

RECEIVED

IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF ILLINOIS

APR 04 2006

MICHAEL W. DOBBINS  
CLERK, U.S. DISTRICT COURT

United States of America ex rel.

Michael Christ K-83030  
(Full name and prison number)  
(Include name under which convicted)

PETITIONER

vs.

Robert Zimmerman / warden  
(Warden, Superintendent, or authorized  
person having custody of petitioner)

RESPONDENT, and

(Fill in the following blank only if judgment  
attacked imposes a sentence to commence in the  
future)

ATTORNEY GENERAL OF THE STATE OF

Illinois  
(State where judgment entered)

06CV1845  
JUDGE BUCKLO  
MAG. KEYS

Case Number of State Court Conviction:

99 CR 28042

PETITION FOR WRIT OF HABEAS CORPUS -- PERSON IN STATE CUSTODY

1. Name and location of court where conviction entered: Circuit Court of Cook County,  
Illinois

2. Date of judgment of conviction: July 6, 2000

3. Offense(s) of which petitioner was convicted (list all counts with indictment numbers, if known)  
home invasion and attempt first degree murder

4. Sentence(s) imposed: 16 years on each conviction, concurrent

5. What was your plea? (Check one) (A) Not guilty ( )  
(B) Guilty (X)  
(C) Nolo contendere ( )

If you pleaded guilty to one count or indictment and not guilty to another count or indictment, give details:

◆ **PART I -- TRIAL AND DIRECT REVIEW**

1. Kind of trial: (Check one):      Jury ( )      Judge only (✓)
2. Did you testify at trial?      YES ( )      NO (✓)
3. Did you appeal from the conviction or the sentence imposed? YES ( ) NO (✓)

(A) If you appealed, give the

(1) Name of court: \_\_\_\_\_

(2) Result: \_\_\_\_\_

(3) Date of ruling: \_\_\_\_\_

(4) Issues raised: \_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_

(B) If you did not appeal, explain briefly why not:

\_\_\_\_\_

4. Did you appeal, or seek leave to appeal, to the highest state court? YES ( ) NO (✓)

(A) If yes, give the

(1) Result \_\_\_\_\_

(2) Date of ruling: \_\_\_\_\_

(3) Issues raised: \_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_

(B) If no, why not: \_\_\_\_\_

5. Did you petition the United States Supreme Court for a writ of *certiorari*? Yes ( ) No (✓)

If yes, give (A) date of petition: \_\_\_\_\_ (B) date *certiorari* was denied: \_\_\_\_\_

**PART II -- COLLATERAL PROCEEDINGS**

1. With respect to this conviction or sentence, have you filed a post-conviction petition in state court?

YES (✓) NO ( )

With respect to *each* post-conviction petition give the following information (use additional sheets if necessary):

A. Name of court: Circuit Court of Cook County, Illinois

B. Date of filing: September 17, 2002

C. Issues raised: ineffective assistance of counsel, interrogated without  
Miranda warnings, wrongfully deprived of critical alibi witness

D. Did you receive an evidentiary hearing on your petition? YES ( ) NO (X)

E. What was the court's ruling? dismissed

F. Date of court's ruling: December 13, 2002

G. Did you appeal from the ruling on your petition? YES (✓) NO ( )

H. (a) If yes, (1) what was the result? affirmed

(2) date of decision: 6/11/04

(b) If no, explain briefly why not: \_\_\_\_\_

I. Did you appeal, or seek leave to appeal this decision to the highest state court?

YES (X) NO ( )

(a) If yes, (1) what was the result? denied leave to appeal

(2) date of decision: 9/29/05

(b) If no, explain briefly why not: \_\_\_\_\_

2. With respect to this conviction or sentence, have you filed a petition in a **state court** using any other form of post-conviction procedure, such as *coram nobis* or habeas corpus? YES ( ) NO (✓)

A. If yes, give the following information with respect to each proceeding (use separate sheets if necessary):

1. Nature of proceeding \_\_\_\_\_

2. Date petition filed \_\_\_\_\_

3. Ruling on the petition \_\_\_\_\_

3. Date of ruling \_\_\_\_\_

4. If you appealed, what was the ruling on appeal? \_\_\_\_\_

5. Date of ruling on appeal \_\_\_\_\_

6. If there was a further appeal, what was the ruling? \_\_\_\_\_

7. Date of ruling on appeal \_\_\_\_\_

3. With respect to this conviction or sentence, have you filed a previous petition for habeas corpus in **federal court**? YES ( ) NO (✓)

A. If yes, give name of court, case title and case number: \_\_\_\_\_

B. Did the court rule on your petition? If so, state

(1) Ruling: \_\_\_\_\_

(2) Date: \_\_\_\_\_

4. WITH RESPECT TO THIS CONVICTION OR SENTENCE, ARE THERE LEGAL PROCEEDINGS PENDING IN ANY COURT, OTHER THAN THIS PETITION?

YES ( ) NO (✓)

If yes, explain: \_\_\_\_\_

**PART III - PETITIONER'S CLAIMS**

1. State briefly every ground on which you claim that you are being held unlawfully. Summarize briefly the facts supporting each ground. You may attach additional pages stating additional grounds and supporting facts. If you fail to set forth all grounds in this petition, you may be barred from presenting additional grounds later.

**BEFORE PROCEEDING IN THE FEDERAL COURT, YOU MUST ORDINARILY FIRST EXHAUST YOUR STATE COURT REMEDIES WITH RESPECT TO EACH GROUND FOR RELIEF ASSERTED.**

(A) Ground one \_\_\_\_\_  
Supporting facts (tell your story briefly without citing cases or law):

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(B) Ground two \_\_\_\_\_  
Supporting facts:

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(C) Ground three \_\_\_\_\_  
Supporting facts:

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(D) Ground four \_\_\_\_\_  
Supporting facts:

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2. Have all grounds raised in this petition been presented to the highest court having jurisdiction?  
YES ( ) NO ( )

3. If you answered "NO" to question (16), state briefly what grounds were not so presented and why not:

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**PART IV -- REPRESENTATION**

Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:

- (A) At preliminary hearing \_\_\_\_\_
- (B) At arraignment and plea \_\_\_\_\_
- (C) At trial \_\_\_\_\_
- (D) At sentencing \_\_\_\_\_
- (E) On appeal \_\_\_\_\_
- (F) In any post-conviction proceeding \_\_\_\_\_
- (G) Other (state): \_\_\_\_\_

**PART V -- FUTURE SENTENCE**

Do you have any future sentence to serve following the sentence imposed by this conviction?

YES ( ) NO (✓)

Name and location of the court which imposed the sentence: \_\_\_\_\_

Date and length of sentence to be served in the future \_\_\_\_\_

WHEREFORE, petitioner prays that the court grant petitioner all relief to which he may be entitled in this proceeding.

Signed on: \_\_\_\_\_  
(Date)

\_\_\_\_\_  
Signature of attorney (if any)

I declare under penalty of perjury that the foregoing is true and correct.

*Michael Chism*  
\_\_\_\_\_  
(Signature of petitioner)

*K-83030*  
\_\_\_\_\_  
(I.D. Number)

\_\_\_\_\_  
(Address)

MICHAEL CHISM  
Register NO. K\_ 83030  
Western ILLinois Correctional Center  
R.R.#4, Box 196  
Mt. Sterling, IL 62353

TO. Honorable Judge Presiding

HI, MY NAME IS MICHAEL CHISM, And I am write you to let you no that I NEED YOU TO please read here my case because, I feel that I didn't get a fair deal in court. I was scared and I did what ever my lawyer told me to do and she told me it I didn't take the deal right now, ~~or~~ I would get 30, year in prison. She told me to take the 12 year and the judge gave me 16 year. I would have never agree to plea guilty on this case if I now more about the law, or if I could have change lawyer, I feel my lawyer was inefficient and didn't give me good counsel when I really need it. So can you please, please go over my case so that, I can get a fair trial I have been lock up sence 99, and I have done everything, I can to get back in court, so I can get a fair trial. I am trying my best to get my life back and do the right thing and to put my life back together and I am asking for your help, to please take another look at my case because this is my last chance. I am sorry that I didn't put in for a not guilty plea, this is my first time being in prison I am not a bad person I work sence I was about 15, year old ~~and never~~ <sup>and never</sup> got in to any trouble, not like this. I pray that you will please take the time and really go back over my case, and see that I was not give a fair trial, I really need your help, your Honor. So please take the time and see that I get a fair trial, becasue my lawyer didn't care about me or my case, I was rush and I didn't really understand what was going in the court, I did what every she told me to do and as long as I been lock up I have been in school, church, Bible Study and help other people with the work of God, I haven't not been a promble to anyone and I do what every they ask me to do. I work in the kitchen and the laundry room and been a porter, just keep myself busy and stayed out of trouble. I just need some one to really give me a chance. I no other people ask you to give them a chance and mess-up, but I am ask you to look at my back ground and you will see that, I am not a problem to anyone even in here all I try to do is to help People and hope that one day I get a break, so please your Honor I am ask you for a break and to take a chance with me and trust that I will go and do the right thing with my life.



And to continue to help other people in here and out in the world and also help the young kids out there because I feel what I went through should no one go through this hell prison is not a fun place to be. I found it to be a place to get one life in order and to understand what life is really all about. Life is to be enjoy, not to be spent in prison. And I <sup>Pray</sup> ~~pray~~ that I can teacher this to the kids and to other people to. to let then know where I have been and what, I have to go through so Your Honor, it up to you to say yes to the kids and other I can continue helping in here and in the world or you can say no. either way I will keep doing what the Lord want me to do. I pray that you will not give up on me and give me a chance with my case so I will have fair trial, but I do want to say thank you for the time out and reamd my letter, it dose mean a lot to me and I hope a pray that you will understand what in my heart for other people, This is really not about me it about helping other out there in the world. So I can give them a chance to make the right chose in there life. Before it to late. Some one have to stand up for the kids that are come in and out of prison, I no I can not save the world, i can at lest try to do my part not that I have been where so many are ~~hearing~~ <sup>hearing</sup> I not try to save the world just the kids of tomorrow. Please understand that I need to tell kids about me and what prison is like. I ~~know~~ <sup>some</sup> ~~saying~~ will get it and some want, but I will try my best to save as many as I can. That why I am as you your Honor give me chance Please. I can't say any more then what I already said. I pray that you look into your heart and see that all I want is my life back, and to help other out there. Again thank you for the time out just to read this letter. Because either way I will still look out for other people. Your Honor my faith I can say is in your hand. I pray that you will open your heart and give me another chance with my life, so I can do the right thing

THANK YOU

Michael Criss  
K-83030

October 2004

**OFFICE OF THE CLERK  
SUPREME COURT OF THE UNITED STATES  
WASHINGTON, D. C. 20543**

**RETURNED**

**GUIDE FOR PROSPECTIVE INDIGENT PETITIONERS FOR WRITS OF CERTIORARI**

AN 2 3 2006  
MICHAEL W. DOBBINS  
CLERK, U.S. DISTRICT COURT

**I. Introduction**

These instructions and forms are designed to assist petitioners who are proceeding *in forma pauperis* and without the assistance of counsel. A copy of the Rules of the Supreme Court, which establish the procedures that must be followed, is also enclosed. Be sure to read the following Rules carefully:

- Rules 10-14 (Petitioning for certiorari)
- Rule 29 (Filing and service on opposing party or counsel)
- Rule 30 (Computation and extension of time)
- Rules 33.2 and 34 (Preparing pleadings on 8½ x 11 inch paper)
- Rule 39 (Proceedings *in forma pauperis*)

**RETURNED**

DEC 2 0 2005

MICHAEL W. DOBBINS  
CLERK, U.S. DISTRICT COURT

**II. Nature of Supreme Court Review**

It is important to note that review in this Court by means of a writ of certiorari is not a matter of right, but of judicial discretion. The primary concern of the Supreme Court is not to correct errors in lower court decisions, but to decide cases presenting issues of importance beyond the particular facts and parties involved. The Court grants and hears argument in only about 1% of the cases that are filed each Term. The vast majority of petitions are simply denied by the Court without comment or explanation. The denial of a petition for a writ of certiorari signifies only that the Court has chosen not to accept the case for review and does not express the Court's view of the merits of the case.

Every petitioner for a writ of certiorari is advised to read carefully the *Considerations Governing Review on Certiorari* set forth in Rule 10. Important considerations for accepting a case for review include the existence of a conflict between the decision of which review is sought and a decision of another appellate court on the same issue. An important function of the Supreme Court is to resolve disagreements among lower courts about specific legal questions. Another consideration is the importance to the public of the issue.

**III. The Time for Filing**

You must file your petition for a writ of certiorari within 90 days from the date of the entry of the final judgment in the United States court of appeals or highest state appellate court or 90 days from the denial of a timely filed petition for rehearing. The issuance of a mandate or remittitur after judgment has been entered has no bearing on the computation of time and does not extend the time for filing. See Rules 13.1 and

13.3. Filing in the Supreme Court means the actual receipt of documents by the Clerk; or their deposit in the United States mail, with first-class postage prepaid, on or before the final date allowed for filing; or their delivery to a third-party commercial carrier, on or before the final date allowed for filing, for delivery to the Clerk within 3 calendar days. See Rule 29.2.

#### **IV. What To File**

Unless you are an inmate confined in an institution and not represented by counsel, file:

—An original and ten copies of a motion for leave to proceed *in forma pauperis* and an original and 10 copies of an affidavit or declaration in support thereof. See Rule 39.

—An original and 10 copies of a petition for a writ of certiorari with an appendix consisting of a copy of the judgment or decree you are asking this Court to review including any order on rehearing, and copies of any opinions or orders by any courts or administrative agencies that have previously considered your case. See Rule 14.1(i).

—One affidavit or declaration showing that all opposing parties or their counsel have been served with a copy of the papers filed in this Court. See Rule 29.

If you are an inmate confined in an institution and not represented by counsel, you need file only the original of the motion for leave to proceed *in forma pauperis*, affidavit or declaration in support of the motion for leave to proceed *in forma pauperis*, the petition for a writ of certiorari, and proof of service.

The attached forms may be used for the original motion, affidavit or declaration, and petition, and should be stapled together in that order. The proof of service should be included as a detached sheet, and the form provided may be used.

#### **V. Page Limitation**

The petition for a writ of certiorari may not exceed 40 pages excluding the pages that precede Page 1 of the form. The documents required to be contained in the appendix to the petition do not count toward the page limit. See Rule 33.2(b).

#### **VI. Method of Filing**

All documents to be filed in this Court must be addressed to the Clerk, Supreme Court of the United States, Washington, D. C. 20543 and must be served on opposing parties or their counsel in accordance with Rule 29.

## INSTRUCTIONS FOR COMPLETING FORMS

### I. Motion for Leave to Proceed *In Forma Pauperis* - Rule 39

A. On the form provided for the motion for leave to proceed *in forma pauperis*, leave the case number blank. The number will be assigned by the Clerk when the case is docketed.

B. On the line in the case caption for "petitioner", type your name. As a *pro se* petitioner, you may represent only yourself. On the line for "respondent", type the name of the opposing party in the lower court. If there are multiple respondents, enter the first respondent, as the name appeared on the lower court decision, followed by "et al." to indicate that there are other respondents. The additional parties must be listed in the LIST OF PARTIES section of the petition.

C. If the lower courts in your case granted you leave to proceed *in forma pauperis*, check the appropriate space and indicate the court or courts that allowed you to proceed *in forma pauperis*. If none of the lower courts granted you leave to proceed *in forma pauperis*, check the block that so indicates.

D. Sign the motion on the signature line.

### II. Affidavit or Declaration in Support of Motion for Leave to Proceed *In Forma Pauperis*

On the form provided, answer fully each of the questions. If the answer to a question is "0," "none," or "not applicable (N/A)," enter that response. If you need more space to answer a question or to explain your answer, attach a separate sheet of paper, identified with your name and the question number. Unless each question is fully answered, the Clerk will not accept the petition. The form must either be notarized or be in the form of a declaration. See 28 U. S. C. § 1746.

### III. Cover Page - Rule 34

When you complete the form for the cover page:

A. Leave case number blank. The number will be assigned by the Clerk when the case is docketed.

B. Complete the case caption as you did on the motion for leave to proceed *in forma pauperis*.

C. List the court from which the action is brought on the line following the words "on petition for a writ of certiorari to." If your case is from a state court, enter the name of the court that last addressed the merits of the case. For example, if the highest state court denied discretionary review, and the state court of appeals affirmed the decision of the trial court, the state court of appeals should be listed. If your case is federal, the United States court of

appeals that decided your case will always be listed here.

D. Enter your name, address, and telephone number in the appropriate spaces.

#### **IV. Question(s) Presented**

On the page provided, enter the question or questions that you wish the Court to review. The questions must be concise. Questions presented in cases accepted for review are usually no longer than two or three sentences. The purpose of the question presented is to assist the Court in selecting cases. State the issue you wish the Court to decide clearly and without unnecessary detail.

#### **V. List of Parties**

On the page provided, check either the box indicating that the names of all parties appear in the caption of the case on the cover page or the box indicating that there are additional parties. If there are additional parties, list them. Rule 12.6 states that all parties to the proceeding whose judgment is sought to be reviewed shall be deemed parties in this Court, and that all parties other than petitioner shall be respondents. The court whose judgment you seek to have this Court review is **not** a party.

#### **VI. Table of Contents**

On the page provided, list the page numbers on which the required portions of the petition appear. Number the pages consecutively, beginning with the "Opinions Below" page as page 1.

#### **VII. Index of Appendices**

List the description of each document that is included in the appendix beside the appropriate appendix letter. Mark the bottom of the first page of each appendix with the appropriate designation, *e.g.*, "Appendix A." See Rule 14.1 pertaining to the items to be included in the appendix.

##### **A. Federal Courts**

If you are asking the Court to review a decision of a federal court, the decision of the United States court of appeals should be designated Appendix A. Appendix A should be followed by the decision of the United States District Court and the findings and recommendations of the United States magistrate judge, if there were any. If the United States court of appeals denied a timely filed petition for rehearing, a copy of that order should be appended next. If you are seeking review of a decision in a habeas corpus case, and the decision of either the United States District Court or the United States Court of Appeals makes reference to a state court decision in which you were a party, a copy of the state court decision must be included in the appendix.

##### **B. State Courts**

If you are asking the Court to review a decision of a state court, the decision of which review is sought should be designated Appendix A. Appendix A should be followed by the decision of the lower court or agency that was reviewed in the decision designated Appendix A. If the highest court of the state in which a

decision could be had denied discretionary review, a copy of that order should follow. If an order denying a timely filed petition for rehearing starts the running of the time for filing a petition for a writ of certiorari pursuant to Rule 13.3, a copy of the order should be appended next.

As an example, if the state trial court ruled against you, the intermediate court of appeals affirmed the decision of the trial court, the state supreme court denied discretionary review and then denied a timely petition for rehearing, the appendices should appear in the following order:

Appendix A Decision of State Court of Appeals

Appendix B Decision of State Trial Court

Appendix C Decision of State Supreme Court Denying Review

Appendix D Order of State Supreme Court Denying Rehearing

### **VIII. Table of Authorities**

On the page provided, list the cases, statutes, treatises, and articles that you reference in your petition, and the page number of your petition where each authority appears.

### **IX. Opinions Below**

In the space provided, indicate whether the opinions of the lower courts in your case have been published, and if so, the citation for the opinion below. For example, opinions of the United States courts of appeals are published in the Federal Reporter. If the opinion in your case appears at page 100 of volume 30 of the Federal Reporter, Third Series, indicate that the opinion is reported at 30 F. 3d 100. If the opinion has been designated for publication but has not yet been published, check the appropriate space. Also indicate where in the appendix each decision, reported or unreported, appears.

### **X. Jurisdiction**

The purpose of the jurisdiction section of the petition is to establish the statutory source for the Court's jurisdiction and the dates that determine whether the petition is timely filed. The form sets out the pertinent statutes for federal and state cases. You need provide only the dates of the lower court decisions that establish the timeliness of the petition for a writ of certiorari. If an extension of time within which to file the petition for a writ of certiorari was granted, you must provide the requested information pertaining to the extension. If you seek to have the Court review a decision of a state court, you must provide the date the highest state court decided your case, either by ruling on the merits or denying discretionary review.

## **XI. Constitutional and Statutory Provisions Involved**

Set out verbatim the constitutional provisions, treaties, statutes, ordinances and regulations involved in the case. If the provisions involved are lengthy, provide their citation and indicate where in the Appendix to the petition the text of the provisions appears.

## **XII. Statement of the Case**

Provide a **concise** statement of the case containing the facts material to the consideration of the question(s) presented; you should summarize the relevant facts of the case and the proceedings that took place in the lower courts. You may need to attach additional pages, but the statement should be concise and limited to the relevant facts of the case.

## **XIII. Reasons for Granting the Petition**

The purpose of this section of the petition is to explain to the Court why it should grant certiorari. It is important to read Rule 10 and address what compelling reasons exist for the exercise of the Court's discretionary jurisdiction. Try to show not only why the decision of the lower court may be erroneous, but the national importance of having the Supreme Court decide the question involved. It is important to show whether the decision of the court that decided your case is in conflict with the decisions of another appellate court; the importance of the case not only to you but to others similarly situated; and the ways the decision of the lower court in your case was erroneous. You will need to attach additional pages, but the reasons should be as concise as possible, consistent with the purpose of this section of the petition.

## **XIV. Conclusion**

Enter your name and the date that you submit the petition.

## **XV. Proof of Service**

You must serve a copy of your petition on counsel for respondent(s) as required by Rule 29. If you serve the petition by first-class mail or by third-party commercial carrier, you may use the enclosed proof of service form. If the United States or any department, office, agency, officer, or employee thereof is a party, you must serve the Solicitor General of the United States, Room 5614, Department of Justice, 950 Pennsylvania Ave., N.W., Washington, D. C. 20530-0001. The lower courts that ruled on your case are not parties and need not be served with a copy of the petition. The proof of service may be in the form of a declaration pursuant to 28 U. S. C. § 1746.

No. 03-0703

No. 99CR 28042

IN THE  
SUPREME COURT OF THE UNITED STATES

---

Michael Chism — PETITIONER  
(Your Name)

VS.

People of State of Illinois — RESPONDENT(S)

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

The petitioner asks leave to file the attached petition for a writ of certiorari without prepayment of costs and to proceed *in forma pauperis*.

Petitioner has previously been granted leave to proceed *in forma pauperis* in the following court(s):

Clerk of the United States Supreme Court  
Supreme Court Building Washington, D.C. 20543

Petitioner has **not** previously been granted leave to proceed *in forma pauperis* in any other court.

Petitioner's affidavit or declaration in support of this motion is attached hereto.

Michael Chism  
(Signature)



**AFFIDAVIT OR DECLARATION  
IN SUPPORT OF MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS***

I, \_\_\_\_\_, am the petitioner in the above-entitled case. In support of my motion to proceed *in forma pauperis*, I state that because of my poverty I am unable to pay the costs of this case or to give security therefor; and I believe I am entitled to redress.

1. For both you and your spouse estimate the average amount of money received from each of the following sources during the past 12 months. Adjust any amount that was received weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate. Use gross amounts, that is, amounts before any deductions for taxes or otherwise.

Income source	Average monthly amount during the past 12 months		Amount expected next month	
	You	Spouse	You	Spouse
Employment	\$None	\$None	\$None	\$None
Self-employment	\$None	\$None	\$None	\$None
Income from real property (such as rental income)	\$None	\$None	\$None	\$None
Interest and dividends	\$None	\$None	\$None	\$None
Gifts	\$None	\$None	\$None	\$None
Alimony	\$None	\$None	\$None	\$None
Child Support	\$None	\$None	\$None	\$None
Retirement (such as social security, pensions, annuities, insurance)	\$None	\$None	\$None	\$None
Disability (such as social security, insurance payments)	\$None	\$None	\$None	\$None
Unemployment payments	\$None	\$None	\$None	\$None
Public-assistance (such as welfare)	\$None	\$None	\$None	\$None
Other (specify): _____	\$None	\$None	\$None	\$None
<b>Total monthly income:</b>	\$None	\$None	\$None	\$None

2. List your employment history for the past two years, most recent first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
<u>NONE</u>	<u>NONE</u>	<u>NONE</u>	\$ <u>NONE</u>
_____	_____	_____	\$ _____
_____	_____	_____	\$ _____

3. List your spouse's employment history for the past two years, most recent employer first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
<u>NONE</u>	<u>NONE</u>	<u>NONE</u>	\$ <u>NONE</u>
_____	_____	_____	\$ _____
_____	_____	_____	\$ _____

4. How much cash do you and your spouse have? \$ \_\_\_\_\_  
Below, state any money you or your spouse have in bank accounts or in any other financial institution.

Financial institution	Type of account	Amount you have	Amount your spouse has
<u>NONE</u>	<u>NONE</u>	\$ <u>NONE</u>	\$ <u>NONE</u>
_____	_____	\$ _____	\$ _____
_____	_____	\$ _____	\$ _____

5. List the assets, and their values, which you own or your spouse owns. Do not list clothing and ordinary household furnishings.

Home  
Value NONE

Other real estate  
Value NONE

Motor Vehicle #1  
Year, make & model \_\_\_\_\_  
Value NONE

Motor Vehicle #2  
Year, make & model NONE  
Value \_\_\_\_\_

Other assets  
Description \_\_\_\_\_  
Value NONE

6. State every person, business, or organization owing you or your spouse money, and the amount owed.

Person owing you or your spouse money	Amount owed to you	Amount owed to your spouse
<u>None</u>	<u>\$ None</u>	<u>\$ None</u>
_____	\$ _____	\$ _____
_____	\$ _____	\$ _____

7. State the persons who rely on you or your spouse for support.

Name	Relationship	Age
_____	_____	_____
_____	_____	_____
_____	_____	_____

8. Estimate the average monthly expenses of you and your family. Show separately the amounts paid by your spouse. Adjust any payments that are made weekly, biweekly, quarterly, or annually to show the monthly rate.

	You	Your spouse
Rent or home-mortgage payment (include lot rented for mobile home)	<u>\$ None</u>	<u>\$ None</u>
Are real estate taxes included? <input type="checkbox"/> Yes <input type="checkbox"/> No		
Is property insurance included? <input type="checkbox"/> Yes <input type="checkbox"/> No		
Utilities (electricity, heating fuel, water, sewer, and telephone)	<u>\$ None</u>	<u>\$ None</u>
Home maintenance (repairs and upkeep)	<u>\$ None</u>	<u>\$ None</u>
Food	<u>\$ None</u>	<u>\$ None</u>
Clothing	<u>\$ None</u>	<u>\$ None</u>
Laundry and dry-cleaning	<u>\$ None</u>	<u>\$ None</u>
Medical and dental expenses	<u>\$ None</u>	<u>\$ None</u>

	You	Your spouse
Transportation (not including motor vehicle payments)	\$ <u>NONE</u>	\$ <u>NONE</u>
Recreation, entertainment, newspapers, magazines, etc.	\$ <u>NONE</u>	\$ <u>NONE</u>
Insurance (not deducted from wages or included in mortgage payments)		
Homeowner's or renter's	\$ <u>NONE</u>	\$ <u>NONE</u>
Life	\$ <u>NONE</u>	\$ <u>NONE</u>
Health	\$ <u>NONE</u>	\$ <u>NONE</u>
Motor Vehicle	\$ <u>NONE</u>	\$ <u>NONE</u>
Other: _____	\$ <u>NONE</u>	\$ <u>NONE</u>
Taxes (not deducted from wages or included in mortgage payments)		
(specify): _____	\$ <u>NONE</u>	\$ <u>NONE</u>
Installment payments		
Motor Vehicle	\$ <u>NONE</u>	\$ <u>NONE</u>
Credit card(s)	\$ <u>NONE</u>	\$ <u>NONE</u>
Department store(s)	\$ <u>NONE</u>	\$ <u>NONE</u>
Other: _____	\$ <u>NONE</u>	\$ <u>NONE</u>
Alimony, maintenance, and support paid to others	\$ <u>NONE</u>	\$ <u>NONE</u>
Regular expenses for operation of business, profession, or farm (attach detailed statement)	\$ <u>NONE</u>	\$ <u>NONE</u>
Other (specify): _____	\$ <u>NONE</u>	\$ <u>NONE</u>
<b>Total monthly expenses:</b>	<b>\$ <u>NONE</u></b>	<b>\$ <u>NONE</u></b>

9. Do you expect any major changes to your monthly income or expenses or in your assets or liabilities during the next 12 months?

Yes  No If yes, describe on an attached sheet.

10. Have you paid - or will you be paying - an attorney any money for services in connection with this case, including the completion of this form?  Yes  No

If yes, how much? \_\_\_\_\_

If yes, state the attorney's name, address, and telephone number:

11. Have you paid—or will you be paying—anyone other than an attorney (such as a paralegal or a typist) any money for services in connection with this case, including the completion of this form?

Yes  No

If yes, how much? \_\_\_\_\_

If yes, state the person's name, address, and telephone number:

12. Provide any other information that will help explain why you cannot pay the costs of this case.

*Because right now I in prison with NO income.*

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: Nov, 2005

Michael Chiam  
(Signature)

No. 03-0703

No. 99 CR 28042

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 05

Michael Chism — PETITIONER  
(Your Name)

vs.

People of the State of Ill. — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

SUPREME COURT OF ILLINOIS  
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Michael Chism  
(Your Name)

R.R. # 4, Box 196  
(Address)

Mt. Sterling, IL 62353  
(City, State, Zip Code)

\_\_\_\_\_  
(Phone Number)

**QUESTION(S) PRESENTED**

## LIST OF PARTIES

- All parties appear in the caption of the case on the cover page.
- All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:



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IN THE  
SUPREME COURT OF THE UNITED STATES  
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

**OPINIONS BELOW**

For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix \_\_\_\_\_ to the petition and is

- reported at \_\_\_\_\_; or,
- has been designated for publication but is not yet reported; or,
- is unpublished.

The opinion of the United States district court appears at Appendix \_\_\_\_\_ to the petition and is

- reported at \_\_\_\_\_; or,
- has been designated for publication but is not yet reported; or,
- is unpublished.

For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix \_\_\_\_\_ to the petition and is

- reported at \_\_\_\_\_; or,
- has been designated for publication but is not yet reported; or,
- is unpublished.

The opinion of the \_\_\_\_\_ court appears at Appendix \_\_\_\_\_ to the petition and is

- reported at \_\_\_\_\_; or,
- has been designated for publication but is not yet reported; or,
- is unpublished.

## JURISDICTION

For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was \_\_\_\_\_.

No petition for rehearing was timely filed in my case.

A timely petition for rehearing was denied by the United States Court of Appeals on the following date: \_\_\_\_\_, and a copy of the order denying rehearing appears at Appendix \_\_\_\_\_.

An extension of time to file the petition for a writ of certiorari was granted to and including \_\_\_\_\_ (date) on \_\_\_\_\_ (date) in Application No. \_\_\_ A \_\_\_\_\_.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

For cases from **state courts**:

The date on which the highest state court decided my case was \_\_\_\_\_.  
A copy of that decision appears at Appendix \_\_\_\_\_.

A timely petition for rehearing was thereafter denied on the following date: \_\_\_\_\_, and a copy of the order denying rehearing appears at Appendix \_\_\_\_\_.

An extension of time to file the petition for a writ of certiorari was granted to and including \_\_\_\_\_ (date) on \_\_\_\_\_ (date) in Application No. \_\_\_ A \_\_\_\_\_.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

**STATEMENT OF THE CASE**

**REASONS FOR GRANTING THE PETITION**

**CONCLUSION**

The petition for a writ of certiorari should be granted.

Respectfully submitted,

\_\_\_\_\_

Date: \_\_\_\_\_

No. 23-0703

99 CR 28042

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 05

Michael Chism — PETITIONER  
(Your Name)

VS.

People of the State of Ill. — RESPONDENT(S)

**PROOF OF SERVICE**

I, Michael Chism, do swear or declare that on this date, \_\_\_\_\_, 2005, as required by Supreme Court Rule 29 I have served the enclosed MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS* and PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid, or by delivery to a third-party commercial carrier for delivery within 3 calendar days.

The names and addresses of those served are as follows:

Clerk of the Circuit Court of Cook County 2650  
South California, Chicago, IL 60608

Clerk of the United State District Court  
Northern District of Illinois 219 South Dearborn 20th Fl Chicago, IL 60604

I declare under penalty of perjury that the foregoing is true and correct.

Executed on \_\_\_\_\_, 20\_\_\_\_

Michael Chism  
(Signature)





*My Name*  
OFFICE OF THE STATE APPELLATE DEFENDER  
FIRST JUDICIAL DISTRICT

*My Address*  
203 NORTH LASALLE STREET  
24TH FLOOR  
CHICAGO, ILLINOIS 60601  
TELEPHONE: 312/814-5472  
FAX: 312/814-1447

RETURNED

JAN 23 2006

MICHAEL W. DOBBINS  
CLERK, U.S. DISTRICT COURT

MICHAEL J. PELLETIER  
DEPUTY DEFENDER

October 11, 2005

PATRICIA UNSINN  
SUPERVISOR

Mr. Michael Chism  
Register No. K-83030  
Western Illinois Correctional Center  
R.R. # 4, Box 196  
Mt. Sterling, IL 62353

RETURNED

DEC 29 2005

MICHAEL W. DOBBINS  
CLERK, U.S. DISTRICT COURT

Dear Mr. Chism:

Enclosed find a copy of the Supreme Court's order denying our petition for leave to appeal. I am disappointed that the court did not choose to review your case, as I am sure you are. Unfortunately, I have reviewed your case and have determined that there are no issues with sufficient legal merit to justify the continued representation of you by this office. Thus, your file will now be closed. However, in the event you wish to appeal your case further, you can do so on your own or with other counsel retained by you. The following pages describe the procedures necessary to urge other courts to look at your case.

There are several ways to proceed. You can write to the United States Supreme Court (petition for writ of certiorari). Depending on what arguments you are making, you might also be able to pursue relief through a post-conviction petition and a federal habeas corpus. The filing deadline for each procedure is noted.

Good luck to you.

Sincerely,  
  
PATRICIA UNSINN  
Supervisor

cc: Docketing cl20

Date: 1/7/2005

Western Illinois Correctional Center  
Trust Fund

JAN 23 2006

Time: 1:36pm

d\_list\_inmate\_trans\_statement\_composite

Inmate Transaction Statement

MICHAEL W. DOBBINS

CLERK U.S. DISTRICT COURT

REPORT CRITERIA - Date: 01/01/2005 thru End; Inmate: K83030;  
Restrictions ? : Yes; Transaction Type: All Transaction Types; Print Furloughs / Restitutions ? : Yes;  
Inmate Totals ? : Yes; Print Balance Errors Only ? : No

Print  
Include

Inmate: K83030 Chism, Michael

Housing Unit: WIL-02-D -15

Date	Source	Transaction Type	Batch	Reference #	Description	Amount	Balance
						Beginning Balance:	0.00
09/15/05	Mall Room	04 Intake and Transfers In	258215	56779	Pontiac C.C.	69.21	69.21
09/29/05	Point of Sale	60 Commissary	272704	464130	Commissary	-55.09	14.12
10/05/05	Point of Sale	60 Commissary	278772	464841	Commissary	-9.11	5.01
10/14/05	Point of Sale	60 Commissary	287772	465590	Commissary	-4.02	.99
10/14/05	Payroll	20 Payroll Adjustment	287130		P/R month of 09/2005	9.59	10.58
10/26/05	Point of Sale	60 Commissary	299751	467234	Commissary	-10.15	.43

URNED

JAN 20 2005

MICHAEL W. DOBBINS  
CLERK U.S. DISTRICT COURT

Total Inmate Funds:	.43
Less Funds Held For Orders:	.00
Less Funds Restricted:	.00
Funds Available:	.43
Total Furloughs:	.00
Total Voluntary Restitutions:	.00

**RETURNED**

No. 1-03-0703

DEC 20 2005

**IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST DISTRICT**

MICHAEL W. DOBBINS  
CLERK, U.S. DISTRICT COURT

**PEOPLE OF THE STATE OF ILLINOIS,**

Respondent-Appellee,

-vs-

**MICHAEL CHISM,**

Petitioner-Appellant.

) Appeal from the Circuit Court  
) of Cook County, Illinois.

) No. 99 CR 28042.

) Honorable  
) John J. Wasilewski,  
) Judge Presiding.

**RETURNED**

JAN 23 2006

MICHAEL W. DOBBINS  
CLERK, U.S. DISTRICT COURT

**BRIEF AND ARGUMENT FOR PETITIONER-APPELLANT**

MICHAEL J. PELLETIER  
Deputy Defender

ADAM L. FRANKEL  
Assistant Appellate Defender  
Office of the State Appellate Defender  
203 North LaSalle Street - 24th Floor  
Chicago, Illinois 60601  
(312) 814-5472

COUNSEL FOR PETITIONER-APPELLANT

**ORAL ARGUMENT REQUESTED**

POINT AND AUTHORITIES

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MICHAEL CHISM’S CLAIM AS RAISED IN HIS *PRO SE* POST-CONVICTION PETITION -  
THAT HE WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL - SETS FORTH  
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## NATURE OF THE CASE

Michael Chism appeals from a judgment dismissing his *pro se* petition for post-conviction relief.

No issue is raised concerning the charging instrument. However, an issue is raised concerning the sufficiency of the post-conviction pleadings.

## ISSUE PRESENTED FOR REVIEW

Whether Michael Chism's claim as raised in his *pro se* post-conviction petition - that he was denied the effective assistance of counsel - sets forth the "gist" of a constitutional claim and thereby warrants further proceedings under the Post-Conviction Hearing Act.

## **JURISDICTION**

Michael Chism appeals the dismissal of his post-conviction petition. The judgment being appealed was entered on December 13, 2002 (C. 42). Notice of appeal was timely filed on January 13, 2003 (C. 107) Jurisdiction therefore lies in this Court pursuant to Article VI, Section 6, of the Illinois Constitution, and Supreme Court Rule 651(a).



## STATEMENT OF FACTS

Michael Chism was charged with home invasion and attempt first degree murder of 85-year-old Sabina Bezjak, arising out of an incident occurring on November 15, 1999 (C. 16; R. 3). Mr. Chism initially entered a plea of not guilty (C. 2), but on June 30, 2000, the trial court held an off-record, in-chambers Rule 402 conference in the presence of the attorneys (C. 3; R. 2). On July 6, 2000, Mr. Chism withdrew his plea of not guilty, and entered a plea of guilty on both charges (R. 3-4).

At the hearing, the court read the counts aloud, after which Mr. Chism indicated that he understood the charges against him (R. 3-4). The court explained that since both offenses were Class X felonies, the court could impose a sentence ranging from 6 to 30 years, or a sentence ranging from 30 to 60 years (R. 4). The court also explained to Mr. Chism that if certain conditions were met, he could serve 85% of the 16-year sentence he was to receive, with credit for good conduct (R. 4-5). The court explained further that it could impose a term of periodic imprisonment and a fine up to \$10,000, and that Mr. Chism would be required to serve a minimum of 6 years in the penitentiary (R. 5). The court admonished Mr. Chism as to his right to a jury trial (R. 5), his right to a presentence investigation report, his right to plead not guilty, and his right to be tried by a jury or the bench (R. 6). The court additionally told Mr. Chism that by pleading guilty, he would be foregoing those rights, and Mr. Chism indicated that he understood the consequences of his plea (R. 7).

The court briefly addressed the facts surrounding the incident and determined that in light of the Rule 402 conference, there was sufficient evidence that could be presented to serve as a

factual basis for the guilty plea (R. 8). The parties then stipulated to the facts as they had been set forth in the Rule 402 conference (R. 8). The court accepted the guilty pleas on each of the charges - attempted murder and home invasion (R. 9). The court noted that as to the charge of home invasion, the victim had incurred great bodily harm (R. 9).

In aggravation, the State emphasized to the court that Ms. Bezjak was 85 years of age; the defense presented no evidence in mitigation (R. 9-10). The court determined that the particular facts of the case, in conjunction with the injuries incurred by Ms. Bezjak, were factors to be properly considered in aggravation (R. 11). The court acknowledged that Mr. Chism was a 40-year-old man with no prior criminal history and stated that "...one could say his [Mr. Chism's] conduct is an aberration" (R. 11). Based on the previous agreement reached by the parties in the Rule 402 conference, the court sentenced Mr. Chism to 16 years incarceration on each of the counts, and ordered that the two 16-year sentences be served concurrently (C. 42; R. 11). The court ordered that Mr. Chism serve at least 85% of each 16-year sentence (R. 11).

#### **Post-Conviction Petition Proceedings**

On October 16, 2001, Mr. Chism filed a motion for discovery for the purpose of filing a post-conviction petition, and it was denied by the trial court on November 5, 2001 (C. 101). On June 20, 2002, Mr. Chism filed a motion to reduce his sentence, which was denied on October 1, 2002, with the court citing its lack of jurisdiction to hear the case (C. 101). On September 17, 2002, Mr. Chism filed both a motion to reduce sentence (C. 64), and a *pro se* post-conviction petition alleging, *inter alia*, that he was denied the effective assistance of trial counsel, that he was interrogated without receiving his Miranda rights, and that he was wrongfully deprived of presenting a critical alibi witness (C. 88-90).

In his petition, Mr. Chism stated that at 11:15 p.m., on November 15, 1999, the police arrived at his home and asked him and his brother whether Hispanic people resided at their residence (C. 90). The brothers replied in the negative and the officer then informed them that one of the neighbors had been robbed by a Hispanic man (C. 90). The brothers told the officer that they lived in a black household and that they owned their home (C. 90). The officer replied, "Okay," and left (C. 90). Four days later, a detective returned to the Chism residence and placed Mr. Chism's brother under arrest (C. 90). Twenty minutes after the arrest of his brother, detectives returned to the residence and asked Mr. Chism whether he was Michael Chism, to which he replied in the affirmative (C. 90). The detectives asked Mr. Chism to accompany them to the police station to identify his brother (C. 90).

Upon arriving at the police station, one of the officers photographed Mr. Chism and had him wait in a room (C. 89). Minutes later, the officer returned and informed Mr. Chism that he was not under arrest, but that the officer needed to ask him some questions (C. 89). Next, a detective entered the room and questioned Mr. Chism about his neighbor, the victim, Sabina Beznak (C. 89). The detective asked him whether he had ever helped his neighbor clean her yard, to which Mr. Chism stated that he had (C. 89). The detective also asked him if he knew anything about a robbery that took place days earlier (C. 89). Mr. Chism said, "Yes," because the police had come to his home on that date to ask him about the robbery (C. 89). The detectives continued asking questions and one said, "Come on Mr. Chism, tell me the truth, are you the one who robbed your neighbor?" (C. 89). Mr. Chism replied, "No," and stated that the lady was about 86 years old, and that he would never harm an elderly person (C. 89). He also explained that he and his son had always helped out the elderly in his neighborhood, and that he had been

living in the neighborhood for 3 years, and most of the families in the neighborhood came to know him (C. 89). Mr. Chism told the police that he helped Ms. Bezjak clean her yard until 4:00 p.m. on the date in question, and that she paid him \$5.00 by dropping the money out of her window (C. 89). Mr. Chism stated that thanked her and then went to Pete's Auto Shop (C. 89).

Also in his petition, Mr. Chism stated that the detective told him that the woman was injured and in the hospital (C. 89). When the detective finished questioning him, the detective put him in a line-up for identification (C. 89). Afterward, the detective told him that Ms. Bezjak had identified him as the offender, but informed him that he was still not under arrest (C. 89). At that point, two more detectives interrogated Mr. Chism, and one detective told him that if he did not confess to the offense, he would have to call the assistant State's attorney ("ASA") (C. 89). Mr. Chism insisted that he did not commit the offense, and waited an hour until the ASA arrived (C. 89). The ASA told Mr. Chism that if he confessed to the offense he would help him receive the minimum sentence of 6 years, but if he did not confess, then he would receive a 30-year sentence (C. 89). Mr. Chism asked the ASA if he could go home since he had not been placed under arrest, but the ASA replied, "No" (C. 89). After the questioning ceased, the ASA read Mr. Chism his rights (C. 89). Upon receiving his rights, Mr. Chism refused to answer any further questions, and the next day Mr. Chism was incarcerated in Cook County Jail (C. 89).

As to the claims included in his *pro se* post-conviction petition, Mr. Chism specifically alleged that he was deprived of the effective assistance of counsel (C. 90). In support of this claim, Mr. Chism stated that at the time of offense, he was at his home with his brother and his son (C. 90). Mr. Chism wanted his brother to testify as an alibi witness on his behalf, and asked

defense counsel to procure him for that purpose (C. 90). Mr. Chism explained to counsel that there was no telephone at his home, but that she could contact his brother through his sister, Cora (C. 90). Mr. Chism stated that there were several continuances in his case, and at each he would ask his counsel whether she had contacted either his brother or sister, to which she always replied, "No" (C. 90). On one of the final court dates, Mr. Chism stated, defense counsel informed him that he would have to serve at least a 12-year sentence (C. 90). Mr. Chism asked defense counsel if he could instead plead guilty in exchange for serving a 6-year sentence, but she told him, "No" (C. 90).

Mr. Chism stated further that there were four to five additional continuances so the State could obtain and present the statement of the doctor who treated Ms. Bezjak (C. 90). Mr. Chism alleged that his counsel could have filed a motion to have his case dropped due to the lack of medical evidence, but instead she asked for another continuance to the benefit of the State's case (C. 90). On the last court date, defense counsel again informed Mr. Chism that it was likely he would have to serve at least a 12-year sentence (C. 90). Mr. Chism stated that after receiving this information he became upset and confused, and did not understand what was happening with his case (C. 90). He stated further that he received no help from his lawyer because she did not keep him informed about his case (C. 90).

On December 13, 2002, the Honorable John A. Wasilewski summarily dismissed the *pro se* petition and the motion to reduce sentence in a written order (C. 100-103). The court stated that the petition was "frivolous and patently without merit" and denied the motion to reduce sentence (R. C103). Mr. Chism now appeals from the summary dismissal of his *pro se* post-conviction petition and the denial of his motion to reduce sentence.

## ARGUMENT

### **MICHAEL CHISM'S CLAIM AS RAISED IN HIS *PRO SE* POST-CONVICTION PETITION - THAT HE WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL - SETS FORTH THE GIST OF A CONSTITUTIONAL CLAIM AND THEREBY WARRANTS FURTHER PROCEEDINGS UNDER THE POST-CONVICTION HEARING ACT.**

In his post-conviction petition, Mr. Chism alleged that he received ineffective assistance from his trial counsel. In reviewing his petition, however, the trial court erroneously concluded the claim was frivolous and without merit. Despite the trial court's ruling, Mr. Chism is entitled to appointment of counsel and further proceedings on this claim. Mr. Chism provided factual support in his petition to support his claim that his trial counsel was ineffective for failing to investigate his alibi witness and failing to suppress illegally obtained statements with sufficient detail as to satisfy the minimal "gist" standard required of post-conviction pleadings. Since the trial court summarily dismissed Mr. Chism's petition where his petition does present the gist of a meritorious claim, Mr. Chism's cause warrants remand for second-stage proceedings under the Post-Conviction Hearing Act.

Post-conviction petitions are governed by the Illinois Post-Conviction Hearing Act, 725 ILCS 5/122-1 *et seq.* (West 2002), which provides a remedy for criminal defendants who claim that a substantial violation of their constitutional rights occurred at the proceedings resulting in their convictions. *People v. Morgan*, 187 Ill.2d 500, 719 N.E.2d 681, 697 (1999); *People v. Johnson*, 191 Ill.2d 257, 730 N.E.2d 1107, 1114 (2000). The Act creates a three-tiered process for the adjudication of claims of constitutional deprivation. *People v. Gaultney*, 174 Ill. 2d 410, 675 N.E.2d 102, 106 (1996). At the first-stage of the process, when the defendant files a *pro se*

post-conviction petition, the Act allows the trial court to review the pleading without input from the State for a 90-day period to assess its adequacy. 725 ILCS 5/122-2.1(a). The trial court's review is limited to a singular inquiry: is the pleading "frivolous and patently without merit?" 725 ILCS 5/122-2.1(a)(2); *People v. Bocclair*, 202 Ill.2d 89, 789 N.E.2d 734 (2002); *People v. Edwards*, 197 Ill.2d 239, 757 N.E.2d 442 (2001). If it is, the court orders its dismissal; if not, counsel is appointed, and the matter proceeds to the second-stage under the Act. 725 ILCS 5/122-2.1(b), 122-4 *et seq.*

The Illinois Supreme Court has held that a post-conviction petition is considered frivolous or patently without merit only if the allegations in the petition, taken as true and liberally construed, fail to present the "gist of a constitutional claim." *People v. Edwards*, 757 N.E.2d at 445. In adopting the more relaxed gist standard, the Court rejected the prior "sufficient facts" test and stated that "requiring this type of full or complete pleading is contrary to this court's holding that the *pro se* defendant need only present a limited amount of detail." *Id.* at 446. Hence, the "gist" standard is a low threshold, requiring only a limited amount of detail and a claim need not be set forth in its entirety. *Id.* Additionally, all well-pleaded facts in the petition are taken as true. *People v. Towns*, 182 Ill.2d 491, 696 N.E.2d 1128, 1134 (1998).

The standard of review in an appeal from an order dismissing a post-conviction petition is plenary or *de novo* review, because inquiry into the sufficiency of the allegations is legal in nature. *People v. Coleman*, 183 Ill.2d 366, 387-88, 701 N.E.2d 1063 (1998).

In the instant case, proper application of the gist standard persuades that Mr. Chism's *pro se* petition should be remanded for second-stage proceedings. Mr. Chism alleged that he was denied the effective assistance of counsel when his attorney both failed to investigate an

indispensable alibi witness and failed to move to suppress his illegally obtained custodial statements. In examining this claim, the court wrote, "As grounds for post-conviction relief, petitioner claims that his attorney did not do a 'good' job for him and that he is requesting a sentence reduction" (C. 100). The trial court did not substantively address the facts Mr. Chism alleged in his petition which supported that claim. The court upheld the voluntariness of the guilty plea, stating simply that Mr. Chism failed to challenge the voluntariness of the plea on direct appeal (however, there was no direct appeal), that he failed to file a motion to withdraw the plea, and that the plea agreement called for him to serve 85% of a 16-year sentence (C. 102). The court found that the trial judge had sufficiently admonished Mr. Chism, but mistakenly noted that Mr. Chism's claim did not depend on material outside of the record, when a cursory reading of the petition reveals that his claim is based on information beyond the record (C. 102). Consequently, the court was able to summarily dismiss the petition as frivolous and without merit.

Mr. Chism's post-conviction petition should advance to the second-stage under the Act because his claim of ineffective assistance of counsel - a claim of constitutional magnitude - presents the "gist" of a claim as plead in the petition. The Illinois Supreme Court explained its rationale in adopting the relevant "gist" standard:

While in a given case the *pro se* defendant may be aware of all the facts pertaining to his claim, he will, in all likelihood, be unaware of the precise legal basis for his claim or all the legal elements of that claim. In many cases, the *pro se* defendant will be unaware that certain facts, which in his mind are tangential or secondary, are, in fact, critical parts of a complete and valid constitutional claim.

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

Mr. Chism has satisfied this "gist" standard. Mr. Chism's petition provides ample detail



and factual support for his claim that counsel failed to investigate his sole alibi witness and failed to suppress illegally obtained statements, causing him to plead guilty.

**Defense Counsel was Ineffective for Failing to Investigate and Obtain Mr. Chism's  
Brother, His Sole Alibi Witness**

Mr. Chism complained that throughout the course of his representation, he requested that his counsel procure his brother as an alibi witness. Mr. Chism stated that he explained to his counsel that he did not commit the offense, and that at the time of the incident he was at home with his brother and son. Instead of initially investigating the potential testimony of his brother, counsel first discouraged Mr. Chism from presenting his brother as a witness because his brother had been incarcerated on a prior occasion (C. 90). Mr. Chism stated that counsel asked him if his brother could be contacted at home, and he explained to her that the home had no telephone (C. 90).

On the next court date Mr. Chism asked defense counsel about his brother, and she stated that she could not locate him. Mr. Chism told her that by calling his sister, Cora, she could get in contact with his brother. On the subsequent court date, however, defense counsel told Mr. Chism that she was not able to contact his sister, but that she would try again (C. 90). During the next continued court appearance, Mr. Chism again asked his attorney whether she had contacted either his brother or sister, and his attorney merely replied, "No." On the court date following, counsel informed him that he would have to serve at least a 12 year sentence, but did not address the issue of Mr. Chism's brother, his only alibi witness (C. 90).

These facts state the gist of a claim that counsel did not act in a professionally reasonable manner in failing to investigate Mr. Chism's alibi defense. Although there is a strong

presumption that trial counsel's actions were the result of a sound trial strategy, the mere characterization of a decision not to call an available witness as "trial strategy" does not preclude inquiry into the reasonableness of that strategy. *Coleman*, 183 Ill.2d at 397; *People v. King*, 316 Ill.App.3d 901, 916, 738 N.E.2d 556 (1st Dist. 2000). Further, Illinois courts have recognized that the failure to investigate or call a witness constitutes ineffective assistance of counsel where the witness was known to trial counsel and the witness's testimony may have been exonerating. *Coleman*, 183 Ill.2d at 398; *King*, 316 Ill.App.3d at 916; *People v. Tate*, 305 Ill.App.3d 607, 612, 712 N.E.2d 826 (1<sup>st</sup> Dist. 1999).

The Illinois Constitution provides that in criminal prosecutions the accused is entitled to have process to compel the attendance of witnesses in his behalf. Ill. Const. 1970, Art. I, sec. 8. Similarly, the United States Constitution provides that the accused in criminal cases is entitled to have compulsory process for obtaining witnesses in his favor. U.S. Const., Amend. VI. Additionally, this court has repeatedly held that where counsel failed to investigate and develop defendant's alibi, counsel's conduct amounted to ineffective assistance of counsel. See e.g., *People v. Garza*, 180 Ill.App.3d 263, 535 N.E.2d 960 (1st Dist. 1989); *People v. Solomon*, 158 Ill.App.3d 432, 511 N.E.2d 875 (1st Dist. 1987); *People v. Gunartt*, 218 Ill.App.3d 752, 578 N.E.2d 1081 (1st Dist. 1991); *People v. O'Banner*, 215 Ill.App.3d 778, 565 N.E.2d 1261 (1st Dist. 1991).

In the instant case, Mr. Chism claimed that the existence of his brother as his sole alibi witness (other than his son, whose age does not appear in the record) was known to counsel, and his brother's testimony may very well have been exonerating. Counsel's failure to procure this witness may not have been mere trial strategy, but rather a lack of diligence. From his petition, it

is evident that defense counsel did not wish to have Mr. Chism's brother testify because of his prior convictions. Mr. Chism was, at the very least, entitled to have his attorney question his brother in order to gauge the strength of his alibi testimony.

There is nothing in the record to suggest that counsel subpoenaed his brother or used other available resources to locate, question or obtain him. Had counsel at least conferred with Mr. Chism's brother, she could have made an informed decision as to his impact on his defense and the State's case. Mr. Chism charged, however, that counsel never reached the threshold inquiry concerning the proffered testimony of the alibi witness, nor did she learn whether the testimony would have been beneficial to Mr. Chism's defense. As such, no reasonable rationale may account for why counsel failed to investigate and subpoena a potentially exonerating alibi witness. Moreover, by removing the possibility of having this key witness testify on his behalf, counsel's ineffectiveness forced Mr. Chism one step closer toward entering a guilty plea where he otherwise may have had other favorable alternatives.

**Defense Counsel was Ineffective for Failing to File a Pre-Trial Motion to Suppress Mr. Chism's Statements Obtained in Violation of His Rights**

Mr. Chism alleged in his petition that he was not advised of his *Miranda* rights until after he was questioned by police and the ASA (C. 89). At the police station, an officer informed Mr. Chism that he was not under arrest, but that he needed to ask him some questions (C. 89). A detective questioned Mr. Chism, and asked him if he knew anything about a robbery that took place days earlier (C. 89). Mr. Chism said, "Yes," because the police had come to his home on that date to ask him about the robbery (C. 89). The detectives continued asking questions and Mr. Chism continued to speak with them, until two more detectives interrogated Mr. Chism,

where one detective threatened him that if he did not confess to the offense, he would have to call the assistant State's attorney ("ASA") (C. 89).

The detective telephoned the ASA, who arrived an hour later and told Mr. Chism that if he confessed to the offense he would help him receive the minimum sentence of 6 years, but if he did not confess, he would receive a 30-year sentence (C. 89). Mr. Chism asked the ASA if he could go home since he had not been placed under arrest, but the ASA replied, "No" (C. 89). After the questioning ceased, the ASA read Mr. Chism his rights (C. 89). Upon receiving his rights, Mr. Chism refused to answer any further questions (C. 89).

The procedures used by police as alleged in the petition were in utter violation of Mr. Chism's *Miranda* rights and were induced by promises of a reduced sentence. Accordingly, Mr. Chism stated the gist of a claim that defense counsel was ineffective for failing to file a pre-trial motion to suppress the illegally obtained statements.

As a general rule, matters of trial strategy, such as whether to file a motion to suppress, are immune from claims of the ineffective assistance of counsel. *People v. Nunez*, 325 Ill. App. 3d 35, 42, 756 N.E.2d 941 (2nd Dist. 2001). Nevertheless, where such a motion is appropriate, the failure to file a motion to suppress will constitute ineffective assistance. *Id.* The failure to challenge improperly obtained evidence has been found to result in incompetent representation. See e.g., *People v. Brinson*, 80 Ill.App.3d 388, 399 N.E.2d 1010 (2nd Dist. 1980); *People v. Fernandez*, 162 Ill.App.3d 981, 988-9, 516 N.E.2d 366 (1st Dist. 1987); *People v. Neeley*, 90 Ill. App.3d 76, 79-81, 412 N.E.2d 1010 (5th Dist. 1980) (failure to file motion to suppress confession held to be ineffective assistance of counsel).

If Mr. Chism's counsel was aware that the statements were illegally obtained (where competent counsel would have been aware), there exists no reasonable trial strategy for counsel not to at least seek to suppress the statements. The instant situation is similar to *People v. Odom*, where the Illinois Appellate Court stated:

The public defender exercised none of the preliminary procedures available to him prior to trial. \* \* \* But in the instant case defense counsel made no effort to exclude the confession despite the fact that he must have known, if he conferred at all with his client \* \* \*, that [a] serious question existed as to the voluntariness of the confession. In so doing he gave his client no protection whatsoever against being convicted on the basis of a coerced confession.

*Odom*, 71 Ill. App.2d 480, 484, 218 N.E.2d 116 (5th Dist. 1966).

In the case at bar, the record does not indicate whether counsel made any effort to suppress Mr. Chism's statements made in violation of *Miranda*. The record is barren of any such motions and does not indicate whether counsel was aware of the violations of Mr. Chism's rights. According to his post-conviction petition, Mr. Chism claims that counsel had only limited interaction with him and may well not have known that the State's case was based on statements that had been obtained illegally because his counsel did not ask him anything about his case, and he was left uninformed about the posture of his case (C. 90). Since the contents of post-conviction petition must be taken as "true and liberally construed," Mr. Chism's allegation that he was denied the effective assistance of counsel must be deemed sufficient to survive the summary dismissal stage. Accordingly, Mr. Chism is entitled to have his cause proceed to the second-stage under the Act.

#### **Mr. Chism's Guilty Plea Was A Product of His Counsel's Ineffectiveness**

The petition states the gist of a claim that the combination of counsel's ineffectiveness for

failure to investigate his alibi, along with counsel's failure to file a pre-trial motion to suppress his statements resulted in Mr. Chism's plea of guilty. Although Mr. Chism was duly admonished and persisted in his guilty plea before the court, his plea was a result of defense counsel leaving him with essentially no option but to plead guilty. His counsel's advice to enter the plea was based on a lack of competence where had counsel taken the necessary steps to protect Mr. Chism's constitutional rights (i.e., to investigate his alibi and seek to suppress the illegally obtained statements), the complexion of the case would have been tilted in Mr. Chism's favor and would have undoubtedly affected his ultimate decision to plead guilty.

The voluntariness of a guilty plea may depend upon whether the defendant had effective assistance of counsel. *People v. Correa*, 108 Ill.2d 541, 549, 485 N.E.2d 307 (1985). If the defendant's pleas were made in reasonable reliance upon the advice or representation of his attorney, which advice or representation demonstrated incompetence, then it can be said that the defendant's pleas were not voluntary; that is, there was not a knowing and intelligent waiver of the fundamental rights which a plea of guilty entails. *Id.*

Here, Mr. Chism's petition present the gist of a claim that he was placed in the unfortunate position of having to succumb to his attorney's inadequately informed advice that he should plead guilty. The strength of Mr. Chism's alternatives evaporated with each act of his counsel's ineffective assistance. If his counsel had been diligent in investigating his alibi witness, Mr. Chism's best option may have been to proceed to either a jury or bench trial. Additionally, if his counsel sought to suppress the illegally obtained statements and received a ruling in his favor, Mr. Chism may have likewise opted to proceed to trial. However, his counsel's ineffectiveness culminated in a weakened defense, where the strength of his alibi was

never investigated, and the State's case regarding the inculpatory statements was not so much as tested for admissibility. The combination of these factors misled Mr. Chism into believing that a guilty plea was his best recourse against the charges he faced. Accordingly, Mr. Chism persisted in his plea during the trial court's admonishments, but because his case was so severely strained by counsel's ineffectiveness as discussed *supra*, his plea was involuntary in so much as it was a product of the ineffectiveness of his trial counsel. *Correa*, 108 Ill.2d at 549.

### **Conclusion**

In sum, Mr. Chism's petition sufficiently states the gist of a constitutional claim - that he received ineffective assistance of trial counsel in two ways. At this first-stage under the Post-Conviction Hearing Act, Mr. Chism must simply meet a low threshold, which he has accomplished by alleging a constitutional claim accompanied by detailed factual support involving matters beyond the record. Therefore, this Court should order Mr. Chism's petition to advance to the second-stage under the Act, where he will be appointed counsel and be given the opportunity to amend his petition so that the trial court may determine whether there has been a substantial showing of a constitutional violation.

## CONCLUSION

For the foregoing reasons, Michael Chism, Petitioner-Appellant, respectfully requests that this Court reverse the summary dismissal of the trial court and remand the cause for further proceedings consistent with sections 122-4 through 122-6 of the Post-Conviction Hearing Act.

Respectfully submitted,

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COUNSEL FOR PETITIONER-APPELLANT



**RETURNED**

No.

DEC 20 2005

IN THE

**SUPREME COURT OF ILLINOIS**

MICHAEL W. DOBBINS  
CLERK, U.S. DISTRICT COURT

**PEOPLE OF THE STATE OF ILLINOIS,**

Respondent-Appellee,

-vs-

**MICHAEL CHISM,**

Petitioner-Appellant.

) Petition for Leave to Appeal from the  
) Appellate Court of Illinois, First District,  
) No. 03-0703  
)

) There heard on Appeal from the Circuit  
) Court of Cook County, Illinois,  
) No. 99 CR 28042.  
)

) Honorable  
) John J. Wasilewski,  
) Judge Presiding.

**RETURNED**

JAN 23 2006

**PETITION FOR LEAVE TO APPEAL**

MICHAEL W. DOBBINS  
CLERK, U.S. DISTRICT COURT

MICHAEL J. PELLETIER  
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No.

IN THE

SUPREME COURT OF ILLINOIS

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PEOPLE OF THE STATE OF ILLINOIS,	)	Petition for Leave to Appeal from the
	)	Appellate Court of Illinois, First District,
Respondent-Appellee,	)	No. 03-0703
	)	
-vs-	)	There heard on Appeal from the Circuit
	)	Court of Cook County, Illinois,
	)	No. 99 CR 28042.
	)	
MICHAEL CHISM,	)	Honorable
	)	John J. Wasilewski,
Petitioner-Appellant.	)	Judge Presiding.

---

**PETITION FOR LEAVE TO APPEAL**

**PRAYER FOR LEAVE TO APPEAL**

Michael Chism, petitioner-appellant, hereby petitions this Court for leave to appeal, pursuant to Supreme Court Rules 315 and 612, from the judgment of the Appellate Court, First District, affirming his conviction for attempt first degree murder and home invasion and his sentence of two 16-year concurrent terms imprisonment.

## PROCEEDINGS BELOW

The appellate court affirmed Michael Chism's conviction on June 11, 2004. On June 15, 2004, Mr. Chism filed an affidavit of intent to file a petition for leave to appeal. No petition for rehearing was filed. A copy of the appellate court's judgment and the affidavit of intent are appended to this petition.

## COMPELLING REASONS FOR GRANTING REVIEW

1. This Court should grant leave to appeal because the appellate court misinterpreted *People v. Bocclair*, 202 Ill. 2d 89, 789 N.E.2d 734 (2002), in holding that a *pro se* post-conviction petition may be summarily dismissed on waiver grounds at the first stage of proceedings. Further, the appellate court's order conflicts with *People v. Blair*, 338 Ill. App. 3d 429, 431-32, 788 N.E.2d 240 (1<sup>st</sup> Dist. 2003), *leave to appeal granted*, \_\_\_ Ill. 2d \_\_\_, 805 N.E.2d 486 (2003), as well as *People v. Morales*, 339 Ill. App. 3d 554, 560-61, 791 N.E.2d 1122 (1<sup>st</sup> Dist. 2003), *People v. McGhee*, 337 Ill. App. 3d 992, 995, 787 N.E.2d 324 (1<sup>st</sup> Dist. 2003), and the plain language of the Post-Conviction Hearing Act. Therefore, review must be granted to decide this case in accordance with this Court's decision in *Bocclair* and to resolve the conflict within the appellate courts as to whether a first stage post-conviction petition can be summarily dismissed on the basis of waiver.

Review is further warranted in this case where the appellate court erroneously determined that the failure to file a motion to vacate a guilty plea or direct appeal results in the waiver of the issues raised in the post-conviction petition. It is well-settled that the "doctrines of waiver and *res judicata* apply to appeals from the denial of post-conviction petitions *only* in cases 'where a petitioner has previously taken a direct appeal from a judgment of conviction.'" *People v. Miranda*, 329 Ill. App. 3d 837, 842, 769 N.E.2d 1000 (1<sup>st</sup> Dist. 2003) (citing *People v. Barrow*, 195 Ill. 2d 506, 519 (2001) (emphasis added)). A petitioner does not waive the right to proceed under the Post-Conviction Hearing Act by failing to file a post-trial motion or a direct appeal. *People v. Tripp*, 248 Ill. App. 3d 706, 711, 618 N.E.2d 1157 (5<sup>th</sup> Dist. 1993). Accordingly, review is necessary because the appellate court's conclusions that Chism's failure to pursue a

direct appeal resulted in the waiver of his claims of ineffective assistance of counsel on collateral review, conflicts with well-settled precedent.

2. This Court should also grant leave to appeal because the appellate court utilized a too stringent standard in analyzing the sufficiency of Chism's first-stage post-conviction allegations. Specifically, where a petition raises an ineffective assistance of counsel claim during first-stage post-conviction proceedings, the "gist of a meritorious constitutional claim" standard should apply, as required by *People v. Edwards*, 197 Ill. 2d 239, 245, 757 N.E.2d 442 (2001). The appellate court erred when it judged Chism's allegations according to whether they satisfied the two-prong standard enunciated by *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). By requiring a first-stage petitioner to satisfy the *Strickland* standard, the appellate court engaged in a substantive review of the merits of Chism's ineffective assistance of counsel claim, which placed a burden on petitioner beyond that required at stage-one proceedings, according to this Court's analysis in *Edwards*.

This Court should grant leave to appeal to provide guidance to the circuit and appellate courts as to the standard it must apply when reviewing a post-conviction petition during first-stage proceedings. Compare *Edwards*, 197 Ill. 2d at 244-45 (applying the "gist of a meritorious constitutional claim" standard during first-stage post-conviction proceedings), with *People v. Jefferson*, 345 Ill. App. 3d 60, 75, 801 N.E.2d 552 (1<sup>st</sup> Dist. 2003) (holding that when determining whether a petition is frivolous or patently without merit, the circuit court may apply the *Strickland* test).

3. Review is further warranted in this matter because the decision of the appellate court is an example of the inconsistent application that courts have given the decision of this Court in *People v. Collins*, 202 Ill. 2d 59, 782 N.E.2d 195 (2002). In the present case, relying on

*Collins*, the court noted that Chism failed to indicate what the alibi witness's testimony would be and failed to provide supporting evidence, despite the fact that Chism did explicitly allege the expected contents of the testimony. Because the appellate court's application of *Collins* is inconsistent and arbitrary, this Court should take review, and clarify the manner in which *Collins* may be reconciled, if at all, with the approach to evaluating first-stage post-conviction petitions set forth in *Boclair*. See *Collins*, 202 Ill. 2d at 75-83 (McMorrow, J., dissenting).

## STATEMENT OF FACTS

Michael Chism was charged with home invasion and the attempt first degree murder of Sabina Bezjak. (C. 16; R. 3) Chism pled guilty on both charges and was sentenced to two concurrent 16-year terms of imprisonment. (R. 3-4)

Chism subsequently filed both a motion to reduce sentence, and a *pro se* post-conviction petition alleging, *inter alia*, that he was denied the effective assistance of trial counsel, that he was interrogated without receiving his Miranda rights, and that he was wrongfully deprived of presenting a critical alibi witness. (C. 64, 88-90)

In his petition, Chism stated that on November 15, 1999, the police arrived at his home and asked him and his brother whether Hispanic people resided at their residence and the brothers replied in the negative. (C. 90) Four days later, a detective returned to the Chism residence and placed Chism's brother under arrest. (C. 90) Twenty minutes after the arrest of his brother, detectives returned to the residence and asked Chism to accompany them to the police station to identify his brother. (C. 90)

Upon arriving at the police station, one of the officers photographed Chism and had him wait in a room. (C. 89) Minutes later, the officer returned and informed Chism that he was not under arrest, but that the officer needed to ask him some questions. (C. 89) Next, a detective entered the room and questioned Chism about his neighbor, the victim, Sabina Bezjak. (C. 89) The detective asked him whether he had ever helped his neighbor clean her yard, to which Chism stated that he had. (C. 89) The detective also asked him if he knew anything about a robbery that took place days earlier. (C. 89) Chism said, "Yes," because the police had come to his home on that date to ask him about the robbery. (C. 89) The detectives continued asking questions and Chism denied robbing Ms. Bezjak. (C. 89) Chism told the police that he helped Ms. Bezjak

clean her yard until 4:00 p.m. on the date in question, and that she paid him \$5.00 by dropping the money out of her window. (C. 89)

When the detective finished questioning him, Chism was put in a line-up. (C. 89)

Afterward, the detective told him that Ms. Bezjak had identified him as the offender, but informed him that he was still not under arrest. (C. 89) The ASA told Chism that if he confessed to the offense he would help him receive the minimum sentence of 6 years, but if he did not confess, then he would receive a 30-year sentence. (C. 89) Chism asked the ASA if he could go home since he had not been placed under arrest, but the ASA replied, "No." (C. 89) After the questioning ceased, the ASA read Chism his rights. (C. 89)

As to the claims included in his *pro se* post-conviction petition, Chism specifically alleged that he was deprived of the effective assistance of counsel. (C. 90) In support of this claim, Chism stated that at the time of offense, he was at his home with his brother and his son. (C. 90) Chism wanted his brother to testify as an alibi witness on his behalf, and asked defense counsel to procure him for that purpose. (C. 90) Chism explained to counsel that there was no telephone at his home, but that she could contact his brother through his sister, Cora. (C. 90) Chism stated that there were several continuances in his case, and at each he would ask his counsel whether she had contacted either his brother or sister, to which she always replied, "No." (C. 90) He stated further that he received no help from his lawyer because she did not keep him informed about his case. (C. 90)

The circuit court summarily dismissed the *pro se* petition stating that the petition was "frivolous and patently without merit." (R. C103)

On appeal, Chism argued that his claim that he was denied the effective assistance of counsel raised the gist of a meritorious claim and thus further post-conviction proceedings were



warranted. The appellate court affirmed the dismissal of the post-conviction petition finding that: 1) Chism's claim that counsel was ineffective in failing to file a motion to suppress statements was waived because it was not included in the *pro se* petition; 2) Chism waived his right to challenge the voluntariness of his guilty plea by failing to file a motion to withdraw his plea or a direct appeal; 3) Chism's claim that counsel was ineffective for failing to locate and investigate alibi witnesses was waived because it was not raised on direct appeal; and 4) Chism's claims of ineffective assistance failed to meet the *Strickland* standard. *People v. Chism*, 1-03-0703 (Rule 23 Order, June 11, 2004), slip op. at 7-16.

## ARGUMENT

**I. Review Is Warranted Because the Appellate Court's Decision Misinterprets *People v. Boclair* in Holding That a *Pro Se* Post-Conviction Petition May Be Summarily Dismissed on Waiver Grounds, and Conflicts with Other Appellate Court Decisions on this Issue, Including *People v. Blair*, Currently Pending Before this Court. Review Is Further Warranted Where the Court Incorrectly Determined That Chism's Failure to File a Motion to Vacate His Guilty Plea or Direct Appeal Resulted in the Waiver of His Ineffective Assistance of Counsel Claims on Collateral Review.**

Chism's petition alleged that he was denied his right to effective assistance of counsel where counsel failed to file a motion to suppress and failed to investigate and call a critical alibi witness. (C. 89-90) The circuit court summarily dismissed Chism's petition on the basis that it failed to state the gist of a meritorious claim. On appeal of the dismissal of his first-stage *pro se* post-conviction petition, Chism argued that the trial court erred in dismissing his petition where he stated the gist of a meritorious claim that he was denied the effective assistance of trial counsel. However, the appellate court determined that Chism's allegations were barred by waiver and rejected Chism's argument that the issue of waiver is not applicable to first-stage post-conviction proceedings. *People v. Chism*, 1-03-0703 (Rule 23 Order, June 11, 2004), slip op. at 7-16; *People v. Boclair*, 202 Ill. 2d 89, 789 N.E.2d 734 (2002); *People v. McGhee*, 337 Ill. App. 3d 992, 995, 787 N.E.2d 324 (2003); *People v. Blair*, 338 Ill. App. 3d 429, 431-32, 788 N.E.2d 240 (2003).

The appellate court's decision was incorrect as it is contrary to the requirements of the Post-Conviction Hearing Act and to this Court's holding in *Boclair*. This order also directly conflicts with *Blair*, which followed this Court's decision in *Boclair*. Accordingly, this Court should grant leave to appeal because the appellate courts are split on the issue of whether a *pro se* post-conviction petition can be summarily dismissed at the first stage on waiver grounds. In

addition, because this Court is currently considering a similar issue in *Blair*, this Court should grant leave to appeal, or stay its decision on this petition until it decides *Blair*, so this case can be decided consistent with *Blair*.

Moreover, review should further be granted where the appellate court affirmed the summary dismissal of Chism's claims based on the erroneous conclusion that the issues had been waived as a result of Chism's failure to file a direct appeal. *Chism*, slip. op. 10-12. However, Chism's petition was not subject to waiver because Chism was not required to file a direct appeal or a motion to vacate his guilty plea before he could collaterally attack his conviction.

In *People v. Boclair*, 202 Ill. 2d at 89, this Court held that under the Post-Conviction Hearing Act, 725 ILCS 122-1 *et seq.* (2002), a trial court cannot base a first-stage summary dismissal on procedural matters such as timeliness. Determination of those matters, which do not concern the potential merits of the claims, is reserved for the second stage of proceedings. This Court made clear that review at the first stage of proceedings is limited to the potential merits of the petitioner's claims. *Boclair*, 202 Ill. 2d at 99. Procedural bars to relief such as *res judicata* and waiver are matters that go beyond the allegations of the petition and should not be reviewed at the first stage of proceedings.

Although the holding in *Boclair* dealt specifically with untimeliness, the case also involved issues of *res judicata* and waiver. In *People v. McCain*, 312 Ill. App. 3d 529, 530-31, 727 N.E.2d 383 (5<sup>th</sup> Dist. 2000), one of the cases consolidated for review in *Boclair*, the appellate court held that a trial court could not summarily dismiss a petition based on untimeliness, *res judicata*, or waiver at the first stage of proceedings. The appellate court explained that the inquiry at the first stage is limited to the potential merits of the petition and that issues of timeliness, *res judicata*, and waiver required the trial court to make factual findings. *McCain*,

312 Ill. App. 3d at 531. According to the appellate court in *McCain*, “At this stage of the proceedings, the court should only determine whether the petition alleges constitutional deprivations, not whether the petitioner will ultimately succeed on those claims.” *McCain*, 312 Ill. App. 3d at 531. This Court in *Boclair* noted that *McCain*’s holding covered *res judicata* and waiver as well as untimeliness, and affirmed the decision in *McCain*. *Boclair*, 202 Ill.2d at 94, 95-96.

The plain language of the Post-Conviction Hearing Act supports applying the holding in *Boclair* to procedural issues beyond timeliness. For a petition at the first stage of proceedings, all that is required is a simple statement of facts which presents the gist of a meritorious constitutional claim. *People v. Edwards*, 197 Ill. 2d 239, 245, 757 N.E.2d 442 (2001). The Act does not require the petitioner to address procedural matters of *res judicata* or waiver. In fact, the Act explicitly directs the petitioner to omit argument and discussion of authorities from the petition. 725 ILCS 5/122-2 (2002). A petitioner cannot reasonably be expected to overcome procedural bars to relief at the first stage of proceedings if argument and discussion of authorities is not required. The Act itself indicates that such procedural matters should be reserved for the second stage of proceedings.

The First District Appellate Court’s Third Division recently confirmed the *Boclair* rule in *People v. Blair*, 338 Ill. App. 3d at 429, which is currently pending before this Court, and *People v. McGhee*, 337 Ill. App. 3d at 992, holding that “the circuit court’s summary dismissal of a defendant’s post-conviction petition cannot be affirmed on the grounds that the claims raised in the petition have been waived or are barred by the doctrine of *res judicata*.” *Blair*, 338 Ill. App. 3d at 431-32 (citing *McGhee*). In *Blair*, the defendant’s post-conviction petition set forth several claims of ineffective assistance of trial and appellate counsel. *Id.* at 431. The trial court

summarily dismissed the defendant's claims at the first stage as *res judicata* or waived. But the appellate court reversed, citing *Boclair*, and ruled that summary dismissal based on waiver and *res judicata* at the first stage is inappropriate. *Id.* This case involves the same issue of ineffectiveness of trial counsel as *Blair*, nevertheless, the court determined in this case that the issues were waived.

Moreover, not only was the appellate court order an incorrect application of *Boclair*, but it also erroneously determined that failure to file a direct appeal results in waiver of issues on collateral review. *Chism*, slip. op. 10-12. Generally, if a petitioner wishes to contest the voluntariness of a guilty plea, he must first file a motion to withdraw the plea. Illinois Supreme Court Rule 604(d) (West 2002); *People v. Vilces*, 321 Ill. App. 3d 937, 940, 748 N.E.2d 1219 (2<sup>nd</sup> Dist. 2001). However, compliance with Rule 604(d) is not a prerequisite to post-conviction proceedings. *People v. Miranda*, 329 Ill. App. 3d 837, 841, 769 N.E.2d 1000 (1<sup>st</sup> Dist. 2002). The *Miranda* Court rejected the State's contention that the petitioner's allegations had been waived because she failed to file a direct appeal or a motion to withdraw her guilty plea pursuant to Rule 604(d) stating that "although petitioner theoretically *could have* appealed her conviction . . . she did not and was not required to do so." *Id.* at 842 (emphasis in original); *see also People v. Stein*, 255 Ill. App. 3d 847, 848, 625 N.E.2d 1151 (3<sup>rd</sup> Dist. 1993) (a defendant who pleads guilty is not required to withdraw his guilty plea and perfect a direct appeal in order to pursue post-conviction relief); *People v. Umfleet*, 190 Ill. App. 3d 804, 809, 546 N.E.2d 1013 (5<sup>th</sup> Dist. 1989) (a defendant's failure to file a motion to withdraw his guilty plea does not foreclose the possibility of review under the Post-Conviction Hearing Act).

Therefore, it is well-settled that the "doctrines of waiver and *res judicata* apply to appeals from the denial of post-conviction petitions *only* in cases 'where a petitioner has previously taken

a direct appeal from a judgment of conviction.” *Miranda*, 329 Ill. App. 3d at 842 (citing *People v. Barrow*, 195 Ill. 2d 506, 519 (2001) (emphasis added)). A petitioner does not waive the right to proceed under the Post-Conviction Hearing Act by failing to file a post-trial motion or a direct appeal. *People v. Tripp*, 248 Ill. App. 3d 706, 711, 618 N.E.2d 1157 (5<sup>th</sup> Dist. 1993) (holding that failure to take a direct appeal does not bar review of constitutional claims raised in a post-conviction petition).

Here, the appellate court held that Chism waived his right to challenge his guilty plea and counsel’s effectiveness because he failed to file a motion to vacate the plea or file a direct appeal. *Chism*, slip. op. at 10-12. As the above discussion demonstrates, Chism was not required to file a direct appeal or a motion to vacate guilty plea before he could file a post-conviction petition. Accordingly, the appellate court erred in dismissing Chism’s petition on the grounds of waiver.

Consequently, this Court should grant leave to appeal because the appellate court’s decision misinterpreted *Boclair*, erroneously determined that a guilty plea results in waiver of issues on collateral review, and conflicts with *Blair*, which is pending before this Court. If the Court does not grant this petition, it should hold this case pending the disposition of *Blair*.

**II. Review Is Warranted to Determine Whether the *Strickland v. Washington* Standard Applies to a Petitioner’s Claim of Ineffective Assistance of Counsel During First-Stage Post-Conviction Proceedings.**

On appeal from the summary dismissal of his post-conviction petition, Chism argued that he was denied his right to the effective assistance of counsel where trial counsel failed to file a motion to suppress statements and failed to investigate an alibi witness. In affirming the circuit court’s summary dismissal of his petition, the appellate court analyzed Chism’s ineffective assistance of trial counsel claim under the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Chism*, 1-03-0703 (Rule 23 Order, June 11, 2004), slip op. at 14-16.

Chism contends that the appellate court erred in affirming the summary dismissal of his petition because it improperly analyzed the substantive merits of his claim under the *Strickland* standard. Chism asserts that the court should have analyzed his claim under the “gist” standard because his petition was procedurally postured at the first-stage of post-conviction proceedings. In addition, the appellate court erred in making factual determinations when it speculated that trial counsel’s decision was trial strategy, where, taken as true, Chism’s allegations rebutted the presumption that trial counsel’s failure to call this witness was trial strategy. Moreover, the appellate court also misapplied the applicable gist standard where the court determined that Chism did not include the claim that counsel was ineffective in failing to file a motion to suppress in his *pro se* petition where Chism specifically included the facts necessary to set forth the gist of a claim. *Chism*, slip. op. 9-10.

During first-stage post-conviction proceedings, all that is required is a simple statement which presents the gist of a meritorious constitutional claim. *People v. Edwards*, 197 Ill. 2d 239, 245, 757 N.E.2d 442 (2001). The “gist” standard establishes a very low threshold, and to meet it, the petition “need only present a limited amount of detail” and “need not set forth the claim in its entirety.” *Id.* at 244. The court must liberally construe the petition, taking as true all well-pleaded facts not positively rebutted by the record. *People v. Montgomery*, 327 Ill. App. 3d 180, 183-84, 763 N.E.2d 369 (1<sup>st</sup> Dist. 2001), citing *People v. Coleman*, 183 Ill. 2d 366, 395, 388-89, 701 N.E.2d 1063 (1988).

There is confusion in the appellate courts as to whether the “gist” standard, discussed in *People v. Edwards*, requires that a *pro se* petitioner, at the first stage, establish that he was prejudiced by his attorney’s neglect of his case. *People v. Edwards*, 197 Ill. 2d 239 at 244. Some appellate courts have interpreted *People v. Edwards* as not requiring a *pro se* petitioner to

establish the second prong of *Strickland v. Washington*. See *People v. Plummer*, 344 Ill. App. 3d 1016, 1052, 801 N.E.2d 1045 (1<sup>st</sup> Dist. 2003) (recognizing that a consideration of the ultimate merits of *pro se* allegations of ineffective assistance of counsel is “premature and inappropriate”); *People v. Ledbetter*, 342 Ill. App. 3d 285, 288, 794 N.E.2d 1067 (4<sup>th</sup> Dist. 2003) (showing of prejudice is not dispositive at first stage because the only relevant inquiry is whether the petitioner has presented the “gist” of a constitutional claim); *People v. Smith*, 326 Ill. App. 3d 831, 854, 761 N.E.2d 306 (1<sup>st</sup> Dist. 2001) (appellate court could not say that trial counsel’s failure to investigate the evidence was not prejudicial; summary dismissal of the post-conviction petition was therefore improper).

Here, however, the appellate court misapplied the *Edwards* “gist” standard appropriate to first-stage review by prematurely engaging in an analysis of Chism’s claim under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Thus, this Court should grant review to resolve the question raised by the appellate court’s decision of whether *People v. Edwards* precludes an appellate court from engaging in the *Strickland* analysis during the review of a summarily dismissal of a first stage petition.

The appellate court erred when it determined that trial counsel’s decision not to Chism’s brother as an alibi witness was trial strategy. *Chism*, slip. op. 16. This determination was factual in nature because the court relied on its own conclusions that the alibi witness could have been impeached because of his prior convictions. *Id.* Additionally, there was no evidence rebutting Chism’s claims that his brother would have provided an alibi and the appellate court did not point to any such evidence.

Moreover, the appellate court determined that not only was the attorney not deficient because of trial strategy, but also determined that Chism was not prejudiced because there was no



evidence what his brother's testimony would have been. *Chism*, slip. op. 15. Once again, this is a misapplication of the gist standard, which does not require a fully pled claim. *Edwards*, 197 Ill. 2d at 244. In his petition he averred that throughout the course of his representation, he requested that trial counsel investigate his brother as an alibi witness. (C. 90) Chism stated that he explained to his attorney that he did not commit the offense, and that at the time of the incident he was at home with his brother and son. (C. 90) On a later court date Chism again asked counsel about his brother, and she stated that she could not locate him. (C. 90) Chism told her that she could get in contact with him through his sister Cora. (C. 90) On the subsequent court date, however, defense counsel told Chism that she was not able to contact his sister, but that she would try again. (C. 90) During the next continued court appearance, Chism again asked his attorney whether she had contacted either his brother or sister, and his attorney merely replied, "No." (C. 90) Chism clearly supported his claim of ineffective assistance of counsel with a detailed explanation of counsel's failure to investigate his alibi witness and what evidence would have been available had counsel called the brother as a witness.

When considering the petition in light of the gist standard, Chism further alleged that he was denied effective assistance of counsel due to counsel's failure to move to suppress his unlawfully obtained statements, contrary to the appellate court's decision. *Chism*, slip. op. 9-10. In his petition Chism stated that he was taken to the station, photographed, and questioned without ever being advised of his rights. (C. 89) At the police station, an officer informed Chism that he was not under arrest, but that he needed to ask him some questions. (C. 89) Chism asked the ASA if he could go home since he had not been placed under arrest, but the ASA replied, "No." (C. 89) After the questioning ceased, the ASA read Chism his rights and at that point Chism refused to answer any further questions. (C. 89) Therefore, however inartfully drawn, the

petition does allege that he was denied his constitutional right to effective assistance due to counsel's failure to move to suppress the statements obtained in violation of his *Miranda* rights. (C. 88-90)

He supported his claim with sufficient detail to survive summary dismissal under the *Edwards* gist standard. Chism alleged facts supporting his belief that his rights were violated. The fact that he did not indicate how his rights should have been vindicated by moving to suppress the statements or that trial counsel was ineffective in failing to file a motion does not constitute a waiver of his claims. The Post-Conviction Hearing Act and *Edwards* only requires that a petitioner allege facts, which is exactly what Chism did, and does not require a petitioner to know and identify the legal theory underlying the facts to state a gist of a claim.

**III. Review Is Necessary to Resolve the Conflict Between *People v. Collins*, Which Allows Dismissal of Post-conviction Petitions at the First Stage That Are Unsupported by Corroborating Evidence, and *People v. Boclair* and *People v. Edwards*, Which Hold That a Case May Only Be Dismissed at the First Stage When it Fails to State the "Gist" of a Constitutional Claim.**

The appellate court's determination that it could not review Chism's claims because he failed to state what his brother's testimony would be is not in keeping with two recent Illinois Supreme Court decisions: *People v. Boclair*, 202 Ill. 2d 80, 789 N.E.2d 734 (2002), and *People v. Edwards*, 197 Ill. 2d 239, 757 N.E.2d 442 (2001). *People v. Chism*, 1-03-0703 (Rule 23 Order, June 11, 2004), slip op. at 15. In both cases, this Court reasoned that a petition may not be dismissed at the first stage except for the failure to state the gist of a constitutional claim – a standard that is fundamentally inconsistent with dismissal because the factual allegations set forth in the petition are uncorroborated. Here, however, the appellate court incorrectly determined that Chism failed to support his claims with evidence. This was incorrect because Chism did in fact support his claim with evidence as to what the alibi testimony would have been

as explained in the previous argument and, moreover, the *Collins* decision is inconsistent with *Boclair*. Thus, leave to appeal should be granted to resolve the inconsistent application of *Collins* in light of the more recent *Boclair*.

In her dissent to this Court's denial of the petition for rehearing in *People v. Collins*, 202 Ill. 2d 59, 782 N.E.2d 195 (2002), and her special concurrence to *Boclair*, Chief Justice McMorrow has argued that the more recently decided case, *Boclair*, overruled the affidavit requirement previously set forth in *Collins*. See *Boclair*, 202 Ill. 2d at 127 (McMorrow, J., specially concurring); *Collins*, 202 Ill. 2d at 83 (McMorrow, J., dissenting). According to the *Boclair* majority, the trial court must look only to 725 ILCS 5/122-2.1 of the Post Conviction Act to determine whether the post-conviction petition is subject to summary dismissal. However, the affidavit requirement discussed in *Collins* is found in 725 ILCS 5/122-2 of the Act, a section that the *Boclair* court deemed inapplicable to first stage post-conviction proceedings. *Id.* at 124. The appellate court's reliance on § 122-2 in the instant case to affirm the summary dismissal of Chism's petition highlights the need for clarity from this Court regarding whether lower courts should follow *Collins* or *Boclair* when evaluating first-stage petitions.

The two cases simply cannot be reconciled. *Boclair* articulated that at the first stage of post-conviction proceedings, "the court should only determine whether the petition alleges constitutional deprivations" and that "the process at the summary review stage measures a petition's substantive virtue rather than its procedural compliance." *Boclair*, 202 Ill. 2d at 102. Chief Justice McMorrow points out in her *Boclair* and *Collins* opinions that, as both a matter of statutory construction and of policy, one cannot reconcile the *Boclair* rule forbidding procedurally-based summary dismissals with the *Collins* rule permitting summary dismissal because of a *pro se* litigant's inclusion of only one affidavit. *Boclair*, 202 Ill. 2d at 127

(McMorrow, J., specially concurring); *Collins*, 202 Ill. 2d at 82-3 (McMorrow, J., dissenting).

The *Collins* requirement that a *pro se* petitioner supplement his petition with affidavits and supporting documents is also contrary to the Illinois Supreme Court's position in *People v. Edwards*, 197 Ill. 2d 239, 757 N.E.2d 442 (2001). The *Collins* requirement that a first-stage petition may be dismissed for failure to meet the requirements of § 122-2 contradicts the *Edwards* court's position that "requiring this type of full or complete pleading is contrary to this court's holding that the *pro se* defendant 'need only present a limited amount of detail' to survive summary dismissal at the first stage of the post-conviction proceedings." *Edwards*, 197 Ill. 2d at 245 (citation omitted).

*Edwards* explicitly overruled the requirement, embodied in previous decisions of the appellate court, that a *pro se* petitioner plead "sufficient facts" in support of his constitutional allegation. *Edwards*, 197 Ill. 2d at 244-247. This holding is fundamentally inconsistent with *Collins*. While *Edwards* emphasized that a defendant cannot be expected to recognize what facts need to be alleged in the initial petition, *Collins* held that a petitioner has the burden to obtain factual affidavits in support of those facts. There is simply no way the two cases can be reconciled.

On a more general level, too, the dismissal of an uncorroborated post-conviction petition at the first stage is contrary to the structure and intent of the Post-Conviction Hearing Act. For one, it conflicts with the right of a petitioner, at the second stage, to amendment of the petition to the extent that the amendment is "appropriate, just and reasonable and as is generally provided in civil cases." 725 ILCS 5/122-5 (West 2002). In civil cases, Illinois allows for liberal amendment of pleadings where a proposed amendment will cure an otherwise defective pleading and will not prejudice the opposing party. See *Board of Educ. v. Robbins*, 327 Ill. App. 3d 599,

605, 765 N.E.2d 449 (1st Dist. 2001). *See also* 735 ILCS 5/2-616 (West 2002). Pursuant to this standard, a petitioner should have the right to cure his or her failure to attach appropriate documentation by filing an amended pleading – a right that is unavailable to a first-stage petitioner.

Accordingly, this Court thus should grant review in the present case, to address whether the holding of *Collins* can be reconciled with *Boclair* and *Edwards*, as well as with the general structure and purpose of the Post-Conviction Hearing Act.

### CONCLUSION

Michael Chism, petitioner-appellant, respectfully requests that this Court grant leave to appeal.

Respectfully submitted,

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No. 1-03-0703

**RETURNED**

DEC 20 2005

MICHAEL W. DOBBINS  
CLERK, U.S. DISTRICT COURT

IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST DISTRICT

PEOPLE OF THE STATE OF ILLINOIS, )  
Respondent-Appellee, )  
-vs- )  
MICHAEL CHISM, )  
Petitioner-Appellant. )

Appeal from the Circuit Court  
of Cook County, Illinois

**RETURNED**

No. 99 CR 28042.

JAN 23 2006

Honorable  
John J. Wasilewski,  
Judge Presiding.

MICHAEL W. DOBBINS  
CLERK, U.S. DISTRICT COURT

**REPLY BRIEF AND ARGUMENT FOR PETITIONER-APPELLANT**

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PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of Cook County, Illinois.
Respondent-Appellee,	)	
	)	
-vs-	)	No. 99 CR 28042.
	)	
MICHAEL CHISM,	)	Honorable
	)	John J. Wasilewski,
Petitioner-Appellant.	)	Judge Presiding.

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**REPLY BRIEF AND ARGUMENT FOR PETITIONER-APPELLANT**

**MICHAEL CHISM'S CLAIM AS RAISED IN HIS *PRO SE* POST-CONVICTION PETITION - THAT HE WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL - SETS FORTH THE GIST OF A CONSTITUTIONAL CLAIM AND THEREBY WARRANTS FURTHER PROCEEDINGS UNDER THE POST-CONVICTION HEARING ACT.**

The State contends that the trial court properly dismissed Chism's *pro se* post-conviction petition because his claim of ineffective assistance of counsel was waived, the post-conviction petition was legally inadequate, and Chism failed to show that trial counsel was deficient. (St. Br. 7-8) However, Chism provided factual support in his petition for his claim that his trial attorney was ineffective for failing to investigate his alibi witness and for failing to move to suppress illegally obtained statements with sufficient detail as to satisfy the minimal "gist" standard

required of post-conviction pleadings. Therefore, the trial court erred in summarily dismissing Chism's petition and the cause must be remanded for further post-conviction proceedings including appointment of counsel.

The State first argues that the issues in the petition are waived because Chism did not file a direct appeal of his conviction. (St. Br. 10) However, the State's argument is the very reason why his claims are not waived. It is well-settled that the "doctrines of waiver and *res judicata* apply to appeals from the denial of post-conviction petitions *only* in cases 'where a petitioner has previously taken a direct appeal from a judgement of conviction.'" *People v. Miranda*, 329 Ill. App. 3d 837, 842, 769 N.E.2d 1000 (1<sup>st</sup> Dist. 2003) (citing *People v. Barrow*, 195 Ill. 2d 506, 519 (2001) (emphasis added)). A petitioner does not waive the right to proceed under the Post-Conviction Hearing Act by failing to file a post-trial motion or a direct appeal. *People v. Tripp*, 248 Ill. App. 3d 706, 711, 618 N.E.2d 1157 (5<sup>th</sup> Dist. 1993) (holding that failure to take a direct appeal does not bar review of constitutional claims raised in a post-conviction petition). Here, Chism raised the gist of a constitutional claim that he was denied effective assistance of counsel and he did not file a direct appeal. Therefore, the State's argument that the claims are waived has no merit.

In addition, waiver is not a proper basis for first stage summary dismissal. At the first-stage of post-conviction proceedings, the court can only dismiss a petition on its substantive merits. *People v. Boclair*, 202 Ill. 2d 89, 99, 789 N.E.2d 734 (2002). The court cannot dismiss it on the basis of procedural noncompliance such as untimeliness, *res judicata*, or waiver. *Id.*; see also, *People v. Blair*, 338 Ill. App. 3d 429, 788 N.E.2d 240 (1<sup>st</sup> Dist. 2003), petition for leave to appeal allowed at 2003 Ill. LEXIS 1428 (Oct. 7, 2003); *People v. McGhee*, 337 Ill. App. 3d 992,



787 N.E.2d 324 (1<sup>st</sup> Dist. 2003). The State further argues that a reviewing court can affirm the dismissal of a post-conviction petition on any basis supported by the record. (St. Br. 10)

However, the affirmation must still be based on a proper ground for first stage dismissal. A post-conviction petition can be dismissed during stage one only if it is frivolous and patently without merit and procedural noncompliance is not a proper basis for first-stage dismissal. *Boclair*, 202 Ill. 2d at 100. Therefore, waiver is inapplicable and the cause must be remanded for further proceedings.

The State next contends that Chism's claim that he was denied effective assistance of counsel due to counsel's failure to file a motion to suppress statements is waived because it was not included in the original post-conviction petition. (St. Br. 11) However, in post-conviction proceedings the petition need only present a simple statement of a constitutional claim with a limited amount of detail and it need not present legal argument or citation to legal authority. *People v. Edwards*, 197 Ill. 2d 239, 244, 757 N.E.2d 442 (2001). A petition is not frivolous or patently without merit if the allegations, taken as true and liberally construed, present the gist of a meritorious claim. *Id.* Here, when considering the petition in light of that standard, Chism did allege that he was denied effective assistance of counsel due to counsel's failure to move to suppress his unlawfully obtained statements. In his petition Chism stated that his attorney did not communicate with him and did not act as a representative. (C. 89-90) He further explained that he was taken to the station, photographed, and questioned without ever being advised of his rights. (C. 89) He was not advised of his rights until the conclusion of questioning. (C. 89) Therefore, however inartfully drawn, the petition does allege that he was denied his constitutional right to effective assistance due to counsel's failure to move to suppress the

statements obtained in violation of his *Miranda* rights. (C. 88-90)

Furthermore, this Court has recently held that the first-stage dismissal of a *pro se* petition cannot be based on waiver. In *People v. Coulter*, the State argued the defendant waived an ineffective assistance of appellate counsel claim for failure to include it in the post-conviction petition. *People v. Coulter*, \_\_Ill. App. 3d \_\_, \_\_N.E.2d \_\_ (No. 1-02-0563, January 16, 2004), slip op. at 2. This Court explained that although any claim not raised in the original or amended petition is waived, the first-stage dismissal of a post-conviction petition cannot be based on waiver and therefore remanded the cause for second-stage proceedings. *Coulter*, slip. op. at 2. Here too, the cause must be remanded for second-stage proceedings as waiver is not a proper basis for summary dismissal. See *People v. Etherly*, \_\_ Ill. App. 3d \_\_, \_\_N.E.2d \_\_ (No. 1-01-4166, November 21, 2003) slip op. at 2. (“Determining substantive merit, not procedural compliance, is the purpose of first-stage review.”)

Moreover, should this Court find the allegation was not presented in the petition, fundamental fairness dictates that the issue should not be considered waived. The waiver rule is not an absolute bar to procedurally defaulted claims and where fundamental fairness requires, waiver will not be applied in post-conviction proceedings. *People v. Bates*, 323 Ill. App. 3d 77, 80, 751 N.E.2d 180 (1<sup>st</sup> Dist. 2001) (applying fundamental fairness exception to the waiver rule to consider issue of improper admonishment of appeal rights during guilty plea); *People v. Marks*, 239 Ill. App. 3d 178, 183, 607 N.E.2d 286 (3<sup>rd</sup> Dist. 1993) (applying fundamental fairness exception to waiver rule to consider claim not included in *pro se* petition); see also *People v. Flores*, 153 Ill. 2d 264, 274-75, 606 N.E.2d 1078 (1992) (procedurally defaulted post-conviction claim reviewed under principle of fundamental fairness where the alleged waiver stemmed from

appellate counsel's failure to raise the issue on direct appeal); *People v. Britz*, 174 Ill. 2d 163, 177, 673 N.E.2d 300 (1996) (in the interests of fundamental fairness, the court reviewed an issue not included in defendant's post-conviction petition); *People v. Perruquet*, 181 Ill. App. 3d 660, 537 N.E.2d 351 (5<sup>th</sup> Dist. 1989) (same).

Application of the fundamental fairness exception to waiver is appropriate here because Chism did not have the benefit of counsel to assist him in drafting his post-conviction petition. Moreover, he was denied effective assistance due to counsel's failure to move to suppress the illegally obtained statements. Thus, this error affected substantial and fundamental rights and "it would be fundamentally unfair to apply the waiver rule to this case." *Marks*, 239 Ill. App. 3d at 183.

Next, the State argues that under *People v. Collins*, the petition was properly dismissed because it was legally insufficient as it failed to include supporting records, affidavits, or other evidence. (St. Br. 11-12) Chism included his own affidavit with his *pro se* petition and he provided a detailed explanation for the basis of his claims. (C. 88-90, 94) In his petition he alleged that he was denied effective assistance of trial counsel. (C. 88-90) Accordingly, it would be unrealistic for him to have obtained an affidavit from his trial attorney to attach to his petition. Recently, in *People v. Kellerman*, the defendant alleged in his petition that he was denied effective assistance of counsel because his attorney's misrepresentation induced him to plead guilty. *People v. Kellerman*, 342 Ill. App. 3d 1019, 1026, 797 N.E.2d 726 (3<sup>rd</sup> Dist. 2003). The court, relying on *People v. Williams*, stated that "the defendant could not be expected to obtain an affidavit from his trial counsel stating that the attorney was ineffective." *Id.* The court held that the defendant's failure to comply with the documentation requirements of the Post Conviction

Hearing Act did not justify dismissal of the petition. *Id.*

Moreover, in *People v. Boclair*, the Illinois Supreme Court effectively overruled the affidavit requirement set forth in *People v. Collins*, 202 Ill. 2d 59, 782 N.E.2d 195 (2002). See *People v. Boclair*, 202 Ill. 2d 80, 789 N.E.2d 734 (2002) (McMorrow, J., specially concurring). According to the *Boclair* majority, the trial court must look only to § 122-2.1 of the Post Conviction Hearing Act to determine whether the post-conviction petition is subject to summary dismissal. However, the affidavit requirement discussed in *Collins* was found in § 122-2 of the Act, a section that the *Boclair* court deemed inapplicable to first stage post-conviction proceedings. *Id.* at 123-124. Stating that *Collins* conflicts with *Boclair* “at every significant point in its analysis” as well as with the policy concerns expressed by the *Boclair* majority, Justice McMorrow, in her special concurrence, articulated that *Boclair* overrules *Collins* *sub silentio* as the more recent of the two conflicting opinions. *Boclair*, 202 Ill. 2d at 123-127.

However, even if an affidavit from trial counsel or an explanation for the absence of that affidavit is required in order to advance this particular point, Chism has met these requirements. In *Williams*, the petitioner alleged that he was induced to plead guilty due to counsel’s misrepresentations and ineffectiveness. *People v. Williams*, 47 Ill. 2d 1, 3, 264 N.E.2d 697 (1970). The petitioner did not explain why supporting documentation was not attached but it did contain facts from which it could be inferred that the only affidavit the “petitioner could have possibly furnished other than his own sworn statement, would have been that of his attorney.” *Id.* at 4. The court noted that “the difficulty or impossibility of obtaining such an affidavit is self-apparent” and reversed the summary dismissal of the petition. *Id.* Therefore, like *Williams*, Chism alleged facts from which it could be inferred that the only affidavit he could have included

was that of his trial attorney. (C. 88-90) It would have been impossible to obtain an affidavit from his attorney admitting her own incompetency. *See also People v. Collins*, 202 Ill. 2d 59, 74, 782 N.E.2d 195 (2002) (McMorrow, Freeman, Kilbride, JJ., dissenting) (relying on the *Williams* decision in finding that the majority erred in holding the petition alleging ineffective assistance must be summarily dismissed because defendant failed to attach affidavits).

Therefore, Chism's petition was not "legally insufficient." The trial court erred in summarily dismissing Chism's petition because he did state the gist of a violation of a constitutional right and the only affidavit he could have included was from his attorney which would have been impossible to obtain.

The State next contends that the petition failed to establish that counsel's performance was deficient or prejudicial and that Chism included no facts to support his claim that counsel was not a "representative on his behalf." (St. Br. 12-14) However, the State articulates an improper standard, arguing that Chism failed to make a substantial showing that his constitutional rights were violated. (St. Br. 8) At the first stage of proceedings the petition must only allege the "gist" of a constitutional claim with a limited amount of detail and it need not present legal argument or citation to legal authority. *People v. Edwards*, 197 Ill. 2d 239, 244, 757 N.E.2d 442 (2001). In adopting the more relaxed gist standard the Court rejected the prior "sufficient facts" test and stated that "requiring this type of full or complete pleading is contrary to this court's holding that the *pro se* defendant need only present a limited amount of detail." *Id.* The State criticizes Chism for failing to allege or support all the elements of an ineffective assistance of counsel claim. (St. Br. 12-14) But, this argument is contrary to *People v. Edwards*, which requires that the petition "need only present a limited amount of detail" and "need not set

forth the claim in its entirety.” *Edwards*, 197 Ill. 2d at 244, quoting *Gaultney*, 174 Ill. 2d at 418. Importantly, at this stage, substantive consideration of the petitioner’s claims or ultimate entitlement to relief is premature. *People v. Seaberg*, 262 Ill. App. 3d 79, 83-84, 635 N.E.2d 126 (2<sup>nd</sup> Dist. 1994). This standard is lenient because *pro se* petitioners are most frequently laypersons and requiring them to state their claims with legal precision would have a chilling effect on their right to meaningful access to the courts. *People v. Dredge*, 148 Ill. App. 3d 911, 913, 500 N.E.2d 445 (4<sup>th</sup> Dist. 1986). Because Chism is a layperson he would not be aware of all the legal elements necessary to fully present his claim, but he still alleged sufficient facts to support the gist of a claim that he received ineffective assistance of counsel. *People v. Edwards*, 197 Ill. 2d 239, 757 N.E.2d 442 (2001).

In his petition he averred that throughout the course of his representation, he requested that trial counsel investigate his brother as an alibi witness. (C. 90) Chism stated that he explained to his attorney that he did not commit the offense, and that at the time of the incident he was at home with his brother and son. (C. 90) On a later court date Chism again asked counsel about his brother, and she stated that she could not locate him. (C. 90) Chism told her that she could get in contact with him through his sister Cora. (C. 90) On the subsequent court date, however, defense counsel told Chism that she was not able to contact his sister, but that she would try again. (C. 90) During the next continued court appearance, Chism again asked his attorney whether she had contacted either his brother or sister, and his attorney merely replied, “No.” (C. 90) Chism clearly supported his claim of ineffective assistance of counsel with a detailed explanation of counsel’s failure to investigate his alibi witness.

The State further argues that the “petitioner’s own allegations demonstrate his attorney

repeatedly attempted to contact both petitioner's brother and sister." (St. Br. 15) Contrary to the State's allegation, the above discussion demonstrates that despite numerous requests, defense counsel failed to investigate an alibi witness with possibly exculpatory evidence. Chism offered counsel detailed information on how to contact his brother, but counsel failed to follow through with the critical investigation into Chism's alibi. Thus, Chism stated the gist of a claim that counsel did not act in a reasonable manner by failing to investigate Chism's alibi defense and he supported his claim with specific facts. Illinois courts have recognized that the failure to investigate or call a witness constitutes ineffective assistance of counsel where the witness was known to trial counsel and the witness's testimony may have been exonerating. *Coleman*, 183 Ill. 2d at 398; *King*, 316 Ill. App. 3d at 916; *People v. Tate*, 305 Ill. App. 3d 607, 612, 712 N.E.2d 826 (1<sup>st</sup> Dist. 1999).

The State also contends that Chism was not denied effective assistance due to counsel's failure to move to suppress the illegally obtained statements. (St. Br. 15) Chism alleged in his petition that he was not advised of his *Miranda* rights until after he was questioned by police and an assistant state's attorney. (C. 89) At the police station, an officer informed Chism that he was not under arrest, but that he needed to ask him some questions. (C. 89) A detective questioned Chism and asked him if he knew anything about a robbery that took place days earlier. (C. 89) Chism said, "Yes," because the police had come to his home on that date to ask him about the robbery. (C. 89) The detectives continued asking questions and Mr. Chism continued to speak with them. (C. 89) An assistant state's attorney told Chism that if he confessed to the offense he would help him receive the minimum sentence of six years, but if he did not confess, he would receive a 30-year sentence. (C. 89) Chism asked the ASA if he could go home since he had not

been placed under arrest, but the ASA replied, "No." (C. 89) After the questioning ceased, the ASA read Chism his rights and at that point Chism refused to answer any further questions. (C. 89)

The State argues that Chism made no incriminating statements which require suppression. (St. Br. 17-18) However, while being questioned he admitted that he knew the victim Sabina Bezjak, that he helped her clean her yard, that he knew about the robbery that took place, and that he helped Ms. Bezjak clean her yard on the day in question and she paid him \$5.00. (C. 89) Accordingly, he did make incriminating statements which placed him at the scene of the crime and his statements may have been the basis of his identification as the perpetrator. Therefore, Chism stated the gist of a claim that defense counsel was ineffective for failing to file a pre-trial motion to suppress the illegally obtained statements, where the procedures used by the police were in violation of his *Miranda* rights. He supported his claim with sufficient detail to survive summary dismissal.

The State further contends that Chism voluntarily and intelligently pled guilty; thus, he was not prejudiced by counsel's performance. (St. Br. 15-16) But, it was counsel's incompetence that induced Chism to plead guilty as counsel made no attempt to act as an advocate. Chism's petition states the gist of a claim that it was the combination of counsel's ineffectiveness for failure to investigate his alibi and failure to file a pre-trial motion to suppress his statements which resulted in his plea of guilty. Although Chism was duly admonished and persisted in his guilty plea before the court, his plea was a result of defense counsel leaving him with essentially no option but to plead guilty.

The voluntariness of a guilty plea may depend upon whether the defendant had effective



assistance of counsel. *People v. Correa*, 108 Ill. 2d 541, 549, 485 N.E.2d 307 (1985). Here, Chism's petition alleged that he had no alternative but to plead guilty due to counsel's failure to move to suppress statements or investigate his alibi. If his attorney had been diligent in investigating his alibi witness, who could provide exculpatory evidence, Chism may have proceeded to either a jury or bench trial. Additionally, if his counsel sought to suppress the illegally obtained statements and received a ruling in his favor, Chism may have likewise opted to proceed to trial. But, counsel's failure to investigate and act as an advocate misled Chism into believing that a guilty plea was his only option. Therefore, contrary to the State's claim, Chism stated the gist of a claim that he was prejudiced by counsel's deficient performance in failing to investigate an alibi witness that would have provided exonerating testimony and by failing to move to suppress statements, as it left him with little alternative but to plead guilty.

Finally, the State speculates that if Chism had elected to go to trial he would have faced "overwhelming evidence" as the trial judge even commented that the evidence was "way more than sufficient." (St. Br. 18) But, the State's recitation fails to take into account the evidence that may have been suppressed had trial counsel properly filed a pre-trial motion. Nor does the State's comment consider that Chism may have had a solid alibi for the time in question which would have been presented to the court had counsel investigated Chism's alibi witness. Thus, had counsel acted as an advocate on Chism's behalf, the evidence may not have been "sufficient" or "overwhelming."

In sum, Chism's petition sufficiently states the gist of a constitutional claim that he received ineffective assistance of trial counsel. Therefore, this Court should order Chism's petition to advance to the second-stage under the Act, where he will be appointed counsel and be

given the opportunity to amend his petition so that the trial court may determine whether there has been a substantial showing of a constitutional violation.

## CONCLUSION

For the foregoing reasons, Michael Chism, Petitioner-Appellant, respectfully requests that this Court reverse the trial court's summary dismissal and remand the cause for further proceedings consistent with sections 122-4 through 122-6 of the Post-Conviction Hearing Act.

Respectfully submitted,

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