not entitled to relief.\textsuperscript{427}

The second petitioner alleged that the trial court had not admonished him prior to accepting his guilty plea to burglary as required by Rule 402 because the judge had not informed him of the maximum penalty that could be imposed for burglary. The Illinois Supreme Court held that even though the trial court had neglected to admonish the petitioner regarding his potential sentence, his plea was knowing and intelligent because he had participated in plea bargain negotiations with the state's attorney and, thus, was aware of the sentence the state could seek.\textsuperscript{428} The petitioner, therefore, was not entitled to post-conviction relief.\textsuperscript{429}

Similarly, in \textit{People v. Weathers},\textsuperscript{430} the petitioner pled guilty to murder and subsequently sought relief under the Post-Conviction Hearing Act. The petitioner alleged that his due process rights were violated because the trial court did not determine that the state had a factual basis to support a murder conviction as required by Rule 402. The appellate court simply noted the general rule that only substantial compliance with Rule 402 is required and alleged noncompliance with this rule does not raise a constitutional issue absent a showing that the petitioner's plea was not knowing and intelligent.\textsuperscript{431} The court held that because the petitioner did not allege or show that his guilty plea was not knowing and intelligent, he was not entitled to relief under the Post-Conviction Hearing Act.\textsuperscript{432}

\textsuperscript{426} Id. at 193, 317 N.E.2d at 562.
\textsuperscript{427} Id. at 193, 317 N.E.2d at 563.
\textsuperscript{428} Id. at 194, 317 N.E.2d at 563.
\textsuperscript{429} Id. at 195, 317 N.E.2d at 564. \textit{See also} People v. Turner, 25 Ill. App. 3d 847, 323 N.E.2d 371 (3d Dist. 1975) (because defendant participated in plea-bargaining negotiations, post-conviction relief denied in spite of fact that defendant expected probation but received prison term; Rule 402 does not require that defendant know in advance of entering his plea what sentence will be imposed, and thus no constitutional issue was presented). \textit{But see} People v. Akers, 137 Ill. App. 3d 922, 484 N.E.2d 1160 (4th Dist. 1985) (when court does not admonish a defendant as to the potential maximum sentence which may be imposed, Supreme Court Rule 402 is not substantially complied with and a guilty plea entered under such circumstances is not voluntary and thus petitioner is entitled to relief under the Post-Conviction Hearing Act).
\textsuperscript{430} 83 Ill. App. 3d 451, 404 N.E.2d 1011 (3d Dist. 1980).
\textsuperscript{431} Id. at 453, 404 N.E.2d at 1012.
\textsuperscript{432} Id. at 453, 404 N.E.2d at 1012-13. \textit{See also} People v. Warship, 59 Ill. 2d 125, 319 N.E.2d 507 (1974) (on appeal, defendant alleged that there was no factual basis for his guilty plea as required by Supreme Court Rule 402, but court held that factual basis must be determined prior to entering final judgment which is the sentencing stage, as opposed to prior to accepting guilty plea, and factual basis here was determined during the mitigation and aggravation hearing and defendant thus was not entitled to reversal of his conviction).
Finally, in *People v. McCoy*, the Illinois Supreme Court used a similar rationale to deny the petitioner's request for post-conviction relief. The petitioner alleged that his constitutional rights were violated because, prior to accepting his guilty plea to burglary, the trial court judge did not admonish him under Rule 402 that he would be required to serve a parole term in addition to a prison term. The Illinois Supreme Court held that the petitioner was not entitled to relief under the Post-Conviction Hearing Act because he did not show that his plea was not knowing and intelligent. Admittedly, the trial court did not admonish the petitioner that a mandatory parole term was part of his sentence, but the petitioner knew that the court was not bound to accept the sentencing recommendation and the imposed prison and parole terms still were less than the maximum sentence which could have been imposed. The petitioner's allegations, therefore, did not raise a constitutional issue and he was not entitled to relief.

c. Speedy trials

The Illinois courts have used a similar rationale, that mere allegations of statutory violations are not cognizable under the Post-Conviction Hearing Act because statutory rights do not confer constitutional rights, to deny petitioners relief when a claim focuses on a violation of the right to a speedy trial. A criminal defendant in custody has a statutory right to be brought to trial within 120 days from the date he was taken into custody. If a defendant is released on bail or on personal recognizance, he has a statutory right to be brought to trial within 160 days from the date he

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433. 74 Ill. 2d 398, 385 N.E.2d 696 (1979).
434. *Id.* at 403, 385 N.E.2d at 698.
435. *Id.* at 403, 385 N.E.2d at 699.
436. *Id.* But see *People v. Isringhaus*, 38 Ill. App. 3d 535, 347 N.E.2d 834 (5th Dist. 1976) (on appeal, defendant alleged that trial court did not comply with Rule 402 because it did not inform him that his parole would be revoked upon pleading guilty to another charge, however, reviewing court held parole revocation is not a direct consequence of a guilty plea, but a collateral consequence, *unlike a mandatory parole term*, and a court thus is not required under Rule 402 to admonish a defendant that his parole will be revoked upon pleading guilty).

The state’s highest court also has held that a lower court is not required to advise a defendant of his right to appeal prior to accepting his guilty plea. *People v. Cox*, 53 Ill. 2d 101, 291 N.E.2d 1 (1972). In denying the petitioner relief under the Post-Conviction Hearing Act, the court noted that:

Our rule stems from the dictates of good practice rather than constitutional command, and where the question has arisen it has been held that the failure of a court to advise of the right to appeal is not a denial of due process or equal protection. Clearly the failure to advise petitioner of his right to appeal from a judgment of conviction . . . raises no question of constitutional dimension.

demands a speedy trial.438 In addition, a defendant's right to a speedy trial is guaranteed by the Illinois constitution.439

Despite the familiar rationale that statutory rights do not confer constitutional rights and, thus, an alleged statutory violation alone does not implicate a constitutional violation, the Illinois Supreme Court's cursory dismissal of post-conviction petitions in this area is particularly unsettling. For example, in People v. French,440 the petitioner sought relief under the Post-Conviction Hearing Act and alleged, inter alia, that his constitutional rights were violated because he was denied his right to a speedy trial by not being brought to trial within 120 days of being taken into custody. The Illinois Supreme Court denied the petitioner relief and, with no further discussion, noted that a violation of the statutory right to a speedy trial is not "constitutional in scope."441

Likewise, in People v. Morris,442 the petitioner claimed that his constitutional right to a speedy trial was violated. The Illinois Supreme Court held that where there is a question as to whether or not the petitioner waived the right, the Post-Conviction Hearing Act does not provide relief.443 Without discussing why waiver might have been at issue in this case, the court held that the petitioner had not raised a constitutional issue and, accordingly, that his claim was not cognizable under the Post-Conviction Hearing Act.444

When addressing statutory violations of the right to a speedy trial, the Illinois Supreme Court has stated that the statute is designed to preserve the Illinois constitutional guarantee.445 However, the statutory right is not the "precise equivalent" of the constitutional right and a statutory violation of the right to a speedy trial does not in itself create a constitutional issue.446 The court has not clearly explained its reason for this view and has not provided any guidance as to when a violation of the statutory right to a speedy trial does implicate a constitutional violation.

d. Sentencing hearings

The Illinois courts also have denied petitioners relief under the Post-Conviction Hearing Act with little to no rationale or analysis when a claim raises issues regarding the petitioner's sentencing hearing. The statutory right to a sentencing hearing provides that, following a determination of

438. Id. at para. 103-5(b).
441. Id. at 107, 262 N.E.2d at 903-04.
442. 3 Ill. 2d 437, 121 N.E.2d 810 (1954).
443. Id. at 442-43, 121 N.E.2d at 814.
444. Id. at 443, 121 N.E.2d at 814.
446. Id. at 523, 216 N.E.2d at 786.
guilt, a hearing shall be held to impose a sentence. The Illinois courts have held that this statutory right does not confer any constitutional rights and a petitioner who seeks relief under the Post-Conviction Hearing Act has not alleged a constitutional violation merely by claiming that he was denied a mitigation and aggravation hearing or that the evidence presented at such a hearing was insufficient to warrant the sentence imposed. For example, in People v. Blewett, the petitioner filed for relief under the Post-Conviction Hearing Act and alleged that his due process rights were violated when, at his sentencing hearing, the judge refused to consider the sentences given to the co-defendants in determining the petitioner's sentence. The appellate court denied the petitioner relief and, without further discussion, simply noted that what evidence will be allowed at such a hearing is not reviewable under the Post-Conviction Hearing Act because this issue is not of "constitutional magnitude."

The petitioner in People v. Scott also alleged that his constitutional rights were violated when a trial court judge accepted his guilty plea to murder and did not admonish the petitioner as to his statutory right to a mitigation and aggravation hearing prior to imposing sentence. The Illinois Supreme Court affirmed the trial court's denial of post-conviction relief and held, without any explanation, that the statute providing for such a hearing does not confer any constitutional rights.

2. Trial Errors

The Illinois courts, in determining whether relief is warranted under the Post-Conviction Hearing Act, consistently have held that mere trial errors do not involve a constitutional right. For example, in People v. Farley, the petitioner alleged that he was entitled to relief under the Post-Conviction Hearing Act because the trial court improperly granted a trial continuance which resulted in a violation of his right to a speedy trial. The Illinois Supreme Court denied the petitioner relief, explaining that the constitution guarantees the right to trial but does not guarantee an error-free trial.

Hence, procedural matters or ordinary trial errors do not constitute federal or state constitutional violations. The court noted that procedural or trial errors may result in a reversal of a conviction, but that this would not be

448. Id. at para. 1005-4-1(a)(3).
450. Id. at 1056, 298 N.E.2d at 370 (citing People v. Wilbourn, 48 Ill. 2d 187, 268 N.E.2d 418 (1971)) (petitioner denied post-conviction relief where he alleged that aggravation and mitigation hearing did not provide sufficient evidence for court to determine his sentence because the statute providing for such a hearing does not confer any constitutional right).
452. Id. at 233-34, 274 N.E.2d at 40.
454. Id. at 292, 96 N.E.2d at 456.
455. Id.
because a constitutional right was violated. Instead, a reversal in such situations would occur because of procedural errors in enforcing a constitutional right.\textsuperscript{456}

The Illinois Supreme Court's explanation in \textit{Farley} for holding that mere trial errors are not cognizable under the Post-Conviction Hearing Act is confusing and not particularly helpful. At one point the court concluded that there is no constitutional right to have a trial free of error and, thus, such claims are not properly brought under the Post-Conviction Hearing Act. The court later stated, however, that a reversal of a conviction might be warranted because of procedural errors since these procedures are supposed to enforce a constitutional right. These statements are contradictory and it remains unclear after \textit{Farley} whether or not a petitioner has a constitutional right to have an error-free trial.

In any event, subsequent case law has recited the general rule that mere trial errors do not implicate constitutional violations because there is no constitutional right involved. The courts have not discussed when a trial error rises to the level of a resultant constitutional violation. With no further explanation, the general rule is used to deny petitioners relief under the Post-Conviction Hearing Act. For example, in \textit{People v. Cox},\textsuperscript{457} the petitioner alleged that he was denied due process when the trial court admitted incriminating statements from his co-defendants at his trial for armed robbery. The Illinois Supreme Court simply held that a claim of erroneously admitted evidence constitutes trial error and does not involve a constitutional right.\textsuperscript{458}

The same superficial rationale has been used by the Illinois courts to deny petitioners relief when their claims involve allegations of improper jury instructions. In \textit{People v. Clark},\textsuperscript{459} for example, the petitioner alleged that he was denied due process when the trial court gave the jury an improper instruction as to the charge of murder. The appellate court held that the instruction was erroneous, but that "the Post-Conviction Hearing Act does not provide a remedy for any and all trial errors."\textsuperscript{460} Without further discussion, the court held that this error did not involve a constitutional right or a denial of due process.\textsuperscript{461}

In \textit{People v. Roberts},\textsuperscript{462} the Illinois Supreme Court similarly denied two petitioners relief under the Post-Conviction Hearing Act when the petitioners alleged that their constitutional rights were violated because the trial court improperly instructed the jury.\textsuperscript{463} The court conceded that the

\textsuperscript{456} Id.
\textsuperscript{457} 34 Ill. 2d 66, 213 N.E.2d 524 (1966).
\textsuperscript{458} Id. at 68, 213 N.E.2d at 525.
\textsuperscript{459} 84 Ill. App. 3d 186, 405 N.E.2d 450 (3d Dist. 1980).
\textsuperscript{460} Id. at 188, 405 N.E.2d at 452.
\textsuperscript{461} Id. at 189, 405 N.E.2d at 452. The court simply concluded: "The giving of the improper instruction did not amount to a violation of due process." Id.
\textsuperscript{462} 75 Ill. 2d 1, 387 N.E.2d 331 (1979).
\textsuperscript{463} Id. at 9-10, 387 N.E.2d at 335.
instructions were erroneous, but added that a legitimate claim of erroneous jury instructions did not “elevate these errors to constitutional status.”\textsuperscript{464} The petitioners’ claims, therefore, were not cognizable under the Post-Conviction Hearing Act.\textsuperscript{465}

3. \textit{Insufficiency of Evidence}

Early Illinois case law held that an allegation of insufficient evidence presented at trial did not present a constitutional issue and, therefore, was not cognizable under the Post-Conviction Hearing Act.\textsuperscript{466} This case law gave no rationale for the general rule. Nonetheless, it is well settled that collateral attack proceedings are not available to relitigate a petitioner’s guilt or innocence, or to redetermine a trial court’s verdict.\textsuperscript{467} Because insufficiency of evidence claims more readily lend themselves to an examination of the petitioner’s guilt and the trial court’s verdict, the courts may have believed that these claims should not be raised during a collateral attack on the final judgment of conviction. This possible rationale, however, does not answer the question of why allegations of insufficient evidence do not implicate constitutional considerations.

In 1979, the United State Supreme Court held, in \textit{Jackson v. Virginia,}\textsuperscript{468} that a claim of insufficient evidence resulting in a guilty finding raises a federal constitutional issue.\textsuperscript{469} The Court based its decision on an interpretation of \textit{In Re Winship}.\textsuperscript{470} The \textit{Jackson} Court held that because \textit{Winship} had found that the defendant has a constitutional right to be protected against a conviction unless he is proved guilty beyond a reasonable doubt

\begin{footnotesize}
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  \item \textsuperscript{464} \textit{Id.} \textit{But see} People v. Ciconte, 32 Ill. App. 3d 374, 377, 336 N.E.2d 260, 263 (1st Dist. 1975) (jury instruction erroneous but error was not of “sufficient constitutional magnitude” to grant petitioner an evidentiary hearing under the Post-Conviction Hearing Act because erroneous instruction did not destroy the petitioner’s presumption of innocence in the jury’s eyes).
  \item \textsuperscript{465} 75 Ill. 2d at 10, 387 N.E.2d at 335. \textit{See also} People v. Johndrow, 40 Ill. 2d 288, 239 N.E.2d 853 (1968) (claim that trial court arbitrarily denied petitioner’s tendered jury instruction not cognizable under the Post-Conviction Hearing Act).
  \item \textsuperscript{466} \textit{E.g.}, People v. Moore, 60 Ill. 2d 379, 384, 327 N.E.2d 324, 327 (1975); People v. Dunn, 52 Ill. 2d 400, 402, 288 N.E.2d 463, 464 (1972); People v. Frank, 48 Ill. 2d 500, 504-05, 288 N.E.2d 25, 27-28 (1971); People v. Johnson, 37 Ill. App. 3d 328, 330, 345 N.E.2d 531, 533 (3d Dist. 1976).
  \item \textsuperscript{467} \textit{E.g.}, People v. Harris, 91 Ill. App. 3d 376, 379, 414 N.E.2d 911, 914 (3d Dist. 1980) (citing People v. Orndoff, 39 Ill. 2d 96, 233 N.E.2d 378 (1966)).
  \item \textsuperscript{468} 443 U.S. 307 (1979).
  \item \textsuperscript{469} \textit{Id.} at 321.
  \item \textsuperscript{470} 397 U.S. 358 (1970).
\end{itemize}
\end{footnotesize}
as to every element of the offense charged, a defendant is denied due process if his criminal conviction is not based on sufficient proof of guilt.471

The Supreme Court's holding in Jackson would appear to lay to rest any question of whether a claim of insufficient evidence raises a constitutional issue and thus is cognizable under the Post-Conviction Hearing Act. However, the first district in People v. Talley,472 held that Jackson v. Virginia does not mean that all insufficiency of evidence claims are of constitutional magnitude.473 The Talley court stated that the standard set out in Jackson for determining whether an insufficiency of the evidence claim raises a constitutional issue is whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."474 The appellate court applied this standard, found that there was sufficient evidence for the trier of fact to find the petitioner guilty beyond a reasonable doubt, and denied the petitioner relief under the Post-Conviction Hearing Act.475

Although the Jackson Court did enunciate the standard as quoted by the Illinois appellate court in Talley, this standard was not meant to be used to find that a claim of insufficient evidence does not raise a constitutional issue. The standard instead can be read to guide lower courts in determining whether or not the evidence resulting in the petitioner's guilt truly was supportive of the finding. The Jackson Court clearly and strongly held that insufficient evidence claims raise a federal constitutional issue. In addition, the Talley court did not need to go so far as to hold that the Jackson holding did not mean that all claims of insufficient evidence raise a constitutional issue. The appellate court only needed to determine whether the petitioner's claims proved a substantial denial of his constitutional rights. If they did, then the petitioner was entitled to relief. If they did not, then the petitioner was not entitled to relief. By stating that some claims of insufficient evidence may not rise to the level of a constitutional claim, the Talley court inaccurately interpreted and applied Jackson and interjected an additional unnecessary step in determining whether a petitioner advancing such claims is entitled to relief under the Post-Conviction Hearing Act.

B. Grounds For Relief Under The Illinois Post-Conviction Hearing Act

The majority of petitioners seeking relief under the Post-Conviction Hearing Act do raise constitutional issues and, thus, appropriately bring their claims under it. However, mere conclusory allegations that constitu-

471. 443 U.S. at 315-18.
473. Id. at 444, 422 N.E.2d at 1088.
474. Id. (quoting Jackson, 443 U.S. at 319).
475. Id. at 444-45, 422 N.E.2d at 1088-89.
tional rights were violated are insufficient. A petitioner must show that the activity or event in question substantially violated his federal or state constitutional rights before he is entitled to relief under the Post-Conviction Hearing Act. Therefore, even though a constitutional right is involved and a constitutional issue is raised, and even though a violation of this right is alleged, the Illinois courts frequently deny a petitioner relief by finding that the claim was merely conclusory or that the petitioner did not prove the existence of a substantial constitutional violation. Although the courts have not defined "substantial" in this context, it is logical to assume, and the case law supports, that a substantial constitutional deprivation exists where it appears that the outcome of the trial would have been different if the alleged violation had not occurred. The case law in this area is voluminous and it is easiest to analyze the Illinois courts' decisions by presenting and discussing the case law as it relates to claims under each relevant constitutional amendment.

1. Fourth Amendment Violations

There is very little case law addressing relief under the Post-Conviction Hearing Act that can be discussed under the heading of alleged fourth amendment violations. Two explanations for this paucity of case law can be advanced. First, very few petitioners seeking relief under the Post-Conviction Hearing Act allege that their conviction resulted from a violation of their fourth amendment right to be free from unreasonable searches and seizures. A possible reason is that alleged fourth amendment violations most appropriately are raised at pre-trial evidentiary suppression hearings. This gives a criminal defendant an additional avenue for presenting allegations of constitutional violations that is not necessarily available to a defendant who is advancing various fifth or sixth amendment claims. The importance of this as it relates to Post-Conviction Hearing Act petitions is that the Illinois courts most frequently deny petitions under the Act by applying the doctrines of waiver and res judicata. This Article will present an in-depth analysis of both doctrines following this discussion.

476. E.g., People v. Shaw, 49 Ill. 2d 309, 311, 273 N.E.2d 816, 817 (1971); People v. Pierce, 48 Ill. 2d 48, 50, 268 N.E.2d 373, 374 (1971); People v. Crislip, 20 Ill. App. 3d 175, 177, 312 N.E.2d 830, 832 (5th Dist. 1974).

477. Shaw, 49 Ill. 2d at 311, 273 N.E.2d at 817; Pierce, 48 Ill. 2d at 50, 268 N.E.2d at 374; People v. Ciccone, 32 Ill. App. 3d 374, 375-76, 336 N.E.2d 260, 262 (1st Dist. 1975); Crislip, 20 Ill. App. 3d at 177, 312 N.E.2d at 832.

478. Allegations are examined as they relate to fourth, fifth, and sixth amendment violations. Although many petitions for relief under the Post-Conviction Hearing Act allege fourteenth amendment violations, the specific claims generally allege violations of rights guaranteed by the Bill of Rights and are brought under the fourteenth amendment through the doctrine of selective incorporation. Allegations of fourteenth amendment violations, therefore, are not discussed separately, but only as they relate to violations of rights guaranteed by the Bill of Rights. Specifically, they are presented under the subsections discussing fourth, fifth, and sixth amendment violations.
of the grounds for relief under the Post-Conviction Hearing Act. For purposes of this discussion, it is important to note that, if a petitioner could have raised a claim in a prior proceeding but did not, he is deemed to have waived the claim.\textsuperscript{479} If the petitioner did raise the claim in a prior proceeding and the court addressed the claim, he is precluded from raising the claim again during collateral attack proceedings.\textsuperscript{480} Thus, the fact that a petitioner has an additional formal proceeding in which he can raise a fourth amendment claim means that the courts reviewing such a claim under the Post-Conviction Hearing Act have a better opportunity of finding that the petitioner waived the claim by not raising it during a pre-trial proceeding on a motion to suppress evidence, or is precluded from raising it because it already was addressed in a pre-trial suppression hearing.

For example, in \textit{People v. Somerville},\textsuperscript{481} the petitioner was convicted of armed robbery and sought post-conviction relief, alleging that prior to arrest his car was illegally searched and seized and that certain evidence derived from the search was wrongly admitted at trial. The Illinois Supreme Court held that because the petitioner had not made a pre-trial motion to suppress the evidence and had not raised this issue at trial or on appeal, he had waived the claim and could not raise it under the Post-Conviction Hearing Act.\textsuperscript{482} Clearly, petitioners who seek post-conviction relief and allege fourth amendment violations have an additional hurdle to overcome than petitioners alleging other constitutional violations. This decreases the likelihood of a petitioner pursuing fourth amendment claims under the Post-Conviction Hearing Act.

Second, because the Post-Conviction Hearing Act addresses claims of substantial constitutional deprivation that occurred during the proceedings that resulted in conviction, fourth amendment claims more frequently may be classified as fifth amendment due process claims. In other words, if a petitioner alleges that he was searched illegally and evidence obtained during this search thus was obtained illegally, and that introduction of this evidence at trial resulted in his conviction, he is actually claiming that he was deprived of liberty without due process in violation of the fifth amendment. For example, in \textit{People v. Heirens},\textsuperscript{483} the petitioner was convicted of murder and burglary after he had pled guilty. In his Post-Conviction Hearing Act petition, he alleged that his home had been searched illegally and his confession obtained pursuant to police coercion. He subsequently pleaded guilty. The Illinois Supreme Court denied him collateral relief and held

\textsuperscript{479} E.g., \textit{People v. Roberts}, 75 Ill. 2d 1, 10-11, 387 N.E.2d 331, 335-36 (1979); \textit{People v. Spicer}, 42 Ill. App. 3d 246, 250, 355 N.E.2d 711, 713 (1st Dist. 1976).
\textsuperscript{480} \textit{Roberts}, 75 Ill. 2d at 10, 387 N.E.2d at 335-36; \textit{Spicer}, 42 Ill. App. 3d at 250, 355 N.E.2d at 713.
\textsuperscript{481} 42 Ill. 2d 1, 245 N.E.2d 461 (1969).
\textsuperscript{482} \textit{Id.} at 12, 245 N.E.2d at 468.
\textsuperscript{483} 4 Ill. 2d 131, 122 N.E.2d 231 (1954).
that his guilty plea and conviction were not the result of the alleged illegal search and coercion.\textsuperscript{484} The court did note, however, that if the petitioner's conviction had resulted from any fourth amendment violation, then his due process rights would have been violated and he would have been entitled to relief under the Post-Conviction Hearing Act.\textsuperscript{485}

In any event, allegations of fourth amendment violations are cognizable under the Post-Conviction Hearing Act. In \textit{People v. Jennings},\textsuperscript{486} the petitioners sought relief under the Act and alleged that their confessions had been obtained pursuant to force and violence. Although the Illinois Supreme Court remanded the case so that the trial court could determine whether the petitioners were entitled to relief, the court noted that the allegations were cognizable under the Post-Conviction Hearing Act and, if the petitioners made the requisite showing, they would be granted relief.\textsuperscript{487}

The Illinois courts more frequently hold, however, that petitioners have not sufficiently proved the requisite substantial constitutional deprivation of fourth amendment rights. For example, in \textit{People v. Goerger},\textsuperscript{488} the petitioner was convicted of aggravated battery and alleged, \textit{inter alia}, that his confession was involuntary, his arrest was without a warrant, and evidence was seized from his home without a search warrant. The Illinois Supreme Court, without any analysis or discussion, held that the petitioner

\textsuperscript{484} Id. at 141-42, 122 N.E.2d at 237.
\textsuperscript{485} Id. at 141, 122 N.E.2d at 237 (citing Waley v. Johnston, 316 U.S. 101 (1942)).
\textsuperscript{486} Two other categories of claims potentially cognizable under the Post-Conviction Hearing Act exist which revolve around an arrest situation but more likely would arise as allegations of fifth amendment due process violations. First, in Doyle v. Ohio, 426 U.S. 610, 616-20 (1976), the United States Supreme Court held that the use of a petitioner's post-arrest silence, after \textit{Miranda} warnings had been given, to impeach his credibility at trial, violates the petitioner's due process rights. In other words, if a petitioner elects to invoke his right to remain silent after being taken into custody and given \textit{Miranda} warnings, the state can not use this silence at trial when the petitioner is testifying to challenge the petitioner's explanation or testimony. If the state asks a testifying petitioner about his original silence after being taken into custody, the petitioner could allege a violation of his due process rights and his claim would be cognizable under the Post-Conviction Hearing Act. See \textit{People v. Talley}, 97 Ill. App. 3d 439, 445-46, 422 N.E.2d 1084, 1089 (1st Dist. 1981).

Second, in Edwards v. Arizona, 451 U.S. 477 (1981), the United States Supreme Court held that if a criminal defendant's request for counsel during custodial interrogation was not acted upon and the defendant subsequently confessed to criminality, use of this confession against the defendant violates his fifth amendment due process rights. Thus, once a defendant invokes his right to counsel, he may not be interrogated further until counsel is made available to him. If a petitioner was questioned while in custody and requested counsel, any confession obtained from him before counsel arrived could not be used against the petitioner or he would have a due process violation claim cognizable under the Post-Conviction Hearing Act. See \textit{People v. James}, 111 Ill. 2d 283, 489 N.E.2d 1350 (1986) (finding \textit{Edwards} claims to be generally cognizable under the Post-Conviction Hearing Act, but not retroactively applicable to pending collateral attack proceedings).

\textsuperscript{486} 411 Ill. 21, 102 N.E.2d 824 (1952).
\textsuperscript{487} Id. at 24-27, 102 N.E.2d at 826-27.
\textsuperscript{488} 52 Ill. 2d 403, 288 N.E.2d 416 (1972).
was not entitled to relief under the Post-Conviction Hearing Act because his allegations simply were conclusory and he had not shown that his constitutional rights were substantially violated.489

Similarly, in People v. Nischt,490 the petitioner was convicted of murder and alleged in his post-conviction petition that his confession was obtained pursuant to police brutality. The Illinois Supreme Court denied the petitioner relief and held that the petitioner had not made the requisite showing in light of the police officers' denial of brutality in obtaining the confession.491

2. Fifth Amendment Violations

The majority of case law addressing Post-Conviction Hearing Act petitions focuses on allegations of various fifth amendment violations. These allegations can be divided into the two main categories of double jeopardy and due process violations. Given the fact that the purpose of the Post-Conviction Hearing Act is to provide relief where there has been a substantial constitutional violation during the proceedings which resulted in conviction, it is not surprising that the majority of claims allege a variety of due process violations, since the right to due process manifests itself at a number of stages throughout a variety of legal proceedings.

a. Due process violations

i. Perjured Testimony.—One of the most frequent claims raised in Post-Conviction Hearing Act petitions alleging due process deprivations in the proceedings which resulted in convictions, is that perjured testimony was admitted at the trials and influenced the outcomes of the trials to the petitioners' detriment. The Illinois courts agree that the use of perjured testimony raises a constitutional issue in that a convicted criminal defendant is deprived of liberty without due process of law if such testimony was admitted against him at trial.492 An allegation of a conviction based on perjured testimony, therefore, is cognizable under the Post-Conviction Hearing Act.493

The Illinois courts, however, frequently hold that a petitioner is not entitled to post-conviction relief because either his allegations are conclu-

489. Id. at 406-08, 288 N.E.2d at 418-19.
490. 23 Ill. 2d 284, 178 N.E.2d 378 (1961).
491. Id. at 289-90, 178 N.E.2d at 381-82.
sory in nature or he has not made the requisite showing of a substantial constitutional deprivation. For example, in *People v. Carbona*, the petitioner sought post-conviction relief and alleged that one of the state's witnesses had testified falsely at trial as to a conversation he had with the petitioner prior to trial. This testimony implicated the petitioner and contributed to her conviction for murder. In support of her claim, the petitioner produced an affidavit from another participant in the conversation who refuted the witness' trial testimony. The court denied the petitioner relief under the Post-Conviction Hearing Act, holding that her allegations were conclusory in nature and were not supported with "legally available specific factual data." The court noted that the petitioner was attempting merely to relitigate her case, and further held that her allegations did not even warrant an evidentiary hearing.

Similarly, in *People v. Shannon*, the court denied the petitioner relief under the Post-Conviction Hearing Act because the allegation of perjured testimony at trial was conclusory and did not provide specific factual information. The petitioner was convicted of burglary, having testified at trial that, although he had entered the building without the owner's consent, he had entered through an open door with the sole intent of drinking a bottle of wine. The owner of the building testified at trial that the door could not have been open without triggering an alarm. Following his conviction, the petitioner filed for relief under the Post-Conviction Hearing Act and produced the affidavit of one of the store's employees. This employee stated that prior to the date of the burglary he had inspected that alarm system, found it to be defective, and informed the building's owner. The court stated that, because the petitioner had not shown that the building owner knew that the defective alarm system prevented the alarm from being triggered when the door in question was opened, his allegations merely were conclusory and did not warrant an evidentiary hearing to consider his petition.

Given the specific facts presented by the petitioners in *Carbona* and *Shannon* to support their allegations, and the courts' findings that these

495. Id. at 1027, 369 N.E.2d at 200.
496. Id. at 1027, 369 N.E.2d at 201.
498. Id. at 879-80, 329 N.E.2d at 405-06.
499. Id. at 880-81, 329 N.E.2d at 406. See also *People v. Harris*, 55 Ill. 2d 15, 302 N.E.2d 1 (1973) (post-conviction relief denied because petitioner's allegations that two state witnesses falsely testified at trial were conclusory and without supportive factual evidence); *People v. Somerville*, 42 Ill. 2d 1, 11-12, 245 N.E.2d 461, 467-68 (1969) (inconsistency in witness testimony between that given at trial and that given at evidentiary hearing does not make allegation of perjured testimony more than conclusory in nature and does not justify post-conviction relief); *People v. McGinnis*, 51 Ill. App. 3d 273, 276-77, 366 N.E.2d 969, 973 (1st Dist. 1977) (negative results of vaginal analysis do not show that victim provided perjured testimony at trial and allegations thus are conclusory in nature and petitioner is not entitled to post-conviction relief).
petitions did not warrant evidentiary hearings, it is apparent that a petitioner seeking relief under the Post-Conviction Hearing Act on the basis of perjured testimony has a fairly high burden to overcome before he will even be entitled to an evidentiary hearing to consider his claim. Furthermore, the hurdle becomes higher because, even if a petitioner alleges a substantial constitutional violation and his petition is not merely conclusory, the Illinois courts provide no clear guidance as to whether this petitioner also must show that the perjured testimony was *knowingly* admitted by the state into evidence at trial. It is a well established rule that before a conviction will be reversed on the basis of admission of perjured testimony, the petitioner must show that the state knowingly used the testimony. The Illinois courts, however, are not only divided in terms of whether this same standard must be satisfied before post-conviction relief is granted, but also are not consistent in determining what constitutes the knowing use of perjured testimony.

In *People v. Cornille*, for example, the petitioner was convicted of arson and alleged in his Post-Conviction Hearing Act petition that he had been convicted on the basis of perjured testimony. The state's expert witness testified at trial as an arson investigator and implicated the petitioner in the crime. The witness admitted to a newspaper reporter two years later that he had lied about his credentials and, thus, had given false testimony at several arson trials. The state contended that the petitioner's allegations did not rise to the level of a due process deprivation because he could not show that the state knew about the witness' lack of credentials and false testimony. However, the Illinois Supreme Court discussed a number of federal cases addressing a similar issue and stated that a conviction based on perjured testimony violates due process even though the state did not knowingly use the testimony. The court noted that the federal case law supported this conclusion and, in each case, the state lacked diligence in determining whether or not its witness was testifying falsely at trial. Because the state easily could have verified the credentials of its own expert witness and did not, it was not diligent and, thus, was sufficiently involved in submitting false testimony to be responsible for its admission. The petitioner, therefore, was convicted in violation of his due process rights and he was entitled to relief under the Post-Conviction Hearing Act.

501. See *Id.* at 904-05, 512 N.E.2d at 1305 (describing the disagreement).
503. 95 Ill. 2d 497, 448 N.E.2d 857 (1983).
504. *Id.* at 509-15, 448 N.E.2d at 863-66.
505. *Id.* at 511-12, 448 N.E.2d at 864-65.
506. *Id.* at 513, 448 N.E.2d at 865.
507. *Id.* at 515, 448 N.E.2d at 866.
People v. Cihlar holds the state to an even stricter standard. In that case, the petitioner had been convicted of rape, burglary, and home invasion. Following his trial, he located three neighbors of the victim who stated that the victim told them information which was contrary to the testimony she had given at trial. Although a state's witness testified at trial in support of the victim's testimony, this witness later agreed with the neighbors and told a state's attorney that her trial testimony was incorrect. The Illinois Supreme Court held that this constituted the knowing use of perjured testimony by the state. Even though the particular state's attorney trying the case was unaware of the perjured testimony, the court noted that the prosecution "is charged with the knowledge of its agents, including the police." The petitioner's conviction, therefore, was obtained in violation of his due process rights and he was entitled to relief under the Post-Conviction Hearing Act.

Similar to Cihlar, in People v. Bland, the appellate court held that the petitioner was entitled to an evidentiary hearing regarding his claim that a state's witness falsely testified at trial, even though no knowledge of the perjured testimony could be imputed to the state. The witness testified at trial as to the petitioner's participation in a murder and armed robbery. This witness later recanted her testimony and the petitioner provided the witness' affidavit along with his petition for post-conviction relief. The court noted that, even though knowing use of perjured testimony must be shown to establish a due process violation, the petitioner in this case would not have been convicted had the witness not testified falsely at trial.

In contrast, in People v. Bailey, the appellate court held that a petitioner must establish that the state knowingly submitted false testimony before a due process violation exists and he is entitled to relief under the Post-Conviction Hearing Act. The court distinguished Cornille and stated that, in that case, the state relied on the testimony of its expert witness in a closely balanced case and had specifically selected the expert to testify. Here, the alleged perjured testimony was given by an occurrence witness "whose presence at the trial was determined by her relationship to the

508. 111 Ill. 2d 212, 489 N.E.2d 859 (1986).
509. Id. at 218-19, 489 N.E.2d at 862.
510. Id. at 219, 489 N.E.2d at 862 (quoting Imbler v. Craven, 298 F. Supp. 795, 806 (S.D. Cal. 1969), aff'd, 424 F.2d 631 (9th Cir. 1970)). See also People v. Martin, 46 Ill. 2d 565, 264 N.E.2d 147 (1970) (where police officer testified that informant was not paid and then in another trial a different officer testified that this informant usually was paid, state was imputed with knowledge that officer in the first trial may have falsely testified).
511. 111 Ill. 2d at 219, 489 N.E.2d at 862.
512. 67 Ill. App. 3d 716, 384 N.E.2d 1380 (1st Dist. 1979).
513. Id. at 720-21, 384 N.E.2d at 1385.
514. Id. at 720, 384 N.E.2d at 1385.
516. Id. at 1098-99, 490 N.E.2d at 1340.
517. Id. at 1099, 490 N.E.2d at 1341.
The petitioner had not established that the state knowingly used this witness’ perjured testimony and, thus, he was not entitled to post-conviction relief.\textsuperscript{519}

The first district’s rationale for distinguishing \textit{Bailey} from \textit{Cornille} is unenlightening at best. The current state of the case law shows that, although a petitioner has a better chance of obtaining relief under the Post-Conviction Hearing Act if he shows that the state knowingly introduced perjured testimony at trial against him, relief still may be granted without proving this element. Until the Illinois courts provide petitioners with guidance and more consistent analysis, petitioners alleging that their convictions were based on perjured testimony should not be discouraged by not being able to show the so-called requisite knowledge element.

\textit{ii. State’s Non-Disclosure of Exculpatory Evidence.}—Failure by the state to disclose information to a criminal defendant upon request that is favorable to his defense, deprives the defendant of his right to due process.\textsuperscript{520} An allegation that the state suppressed such evidence, therefore, is cognizable under the Post-Conviction Hearing Act\textsuperscript{521} because the convicted petitioner is claiming that he was deprived of his liberty in violation of his due process rights since he was unable to prepare his defense sufficiently. Although the United States Supreme Court recognized this constitutional right in \textit{Brady v. Maryland},\textsuperscript{522} it also held that, to sufficiently prove a constitutional violation, the accused must show 1) that he requested the information from the state, and 2) that the information was material to guilt or punishment.\textsuperscript{523}

The Illinois Supreme Court has focused on these two requirements and denied Post-Conviction Hearing Act relief where they have not been met by reasoning that such petitioners have not shown a substantial constitutional violation. For example, in \textit{People v. Jones},\textsuperscript{524} the petitioner was convicted of murder and in his Post-Conviction Hearing Act petition he alleged that his due process rights were violated because the state had failed to disclose to the petitioner the grand jury testimony of a potential witness. At the petitioner’s request, the state provided him with a list of state witnesses and any statements they had made, and included this potential witness’ name. However, the state did not provide a copy of his grand jury testimony. The state did not present this witness at trial. The petitioner contended that the grand jury testimony was favorable to his defense because this testimony corroborated the petitioner’s explanation that the

\textsuperscript{518} Id.
\textsuperscript{519} See \textit{id.} at 1099, 490 N.E.2d at 1340.
\textsuperscript{522} 373 U.S. 83 (1963).
\textsuperscript{523} \textit{Id.} at 87.
\textsuperscript{524} 66 Ill. 2d 152, 361 N.E.2d 1104 (1977).
victim was the aggressor in a fight between the petitioner and the victim. The Illinois Supreme Court held that the petitioner did not sufficiently show a substantial constitutional deprivation and affirmed the lower court’s dismissal of his post-conviction petition without an evidentiary hearing. First, the court reasoned that the petitioner had not specifically requested the grand jury testimony, but only had asked for the state to produce a list of witnesses and any statements made by them. The petitioner, therefore, did not satisfy the demand requirement of Brady. Second, the court found that the grand jury testimony was not sufficiently material since this testimony would not have altered the outcome of the trial. Thus, the materiality requirement of Brady also was not satisfied.

Similarly, in People v. Moore, the petitioner was convicted of murder and alleged that his due process rights were violated when the state failed to disclose the results of certain police investigative efforts that would have supported the petitioner’s alibi defense at trial. The Illinois Supreme Court affirmed the trial court’s dismissal of the Post-Conviction Hearing Act petition, concluding that the petitioner had not shown a substantial violation of his constitutional rights. The court reasoned that the petitioner had not requested the information from the state that he now alleged was unconstitutionally concealed. Further, the details of the police investigation included information that was immaterial to the petitioner’s defense.

iii. Incompetency to Enter a Plea or to Stand Trial.—The Illinois courts consistently have held that the due process rights of a mentally incompetent criminal defendant are violated if he is convicted of criminality. Competency to stand trial or to enter a guilty plea, therefore, is of constitutional magnitude and is an issue cognizable under the Post-Conviction Hearing Act. Once a defendant presents evidence that raises a bona fide doubt as to his mental fitness, the court is required to order a fitness hearing to consider further evidence and to determine whether the defendant is mentally competent to stand trial. Evidence of psychiatric or social distur-

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525. Id. at 162, 361 N.E.2d at 1108.
526. Id. at 158-60, 361 N.E.2d at 1106-07.
527. Id. at 160-62, 361 N.E.2d at 1107-08.
528. 42 Ill. 2d 73, 246 N.E.2d 299 (1969).
529. Id. at 80-81, 84, 246 N.E.2d at 304, 306.
530. Id. at 80-81, 246 N.E.2d at 304.
531. Id. at 81, 246 N.E.2d at 304.
532. People v. Andson, 73 Ill. App. 3d 700, 704, 392 N.E.2d 358, 362 (1st Dist. 1979) (citing People v. Murphy, 72 Ill. 2d 421, 430, 381 N.E.2d 677, 682 (1978)).
533. People v. Bailey, 141 Ill. App. 3d 1090, 1097, 490 N.E.2d 1334, 1339 (1st Dist. 1986); Andson, 73 Ill. App. 3d at 705, 392 N.E.2d at 362.
bances alone are not enough to raise a bona fide doubt as to mental competency. Rather, fitness to stand trial in this context requires that a defendant be able to understand the nature of the proceedings against him and be able to assist in his defense. A defendant is deprived of liberty without due process in violation of the fifth amendment, therefore, if he is unable to understand the proceedings against him or he is unable to assist in his defense and a judgment of conviction is entered against him.

In addition, once a defendant is adjudged incompetent to stand trial or to enter a plea, he is presumed to remain unfit until he is adjudged competent. For example, in People v. Thompson, the petitioner was arrested for rape, examined to determine his fitness to stand trial, found unfit, and transferred to the Department of Mental Health for treatment. Five months later the state's attorney and defense counsel stipulated to the petitioner's competency based on further psychiatric examinations, and the petitioner was brought to trial where he entered a plea of guilty but mentally ill. The petitioner later sought relief under the Post-Conviction Hearing Act and alleged that his due process rights were violated when a judgment of conviction was entered against him. The court held that because the petitioner had been adjudged unfit to stand trial, a presumption of unfitness remained until he was adjudged competent, and competence could not be determined simply by stipulation to psychiatric conclusions by the attorneys involved in the case. Hence, a judgment of conviction had been entered against the petitioner while he was legally incompetent in violation of his due process rights and he was entitled to relief under the Post-Conviction Hearing Act.

Similarly, in People v. Andson, the petitioner was adjudged incompetent to stand trial and four years later he was convicted of rape. The finding of incompetency was based on psychiatric examinations which showed that the petitioner suffered from chronic, irreversible mental disease. The court found that the adjudication of incompetency was not excessively remote from his conviction and, because he had not been adjudged competent in the interim, his conviction violated his due process rights. The petitioner thereby was entitled to relief under the Post-Conviction Hearing Act.

537. E.g., People v. Thompson, 158 Ill. App. 3d 860, 865, 511 N.E.2d 993, 996 (3d Dist. 1987).
539. Id. at 865, 511 N.E.2d at 996.
540. Id.
541. 73 Ill. App. 3d 700, 392 N.E.2d 358 (1st Dist. 1979).
542. Id. at 705-06, 392 N.E.2d at 362-63.
543. Id. at 706, 392 N.E.2d at 363.
Petitioners filing for post-conviction relief, who allege due process violations because their convictions were entered while they were mentally unfit, have had a more difficult time obtaining relief when they were not adjudged incompetent prior to conviction. For example, in *People v. Lee*, the petitioner had a long history of mental illness for which he was treated on an inpatient and outpatient basis. Five years later the petitioner was convicted of murder and alleged in his Post-Conviction Hearing Act petition that this prior psychiatric treatment should have raised a bona fide doubt as to his fitness to stand trial. The court found that, although the petitioner suffered from mental disorders, there was no evidence to show that he was unable to understand the charges against him or was unable to assist in his defense. Thus, he was not convicted in violation of his due process rights and was not entitled to post-conviction relief.

Similarly, in *People v. Cyburt*, the petitioner was convicted of various sexual offenses upon entering a guilty plea. He later alleged in his Post-Conviction Hearing Act petition that he was incompetent to enter the plea because at the time of the plea he was acting bizarre and taking anti-depressive medications. In addition, he attempted suicide on the day following his guilty plea. However, a psychiatric examination had been conducted six weeks prior to entering the plea in which the petitioner was found mentally fit. The court first noted that the competency standard was the same for entering a plea as it was to stand trial. The court then held that the petitioner was able to understand the charge against him, could assist in his defense and, accordingly, was not convicted in violation of his due process rights.

iv. Sentencing Violations.—Petitioners who seek relief under the Post-Conviction Hearing Act and claim that their constitutional rights were violated because of the sentence imposed against them, most frequently allege fifth amendment due process violations and eighth amendment violations for infliction of cruel and unusual punishment. Because the case law in this area does not provide any in depth constitutional analysis and does not differentiate between the two types of constitutional claims, this Article will consider allegations of sentencing violations in its discussion of fifth amendment due process violations.

The Illinois courts consistently have held that a sentence challenged as excessive is not reviewable under the Post-Conviction Hearing Act if the sentence is statutorily prescribed. In *People v. Baker*, for example, the...
petitioner was sentenced to thirty years to life pursuant to his guilty plea for murder. He sought post-conviction relief and alleged that his constitutional rights had been violated because the sentence imposed was excessive. His claim was based on an interpretation of the sentencing statute that a term of life imprisonment was not statutorily recognized. The Illinois Supreme Court held that the sentence was statutorily authorized, the petitioner's constitutional rights were not violated, and accordingly he was not entitled to relief under the Post-Conviction Hearing Act. 531

Likewise, in People v. Krankel, 532 the petitioner was convicted of burglary and sentenced to fourteen years imprisonment consecutive to two five year terms he already was serving for prior offenses. He sought post-conviction relief and raised a number of issues regarding the imposed sentence: the extended term sentence was improper; he was entitled to resentencing because a prior conviction was overturned; and his sentence was disproportionate to the nature and seriousness of the offense. The court denied the petitioner relief, holding that his constitutional rights had not been substantially violated because the sentence imposed was within the appropriate statutory guidelines. 533

Petitioners have been granted Post-Conviction Hearing Act relief, however, when constitutional issues are raised regarding the sentence imposed after rehearing and resentencing. For example, in People v. Yarbar, 534 the petitioner originally was sentenced to five to ten years imprisonment for robbery. He then was resentenced to four to twelve years based on the revised Uniform Code of Corrections. The petitioner filed for post-conviction relief and alleged that his due process rights were violated because the new sentence imposed was higher than the original sentence. The court cited a previous Illinois Supreme Court decision which had held that, absent conduct on the part of the petitioner after sentencing that would warrant the imposition of a higher sentence, the petitioner's due process rights are violated if he is given a heavier sentence on retrial. 535 Applying this standard, the appellate court in Yarbar found that, because this petitioner had done nothing after the imposition of the original sentence that would support inflicting a higher sentence, his due process rights were violated when he was resentenced to four to twelve years. 536 Consequently, the petitioner was entitled to Post-Conviction Hearing Act relief. 537

531. Id. at 95, 440 N.E.2d at 861. See also People v. Ballinger, 53 Ill. 2d 388, 292 N.E.2d 400 (1973) (alleged excessive sentence was within statutory limits and petitioner, therefore, was not entitled to post conviction relief).
533. Id. at 895-97, 476 N.E.2d at 784-86.
534. 43 Ill. App. 3d 668, 357 N.E.2d 166 (1st Dist. 1976).
535. Id. at 672, 357 N.E.2d at 169 (quoting People v. Baze, 43 Ill. 2d 298, 303, 253 N.E.2d 392, 395 (1969)).
536. Id. at 672, 357 N.E.2d at 169.
537. Id. at 672, 357 N.E.2d at 169-70.
Similarly, in *People v. Talley*, the petitioner was resentenced following an appeal of an earlier case and the new sentence imposed was the same as the original sentence. He sought Post-Conviction Hearing Act relief and alleged that the sentence was excessive because the court had not considered on resentencing his potential for rehabilitation as evidenced by his conduct in prison. The petitioner presented evidence that showed that the trial court judge believed he did not have discretion to impose a different sentence than originally was imposed. The appellate court held that the trial court is empowered to consider the possibility of rehabilitation as evidenced by prison behavior and may reduce the original sentence on remand based on this consideration. Because during resentencing the trial court had underestimated its authority and had not considered this mitigating factor, the petitioner had been resentenced in violation of his constitutional rights and he was entitled to post-conviction relief.

The Illinois courts also have held that similarly situated defendants must receive similar sentences. A petitioner who alleges that his constitutional rights have been violated because disparate sentences were imposed between he and a similarly situated co-defendant, therefore, has a cognizable Post-Conviction Hearing Act claim. For example, in *People v. Hoffman*, the petitioner was convicted of armed robbery in a jury trial and was sentenced to fifteen to thirty years of imprisonment. He alleged in his post-conviction petition that this sentence violated his constitutional rights because his co-defendant, who had pled guilty, received a lighter sentence. The court held that the petitioner was not entitled to post-conviction relief because he had not sufficiently shown that he and the co-defendant were similarly situated or that he received a higher sentence than his co-defendant simply because he exercised his right to be tried by a jury. The court did note that had the petitioner provided evidence to support his claim of constitutional deprivation, he would have been entitled to Post-Conviction Hearing Act relief.

In two recent Illinois Supreme Court decisions, *People v. Stewart (Walker)* and *People v. Stewart (Raymond Lee)*, the court addressed the question of whether Post-Conviction Hearing Act relief is warranted where a petitioner alleges that the death penalty was imposed arbitrarily and capriciously because of prosecutorial discretion in seeking it. In both cases,

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559.  Id. at 447-48, 422 N.E.2d at 1091.
560.  Id. at 448, 422 N.E.2d at 1091.
563.  Id.
564.  Id. at 265-67, 322 N.E.2d at 869.
565.  Id. at 267, 322 N.E.2d at 869.
566.  123 Ill. 2d 368, 528 N.E.2d 631 (1988).
the petitioners presented as evidence a study which showed the pattern of
certain prosecutors in seeking the death penalty. The Illinois Supreme Court
held that in both cases the petitioners had not shown that the death penalty
was sought improperly in their cases and, thus, had not sufficiently shown a
deposition of their constitutional rights in receiving this sentence.568 The
court noted that the petitioners were not entitled to Post-Conviction Hear-
ing Act relief unless they provided sufficient evidence to show that the
state had considered improper factors and arbitrarily and capriciously
sought the death penalty against them individually.569

Because allegations of state constitutional violations are cognizable under
the Post-Conviction Hearing Act, petitioners may have an additional claim
regarding unconstitutionally imposed sentences under the Illinois constitu-
tion that they would not have under the federal constitution. The Illinois
constitution provides that "all penalties shall be determined both according
to the seriousness of the offense and with the objective of restoring the
offender to useful citizenship."

The Illinois courts have held that this constitutional provision requires that a trial court judge consider the re-
habilitative potential of a defendant when imposing a sentence.571 The courts also have noted the difficulty in applying this provision because a
judge is required to balance the defendant's potential for rehabilitation
with the public's need for safety when determining an appropriate sen-
tence.572 Although there are no Post-Conviction Hearing Act cases that
directly address this issue, the Illinois courts have reduced a defendant's
sentence on appeal because the trial court did not sufficiently consider the
defendant's rehabilitative potential when imposing a sentence.573 In light
of this constitutional provision and the Illinois court decisions addressing
application of this provision on appeal, it is reasonable to conclude that a
petitioner who alleges that his sentence was imposed in violation of this
 provision would have a claim cognizable under the Post-Conviction Hearing
Act.

b. Double Jeopardy

Allegations of improperly imposed multiple convictions or sentences in
violation of the fifth amendment guarantee against double jeopardy are
reviewable under the Post-Conviction Hearing Act.574 In People v. Cy-

568. 123 Ill. 2d at 381-82, 528 N.E.2d at 637-38; 121 Ill. 2d at 110-12, 520 N.E.2d at 356-
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569. 123 Ill. 2d at 381, 528 N.E.2d at 637-38; 121 Ill. 2d at 111-12, 520 N.E.2d at 356-
57.
570. ILL. CONST. art. I, § 11.
Gill, 7 Ill. App. 3d 24, 286 N.E.2d 516 (5th Dist. 1972).
574. People v. Cox, 53 Ill. 2d 101, 103, 291 N.E.2d 1, 2 (1972); People v. Cyburt, 50 Ill.
burt, for example, the petitioner had been convicted of rape, deviant sexual assault, and incest, and was sentenced to respective concurrent terms of fifteen to forty years, four to fourteen years, and three to ten years. In his petition for post-conviction relief, the petitioner alleged that the convictions for both rape and incest violated his fifth amendment rights. The court vacated the incest conviction and sentence because the rape and incest arose from the same physical act. The conviction and sentence for incest, therefore, violated the petitioner's constitutional right against double jeopardy.

Likewise, in People v. Ashton, the petitioner was convicted of armed robbery and aggravated battery. He filed for relief under the Post-Conviction Hearing Act and alleged that the aggravated battery conviction should be reversed because it was based on the same physical conduct as the armed robbery conviction. The court granted the petitioner relief and vacated the aggravated battery conviction. The court found that the use or threat of force is an essential element of armed robbery and holding a knife to the victim's throat, which was the basis of the aggravated battery conviction, was only for the purpose of committing the robbery. Thus, the petitioner should not have been convicted of the lesser aggravated battery charge.

However, in People v. Fernandez, the court refused to grant the petitioner Post-Conviction Hearing Act relief when he was convicted of armed robbery and aggravated assault and was sentenced to respective concurrent terms of twenty to forty years and one to three years. The court reasoned that the convictions and sentences did not violate the petitioner's right not to be placed in double jeopardy because aggravated assault was not a lesser included offense of armed robbery. The court stated that both charges were distinct offenses because it was possible to commit armed robbery without bludgeoning the victim as was done in this case. Thus, both crimes were considered separate and independent and it was appropriate to enter sentences on both convictions.

Finally, in People v. Cox, the petitioner was convicted of two counts of indecent liberties with a child and received two concurrent sentences. The sentences imposed arose from a charge of two acts which were based on a single occurrence with one victim and transpired almost simultane-

575. 50 Ill. App. 3d 414, 365 N.E.2d 1004 (1st Dist. 1977).
576. Id. at 418, 365 N.E.2d at 1006-07.
577. Id.
578. 32 Ill. App. 3d 353, 336 N.E.2d 582 (1st Dist. 1975).
579. Id. at 354, 336 N.E.2d at 583.
580. Id. at 353-54, 336 N.E.2d at 583.
581. Id.
583. Id. at 632, 421 N.E.2d at 958.
584. Id.
585. Id.
ously. Further, each act was prescribed by a single statute. The Illinois Supreme Court held that only a single offense occurred and, consequently, only one sentence should have been imposed. The court granted the petitioner Post-Conviction Hearing Act relief and vacated the second conviction and sentence.

3. Sixth Amendment Violations

a. Ineffective counsel

Petitioners who seek relief under the Post-Conviction Hearing Act based on alleged sixth amendment violations that occurred during the proceedings resulting in conviction, most frequently claim that they were deprived of the effective assistance of counsel. For a petitioner to satisfy the requisite showing of a substantial constitutional violation in this area, he must meet the two-part test as set out by the United States Supreme Court in *Strickland v. Washington.* First, the petitioner must show that his counsel's performance was deficient and fell below the objective standard of reasonableness. Second, he must show that his counsel's deficient performance prejudiced him or adversely affected the outcome of the proceedings. The Illinois Supreme Court has noted that the *Strickland* standard does not vary significantly from that formerly applied in Illinois. Although the Illinois courts traditionally employed a different standard to evaluate the competency of court appointed counsel than they used to evaluate the competency of privately retained counsel, the distinction no longer exists and all incompetency of counsel claims are evaluated under the *Strickland* two-part test.

The Illinois courts rarely grant a petitioner Post-Conviction Hearing Act relief when the alleged constitutional deprivation is based on an ineffectiveness of counsel claim. The case law in this area generally does not demonstrate any in-depth analysis as to whether either portion of the *Strickland* two-part standard has been met. The first part of the standard, performance which was deficient and not objectively reasonable, is often

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587. *Id.* at 105-06, 291 N.E.2d at 3-4.
588. *Id.* at 106, 291 N.E.2d at 4.
590. *Id.* at 687-91.
591. *Id.* at 691-96.
594. It should be noted that a criminal defendant who elects to proceed *pro se* and who has knowingly and voluntarily waived his right to counsel, is not entitled to relief based on an ineffectiveness of counsel claim against either appointed standby counsel representation or his own representation. *People v. Williams,* 97 Ill. 2d 252, 266-67, 454 N.E.2d 220, 226-27 (1983). This general rule is followed whether the ineffective counsel claim is raised on appeal or whether it is raised on collateral attack. See *People v. Silagy,* 116 Ill. 2d 357, 369-70, 507 N.E.2d 830, 835 (1987).
not even reached by the Illinois courts. The courts most often find that
counsel's conduct did not adversely prejudice the petitioner or that this
conduct merely was a display of trial strategy or tactics. Thus, defense
counsel was not incompetent, no substantial constitutional deprivation
occurred, and the petitioner's claim does not warrant relief under the Post-
Conviction Hearing Act. First are the cases which hold that counsel is not
ineffective simply for taking one tactical route in favor of another. For
example, in People v. Rogers,\(^ {595} \) the petitioner was convicted of murder
and, in his Post-Conviction Hearing Act petition, he alleged that both his
trial and appellate counsel were incompetent and, thus, he was convicted
in violation of his sixth amendment rights. First, the petitioner claimed
that his counsel did not effectively represent him because he was advised
not to testify in his own behalf. The court found that counsel advised the
petitioner not to testify at trial because he mistakenly believed that a prior
conviction could have been used to impeach the petitioner's credibility.
The court held, however, that this error merely occurred pursuant to a
trial strategy decision and, therefore, did not rise to the level of a consti-
tutional violation.\(^ {596} \) In addition, the court held that the evidence presented
at trial was not closely balanced and that there was a substantial probability
that the petitioner would have been convicted even if he had testified.\(^ {597} \)
Thus, the petitioner was not prejudiced by his counsel's error.\(^ {598} \) Second,
the petitioner alleged that his counsel was ineffective because he failed to
impeach a state's witness during trial with a prior statement made in support
of the petitioner. The court held that, even if counsel's performance in
this regard was deficient, the petitioner failed to show that this performance
prejudiced him.\(^ {599} \) Further, the court noted that the petitioner also failed
to overcome the presumption that his counsel's conduct in this regard was
simply trial strategy.\(^ {600} \) The petitioner had not proved the requisite sub-
stantial constitutional violation under the Post-Conviction Hearing Act
and, accordingly, was not entitled to relief.\(^ {601} \)

The first district also has addressed the effectiveness of defense counsel
who prevents a petitioner from exercising his right to testify in his own
behalf. Similar to Rogers, the petitioner in People v. Jones\(^ {602} \) alleged that
his counsel was ineffective, in part, because this counsel had advised him
that he should not testify in his own behalf, since a prior conviction could
be used to impeach his credibility as a witness. The appellate court did not
determine whether counsel's advice was an exercise of trial strategy, but,

\(^ {595} \) 147 Ill. App. 3d 1, 497 N.E.2d 856 (5th Dist. 1986).
\(^ {596} \) Id. at 3, 497 N.E.2d at 857.
\(^ {597} \) Id. at 3-4, 497 N.E.2d at 857-58.
\(^ {598} \) Id. at 4-5, 497 N.E.2d at 857-58.
\(^ {599} \) Id. at 5-6, 497 N.E.2d at 858-59.
\(^ {600} \) Id. at 5, 497 N.E.2d at 858.
\(^ {601} \) Id. at 6, 497 N.E.2d at 859.
\(^ {602} \) 168 Ill. App. 3d 925, 522 N.E.2d 1325 (1st Dist. 1988).
instead, held that the alleged deprivation of the right to testify is a sufficient claim for purposes of obtaining an evidentiary hearing under the Post-Conviction Hearing Act.603 The court reasoned that, because the right to testify in one's own behalf is a fundamental right and not considered a strategic or tactical decision, a petitioner has a low standard to meet in order to gain an evidentiary hearing, whether or not this alleged deprivation is presented along with an ineffectiveness of counsel claim.604

Although the fifth district in Rogers reviewed the petitioner's claim after the trial court denied him post-conviction relief based on the evidence presented at an evidentiary hearing,605 two conclusions can be reached from analyzing Rogers and Jones together. First, a petitioner who seeks Post-Conviction Hearing Act relief and alleges that his counsel was ineffective because counsel prevented him from testifying in his own behalf is claiming deprivation of a fundamental constitutional right and, hence, has a lower burden to meet before he is entitled to an evidentiary hearing to review his claim. Second, although a court may find during this hearing that the petitioner was not prejudiced by not being able to testify and his counsel, therefore, was not ineffective under the Strickland standard and the sixth amendment, this counsel's advice to the petitioner is not merely an exercise of trial strategy.

People v. Krankel606 is another example of the Illinois courts' tendency to determine that the alleged ineffectiveness of counsel claim is based merely on counsel's exercise of trial strategy and, thus, the petitioner has not proved that a substantial constitutional violation occurred and is not entitled to Post-Conviction Hearing Act relief. The petitioner in Krankel alleged that his counsel was ineffective because he did not adequately investigate the petitioner's alibi defense and, as a result, did not call a particular witness to testify at trial on the petitioner's behalf. The court noted that the decision on whether or not to call a certain witness to testify is a matter of strategy and that errors in strategy do not constitute ineffective counsel, unless the witness' testimony would exonerate the petitioner.607 The Krankel court found that defense counsel was not ineffective since the decision was merely tactical, and the petitioner was not entitled to post-conviction relief.608

The Illinois courts' other tendency is to hold that the alleged ineffective conduct did not prejudice the petitioner. This approach is demonstrated by People v. Wishon.609 In Wishon the petitioner pled guilty to murder

603. Id. at 937, 522 N.E.2d at 1333.
604. Id.
605. 147 Ill. App. 3d 1, 2-3, 497 N.E.2d 856, 856 (5th Dist. 1986).
607. Id. at 892, 476 N.E.2d at 782.
608. Id. at 893, 476 N.E.2d at 783.
and alleged in his Post-Conviction Hearing Act petition that his counsel was ineffective for not presenting evidence that would have shown he was mentally unfit to enter the plea. The court did not discuss whether counsel’s conduct was deficient, but simply held that the petitioner appeared to understand the charges and articulately entered his plea and, thus, was not prejudiced by his counsel’s failure to raise the issue of competency. Since the outcome of the proceedings would not have been different even if counsel had raised this issue, the petitioner’s sixth amendment rights were not violated and he was not entitled to post-conviction relief.

*People v. Bailey* is one of the few Illinois decisions that has denied a petitioner Post-Conviction Hearing Act relief by finding that the petitioner did not meet the first part of the *Strickland* standard. The *Bailey* court explicitly found that the petitioner had not shown that his counsel’s performance was deficient and below an objective standard of reasonableness. The petitioner had alleged that his counsel was ineffective for not compelling witness testimony, not introducing certain evidence, and not objecting to jury instructions. The court held that counsel’s performance was not deficient because he objected at trial, moved for a directed verdict, moved for a mistrial, and filed various post-trial motions. Thus, the petitioner was not denied effective counsel in violation of his sixth amendment rights and, accordingly, was not entitled to relief under the Post-Conviction Hearing Act.

In a particularly unsettling opinion by the Illinois Supreme Court, *People v. James,* the petitioner alleged that he was denied the effective assistance of counsel because his appellate counsel failed to petition the United States Supreme Court for review of his attempted murder conviction. The state’s highest court did not evaluate this claim under the *Strickland* standard, but, instead, cited a number of other United States Supreme Court decisions and held that, because the petitioner had no right to the assistance of counsel in discretionary review proceedings, he could not allege that his counsel was ineffective for failing to seek discretionary review of his case. In other words, because the petitioner had no right to counsel, he had no right to effective counsel. The petitioner was not deprived of his sixth amendment rights.

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610. *Id.* at 854, 516 N.E.2d at 1012-13.
611. *Id.* See also *People v. Kubat*, 114 Ill. 2d 424, 501 N.E.2d 111 (1986) (petitioner alleged numerous reasons why his counsel was ineffective but the Illinois Supreme Court found that the petitioner’s sixth amendment rights were not violated because counsel’s conduct either was not deficient, did not prejudice the petitioner, or constituted trial strategy, however, the court did not apply both portions of the *Strickland* test to any one claim in reaching its decision).
613. *Id.* at 1101-02, 490 N.E.2d at 1342-43.
614. *Id.* at 1105, 490 N.E.2d at 1345.
615. 111 Ill. 2d 283, 489 N.E.2d 1350 (1986).
616. *Id.* at 291, 489 N.E.2d at 1353-54.
617. *Id.* at 291, 489 N.E.2d at 1354.
amendment rights and, therefore, was not entitled to relief under the Post-Conviction Hearing Act.\textsuperscript{618}

The Illinois courts have held that where a petitioner shows that an actual conflict of interest existed during his counsel's representation, or shows that he was totally denied representation at a crucial stage, he does not need to show that he was prejudiced by his counsel's behavior.\textsuperscript{619} In such a case, prejudice will be presumed and the petitioner will be entitled to relief on the basis of a sixth amendment violation.\textsuperscript{620} Although the courts are consistent in reciting this holding, petitioners rarely are able to show \textit{per se} prejudice, and, as a result, must nonetheless meet the \textit{Strickland} standard to successfully allege the existence of ineffective counsel. For example, in \textit{People v. Free},\textsuperscript{621} the petitioner alleged that he was denied the effective assistance of counsel because the public defender appointed to represent him had represented another person who was an adverse witness at the petitioner's preliminary hearing. The court noted that a \textit{per se} conflict of interest exists where an attorney is representing an adverse witness and contemporaneously representing the petitioner.\textsuperscript{622} In such a case, the prejudice component of the \textit{Strickland} standard is satisfied without additional proof by the petitioner.\textsuperscript{623} The \textit{Free} court, however, concluded that the \textit{per se} test had not been met. The court first held that an actual conflict of interest did not exist in \textit{Free} because the public defender was no longer representing the adverse witness when he was representing the petitioner.\textsuperscript{624} As a result, the petitioner did have the burden of proving that his counsel's representation of the adverse witness prejudiced the outcome of his trial.\textsuperscript{625} The court next held that the petitioner was unable to meet this burden and, thus, was unable to show that his counsel was ineffective.\textsuperscript{626} The petitioner, therefore, had not sufficiently shown that a substantial sixth amendment violation occurred and he was not granted relief.\textsuperscript{627}

Similarly, in \textit{People v. Bone},\textsuperscript{628} the petitioner was convicted of murder, felony murder, and armed robbery and alleged in his Post-Conviction Hearing Act petition that he received ineffective assistance of counsel because this counsel conceded the petitioner's guilt during closing argument.

\begin{itemize}
\item \textsuperscript{618} \textit{Id.} at 291-92, 489 N.E.2d at 1354.
\item \textsuperscript{620} \textit{People v. Bone}, 154 Ill. App. 3d 412, 506 N.E.2d 1033 (3d Dist. 1987).
\item \textsuperscript{621} 112 Ill. 2d 154, 492 N.E.2d 1269 (1986).
\item \textsuperscript{622} \textit{Id.} at 168, 492 N.E.2d at 1274.
\item \textsuperscript{623} \textit{Id.} at 169, 492 N.E.2d at 1274-75.
\item \textsuperscript{624} \textit{Id.} at 168-69, 492 N.E.2d at 1275.
\item \textsuperscript{625} \textit{Id.} at 169, 492 N.E.2d at 1275.
\item \textsuperscript{626} \textit{Id.} at 169-70, 492 N.E.2d at 1275-76.
\item \textsuperscript{627} \textit{Id.} at 170, 492 N.E.2d at 1276. \textit{See also} \textit{People v. Griffin}, 124 Ill. App. 3d 169, 463 N.E.2d 1063 (5th Dist. 1984) (petitioner had the burden of proving prejudice in an ineffectiveness of counsel claim where he was unable to show an actual conflict of interest existed by counsel's representation of multiple defendants).
\item \textsuperscript{628} 154 Ill. App. 3d 412, 506 N.E.2d 1033 (3d Dist. 1987).
\end{itemize}
The court noted that some conduct by counsel is so likely to prejudice a defendant that prejudice will be presumed.\textsuperscript{629} An example of such conduct would be where defense counsel failed to attack the state's case zealously.\textsuperscript{630} The court further noted that such conduct constituted a \textit{per se} exception to the case-by-case analysis set forth in \textit{Strickland}.\textsuperscript{631} The court held that defense counsel in this case did not actually admit the petitioner's guilt and had defended the petitioner aggressively throughout the trial.\textsuperscript{632} Thus, to support his ineffectiveness of counsel claim, the petitioner had to show that he was prejudiced by his counsel's remarks because prejudice could not be presumed in this case.\textsuperscript{633} The petitioner was unable to meet this burden and, accordingly, was not entitled to relief under the Post-Conviction Hearing Act.\textsuperscript{634}

\textbf{b. Confrontation of adversarial witnesses}

The sixth amendment guarantees a criminal defendant's right to confront the witnesses against him.\textsuperscript{635} Thus, if a petitioner offers sufficient proof that he was deprived of this constitutional right, his claim will be cognizable under the Post-Conviction Hearing Act.\textsuperscript{636} In \textit{People v. Talley},\textsuperscript{637} for example, the petitioner alleged that he was denied his right to adequately confront the witness against him when the trial court allowed a police officer's testimony into evidence over the objections of defense counsel. The petitioner claimed that this testimony contained inadmissible hearsay. The court held that, although the petitioner's claim was reviewable under the Post-Conviction Hearing Act, his right of confrontation sufficiently was preserved through his counsel's cross-examination of the witness.\textsuperscript{638} Therefore, the petitioner's sixth amendment rights were not violated and he was not entitled to relief based on this issue.\textsuperscript{639}

In \textit{People v. Ikerd},\textsuperscript{640} the petitioner was convicted of armed robbery and in his Post-Conviction Hearing Act petition he alleged that he was denied

\begin{itemize}
\item \textsuperscript{629} Id. at 414-15, 506 N.E.2d at 1035.
\item \textsuperscript{630} Id.
\item \textsuperscript{631} Id. at 415, 506 N.E.2d at 1035.
\item \textsuperscript{632} Id. at 415-16, 506 N.E.2d at 1036.
\item \textsuperscript{633} Id.
\item \textsuperscript{634} Id. at 416, 506 N.E.2d at 1036. \textit{See also} People v. Bernardo, 171 Ill. App. 3d 652, 525 N.E.2d 857 (1st Dist. 1988) (prejudice will not be presumed where ineffectiveness of counsel claim is based on the fact that counsel was suffering from mental illness, drug addiction, and pending disbarment proceedings; petitioner was unable to show prejudice under the \textit{Strickland} standard and was not entitled to post-conviction relief).
\item \textsuperscript{635} U.S. Const. amend. VI.
\item \textsuperscript{636} People v. Somerville, 42 Ill. 2d 1, 245 N.E.2d 461 (1969); People v. Talley, 97 Ill. App. 3d 439, 422 N.E.2d 1084 (1st Dist. 1981).
\item \textsuperscript{637} 97 Ill. App. 3d 439, 422 N.E.2d 1084 (1st Dist. 1981).
\item \textsuperscript{638} Id. at 441-46, 422 N.E.2d at 1086-89.
\item \textsuperscript{639} Id.
\item \textsuperscript{640} 47 Ill. 2d 211, 265 N.E.2d 120 (1970).
\end{itemize}
the right to confront the witness against him in violation of Bruton v. United States.641 In Bruton, the United States Supreme Court held that a defendant's sixth amendment confrontation clause rights are violated when a co-defendant does not testify at trial but his confession implicating the defendant is admitted at trial, because the defendant is deprived of the opportunity to cross-examine the co-defendant regarding the inculpating statements.642 Distinguishing Bruton, the Illinois Supreme Court held that the petitioner's sixth amendment rights were not violated in Ikerd because the co-defendant did testify at trial and denied making the confession.643 The petitioner had the opportunity to cross-examine the co-defendant and, consequently, was not entitled to post-conviction relief.644

C. Res Judicata and Waiver

The doctrines of waiver and res judicata effectively operate to deny most petitioners relief under the Post-Conviction Hearing Act even though these petitioners make the requisite showing under the Act that a substantial constitutional violation occurred during the proceedings that resulted in conviction. The Illinois courts most often discuss and apply both doctrines when denying a petitioner relief under the Act. The result is that, if the petitioner's claim is not barred by one doctrine, it almost certainly will be barred by the other. The general rule regarding res judicata and waiver is that a court judgment is res judicata as to all issues actually decided, and any issue that could have been raised during that proceeding but was not, is waived.645 In other words, once a petitioner institutes formal proceedings, he is precluded from bringing up any constitutional claims raised in those proceedings during any later proceedings, and he is prevented from bringing up any constitutional claims in later proceedings that he could have raised during the earlier proceedings. Furthermore, these doctrines apply regardless of whether the constitutional claim was reviewed or could have been reviewed during a pre-trial suppression hearing,646 trial,647 appeal,648 or collateral attack hearing,649 or in a post-trial motion650 or collateral attack petition.651

642. Id.
643. 47 Ill. 2d at 213, 265 N.E.2d at 121.
644. Id. at 213-14, 265 N.E.2d at 121-22. See also People v. Somerville, 42 Ill. 2d 1, 245 N.E.2d 461 (1969) (petitioner denied Post-Conviction Hearing Act relief where no Bruton violation existed because petitioner confronted testifying co-defendant as to inculpating statements through cross-examination).
647. People v. Roberts, 75 Ill. 2d 1, 387 N.E.2d 331 (1979).
For example, in *People v. Silagy*, the petitioner was convicted of murder and later filed for relief under the Post-Conviction Hearing Act. The trial court dismissed his petition without an evidentiary hearing. On appeal of this order, the petitioner again alleged that a number of constitutional violations occurred during his trial. These allegations focused on such issues as jury selection, jury behavior, newly discovered evidence, ineffective counsel, evidence presented at the sentencing hearing, and imposition of the death penalty. The Illinois Supreme Court held that it was precluded from considering some of these issues under the doctrine of res judicata because the issues previously had been addressed by the appellate court on direct appeal. The court further held that those issues not addressed on direct appeal were waived because the petitioner could have raised them on direct appeal.

Similarly, in *People v. Kubat*, the petitioner was convicted of aggravated kidnapping and murder. His conviction was affirmed by the Illinois Supreme Court and he subsequently filed for Post-Conviction Hearing Act relief alleging that his sixth amendment rights were violated during trial because he did not receive effective assistance of counsel. The trial court dismissed the post-conviction petition following an evidentiary hearing. The Illinois Supreme Court, on appeal of the dismissal of the petitioner's post-conviction petition, affirmed the trial court ruling and held that all issues raised were addressed on direct appeal and the petitioner was precluded from raising them in his post-conviction petition under the doctrine of res judicata. The court further held that any specific claims regarding his counsel that were not raised on direct appeal, should have been raised, and, accordingly, were waived. The Illinois Supreme Court opinions in *Silagy* and *Kubat* are common examples of the Illinois courts' application of the res judicata and waiver doctrines. The effect of these doctrines is to deny petitioners relief under the Post-Conviction Hearing Act, regardless of the validity of their claims.

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653. Id. at 364, 507 N.E.2d at 832.
654. Id. at 366-71, 507 N.E.2d at 833-36.
655. Id.
657. See id. at 427, 501 N.E.2d at 112.
658. Id. at 428, 501 N.E.2d at 112.
659. Id. at 436-38, 501 N.E.2d at 116-17.
660. Id.
The application of the res judicata and waiver doctrines is not absolute and there are three general exceptions to both doctrines. However, the Illinois courts have applied these exceptions narrowly. The first exception is that, if fundamental fairness requires that the doctrines not be applied, then the Illinois courts will consider a petitioner's claim under the Post-Conviction Hearing Act, even if the claim was addressed or not raised but should have been raised during an earlier proceeding. The case law does not define the term fundamental fairness, but, instead, appears to apply this exception on a case-by-case basis. For example, in People v. Cihlar, the petitioner was convicted of rape, burglary, and home invasion. The appellate court affirmed the conviction and the petitioner subsequently filed for relief under the Post-Conviction Hearing Act alleging that a state's witness had testified against him falsely at trial. The trial court dismissed the petition without an evidentiary hearing and on appeal, the appellate court reversed. The state appealed this reversal to the Illinois Supreme Court, which affirmed the appellate court decision. The state argued that res judicata and waiver should apply because the appellate court affirmed the conviction on direct appeal and the petitioner should be prevented from raising the issue of perjured testimony at a post-conviction hearing. The Illinois Supreme Court, however, noted that the witness had admitted to a state's attorney that she had testified falsely and fundamental fairness required that the petitioner's claim be considered at a post-conviction evidentiary hearing.

People v. Hamby presents another application of the fundamental fairness exception. In Hamby, the petitioner had been convicted of armed robbery and his conviction was affirmed on direct appeal. In his post-conviction petition, the petitioner raised a number of constitutional issues that were not raised on direct appeal because his attorney had chosen not to raise them. The petitioner requested that he be allowed to proceed pro se on direct appeal but his request was denied. The Illinois Supreme Court held that fundamental fairness required that the petitioner be allowed to raise these issues in a post-conviction evidentiary hearing. The fact that these claims were not raised on direct appeal was beyond the petitioner's
control and, hence, the doctrines of res judicata and waiver should not be applied to prevent review of the claims.671

However, the first district in People v. Bailey,672 applied what can only be called an exception to the fundamental fairness exception and held that the petitioner's claims were barred by res judicata from being considered during a post-conviction evidentiary hearing.673 The petitioner had been convicted of attempted murder and on direct appeal he raised the issue of improper jury instructions given during trial. His conviction was affirmed and the petitioner again raised the issue of improper jury instructions in his Post-Conviction Hearing Act petition. The appellate court held that the jury instructions were indeed improper, but that fundamental fairness does not require the doctrines of res judicata and waiver not be applied (even in a case where it would otherwise have been appropriate) where the evidence at trial was not closely balanced and was sufficient for the jury to convict regardless of the error.674 Because the evidence was not closely balanced in Bailey, the court's decision on direct appeal was res judicata and the petitioner was barred from raising the issue in his post-conviction petition.675

The second exception to an application of res judicata or waiver is that, if a petitioner's claims can be proved only by facts that are outside of the record, the claims could not have been addressed or raised during earlier review proceedings and the petitioner is entitled to review during a Post-Conviction Hearing Act proceeding.676 For example, in People v. Jones,677 the petitioner was convicted of murder and his conviction was affirmed on appeal. In his post-conviction petition, the petitioner alleged that he was denied effective assistance of counsel during trial because his counsel prevented him from testifying on his own behalf. The state argued that the petitioner waived this claim because he did not raise it on direct appeal. The court held that, because the factual basis for this claim was not on the record, the claim could not have been raised on direct appeal and the waiver doctrine did not apply.678 The petitioner, therefore, was entitled to

671. Id. at 294-95, 205 N.E.2d at 458-59. See also People v. Spicer, 42 Ill. App. 3d 246, 355 N.E.2d 711 (1st Dist. 1976) (petitioner's conviction affirmed on appeal and raised issue of perjured trial testimony in Post-Conviction Hearing Act petition; fundamental fairness required that petitioner be allowed to advance this claim during a post-conviction evidentiary hearing); People v. Polansky, 39 Ill. 2d 84, 233 N.E.2d 374 (1968) (fundamental fairness required that petitioner be allowed to raise constitutional claim in second post-conviction hearing where he was denied his right to counsel during first post-conviction proceeding and thus did not raise the claim).
672. 141 Ill. App. 3d 1090, 490 N.E.2d 1334 (1st Dist. 1986).
673. Id. at 1095, 490 N.E.2d at 1338.
674. Id.
675. Id.
678. Id. at 937, 522 N.E.2d at 1333.
an evidentiary hearing to review his ineffective counsel claim.\(^\text{679}\)

Similarly, in *People v. Shannon*,\(^\text{680}\) the petitioners were convicted of burglary, the conviction was affirmed on appeal, and the trial court dismissed their Post-Conviction Hearing Act petition without an evidentiary hearing. The petition alleged that a state's witness had committed perjury at trial and the attached affidavit of a third party supported the petitioners' claim. The state contended that the issue of the witness' credibility was addressed on direct appeal and the petitioners' claim, therefore, could not be considered on collateral attack based on the doctrine of res judicata. The court first noted that the issue of the witness' credibility was different from an allegation of perjury.\(^\text{681}\) In addition, the allegation was supported by a third party's affidavit and this information was not available on direct appeal.\(^\text{682}\) Accordingly, the facts surrounding the allegation were outside of the record, could not have been addressed on direct appeal, and the petitioners were not precluded by res judicata from raising the issue under the Post-Conviction Hearing Act.\(^\text{683}\)

The third exception to the application of res judicata and waiver to deny review of a petitioner's allegations under the Post-Conviction Hearing Act centers on incompetency of counsel claims. One of the general rules in this area is that a petitioner's post-conviction claim that his trial counsel was incompetent will not be barred by an earlier reviewing court's decision if the petitioner was represented by the same counsel at trial and on appeal.\(^\text{684}\) In other words, a petitioner can not be expected to raise an incompetent trial counsel claim on appeal when the counsel who is representing him on appeal is the same counsel who represented him at trial. Accordingly, a corollary to this rule is that if a different attorney represented the petitioner on appeal than represented him at trial, he will have waived his incompetent trial counsel claim if he did not raise it on appeal.\(^\text{685}\) An example of the corollary principle can be found in *People v. Stewart*.\(^\text{686}\) There, the petitioner had been convicted of armed robbery and the conviction was affirmed on appeal. The petitioner filed for post-conviction relief, alleging that he had not received effective assistance of counsel at trial. However, he had not raised this claim on appeal. The court held that, because a

\(^{679}\) Id.


\(^{681}\) Id. at 876, 329 N.E.2d at 403.

\(^{682}\) Id.

\(^{683}\) Id. See also *People v. Mengedoht*, 91 Ill. App. 3d 239, 414 N.E.2d 893 (2d Dist. 1980) (res judicata did not bar petitioner's post-conviction allegation that his counsel was ineffective at motion to suppress hearing because factual information regarding the allegation was outside of the record and could not be considered on direct appeal).


different attorney had represented the petitioner on appeal than at trial, there was no reason for him to not have raised the incompetent counsel claim on appeal. As a result, the petitioner was considered to have waived the claim and was barred from raising it in his Post-Conviction Hearing Act petition.

The waiver and res judicata doctrines also will not be applied to incompetency of trial counsel claims alleged for the first time on collateral attack where different attorneys represented the petitioner on appeal and at trial, but both attorneys were from the same public defender's office. In People v. Bland, for example, the petitioner had been convicted of murder and armed robbery and raised an incompetency of trial counsel claim for the first time in his Post-Conviction Hearing Act petition, even though his conviction was reviewed on direct appeal. The court held that the petitioner had not waived this claim, even though he had not raised it on direct appeal, because the two attorneys representing him at trial and on appeal, although different, were both from the same public defender's office. The incompetency of counsel claim, therefore, could be addressed in a post-conviction evidentiary hearing.

Finally, waiver and res judicata will not be applied to issues not raised on appeal and raised for the first time in a Post-Conviction Hearing Act petition when the petitioner was denied effective assistance of counsel in the direct appeal itself. In People v. Blewett, the petitioner contended that a due process violation occurred at trial but was not raised on appeal because his appellate counsel was incompetent. The petitioner thus raised the due process claim for the first time in his Post-Conviction Hearing Act petition. Although the court stated that it believed a due process violation had not occurred and that the petitioner's counsel on appeal was not ineffective, these claims would not be barred if raised for the first time on collateral attack when a petitioner's right to direct appeal in essence has been unconstitutionally denied because of incompetent counsel on appeal.

D. Procedural Barriers To Post-Conviction Hearing Act Relief

Although the Post-Conviction Hearing Act does not necessarily contain a greater number of procedural requirements than either statutory habeas

687. Id. at 352-53, 383 N.E.2d at 1188.
688. Id. See also Healey, 23 Ill. App. 3d 214, 318 N.E.2d 89 (petitioner was barred from raising incompetency of counsel claim in Post-Conviction Hearing Act petition where not raised on direct appeal and different attorney represented him on appeal than represented him at trial).
689. 67 Ill. App. 3d 716, 384 N.E.2d 1380 (1st Dist. 1978).
690. Id. at 723, 384 N.E.2d at 1387.
691. Id.
693. Id. at 1055, 298 N.E.2d at 369.
corpus or statutory coram nobis, the procedural requirements under the Post-Conviction Hearing Act are litigated more often than those under habeas corpus or coram nobis. This is not surprising in light of the fact that the Post-Conviction Hearing Act is used by more petitioners to collaterally attack final judgments of conviction than either habeas corpus or coram nobis. In addition, statutory habeas corpus and statutory coram nobis are much older collateral attack remedies than the Post-Conviction Hearing Act, and the application and constitutionality of various procedures under the Post-Conviction Hearing Act are still being settled.

Similar to the other two Illinois collateral attack remedies, the Post-Conviction Hearing Act is not a substitute for appeal and its purpose is not to relitigate a petitioner's guilt or innocence. Therefore, the Act does not provide a method for redetermining a trial court's verdict. The purpose of the Act is to remedy constitutional violations that occurred during the proceedings resulting in conviction. Although the Act is directly applicable to criminal proceedings, it is civil in nature and the petitioner has the burden of showing the requisite constitutional violation by a preponderance of the evidence. Because the purpose of the Act is to remedy constitutional violations that occurred during the proceedings that resulted in conviction, and because the Act is directly applicable to criminal proceedings, the Illinois courts have held that the Act does not extend to juvenile proceedings. Therefore, there is no comparable remedy available to juveniles who allege constitutional violations arising from various juvenile proceedings.

The statute of limitations under the Post-Conviction Hearing Act is currently ten years, although this statutory period has undergone a number of changes since the Act's inception in 1949. The current Act states that a petition must be filed within ten years after a final judgment has been entered "unless the petitioner alleges facts showing that the delay was not due to his culpable negligence." The Illinois Supreme Court has noted

694. See infra notes 719-50 and accompanying text.
that this flexibility in the ten year time frame provides a safety valve to petitioners that did not exist with previous statute of limitation periods under the Act.\textsuperscript{703} It is unknown how broadly the Illinois courts will ultimately interpret this provision but the Illinois Supreme Court recently applied the provision very literally to deny a petitioner relief. In \textit{People v. Bates},\textsuperscript{704} the petitioner had been convicted of murder in 1972 and, at the time, the statute of limitation period under the Post-Conviction Hearing Act was twenty years.\textsuperscript{705} In 1984, the statutory period was shortened to ten years.\textsuperscript{706} The petitioner filed for relief eleven years after his conviction and five weeks after the new statutory period became effective. The Illinois Supreme Court first determined that the shortened period applied retroactively to the petitioner's claim.\textsuperscript{707} The court next discussed the general rule that when a new shortened statutory time period applies, a petitioner still is afforded a reasonable time frame after its effective date within which to bring an action.\textsuperscript{708} Thus, the petitioner's claim was not instantaneously barred by the new statute of limitations.\textsuperscript{709} The court held, however, that the Post-Conviction Hearing Act requires a petitioner to allege facts justifying his delay in filing and the petitioner here had not done so.\textsuperscript{710} Therefore, the petitioner was not entitled to relief under the so-called "safety valve" provision and his petition was barred by the new statute of limitation time period.\textsuperscript{711}

The Illinois Supreme Court's holding in \textit{Bates} is troublesome in that the petitioner clearly had a justifiable reason for not complying with the ten year statutory period because, when he was convicted and shortly before he filed for relief, the statutory period was twenty years and not ten years. The petitioner's failure to allege this fact in his Post-Conviction Hearing Act petition does not appear to be a good reason to deny review of his claim. The court just as easily could have allowed the petitioner to amend his petition to include this obvious reason for not complying with the ten year period.

Similar to incorrectly labelled habeas corpus and coram nobis petitions, the Illinois courts have held that unlabelled or mislabelled petitions should be treated as petitions seeking relief under the Post-Conviction Hearing Act if the Act more appropriately applies to the allegations set forth in the petition.\textsuperscript{712}

\textsuperscript{703} Bates, 124 Ill. 2d at 87-88, 529 N.E.2d at 230.
\textsuperscript{704} Id. at 81, 529 N.E.2d at 227.
\textsuperscript{705} Id. at 83, 529 N.E.2d at 228.
\textsuperscript{706} Id. at 83-84, 529 N.E.2d at 228.
\textsuperscript{707} Id. at 84-86, 529 N.E.2d at 228-29.
\textsuperscript{708} Id. at 86-87, 529 N.E.2d at 229-30.
\textsuperscript{709} Id. at 87-89, 529 N.E.2d at 230-31.
\textsuperscript{710} Id. at 88, 529 N.E.2d at 230.
\textsuperscript{711} Id.
\textsuperscript{712} People v. Carbona, 53 Ill. App. 3d 1022, 1025, 369 N.E.2d 197, 199 (1st Dist. 1977);
For example, in *People v. Yarbar*,\textsuperscript{713} the petitioner filed a motion to vacate his sentence under statutory coram nobis. The petitioner had been resentenced under the Uniform Code of Corrections and he alleged in his motion that the trial court had imposed an unwarranted higher maximum sentence in violation of his due process rights. The court held that statutory coram nobis was not applicable to his claim and that the Post-Conviction Hearing Act provided the petitioner with a more appropriate remedy.\textsuperscript{714} The court then proceeded to consider whether or not the petitioner was entitled to relief under the Post-Conviction Hearing Act.\textsuperscript{713}

Similarly, in *People v. Carbona*,\textsuperscript{715} the petitioner did not mislabel her petition, but simply did not state a procedural basis in her motion for a new trial. The petitioner was convicted of murder and alleged that she should receive a new trial because of newly discovered evidence. The court first determined whether statutory habeas corpus or statutory coram nobis more appropriately applied to the petitioner's claim.\textsuperscript{717} The court finally determined that the Post-Conviction Hearing Act provided the most appropriate remedy and then analyzed the claim accordingly.\textsuperscript{718}

Petitioners have challenged the constitutionality and interpretation of a variety of procedural requirements under the Post-Conviction Hearing Act. The procedural issues most frequently addressed by a reviewing court after a petitioner's request for relief has been denied will now be examined.

1. **Constitutional Challenges and Mandatory Versus Directory Provisions**

The constitutionality of a number of the Post-Conviction Hearing Act's procedural requirements have been challenged, and only recently have the Illinois courts reached decisions on these issues. In addition, the Illinois courts recently have determined that trial courts are mandated to follow certain procedures under the Act, while other provisions are optional in nature. Petitioners seeking relief under the Post-Conviction Hearing Act, therefore, are finally receiving judicial guidance as to the procedural meaning and ramifications of many of the Act's provisions.


\textsuperscript{714} Id. at 670-71, 357 N.E.2d at 168.

\textsuperscript{715} Id. at 670-72, 357 N.E.2d at 168-70. See also *People v. Williams*, 11 Ill. App. 3d 275, 296 N.E.2d 617 (5th Dist. 1973) (petitioner's motion to vacate judgment and sentence should be considered under the Post-Conviction Hearing Act because form over substance should not prevail in determining whether petitioners are entitled to post-conviction relief); *People v. Mass*, 9 Ill. App. 3d 67, 292 N.E.2d 33 (2d Dist. 1972) (petitioner's pro se motion for rehearing on aggravation and mitigation should be considered under the more appropriate Post-Conviction Hearing Act).

\textsuperscript{716} 53 Ill. App. 3d 1022, 369 N.E.2d 197 (1st Dist. 1977).

\textsuperscript{717} Id. at 1025, 369 N.E.2d at 199.

\textsuperscript{718} Id. at 1025-27, 369 N.E.2d at 199-201.
Up until 1986, the Post-Conviction Hearing Act required that all petitions and proceedings under the Act must be handled by a judge who was not involved in the original proceedings which resulted in conviction. The purpose of the provision was to provide a petitioner with a more objective and fresher approach to reviewing his claim and, therefore, ensure greater procedural protection. However, the court in Joseph held that this provision violated the constitutionally mandated separation of powers principle. The court noted that the assignment of judges to a proceeding is an administrative function of the judicial system and, accordingly, is an element of judicial power. The court held that the legislature constitutionally has no authority to interfere with the court's administrative and supervisory responsibilities, and the statutory provision encroached upon judicial administrative responsibilities, namely, assigning judges to proceedings. Thus, the court held that the provision was unconstitutional.

The Post-Conviction Hearing Act allows a trial court judge to dismiss a frivolous or meritless post-conviction petition without first appointing counsel, and petitioners also have challenged this provision as violative of the separation of powers clause of the Illinois constitution and of due process and equal protection. In People v. Porter, the petitioner first contended that this provision violated the doctrine of separation of powers because it conflicted with Supreme Court Rule 651(c). The rule provides that a trial court must provide an indigent petitioner with a transcript and counsel upon a timely filing of a notice of appeal in a post-conviction proceeding. The rule further requires that the record filed in the appellate court show that this counsel reviewed the petition and consulted with the petitioner. The petitioner alleged that when a trial court dismisses a pro se indigent petitioner's claim without appointing counsel, the record on appeal fails to comply with the requirements of Rule 651(c). The Illinois Supreme Court held that the Post-Conviction Hearing Act provision was not unconstitutional and did not conflict with Rule 651(c).
reasoned that Rule 651(c) governs appeals from post-conviction proceedings, while the Post-Conviction Hearing Act provision governs the trial court review of collateral claims. Therefore, both provisions address different stages of the post-conviction process. In addition, the court noted that a petitioner does not have a right to counsel at post-conviction proceedings and any statutory provision requiring appointment of counsel at such a proceeding is a matter of "legislative grace."

The Porter court also held that the Post-Conviction Hearing Act's provision allowing for dismissal of a petition without appointing counsel did not violate the petitioner's equal protection and due process rights. The court stated that the provision only speaks to the dismissal of frivolous or meritless claims. If an indigent petitioner sufficiently alleges a constitutional violation, the petition will not be dismissed and he will be entitled to appointed counsel. The Act, therefore, provides indigent petitioners with an opportunity to be heard and is not fundamentally unfair.

The Post-Conviction Hearing Act states that the trial court must review a petition and enter its order within thirty days after the petition is filed and docketed. Although the Illinois appellate courts held that this provision was not mandatory and that an order dismissing a petition after the thirty days was not void, the Illinois Supreme Court recently held in People v. Porter that this provision is mandatory. The supreme court noted that, in order to determine whether a statutory provision is mandatory or directory, the legislative intent of the provision must be examined. The court found the provision mandatory for two reasons. First, the Act states that a court "shall" examine a petition and enter an order within thirty days and the word "shall" generally indicates a mandatory intent. Second, when a provision prescribes the result if a trial court fails to comply, this is indicative of mandatory intent. The provision at issue

731. Id. at 72, 521 N.E. 2d at 1160.
732. Id.
733. Id. at 73, 521 N.E.2d at 1161 (quoting People v. Ward, 124 Ill. App. 3d 974, 978, 464 N.E.2d 1144, 1147 (1st Dist. 1984)).
734. Id. at 73-78, 521 N.E.2d at 1161-63.
735. Id. at 74, 521 N.E.2d at 1161.
737. 122 Ill. 2d at 74-78, 521 N.E.2d at 1161-63.
741. Id. at 84-85, 521 N.E.2d at 1166.
742. Id. at 85, 521 N.E.2d at 1166.
743. Id.
states that if the petition is not dismissed, the court shall order the petition
docketed for further consideration. The court thus concluded that the
thirty day requirement was mandatory and not directory.

Finally, the Act requires that if a trial court determines that a petition
is frivolous or without merit, the dismissal shall occur through a written
order. The Illinois Supreme Court held in Porter, however, that the
written order requirement was not mandatory. The court noted that the
word “shall” does not always indicate a mandatory legislative intent, and
the purpose and context of the provision must be examined. The court
found that the word “shall” referred to the court’s duty to dismiss a
meritless or frivolous claim, and not to the fact that the dismissal must be
in writing. Further, because the Post-Conviction Hearing Act does not
state that the order is void if not in writing, the legislature intended that
this portion of the provision be directory and not mandatory.

2. Evidentiary Hearing

The Illinois courts consistently have held that a petitioner seeking relief
under the Post-Conviction Hearing Act does not have a right to an evi-
dentiary hearing to review his claim. A trial court, however, should order
a hearing when a petitioner makes a substantial showing that his consti-
tutional rights were violated during the proceedings that resulted in con-
viction. To make a substantial showing, a petitioner must support his
claim with the trial court record or accompanying affidavits. A petition-
er’s claim, therefore, will be summarily dismissed without an evidentiary
hearing and his allegations held to be merely conclusory if the records and
affidavits do not accompany his petition or are found not to support the
allegations.

745. 122 Ill. 2d at 85, 521 N.E.2d at 1166.
747. 122 Ill. 2d at 82-83, 521 N.E.2d at 1165.
748. Id. at 82, 521 N.E.2d at 1165.
749. Id.
750. Id. at 83, 521 N.E.2d at 1165.
751. People v. Silagy, 116 Ill. 2d 357, 365, 507 N.E.2d 830, 833 (1987); People v. James,
752. E.g., Silagy, 116 Ill. 2d at 365, 507 N.E.2d at 833.
753. Id.; People v. Pierce, 48 Ill. 2d 48, 50, 268 N.E.2d 373, 374 (1971); People v.
STAT. ch. 38, para. 122-2 (1987). See also People ex rel. Daley v. Fitzgerald, 123 Ill. 2d 175,
526 N.E.2d 131 (1988) (trial court judge has discretion to permit discovery depositions in a
Post-Conviction Hearing Act proceeding).
754. E.g., James, 111 Ill. 2d at 292, 489 N.E.2d at 1354; Pierce, 48 Ill. 2d at 50, 268
N.E.2d at 374. See also People v. Andson, 73 Ill. App. 3d 700, 705, 392 N.E.2d 358, 362
(1st Dist. 1979) (post-conviction trial court finding will not be set aside on review “unless it
is contrary to the manifest weight of the evidence.”).
For example, in People v. McGinnis, the petitioner alleged that he was
denied effective assistance of counsel at trial and that the complaining
witness had given perjured testimony at trial. The court held, however,
that the petitioner was not entitled to an evidentiary hearing. The peti-
tioner had not attached affidavits to his petition and the court stated that,
although this alone was not fatal to his claim, his allegations must then be
uncontradicted and supported by the trial record. The court found that
the record did not support the petitioner’s allegations and the trial court’s
dismissal of the petition without an evidentiary hearing was affirmed.

Similarly, in People v. Harris, the petitioner alleged that circumstances
surrounding his guilty plea and sentence for murder violated his constitu-
tional rights. The petitioner attached the affidavits of his counsel and of
himself to support his claim. The court affirmed the trial court’s dismissal
of the petition without an evidentiary hearing, holding that the record
contradicted the allegations contained in the petition and affidavits.

The Illinois Supreme Court has held that, if an evidentiary hearing is
ordered to review a petitioner’s allegations, the petitioner is not entitled to
attend such a hearing unless his presence is necessary because factual,
rather than legal, issues must be determined. The supreme court has
determined that one of the Post-Conviction Hearing Act’s provisions sup-
pports this holding. This provision provides that “in its discretion the
[trial] court may order the petitioner brought before the court for the
hearing.” In People v. Hamby, the Illinois Supreme Court noted that
this provision was a result of the recognized hazards and expenses that are
always involved in transporting prisoners to court for collateral attack
proceedings. The court held that the determining factor is whether factual
issues or legal issues must be decided at the hearing. The trial court in
this case requested information regarding evidence presented at trial during
the evidentiary hearing. The supreme court held that, when looking at the
request in the context of the entire proceedings, this request was not for

756. Id. at 276-77, 366 N.E.2d at 973.
757. Id. at 275, 366 N.E.2d at 972.
758. Id. at 275-76, 366 N.E.2d at 972-73.
759. 91 Ill. App. 3d 376, 414 N.E.2d 911 (3d Dist. 1980).
760. Id. at 380-81, 414 N.E.2d at 914-15. See also People v. Carbona, 53 Ill. App. 3d
1022, 369 N.E.2d 197 (1st Dist. 1977) (post-conviction allegations were conclusory in nature
and petitioner was not entitled to an evidentiary hearing because affidavits accompanying
petition did not contain legally available factual information).
761. People v. Hamby, 39 Ill. 2d 290, 291-92, 235 N.E.2d 572, 574 (1968); People v.
122-6 (1987)).
765. Id. at 291-92, 235 N.E.2d at 574.
766. Id. at 292, 235 N.E.2d at 574.
factual information.\textsuperscript{767} Therefore, only legal issues were being determined and the petitioner was not entitled to attend the hearing.\textsuperscript{768} The court did not discuss whether or why this holding and this portion of the Post-Conviction Hearing Act are also applicable to petitioners not imprisoned at the time of the hearing.

3. \textit{Standing}

The Post-Conviction Hearing Act states that it is applicable to "any person imprisoned in the penitentiary" who makes the requisite showing that his constitutional rights were substantially violated during the proceedings that resulted in conviction.\textsuperscript{769} Although an early Illinois Supreme Court ruling held that the Act is available only to incarcerated petitioners, the rationale articulated by the court stressed the distinction between felons as serious offenders and other persons convicted of criminality.\textsuperscript{770} Accordingly, the court found that the purpose of the Act supported its application only to petitioners actually imprisoned in the penitentiary.\textsuperscript{771}

In recent years, however, the Illinois Supreme Court has altered its interpretation of custody as it relates to the Act and, hence, has retreated from its earlier ruling regarding the standing issue. In \textit{People v. Correa},\textsuperscript{772} the petitioner had pled guilty to delivery of a controlled substance and was sentenced to three years in the Illinois Department of Corrections. At the time the petitioner filed for post-conviction relief, he was no longer incarcerated but was serving a term of mandatory supervised release as part of his original sentence. The Illinois Supreme Court held that the petitioner did have standing to seek relief under the Post-Conviction Hearing Act.\textsuperscript{773} The court reasoned that, because he was on mandatory supervised release, he still was serving part of his original sentence and the Illinois Department of Corrections retained supervision and custody of him.\textsuperscript{774} Therefore, the petitioner was still subject to being confined if he violated the conditions of his release, and this was sufficient to find that he was in custody for purposes of the Act.\textsuperscript{775}

In \textit{People v. Martin-Trigona},\textsuperscript{776} the Illinois Supreme Court extended the rationale of \textit{Correa} and held that the petition was entitled to seek relief

\begin{thebibliography}{99}
\bibitem{767} Id. at 294-95, 235 N.E.2d at 575-76.
\bibitem{768} See id.
\bibitem{771} Id.
\bibitem{772} 108 Ill. 2d 541, 485 N.E.2d 307 (1985).
\bibitem{773} \textit{Id.} at 544-47, 485 N.E.2d at 308-09.
\bibitem{774} \textit{Id.} at 546, 485 N.E.2d at 309.
\bibitem{775} \textit{Id.} at 546-47, 485 N.E.2d at 309. See also \textit{People v. Meyerowitz}, 61 Ill. 2d 200, 335 N.E.2d 1 (1975) (petitioner on probation entitled to seek relief under the Post-Conviction Hearing Act).
\bibitem{776} 111 Ill. 2d 295, 489 N.E.2d 1356 (1986).
\end{thebibliography}
under the Post-Conviction Hearing Act, even though he avoided incarceration for his current conviction by posting an appeal bond. The court cited Correa and noted that, while those on bond are at liberty, they nevertheless are subject to incarceration and, thus, are still under the state's control. The court concluded that a petitioner on appeal bond and not incarcerated is nonetheless imprisoned in the penitentiary for purposes of the Post-Conviction Hearing Act.

The Illinois Supreme Court, in People v. Warr, was faced with the issue of whether convicted misdemeanants had standing under the Post-Conviction Hearing Act. The Court in Warr, while granting relief, chose not to erode further the Act's imprisoned felon standing requirement. Instead, the court fashioned a common law remedy for convicted misdemeanants similar to that provided by the Post-Conviction Hearing Act. In Warr, the petitioners were sentenced to jail terms following convictions for various misdemeanor offenses. The court noted that the Post-Conviction Hearing Act was not an available collateral attack remedy because the petitioners were not imprisoned felons. The court stated, however, that a collateral attack remedy should be available to misdemeanants who show that their constitutional rights were violated during the proceedings that resulted in conviction. Accordingly, the court held that, in the exercise of its supervisory power, and until the Illinois legislature modified the Post-Conviction Hearing Act, a petitioner convicted of a misdemeanor is entitled to seek relief by instituting a proceeding that is similar in nature to a proceeding under the Post-Conviction Hearing Act. The court further held that for a petitioner to be entitled to relief, the petitioner need not be imprisoned, he is not entitled to appointed counsel if his petition is without merit, and he must bring his claim within four months if final judgment was entered upon a guilty plea and within six months if it was entered following trial.

The result of the Warr holding is that the provisions of the Post-Conviction Hearing Act generally are applicable to convicted misdemeanants, even though technically the Act is not an available remedy for this group. The Illinois legislature has not amended the Act to include misdemeanants, but the Warr holding still provides a similar remedy to those convicted of misdemeanors.

E. Critical Summary

The Illinois Post-Conviction Hearing Act provides convicts with a more broad based collateral attack vehicle than state habeas corpus or coram
nobis. Since the Act addresses violations of constitutional rights, which are 1) the most frequently raised claims, and 2) the most significant violations because they implicate fundamental rights, the state legislature has created an important remedy that filled the wide gap of defects not contemplated by the other two remedies.

However, this enactment and the judicial interpretations of it reveal a number of flaws. For example, the courts have at times appeared to take a very narrow view of what constitutes a constitutional violation. The courts’ consideration of claims regarding illegal arrests and detentions sometimes are rejected on the theory that these claims do not implicate constitutional rights. Obviously, the fourth amendment of the federal constitution and article I, section 6 of the Illinois constitution do govern unreasonable arrests and detentions. Similarly, since guilty pleas must be voluntary and intelligent in order to comport with due process, it is not clear as to why violations of Supreme Court Rule 402, which apparently is designed to address these due process concerns, are not viewed as cognizable claims under the Post-Conviction Hearing Act.

In some instances, the courts’ refusal to characterize certain claims as constitutional claims may be defensible but is not adequately explained. For example, violations of the state speedy trial requirements are viewed as not cognizable constitutional claims. Of course, the sixth amendment

785. See supra notes 413-17 and accompanying text. Cf. supra notes 479-91 and accompanying text.

786. U.S. CONST. amend. IV.


788. See, e.g., Steagald v. United States, 451 U.S. 204 (1981) (where police possessed only an arrest warrant for a third party, entry into defendant’s premises in order to search for and effectuate arrest of the third party is violative of the fourth amendment in absence of exigent circumstances or consent); Payton v. New York, 445 U.S. 573 (1980) (warrantless entry into defendant’s premises in order to effectuate arrest violative of fourth amendment in absence of exigent circumstances or consent).

789. See, e.g., Gerstein v. Pugh, 420 U.S. 103 (1975) (fourth amendment violated where state fails to provide arrestee, not formally charged, with a prompt judicial determination of probable cause to justify cautioned detention of accused); Sibron v. New York, 392 U.S. 40 (1968) (stop and frisk of suspect which was not motivated by search for weaponry violative of fourth amendment).

790. See Boykin v. Alabama, 395 U.S. 238 (1969) (failure of trial court to affirmatively find that defendant’s guilty plea was voluntary and intelligent was violative of due process).


792. People v. Billops, 16 Ill. App. 3d 892, 894, 307 N.E.2d 206, 208 (5th Dist. 1974): “The purpose of these [Rule 402] admonitions is to assure that the defendant fully understands what he is pleading to, what rights he is waiving by so pleading, and what the results of his action might be.”

793. See, e.g., People v. Turner, 25 Ill. App. 3d 847, 323 N.E.2d 371 (3d Dist. 1975). To the extent Rule 402 requires certain procedures not constitutionally required, such as establishing a factual basis supportive of the plea, the trial court’s failure to not scrupulously honor these aspects of Rule 402 would not implicate constitutional concerns. See People v. Weathers, 83 Ill. App. 3d 451, 404 N.E.2d 1011 (3d Dist. 1980).

794. See supra notes 437-46 and accompanying text.
of the federal constitution\textsuperscript{795} and article I, section 8 of the Illinois constitution do guarantee defendants the right to a speedy trial.\textsuperscript{796} However, the federal constitutional guarantee was interpreted in one case as having no application, even after several years had passed in bringing the accused to trial.\textsuperscript{797} Accordingly, the mere passage of only a few months will not create a federal constitutional problem.\textsuperscript{798} In addition, it is true that the Illinois speedy trial enactment, which normally requires a trial within 120 days if the defendant remains in custody or within 160 days of a speedy trial demand if he is not in custody,\textsuperscript{799} may require a trial more promptly than the state constitutional mandate.\textsuperscript{800} But in any event, the Illinois courts have not provided useful guidance as to when the state constitution speedy trial provision becomes operative, nor any opinion as to when the federal guarantee becomes applicable. Consequently, it is totally unclear as to 1) where the Illinois courts, faced with an inordinate delay between a charge and trial, would draw the line between mere statutory violations, not cognizable under the Post-Conviction Hearing Act, and constitutional violations, which must be addressed by the Act's provision, or 2) whether they would ever find a lengthy delay worthy of consideration under a constitutional analysis.

A similar criticism can be directed at the case law involving claims of error in a sentencing proceeding. The extent to which the constitution demands certain procedural requirements in a sentencing hearing or, in any event, any type of hearing is not entirely clear. In one opinion, the United States Supreme Court flatly stated "We [have] held . . . that the Due Process Clause of the Fourteenth Amendment did not require a judge to have [sentencing] hearings and to give a convicted person an opportunity to participate in those hearings when he came to determine sentence."\textsuperscript{801} On the other hand, if the state moves to have a convicted defendant designated as falling within a certain class of offenders, such as a "sexually dangerous person"\textsuperscript{802} or "habitual criminal,"\textsuperscript{803} which findings normally

\textsuperscript{795} U.S. Const. amend VI.
\textsuperscript{796} Ill. Const. art. I, § 8.
\textsuperscript{797} Barker v. Wingo, 407 U.S. 514 (1972).
\textsuperscript{800} People v. Stuckey, 34 Ill. 2d 521, 216 N.E.2d 785 (1966).
\textsuperscript{802} \textit{See} Ill. Rev. Stat. ch. 38, para. 105-1.01 (1987); People v. Studdard, 51 Ill. 2d 190, 281 N.E.2d 678 (1972) (Sexual Dangerous Person Act finding requires hearing that comports with due process).
invoke more serious sanctions than those attached to the offense of which the defendant has just been convicted, a hearing comporting with due process is required. In addition, it has been held that a defendant must be afforded an opportunity to present any mitigating factors before a death penalty sentence is imposed and, accordingly, by implication, a sentencing hearing is required in a capital case. Before a person's probation or parole is revoked, he must be afforded a hearing. In Illinois, it could be argued that the sentencing hearing provisions of the Uniform Code of Corrections, which require a sentencing hearing in which full consideration must be given to certain factors in mitigation as well as certain factors in aggravation, implicitly are required by the Illinois constitution which states "[a]ll penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship." Thus, to the extent cases like People v. Scott suggest a sentencing hearing is not mandated by either the federal or state constitution, these holdings may be simplistic. In any event, the total lack of any useful analysis or reasoning in connection with such a complicated and important issue is disturbing.

Not only does the federal and, perhaps, the state constitution require a sentencing hearing in some, if not all, circumstances, but it also is clear that certain procedural and substantive protections must attend any sentencing hearing. For example, the United States Supreme Court has ruled that a defendant should be afforded counsel at a sentencing hearing. The Court also has held that it was a constitutional error for a sentencing judge to rely on erroneous information presented by the government as evidence in aggravation. Further, the Court has held that sentences cannot be disproportionate to the wrong or to other’s sentences following similar

809. ILL. REV. STAT. ch. 38, paras. 1001-1-1 to 1008-6-1 (1987).
810. See id. at para. 1005-4-1.
811. See id. at para. 1005-5-3-1.
812. See id. at para. 1005-5-3-2.
813. ILL. CONST. Art I, § 11.
814. See supra notes 451-52 and accompanying text.
815. For a discussion of this important issue, see REPORT OF THE NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS: COURTS 190-92 (1973).
818. Coker v. Georgia, 433 U.S. 584 (1977) (death penalty for rape was per se disproportionate and violative of the cruel and unusual punishment provision); Trop v. Dulles, 356 U.S. 86 (1958) (denationalization for military desertion constitutes cruel and unusual punishment); Weems v. United States, 217 U.S. 349 (1910) (15 years at hard labor for falsifying an official document constitutes cruel and unusual punishment in violation of the eighth amendment).
criminality without violating the eighth amendment prohibition against cruel and unusual punishment. In addition, Illinois courts have struck down sentences at odds with article I, section 11 of the Illinois constitution because they were either excessive in light of the "seriousness of the offense" or they were not in accordance with the aim of "restoring the offender to useful citizenship." Thus, when the court in People v. Blewett proclaimed that the defendant's constitutional rights were not violated where the sentencing court refused to consider the sentences given to his co-defendants, the court ignored the federal and state constitutional jurisprudence that protects against sentencing disparity. While the result in Blewett may have been correct, the court offered no principled rationale to justify its ultimate conclusion.

The Illinois courts' determination that most trial errors do not amount to constitutional error is likewise quite simplistic. For example, when the court in People v. Farley dismissed a petitioner's claim that his speedy trial rights were violated when an erroneous continuance of his trial occurred, the court failed to address the federal and state constitutional rights to a speedy trial that conceivably might have been violated. When the trial court in People v. Cox possibly erred in admitting incriminating statements of the petitioner's co-defendant, the reviewing court's statement that a claim of erroneously admitted evidence was not of constitutional magnitude ran counter to a large body of case law. Likewise, some erroneous jury instructions do give rise to constitutional violations.

819. Solem v. Helm, 463 U.S. 277 (1983) (sentence is constitutionally disproportionate and violative of the eighth amendment where not proportionate to: 1) the crime; 2) sentences normally received by defendants in the same jurisdiction for the same or more serious criminality; and, 3) sentences normally received by defendants in other jurisdictions for the same or more serious criminality).

820. U.S. Const. amend VIII.


823. See supra notes 449-50 and accompanying text.

824. See supra notes 453-56 and accompanying text.

825. See supra notes 795-800 and accompanying text.

826. See supra notes 457-58 and accompanying text.

827. See, e.g., Bruton v. United States, 391 U.S. 123 (1968) (admission of non-testifying co-defendant's confession implicating defendant violated defendant's sixth amendment right to confrontation requiring reversal). See also Griffin v. California, 380 U.S. 609 (1965) (prosecutorial comment about defendant's failure to testify violative of fifth amendment self-incrimination privilege requiring reversal); Massiah v. United States, 377 U.S. 201 (1964) (admission of defendant taken from defendant without counsel is violative of sixth amendment and is inadmissible, requiring reversal); Wong Sun v. United States, 371 U.S. 471 (1963) (fruits of unreasonable search and seizure violative of fourth amendment are inadmissible, requiring reversal); Spano v. New York, 360 U.S. 315 (1959) (admission of coerced confession violative of due process, requiring reversal).

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notwithstanding Illinois court statements to the contrary. 829

Finally, the Illinois decision of People v. Talley 830 that held in dicta that not all insufficiency of evidence findings are necessarily of constitutional magnitude, appears totally at odds with the United States Supreme Court’s view. 831 By asserting that certain insufficiency of evidence findings may not violate due process while conceding other insufficiency findings do, the court is simply splitting hairs to avoid appropriate collateral review when insufficient evidence claims are advanced in a Post-Conviction Hearing Act forum. More important, however, is the fact that this type of error, unlike unconstitutional procedural irregularities, goes to the very heart of the fact-finding process. If the evidence supportive of guilt is insufficient as a matter of law, it is insufficient as a matter of constitutional law. By injecting into the case law a statement that, beyond sufficient evidence and unconstitutional insufficient evidence, there exists a third possibility—insufficient but constitutional evidence—the Talley court reflects judicial confusion at its worst. Fortunately, the Talley statement can be viewed as mere dicta and, accordingly, can and should be ignored.

Assuming that the petitioner’s claim is not rejected on the theory that it raises no constitutional question, the petitioner still faces a considerable burden in order to gain relief under the Post-Conviction Hearing Act. The breach of a constitutional right must be “substantial” in nature. 832 This language implicitly requires that the petitioner must have been actually prejudiced by the error in question. 833 In other words, this error must in all likelihood have altered the outcome of the proceedings. 834

Moreover, even if a breach of a constitutional right is substantial, the petitioner is likely to be denied relief on the basis of the doctrines of waiver and res judicata. Nowhere is the effect of these doctrines better exemplified than in the Post-Conviction Hearing Act. Evidence seized in violation of the fourth amendment must 1) normally be challenged in a pre-trial motion to suppress, 835 2) be the subject of a contemporaneous objection at trial if

defendant’s instruction regarding his right to not testify, and be free of adverse consequences by not testifying, violative of privilege against self-incrimination); Taylor v. Kentucky, 436 U.S. 478 (1978) (trial court’s refusal to give defendant’s requested instruction on presumption of innocence violated defendant’s right to fair trial); Cool v. United States, 409 U.S. 100 (1972) (instruction telling jury to ignore defense testimony unless it believes it beyond a reasonable doubt violative of due process, requiring reversal).

829. See supra notes 459-65 and accompanying text.
830. See supra notes 472-75 and accompanying text.
835. Ill. REV. STAT. ch. 38, para. 114-12(c) (1987); People v. Davidson, 116 Ill. App. 3d 164, 451 N.E.2d 978 (5th Dist. 1983) (trial court should not consider fourth amendment claim raised for first time at trial where it could have been raised prior to trial).
no opportunity existed to raise the challenge prior to trial,\textsuperscript{836} and 3) be challenged in a post-trial motion for a new trial,\textsuperscript{837} even if the alleged error was raised earlier.\textsuperscript{838} If the petitioner failed to make his timely challenges to the evidence allegedly illegally seized, neither the trial court,\textsuperscript{839} the appellate court,\textsuperscript{840} nor the collateral attack reviewing court\textsuperscript{841} are required to consider the constitutional issue, and normally will consider it waived.\textsuperscript{842} Thus, the waiver doctrine creates a particularly important obstacle in the path of fourth amendment Post-Conviction Hearing Act petitions. And, of course, if the petitioner's claim already has been given due consideration, the principle of res judicata will apply.\textsuperscript{843} These two doctrines—waiver and res judicata—effectively bar most fourth amendment claims from gaining Post-Conviction Hearing Act review. As a practical matter, if not as a legal matter, Illinois courts are saying that, if a petitioner was given a full and fair opportunity to litigate his fourth amendment claim at the trial and appellate levels, it is not necessary to give further collateral review to the claim.\textsuperscript{844}

The principles of waiver and res judicata in connection with Post-Conviction Hearing Act petitions merit further comment. It is the opinion of the author that these doctrines are the greatest obstacle to gaining effective collateral review of constitutional irregularities. If the petitioner has not raised the issue in timely fashion at the trial and appellate levels, the issue generally is considered to have been waived. If it was raised and considered prior to collateral attack, the earlier review is normally res judicata. In a sense, the petitioner is caught between a rock and a hard place. By invoking one or the other of these doctrines, the petitioned court normally can avoid any consideration of the merits of the petitioner's claim. The exceptions of 1) fundamental fairness, 2) basis for relief outside the record, and 3) incompetency of counsel, do inject an element of fairness and equity into these considerations. However, the courts often are inconsistent in their application of these exceptions. In any event, it does appear

\textsuperscript{836} ILL. REV. STAT. ch. 38, para. 114-12(c) (1987); People v. Grotti, 112 Ill. App. 3d 718, 445 N.E.2d 946 (5th Dist. 1983) (consideration of motion to suppress at trial proper where defense had no opportunity to raise it earlier).

\textsuperscript{837} ILL. REV. STAT. ch. 38, para. 116-1 (1987).

\textsuperscript{838} P. PERKO, APPEALS AND COLLATERAL REMEDIES, in ILLINOIS CRIMINAL PROCEDURE 387, 422-23 (Ruebner ed. 1987).

\textsuperscript{839} People v. Rose, 75 Ill. App. 3d 45, 393 N.E.2d 698 (1st Dist. 1979) (defense failure to make pre-trial motion to suppress allowed trial court to refuse claim first raised at trial).

\textsuperscript{840} People v. Moore, 43 Ill. 2d 102, 251 N.E.2d 181 (1969) (failure of defense to raise timely motion to suppress constituted waiver for purpose of appeal).

\textsuperscript{841} People v. Somerville, 42 Ill. 2d 1, 245 N.E.2d 461 (1969) (fourth amendment claim first raised in collateral attack rejected as not timely).

\textsuperscript{842} Id. at 12; Moore, 43 Ill. 2d at 100, 251 N.E.2d at 184.


\textsuperscript{844} See id. (United States Supreme Court articulated the legal barrier in conjunction with federal habeas corpus claims).
that the third exception—incompetency of counsel—is a very important issue and can be raised, where appropriate, to surmount the state’s claim of waiver or res judicata. By shifting the focus to his attorney, a Post-Conviction Hearing Act petitioner may be able to effectively demonstrate that he personally did not waive the issue his attorney dismissed or overlooked. Similarly, if the issue was raised, he may be in a position to argue that his counsel’s ineptness in presenting the issue at trial or on appeal should defeat the state’s res judicata argument. Thus, petitioners pursuing relief under this Act should be very alert to the possibility of merging an incompetence of counsel claim into their other substantive grounds for relief in order to overcome these two doctrines.

Regarding due process claims that involved claims of perjured testimony, it remains unclear as to whether this is a basis for relief where the state’s witness has perjured himself but the prosecution is unaware of the perjury. The inconsistent rulings on this important issue should be addressed by the state’s highest court so that the petitioned trial court enjoys more direction in resolving such significant claims. More importantly, because claims of perjury by state witnesses clearly raise questions about the integrity of a guilty finding, it is certainly arguable that principles of equity and fairness dictate that a witness’ knowledge that his testimony is false be imputed to the state.

Although particular criticisms could be made at this juncture about the Illinois courts’ consideration of other specific grounds for relief, these already were noted in the earlier discussion of grounds for relief and need not be repeated. On the other hand, a final comment must be directed at the Post-Conviction Hearing Act itself. A review of the statute reveals that it is only available to convicted felons and not misdemeanants. However, the United States Supreme Court has made it clear that most constitutional rights, such as the right to a jury trial, the right to counsel, the right to a fair trial, and the right to a trial transcript for purposes of appeal, are extended to many misdemeanor prosecution situations. When the Illinois legislature responded to the United States Supreme Court criticism of the Illinois collateral attack framework and enacted the Post-Conviction Hearing Act, it provided prospective collateral attack petitioners who had

845. See supra notes 500-19 and accompanying text.
848. Groppi v. Wisconsin, 400 U.S. 505 (1971) (refusal of request to change venue in order to avoid prejudicial pre-trial publicity on grounds that case involved a misdemeanor held violative of right to trial by an impartial jury).
849. Mayer v. Chicago, 404 U.S. 189 (1971) (indigent defendant convicted of an offense punishable by fine only must be furnished “a record of sufficient completeness for purposes of appeal”).
850. See supra notes 405-06 and accompanying text.
constitutional claims with only a half a loaf, in the sense that misdemeanor convictions were not addressed by the statute. Because of the inadequacy of the Act, the Illinois Supreme Court felt compelled to create a roughly equivalent remedy for misdemeanants who have constitutional objections regarding their convictions. While the court must be commended for its ruling in People v. Warte addressing constitutional problems that the state legislature chose to ignore, the Warr decision creates protections for misdemeanants that are not consistent with the Act's protections for felons. In Warr, the court set out a four months statute of limitations for filing petitions following a guilty plea and a six month statute of limitations following a trial. Meanwhile, the Act itself currently requires the filing of a petition within ten years. Furthermore, the Act requires the petitioner be within the custody of the state, while Warr imposes no similar standing requirement on misdemeanants. Why Warr provided more limited protection in one regard and broader protection in another is not clear. This disparate treatment of felons and misdemeanants has no logical basis. It is unfortunate that the state legislature has yet to create an equivalent collateral attack remedy for misdemeanants. Perhaps, a revision of the Post-Conviction Hearing Act is in order.

IV. DOCTRINAL RECOMMENDATIONS: A CALL FOR AN ADEQUATE JURISPRUDENCE

A number of criticisms have been directed at each of the three Illinois collateral attack remedies in the separate discussions above. The specific criticisms need not be repeated at this juncture. However, a common thread running through many of the criticisms is that the case law reflects the absence of a well developed jurisprudential framework for evaluating collateral attack claims. In other words, there exists a need for useful doctrines and principles to guide trial court judges in collateral attack forums.

Further, to the extent that some standards do emerge in the case law, they often are unsupported by logic or reason. For instance, in the habeas corpus cases, the courts normally refuse to afford relief unless the judgment or sentence is deemed "void." Where the charge upon which a conviction is based or the sentence following conviction merely is "erroneous,"

851. See supra notes 780-84 and accompanying text.
852. 54 Ill. 2d 487, 298 N.E.2d 164 (1973).
853. Id. at 493, 298 N.E.2d at 167.
855. Id.
856. See 54 Ill. 2d at 493, 298 N.E.2d at 167.
857. See supra Part IC, page 231 (critical summary of habeas corpus); Part IID, page 248 (critical summary of coram nobis); Part IIIE, page 298 (critical summary of Post-Conviction Hearing Act).
858. See supra notes 38-90 and accompanying text.
859. See supra notes 38-70 and accompanying text.
860. See supra notes 71-86 and accompanying text.
it is not necessarily void. These resolutions involve little more than an exercise in semantics and unprincipled characterization. Similarly, a "subsequent event" operates to invoke the habeas corpus remedy only where the occurrence would entitle the petitioner to immediate release. The opinions addressing this issue articulate no principle or rationale as to why illegal subsequent occurrences should be ignored where the petitioner is not entitled to immediate release or is not in "custody."

In addition, the standards that do exist often are cast in very general, and therefore, unhelpful, terms. For example, the coram nobis case law promises that where ever necessary, the petitioned court will invoke its "equitable powers to prevent enforcement of a judgment that is "unfair or unjust." This is not a particularly useful guiding principle.

Similarly, the Post-Conviction Hearing Act states that relief is available to petitioners who point to "substantial" violations of their constitutional rights. Yet, the courts have made no apparent effort to define what constitutes a substantial violation. The Post-Conviction Hearing Act has been interpreted as affording relief where ever "fundamental fairness" dictates that relief is warranted. However, the courts offer no criteria for determining when the petitioner was deprived of fundamental fairness. Occasionally, the courts indicate that the "ends of justice" may require the collateral attack reviewing court to take certain action under the Post-Conviction Hearing Act. Nonetheless, the courts routinely ignore claims raised under the Act because of waiver or res judicata. Finally, in some cases, the courts state that a petitioner has a right to a "meaningful opportunity to be heard" when advancing a claim under the Act, while in other cases, the petitioner is given no right to a hearing.

In order to bring some semblance of clarity to the collateral attack remedy jurisprudence, the following suggestions are offered. First, the reviewing courts should state that all collateral attack remedies are "extraordinary" equitable remedies. Historically, courts of chancery only invoked their authority to issue equitable remedies in circumstances where the regular courts of common law were powerless, given the substantive and procedural rules that they were required to follow, to grant the petitioner redress. Where the courts of law had the capacity to afford a claimant appropriate relief, the court of equity would never intervene.

861. See supra notes 111-80 and accompanying text.
862. See supra note 278.
864. See supra notes 664-75 and accompanying text.
867. See People v. Porter, 122 Ill. 2d 64, 74, 521 N.E.2d 1158, 1161 (1988).
868. See supra notes 751-68 and accompanying text.
Hence, when the chancery court was faced with that rare case where 1) the courts of law did not have an adequate remedy, and 2) the relief sought was warranted, the court would issue its “extraordinary” writ.\textsuperscript{870} This dichotomy between legal remedies and equitable remedies provides a useful perspective for analyzing collateral attack claims. Where, for example, a claimant could have invoked the trial and appellate courts’ legal remedies, but chose not to do so, the collateral attack reviewing court could refuse to invoke its equitable powers. Thus, where the petitioner could have raised his constitutional claim on direct appeal but did not, Post-Conviction Hearing Act review might be deemed an inappropriate vehicle for consideration of the claim. On the other hand, where the claim for relief from a violation of constitutional rights involves a novel claim not available when the appeal was taken or when the appeal could have been taken, redress of the petitioner’s grievance might be appropriate through a collateral attack remedy. Similarly, where a petitioner’s claim of state witness perjury was raised in the trial court and rejected, the coram nobis petitioner who is attempting to resurrect his claim has already had his day in court. However, if the coram nobis petitioner has only recently uncovered evidence of such perjury, then the intervention of the court of equity would be necessary. And, where a petitioner pointed to some fundamental error long after trial and appeal, such as the trial court’s lack of subject matter jurisdiction or clear insufficiency of evidence to convict, equitable considerations would militate in favor of an “extraordinary” remedy. In any event, this characterization would immediately send a signal to prospective petitioners and their counsel that these remedies are not casually used to extend relief or routinely invoked by the reviewing courts.

Second, the courts should make it clear that none of the collateral attack remedies are available unless the claim of error would have in all probability altered the outcome of the proceeding in question.\textsuperscript{871} Normally, this will mean that the petitioner will be required to show that, without the error

\textsuperscript{870} H. McClintock, \textit{Handbook of the Principles of Equity} 46-49 (2d ed. 1948).

\textsuperscript{871} The United States Supreme Court has indicated that even where the petitioner is responsible for a procedural default in state court, a federal habeas corpus forum should be available when the petitioner may have been innocent of the charge. Murray v. Carrier, 477 U.S. 478 (1986). The Court stated: “[I]n an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default.” \textit{Id.} at 496. In addition, in Smith v. Murray, 477 U.S. 527 (1986), the Supreme Court noted that where the petitioner claimed he was “unjustly incarcerated,” he would have to demonstrate that he was “actually” innocent rather than “legally” innocent before his procedural default would be excused. \textit{Id.} at 537-38. In that case, the Court held that the erroneous admission of the petitioner made during an earlier psychiatric examination did not support the conclusion that he was actually innocent of the charge of which he was convicted at trial. \textit{Id.} at 537-39. In an earlier case, the Supreme Court had stated: “any prisoner bringing a constitutional claim to the federal courthouse after a state procedural default must demonstrate cause [for the procedural default] and actual prejudice before obtaining relief.”
in question, he never would have been convicted. In other words, the petitioner will have to demonstrate actual prejudice and, if he cannot do so, the reviewing courts will be in a position to hold that the alleged error constituted harmless error. Thus, under habeas corpus, where a court was entirely without jurisdiction over the proceeding in that, for example, the offense occurred in another jurisdiction, a convicted petitioner could successfully argue actual prejudice. In contrast, where the petitioner's conviction rests on a claim of a faulty charging instrument, the reviewing court could respond that the error was harmless where the petitioner was unable to demonstrate how he was prejudiced in presenting a defense at trial or in warding off successive prosecutions for the same offense. Similarly, where a coram nobis petitioner presented evidence of perjury by a state witness, he would be accorded relief if the witness' testimony was crucial to the finding of guilt. On the other hand, if the perjured testimony was not material to the issue of guilt or innocence or where there existed other evidence that overwhelmingly supported the petitioner's guilt, the court could rule that the admission of the perjured testimony was not actually prejudicial and, at best, was harmless. Finally, where a Post-Conviction Hearing Act petitioner proved that the evidence offered at trial was legally insufficient to support a guilty verdict, a remedy of reversal of the conviction obviously would be warranted. However, if he pointed to some type of procedural irregularity, such as police non-compliance with the warrant clause of the fourth amendment in a residential search situation, which in no way would have altered the outcome of the trial given other constitutionally seized evidence that clearly supported the petitioner's guilt, the reviewing court could hold that the admission of the evidence wrongfully seized from the residence without a warrant was harmless error.

Of course, there might be situations where the claim of constitutional error had no bearing on the petitioner's guilt but nonetheless still would be cognizable in a collateral attack forum. For instance, where a trial court

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Engle v. Isaac, 456 U.S. 107, 129 (1982). See also Wainwright v. Sykes, 433 U.S. 72 (1977) (federal habeas corpus petitioner must show cause for the procedural default and prejudice resulting from this default in order to obtain review of his claim). Thus, actual innocence is an exception to the Engle procedural default mandate.

One of the conditions of federal coram nobis relief is that the petitioner must show that the error in question would have altered the outcome of the proceeding in question. United States v. Stimac, 684 F. Supp. 545, 547 (N.D. Ill. 1988) ("The petitioner must demonstrate that 'but for the fundamental errors committed a more favorable judgment would have been rendered.'"). See infra note 929 for additional requirements of coram nobis relief. See also Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments, 38 U. Chi. L. Rev. 142 (1970) (proposes that collateral attack relief should only be available where claim of innocence attaches to constitutional claim).

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summarily refused to conduct a fitness hearing to determine whether the petitioner was competent to stand trial, a collateral attack remedy would be warranted. However, since most collateral attack claims involve alleged procedural errors that may have had no bearing on the petitioner's factual innocence, this proposed actual prejudice doctrine would provide a useful mechanism for rejecting many unwarranted collateral claims.

Third, and vitally important, the Illinois courts should **routinely** incorporate a principle or presumption of finality of trial and appellate court decisions into the collateral attack doctrine. Occasionally, the Illinois courts implicitly use such a principle. For instance, one opinion referred to a "policy of prohibiting piece-meal invocation of post-conviction remedies." In another case, the Illinois Supreme Court stated that further consideration of a particular claim in a collateral attack forum "would only serve to prolong this proceeding interminably." In a few cases, the Illinois courts have explicitly pointed out that consideration of a "defendant's procedurally defaulted claims in a post-conviction proceeding...would deny the State's legitimate interest in the finality of the defendant's convictions..." In a few others, the courts have indicated that petitioners' claims could not be rejected due to the "objective of finality" where fundamental fairness required consideration of the claim. Notwithstanding, the Illinois courts do not regularly employ a principle of finality in their collateral attack decisions.

In sharp contrast, the federal courts routinely make reference to a principle or presumption of finality in connection with federal collateral attacks. While the author personally agrees with many of the criticisms directed at the case law which has narrowed the availability of federal collateral relief, it seems that the doctrinal underpinnings of Illinois collateral attack case law should coincide with the practical realities of the scope and actual availability of Illinois collateral attack relief. As has been stressed throughout this Article, collateral relief is rarely extended to Illinois

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874. People v. Mamolella, 42 Ill. 2d 69, 73, 245 N.E.2d 485, 487 (1969). See also People v. Carlisle, 174 Ill. App. 3d 454, 528 N.E.2d 1029 (4th Dist. 1988) (when issue could have been raised but was not, to consider it on a third collateral attack could continue the post-conviction process indefinitely).

On the other hand, some commentators have more or less applauded the Supreme Court's narrowing of the availability of federal habeas corpus, but indicate that further erosion is inadvisable. See Wechsler, Habeas Corpus and the Supreme Court: Reconsidering the Reach of the Great Writ, 59 U. Colo. L. Rev. 167, 182 (1988).
petitioners. After trial and appellate procedures have run their course, the reviewing courts are not very receptive to post-appeal claims and, indeed, seem to avail themselves of every escape hatch possible. In the habeas corpus case law, the courts routinely refuse to characterize the claim of error as a jurisdictional defect that voids the judgment of conviction. So too, the habeas corpus decisions often invoke the escape hatch that relief is not available because the petitioner will not be entitled to immediate release. In the coram nobis cases, the courts most often conclude that new evidence of fraud, duress, perjury, or the like is not material to the issue of guilt, or is overcome by cumulative evidence of guilt. In Post-Conviction Hearing Act decisions, the doctrines of waiver and res judicata effectively bar petitioners from advancing post-appeal claims regarding violations of constitutional rights. Accordingly, because the factual reality is that collateral attack reviewing courts attach presumed finality to trial and appellate judgments, these same courts should articulate in their holdings a legal presumption which reflects this finality concern. Such a principle would go a long way in clarifying the true scope of Illinois collateral relief. It would allow collateral attack reviewing courts to deny relief where appropriate without adopting a very narrow view of 1) what is a jurisdictional error, 2) what are newly discovered facts warranting relief, and 3) what are substantial violations of constitutional rights. A principle or presumption of finality would symbolize the importance that the reviewing courts place on a petitioner's failure to raise claims of trial court error on direct appeal. Finally, it would eliminate the false promises many of the collateral attack decisions reflect in their repeated references, usually in dicta, to concerns of equity, fundamental fairness, justice, and the like, and educate inmates and inexperienced attorneys to not hold false hopes that collateral attack remedies provide equivalent relief to that afforded on direct review.

The federal collateral attack case law reflects a useful frame of reference for Illinois courts in developing a principle of finality. For example, in Reed v. Ross,879 the United States Supreme Court stated that a procedural default in not raising violations of constitutional rights in state court could be a basis for denying federal habeas corpus relief in federal court.880 The Court stated that "there is the state's interest in the integrity of its rules and proceedings and the finality of its judgments, an interest that would be undermined if the federal courts were too free to ignore procedural forfeitures in state court."881 The Court pointed out that if a constitutional claim was first raised in a federal habeas corpus forum long after trial, evidence might no longer be available to evaluate the petitioner's constitutional claim.882 In addition, if the petitioner was to succeed with his claim

880. Id. at 9-11.
881. Id. at 10.
882. Id. at 11.
of error requiring a reversal, it might be too late to effectively retry the petitioner.\textsuperscript{883} Thus, the Court indicated that a defense attorney would not be allowed to ignore the state’s procedural rules in the expectation that his client’s claims could be raised at a later date in federal court.\textsuperscript{884} Similarly, the Court stated that a petitioner may not use the possibility of federal relief to hedge against strategic risks he takes in state court.\textsuperscript{885} On the other hand, the Court pointed out that where the petitioner raises a claim that is so novel that it could not have been available to the petitioner earlier, then he might be excused from raising it earlier in the state courts.\textsuperscript{886}

In Murray v. Carrier,\textsuperscript{887} the Court discussed this principle of finality in conjunction with a state procedural default.\textsuperscript{888} The Court noted that a procedural default by the petitioner normally deprives the trial court of an opportunity to correct the error without a retrial, gives the appellate court no chance to review trial errors, and exacts an extra charge by undercutting the state’s ability to enforce its procedural rules.\textsuperscript{889} Therefore, the default should be ignored only where the error probably resulted in a conviction of an innocent person.

On the other hand, in various cases, including Duckworth v. Serrano,\textsuperscript{890} the Court has held that the failure of a state petitioner to exhaust all state remedies is not an absolute bar to collateral relief.\textsuperscript{891} In Duckworth, the Court stated that, if there existed no opportunity to obtain redress in state court or if the corrective process was so obviously deficient as to render futile any effort to obtain relief, the federal courts could intervene.\textsuperscript{892} However, in Engle v. Isaac,\textsuperscript{893} the Court undercut the utility of the “futility” doctrine by stating that a petitioner’s perception that it would be futile to raise a particular issue in state court does not excuse his procedural default in state court.\textsuperscript{894}

\textsuperscript{883} Id.
\textsuperscript{884} Id. at 13-14.
\textsuperscript{885} Id.
\textsuperscript{886} Id. at 16.
\textsuperscript{887} 477 U.S. 478 (1986).
\textsuperscript{888} Id. at 485-92.
\textsuperscript{889} Id. at 487 (citing Engle v. Isaac, 456 U.S. 107, 129 (1982)).
\textsuperscript{890} 454 U.S. 1 (1981).
\textsuperscript{891} Id. at 3-4.
\textsuperscript{892} Id. at 3. See also Engle, 456 U.S. at 135 (“In appropriate cases those principles must yield to the imperative of correcting a fundamentally unjust incarceration.”) See also supra note 871 for a complete discussion of Engle and its exceptions.
\textsuperscript{893} 456 U.S. 107 (1982).
\textsuperscript{894} Id. at 130. The Court stated:

\textit{We note at the outset that the futility of presenting an objection to the state courts cannot alone constitute cause for a failure to object at trial. If a defendant perceives a constitutional claim and believes it may find favor in the federal courts, he may not bypass the state courts simply because he thinks they will be unsympathetic to the claim. Even a state court that has previously rejected a constitutional argument may decide, upon reflection, that the contention is valid.}

\textit{Id.} at 130 (footnote omitted).
When the federal courts are faced with successive collateral attack petitions, they also will invoke the principle of finality. In *Kuhlmann v. Wilson*, the United States Supreme Court attempted to clarify its previous holding as to when successive petitions constitute an abuse of the writ of habeas corpus. In *Kuhlmann*, the Court ruled that the petitioner as well as the state has an interest in "according finality to the prior judgment." First, the Court stated that while the petitioner may have an obvious interest in avoiding finality in his judgment of guilty where he was innocent of the charge, he also has an interest "that comes with an end to litigation," namely, that "attention will ultimately be focused not on whether a conviction was free from error but rather on whether the prisoner can be restored to a useful place in the community." In addition, the Court stated that "finality" serves many state interests. These include deterring crime, an interest which is frustrated by a perception that collateral relief may afford persons a way of escaping punishment. Similarly, finality serves the goal of rehabilitating convicts, which is best accomplished when the defendant ultimately realizes that he is justly subject to the sanction received following his conviction. Finality serves the state's legitimate punitive interests because, if a petitioner is freed on a successive petition, the state may be unsuccessful in its effort to retry him given the passage of time, lost witnesses, and cloudy memories. Thus, the Court held that unless the petitioner can establish that "under the probative evidence he has a colorable claim of factual innocence," he should be denied relief; such a "colorable claim of factual innocence," the Court opined, would be the "rare" case. As Justice O'Connor stated in *United States v. Frady*, where a federal convict was challenging his conviction in a section 2255 petition:

Once the defendant's chance to appeal has been waived or exhausted, however, we are entitled to presume he stands fairly and finally convicted, especially when, as here, he already has had a fair opportunity to present his federal claims to a federal forum. Our trial and appellate procedures are not so unreliable that we may not afford their completed operation any binding effect beyond the next in a series of endless post-conviction collateral attacks. To the contrary, a final judgment commands respect.

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897. 477 U.S. at 452.
898. Id. (quoting Sanders, 373 U.S. at 24-25 (Harlan, J., dissenting)).
899. *Kuhlmann*, 477 U.S. at 452. The Court noted "objective factors" that would excuse nonexhaustion of state remedies such as the novelty of the claim, interference by state officials in a petitioner's effort to gain redress, and incompetent counsel. Id.
900. Id. at 452-53.
901. Id. at 453.
902. Id.
903. Id. at 454.
905. Id. at 164-65.
Throughout these cases, the United States Supreme Court has indicated that federal collateral attack remedies should not be viewed as a substitute for direct review. The Court has stated that direct review is the "primary avenue for review" and when the "process of direct review . . . comes to an end, a presumption of finality and legality attaches to the conviction and sentence." Even the fact that the petitioner is faced with the death penalty does not create an exception to these rules. As the Frady Court stated, "We reaffirm the well-settled principle that to obtain collateral relief a prisoner must clear a significantly higher hurdle than would exist on direct appeal." In another case, the Court noted that "[c]ollateral review of a final judgment is not an endeavour to be undertaken lightly."

For example, in United States v. Timmreck, a petitioner argued in pursuit of a writ of habeas corpus that the trial court failed to explain to him the sanction he would receive after he entered his plea of guilty. While the Court intimated it would have afforded relief to the petitioner had he raised his claim on direct appeal, the Court refused to give the petitioner the remedy he desired because, among other considerations, "the concern with finality served by the limitation on collateral attack has special force with respect to convictions based on guilty pleas."

In an area related to collateral attack, the retroactive application of court decisions, it often has been held that the retroactive application should only extend to those cases which are pending on direct review. In Shea v. Louisiana, for example, the Supreme Court held that its decision in Edwards v. Arizona, which held that it is violative of the defendant's fifth and fourteenth amendment rights to initiate an interrogation of a defendant after he has invoked his Miranda protections, would be given retroactive application only in those cases pending on direct review. The Court cited finality concerns as the basis for its determination not to give the Edwards doctrine retroactive application to cases involving collateral claims.

907. Id.
908. Id.
912. Id. at 784 (citing McCarthy v. United States, 394 U.S. 459 (1969)).
913. Id.
917. 470 U.S. at 54-61.
918. Id. at 59-60. The Court reasoned as follows:

[It is said that drawing a distinction between a case pending on direct review}
Nowhere is it more clear as to how the Supreme Court distinguishes collateral attack claims from direct appeal claims than in *Stone v. Powell.* In that case, the Court removed from the reach of federal habeas corpus a state petitioner’s claims “that evidence obtained in an unconstitutional search or seizure was introduced at his trial” unless the petitioner could demonstrate that the state did not provide him with “an opportunity for full and fair litigation” of his fourth amendment claim. The Court reasoned that any “advance of the legitimate goal of furthering Fourth Amendment rights” through application of the judicially created exclusionary rule on federal habeas corpus was “outweighed by the acknowledged costs to other values vital to a rational system of criminal justice.”

Thus, in *Stone,* the interest of deterring the police from violations of citizen rights was outweighed by the consumption of scarce judicial resources and, among other things, the interest in finality in criminal proceedings. Although the Court has not extended *Stone* to contexts beyond the fourth amendment, it is certainly conceivable that it might do so in the future.

More importantly, the *Stone* doctrine could be employed in connection with, for example, all Post-Conviction Hearing Act claims where the petitioner was given a full and fair opportunity to litigate his constitutional claims at the trial and appellate levels.

It is important, however, to point out that the Supreme Court refuses to use the finality principle where the federal habeas corpus petitioner alleges that the evidence was insufficient as a matter of law to support a case on collateral attack produces inequities and injustices. The argument is that the litigant whose *Edwards* claim will not be considered because it is presented on collateral review will be just as unfairly treated as the direct-review litigant whose claim would be bypassed were *Edwards* not the law. The distinction, however, properly rests on considerations of finality in the judicial process. The one litigant already has taken his case through the primary system. The other has not. For the latter, the curtain of finality has not been drawn.

*Id.*

920. *Id.* at 494.
921. *Id.*
922. *Id.* at 492-95. However, in Kimmelman v. Morrison, 477 U.S. 365 (1986), the Court indicated that *Stone* would not apply where counsel was inept in raising the fourth amendment claim.


In Jackson v. Virginia, the state argued that federal consideration of a state petitioner's insufficiency claim would "deserve the societal interest in the finality of state criminal proceedings . . . ." The Court responded by pointing out that the constitutional lack of evidence issue is far different from a claim of an unconstitutional procedural irregularity, for insufficiency goes to the very heart of the basic question of guilt or innocence.

In any event, a presumption of finality should be introduced into Illinois collateral attack remedies. The various arguments offered in support of such a principle—scarcity of judicial resources, deterrence, rehabilitation of offenders, difficulty in retrying successful petitioners, and the like—could be borrowed from federal collateral attack case law. This presumption could then be rejected in contexts where it would be inappropriate, such as where the petitioner's claim involves the basic question of guilt or innocence. In other appropriate contexts, it would have to be clearly understood that this presumption could be rebutted where, for example, the procedural irregularity raised serious questions about the integrity of the fact-finding process. Thus, where a petitioner's defense was undercut by his counsel's ineptness in presenting the defense or where a petitioner was frustrated by the trial court's refusal to give him an ample opportunity to cross examine the state's witnesses, the collateral attack court could offer appropriate redress.

A fourth doctrine that the Illinois courts should develop in conjunction with collateral attack claims is a presumption of correct factual determinations. Like the presumption of finality, a presumption of factual correctness has been incorporated into the federal collateral attack doctrine. In actuality, this presumption of correct factual resolutions had its genesis

926. Id.
927. Id. at 321.
928. Id. at 323.

In addition to the utilization of the presumption of correctness in federal habeas corpus, the same principle is used in connection with federal coram nobis. See United States v. Stimac, 684 F. Supp. 545, 547 (N.D. Ill. 1988) (citing United States v. Morgan, 346 U.S. 302, 312 (1954)). Federal coram nobis relief is subject to the following limitations: 1) it is presumed that the proceedings were correct and the burden is on the petitioner to show otherwise; 2) the petitioner must show, but for the error, a more favorable judgment would have been rendered; 3) the petitioner must satisfy the "case or controversy" requirement of Article III; and, 4) relief should be granted only where such is compelled to "achieve justice" and only where "sound reasons" exist for failing to seek appropriate relief earlier. Id. (quoting Morgan, 346 U.S. at 511-12).
In a congressional enactment.\textsuperscript{930} In pertinent part, the statute provides that "a determination after a hearing on the merits of a factual issue, made by a state court of competent jurisdiction . . . evidenced by [an appropriate record] . . . shall be presumed to be correct . . . ."\textsuperscript{931} This presumption is then subject to certain exceptions, such as where the merits of the factual dispute were not resolved in state court, were not adequately developed in the state forum, or were not resolved in a fair forum.\textsuperscript{932} Finally, the petitioner bears the burden of demonstrating incorrect factual resolutions by "convincing evidence."\textsuperscript{933}

\textsuperscript{930} 28 U.S.C. § 2254(d) (1982):

(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the state court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

\textit{Id.}

931. 684 F. Supp. at 547.

932. \textit{Id.}

933. \textit{Id.}
This federal statute and its subsequent interpretations provide a useful frame of reference for development of such a principle in connection with Illinois collateral attacks. The United State Supreme Court has employed the presumption of factual correctness in a number of settings. These include a trial courts' determination that a prospective juror in a capital case was properly excluded for cause, that an individual juror was impartial, of the effect of an ex parte communication on impartiality of an individual juror, of a defendant's competence to stand trial, and that the defendant received and understood sufficient notice of charges against him to render his guilty plea voluntary and intelligent. In addition, the Court has ruled that this presumption applies not only to resolutions of fact by a trial court, but also to factual findings by an appellate court.

The presumption of factual correctness only applies to a determination of "historic facts" as opposed to issues of law or "a mixed determination of law and fact that requires the application of legal principles to the historic facts." Thus, where the petitioner alleged that his counsel had a conflict of interest in the simultaneous representation of three co-defendants, this was considered a mixed determination of fact and law that dictated the rejection of the presumption of correctness. Similarly, the Supreme Court has ruled that the question of whether a confession was voluntary is a question of law not susceptible to the presumption of correctness.

While the Court has conceded that the fact versus law distinction may be, "to say the least, elusive," the courts could deal with this issue on
a case-by-case basis by looking at various considerations, including how
the issue has been treated historically.\textsuperscript{945} Presumably, a subject matter
jurisdiction problem would be treated as a legal issue, in which case the
presumption of correctness would be inoperable in the state habeas corpus
forum. In addition, where newly discovered evidence of fraud, duress, or
perjury is presented in a state coram nobis context, it would be impossible
to invoke the presumption of factual correctness since the issue in question
has never been previously litigated. On the other hand, as the federal
habeas corpus case law discussed previously reflects, constitutional issues
raised under the Post-Conviction Hearing Act might, in some cases, involve
only factual disputes and may, in other situations, involve mixed deter-
minations of fact and law.

Of course, the collateral attack reviewing court would not only be
required to determine that a factual finding has occurred that was adverse
to the interests of the petitioner, it also would have to be alert to the ade-
quacy of the fact-finding process. If the fact-finding process was not
adequate to afford a full and fair hearing on the factual issue or the
material facts were not adequately developed in the forum in question,
then the presumption of factual correctness could not be utilized in the
collateral attack review of the claim in question.\textsuperscript{946}

In conclusion, there are several doctrines or principles that could be
invoked under the existing Illinois legislation that would inject some reason
and logic into the courts’ rulings. These concepts would not in any way
radically alter existing results, but rather, would make these results more
intellectually and legally palatable. First, the courts could emphasis that
collateral attack vehicles are equitable in nature and remedies are granted
in only those rare circumstances where relief is warranted. This position
would make it patently clear that collateral attack remedies are no substitute
for direct appeal. Second, the courts could insist that these remedies be
invoked only where a serious question about the accused’s factual guilt
exists, either because the evidence was insufficient to support a conviction
or because the process afforded the petitioner did not lend itself to appro-
 priate consideration of the petitioner’s claim of innocence. Third, the courts
could borrow from the federal courts a principle or presumption of finality
that would clarify that review of a criminal conviction normally ends, with
few exceptions, at the direct appeal stage. Finally, the courts could develop
a rebuttable presumption of correct resolution of facts at the trial and
appellate levels.

\textsuperscript{945} See id. at 113-18 (voluntariness of a confession historically has been treated as
comprising a question of law).

\textsuperscript{946} Ford v. Wainwright, 477 U.S. 399, 411-18 (1986) (state procedure for determining
sanity of death row prisoner scheduled for execution was inadequate and presumption of
correctness therefore not operable).
It might be said that the doctrinal weaknesses of Illinois case law are somewhat understandable given the almost unintelligible legislative directives in the state collateral relief statutes. The statutory sources of collateral attack relief currently are scattered throughout the Illinois code. State habeas corpus protections exist in the Illinois Code of Civil Procedure, the state coram nobis protections appear in a different part of the same code, and the Post-Conviction Hearing Act is found in the Code of Criminal Procedure. It makes little sense that the post-appeal remedies for criminal cases are entirely disconnected and not part of a comprehensive, unified legislative package.

In addition, two of the three enactments either are facially indecipherable or contain sections that, as applied in the case law, are quite useless or irrelevant. For example, although the state habeas corpus legislation lists seven grounds for relief, there are in actuality only two grounds for relief recognized in the case law. The coram nobis statute, on the other hand, is cast in such general terms that it appears facially meaningless. While the Post-Conviction Hearing Act cannot be criticized on these grounds, the scope of that enactment is unduly narrow in that it affords no relief for misdemeanants. The net effect of this latter legislative oversight resulted in the Illinois Supreme Court's creation of a fourth, common law collateral attack remedy designed to address a misdemeanant's claim of violation of a constitutional right. Moreover, each of these collateral attack vehicles contain certain procedural barriers which are not necessarily consistent with one another. The habeas corpus legislation contains no statute of limitation period during which a petition should be filed, the coram nobis proscriptions contain a two year statute of limitations, which is subject to certain exceptions, the Post-Conviction Hearing Act contains a ten year statute of limitations period, which is subject to no apparent exceptions, and the judicially created remedy for misdemeanants alleging constitutional errors involves a four month statute of limitations following a guilty plea and a six month period following a trial.

948. Id. at 2-1401 (1987).
950. See supra note 35.
951. See supra note 36 and accompanying text.
952. See supra note 273.
955. See supra note 186 and accompanying text.
956. See supra notes 380-85 and accompanying text.
957. See supra notes 702-11 and accompanying text.
958. See supra note 784 and accompanying text.
Habeas corpus contains a custody requirement that has been interpreted, in some cases, as actual confinement and, in other cases, as some type of restraint on the petitioner's liberty not suffered by the public at large.\textsuperscript{959} Coram nobis has no custody requirement.\textsuperscript{960} The Post-Conviction Hearing Act includes a custody requirement, but it has been interpreted as not requiring actual confinement.\textsuperscript{961} Meanwhile, the \textit{Warr} decision imposes no custody showing on misdemeanants who raise constitutional irregularities.\textsuperscript{962}

The habeas corpus petitioner never is entitled to appointed counsel,\textsuperscript{963} the coram nobis case law offers no directive on this issue, the Post-Conviction Hearing Act requires no counsel if the petition is frivolous, but does require counsel if it is not,\textsuperscript{964} and the \textit{Warr} decision provides that the petitioner is not entitled to appointed counsel if his petition is without merit.\textsuperscript{965} Such inconsistent approaches to procedural protections are not supported by principle or logic.

In contrast to the Illinois approach, the National Conference of Commissioners on Uniform State Laws promulgated a Uniform Post-Conviction Procedure Act in 1955,\textsuperscript{966} it was revised in 1966\textsuperscript{967} and again in 1980.\textsuperscript{968} The revision in 1980 was designed to accommodate recommendations reflected in the A.B.A. Standards.\textsuperscript{969} The avowed purpose of this legislative proposal, designed for state enactment, was “to bring together and consolidate into one simple statute all the [collateral] remedies.”\textsuperscript{970} The Uniform Post-Conviction Procedure Act of 1980\textsuperscript{971} states that a petitioner should be afforded relief where 1) his conviction or sentence was violative of the federal or state constitution,\textsuperscript{972} 2) the conviction occurred under an unconstitutional statute,\textsuperscript{973} 3) the trial court was without jurisdiction over the person or the subject matter,\textsuperscript{974} 4) the sentence was not authorized by law,\textsuperscript{975} 5) new evidence, previously not available, requires vacating the judgment,\textsuperscript{976} 6) a significant change in procedural or substantive law has

\textsuperscript{959} See supra notes 189-206 and accompanying text.
\textsuperscript{960} See supra note 377 and accompanying text.
\textsuperscript{961} See supra notes 769-79 and accompanying text.
\textsuperscript{962} See supra notes 780-84 and accompanying text.
\textsuperscript{963} See supra note 187 and accompanying text.
\textsuperscript{964} See supra notes 726-37 and accompanying text.
\textsuperscript{965} See supra note 784 and accompanying text.
\textsuperscript{967} See id. §§ 1-14, 11 U.L.A. 485-540.
\textsuperscript{969} See \textit{4 A.B.A. Standard for Criminal Justice} § 21-1.1 (2d ed. 1980).
\textsuperscript{971} Id. §§ 1-19, 232-41 (1988 Supp.).
\textsuperscript{972} Id. § 1(a)(1).
\textsuperscript{973} Id. § 1(a)(2).
\textsuperscript{974} Id. § 1(a)(3).
\textsuperscript{975} Id. § 1(a)(4).
\textsuperscript{976} Id. § 1(a)(5).
occurred and requires retroactive application,\footnote{Id. § 1(a)(6).} the sentence has expired, probation or parole or other conditional release was illegally revoked, or the petitioner is otherwise unlawfully confined,\footnote{Id. § 1(a)(7).} or, 8) the petitioner was entitled to relief under any ground provided in the previously existing collateral attack remedies that were available to the petitioner before the passage of the Act.\footnote{Id. § 1(a)(8).} The Act makes clear that proceedings provided by it shall not be considered a substitute for direct review.\footnote{Id. § 1(b).} The Act does not reflect a "custody" requirement,\footnote{Id. Comment, 11 U.L.A. 233.} no statute of limitations period is imposed,\footnote{Id. § 3.} and appointment of counsel is guaranteed.\footnote{Id. § 5.} The Act outlines the required contents of the petition for collateral relief\footnote{Id. § 4.} and the requirements for a timely response from the state.\footnote{Id. § 5.} It provides for amended pleadings,\footnote{Id. § 6 (30 days).} discovery,\footnote{Id. § 7.} summary disposition on the pleadings of record if there exists "no genuine issue as to any material fact and [either] moving party is entitled to a judgment as a matter of law,"\footnote{Id. § 8.} an evidentiary hearing where necessary,\footnote{Id. § 9(a).} and explicit findings by the petitioned court.\footnote{Id. § 10.} The Act states that an application for collateral relief may be rejected where the claim or claims in question were "fully and finally" adjudicated in a prior proceeding.\footnote{Id. § 11.} The petitioned court also can deny relief where there exists a "misuse of process."\footnote{Id. § 12(a).} Misuse of process arises where the petitioner 1) "inexcusably failed" to raise the claim at the trial level or "in a previous post-conviction proceeding,"\footnote{Id. § 12(b).} or, 2) presents a frivolous claim.\footnote{Id. § 12(b)(1).} Res judicata or misuse of process is an affirmative defense which the state has the burden of demonstrating.\footnote{Id. § 12(b)(2).} However, where the petitioner has failed to raise a defense or objection at a specified stage of a criminal prosecution as required by a statute or rule, he must "show good cause for non-compliance with the statute or rule."\footnote{Id. § 12(c).} The final judgment of the petitioned court is subject to appeal.\footnote{Id. § 14.}
This Uniform Post-Conviction Procedure Act of 1980998 and the federal habeas corpus legislation999 provide useful guidelines in the creation of a comprehensive post-conviction collateral attack enactment in Illinois. Accordingly, this Article will conclude by setting forth a suggested statutory scheme for Illinois, using both of these collateral attack schemes as models. However, because the Illinois case law provides, in certain instances, protections and procedures somewhat different than the Uniform Act and federal habeas corpus, this proposed statute will be modified to more closely track existing Illinois collateral attack law. Like the Uniform Act, it will incorporate all collateral attack remedies under a single legislative umbrella. Like federal habeas corpus, it will include a statutory presumption of correct factual resolutions and a presumption of finality. Consistent with the recommendations previously suggested for adoption into the case law, these remedies will be deemed "extraordinary" and normally will be available only where the alleged error would have altered the outcome of the earlier proceeding. The proposed enactment might appear in the Illinois Code as follows.

VI. ILLINOIS POST-CONVICTION COLLATERAL RELIEF ACT

§ 1 [SHORT TITLE]

THIS ACT SHALL BE KNOWN AND MAY BE CITED AS THE ILLINOIS POST-CONVICTION COLLATERAL RELIEF ACT.

Commentary

This enactment is given a title that clearly indicates that it relates to collateral attacks rather than to direct appeals. The title, Post-Conviction Hearing Act, previously existing in Illinois, was rejected because this Act, like the prior Post-Conviction Hearing Act, does not invariably require a hearing. Also a "Post-Conviction Act," without further clarification, would suggest that it considers all post-conviction matters, such as post-trial motions and direct appeals.

§ 2 [LEGISLATIVE PURPOSE]

THE PURPOSE OF THIS ACT IS TO CREATE AN EXTRAORDINARY REMEDY AVAILABLE TO ONLY THOSE POST-CONVICTION PETITIONERS WHO CAN DEMONSTRATE THAT A SUBSTANTIAL ERROR OCCURRED DURING EITHER THE TRIAL OR DIRECT APPEAL STAGE, WHICH ERROR IN ALL LIKELIHOOD ALTERED THE OUTCOME OF THE PROCEEDING. ALL JUDGMENTS OF CONVICTION THAT HAVE BEEN AFFIRMED ON APPEAL OR THAT HAVE NOT BEEN APPEALED ARE PRESUMED FINAL AND THE PETITIONER BEARS THE BURDEN OF DEMONSTRATING TO THE PETITIONED COURT THE NECESSITY THAT THE PRESUMPTION OF FINALITY SHALL NOT BE OPERATIVE BECAUSE OF THE SUBSTANTIAL ERROR OR ERRORS IN QUEST-
tion. The relief afforded under this Act shall not be deemed a substitute for direct appeal.

Commentary

It should be clearly understood that this Act provides only extraordinary relief consistent with principles of equity. Accordingly, the petitioner is required to show that the alleged error was "substantial," consistent with the prior Post-Conviction Hearing Act. An error is substantial only if it in all probability would have altered the outcome of the proceeding. Consistent with federal habeas corpus, all convictions are presumed to be final beyond the direct appeal stage. Finally, this Act explicitly states that the redress offered under it Act is not viewed as a substitute for taking an appeal. This section rather stridently projects the notion that a petitioner under this Act has a significant hurdle to overcome before he will gain a redress of his grievances. At a very minimum, he will have to demonstrate that he was actually prejudiced when the court imposed judgment and sentence. In other words, factual innocence will be the keystone of successful claims under this Act.

§ 3 [Remedy—To Whom Available—Conditions]

Any person who has been convicted and sentenced for having committed a crime may institute a proceeding for relief under this Act upon the following grounds:

(A) The conviction was obtained or the sentence was imposed in circumstances where there was a substantial violation of either the Constitution of the United States or the State of Illinois;
(B) The conviction or sentence was imposed under a statute that was unconstitutional under either the Constitution of the United States or the State of Illinois;
(C) The court that rendered the judgment of conviction and sentence was without jurisdiction over the person of the petitioner or the subject matter;
(D) The sentence imposed was not authorized by law;
(E) Evidence exists, not previously presented and heard, requiring vacation of the conviction or sentence because the evidence in all likelihood would have altered the judgment or sentence had it been available earlier;
(F) A significant change in substantive or procedural law has occurred which, in the interest of justice, should be applied retroactively;
(G) The sentence has expired, or the probation, mandatory supervised release, or other conditional release was unlawfully revoked, or the applicant is otherwise unlawfully in custody or restrained; or,
(H) The conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error available to the petitioner before the effective date of this Act.

Commentary

The relief afforded under this Act is available to any person convicted of a state offense. There exists no custody requirement for persons wrongly convicted of a crime punishable by some non-penal sanction or those who
have already served their sentence of incarceration, as these groups also should enjoy the right to collaterally attack their erroneous convictions. Subsection (a), like the prior Post-Conviction Hearing Act, takes into account only substantial constitutional violations. The implication of this term is that a petitioner has no right to a judgment entirely free of constitutional error. Rather, the constitutional error must have actually prejudiced the outcome of the trial, sentence, or appeal.

Subsection (b) provides for relief from those convictions or sentences that are based on constitutionally faulty laws. Principles of equity and fairness require no less. The “subsequent occurrences” case law under the prior state habeas corpus enactment offered parallel relief.

Subsection (c) addresses those jurisdictional concerns previously addressed under state habeas corpus. However, the arcane principle that relief was available only to those entitled to immediate release, which was central to the prior state habeas corpus case law, is rejected.

Subsection (d) can be used to challenge any erroneous, unauthorized sentence. These problems previously were addressed under the jurisdictional theory of state habeas corpus. No distinction, however, remains between erroneous sentences and void sentences, for both are deserving of condemnation.

Subsection (e) focuses on newly discovered evidence that supports the petitioner's claim of innocence or excessive sentence. These claims previously were addressed under state coram nobis. Thus, evidence of fraud, duress, state witness perjury, and the petitioner's unfitness to stand trial would continue to provide a basis for relief. This evidence would have to be sufficient enough to alter the outcome of the proceeding had it been available earlier. In other words, the petitioner will be required to show that the unavailability of the evidence in question actually prejudiced his case. Thus, where the evidence in question was merely cumulative, it would not form a basis for relief under this Act.

Subsection (f) provides claimants with the benefits of retroactive application of new substantive or procedural protections. Similar relief was provided state habeas corpus petitioners under the “subsequent occurrences” rationale.

Subsection (g) essentially addresses three problems. First, where the sentence has expired, relief is afforded. Under habeas corpus, the incorporation of this ground of relief was accomplished under the subsequent occurrence rationale; it is presently incorporated in this statute. Second, this Act provides relief from the erroneous revocation of probation, supervision, mandatory supervised release, and the like. Here, relief was not previously afforded to claimants under state habeas corpus. While this might have been deemed an illegal subsequent occurrence, it was not an occurrence that would entitle the petitioner to immediate, unconditional release. Because collateral relief under this Act no longer is subject to an unconditional release requirement, such a claim of error is now cognizable. Moreover, since due process now requires the state to prove the existence
of a violation of the conditions of release in a fair hearing before either probation or parole are revoked, it could be argued that the sentence imposed after an illegal revocation was at odds with the federal constitution. The third part of subsection (g) provides a useful catch-all. For example, if a petitioner were restrained by the police without the usual judicial reviews of the detention, this section would operate similar to common law habeas corpus. So too, to the extent a delay in execution of a sentence previously remained a viable approach to arguing that a subsequent occurrence had occurred justifying state habeas corpus relief, this language contemplates that possibility as well.

Subsection (h) addresses those transitional problems that occur with any new enactment. Thus, to the extent there previously existed avenues of collateral relief not contemplated by this Act, those bases of relief are not eliminated as to those petitioners who enjoyed such grounds for relief before the passage of this enactment, but had not yet pursued their remedies.

§ 4 [Commencement of Proceedings]

(A) A PROCEEDING IS COMMENCED BY FILING A PETITION WITH THE CLERK OF THE COURT IN WHICH THE CONVICTION AND SENTENCE TOOK PLACE. THE STATE MUST BE NAMED AS RESPONDENT.

(B) A PETITION MUST BE FILED WITHIN TEN YEARS OF THE ENTERING OF JUDGMENT OF CONVICTION UNLESS:

(i) THE CLAIM INVOLVES THE ABSENCE OF JURISDICTION OVER THE SUBJECT MATTER OR PERSON OF THE PETITIONER, IN WHICH CASE THE CLAIM CAN BE RAISED AT ANY TIME; OR,

(ii) THE BASIS OF THE CLAIM WAS NOT PREVIOUSLY AVAILABLE TO THE PETITIONER, IN WHICH CASE THE CLAIM CAN BE RAISED WITHIN TEN YEARS OF THE TIME THAT THE BASIS OF THE CLAIM BECAME AVAILABLE TO THE PETITIONER.

(C) IF THE PETITION IS FILED BEFORE THE TIME FOR DIRECT APPEAL FROM THE JUDGMENT OR SENTENCE HAS EXPIRED, THE COURT MAY DEFER FURTHER ACTION ON THE PETITION UNTIL THE DIRECT APPEAL PROCESS HAS BECOME FINAL OR THE TIME FOR APPEAL HAS EXPIRED.

(D) THE PETITION MAY BE CONSIDERED BY ANY JUDGE OF THE COURT IN WHICH THE CONVICTION TOOK PLACE.

Commentary

Subsection (a) follows the normal collateral review process of initiating review in the court of original jurisdiction where the judgment of conviction and sentence occurred.

Subsection (b) sets out a statute of limitations period that roughly parallels the previously existing collateral review enactments. The ten year period previously used in connection with the Post-Conviction Hearing Act provides the normal rule of thumb for constitutional claims raised under sections 3(a) and 3(b). However, the jurisdictional problems contemplated by sections 3(c) and 3(d) previously have been exempt from statute of limitations concerns and remain so here. In addition, the statute should not commence to run in connection with those claims that involve developments or irregularities that might not occur until the normal statute of
limitations period has expired. These would include newly discovered evidence claims raised under section 3(e), significant changes in the law addressed by section 3(f), and expiration of sentence or revocation of conditional release reviewable under section 3(g). A section 3(g) claim that the petitioner is "otherwise unlawfully in custody" is best viewed as a jurisdictional problem over the petitioner's person and, hence, not subject to a statute of limitations period. Finally, a section 3(h) claim is to be governed by the earlier enactments. Subsection (4)(c) normally would allow the direct appeal process, if yet available, to run its course before collateral review would occur. Here, the usual principles of equity would not permit invocation of the extraordinary collateral remedies where an adequate legal remedy, namely direct appeal, remains an option.

Subsection (4)(d) is consistent with prior case law that found unconstitutional an earlier legislative mandate that a judge, other than the original trial judge, handle the petition. Thus, assignment of this matter would be handled in the same fashion as other assignments of civil and criminal cases to circuit court judges.

§ 5 [Contents of Petition, Service, Responsive Pleadings, Amended and Supplemental Pleadings, Discovery, Summary Disposition, Counsel, Hearing, Findings, Orders, Appeal]

(A) Except as otherwise provided for herein, the rules regarding contents of the petition, service, responsive pleadings, amended and supplemental pleadings, discovery, summary disposition, hearing, findings, orders, and appeals from said orders, shall be in accordance with Chapter 110 of the Code of Civil Procedure.

(B) A petition for relief under this Act containing a claim so lacking in factual support or legal basis as to be frivolous, may be dismissed without further review and without affording the petitioner appointed counsel. An allegation that the claim is frivolous is an affirmative defense to be pled by the state. A petition that is not frivolous may not be dismissed without further review, nor without providing the petitioner, if indigent, with appointed counsel.

(c) A petition for relief under this Act may be denied on the ground that the same claim or claims were fully and finally determined in a previous proceeding. Res judicata is an affirmative defense to be pled by the state.

(d) A petition for relief under this Act may be denied where the petitioner presents a claim which he inexcusably failed to raise either in a proceeding leading to judgment of conviction and sentence, or on direct appeal, or in a previous proceeding under this Act. Waiver is an affirmative defense to be pled by the state.

Commentary

Rather than develop a separate procedural mechanism for reviewing collateral claims, subsection (a) simply requires that these civil collateral claims be reviewed in accordance with the already existing Code of Civil Procedure. Subsection (b) unequivocally provides, in accordance with prior collateral attack case law, that frivolous claims may be summarily dismissed without counsel. However, non-frivolous claims obviously cannot be sum-
marily rejected and, more importantly, the right to counsel should attach at that point.

Subsections (c) and (d) present the doctrines of res judicata and waiver respectively. These doctrines reinforce the principle of finality that is central to this enactment. However, because the trial court normally assesses the merits of a petitioner's claim before invoking either res judicata or waiver, it would seem that the petitioner needs the guiding hand of counsel in this type of inquiry and during any further hearings on his petition.

§ 6 [Presumption of Correct Resolution of Factual Issues]
(A) In a proceeding initiated by a petition under this Act, a determination after a judicial hearing on the merits of a factual dispute evidenced by a written finding, order or opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the petitioner shall establish, or the respondent shall admit, or it shall otherwise appear that:
(i) the merits of the factual dispute were not resolved in the earlier hearing;
(ii) the fact finding procedure employed in the hearing was not adequate to afford a full, fair and adequate resolution of the factual dispute; or,
(iii) the material facts were not adequately developed at the hearing.
(b) The petitioner bears the burden of demonstrating by a preponderance of evidence that the record as a whole does not fairly support the factual determination of the earlier hearing.
(c) This section applies only to issues of fact and the presumption of correct resolution of factual issues has no operative effect as to questions of law or mixed determinations of law and fact.

Commentary
Following the lead of federal habeas corpus legislation, this section of the Act introduces into Illinois collateral attack proceedings a presumption of the correct resolution of factual disputes in earlier hearings. While the doctrine of res judicata points in the same direction, this section reinforces the notion that collateral review forums need not continuously relitigate factual disputes and will, in its own way, inject a degree of finality into the post-conviction review process.