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Losing Our Innocence: The Illinois Successive Postconviction Actual Innocence Petition Standard After People v. Edwards

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LOSING OUR INNOCENCE:

THE ILLINOIS SUCCESSIVE POSTCONVICTION ACTUAL INNOCENCE PETITION STANDARD AFTER *PEOPLE V. EDWARDS*

Vanessa J. Szalapski*

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* J.D. Candidate, Northwestern University School of Law, May 2014; B.A., Dartmouth College, 2010. Thank you to all my editors, especially Sharon Makowsky, my comment editor, who inspired this Article and without whom it would not be half as good, and Kelsey Shust, whose thoughtful and careful comments gave it its final polish. Thank you also to my family for supporting me in all my endeavors; I would not be here without you.

INTRODUCTION

The Illinois Supreme Court's holding in *People v. Edwards*[1] demonstrates its intent to change the Illinois successive postconviction actual innocence standard to parallel the federal habeas actual innocence gateway standard. The *Edwards* court's muddled holdings and reliance on U.S. Supreme Court cases *Schlup v. Delo*[2] and *Sawyer v. Whitley*[3] demonstrate that objective. However, such an objective is unfounded and unnecessary. *Edwards* was wrongly decided, and therefore, the Illinois Supreme Court should reverse *Edwards* and return to the standard set forth in *People v. Ortiz*.[4]

Illinois has a long history of allowing prisoners to file postconviction actual innocence petitions. In 1996, the Illinois Supreme Court boldly declared in *People v. Washington*[5] that it would interpret the Illinois constitution's due process clause differently from the way the U.S. Supreme Court interpreted the Fourteenth Amendment's Due Process Clause in *Herrera v. Collins*[6] by recognizing a substantive due process claim of actual innocence.[7] The Illinois Supreme Court majority wrote:

> We think that the Court overlooked that a "truly persuasive demonstration of innocence" would, in hindsight, undermine the legal construct precluding a substantive due process analysis. The stronger the claim—the more likely it is that a convicted person is actually innocent—the weaker is the legal construct dictating that the person be viewed as guilty. . . . *We believe that no person convicted of a crime should be deprived of life or liberty given compelling evidence of actual innocence*.[8]

In essence, by recognizing a substantive due process claim for actual innocence, the Illinois Supreme Court declared that the Illinois constitution would give actual innocence claims greater protection than would the Federal Constitution.[9]

Any postconviction petition filed after the first petition is considered a successive postconviction petition. Until *Edwards*, the standard for a court granting leave to file a successive postconviction actual innocence petition required the petitioner's claim to be "of such conclusive character that it

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[1] 969 N.E.2d 829 (Ill. 2012).
[2] 513 U.S. 298 (1995).
[3] 505 U.S. 333 (1992).
[4] 919 N.E.2d 941 (Ill. 2009).
[5] 665 N.E.2d 1330 (Ill. 1996).
[6] 506 U.S. 390 (1993).
[7] *See id.* at 404, 407 n.6; *Washington*, 665 N.E.2d at 1337.
[8] *Washington*, 665 N.E.2d at 1336 (emphasis added) (quoting *Herrera*, 506 U.S. at 417).
[9] *Id.* at 1337.

would probably change the result [of] retrial."[10] In *Edwards*, the court described a winning successive postconviction actual innocence petition as one in which the petitioner puts forth a "colorable claim of actual innocence" through documentation that raises the probability that "it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence."[11] On one hand, the court may have relaxed the standard for granting leave of court to file a successive postconviction petition by using the term "colorable." On the other hand, despite the court's recent suggestion to the contrary,[12] the court may have made it more difficult by using the phrase "no reasonable juror."[13] Additionally, the *Edwards* court cited federal case law and used language directly from *Schlup*.[14] The muddled language and conflicting precedent in *Edwards* has left lower courts and practitioners confused because of the possibility that it created a new standard for granting leave of court for successive postconviction actual innocence petitions.

This Comment will demonstrate how *Edwards* created a more stringent standard for granting leave of court to file successive postconviction actual innocence petitions that resembles the federal habeas actual innocence gateway standard. Part I provides background on the Illinois Postconviction Act, relevant Illinois case law, the federal habeas actual innocence gateway standard, and the *Edwards* decision. Part II untangles the language of *Edwards* and examines the effects of the decision in the Illinois appellate courts. Part III addresses policy considerations both for and against a more stringent standard and demonstrates why *Edwards* was wrongly decided and should be reversed. Finally, Part IV describes the implications for the Illinois Supreme Court's position.

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[10] People v. Ortiz, 919 N.E.2d 941, 950 (Ill. 2009) (quoting People v. Morgan, 817 N.E.2d 524, 527 (Ill. 2004)); *accord* People v. Munoz, 941 N.E.2d 318, 325 (Ill. App. Ct. 2010).

[11] Illinois v. Edwards, 969 N.E.2d 829, 836 (Ill. 2012) (quoting Schlup v. Delo, 513 U.S. 298, 327 (1995)).

[12] The Illinois Supreme Court declared, "[o]ur commitment" to the *Washington* standard "is unwavering. . . . [W]e have not strengthened that standard, as the State hopes we did in *Edwards*. In both cases, we reiterated that *Washington* provides the appropriate standard for ultimate relief." People v. Coleman, No. 113307, 2013 WL 5488934, ¶ 93 (Ill. Oct. 3, 2013); *see infra* note 141.

[13] *Edwards*, 969 N.E.2d at 836.

[14] *Id.*

I. BACKGROUND

A. THE POSTCONVICTION HEARING STATUTE

The Illinois Post-Conviction Hearing Act (the Act)[15] allows prisoners to collaterally attack their convictions on constitutional grounds.[16] The Act provides an additional remedy for them to pursue claims that were not made on direct appeal or that are based on facts not in the record.[17] The Act is composed of three stages of review for first petitions; if the petitioner successfully passes through all three stages, the petitioner will be granted a retrial.[18]

1. *Stage One*

The first stage of the Act, often filed pro se, requires the petitioner's claim to survive summary dismissal.[19] To survive dismissal, the petitioner must give "a gist" of a claim.[20] The court of appeals has found petitions that provide newly discovered evidence that is neither fantastic nor delusional are sufficient to support a "gist of a meritorious claim."[21] If the judge fails to find "a gist" of a claim, the judge will dismiss the claim as "frivolous or patently without merit."[22] The judge is required to give reasons in a written order for dismissing these claims as "frivolous or patently without merit."[23] The State is not allowed to respond at this

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[15] 725 ILL. COMP. STAT. 5/122-1 (2010).

[16] *See Ortiz*, 919 N.E.2d at 947; Kerry J. Bryson, *A Guide to the Illinois Post-conviction Hearing Act*, 91 ILL. B.J. 248, 248 (2003).

[17] Bryson, *supra* note 16, at 248–49.

[18] *Id.* at 249.

[19] *See* People v. Porter, 521 N.E.2d 1158, 1159–62 (Ill. 1988) (holding dismissal of postconviction petitions constitutional); Bryson, *supra* note 16, at 249–50.

[20] *See* Bryson, *supra* note 16, at 249 & n.18 (citing People v. Edwards, 757 N.E.2d 442, 445–46 (Ill. 2001) (noting the "gist" threshold and describing an earlier *People v. Edwards* as "criticiz[ing] several appellate court decisions holding that petitioner must plead sufficient *facts* from which the trial court could find a valid claim of deprivation of a constitutional right, noting that this standard imposes too heavy a burden on petitioner and conflicts with precedent which requires only a limited amount of detail" (internal quotation marks omitted)).

[21] People v. Sparks, 913 N.E.2d 692, 698–99 (Ill. App. Ct. 2009); *see also Edwards*, 757 N.E.2d at 452–53 (finding that a pro se petitioner's statement that his attorney at trial refused his request to appeal constituted a gist of a claim for ineffective assistance of counsel).

[22] Bryson, *supra* note 16, at 249; *see also* 725 ILL. COMP. STAT. 5/122-2 (2010).

[23] Bryson, *supra* note 16, at 249; *see* People v. Collins, 782 N.E.2d 195, 200 (Ill. 2002) (upholding a district court's dismissal of the petition as frivolous and patently without merit because the petition contained no affidavits, records, or other evidence or explanation for why such supporting documentation was not included).

stage.[24] The petitioner may appeal, and the appellate court then applies a de novo review standard.[25]

2. *Stage Two*

If the petitioner successfully passes stage one, the petitioner moves to the second stage of securing an evidentiary hearing.[26] At this stage, the court may appoint counsel for the petitioner if the petitioner cannot afford one.[27] To successfully secure an evidentiary hearing, the petitioner must make a substantial showing of a constitutional violation, such as ineffective assistance of counsel, a *Brady* violation, or actual innocence.[28] The record must also show that (1) appointed counsel ascertained petitioner's deprivation of his or her constitutional rights by consulting with the petitioner in person or by mail, (2) counsel examined the trial record, and (3) counsel made any necessary changes to the pro se petition.[29] Appointed counsel must demonstrate that these requirements have been met, or any subsequent dismissal of the petition will be reversed and remanded for further proceedings under the Act.[30] The State may answer or move to dismiss the petition at this stage.[31] However, all "well-pleaded facts that are not positively rebutted by the trial record are to be taken as true,"[32] and waiver and res judicata claims may be waived by the court "when the

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[24] *See* Bryson, *supra* note 16, at 249; *see also* People v. Gaultney, 675 N.E.2d 102, 106 (Ill. 1996); People v. Ponyi, 734 N.E.2d 935, 939–40 (Ill. App. Ct. 2000).

[25] Bryson, *supra* note 16, at 250.

[26] *Id.*

[27] 725 ILL. COMP. STAT. 5/122-4 (explaining that "the court shall appoint counsel if satisfied that the petitioner has no means to procure counsel").

[28] *See* People v. Beaman, 890 N.E.2d 500, 502 (Ill. 2008) (examining a postconviction petition alleging a *Brady* violation); *see also* People v. Ortiz, 919 N.E.2d 941, 948–49 (Ill. 2009); People v. Morgan, 817 N.E.2d 524, 527 (Ill. 2004); People v. Washington, 665 N.E.2d 1330, 1336–37 (Ill. 1996). A *Brady* violation occurs when the prosecution fails to disclose material evidence favorable to the accused, a violation of the Fourteenth Amendment Due Process Clause. *See* Brady v. Maryland, 373 U.S. 83, 87 (1963) ("[S]uppression by the prosecution of evidence favorable to an accused upon request violates due process . . . .").

[29] Bryson, *supra* note 16, at 250 (citing ILL. SUP. CT. R. 651(c)).

[30] *Id.* at 250; *see* ILL. SUP. CT. R. 651(c) ("The record filed in that court shall contain a showing, which may be made by the certificate of petitioner's attorney, that the attorney has consulted with petitioner by phone, mail, electronic means or in person to ascertain his or her contentions of deprivation of constitutional rights, has examined the record of the proceedings at the trial, and has made any amendments to the petitions filed *pro se* that are necessary for an adequate presentation of petitioner's contentions."); *see also* People v. Guest, 655 N.E.2d 873, 887 (Ill. 1995) (holding that absence of a Rule 651(c) certificate is harmless if the record shows that counsel satisfied the Rule's requirements).

[31] Bryson, *supra* note 16, at 251.

[32] *Id.* at 250 (quoting People v. Childress, 730 N.E.2d 32, 35 (Ill. 2000)).

record on appeal is insufficient to support the petitioner's claim, where the alleged waiver stems from ineffective assistance of counsel on appeal, where the law on an issue has changed since that issue was considered and rejected, or where fundamental fairness so requires."[33] This stage is also appealable with a de novo standard of review.[34]

3. *Stage Three*

The last stage of the Act grants the petitioner an evidentiary hearing to put on his evidence in the hope of securing a new trial.[35] The petitioner bears the burden of showing that his constitutional rights were violated.[36] The petitioner may appeal the decision, but the standard of review on such an appeal is "manifestly erroneous," a significantly higher standard than the de novo standard applied in the previous two stages.[37] Thus, the trial court's determination at the third stage will likely be final and probably will not be reversed on appeal.

4. *Successive Postconviction Petitions*

It is well established that the Act "contemplates the filing of a single post-conviction petition."[38] However, a court may grant leave for successive petitions if the petitioner can show that "fundamental fairness" requires it.[39] Courts employ the "cause and prejudice" test to determine whether prior postconviction petitions were "deficient in some fundamental way."[40]

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[33] *Id.* at 251 (citation omitted); *see* People v. Gardner, 771 N.E.2d 26, 34 (Ill. App. Ct. 2002).

[34] Bryson, *supra* note 16, at 251.

[35] *Id.*

[36] *Id.*

[37] People v. Ortiz, 919 N.E.2d 941, 949 (Ill. 2009); Bryson, *supra* note 16, at 251.

[38] Bryson, *supra* note 16, at 251; *see* People v. Morgan, 817 N.E.2d 524, 527 (Ill. 2004); *see also Ortiz*, 919 N.E.2d at 947.

[39] *Morgan*, 817 N.E.2d at 527; People v. Pitsonbarger, 793 N.E.2d 609, 620–21 (Ill. 2002); Bryson, *supra* note 16, at 251.

[40] Bryson, *supra* note 16, at 251 (citing People v. Flores, 606 N.E.2d 1078, 1083 (Ill. 1992)); *see Pitsonbarger*, 793 N.E.2d at 621. The test is intended to limit successive and frivolous postconviction petitions. *See* Bryson, *supra* note 16, at 251 (citing *Flores*, 606 N.E.2d at 1083). "In pursuit of the latter objective, the legislature has also seen fit to enact section 22–105 of the Code of Civil Procedure," People v. Tidwell, 923 N.E.2d 728, 732 (Ill. 2010), which is intended "to curb the large number of frivolous collateral pleadings filed by prisoners which adversely affect the efficient administration of justice, and to compensate the courts for the time and expense incurred in processing and disposing of them," People v. Conick, 902 N.E.2d 637, 643 (Ill. 2008). To satisfy the cause and prejudice test, the petitioner must demonstrate to the court that an "external factor impeded efforts to raise the claim in the initial post-conviction proceeding (cause) and that application of waiver would

The petitioner can bypass the cause and prejudice test if he can make a showing of actual innocence.[41] To do so, the petitioner must show newly discovered evidence that is material and noncumulative.[42] Evidence found postconviction that could not have been discovered earlier with the exercise of due diligence is considered to be newly discovered.[43] Evidence is cumulative when it does not add anything to what has already been presented to the jury.[44] Prior to *Edwards*, the new evidence had to be "of such a conclusive character that it would probably change the result of retrial."[45]

This standard was developed considerably in *Ortiz*, a successive postconviction petition case at the Act's third stage.[46] In *Ortiz*, petitioner "Salvador Ortiz was convicted of first degree murder after a bench trial and sentenced to 47 years in prison."[47] The conviction relied heavily on the eyewitness accounts of Christopher Estavia and Edwin Villariny, despite the fact that both witnesses later recanted their statements to the police prior to trial.[48] The trial judge found that the forensic and ballistic evidence corroborated Estavia's and Villariny's original statements to the police.[49]

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deny the petitioner consideration of an error that 'so infected the entire trial that the resulting conviction or sentence violates due process' (prejudice)." Bryson, *supra* note 16, at 251 (quoting *Pitsonbarger*, 793 N.E.2d at 624).

[41] *Pitsonbarger*, 793 N.E.2d at 621.

[42] People v. Washington, 665 N.E.2d 1330, 1336 (Ill. 1996); *see Ortiz*, 919 N.E.2d at 950; *Morgan*, 817 N.E.2d at 527.

[43] *Ortiz*, 919 N.E.2d at 950. In *Ortiz*, a previously unknown witness to the crime came forward to the defendant's mother ten years after the trial. Due to the witness's location during the crime, it would have been impossible for the defendant to have seen him. Furthermore, the witness made himself unavailable by moving to Wisconsin shortly after the murder. Thus, the court held the man to be a new witness. *Id.*

[44] People v. Molstad, 461 N.E.2d 398, 402 (Ill. 1984) (explaining that evidence might not be cumulative if it "goes to an ultimate issue in the case"); *see also Ortiz*, 919 N.E.2d at 951 ("Hernandez's testimony supplied a first-person account of the incident that directly contradicted the prior statements of the two eyewitnesses for the prosecution. This testimony was not merely cumulative to Dunlam's testimony supporting defendant's alibi defense, or to Estavia's and Villariny's recantations of their prior statements. Rather, it added to what was before the fact finder."). Evidence that would merely impeach a witness's credibility is not considered material and noncumulative. *See* People v. Smith, 685 N.E.2d 880, 892–93 (Ill. 1997).

[45] People v. Harris, 794 N.E.2d 181, 188 (Ill. 2002) (citations omitted); *see also Ortiz*, 919 N.E.2d at 950 (quoting *Morgan*, 817 N.E.2d at 527).

[46] *Ortiz*, 919 N.E.2d 941.

[47] *Id.* at 943.

[48] *Id.* at 943–44.

[49] *Id.* at 944–45.

In his third postconviction petition, rewritten by his attorneys,[50] Ortiz based his actual innocence claim on the new eyewitness testimonies of Sigfredo Hernandez, Daniel Huertas, and Victor Ocasio.[51] In affidavits, Huertas and Hernandez claimed to have witnessed three other people—not the defendant—beat and shoot the victim.[52] They stated that they did not see Ortiz at the crime scene.[53] Ocasio claimed to have witnessed the crime from a pay phone and did not mention seeing Ortiz.[54]

The trial court denied Ortiz's third successive postconviction petition for a retrial after the conclusion of the evidentiary hearing in stage three, finding that the eyewitness testimony was cumulative and did not meet the required standard for newly discovered evidence for an actual innocence claim.[55] The appellate court reversed the trial court and remanded the case for a new trial, and the Illinois Supreme Court upheld the appellate court.[56] The Illinois Supreme Court held the eyewitness testimonies constituted newly discovered evidence because the two eyewitnesses were previously unknown to the petitioner.[57] To determine whether to grant a new trial, the court considered "whether the evidence offered by [the petitioner] 'is of such a conclusive character that it would probably change the result of retrial.'"[58] The court explained that the new evidence would strengthen the petitioner's claim of innocence at retrial when weighed against the conflicting eyewitness accounts.[59] However, the court restated that "this does not mean that [the petitioner] is innocent, merely that all of the facts and surrounding circumstances, including the testimony of [the petitioner's

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[50] *Id.* at 945. Ortiz filed a pro se postconviction petition on February 17, 2004, and his new counsel substituted a different version on August 10, 2004. *Id.*

[51] *Id.*

[52] *Id.*

[53] *Id.*

[54] *Id.* Ocasio's affidavit had also been presented in Ortiz's second postconviction petition. *Id.*

[55] *Id.* at 946.

[56] *Id.* at 943.

[57] *Id.* at 950–51.

[58] *Id.* at 951 (quoting People v. Harris, 794 N.E.2d 181, 188 (Ill. 2002)).

[59] *Id.* at 952 (citing People v. Molstad, 461 N.E.2d 398, 401–02 (Ill. 1984)) ("Thus, at retrial, the evidence of defendant's innocence would be stronger when weighed against the recanted statements of the State's eyewitnesses. The fact finder will be charged with determining the credibility of the witnesses in light of the newly discovered evidence and with balancing the conflicting eyewitness accounts."). *Molstad* involved a case of actual innocence on direct appeal rather than in a postconviction petition. *Molstad*, 461 N.E.2d at 400. Nevertheless, the court adopted the same standard for new evidence in postconviction petitions as on direct appeal. *Id.* at 401–02.

witnesses], should be scrutinized more closely to determine the guilt or innocence of [the petitioner]."[60]

In Illinois courts, the *Ortiz* standard—applied in conjunction with the appropriate evidentiary standard—remained the test to determine whether to grant leave to file successive postconviction petitions or to allow petitions to continue to subsequent stages up until the Illinois Supreme Court decided *Edwards*.[61]

B. THE FEDERAL HABEAS ACTUAL INNOCENCE GATEWAY STANDARD

Understanding federal actual innocence law is crucial to understanding Illinois actual innocence cases. The following sections explain the federal standards set forth in *Herra v. Collins* and *Schlup v. Delo*.

1. Herrera v. Collins

The U.S. Supreme Court in *Herrera v. Collins* rejected actual innocence as a substantive due process claim, insisting that "[c]laims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding."[62] However, the Court did not bar actual innocence claims entirely. Rather, the Court acknowledged that if a "proper showing of actual innocence" is made such that it would be a "fundamental miscarriage of justice" not to hear the claim, the Court could make an exception.[63] The Court also acknowledged that "a claim of 'actual innocence' is not itself a constitutional claim, but instead a gateway through which a habeas petitioner must pass to have his *otherwise barred constitutional claim considered on the merits*."[64] Thus, in federal habeas cases, a habeas petition that is barred for whatever reason—such as when the state court rejects a petitioner's claim on procedural grounds[65] or the petitioner fails to bring the

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[60] *Ortiz*, 919 N.E.2d at 952 (quoting *Molstad*, 461 N.E.2d at 402) (internal quotation marks omitted).

[61] *See* People v. Anderson, 929 N.E.2d 1206, 1211–12 (Ill. App. Ct. 2010); People v. Gillespie, 941 N.E.2d 441, 460 (Ill. App. Ct. 2010). For example, when deciding whether the petitioner passes the first stage of the Act, Illinois courts take the facts pleaded as true and apply the *Ortiz* standard—whether the newly discovered, material, noncumulative evidence "is of such a conclusive character that it would probably change the result of retrial"—to those facts. *Ortiz*, 919 N.E.2d at 951; *see, e.g.*, People v. Parker, 975 N.E.2d 78, 91–93 (Ill. App. Ct. 2012), *appeal denied*, 979 N.E.2d 885 (Ill. 2012).

[62] Herrera v. Collins, 506 U.S. 390, 400 (1993).

[63] *Id.* at 404.

[64] *Id.* (emphasis added).

[65] *See, e.g.*, Harrington v. Richter, 131 S. Ct. 770, 787 (2011).

claim on direct review[66]—may be allowed if the petitioner makes an actual innocence claim *coupled with* a claim alleging an independent constitutional procedural error.[67] The actual innocence claim opens the door for a court to examine an otherwise barred freestanding constitutional violation. The actual innocence claim thus acts as a "gateway" to the rest of the formerly prohibited claim. *Schlup v. Delo*, decided shortly after *Herrera*, created the federal standard for actual innocence gateway claims. *Schlup*, discussed below, provides insight into the meaning of *Edwards*.

2. Schlup v. Delo

The U.S. Supreme Court decided *Schlup* two years after *Herrera*.[68] The petitioner, Schlup, was convicted of murdering a fellow prison inmate and sentenced to death.[69] After exhausting his state remedies on direct and collateral review, Schlup filed a pro se habeas petition alleging ineffective assistance of counsel because his attorney failed to call witnesses who could establish his innocence.[70] The district court found his claim to be procedurally barred, and the Eighth Circuit affirmed the lower court based on its own examination of the record, determining that Schlup's counsel had not been ineffective.[71] With new counsel, Schlup filed a second federal habeas petition alleging that he was actually innocent and that his execution would violate the Eighth and Fourteenth Amendments.[72] He also alleged ineffective assistance of counsel at the trial level and that the State had committed a *Brady* violation by failing to disclose exculpatory evidence.[73] Several affidavits were included with his petition.[74] After the case worked its way through the district court and court of appeals, the Supreme Court granted certiorari.[75]

The Supreme Court distinguished *Schlup* from *Herrera*.[76] The majority claimed that Schlup's innocence claim was procedural, rather than substantive, because his claim relied not on his innocence but on ineffective

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[66] *See, e.g.*, Bousley v. United States, 523 U.S. 614, 622 (1998).
[67] *Herrera*, 506 U.S. at 404–05.
[68] Schlup v. Delo, 513 U.S. 298 (1995).
[69] *Id.* at 301–05.
[70] *Id.* at 306.
[71] *Id.* at 306–07.
[72] *Id.* at 307.
[73] *Id.*
[74] *Id.*
[75] *Id.* at 306–13.
[76] *Id.* at 313–17.

counsel and the prosecution's *Brady* violation.[77] The Court found that Schlup could obtain review of his procedurally barred petition if his case fell within "the narrow class of cases . . . implicating a fundamental miscarriage of justice" mentioned in *Herrera*.[78] The Court found that it would be a fundamental miscarriage of justice to refuse to hear the procedurally barred claim assuming Schlup could demonstrate actual innocence.[79] Essentially, the Court found that Schlup's claim of actual innocence could act as a gateway to his procedurally barred habeas petition.[80] Furthermore, because Schlup's innocence claim constituted a gateway claim, his burden to prove his innocence claim was lower than that for Herrera, who based his claim purely on substantive due process.[81]

It is important to note the Court's lengthy discussion of the standards set forth in two previous decisions, *Sawyer v. Whitley*[82] and *Murray v. Carrier*.[83] The *Sawyer* and *Carrier* standards are two different standards of proof that the Supreme Court uses in habeas cases.[84] The *Sawyer* standard, the more stringent of the two standards of proof, "was fashioned to reflect the relative importance of a claim of an erroneous sentence."[85] Under the *Sawyer* standard, a petitioner "must show by *clear and convincing* evidence that but for a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty."[86] The less stringent *Carrier* standard was created for the "extraordinary case[] where a constitutional violation has probably resulted in the conviction of one who is actually innocent."[87] To satisfy the *Carrier* standard, a petitioner must "show that it is more likely than not that no reasonable juror would have found [him] guilty beyond a reasonable doubt."[88]

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[77] *Id.* at 314. Herrera brought a *Brady* violation claim in his successive petition, but the court of appeals, affirming the district court's determination, dismissed it for lack of evidentiary basis. Herrera v. Collins, 506 U.S. 390, 397 (1993). For an explanation of *Brady* violations, see *supra* note 28.

[78] *Schlup*, 513 U.S. at 314–15 (internal quotation marks omitted) (citing McCleskey v. Zant, 499 U.S. 467, 494 (1991)).

[79] *Id.*

[80] *Id.* at 315 (citing *Herrera*, 506 U.S. at 404).

[81] *Id.* at 315–16.

[82] 505 U.S. 333 (1992).

[83] 477 U.S. 478 (1986).

[84] *Schlup*, 513 U.S. at 320.

[85] *Id.* at 325.

[86] *Id.* at 323 (quoting Sawyer v. Whitley, 505 U.S. 333, 336 (1992)). The Court also remarked that the court of appeals misapplied the *Sawyer* standard. *Id.* However, since the Court did not think the *Sawyer* standard, correctly or incorrectly applied, should be used at all, the Court did not discuss the error further. *Id.* at 323–24.

[87] *Id.* at 321 (quoting *Carrier*, 477 U.S. at 496) (internal quotation marks omitted).

[88] *Id.* at 327.

In *Schlup*, the Supreme Court ultimately decided that the *Carrier* standard was the more appropriate of the two, overruling the Eighth Circuit, which had applied the *Sawyer* standard.[89] The Court emphasized the difference between the two standards: the *Sawyer* standard applies to cases where the petitioner claims that he is ineligible for the death penalty but does not claim to be innocent of the crime, whereas the *Carrier* standard applies where the petitioner claims that he is actually innocent of the entire crime of which he was convicted.[90] According to the Court in *Schlup*, because the correct analysis in actual innocence gateway cases seeks to "balance the societal interests in finality, comity, and conservation of scarce judicial resources with the individual interest in justice that arises in the extraordinary case," the *Carrier* standard is most appropriate.[91]

Applying the *Carrier* standard, the Court held that where the petitioner uses actual innocence as the means for the federal court to examine an otherwise procedurally barred freestanding constitutional violation, a petitioner must "show that it is more likely than not that 'no reasonable juror' would have convicted him."[92] The Court stated that at trial a "reasonable juror would consider fairly all of the evidence presented."[93] Therefore, "the habeas court must consider what reasonable triers of fact are likely to do."[94] The Court called it a probability standard; however, this standard is stringent and extremely difficult to meet.[95]

Herrera and *Schlup* demonstrate the U.S. Supreme Court's reluctance to recognize actual innocence claims. First, in *Herrera*, the Court rejected actual innocence as a substantive due process claim under the Constitution. In *Schlup*, the Court recognized actual innocence as a gateway to otherwise procedurally barred claims, but set the bar to win a retrial very high. The test, a probability test based on the *Carrier* standard, requires petitioners to "show that it is more likely than not that 'no reasonable juror' would have convicted him."[96]

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[89] *Id.* at 325–27.

[90] *Id.* at 322–23.

[91] *Id.* at 324.

[92] *Id.* at 329.

[93] *Id.*

[94] *Id.* at 330.

[95] *See id.*; *see also* House v. Bell, 547 U.S. 518, 522 (2006). *Bell*, the only actual innocence gateway habeas petition heard by the U.S. Supreme Court since *Schlup*, demonstrates the extensive amount of new evidence necessary to meet the *Schlup* standard. The Court granted Paul Gregory House's habeas petition based on new DNA evidence, other forensic evidence, and a new suspect. *Id.* at 540–41, 548. "After careful review of the full record, we conclude that House has made the stringent showing required by this exception; and we hold that his federal habeas action may proceed." *Id.* at 522.

[96] *Schlup*, 513 U.S. at 329.

The federal standard for actual innocence gateway claims is difficult to meet and is not petitioner friendly.[97]

C. THE PROBLEM OF *PEOPLE V. EDWARDS*

It is with these cases in mind—*Hererra*, *Schlup*, *Washington*, and *Ortiz*—that *Edwards* must be understood. The Illinois Supreme Court decided *Edwards* in April 2012.[98] Edwards, the petitioner, was convicted of first-degree murder under a theory of accountability and was sentenced to twenty-eight years in prison.[99] Only Edwards's own statements linked him to the crime scene.[100] None of the State's eyewitnesses or physical evidence placed Edwards at the scene of the crime.[101] Edwards was only fifteen years old at the time of the murder.[102]

In total, Edwards filed four successive postconviction petitions, and this case derived from his appeal of the denial of his third and fourth successive postconviction petitions, which included claims of actual innocence.[103] In his third petition, Edwards presented newly discovered evidence in the form of affidavits.[104] One affidavit submitted by witness Eddie Coleman stated that he, along with Willie Richards and "Little Mikey," committed the murder and that Edwards "had nothing to do with this shooting."[105] Coleman said he failed to come forward earlier out of fear of self-incrimination.[106] In his fourth petition, Edwards presented alibi affidavits from Dominique and Kathleen Coleman, stating that Edwards had

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[97] *See id.*; *see also Bell*, 547 U.S. at 522.

[98] People v. Edwards, 969 N.E.2d 829 (Ill. 2012).

[99] *Id.* at 832. Convictions based on a theory of accountability are particularly difficult to overcome in postconviction actual innocence petitions because a person convicted under a theory of accountability was convicted not based on the commission of the final act but rather when:

> (a) having a mental state described by the statute defining the offense, he or she causes another to perform the conduct, and the other person in fact or by reason of legal incapacity lacks such a mental state;
>
> (b) the statute defining the offense makes him or her so accountable; or
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> (c) either before or during the commission of an offense, and with the intent to promote or facilitate that commission, he or she solicits, aids, abets, agrees, or attempts to aid that other person in the planning or commission of the offense.

720 ILL. COMP. STAT. 5/5-2 (Supp. 2013).

[100] *Edwards*, 969 N.E.2d at 832.

[101] *Id.*

[102] *Id.*

[103] *Id.*

[104] *Id.* at 833.

[105] *Id.* (internal quotation marks omitted).

[106] *Id.*

been "with them in their residence before, during, and after the shooting took place."[107] Dominique explained that she did not present this evidence earlier because she was a minor and her mother, Kathleen, forbade her from coming forward.[108] Kathleen stated in her affidavit that she was afraid to get involved in the case because of its serious nature and because several of her family members were allegedly involved in the crime.[109] She stated that she had refused to testify or to allow her daughter Dominique to testify despite numerous requests by Edwards's counsel and had repeatedly been uncooperative since Edwards's incarceration.[110] On appeal, the two petitions were consolidated and both were denied.[111]

The Illinois Supreme Court began its analysis by reiterating that the Act only contemplates one petition, but that a court may allow successive petitions in one of two ways: either the petitioner must meet the cause and prejudice test or, if the petitioner claims actual innocence, he must meet the more relaxed standard of "fundamental miscarriage of justice."[112] The court cited *Ortiz* for the proposition that the relaxed bar for actual innocence is a judge-made exception.[113] At this point, the court turned away from its usual analysis. Instead of citing *Ortiz* and determining whether Edwards had presented "newly discovered evidence" that would "probably change the result on retrial," the court stated the standard as follows: "[W]e hold today that leave of court should be denied only where it is clear, from a review of the successive petition and the documentation provided by the petitioner that, as a matter of law, the petitioner cannot set forth a colorable claim of actual innocence."[114] The court then restated the standard but varied its language. In its second articulation of the holding the court wrote: "Stated differently, leave of court should be granted when the petitioner's supporting documentation raises the probability that 'it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence.'"[115] Despite its claim that the second articulation of the holding is merely a restatement of the first, the second holding's use of very different language suggests otherwise.

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[107] *Id.* at 833–34 (internal quotation marks omitted).

[108] *Id.* at 834.

[109] *Id.*

[110] *Id.*

[111] *Id.* Interestingly, Justice Charles Freeman, the same justice who wrote the majority opinion in *People v. Washington*, authored the opinion in this case.

[112] *Id.* at 835–36.

[113] *Id.* at 836.

[114] *Id.*

[115] *Id.* (quoting Schlup v. Delo, 513 U.S. 298, 327 (1995)).

Adding to the confusion, the court relied on conflicting case law to support the two different holdings. To support its first holding, the court cited *People v. Smith*, an Illinois case predating *Ortiz*.[116] *Smith* cited *Sawyer*, the federal habeas case, for the proposition that a petitioner must provide enough documentation to set forth a colorable claim of actual innocence.[117] *Sawyer* is the same case the U.S. Supreme Court rejected in *Schlup* for creating too high a standard under which to evaluate postconviction actual innocence gateway claims. But when restating the holding, the *Edwards* court cited and quoted *Schlup*. Thus, in an attempt to clarify its holding, the *Edwards* court used conflicting Supreme Court precedent.

The court also noted that, according to the Act's legislative history, the Act was intended to be consistent with federal law insofar as the Act was intended to only allow one postconviction petition.[118] The court stated that the Illinois Act "disfavor[s]" successive postconviction petitions, noting that it was intended to be consistent with federal law's prohibition of multiple habeas petitions and thus only allows one postconviction petition.[119] Therefore, the court reasoned, the legislative history "clearly support[s] our conclusion that the 'colorable claim of actual innocence' standard should apply" to successive postconviction actual innocence petitions.[120] As a result, the court rejected the petitioner's argument that successive petitions should be read with the same standard as first-time petitions.[121]

The *Edwards* court also added an element from federal law to the "newly discovered" evidence standard in Illinois actual innocence claims.[122] In addition to the requirement that evidence of actual innocence be newly discovered, material, and not merely cumulative, the court stated that the evidence must also be reliable.[123] Here, the Illinois Supreme Court openly acknowledged its reliance on the U.S. Supreme Court's precedent in *Schlup*.[124]

Applying the standard created earlier in the opinion as well as the new reliability requirement to Edwards, the court concluded that Edwards did

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[116] *Id.* (citing People v. Smith, 794 N.E.2d 367, 374 (Ill. App. Ct. 2003).

[117] *See* Sawyer v. Whitley, 505 U.S. 333, 339–40 (1992) (defining actual innocence in the context of federal habeas petitions as a colorable claim of factual innocence).

[118] *Edwards*, 969 N.E.2d at 837.

[119] *Id.*

[120] *Id.*

[121] *Id.* at 837–38.

[122] *Id.* at 838.

[123] *Id.* (quoting Schlup v. Delo, 513 U.S. 298, 324 (1995)).

[124] *Id.*

not "set forth a colorable claim of actual innocence," nor stated the other way, did he "raise the probability that it is more likely than not that no reasonable juror would have convicted him in light of the new evidence."[125]

II. ANALYSIS

Edwards has created confusion about what the exact standard is in Illinois for granting successive postconviction actual innocence petitions. Despite the confusion caused by the *Edwards* court's two holdings and conflicting use of precedent, the case establishes a higher standard for petitioners filing successive postconviction petitions of actual innocence. This higher standard is evidenced by the language of the opinion and the continued use of federal precedent, and has been bolstered by the lower courts' interpretations of the *Edwards* standard. To begin that discussion, I will first untangle the text of the case. I will then turn to the lower courts' interpretations of *Edwards* in recent cases.

A. LANGUAGE PROBLEMS AND CONFUSION IN *PEOPLE V. EDWARDS*

The holding in *Edwards* is stated in two conflicting ways. The court's first iteration of the holding states:

> With respect to those seeking to relax the bar against successive postconviction petitions on the basis of actual innocence, we hold today that leave of court should be denied only where it is clear, from a review of the successive petition and the documentation provided by the petitioner that, as a matter of law, the petitioner cannot set forth a colorable claim of actual innocence.[126]

From this statement, it appears that the standard for filing postconviction petitions rests on the term "colorable claim of actual innocence." The term "colorable" suggests a standard based on probability or reasonable chance. In other words, a "colorable claim of actual innocence" would be a claim for which there is a reasonable chance that the petitioner is innocent. However, immediately following the first articulation of the holding, the court wrote: "Stated differently, leave of court should be granted when the petitioner's supporting documentation raises the probability that 'it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence.'"[127]

This second statement of the holding reads very differently from the first iteration and is internally contradictory. The first part of the second statement of the holding, which reads, "raises the probability that it is more

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[125] *See id.* at 837–38.

[126] *Id.* at 836 (internal citations omitted) (citing People v. Smith, 794 N.E.2d 367, 374 (Ill. App. Ct. 2003)).

[127] *Id.* (quoting *Schlup*, 513 U.S. at 327).

likely than not," echoes the first statement of the holding and its focus on probability. However, the court then explains that the documentation must demonstrate that there is no doubt of the petitioner's innocence because "no reasonable juror" would have convicted the petitioner had this new evidence been presented. The mixture of "no reasonable juror" with the probability standard is confusing because readers cannot discern which part of the holding is more important. On one hand, taken with the first statement of the holding, the suggestion of weighing probability seems more important than the certainty that "no juror" would convict the defendant on retrial. On the other hand, "no reasonable juror" is very strong language and cannot be ignored.

Compounding the confusion, the court also relied upon conflicting precedent. Immediately before stating the two contradictory versions of the holding, the court cited *Ortiz* to support the idea that showing actual innocence relaxes the bar against successive petitions.[128] The court also cited *Ortiz* and *Washington* when it defined the elements of actual innocence: "The elements of a claim of actual innocence are that the evidence in support of the claim must be 'newly discovered'; material and not merely cumulative; and of such conclusive character that *it would probably change the result on retrial*."[129] Thus, the court used the *Ortiz* probability standard in parts of the opinion. However, after reviewing the new evidence presented by Edwards, the court found that "it does not raise the probability that, in light of the new evidence, it is more likely than not that *no reasonable juror* would have convicted petitioner."[130] Immediately following that statement, the court found that "[t]his evidence is not 'of such conclusive character that it would probably change the result on retrial.'"[131]

In addition to citing *Ortiz*, the court also cited several federal habeas cases to support its reasoning. In the first statement of the holding, the court cited *Sawyer*;[132] yet, in the second statement of the holding the court cited *Schlup*.[133] These citations are highly problematic because, as noted earlier, the U.S. Supreme Court in *Schlup* blatantly rejected the *Sawyer* standard in the actual innocence context as too stringent.[134] Furthermore, *Sawyer* addressed an erroneous sentence claim whereas *Schlup* specifically

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[128] *Id.* at 835–36 (citing People v. Ortiz, 919 N.E.2d 941, 950 (Ill. 2009)).

[129] *Id.* at 838 (emphasis added) (citations omitted).

[130] *Id.* at 839 (emphasis added).

[131] *Id.* (quoting People v. Morgan, 817 N.E.2d 524, 527 (Ill. 2004)).

[132] *Id.* at 836 (citing People v. Smith, 794 N.E.2d 367, 374 (Ill. App. Ct. 2003), which cited and adopted Sawyer v. Whitley, 505 U.S. 333, 339 (1992)).

[133] *Id.* (citing Schlup v. Delo, 513 U.S. 298, 327 (1995)).

[134] *Schlup*, 513 U.S. at 325–26.

addressed a claim of actual innocence.[135] Thus, the Illinois Supreme Court not only mixed federal law with Illinois law but also failed to correctly cite federal actual innocence law.[136] Furthermore, as discussed in Part II.B, the federal standard, even under *Schlup*, is incredibly difficult to meet, in part because the U.S. Supreme Court relies on state courts to adjudicate actual innocence claims.[137] This use of federal law in conjunction with *Ortiz* and other Illinois law only compounds the confusion.

Nonetheless, the Illinois Supreme Court's use of federal law in other areas of the opinion suggests that the court intended to make the Illinois standard parallel the federal standard. First, the Illinois Supreme Court added an element, reliability, to the actual innocence claim directly from *Schlup*, openly acknowledging the U.S. Supreme Court as its source.[138] Second, when discussing whether to make the standard for successive petitions the same as that for first petitions, the court cited the Act's legislative history in which a state senator remarked that allowing one petition under the Illinois Act would make the Act consistent with federal law.[139] The court found these remarks sufficient to support its conclusion that the first-stage analysis did not apply to successive petitions and that the "colorable claim of actual innocence" standard should apply instead, because federal habeas actual innocence gateway cases employ the "colorable claim of actual innocence" language.[140]

Despite the many textual contradictions, it appears the court intended to strengthen the requirements to get leave of court to file a successive petition.[141] While the court held onto some of the language from *Ortiz*, the

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[135] *Id.* at 325 ("Though the *Sawyer* standard was fashioned to reflect the relative importance of a claim of an erroneous sentence, application of that standard to petitioners such as Schlup would give insufficient weight to the correspondingly greater injustice that is implicated by a claim of actual innocence.").

[136] Of course, the Illinois Supreme Court is not required to follow the federal actual innocence standard. However, it is odd that the court should reject the federal standard in *Washington* for being too strict only to later cite federal law in a subsequent case, written by the same justice (Justice Freeman). The Illinois Supreme Court's use of federal law is even more confusing considering that the federal law the Illinois Supreme Court cites was rejected by the U.S. Supreme Court for being *too* strict.

[137] *See supra* Part I.B.

[138] *Edwards*, 969 N.E.2d at 838 (citing *Schlup*, 513 U.S. at 324).

[139] *Id.* at 837.

[140] *Id.*

[141] In an opinion released October 3, 2013, the Illinois Supreme Court states that *Edwards* did not change the actual innocence standard. *See* People v. Coleman, No. 113307, 2013 WL 5488934, ¶ 93 (Ill. Oct. 3, 2013). However, this statement is unfounded for the reasons stated above (including *Edwards*'s contradictory language, reliance on federal law, and addition of a new reliability requirement taken directly from federal law). Furthermore, the *Coleman* opinion dealt with a first-time petition at the third stage of the Act, not a

court's insistence on following each statement with language and citations from federal cases, even if those citations were poorly applied, demonstrates the court's desire to create a higher bar for granting leave to file successive postconviction actual innocence petitions. Regardless of which federal standard is used, *Schlup* or *Sawyer*, *Edwards* raised the bar for obtaining leave of court to file;[142] choosing between *Schlup* and *Sawyer* only changes the degree to which the bar has been raised.[143] Furthermore, adding *Schlup's* reliability requirement and rejecting the first-stage analysis in successive petitions clarifies the court's intent. Despite the fact that the *Edwards* opinion was written by the same justice who so vehemently rejected *Herrera* in *Washington*,[144] the court changed the Illinois successive actual innocence petitions standard to more closely parallel the federal actual innocence gateway standard.

B. *EDWARDS*'S IMPACT FOR PETITIONERS SEEKING LEAVE OF COURT

The lower courts' decisions are the true indicator of whether, in practice, *Edwards* changed the standard for granting leave to file successive postconviction actual innocence petitions. Since the *Edwards* decision, the lower appellate courts have decided several cases using the *Edwards* standard. Interestingly, most of the opinions are unpublished, and of the roughly thirty-five successive postconviction actual innocence petitions that were decided by October 1, 2013, thirty-four of them were denied by the court of appeals. One of those denials was overturned by the Illinois Supreme Court, and one petition was granted by a court of appeals.[145]

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successive petition seeking leave of court to file. *Id.* ¶ 98. Additionally, it would not be the first time a court has said one thing and done another. *See, e.g.*, John E. Kennedy, *Federal Summary Judgment: Reconciling* Celotex v. Catrett *with* Adickes v. Kress *and the Evidentiary Problems Under Rule 56*, 6 REV. LITIG. 227, 229–30 (1987) ("The *Celotex* Court rejected that interpretation of *Adickes*, in the process explicitly approving the *Adickes* ruling handed down some sixteen years earlier. Although *Celotex* and its progeny do not purport to establish new law with respect to Rule 56, taken together they do signal a significant change in attitude toward grants of summary judgment.").

[142] *Edwards*, 969 N.E.2d at 837; *see also* House v. Bell, 547 U.S. 518, 538–53 (2006) (explaining the application of the "no reasonable juror" standard under *Schlup* and *Sawyer* as applied to various types of new evidence a jury had not had available to consider in a case).

[143] *Schlup*, 513 U.S. at 324–27.

[144] People v. Washington, 665 N.E.2d 1330, 1335–36 (Ill. 1996) ("[W]e labor under no self-imposed constraint to follow federal precedent in 'lockstep' in defining Illinois' due process protection. . . . We believe so as a matter of both procedural and substantive due process. In terms of procedural due process, we believe that to ignore such a claim would be fundamentally unfair." (citations omitted)).

[145] People v. Bruce, No. 1-09-3401, 2012 WL 6936105 (Ill. App. Ct. Mar. 12, 2012), *vacated*, 978 N.E.2d 241 (Ill. 2012); *see also* People v. Adams, No. 1-11-1081, 2013 WL 4516943 (Ill. App. Ct. Aug. 23, 2013).

The cases decided by the Illinois appellate courts after *Edwards* demonstrate that *Edwards* created a more stringent standard for successive petitions. In some cases, the petitions failed under the *Ortiz* standard, and *Edwards* did not affect the decisions.[146] But *Edwards* had a notable effect in several other cases where the appellate courts used the new reliability requirement to dismiss successive petitions.[147] The following Sections provide examples of (1) cases unaffected by *Edwards*; (2) cases that demonstrate *Edwards*'s stricter standard; and (3) cases where *Edwards*'s new reliability requirement raised the petitioners' burden.

1. *Cases Unaffected by* Edwards

As one example, *Edwards* had little effect on the outcome in *People v. Spencer*.[148] The defendant, Robert Spencer, was found guilty on a theory of accountability,[149] a difficult charge to collaterally attack.[150] Spencer's claim of innocence was based on the fact that police did not find his blood on stereo equipment taken from the scene of the crime.[151] However, because the defendant was convicted on a theory of accountability, the absence of his blood could not exculpate him.[152] Thus, the court's decision in *Spencer* sheds little light on the full impact of *Edwards*.

In *People v. Tellez*, another case where *Edwards* had little effect, the court denied the prisoner's successive petition because the new evidence from a *60 Minutes* investigative report on bullet lead analysis "would have no discernible impact on the result of defendant's trial if there were further proceedings under the Act."[153] Even if the new evidence were accepted as true, the court stated, all of the other evidence previously used at trial would

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[146] *See, e.g.*, People v. Brown, No. 1-09-2597, 2012 WL 6859503 (Ill. App. Ct. Dec. 21, 2012); People v. Hanible, Nos. 1-10-1537, 1-10-2400, 2012 WL 6950244 (Ill. App. Ct. Oct. 19, 2012); People v. Glinsey, No. 1-09-0608, 2012 WL 6934896 (Ill. App. Ct. Sept. 5, 2012); People v. Tellez, No. 1-10-1272, 2012 WL 6950176 (Ill. App. Ct. Aug. 21, 2012); People v. Spencer, No. 1-09-0105, 2012 WL 6934890 (Ill. App. Ct. Aug. 6, 2012).

[147] *See, e.g.*, People v. Garcia-Sandoval, Nos. 1-11-2215, 1-11-3763, 2013 WL 1289148 (Ill. App. Ct. Mar. 29, 2013); People v. Strong, No. 2-10-1012, 2012 WL 6965370 (Ill. App. Ct. Sept. 26, 2012); People v. Register, No. 3-10-0038, 2012 WL 6968363 (Ill. App. Ct. May 22, 2012).

[148] 2012 WL 6934890.

[149] *Id.* at *1.

[150] *See* People v. Anderson, 929 N.E.2d 1206, 1212 (Ill. App. Ct. 2010); *see also* discussion *supra* note 99 (describing convictions founded upon theories of accountability).

[151] *Spencer*, 2012 WL 6934890, at *4.

[152] *Id.* The trier of fact may use the defendant's presence at the scene of the crime as evidence supporting a theory of accountability. *See* discussion *supra* note 99. Thus, it is very difficult for a prisoner to prove actual innocence when he is convicted on a theory of accountability.

[153] No. 1-10-1272, 2012 WL 6950176, at *3 (Ill. App. Ct. Aug. 21, 2012).

overwhelm the new evidence.[154] The court pointed to three pieces of evidence used at trial that could not be overcome by new evidence: (1) two recorded conversations in which the petitioner had admitted his guilt; (2) two acquaintances who stated that the petitioner had asked them to falsely testify on his behalf at trial; and (3) police officers who testified as to the type of gun the defendant used.[155] As the court aptly explained it, the forensics used in the case were far from the "l[i]nchpin" of the case against the defendant, so the new contradictory evidence did little to undermine the case against him.[156] Indeed, it appears that the prosecution had a solid case against the petitioner and the court could dismiss the petition under *Ortiz*.

2. *Cases Demonstrating* Edwards*'s Stricter Standard*

In other cases, *Edwards* functioned to create a stricter standard, even if the courts did not explicitly acknowledge the change. In *People v. Glinsey*, the court appeared to argue that *Edwards* did not change the standard.[157] In actuality, the court's analysis demonstrates that the *Edwards* standard was indeed stricter.[158] The court reiterated the four requirements from *Ortiz* that petitioners must satisfy to establish newly discovered evidence of actual innocence.[159] However, the court used the *Edwards* holding ("'does not raise the probability that, in light of this new evidence, it is more likely than not that no reasonable juror would have convicted' [the] defendant"[160]) to determine whether the fourth *Ortiz* element ("would probably change the result upon retrial") had been met.[161] The court stated that while the new evidence—in the form of a recantation—would be enough to assert a "reasonable doubt argument," it was not "so conclusive that it would change the result at trial."[162] The court omitted the word "probably" and just stated, "would change the result at trial."[163] Thus, the appellate court interpreted the *Edwards* standard to require that the result *would* change instead of requiring that the result would *probably* change.

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[154] *Id.*
[155] *Id.*
[156] *Id.* at *4.
[157] No. 1-09-0608, 2012 WL 6934896 (Ill. App. Ct. Sept. 5, 2012).
[158] *Id.*
[159] *Id.* at *4.
[160] *Id.* (quoting People v. Edwards, 969 N.E.2d 829, 839 (Ill. 2012)).
[161] *Id.*
[162] *Id.* at *5.
[163] *Id.*

3. *Cases Adding* Edwards*'s Reliability Requirement*

The new element of reliability is proving to be a strong barrier to granting leave to file successive petitions.[164] In *People v. Register*, the court began its analysis with the *Ortiz* standard.[165] The court found that the evidence offered in the petition was not newly discovered; rather, the evidence was cumulative and "was not 'of such conclusive character that it would likely change the result on retrial.'"[166] The court stated that the defendant knew about the witnesses prior to his trial, therefore their statements were not new.[167] Furthermore, the "new" witnesses' statements did not differ from those statements already proffered at trial and "would not necessarily impeach the credibility of the State's principal witness."[168] The court addressed the possibility of newly discovered evidence taking the form of a witness recantation as well.[169] Here, quoting *Edwards*, the court stated that new evidence of actual innocence must be reliable.[170] Because the witness demonstrated uncertainty about the timing of his statements and was not recanting his prior testimony, the court found that this new evidence was not reliable.[171] This finding is a sharp departure from the reasoning in *People v. Lofton*, in which the court made it clear that the credibility of the witness was to be determined at the evidentiary hearing and not when determining whether to grant a successive petition.[172]

People v. Strong demonstrates a more stringent standard as well.[173] First, like the court in *Register*, the *Strong* court adopted the reliability requirement for newly discovered evidence.[174] In *Strong*, the court stated that the recanted testimony was neither newly discovered *nor reliable*.[175]

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[164] *See, e.g.*, People v. Garcia-Sandoval, Nos. 1-11-2215, 1-11-3763, 2013 WL 1289148 (Ill. App. Ct. Mar. 29, 2013); People v. Strong, No. 2-10-1012, 2012 WL 6965370 (Ill. App. Ct. Sept. 26, 2012); People v. Register, No. 3-10-0038, 2012 WL 6968363 (Ill. App. Ct. May 22, 2012).

[165] *Register*, 2012 WL 6968363, at *1 (citing *Edwards* but using the language from *Ortiz*).

[166] *Id.* at *2 (quoting People v. Smith, 685 N.E.2d 880, 893 (1997)). Interestingly, the *Register* court used the manifestly erroneous standard on review. *Id.* at *1. Other courts used a de novo standard. *See, e.g.*, *Garcia-Sandoval*, 2013 WL 1289148; *Strong*, 2012 WL 6965370.

[167] *Register*, 2012 WL 6968363, at *2.

[168] *Id.*

[169] *Id.* at *3.

[170] *Id.*

[171] *Id.*

[172] People v. Lofton, 954 N.E.2d 821, 834 (Ill. App. Ct. 2011) (stating that credibility is to be determined at the third stage evidentiary hearing and not at earlier stages).

[173] People v. Strong, No. 2-10-1012, 2012 WL 6965370 (Ill. App. Ct. Sept. 26, 2012).

[174] *Id.* at *6 (citing People v. Edwards, 969 N.E.2d 829, 838 (Ill. 2012)).

[175] *Id.* at *7.

Second, like the *Glinsey* court, the *Strong* court rejected the petition because it found that an alternate theory, which could create reasonable doubt as to the defendant's guilt, did not satisfy the requirement that new evidence would make it "more likely than not that no reasonable juror would have convicted him."[176] The court stressed that the standard is "*no reasonable juror*."[177] Thus, the *Strong* court interpreted the *Edwards* standard as requiring a greater amount of certainty of a different outcome at retrial than merely the probability of a different outcome.

In *People v. Garcia-Sandoval* the appellate court strongly emphasized the new reliability requirement as well.[178] The court's ultimate denial did not rely on the reliability of the new evidence;[179] however, the court twice stated in two separate paragraphs of the opinion that the new evidence must be reliable, underscoring the importance of the requirement in the eyes of the appellate court.[180]

The cases decided after *Edwards* reveal the wide spectrum of options available to courts when deciding whether to grant leave of court. In some instances, the facts allowed the courts to rely only on *Ortiz* to dismiss the cases.[181] Other times, courts read *Edwards* as abandoning the *Ortiz* probability standard in favor of a near certainty standard.[182] The new reliability element equips the courts with a powerful tool to find the new evidence unreliable and deny leave to file successive petitions.[183] It is clear that *Edwards*'s stricter standard makes it easier for courts to dismiss successive postconviction actual innocence petitions.

III. POLICY

As explained in Part II, *Edwards* created a more stringent standard. The cases decided since *Edwards* are not the end of the story, but they certainly indicate that the standard for successive postconviction actual innocence petitions is stricter than before. Yet, it is important to examine whether a stricter standard for granting leave of court for successive

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[176] *Id.* at *6 (citing *Edwards*, 969 N.E.2d at 836).

[177] *Id.* at *7 (emphasis added).

[178] Nos. 1-11-2215, 1-11-3763, 2013 WL 1289148 (Ill. App. Ct. Mar. 29, 2013).

[179] *Id.* at *6.

[180] *Id.* at *4–5.

[181] *See, e.g.*, People v. Tellez, No. 1-10-1272, 2012 WL 6950176, at *3 (Ill. App. Ct. Aug. 21, 2012); People v. Spencer, No. 1-09-0105, 2012 WL 6934890 (Ill. App. Ct. Aug. 6, 2012).

[182] *Strong*, 2012 WL 6965370, at *7 (emphasizing that the *Strong* court would have affirmed the lower court's determination unless "*no* reasonable juror" would have convicted the defendant, and thus affirming the lower court).

[183] *See, e.g.*, *Garcia-Sandoval*, 2013 WL 1289148; *Strong*, 2012 WL 6965370; People v. Register, No. 3-10-0038, 2012 WL 6968363 (Ill. App. Ct. May 22, 2012).

postconviction actual innocence petitions is good for Illinois from a policy standpoint, given both the state of criminal law in Illinois, in which news of exonerations occurs regularly, and the purpose of the Act.

Between 1989 and 2012, a staggering 311 DNA exonerations occurred in the United States.[184] However, considering the number of criminal cases that do not have the benefit of DNA to scrutinize the validity of their convictions, there are likely hundreds more innocent people in prison. According to one study of 200 DNA exonerations, 79% of those wrongfully convicted had faulty eyewitness identifications at their trials.[185] Other studies have demonstrated similarly appalling results.[186] Thus, as Joshua Dressler and George Thomas aptly put it, "*eyewitness misidentification is the single most common factor in wrongful convictions throughout the United States*."[187] It can be inferred that hundreds of innocent men and women are in prison without the benefit of DNA evidence to exonerate them. With these statistics in mind, a stricter standard for successive postconviction actual innocence petitions is unjust, especially given the truism that it would be better to let ten guilty defendants walk free than to convict one innocent person.[188]

In *People v. Washington*, the Illinois Supreme Court took a monumental step by refusing to interpret the Illinois constitution in lockstep with the U.S. Constitution. Indeed, the U.S. Supreme Court has even recognized that state criminal justice systems are the best forum for dealing with actual innocence petitions.[189] One of the reasons for such a strict federal standard is, in the view of at least one Supreme Court Justice, that state courts are more appropriate and better equipped to handle actual

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[184] *DNA Exoneree Case Profiles*, INNOCENCE PROJECT, http://goo.gl/Qs0SP6 (last visited Dec. 20, 2013); *see also* Robert J. Smith, *Recalibrating Constitutional Innocence Protection*, 87 WASH. L. REV. 139, 142 (2012).

[185] Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 60 (2008).

[186] *See* Samuel R. Gross et al., *Exonerations in the United States: 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 542 (2005). In the 340 exonerations between 1989 and 2003, 64% of wrongful convictions included at least one eyewitness who had misidentified the defendant. The percentage jumps to a staggering 90% in wrongful rape convictions. *Id.*

[187] JOSHUA DRESSLER & GEORGE C. THOMAS, III, CRIMINAL PROCEDURE: INVESTIGATING CRIME 764 (5th ed. 2013).

[188] Many scholars, including William Blackstone and Benjamin Franklin, have stated variations of this maxim. *See, e.g.*, 4 WILLIAM BLACKSTONE, COMMENTARIES *713 ("All presumptive evidence of felony should be admitted cautiously; for the law holds it better that ten guilty persons escape, than that one innocent party suffer."); Letter from Benjamin Franklin to Benjamin Vaughan (Mar. 14, 1785), *in* 9 THE WRITINGS OF BENJAMIN FRANKLIN: COLLECTED AND EDITED WITH A LIFE AND INTRODUCTION 291, 293 (Albert Henry Smyth ed., 1906) ("That it is better 100 guilty Persons should escape than that one innocent Person should suffer . . . .").

[189] Herrera v. Collins, 506 U.S. 390, 400–01 (1993).

innocence cases.[190] Thus, the Supreme Court's standard is extremely strict and difficult to meet precisely because the states are the main forum for innocence claims. For Illinois to make it more difficult to obtain leave of court simply to file is therefore unjust. Furthermore, of the pre-*Edwards* successive postconviction actual innocence petitions citing *Ortiz*, appellate courts have granted only two successive petitions.[191] *Ortiz* was undoubtedly already strict enough, and there was no need for a stricter standard.

Essentially, *Edwards* may require the petitioner to prove his case before getting to the first stage of the Act, rather than at a retrial, because the petition may proceed if and only if "*no* reasonable juror" would find the defendant guilty.[192] If this language is read literally, the court is asking petitioners to prove their cases at the outset of the process, before any evidentiary hearing and without the benefit of live witnesses. Today, with our modern understanding of trial procedures and wrongful convictions, it is evident that standards requiring near-certitude, such as DNA testing, do not adequately protect the innocent.[193] Furthermore, if *Edwards* has indeed created a higher standard for granting leave to file successive postconviction actual innocence petitions, then the standard for granting leave of court to file a successive petition is at odds with the standard for stage three evidentiary hearings. At stage three, the petitioner is held to the "probably change the result on retrial" standard. What is the point of stage three if the petitioner already proved her case just to get leave to file?

Edwards's proponents may argue that the petitioner should have gotten it right on the first petition and should be grateful for the chance to submit successive petitions at all. *Edwards*'s proponents may further argue that it is more difficult to put on and make a case in an evidentiary hearing than the earlier stages where the petitioner must simply supply documentation such as affidavits. But this view is unreasonable, especially

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[190] *Id.* at 427 (O'Connor, J., concurring) ("Instead, the Court assumes for the sake of argument that a truly persuasive demonstration of actual innocence would render any such execution unconstitutional and that federal habeas relief would be warranted if no state avenue were open to process the claim."). Thus, it appears that the Court's reasoning relies, at least in part, on the idea that there is some avenue for relief in the state criminal system.

[191] *See* People v. Hill, No. 1-09-1657, 2011 WL 9692904 (Ill. App. Ct. Feb. 8, 2011); People v. Munoz, 941 N.E.2d 318, 329 (Ill. App. Ct. 2010). A Westlaw search revealed twenty-two successive postconviction actual innocence cases citing *Ortiz*. Many of these postconviction petition cases are not published, making it difficult to know exactly how many are denied or granted. Furthermore, cases involving DNA evidence are not included because those cases are not the subject of this Comment. A second successive postconviction petition cites *Ortiz* at the third stage of the Act. *See* People v. Lofton, 954 N.E.2d 821, 832 (Ill. App. Ct. 2011).

[192] People v. Edwards, 969 N.E.2d 829, 836 (Ill. 2012) (emphasis added).

[193] Smith, *supra* note 184, at 185.

considering who the petitioners are in these cases. The petitioners are prisoners in the state system who have little or no legal knowledge, have in many cases very little schooling, and have very limited access to information.[194] Some cases require further investigation to prove innocence, a challenging task from a prison cell. Furthermore, first petitions are filed pro se more often than not.[195] Legal assistance may come later, but often, it is too late. With legal assistance, successive petitions are often stronger than the first one.

In his recent article, Robert Smith disagreed with these assertions.[196] Smith *does* believe that postconviction actual innocence petitions are necessary for today's criminal justice system in which trials are no longer the great exposer of innocence and guilt.[197] For nonprocedurally defaulted claims, he proposes that petitioners must demonstrate their innocence by clear and convincing evidence.[198] In other words, petitioners would have to prove that they are "highly probably innocent."[199] For gateway claims where innocence is used to get to otherwise procedurally defaulted claims, he proposes a lower standard of "reasonable probability of innocence."[200] He finds the *Washington* standard, and by extension the *Ortiz* standard, to be too low, because it "does not adequately account for the societal interest in securing and maintaining convictions against those who do commit crimes," and because some guilty people would walk free because the standard of proof is 51% chance the person is innocent.[201] He argues that it would be unlikely that the state could retry the petitioner, and thus there is a significant risk to society.[202]

However, Smith's claims are unfounded. Of the sixty-eight published cases in Illinois citing *Washington* as of October 1, 2013, only three petitioners were granted new trials, and one of those trials was granted due

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[194] *See* Steven D. Hinckley, *Bounds and Beyond: A Need to Reevaluate the Right of Prisoner Access to the Courts*, 22 U. RICH. L. REV. 19, 43 (1987) ("[O]ver thirty percent of all prisoners have less than an eighth grade education, as opposed to only nine percent with less than an eighth grade education among the general population."); *see also* Johnson v. Avery, 393 U.S. 483, 487 (1969) ("Jails and penitentiaries include among their inmates a high percentage of persons who are totally or functionally illiterate, whose educational attainments are slight, and whose intelligence is limited."); Hooks v. Wainwright, 775 F.2d 1433, 1435 (11th Cir. 1985) (noting a district court's finding that Florida's prison population had "more than [a] 50% rate of inmate functional illiteracy").

[195] Bryson, *supra* note 16, at 249.

[196] Smith, *supra* note 184.

[197] *Id.* at 146–47.

[198] *Id.* at 204.

[199] *Id.* at 186 (citations omitted).

[200] *Id.* at 204.

[201] *Id.* at 186.

[202] *Id.*

to new DNA evidence.[203] Thus, out of the sixty-eight cases, only two resulted in new trials based on non-DNA, newly discovered evidence.[204] Of the pre-*Edwards* Illinois cases citing *Ortiz*, only two successive postconviction actual innocence petitions were granted.[205] Considering the number of innocent people likely sitting in prison, three new trials is hardly a frightening number.[206] Justice trumps finality; an innocent person should not serve time in the name of finality.

IV. THE BIGGER PICTURE

Edwards may have done far more than simply create a stricter standard for granting leave of court for successive postconviction actual innocence petitions. Despite the Illinois Supreme Court's recent statement in *People v. Coleman* that *Edwards* did not change the actual innocence standard, decisions interpreting *Edwards* in the lower courts suggest otherwise.[207] *People v. Chest* and *People v. Cole* demonstrate *Edwards*'s potential to expand beyond granting leave of court to file a successive petition to later stages of the Act.[208]

In Antoine Chest's first postconviction petition, he challenged his conviction of two counts of attempted first-degree murder.[209] The trial court had specifically found that Chest was the shooter.[210] In his petition, Chest produced an affidavit from another man charged with the attempted murders who claimed that he had pleaded guilty to and committed the attempted murders, and that the petitioner was not with him at the time of the incident.[211] The court cited *Edwards* extensively and specifically emphasized the reliability requirement.[212] The court denied this first-stage petition, finding that the new evidence was not completely exculpatory and

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[203] People v. Ortiz, 919 N.E.2d 941 (Ill. 2009); People v. Burrows, 665 N.E.2d 1319 (Ill. 1996); People v. Starks, 850 N.E.2d 206 (Ill. App. Ct. 2006) (reversing the trial court and remanding for a new trial because of new DNA evidence).

[204] *Ortiz*, 919 N.E.2d 941; *Burrows*, 665 N.E.2d 1319.

[205] *See* People v. Hill, No. 1-09-1657, 2011 WL 9692904 (Ill. App. Ct. Feb. 8, 2011); People v. Munoz, 941 N.E.2d 318, 325, 328 (Ill. App. Ct. 2010); *see also* discussion *supra* notes 184–91 and accompanying text.

[206] *See* discussion *supra* notes 184–91 and accompanying text.

[207] People v. Coleman, No. 113307, 2013 WL 5488934, ¶ 93 (Ill. Oct. 3, 2013). In this recent opinion, the court upheld the *Washington* standard and rejected the State's arguments that *Edwards* changed the actual innocence standard. *Id.* ¶ 88–94.

[208] People v. Chest, No. 2-12-0687, 2013 WL 1296403 (Ill. App. Ct. Mar. 29, 2013); People v. Cole, No. 3-11-0787, 2012 WL 6862485 (Ill. App. Ct. Dec. 20, 2012).

[209] *Chest*, 2013 WL 1296403, at *1.

[210] *Id.* at *2.

[211] *Id.* at *3.

[212] *Id.* at *5.

that the petitioner had not shown that it was "more likely than not that no reasonable juror would have convicted defendant."[213] The court used the *Edwards* standard even though this was Chest's first petition, not a successive petition.

Similarly, the petitioner in *Cole* appealed the second-stage dismissal of his first postconviction petition.[214] Corzell Cole was convicted of first-degree murder and attempted first-degree murder on an accountability theory.[215] Travaris Guy was the passenger in a car Cole drove.[216] When Cole pulled up at a stoplight behind a van with four people in it, Guy fired four shots into the van, killing one person and injuring a second.[217] Cole sped from the scene and was later arrested in Colorado Springs, Colorado.[218] At trial, Cole did not put forth a defense and was convicted on a theory of accountability.[219] In his postconviction petition, Cole provided a statement from Guy, the passenger and the shooter, and claimed that this statement was newly discovered evidence because Guy had not yet been apprehended at the time of Cole's trial and thus could not speak on his behalf for fear of self-incrimination.[220] Despite the fact that this was not a successive postconviction petition, the court relied on *Edwards*.[221] The court acknowledged that *Edwards* involved a successive petition and that this was Cole's first petition.[222] However, the court still found the *Edwards* standard applicable and held that Cole had to make a "substantial showing" of actual innocence.[223] In its analysis, the court stated that Guy's evidence did not "paint a colorable actual innocence claim" nor did it "make it more likely than not that no reasonable juror would have convicted petitioner in light of such a claim."[224] Moreover, the court stated the evidence "is not of such conclusive character that it would probably change the result of the retrial."[225] The court did not cite *Ortiz*, but it did cite to the various

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[213] *Id.* at *6.

[214] People v. Cole, No. 3-11-0787, 2012 WL 6862485, at *1 (Ill. App. Ct. Dec. 20, 2012). This was Cole's first petition and not a successive petition.

[215] *Id.*

[216] *Id.*

[217] *Id.*

[218] *Id.*

[219] *Id.*

[220] *Id.* at *3.

[221] *Id.* at *4–5.

[222] *Id.* at *6.

[223] *Id.*

[224] *Id.* at *6–7.

[225] *Id.* at *7. (quoting People v. Edwards, 969 N.E.2d 829, 839 (Ill. 2012)) (internal quotation marks omitted).

holdings in *Edwards* that included the *Ortiz* standard.[226] While both of these petitions probably would have failed under the *Ortiz* standard, and the court's reasoning is solid in both cases, these cases demonstrate that the potential reach of the *Edwards* decision expands far beyond just successive actual innocence petitions.

In *People v. Davis*, the court of appeals noted that the Illinois Supreme Court's decision in *Edwards* provides a comment on the postconviction actual innocence claims spectrum.[227] The court quoted the portion of the *Edwards* decision that added the reliability requirement for newly discovered evidence.[228] The appellate court reversed the trial court and allowed the petitioner to proceed to the third stage evidentiary hearing.[229] The court did not rule on the reliability of the witness, instead directing the trial court to do so at the evidentiary hearing.[230] However, once again, the *Edwards* decision manifested itself in first petitions at later stages in the Act.

The effects of *Edwards* reach beyond actual innocence postconviction petitions as well. In *People v. Nicholas* and *People v. Smith*, the courts applied *Edwards* to petitions advancing procedural claims under the cause and prejudice test.[231] In *Nicholas*, the petitioner alleged in his successive postconviction petition both a procedural error—that his confession was physically and psychologically coerced—and an actual innocence claim.[232] In its analysis, the court held that Antonio Nicholas's alleged procedural error, which was analyzed under the cause and prejudice test, needed to meet *Edwards*'s heightened standard, requiring a "'more exacting' or 'substantial' showing of cause and prejudice to be granted leave to file a successive postconviction petition. A 'gist' of a claim of cause and prejudice is insufficient."[233] Even though the scope of *Edwards* was limited to successive postconviction actual innocence petitions, the appellate court

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[226] *Id.* at *6–7.

[227] People v. Davis, No. 3-11-0217, 2013 WL 161630, at *5 (Ill. App. Ct. Jan. 7, 2013).

[228] *Id.*

[229] *Id.* at *7.

[230] *Id.* ("To be clear, our reversal is not a directive to the trial court to provide defendant the postconviction relief he seeks. We merely find that the defendant's petition makes a substantial showing of actual innocence and, therefore, he is entitled to an evidentiary hearing. Just as the trial judge did in *Morgan*, it is for the trial court herein to observe the demeanor of witnesses and assess the new testimony against the facts and circumstances previously established at trial prior to determining whether or not to grant or deny the defendant posttrial relief.").

[231] People v. Nicholas, 987 N.E.2d 482 (Ill. App. Ct. 2013); People v. Smith, No. 1-11-1069, 2013 WL 1501787 (Ill. App. Ct. Apr. 11, 2013).

[232] *Nicholas*, 987 N.E.2d at 487.

[233] *Id.* at 488 (internal citations omitted).

in *Nicholas* found that *Edwards*'s heightened standard applies to procedural postconviction successive petitions as well as actual innocence petitions.[234] The court in *People v. Smith* similarly applied *Edwards*'s heightened standard to the cause and prejudice standard, stating that the Illinois Supreme Court had rejected the argument that successive petitions should be evaluated under the same standard as first petitions, and therefore, "rather than merely presenting the gist of a claim, [the petitioner] must make a 'more exacting' showing of cause and prejudice to merit leave to file a successive post-conviction petition."[235]

Edwards has undoubtedly affected Illinois lower court decisions in postconviction actual innocence petitions beyond those seeking leave to file successive postconviction actual innocence petitions, and it remains to be seen if this trend will continue in light of the Illinois Supreme Court's recent opinion in *People v. Coleman*.[236]

CONCLUSION

The standard for granting leave of court for successive postconviction actual innocence petitions in Illinois is in a state of confusion. The *Edwards* opinion is self-contradictory in many ways, leaving practitioners and prisoners without a clear understanding of what standard applies. However, analysis of the language and precedent used in the case demonstrate that *Edwards* created a stricter standard that parallels the federal habeas actual innocence gateway standard for granting leave of court for successive postconviction actual innocence petitions. Furthermore, the appellate courts' application of the *Edwards* standard illustrates this higher bar.

Despite the court's opinion in *People v. Coleman* stating otherwise,[237] the language of the *Edwards* opinion, the precedent used to support its analysis, and the addition of a new reliability requirement from *Schlup* demonstrates that *Edwards* created a stricter standard for granting leave of court to file successive postconviction actual innocence petitions. Looking to the history of actual innocence petitions, *Edwards*'s stricter standard is unwarranted and unjust. Under the pre-*Edwards* standards, few petitions resulted in retrial, and thus, raising the standard to parallel the federal standard needlessly limits petitioners' access to the channels of postconviction justice. Furthermore, considering the number of wrongfully convicted people who lack the benefit of exculpatory DNA evidence, the

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[234] *Id.*
[235] *Smith*, 2013 WL 1501787, at *3.
[236] *See* People v. Coleman, No. 113307, 2013 WL 5488934, ¶ 88–94 (Ill. Oct. 3, 2013).
[237] *Id.*

standard for successive postconviction innocence petitions should not be enhanced.

In conclusion, *People v. Edwards* heightened the standard for successive postconviction actual innocence petitions to closely match the federal actual innocence gateway standard. Not only is the added stringency unnecessary because the prior standard functioned as a sufficient barrier to getting leave of court to file successive postconviction actual innocence petitions, but it is also unjust in light of the Illinois Supreme Court's interpretation of the Illinois constitution and the relationship between federal and state law. Therefore, the Illinois Supreme Court should overrule *Edwards* and return to the previous *Ortiz* standard.