

2023 IL App (4th) 230110

NO. 4-23-0110

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED

December 1, 2023

Carla Bender

4th District Appellate

Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
Plaintiff-Appellee,)	Circuit Court of
v.)	Sangamon County
RAY T. OVERTON,)	No. 90CF652
Defendant-Appellant.)	
)	Honorable
)	Adam Giganti,
)	Judge Presiding.

JUSTICE STEIGMANN delivered the judgment of the court, with opinion.

Justices Turner and Lannerd concurred in the judgment and opinion.

OPINION

¶ 1 In November 1991, a jury convicted defendant of first degree murder (Ill. Rev. Stat. 1989, ch. 38, ¶ 9-1(a)(1)). The State alleged that (1) defendant and three others started a fist fight with Paul Babcock and (2) defendant and Clarence Smith later stabbed Babcock in the head with screwdrivers. In January 1992, the trial court sentenced defendant to 90 years in prison. This court affirmed on direct appeal. *People v. Overton*, No. 4-92-0096 (Nov. 5, 1992) (unpublished order under Illinois Supreme Court Rule 23).

¶ 2 In July 1993, defendant filed a postconviction petition, which (1) the trial court dismissed after second-stage proceedings and (2) this court later affirmed on appeal. *People v. Overton*, No. 4-96-0085 (June 3, 1997) (unpublished order under Illinois Supreme Court Rule 23).

¶ 3 In June 2017, defendant filed a motion for leave to file a successive postconviction petition, alleging, among other things, (1) a *Brady* violation (*Brady v. Maryland*, 373 U.S. 83

(1963)) and (2) ineffective assistance of counsel by his prior attorneys for failing to argue and preserve a claim that the trial court improperly excluded a codefendant's confession pursuant to *Chambers v. Mississippi*, 410 U.S. 284 (1973). The trial court denied defendant leave to file his petition. On appeal, this court reversed and remanded for further proceedings, concluding that defendant's petition made an adequate showing at the leave-to-file stage to be entitled to further proceedings. *People v. Overton*, 2020 IL App (4th) 170639-U, ¶¶ 52, 56.

¶ 4 On remand, the trial court appointed postconviction counsel to represent defendant, who filed an amended petition that altered some of the *pro se* claims and added new claims. The State filed a motion to dismiss, arguing that defendant failed to make a substantial showing of a constitutional violation. In support of its motion, the State attached documents that were not previously contained in the trial court record and argued that those documents defeated defendant's *Brady* claim by showing the allegedly withheld evidence was, in fact, disclosed prior to trial. After conducting a hearing, the court granted the State's motion to dismiss. In its written order, the court made an explicit finding that the State had disclosed the allegedly withheld evidence prior to trial.

¶ 5 Defendant appeals, arguing, in relevant part, that the (1) trial court erred by granting the State's motion to dismiss because the petition made a substantial showing of a *Brady* violation and (2) postconviction counsel provided unreasonable assistance by failing to make necessary amendments to the petition to survive dismissal. We agree that the petition was dismissed on improper grounds, reverse that dismissal, and remand for third-stage proceedings.

¶ 6 I. BACKGROUND

¶ 7 A. Relevant History of this Case

¶ 8 This court provided a detailed recitation of the trial evidence and procedural history in our prior decision. *Overton*, 2020 IL App (4th) 170639-U, ¶¶ 8-28. Here, we provide only the

information necessary to resolve the current appeal.

¶ 9

1. The Charges

¶ 10 In September 1990, the State charged defendant with first degree murder (Ill. Rev. Stat. 1989, ch. 38, ¶ 9-1(a)(1)), alleging that he and three other people started a fist fight with the victim, Paul Babcock, and later stabbed him in the head causing his death.

¶ 11

2. The Jury Trial

¶ 12 In November 1991, the trial court conducted defendant's jury trial. The State presented evidence that Babcock died from small circular stab wounds to his head. Dr. Alfonso Strano, the doctor who performed the autopsy, testified that the wounds were consistent with being stabbed with a Phillips and flathead screwdriver, though he could not say whether one or two implements were used.

¶ 13

Two witnesses, Carrie Cook and Rita Davidson, testified that on February 9, 1990, they were with defendant and Clarence Smith the entire night and defendant and Smith participated in the beating of Babcock. When the group began to drive home, defendant and Smith stopped in the alley where Babcock was laying, got tools out of the trunk, walked down the alley, and returned with blood on them (Davidson noticed blood on their shoes, although Cook said Smith was splattered from head to toe and defendant had blood only on his shoes pants).

¶ 14

The State presented two statements defendant gave to the police during interviews conducted in September 1990. The first statement was an audio-recorded interview of defendant by Detectives Charles Pennell and Tim Young. The second statement, which came from a follow-up interview with defendant, was handwritten by the detectives and signed by defendant after the detectives read him the written statement. In both statements, defendant (1) admitted he participated in the beating, (2) was with Smith in the alley, and (3) stated that Smith stabbed

Babcock with a screwdriver.

¶ 15 In the first statement, defendant denied ever stabbing Babcock, but in the second statement, defendant admitted he stabbed Babcock in the back with the handle of a flathead screwdriver. Defendant never asserted in either statement that he attempted to stop Smith from stabbing Babcock.

¶ 16 Defendant testified on his own behalf and stated that when he saw Smith stabbing Babcock, defendant eventually got Smith to stop, scratching Smith's arm in the process. Defendant testified that Pennell (1) told him during his first interview that he saw a picture of Smith's scratched arm and (2) left out relevant portions of the second statement when reading it to get defendant to sign it, including that defendant stabbed Babcock in the back.

¶ 17 On cross-examination, the State attacked defendant's credibility by pointing out that the audio-recorded statement did not contain the most important details of defendant's testimony. Defendant responded by suggesting that the tape was edited. On cross-examination, the following exchange occurred:

“Q. And I guess you told [the detective] too that you tried to stop [Smith] too when he was stabbing him?

A. Yes, I did, and as I understand they are supposed to have pictures of Mr. Smith's arm.

Q. But I guess they turned the tape off too when they said that?

A. About a scratch?

Q. Yes.

A. I guess so.”

¶ 18 In closing argument, the State asserted, as follows:

“[W]hen it is all boiled down, I really think you are just looking at one issue and that is credibility.

Did the Defendant participate in the stabbing of Paul Babcock in the alley? I think that is really the only issue you have to decide here. I think that the crux of the whole case is the statement that this defendant gave to Detectives Pennell and Young on September 27, 1990. You never like to accuse somebody of perjury but I submit to you that either Detective Pennell and Detective Young are committing perjury or this defendant is committing perjury. It can't be both ways. ***

If you believe that the Defendant gave that statement he is guilty of murder, and if you believe that the statement is accurate, he is guilty o[f] murder based upon the theory of accountability.”

¶ 19 The jury found defendant guilty of first degree murder and not guilty of armed robbery. In January 1992, the trial court sentenced defendant to 90 years in prison.

¶ 20 On direct appeal, defendant argued only that his sentence was excessive. In November 1992, this court affirmed. *Overton*, No. 4-92-0096.

¶ 21 *3. The Postconviction Petition*

¶ 22 In July 1993, defendant *pro se* filed a petition for postconviction relief pursuant to the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 1992)), alleging, among other things, that he was denied due process when Cook was not allowed to testify that Smith confessed to killing Babcock. The trial court advanced the petition to the second stage, and postconviction counsel filed an amended petition that incorporated all of defendant's *pro se* claims. The amended petition did not elaborate on defendant's claim regarding Cook; instead, it addressed ineffective assistance of trial counsel on various grounds. The court subsequently

dismissed the petition on the State's motion.

¶ 23 This court affirmed the dismissal of defendant's postconviction petition. *Overton*, No. 4-96-0085. This court concluded that defendant had forfeited the only claim raised on appeal—namely, that trial counsel was ineffective because he was allegedly drunk during trial—by not raising it before the trial court. This court also concluded that absent forfeiture, defendant's ineffective assistance claim was meritless.

¶ 24 B. The Motion for Leave To File a Successive Postconviction Petition

¶ 25 In June 2017, defendant filed a motion for leave to file a successive postconviction petition, alleging that he received ineffective assistance of counsel when his prior attorneys failed to argue that the trial court improperly excluded Cook's testimony that Smith confessed to the murder. In support of that claim, defendant attached the affidavit of David Dunn, who averred that later on the morning of the murder, defendant, Smith, and Cook came to Dunn's house. Smith had blood splattered on his shirt, pants, and shoes, and when asked why, Smith bragged that he stabbed a guy in the head until defendant grabbed his arm to stop him. Smith showed Dunn a scratch on his forearm. Dunn further averred that he later told Pennell about Smith's confession, and Pennell asked him to sign a statement. Dunn refused when (1) Dunn told Pennell the statement Dunn was being asked to sign falsely said defendant also stabbed the victim and (2) Pennell refused to amend the statement. Dunn's affidavit concluded by saying he informed defense counsel about the information contained in the affidavit but counsel never called him to testify.

¶ 26 In July 2017, the State filed a response to defendant's motion for leave to file a successive postconviction petition, arguing defendant's claims (1) could have been raised earlier and (2) did not set forth a claim of actual innocence, which would excuse any forfeiture.

¶ 27 Later in July 2017, defendant filed a motion to supplement his petition to include a

claim that the State violated *Brady v. Maryland*, 373 U.S. 83 (1963). Defendant alleged that the State had photographs of the scratch on Smith’s arm but failed to disclose them. Defendant explained that he received a response to a Freedom of Information Act (FOIA) (5 ILCS 140/1 *et seq.* (West 2016)) request in June 2017 that contained a police report. That report, attached to the motion to supplement, was dated September 13, 1990, and stated, “Per request of Det. T. Young I took photos of a cut on the right arm of [redacted] ***. Photos were taken at 601 E. Jefferson St.” The report was signed by William Sowers. Defendant asserted the photographs would have changed the outcome of the trial because they supported his defense.

¶ 28 In August 2017, the trial court conducted a hearing on defendant’s motions. The court agreed with the State’s arguments and denied defendant leave to file, specifically noting that (1) defendant should have brought the photographs up at trial and that (2) the State did not conceal them.

¶ 29 C. The Prior Appeal

¶ 30 Defendant appealed, arguing that the trial court erred by denying him leave to file because his successive petition made a *prima facie* showing of cause and prejudice for his *Brady* and *Chambers* claims. After analyzing the supreme court’s opinion in *People v. Robinson*, 2020 IL 123849, which set forth the appropriate standard for assessing claims of actual innocence at the leave-to-file stage, this court concluded that, taking defendant’s allegations as true, as required by *Robinson*, he cleared the “low bar” applicable at the leave-to-file stage, and further proceedings were appropriate. *Overton*, 2020 IL App (4th) 170639-U, ¶¶ 46, 52. We also made clear that (1) we expressed no opinion regarding whether defendant could survive a second-stage motion to dismiss and (2) the State was free to make its arguments on remand. *Id.* ¶ 53.

¶ 31 D. The Second-Stage Proceedings on Remand

¶ 32 On remand, the trial court appointed counsel for defendant and advanced his petition to the second stage. Postconviction counsel served discovery requests on the State, asking for the unredacted police report and any photographs.

¶ 33 In August 2022, defendant filed an amended successive petition in which he raised the following claims: (1) actual innocence, based on (a) the photos of Smith’s scratched arm received from the State in response to the postconviction discovery requests, (b) Dunn’s affidavit, (c) text messages from Cook to defendant’s cousin suggesting the police pressured her to give a false statement, and (d) Strano’s original autopsy report’s stating only one instrument was used; (2) defendant’s sentence violated *Apprendi v. New Jersey*, 530 U.S. 466 (2000), which he claimed applied retroactively; and (3) his 90-year sentence was disproportionate compared to Smith’s 60-year sentence. Postconviction counsel incorporated the *pro se* petition’s claims of ineffective assistance of counsel and stated he would provide further details “if required.”

¶ 34 In October 2022, the State filed a motion to dismiss, arguing, in pertinent part, that defendant failed to make a substantial showing of a constitutional violation because (1) the evidence was not newly discovered, (2) the State disclosed the police report and photographs of Smith’s arm before trial, and (3) defendant’s claims were untimely and could have been raised in his original postconviction petition. In support of its motion, the State attached a copy of the unredacted police report, which confirmed that Young ordered Sowers to photograph Smith’s cut arm, and a copy of a certificate of discovery certifying that the State had tendered 154 consecutively numbered pages of discovery to the defense. The State argued that certificate proved the police report and photos were disclosed because the report was numbered “41.” The State also made lengthy arguments regarding (1) how, when, and why the photos of Smith’s arm were taken, (2) the State’s theories of the most likely causes of the scratch on Smith’s arm, and (3) why

defendant's claim that the State withheld the photos and altered the taped interview were absurd and unworthy of belief.

¶ 35 In November 2022, in response to the State's motion to dismiss, postconviction counsel filed an addendum to defendant's amended petition asserting *Brady* violations. Specifically, counsel alleged that the State (1) failed to disclose to the defense the photos of Smith's arm and (2) influenced the testimony of two witnesses, Cook and Strano.

¶ 36 The State filed a supplemental motion to dismiss the addendum in which it largely reiterated and expanded on its earlier arguments.

¶ 37 In January 2023, the trial court conducted a hearing on the State's motion to dismiss. At that hearing, postconviction counsel argued that an evidentiary hearing was necessary for him to be able to present evidence to support his claims. Regarding Cook's recantation, counsel stated that defendant's cousin exchanged messages over social media with Cook in which she recanted. The cousin had submitted an affidavit. Counsel then stated that Cook was willing to testify at a third-stage hearing that she believed defendant was innocent and "[t]he text messages *** along with an affidavit and phone records would be admitted as evidence at the next hearing and lay the foundation for these types of messages, and [Cook] would be subpoenaed so that we could question her regarding what she was forced to say and what the real truth was regarding that night."

¶ 38 Regarding the Dunn affidavit, postconviction counsel stated, "If this were to go to a third-stage evidentiary hearing, then I would be able to enter this affidavit and subpoena this witness as well as corroborate my client's description of what actually happened." Counsel stated, "[Dunn] was ready to testify to these facts [at trial] but did not get called, which goes either to newly-discovered evidence now or ineffective assistance of counsel claims against his previous

attorney.”

¶ 39 Regarding Dr. Strano, postconviction counsel asserted the State engaged in “tampering with witnesses and prosecutorial misconduct that could be better explained through an evidentiary hearing. If this goes to evidentiary hearing, we would attempt to subpoena Dr. Strano to explain this discrepancy in his report and in his testimony on the stand.”

¶ 40 Counsel concluded by asserting that the petition and arguments “warrant and necessitate a third-stage evidentiary hearing where more evidence and witnesses can be brought forth to the Court to better explain in detail just what happened in September of 1990 and how my client is indeed innocent.”

¶ 41 The State argued in support of its motion, as follows:

“So I’ll start with the reason why this case was let go to this stage, which is the arm scratch photo, so-called. So, this is a photo of a scratch on Co-Defendant Clarence Smith’s arm. And it’s a small scratch, and it is the basis for a *Brady* claim and an actual innocence claim, but it cannot support either.

* * *

The State’s provided some documents for the record, A through F. Exhibit B is that report that we’re talking about, the one that just simply says, per the request of Detective Young, I photographed Clarence Smith’s arm. There’s a scratch on it, cut on his right arm. And what’s significant is that, it’s number. It’s number 41, page 41.

The next exhibit is People’s C, and it’s the certificate of compliance that says way back on 18 October 1990, State provided its first discovery submission, 1 through 154 consecutively-numbered pages. So the report of the scratch was

provided in discovery.

* * *

Now, what seems to have happened at the time of trial, [defendant] would have been shown the discovery but not given the discovery, of course. Would have gone to his attorney who is now deceased, and there's, there's nothing to contradict the documentary evidence that this discovery was provided.”

¶ 42 The trial court took the case under advisement and shortly thereafter entered a written order granting the State's motion to dismiss, stating as follows:

“The evidence of defendant's guilt at trial was substantial, including physical evidence, witnesses (both lay and expert), and defendant's statement. Defendant's own statement was damning to him and raised the issue of coercion by the police and other contradicting testimony and the claim of attempting to stop co-defendant by grabbing his arm.

Defendant's claim the police stopped the tape of his statement to him is contradicted by evidence presented at trial.

Defendant could have challenged the sufficiency of the evidence at the trial or in a direct appeal. Furthermore, the issues now raised were presented at trial. In addition the defendant fails to show he can be exonerated of guilt under the doctrine of accountability.

Defendant's claim of acting in self-defense or acting as a 'protector' of the victim is based upon his claim of a scratch on the co-defendant's arm. Again, this evidence is not new and the photo of the scratch was provided to the defense prior to trial.”

¶ 43 Regarding the remaining claims, the trial court found that (1) the evidence offered in support of those claims was not newly discovered and was available at the time of trial or (2) those claims were raised at trial, on appeal, or in prior postconviction proceedings.

¶ 44 This appeal followed.

¶ 45 II. ANALYSIS

¶ 46 Defendant appeals, arguing, in relevant part, the (1) trial court erred by granting the State's motion to dismiss because the petition made a substantial showing of a *Brady* violation and (2) postconviction counsel provided unreasonable assistance by failing to make necessary amendments to the petition to survive dismissal. We agree that the petition was dismissed on improper grounds, reverse that dismissal, and remand for third-stage proceedings.

¶ 47 A. Successive Postconviction Petitions

¶ 48 At the second stage, the State may file either a motion to dismiss or an answer to the petition. 725 ILCS 5/122-5 (West 2018); *People v. Domagala*, 2013 IL 113688, ¶ 33. When the State seeks dismissal of a postconviction petition instead of filing an answer, the State assumes the truth of the allegations and supporting documents, eliminating all factual issues from the inquiry, and questions only the legal sufficiency of those allegations. *People v. Coleman*, 183 Ill. 2d 366, 390-91, 701 N.E.2d 1063, 1076 (1998). The question for a trial court is whether the defendant has made a substantial showing of a constitutional violation. *People v. Urzua*, 2023 IL 127789, ¶ 34. The “substantial showing” requirement of the second stage “is a measure of the legal sufficiency of the petition’s well-pled allegations of a constitutional violation, *which if proven* at an evidentiary hearing, would entitle petitioner to relief.” (Emphasis in original.) *Domagala*, 2013 IL 113688, ¶ 35.

¶ 49 To make this determination, the trial court considers only the proofs attached by

defendant to his petition and the record of his original trial proceedings. *People v. Sanders*, 2016 IL 118123, ¶¶ 45, 48, 47 N.E.3d 237. The Act specifically requires the petitioner to attach to his petition “affidavits, records or other evidence supporting the petition’s allegations or state why the same are not attached.” *Id.* ¶ 45 (citing 725 ILCS 5/122-2 (West 2014)). The court must accept as true both the petition’s allegations and its supporting evidence “unless they are positively rebutted by the record of the original trial proceedings.” *Id.* ¶ 48. As used in the Act, “the record” means “ ‘the court file of the proceeding *** and any transcripts of such proceeding.’ ” *Id.* ¶ 43 (quoting 725 ILCS 5/122-2.1(c) (West 2014)).

¶ 50 “The inquiry into whether a post-conviction petition contains sufficient allegations of constitutional deprivations does not require the circuit court to engage in any fact-finding or credibility determinations. The Act contemplates that such determinations will be made at the evidentiary stage ***.” *Coleman*, 183 Ill. 2d at 385; see *id.* at 390 (“Had the State wished to test the [witness’s] credibility, the State should have *answered* the petition ***.” (Emphasis in original.)). “[O]ur supreme court has emphasized that, when a petitioner’s claims are based upon matters outside the record, the Postconviction Act does not intend such claims be adjudicated on the pleadings.” *People v. Snow*, 2012 IL App (4th) 110415, ¶ 15, 964 N.E.2d 1139 (citing *People v. Simms*, 192 Ill. 2d 348, 360, 736 N.E.2d 1092, 1105 (2000)). Similarly, the trial court commits error if it relies on material outside the record, whether attached to the State’s motion to dismiss or obtained *sua sponte*, when dismissing a postconviction petition. *Sanders*, 2016 IL 118123, ¶¶ 42-44; *People v. Harper*, 2013 IL App (1st) 102181, ¶ 44, 987 N.E.2d 954; *People v. Fields*, 2020 IL App (1st) 151735, ¶¶ 41-42, 175 N.E.3d 1131.

¶ 51 Because the issue of whether a trial court properly dismissed a defendant’s petition at the second stage presents only questions of law, an appellate court applies a *de novo* standard of

review. *Sanders*, 2016 IL 118123, ¶ 31.

¶ 52 B. Defendant's *Brady* Claim

¶ 53 Defendant argues that the trial court erred by dismissing defendant's amended postconviction petition based on the State's argument and evidence in support thereof that the photographs were tendered to the defense before trial. First, defendant points out that the State claimed the report concerning the photos was disclosed in discovery because it was numbered page 41 and a certificate of service showed the State disclosed materials consecutively numbered 1 through 154; however, the photographs themselves are not numbered, suggesting they were not turned over. Second, defendant contends that the State's argument did nothing more than create an issue of fact for a third-stage evidentiary hearing by contradicting the well-pleaded allegations in the amended petition.

¶ 54 The State argues, as it did before the trial court, that the unredacted police report and certificate of disclosure of discovery that it attached to its motion to dismiss demonstrate that the report and the photographs were turned over to defendant in discovery prior to trial. Specifically, the State claims the lower right-hand corner of the police report is numbered "41," which shows that it was turned over as part of the documents numbered 1 through 154 as described in the discovery disclosure.

¶ 55 1. *The Law*

¶ 56 In *Brady*, the United States Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused *** violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady*, 373 U.S. at 87. To establish a *Brady* claim, defendant must show "(1) the State suppressed evidence and that evidence was (2) favorable to him and (3) material to his guilt

or punishment.” *Snow*, 2012 IL App (4th) 110415, ¶ 35.

“In assessing materiality, we must keep in mind (1) it does not require a demonstration by a preponderance of the evidence that disclosure of the suppressed evidence would have resulted ultimately in the defendant’s acquittal; (2) the focus is on whether, in the absence of the undisclosed information, the defendant received a fair trial, which is a trial resulting in a verdict worthy of confidence; (3) it does not require the defendant to demonstrate that, ‘after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict’; and (4) it is defined ‘in terms of suppressed evidence considered collectively, not item by item.’ ” *Id.* ¶ 37 (quoting *Kyles v. Whitley*, 514 U.S. 419, 434-36 (1995)).

¶ 57

2. *This Case*

¶ 58 The defendant has made a substantial showing that the report and photos here may be exculpatory and impeaching. As explained in our prior decision, the State’s closing argument focused on credibility, explicitly telling the jury that the “crux” of the case was the veracity of defendant’s September 27, 1990, statement, (1) which was written by the detectives and (2) about which defendant testified at trial that the police tricked him into signing by omitting material portions when telling its contents. The alleged failure of the police to disclose photos that supported defendant’s version of events would impeach the officers’ credibility and provide some objective support for defendant’s otherwise self-serving claim.

¶ 59 For these same reasons, the report and photos are arguably material, assuming, as we must at the second stage, that defendant’s assertions about the photos are true. Moreover, whether defendant attempted to stop Smith from stabbing Babcock was certainly material to

punishment, if nothing else. Defendant received 90 years while Smith received only 60. Although Smith was only 17 at the time of the offense, defendant nonetheless received an additional 30 years due to the heinous and wanton nature of the murder. Any evidence to support defendant's claim that he attempted to and did eventually stop Smith's stabbing Babcock stood to better defendant's chances of materially decreasing his sentence.

¶ 60 In addition, the jury acquitted defendant of the armed robbery charge, but Smith was convicted of robbery. This suggests that the jury could have believed defendant's statement.

¶ 61 However, the trial court never addressed the materiality of the photographic evidence. Instead, the court relied on *outside* evidence submitted by the State to dismiss the claim in its entirety. Specifically, the court accepted the State's unredacted police report, which (1) was submitted only as an attachment to the State's motion to dismiss and (2) was not independently present in the record prior to that submission. The court also accepted the State's assertion that the certificate of discovery proved the photos were provided in discovery. However, factual questions remain surrounding whether the photos were actually provided in discovery.

¶ 62 The record contains multiple photographs of the scratch and multiple versions of the police report. For instance, one version of the report has a faint stamp indicating it was provided to the state's attorney's office. Although the report is purportedly numbered (the document contains markings that are covered by the electronic page number added upon e-filing), the photographs themselves are not numbered, which creates an ambiguity regarding whether those photographs were disclosed along with the explicitly numbered report.

¶ 63 Defendant alleged that the State did not provide any photos (or the report) of the scratch prior to trial despite a direct request from defense counsel. Accordingly, the State's presentation of new evidence at the second-stage proceedings to contradict defendant's allegations

did nothing more than create an issue of fact that needed to be resolved at a third-stage hearing. See *Fields*, 2020 IL App (1st) 151735, ¶ 42 (“The purpose of the first two stages is to determine whether an evidentiary hearing is even necessary. To the extent that the State believes that it must introduce other evidence to counter defendant’s claims, then it may introduce that material at a third-stage evidentiary hearing. That is what an evidentiary hearing is for.”).

¶ 64 As we have explained, when the State files a motion to dismiss a postconviction petition at the second stage, it may not—in support of that motion—submit new material—that is, material that is not contained anywhere in the record.

¶ 65 The State claims that defendant failed to rebut the State’s evidence that the photos were disclosed; however, second-stage proceedings do not contemplate a summary-judgment style procedure. When a defendant’s postconviction claims depend on factual information outside of the record, the State is limited to arguing that the defendant’s claims are affirmatively rebutted by the record. The State cannot present its own factual information from outside the record to contradict a defendant’s claims.

¶ 66 Defendant had no ability to challenge the State’s evidence. His petition and affidavit asserted he never saw the photos and they were not produced before trial. He could not do anything more at the second stage. However, at the third stage, defendant would be called upon to *prove* that he never saw the photos and that they were not produced before trial. And as part of a third-stage evidentiary hearing, the State could contest and rebut defendant’s claims with its own evidence and argument.

¶ 67 The State is never required to file a motion to dismiss a postconviction petition. Indeed, if the State has evidence outside of the record that disproves the allegations in a defendant’s postconviction petition, the better course of action for the State would be to file an answer, deny

the allegations in the petition, and request a third-stage hearing during which the State could submit such evidence.

¶ 68 We emphasize that at a third-stage hearing the burden is on a defendant to prove his claims by a preponderance of the evidence. In this case, the State would not have needed to do much more than it did at the motion to dismiss stage to possibly prevail at an evidentiary hearing. At a third-stage evidentiary hearing in this case, the trial court might well find that defendant failed to sustain his burden of proving the elements of his various postconviction claims by a preponderance of the evidence, especially given the State's evidence and arguments rebutting those claims.

¶ 69 Given the procedural posture of this case, we conclude that further second-stage proceedings are unwarranted. In the interests of judicial economy, we remand the case for a third-stage evidentiary hearing on defendant's claims. On remand, if defendant wishes to pursue his claim based on *Chambers v. Mississippi*, 410 U.S. 284 (1973), which this court addressed in the prior appeal in *People v. Overton*, 2020 IL App (4th) 170639-U, ¶¶ 55-57, we direct the trial court to (1) grant defendant leave to file an amended petition to include the *Chambers* claim and (2) conduct a third-stage evidentiary hearing on all of defendant's claims. If defendant does not wish to include the *Chambers* claim, we direct the trial court to conduct an evidentiary hearing on all the claims in defendant's amended successive petition. We clarify that all further proceedings are to be third-stage evidentiary proceedings and no motion to dismiss by the State should be accepted by the trial court.

¶ 70 We wish to make clear that we express no opinion on the ultimate merits of any of the arguments of the parties. On remand, the trial court will be able to evaluate any evidence presented by both parties, make credibility determinations, and weigh the totality of the evidence

presented both at the third-stage hearing and at the original jury trial. See *People v. Carter*, 2021 IL App (4th) 180581, ¶ 64 (explaining “the wisdom and importance of deferring to a fact finder’s determinations” on whether a defendant met his burden of proof at the third stage); *People v. House*, 2023 IL App (4th) 220891, ¶ 93 (“At the second stage, the defendant need only allege evidence of his actual innocence and support his allegations with affidavits or other supporting documentation. At the third stage, the focus shifts to the quality and credibility of that alleged evidence, which is why the witnesses are required to testify in open court.”).

¶ 71 We reiterate that defendant, at all times, bears the burden of proving the elements of his various claims by a preponderance of the evidence. That is, at the second stage, the trial court is required to accept the defendant’s well-pleaded allegations as true and make all reasonable inferences in the light most favorable to the defendant. However, at the third stage, that acceptance and those favorable inferences disappear. The State may, but is not required to, submit evidence to contradict the defendant’s claims, and the State may prevail based solely on its arguments that the defendant failed to prove the elements of his claims.

¶ 72 III. CONCLUSION

¶ 73 For the reasons stated, we reverse the trial court’s judgment and remand the case for third-stage proceedings consistent with this opinion.

¶ 74 Reversed and remanded.

People v. Overton, 2023 IL App (4th) 230110

Decision Under Review: Appeal from the Circuit Court of Sangamon County, No. 90-CF-652; the Hon. Adam Giganti, Judge, presiding.

Attorneys for Appellant: James E. Chadd, Douglas R. Hoff, and David T. Harris, of State Appellate Defender's Office, of Chicago, for appellant.

Attorneys for Appellee: Daniel K. Wright, State's Attorney, of Springfield (Patrick Delfino, David J. Robinson, and Luke McNeill, of State's Attorneys Appellate Prosecutor's Office, of counsel), for the People.
