From: **Alphonse Talarico** contact@lawofficeofalphonsetalarico.com
Subject:
Date: January 4, 2024 at 9:05 AM
To: Paul Dulberg Paul_Dulberg@comcast.net, Paul Dulberg pdulberg@icloud.com, T Kost tkost999@gmail.com

AT

Westlaw Edge -
2 full t...s 1.zip

2013 WL 2394936 (Ill.) (Appellate Petition, Motion and Filing)
Supreme Court of Illinois.

PEOPLE OF THE STATE OF ILLINOIS, Respondent-Appellee,
v.
Anthony ENGLISH, Petitioner-Appellant.

No. 115421.
January 3, 2013.

Petition for Leave to Appeal from the Appellate Court of Illinois, First District, No. 10-2732
There heard on Appeal from the Circuit Court of Cook County, Illinois, No. 96 CR 11509
Honorable James B. Linn, Judge Presiding.

Petition for Leave to Appeal

Michael J. Pelletier, State Appellate Defender.

Alan D. Goldberg, Deputy Defender.

Robert Hirschhorn, Assistant Appellate Defender, Office of the State Appellate Defender, First Judicial District, 203 N. LaSalle, 24th Floor, Chicago, IL 60601, (312) 814-5472, lstdistricteserve@osad.state.il.us, Counsel for Petitioner-Appellant.

***1PRAYER FOR LEAVE TO APPEAL**

Anthony English, petitioner-appellant, hereby petitions this Court for leave to **appeal**, pursuant to **SupremeCourt** Rules 315 and 612, from the judg-ment of the Appellate Court, August 22, 2012, affirming his conviction for first degree murder and his sentence of 40 years imprisonment.

PROCEEDINGS BELOW

The Appellate Court affirmed Anthony English's conviction on August 22, 2012. Mr. English filed a petition for rehearing on August 31, 2012. The Appel-late Court denied the Petition for Rehearing on November 30, 2012. A copy of the Appellate Court's judgment and order denying petition for rehearing are appended to this petition.

***2COMPELLING REASONS FOR GRANTING REVIEW**

Of all the pernicious evils birthed by Jon Burge's midnight crew, the most lasting may be how his legacy has distorted the law, not merely forcing those who claim to have been the direct victims of that misconduct - people such as petitioner Anthony English - through lengthy processes to vindicate their rights but also causing Illinois courts through contortions to balance the search for justice with notions of finality in criminal prosecutions. This case is yet another exemplar. Anthony English filed a post-conviction challenge alleging that he was framed for murder owing the misconduct of Detective McWeeny, who effec-tively manufactured evidence convicting him of not one, but two murders. He was denied the opportunity to litigate that claim by the Circuit Court, a result affirmed by the Appellate Court.

In order to sustain his conviction against his challenge, the Appellate Court was forced to ignore a host of precedents:

Your Honors held, in *People v. Edwards,* 2012 IL 111711, that post-con-viction claims of actual innocence, raised in successive petitions, should be initially assessed to determine if they make a "colorable claim" of inno-cence, in which case the petition should be allowed to proceed.[1] Rather than apply this precedent, the Appellate Court applied its own, older an-alysis, gleaned from *People v. Collier,* 387 Ill.App.3d 630 (1st Dist. 2008), essentially using a cause-and-prejudice analysis that was rejected for such claims in Edwards;

***3** nor was this the only departure from this Court's recent pronouncements in contrast with Your Honors' willingness to allow an accused to litigate such claims in successive petitions in *People v. Wrice,* 2012 IL 111860, the Appellate Court here allowed an earlier filing to establish a procedural bar to such claims.

These two disharmonies, individually and collectively, warrant this Court's intervention.

But most disturbing is the underlying injustice of the result here. Your Honors have always abhorred the concept of guilt-by-association, calling it a "thoroughly discredited doctrine." *People v. Perez,* 189 Il1.2d 254, 266 (2000). This same logic has animated Your Honors' precedents barring the use of other crimes evidence. *People v. Lindgren,* 79 I11.2d 129, 137 (1980) ("[s]uch evidence over-persuades the jury, which might convict the defendant only because it feels he or she is a bad person deserving punishment.") Both bodies of case-law are predicated on the same underlying notion: an accused is entitled to have his case determined based upon proof that he was guilty of the charged offense, not be-cause he is guilty of something. Here, in granting the State's motion to dismiss the Circuit Court reasoned that because petitioner's allegations of police miscon-duct had been insufficient to warrant a new trial in a different murder case - a decision made after an evidentiary hearing - he did not even merit an eviden-tiary hearing in this case. The Appellate Court's decision effectively approved that analysis. Thus, Anthony English has been denied an evidentiary hearing based, not because there was such overwhelming evidence of guilt adduced in this case as to negate his allegations of police misconduct, but because evidence ***4** adduced in another case overcame such allegations. In essence, the denial of a new trial in one case was deemed dispositive in all cases. That is not, and cannot be, the law. This Court's review is mandated accordingly.

STATEMENT OF FACTS

Procedural Summary: Anthony English was charged by indictment with murder, arising from the December 27, 1995 shooting death of Bertram Scarver. (CLR.8-9). After a bench trial, he was sentenced to a 40-year term. (CLR.10, 12). Following an appellate affirmance (CLR.15), he filed a pro se post-convic-tion petition. (CLR.47). It was summarily dismissed (CLR.45), but the Appellate Court remanded the case for stage-two proceedings. (SC.23). In 2005, the Cir-cuit Court granted the State's dismissal request (R.CC4-5), and the Appellate Court affirmed in 2007. (PC. 13). On May 4, 2010, English initiated the instant proceedings with a new post-conviction petition (PC. 13), which was summarily dismissed. (PC.46, PR.J3-4). The Appellate Court thereafter affirmed.

The Underlying Proceedings: Prior to trial, English sought to quash his arrest and suppress its fruits. Although not included in the record on appeal, the thrust of the motion was summarized by defense counsel in his argument, where he stated "Judge, you've heard the evidence. This becomes a question of credibility. My client told you at the time he was arrested there was no war-rant, that he was merely in the apartment of Shirley Henderson, and I would submit that the State has not made a case that they've got any probable cause to effect the arrest at the time." (R2.C4). The arresting officer also admitted the lack of a warrant. (R2.A35). The motion rested on a lack of probable cause.

***5** English testified at the hearing (R2.A4-10), stating that the police never showed him a warrant and did not have consent to enter the residence. Detective McWeeny testified for the State, asserting that English had been identified as the shooter by Jerry Lawrence on April 6, 1996 (R2.A18), days before the ar-rest was made. Though this would have permitted the issuance of a warrant, none was obtained or even sought; instead, all McWeeny did was issue a "stop order" for English. (R2. A18). McWeeny also indicated that English had been identified by Josh Cole on April 10, 1996 (R2.A19), also before the arrest. The police had Cole lead them to an apartment where English was allegedly to be found, and he was found and arrested. (R2.A21-24). Defense counsel sought, and obtained, a continuance to obtain the testimony of other occupants of the apartment to repudiate the officer's testimony of consent (R2.A36-38), but he apparently served someone else, and was unable to present that testimony. (R2. C3). The Circuit Court then found that there was probable cause for the arrest, and accordingly denied the motion. (R2.C6).

The case then proceeded to trial. The evidence at trial was contested; the State's key witnesses, Jerry Lawrence, Josh Cole, and Dwight Sanders, all of whom had implicated English earlier, failed to do so at trial, and the State was forced to substantive adduce their prior testimony to the grand jury, and conversations the had with both the police and prosecutors, to contradict that trial testimony. In the direct appeal, the Appellate Court summarized the problem this way: "[a]t trial, the State was confronted with a number of prosecution witnesses who disavowed or partially contradicted earlier statements and testimony in which they incriminated defendant in the shooting." (CLR.15).

***6** The specific details of their testimony at trial and earlier is not directly relevant to the issues in this appeal; it suffices to say that their trial testimony would not have convicted English, but their earlier testimony succeeded in doing so, as the Appellate Court found: "a reasonable trier of fact could have found the prior inconsistent statements of Lawrence, Sanders and Cole, admitted as substantive evidence, to be accurate and credible. Having done so, and considering all of the evidence presented, a reasonable trier of fact could also have found there was sufficient evidence to find defendant guilty..." (CLR.36). The Circuit Court found English guilty (CLR.10), and sentenced him to 40 years. (CLR.12).

On direct appeal English, again represented by the Public Defender, raised only one issue: whether the evidence was sufficient to convict him given the contradictions between the trial and pre-trial testimonies. As indicated by the above-quoted passage, the Appellate Court affirmed the conviction. (CLR.36).

The Initial Post-Conviction Proceedin's: On April 11, 2000, English filed his initial post-conviction petition. (CLR.48). It consisted of two parts: a lengthy recitation of the trial record (CLR.46-68), and then a multiple-part claim for relief. (CLR.68-77). In section 9(a) of the petition, English contended that his appointed appellate counsel on direct appeal was ineffective in failing to raise is which he wished, and in fact directly instructed appellate counsel to raise. In context, there were two issues he maintained should have been raised: first, the issue of whether his warrantless arrest, made in the private residence of a friend, was unconstitutional; and second, whether trial counsel was ineffective in his representation of English on the motion to quash. (CLR.68-69). This por of the petition was supported by his affidavit, and correspondence between ***7** English and his appellate attorney. (CLR. 78-81). In section 9(b) of the petition, he challenged trial counsel's competence in several ways. First was an attack on preparation: he maintained he and his family had mustered a number of witnesses to the murder who would have exonerated him and who would have testified that the actual shooter was hooded (CLR.70); one witness was identified by name, Sidney Grissom. (CLR.73). As to all these witnesses, he claimed his trial counsel had turned a deaf ear, either refusing to meet with them and interview them, or cancelling arranged interviews. Next, he assailed counsel's preparation in that he failed to interview or adequately prepare for cross-examination of the State's witnesses. (CLR.70-72). Finally, he asserted that he waived a jury be-cause trial counsel incorrectly advised him that by doing so he would avoid the death penalty. (CLR.72). The latter point was supported by two affidavits. (CLR.78, 83). In section 9(c) of the petition, English claimed that his Fourth Amendment rights had been violated by his warrantless arrest while staying overnight in the home of a friend. The thrust of this claim was that the arrest, though supported by probable cause, was unconstitutional as the police had no warrant to enter the home, and had improperly delayed obtaining the requisite warrant. (CLR. 73-76). The Circuit Court summarily dismissed the petition, finding that he was "well-represented, and a jury found him guilty." (R3. 3-4).

On appeal, the Appellate Court issued two Rule 23 decisions. The first, issued on September 30, 2002, reviewed each of the claims, and found that only the one pertaining to the waiver of a jury stated the gist of a claim. (SC2.2-6). Following rehearing, the Appellate Court withdrew the decision, and issued a new Rule 23 Order. (SC.23). This decision noted that, although only the jury ***8** waiver claim stated the gist of a claim, all his claims would advance on remand, holding that "since this [jury waiver] claim survives summary dismissal and advances to stage two proceedings... neither defendant nor his appointed attorney is barred from reasserting the other constitutional claims in defendant's pro se petition with proper support." (SC.25).

The Post-Conviction Proceedings On Remand: Following that reversal, the petition was docketed (R.Q3), and at all times thereafter, the initial petition in this case was heard in the Circuit Court alongside a petition filed by English in a second case. On May 9, 2005, appointed counsel filed a supplemental petition to "augment" the existing pro se petition. (C.79). The matter appeared before the Circuit Court the following day, and the prosecutor, without objection by appointed counsel, informed the Circuit Court that the only meritorious claim surviving the prior appeal was the jury waiver claim. (R.Y3).

On May 26, 2005, the State filed its Motion to Dismiss Petitioner's Origi-nal and Supplemental Petitions (C.84), explicitly incorporating its earlier motion to dismiss. (C.88). In that motion, the State urged that "the only issue" raised in the pro se petition which was found to state a claim by this Court was the jury waiver claim, and that this was accordingly "the sole basis" for the stage two proceedings this Court ordered. (C.85). In addition to asserting an untimeliness defense, the State asserted that the jury waiver claim was "ridiculous" as it was "highly unlikely" that trial counsel would "make such a ridiculous statement." (C.85-86). That claim, however, was not supported by any affidavit from trial counsel. The Circuit Court opted to put matters over, to allow appointed counsel to consult with trial counsel. (R.Z6-9). When the matter

reconvened on June 30, ***9** 2005, both sides indicated they had spoken to trial counsel. (R.AA3, 5). The par-ties then argued the petition in the other case (R.AA4-7); as to the charge sub judice, the State merely indicated that the issue was whether he had properly waived a jury to avoid the death penalty. (R.AA7). The Circuit Court took both cases under advisement. (R.AA8). On the last court date, July 7, 2005, the State again represented that the sole issue in the case at bar was the jury waiver. (R. CC3). The Circuit Court then ruled:

"The Court has considered the filings and I find that the post-conviction hearing petitions are on both ends without merit and not requiring an evidentiary hearing, so post-conviction peti-tions are denied." (R.CC5).

English again appealed (C.123), claiming that he had been denied the reason-able assistance of appointed counsel owing to a number of specified failures. The Appellate Court affirmed the dismissal in 2007. (PC.13).

The Instant Post-Conviction Proceedings: In May, 2010, English re-init-iated post-conviction proceedings with a new filing. That petition was stamped "received" on May 3, 2010, stamped "filed" the following day (May 4, 2010) (PC. 13), and assigned to Judge Linn for a hearing to be held on May 11, 2010 (PC. 11). It was summarily dismissed by Judge Linn on August 10, 2010 (PC.46; PR. J3-4), 92 days after the hearing date and 99 days after the petition was filed.

In his petition, English divided his post-conviction claims into several components: (a) he noted that his was a claim of actual innocence, and thus was outside the scope of limitations periods created by the Act (PC.14); (b) he claim-ed that he was deprived of the right to a fair trial, as guaranteed by the due pro-cess clause, owing to the use of torture by Detective McWeeny, a member of Jon Burge's "midnight crew" who used such tactics to manufacture evidence and ob- ***10** tain false statements, also noting that the State's witnesses had recanted their accusations at his trial, and adding as substantiation newly discovered evidence documenting the use of such tactics that had emerged since his conviction (PC. 15-18); (c) next, he expanded his claim that the evidence against him was ob-tained through torture with a claim that the State's usage here amounted to the knowing use of perjury to obtain a conviction (PC. 19-25), in which he recounted the substance of various witnesses' inculpatory pre-trial statements, and their exculpatory trial recantations, and also provided the affidavit of an individual who was with English when the shots were fired and exonerated him (PC.37); and (d) he asked for an evidentiary hearing to allow all the evidence to be pro-perly weighed and balanced in light of all the new details that have emerged both as to this case, and as to the conduct of Burge and his cronies generally. (PC.26-32).

On August 10, 2010, the petition was summarily dismissed. The Circuit Court noted that this is one of two murder prosecutions against English, that other case number was 96 CR 11508, and that in the other case in which he also filed a petition on the same or similar grounds. (PR. J3). In dismissing the peti-tion, the Circuit Court explained its reasoning as follows:

"found not to be credible. It's basically the same allegations on this case as it was on he other case where an evidentiary hear-ing has already been held. I'll incorporate by reference the eviden-tiary hearing on the other case, 96-11508. That hearing was con-ducted February 25th, April 16th, and May 19th of 2009. I find ac-cordingly that this pro se Post-Conviction Petition is without merit and is denied." (R.J3-4).

English again appealed. (PC.49).

***11** On appeal, English maintained that (a) as his claim was one of actual innocence, he was not required to obtain leave of court under *People v. Ortiz,* 235 I11.2d 319 (2009); (b) the summary dismissal was statutorily unauthorized, as more than 90 days had expired since the petition was filed; and (c) the Circuit Court's expressed rationale was demonstrably faulty, as a failed challenge to a different conviction could not bar litigation of a claim of actual innocence in this case. The Appellate Court rejected all his claims and affirmed.

ARGUMENT

I. This Court Should Grant Review, As The Appellate Court's Deci-sion Operates Under A Misapprehension Of Law As To The Con-trolling To Be Applied In Assessing Whether To Grant Leave To File A Successive Petition Alleging

Actual Innocence.

In the Circuit Court, English never asked for, nor was he granted, leave to file his successive petition; instead, the Circuit Court simply summarily dis-missed the petition. In doing so, the Circuit Court noted that this is one of two murder prosecutions against English, that other case number was 96 CR 11508, and that in the other case he also filed a post-conviction challenge along similar lines. (PR.J3). In dismissing the petition, the Circuit Court cited its assessment of these witnesses in the companion case and explained its reasoning as follows:
"[in that hearing those witnesses were] found not to be credi-ble. It's basically the same allegations on this case as it was on he other case where an evidentiary hearing has already been held. I'll incorporate by reference the evidentiary hearing on the other case, 96-11508. That hearing was conducted February 25th, April 16th, and May 19th of 2009. I find accordingly that this pro se Post-Con-viction Petition is without merit and is denied." (R.J3-4).

English maintained in the Appellate Court that the petition should be accord-ingly deemed to have been dismissed at stage one, a result that was statutorily ***12** untimely and therefore unauthorized, and thus reversible error. The Appellate Court disagreed, stating:
"We find the trial court's denial to be a denial of defendant's implicit request for leave to file his successive postconviction pe-tition because the petition failed to meet the actual innocence ex-ception under section 122-1(f) (725 ILCS 5/122-1(1) (West 2012)), not a summary dismissal as defendant contends. Accordingly, de-fendant's successive postconviction petition never reached first-stage consideration by the trial court. The time restrictions of sec-tion 122-2.1(a), which require the trial court to independently re-view the post-conviction petition within 90 days of its filing to de-termine whether 'the petition is frivolous or [ ] patently without merit,' ((725 ILCS 5/122-2.1(a)(2) (West 2012)), do not apply here *See People v. LaPointe,* 227 Ill.2d 39, 43 (2007) (the court rejected the defendant's argument that the trial court had to docket his suc-cessive postconviction petition because it failed to dismiss it within 90 days, noting 'the Act treats successive petitions differently than initial petitions')." *People v. English,* 2012 IL App (1st) 102732-U, ¶37.

The Appellate Court proceeded to analyze the question of whether this implied denial of leave to file was error, an analysis that, necessarily, presumed that the petition was never formally filed and adjudicated on its merits.

That Court first rejected the State's claims that English had forfeited his claim of actual innocence, and but nonetheless held that he had failed to meet the "cause-and-prejudice" test of *People v. Pitsonbarger,* 205 111.2d 444 (2002) (later codified as § 122-1(f) of the Post Conviction Hearing Act. 725 ILCS 5/122-1(f) ("the PCHA"). *English,* 2012 IL App (1st) 102732-U, 142. The Appellate Court explained its reasoning, and its understanding of the applicable test, this way:
"To obtain relief under a theory of actual innocence based on 'newly discovered' evidence, the defendant must offer evidence that was not available at his original trial and that he could not have discovered sooner through diligence. *Morgan,* 212 I11.2d at 154. To be considered, the evidence must be material, noncumulative, and of such a conclusive nature, that it would probably change the re-sult upon a retrial. *People v. Washington,* 171 111.2d 475, 489 (1996)." *English,* 2012 IL App (1st) 102732-U, ¶43.

***13** This approach may have been valid under some of that Court's precedents, such as *People v. Collier,* 387 Ill.App.3d 630 (1st Dist. 2008), which the Court cited in applying the above-quoted standard. *English,* 2012 IL App (1st) 102732-U, 147. That reliance, however, was wholly misplaced, as not only are Collier and its ilk factually inapposite, their legal bases have been supplanted by this Court's more recent decision in *People v. Edwards,* 2012 IL 111711, decided after briefing in this case was completed.

To begin, even though Collier involved a fourth collateral attack on a criminal conviction, by its express terms the Collier Court did not analyze the question of whether the Circuit Court had properly granted or denied leave to file a successive post-conviction petition. In that case, the accused filed a petition for relief under §2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401), which the Circuit Court recharacterized as a post-conviction petition and summarily dismissed. *Collier,* 387 Ill.App.3d 630, 632. Collier appealed, and applying the logic of *People v. Shellstrom,* 216 Ill.2d 45

(2005), the Court vacated that order and remanded the case for proper admonitions as required by Shellstrom. *Collier,* 387 Ill.App.3d 630, 632. In the Circuit Court, after those admonitions were given, Collier opted to proceed under the PCHA, and amended his filing as a post-conviction petition claiming actual innocence based on newly discovered evidence. *Collier,* 387 Ill.App.3d 630, 632-33. The Circuit Court thereafter dismissed that pleading, specifically invoking the cause-and-prejudice test and the Pitsonbarger decisions as its basis therefore, and Collier again appealed.

On appeal, the Appellate Court explicitly stated that it was analyzing the case as if leave to file had been granted:
***14** "defendant's 2005 petition for relief was grounded on section 2-1401 and, following recharacterization as a successive postconviction petition, was summarily dismissed. We remanded the matter pursuant to *Shellstrom* and after receiving his mandated ad-monishments, defendant elected to treat the filing as a successive petition. By granting defendant's request to amend the petition... the trial court implicitly acknowledged a request for leave to file and thus fulfilled the requirements of section 122-1(f).... Although we agree that the filing of a separate motion for leave to file a successive petition is the preferred mode of proceeding, given the unique circumstances presented here, the procedure did not hinder the trial court from performing its review under section 122-1(f)." *Collier,* 387 Ill.App.3d 630, 635-36; citations omitted.

Thus, the very premise animating the Collier Court's analysis - that the Circuit Court implicitly denied leave to file - was absent in Collier as that Court in fact presumed that the Circuit Court had implicitly granted leave to file.

In both physics and law, actions have consequences. In Collier, the presumption that leave had been granted led the Appellate Court to analyze the dismissal as a stage one summary dismissal. The Collier Court proceeded to consider, essentially, whether Collier had sufficiently pleaded his claim of actual innocence so as to allow his petition to proceed to an evidentiary hearing. The Court noted that actual innocence' is not within the rubric of whether a defendant has been proved guilty beyond a reasonable doubt" (Collier, 387 Ill.App.3d 630, 636) - an important factor because, the Court stated, "it has long been established that reasonable doubt of a defendant's guilt is not a proper issue for a post-conviction proceeding." Collier, 387 Ill.App.3d 630, 638. Instead, to state a cognizable claim of actual innocence and survive stage one scrutiny, the claim must be one of "total vindication" or "exoneration" in this Court's estimate. Collier, 387 Ill.App.3d 630, 636.

15** Viewed in that light, the Appellate Court held that there was no claim of actual innocence arising from the collateral challenge based on the alleged machinations of Detective McWeeny[2] and the recantations of the various witnesses, as the facts undergirding the alleged actual innocence claims had been vetted at trial and/or in previous collateral attacks on the same conviction and using many of the same affidavits, and thus were not "newly discovered evidence" nor was the evidence of such conclusive character as to change the result on retrial, as it was merely impeaching. *Collier,* 387 1ll***.App.3d 630, 637. The Court also held that the lengthy history of distinct collateral attacks using essentially the same evidence created res judicata and forfeiture bars to consideration of the claim (*Collier,* 387 Ill.App.3d 630, 639) - those being typical bases for stage one dismissal. *See* *People v. Anderson,* 375 Ill.App.3d 121, 132 (1st Dist. 2007); *People v. Gacho,* 2012 IL App. (1st) 091675, ¶24. By its own terms, then, *Collier* was irrelevant to the case at bar - the *Collier* Court having held that leave to file was denied, resort to an analysis of the adequacy of the pleading to survive to stage two in a case where leave to file was recognized is simply inapposite.

Equally important, however, is that even if the Collier analysis is correct insofar as it analyzes whether a petition claiming actual innocence survives stage one consideration, it has been legally supplanted by this Court's decision in Edwards with regard to how questions of leave to file should be analyzed. In that case, the petitioner sought to apply stage one analysis to the issue of the grant of leave to file a successive petition. *Edwards,* 2012 IL 111711, ¶25. This ***16** Court explicitly rejected that approach, stating "applying the frivolous or patently without merit standard here would render the 'leave of court' language in section 122-1(f) superfluous" (*Edwards,* 2012 IL 111711, ¶26) - that is, the question of leave is discrete from the question of pleading sufficiency. The requirement to obtain leave of court for successive petition is simply an entry portal to the post-conviction process, not a substitute for it. This Court explained:
"there is simply no basis in the statute for applying a first-stage analysis to a successive petition. Section 122-1(f), which gov-erns successive petitions, describes the 'leave of court' requirement but makes no mention of the frivolous or patently without merit standard, which is set forth in a separate provision section 122-2.1(a)(2). The legislature was clearly aware of the frivolous or patently without merit language in 2004, when section 122-1(f) was added, and could have incorporated it

into that section if it chose to do so. Where language is included in one section of a sta-tute but omitted in another section of the same statute, we pre-sume the legislature acted intentionally and purposely in the in-clusion or exclusion." *Edwards,* 2012 IL 111711, 127; italics in original.

Under Edwards, the grant of leave to file allows access to the procedure, but does not constitute a judgment on the merits. This is most easily understood by considering the consequence if the opposite was true: if an assessment of whe-ther to grant leave to file was equivalent to a full assessment of the merits of the underlying claim, then the grant of leave would carry with it the grant of relief from the judgment under attack. Clearly, however, the legislature did not in-tend that by granting leave, the PCHA's procedures would be short-circuited.

Edwards instead specified that, as the question of leave to file can only be granted under two circumstances:
"... this court has, in its case law, provided two bases upon which the bar against successive proceedings will be relaxed... See People v. Pitsonbarger, 205 11.2d 444, 459 (2002) (citing People v. Flores, 153 11.2d 264, 278-79 (1992)); see also ***17**People v. Szabo, 186 Ill.2d 19, 42-44 (1998) (Freeman, C.J., specially concurring, joined by Heiple, J.) (tracing history of relaxation of bar against successive postconviction proceedings). The first basis for relaxing the bar is when a petitioner can establish 'cause and prejudice' for the failure to raise the claim earlier. Pitsonbarger, 205 Ill.2d at 459. The General Assembly codified the cause-and-prejudice ex-ception in section 122-1(f) of the Act, several years after our deci-sion in Pitsonbarger. The second basis by which the bar to suc-cessive postconviction proceedings may be relaxed is what is known as the 'fundamental miscarriage of justice' exception...In order to demonstrate a miscarriage of justice to excuse the appli-cation of the procedural bar, a petitioner must show actual inno-cence. *See Pitsonbarger,* 205 111.2d at 459; *Sawyer v. Whitley,* 505 U.S. 333 (1992). Although this exception was not codified by the legislature, this court has reaffirmed its use in relaxing the bar against successive postconviction proceedings. See People v. Ortiz, 235 I11.2d 319 (2009) (acknowledging that leave of court to file a successive postconviction petition may be based on actual inno-cence alone)." *Edwards,* 2012 IL 111711, 1122, 23.

The test for the first kind of successive petition is self-executing: if one can esta-blish both cause for the failure to assert it initially, and prejudice from the in-ability to pursue the claim successively (terms defined in Pitsonbarger), then leave to file should be allowed.

This Court did not feel this hurdle an appropriate measure for evaluating whether claims of actual innocence should be allowed to proceed in a successive filing. As to that caliber of claims, *Edwards* specified that leave should be deni-ed "only where it is clear, from a review of the successive petition and the docu-mentation provided by the petitioner that, as a matter of law, the petitioner can-not set forth a colorable claim of factual innocence." *Edwards,* 2012 IL 111711, ¶24. A claim reaches the "colorable" threshold when there the petitioner raises the probability that "it is more likely than not that no reasonable juror would have convicted him in light of the new evidence." *Edwards,* 2012 IL 111711,¶24.

***18** Here, it is palpably obvious that English met this threshold. In his peti-tion (and, given the Appellate Court's conclusion that the Circuit Court was evaluating whether to grant leave to file, under Edwards it is the allegations of the petition and its supporting documentation which are germane), English claimed that he was deprived of the right to a fair trial, as guaranteed by the due process clause, owing to the use of torture by McWeeny, a member of Jon Burge's "mid-night crew" who used such tactics to manufacture evidence and ob-tain false statements against English. Noting that the State's witnesses had re-canted their accusations at his trial, English added as substantiation newly dis-covered evidence documenting the use of such tactics that had emerged since his conviction. (PC.15-18). English then expanded upon his claim that the evidence against him was obtained through torture with a claim that the State's usage here amounted to the knowing use of perjury to obtain a conviction. (PC. 19-25). After recounting the substance of various witnesses' inculpatory pre-trial state-ments, and their exculpatory trial recantations, he also provided the affidavit of an individual who was with him when the shots were fired and who exoner-ated him. (PC.37). It simply cannot be stated, as a matter of law, that if the jury knew that the inculpatory testimony was obtained via torture, they would still discount the recantations and convict - that is, it cannot be said that all rea-sonable jurors still would have convicted him.

There is the further irony that the decision here cannot be harmonized with this Court's decision in *People v. Wrice,* 2012 IL 111860. In *Wrice,* as here, this Court addressed a successive post-conviction petition. In *Wrice,* the new pe-tition claimed newly discovered evidence of police brutality in Area 2, speci ***19** fically the 2006 report of Special State's Attorney Egan about Jon Burge's record of torture (*Wrice,* 2012 IL 11860,141), while here English filed his successive pe-tition based in part on a 2005 Chicago Tribune article (PC.34) and a Chicago Reader article (PC.42), both upon the same subject. Though Wrice had raised the torture issue in his two previous post-conviction petitions (*Wrice,* 2012 IL 11860, 1139-40), English's prior petition did not raise the issue (CLR.48-77).

The inescapable fact is that in Wrice Your Honors favored allowing the pe-tition to proceed. The State's appellate brief here explained:
"In considering the case on **appeal**, the **SupremeCourt** did not treat Wrice's claim as one of newly discovered evidence of ac-tual innocence, exempt from the required cause and prejudice test. Rather, it examined whether Wrice had made the necessary show-ing of cause and prejudice to warrant further post-conviction pro-ceedings. It found that Wrice had satisfied both cause and preju-dice, but did not affirm the Appellate Court's direct remand for an evidentiary hearing. Rather, '[i]n an effort not to "short circuit" the process,' the Court remanded the matter for appointment of post-conviction counsel and second-stage proceedings." (St. Br., p.25).

If Wrice was entitled to present, for a third time, a claim that his conviction was the product of police brutality based on newly discovered evidence in the form of a 2006 report that came to Wrice's attention in 2007, because this sequence satisfied the "cause-and-prejudice" test, it is impossible to bar English's first at-tempt in this prosecution to advance this claim - he too must meet the require-ments of that test, as he could not have included these allegations in his initial petition, filed in 2000, years before the information developed in 2005 and there-after. In other words, the State's argument, if accepted, achieves the same re-sult as a finding that his petition stated a claim of actual innocence: it must be docketed and advanced to stage two. Moreover, the State's admission that Wrice ***20** expressed reluctance to "short-circuit" the post-conviction process confirms the view that the leave to file question is discrete from the on-the-merits post-conviction process.

Anthony English pleaded enough to warrant opening the post-conviction portal for a hearing on the merits of his claim.[3]

CONCLUSION

Anthony English, petitioner-appellant, respectfully requests that this Court grant leave to appeal.

Appendix not available.

Footnotes

[1] To be fair, Edwards was not decided until after the case was briefed, and thus not cited to the Appellate Court until rehearing.

[2] This is, it appears, the same Detective McWeeny as the one challenged in the case *sub judice.*

[3] Indeed, there is one striking discordancy that arises from denying him such a hearing. When similar allegations were raised, using some of the same evidence, in the other murder case, it was of sufficient heft not merely to survive stage one, but to proceed to an evidentiary hearing. That is, the claim was weighty enough there, measured against the

evidence adduced in that case, to merit an evidentiary evaluation. Since Edwards commands that evaluation of whether or not to grant leave is based upon the supporting documentation and thus not based upon a weighing of any countervailing evidence adduced in this trial proceeding - it must be at a minimum of sufficient weight to warrant moving forward.

End of Document

2012 WL 8262383 (Ill.) (Appellate Petition, Motion and Filing)
Supreme Court of Illinois.

PEOPLE OF THE STATE OF ILLINOIS, Respondent-Appellee,
v.
Hernando CARDONA, Petitioner-Appellant.

No. 114076.
March 29, 2012.

Petition for Leave to Appeal from the Appellate Court of Illinois, Second Judicial District, No. 2-10-0542.
There heard on Appeal from the Circuit Court of Lake County, Illinois, No. 07 CF 2036.
Honorable Fred Foreman, Judge Presiding.

Petition for Leave to Appeal

Michael J. Pelletier, State Appellate Defender.

Alan D. Goldberg, Deputy Defender.

Kathleen Weck, Assistant Appellate Defender, Office of the State Appellate Defender, First Judicial District, 203 N. LaSalle, 24th Floor, Chicago, IL 60601, (312) 814-5472, Counsel for Petitioner-Appellant.

***1 PRAYER FOR LEAVE TO APPEAL**

Hernando Cardona, petitioner-appellant, by his attorneys, Kathleen Weck and Alan D. Goldberg, hereby petitions this Court for leave to **appeal**, pursuant to **Supreme Court** Rules 315 and 612, from the judgment of the Appellate Court, Second District, without hearing oral argument, which affirmed the trial court's certification of his sex offender status.

PROCEEDINGS BELOW

The appellate court affirmed the trial court's judgment on March 2, 2012. No petition for rehearing was filed. A copy of the appellate court's judgment is appended to this petition.

***2 STATEMENT OF THE POINTS RELIED UPON FOR REVIEW**

In *People ex rel. Birkett v. Konetski,* 233 Ill. 2d 185 (2009), this Court recognized that being subjected to the Illinois Sex Offender Registration Act (SORA) might impact a person's liberty interest, but did not directly address whether it did so. This case presents this Court with the opportunity to finally resolve this issue. Hernando Cardona is a schizophrenic who is unlikely to ever be restored to fitness, but he is also a person whom the circuit court found not to be a threat to the public. (C. 142, 152) Subjecting this unfit defendant with the burdens of SORA and its accompanying sex offender notification laws has severely affected his liberty interest. Labeling him as a sex offender and placing his information on the sex offender registry stigmatizes him as a dangerous individual whom the public should avoid. Furthermore, the consequence of being labeled a child sex offender means that he can no longer live in the residence where he lived with his mother and siblings for twelve years, as it was within 500 feet of a school. (C. 22) Cardona's liberty is further impacted by the obligation to register in person with the local police whenever he changes his address or employment.

Review is further warranted to address whether the liberty interest of an unfit defendant can be infringed in this manner when he is entitled only to a discharge hearing, rather than a jury trial, before he is subjected to the registration and notification schemes. The right to procedural due process encompasses the right to notice and a meaningful opportunity to be heard. *Mathews v. Eldridge,* 424 U.S. 319, 349 (1976). Here, because Cardona could not testify on his own behalf, and did not have the opportunity to have a jury ***3** adjudicate his guilt before he was subjected to SORA, his right to procedural due process was not sufficiently safeguarded. Accordingly, this Court should leave to appeal the appellate court's decision affirming the circuit court's certification of Hernando Cardona as a sex offender.

***4 STATEMENT OF FACTS**

Hernando Cardona, a diagnosed schizophrenic who speaks little or no English, was charged with indecent solicitation of a child and unlawful restraint, for an event that occurred on May 18, 2007. (C. 56-57; see fitness evaluations - C. 14, 37, 52-53, 85, 142) The court determined that Cardona was unfit to stand trial. (C. 15) He was sent to Elgin Mental Health Center for treatment, but after more than a year there, his treatment providers were unable to restore Cardona to fitness. Defense counsel therefore requested a discharge hearing, pursuant to 724 ILCS 5/104-23. (C. 54)

At the discharge hearing, the evidence showed that on May 18, 2007, an older man approached grade school student Dajee H., while she was walking home from school. (R. 126-27) The man was wearing jeans and black shoes that looked "torn up," and Dajee had seen the man before. (R. 126-27, 132) Dajee ran from him. She caught up with her classmate, 11-year-old Alexandra K., and told her about the man. (R. 111, 129) The two girls walked together to the corner, then separated as they headed in different directions. (R. 130-31)

While Alexandra continued towards home, she realized she had dropped some CDs, so she crossed the street to retrieve them. When she stood back up, a man "grabbed" her by the wrist. (R. 111-12, 114) The man told her that she was "going to go with him." He said she was going to go with him "whether [she] liked it or not." (R. 115) The man had a Spanish accent. (R. 123)

***5** Alexandra tried to "yank away" from the man, but was unsuccessful. She kicked him in the shin, and he let her go. She ran from him, and he chased after her. (R. 113) Eventually she looked back and saw that he had stopped chasing her and was headed in the opposite direction. (R. 116) She had not looked at his face, because she was scared. (R. 114, 120) She noticed, though, that he was wearing black shoes that were "kind of torn up." (R. 115-117-18) On other occasions she had seen a man with those shoes walking in the neighborhood near the school. (R. 118-19)

Richard K., Alexandra's father, testified at the discharge hearing about what happened when his daughter arrived home from school. [The court had previously ruled, after a hearing pursuant to section 115-10 of the Code of Criminal Procedure, that Alexandra's statements to her father and to police officer Michael Taylor were admissible as substantive evidence.] Richard saw Alexandra run up to him. She was shaky and crying. She told him that somebody grabbed her and said they were going to have sex with her. (R. 136-37) At the discharge hearing, Alexandra's own testimony was that she did not recollect that the man had said anything to her about wanting to have sex. (R. 123)

Officer Taylor testified that he interviewed Alexandra at her school, several days after the incident. (R. 144) During the interview, Alexandra described how the man grabbed her arm and spun her around. He asked her if she wanted to have sex with him, and she told the man, "no." He replied, "you need to." After the man asked her a second time if she wanted to have ***6** sex with him, Alexandra kicked him in the shin twice and was able to break away. (R. 148)

A few days after the incident, Richard saw Hernando Cardona in the neighborhood and thought that he may have been the man who grabbed his daughter. Cardona was wearing worn-out black Converse shoes, which looked like the shoes Alexandra had seen on the man who grabbed her. (R. 139-40) Dajee identified Cardona's photograph in an array as the person who followed her. (R. 155-56)

The court found Cardona not guilty as to the indecent solicitation of a child charge, ruling that there was "conflicting testimony" which left "some doubt as to what actually transpired and what in fact was said to the victim." (R. 180) The court found Cardona "not not guilty" of the unlawful restraint charge. (C. 126) The court ordered Cardona to undergo fifteen months of further mental health treatment. (C. 126; R. 181) Near the conclusion of that period, the Department of Human Services (DHS) concluded that Cardona was "unfit and unlikely to ever be restored to fitness." (C. 142; R. 197) However, DHS recommended that Cardona be released back in the community. (R. 197)

On September 17, 2009, the State moved to certify Cardona as a sex offender, arguing that the unlawful restraint offense was "sexually motivated." (C. 144-46) The court agreed with the State and advised Cardona of his duty to register as a sex offender. (C. 151) As Cardona's extended term treatment period had concluded, the court found that Cardona ***7** continued to be unfit to stand trial. The court ruled that Cardona did "not constitute a serious threat to the public safety." (C. 152)

On May 12, 2010, defense counsel filed a motion to reconsider the court's ruling regarding the sex offender registration. (C. 166) The court denied the motion on May 26, and notice of appeal was filed on that date. (C. 170; R. 267)

On appeal, Cardona argued that the trial court erred in finding that his offense of unlawful restraint was sexually motivated, because the evidence was insufficient to prove that he grabbed the child's wrist with an intent to engage in behavior of a sexual nature. Alternatively, he argued that his constitutional right to procedural due process was violated, because he was ordered to register as a sex offender even though he had not been afforded a trial to determine his guilt for the unlawful restraint offense. In a published decision, People v. Cardona, 2012 IL App (2d) 100542, the appellate court rejected both arguments and affirmed the trial court's certification of Hernando Cardona as a sex offender.

*8 ARGUMENT

Because Hernando Cardona's right to procedural due process was violated when he was ordered to register as a sex offender even though he had not been afforded a trial to determine his guilt for the unlawful restraint offense, this Court should grant leave to appeal.

Hernando Cardona was never adjudged guilty of committing the offense of unlawful restraint, as a trial on that charge could not be held because Cardona remained unfit to stand trial. Nevertheless, the circuit court determined that Cardona was not "not guilty" of the offense, that the offense was "sexually motivated," and that Cardona therefore was subject to the Sex Offender Registration Act (SORA). Review of the appellate court's opinion affirming the circuit court's ruling is warranted, because subjecting Hernando Cardona to SORA without first affording him a meaningful opportunity to be heard in a trial violates his right to procedural due process under the United States and Illinois Constitutions.

The United States Constitution prohibits states from depriving any person of "life, liberty, or property, without due process of law." U.S. Const., Amend. XIV. The Illinois Constitution includes a parallel provision, and may be construed more broadly than the U.S. Constitution. Ill. Const. Art. I, sec. 2; *People v. Washington,* 171 Ill. 2d 475, 485-86 (1996). Before the government takes action that impacts a person's life, liberty, or property, procedural due process requires that the person affected be afforded a fair process that provides notice and a meaningful opportunity to be heard. *Matthews v. Eldridge,* 424 U.S. 319 (1976). A procedural due process claim ***9** presents a legal question subject to de novo review. People ex rel. *Birkett v. Konetski,* 233 Ill. 2d 185, 201 (2009).

Procedural due process claims are analyzed under a two-step process. The first question asks whether the State action has interfered with a liberty or property interest. If it has, the next step is to examine "whether the procedures attendant upon that deprivation were constitutionally sufficient." *Kentucky Dep't of Corrections v. Thompson,* 490 U.S. 454, 460 (1989); *see also Lyon v. Dep't of Children & Family Servs.,* 209 Ill. 2d 264 (2004) (outlining the two-step process for a procedural due process claim).

Rgarding the first prong of a procedural due process claim, Hernando Cardona argued on appeal that the State had infringed upon a liberty interest, because labeling him as a sex offender and placing his information on the sex offender registry stigmatizes him as a currently dangerous individual whom the public should avoid. See Paul v. Davis, 424 U.S. 693, 701-02 (1976) (discussing the "liberty interest" protected by the due process clause). Moreover, Cardona's liberty was impacted by SORA's requirement that, upon pain of a felony conviction, offenders must register in person with the local police department within five days of enrolling in school or changing address or employment. See 730 ILCS 150/6 (2008) (outlining "duty to report" registration requirements). Furthermore, having been labeled as a child sex offender, Cardona is now forbidden from living within 500 feet of a school. 720 ILCS 5/11-9.3 (2007). Accordingly, he can no longer live in the residence where he lived with his mother and siblings for twelve years. (C. 22)

***10** On appeal, Cardona urged the appellate court to construe the Illinois Constitution's due process provision broadly and follow other jurisdictions in recognizing that sex offender registration and notification schemes affect a constitutionally protected liberty interest. *See, e.g., Doe v. Pataki,* 3 F. Supp. 2d 456 (S.D.N.Y. 1998); *State v. Robinson. 873* So.

2d 1205, 1213-1214 (Fla. 2004); *State v. Bani,* 36 P. 3d 1255, 1265 (Haw. 2001).

The appellate court recognized that the United States Supreme Court avoided the question of whether sex offender registration implicates a liberty interest in Connecticut Department of Public *Safety v. Doe,* 538 U.S. 1, 7 (2003), and that this Court recognized that SORA might affect a liberty interest in *Konetski,* 233 Ill. 2d at 201-02. *People v. Cardona,* 2012 IL App (2d) 100542, at ¶47. The appellate court decided to follow those higher courts in avoiding the question and instead resolved the issue by focusing on the second prong of a procedural due process claim. *Cardona,* at ¶ 47.

The court concluded that "[e]ven if registration under SORA implicates a liberty interest, defendant cannot show that he was denied a meaningful opportunity to be heard." *Cardona,* at ¶ 48. Although the court admitted that discharge hearings "do not afford the same procedural rights as criminal proceedings," *Cardona,* at 149, the court "fail[ed] to see" how a discharge hearing differed from a trial in its ability to grant a defendant the "safeguarded opportunity to contest the ruling that triggered the imposition of the sex offender status." *Cardona,* at ¶ 48. The court noted that, at the discharge hearing, the defendant "had an appointed attorney who was able to cross-examine the *State's witnesses,*" along with the "additional ***11** constitutional safeguard of the right to notice, the privilege against self-incrimination, and the standard of proof beyond a reasonable doubt." Cardona, at ¶ 50.

By rejecting Hernando Cardona's procedural due process argument, though, the appellate court failed to consider that, because Cardona was unfit, he was unable to testify or otherwise assist in his defense against the charge of unlawful restraint. Particularly under the facts of this case, in which the child who was allegedly grabbed by him could not even identify Cardona as the offender, doubt remains as to whether the actual offender was even prosecuted for the offense, let alone what the offender's motivation was in grabbing the child. Cardona was also not entitled to the other important procedural safeguard of an impartial jury. Instead, it was a single person who found him not "not guilty," which consequently led to his certification as a sex offender and its attendant impact on his liberty interest.

In sum, because there has been no actual adjudication of Cardona's guilt at a trial, this Court should grant leave to appeal and find that SORA and its associated Notification Law are unconstitutional as applied to Cardona and similarly situated unfit defendants. Cardona was not afforded sufficient procedural due process to protect his liberty interest before he was certified as a sex offender and subjected to the State's registration and notification scheme.

***12 CONCLUSION**

Hernando Cardona, petitioner-appellant, respectfully requests that this Court grant leave to appeal.

Appendix not available.

End of Document