THIRD DIVISION
November 22, 2017

No. 1-15-3470

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 98 CR 24643
	)	
MARVIN WARE,	)	Honorable
	)	Gregory R. Ginex,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Justices McBride and Burke concurred in the judgment.

ORDER

¶ 1 *Held*: The judgment of the circuit court of Cook County denying defendant leave to file a successive postconviction petition and dismissing defendant's petition for relief from judgment is reversed; defendant's successive petition for postconviction relief states a colorable claim of actual innocence based on newly discovered evidence, and the trial court's judgment on defendant's petition for relief from judgment was based on a misapprehension of the facts.

¶ 2 Following a bench trial the circuit court of Cook County convicted defendant, Marvin Ware, of aggravated criminal sexual assault of 16-year old C.K. and sentenced him to natural life imprisonment based on being a repeat sex offender. This court affirmed defendant's conviction

and sentence on direct appeal. Defendant sought postconviction relief and DNA testing that was not available at the time of his trial. Defendant's initial postconviction petition was summarily dismissed. During the pendency of the appeal of the summary dismissal, defendant filed an amended motion for DNA testing, which the trial court denied. This court reversed and ordered DNA testing. On remand, in addition to defendant's requested testing, the State also caused evidence to be tested that had not previously been tested before defendant's trial. Once DNA testing was complete defendant filed a motion for leave to file a successive postconviction petition and a petition for relief from judgment. Defendant attached to his petitions the results of all of the testing that had been completed after our remand (the testing by him and by the State). The trial court considered the results of all of the tests when it entered its judgment. The court denied defendant's motion for leave to file a successive postconviction petition and granted judgment on the pleadings in favor of the State on defendant's petition for relief from judgment. For the following reasons, we reverse and remand for further proceedings.

¶ 3 BACKGROUND

¶ 4 This court has previously set forth the details of defendant's trial and conviction in the direct appeal and in appeals from both the dismissal of his initial postconviction petition and a motion for forensic testing pursuant to section 116-3 of the Code of Criminal Procedure (725 ILCS 5/116-3 (West 2008)). We will briefly set forth those facts necessary to an understanding of our disposition of the current appeal. C.K. testified that on August 19, 1998, she was visiting her former place of employment, a bagel shop, where defendant also worked. As C.K. was walking down a hallway toward the back door defendant grabbed her and pulled her into the men's washroom. Defendant locked the door and pinned C.K. to the wall. C.K. tried to say "no" and "stop" but defendant either had his tongue in her mouth or covered her mouth with his hand. Defendant pulled down C.K.'s pants and underwear and inserted his penis into her vagina.

Defendant ejaculated onto the floor and into some toilet paper. C.K. reported the assault to her mother, who took C.K. to the hospital. C.K. told medical personnel she had not had sex with anyone within 72 hours of the incident. The Illinois State Police found semen on the crotch area of C.K.'s underwear. Because it pertains to an issue in this appeal, the testimony concerning the DNA analysis on the semen is set forth in detail below. A Chicago Police Department detective testified that when he interviewed C.K., she identified the perpetrator as a former co-worker and provided his first name. C.K. identified defendant in a physical lineup.

¶ 5 Dr. Barbara Wilson, a forensic scientist for the Illinois State Police, testified at defendant's trial. Wilson testified semen was identified on the victim's underwear but no sperm were identified. The State asked Wilson if the fact no sperm was identified made it hard to find DNA. Wilson testified to further steps she took to try to find DNA. Wilson testified that she took the portion of the underwear containing the semen stain and added it to chemicals "to release the DNA from that material and then *** analyzed that DNA." The State then asked Wilson the following questions and Wilson gave the following answers:

> "Q. Okay. And pursuant to you analyzing that DNA in that sample, can you tell the judge what your conclusion was, what were your results?
>
> A. The only DNA I was able to find from that panty, the semen stain, was DNA that matches the DNA of the victim.
>
> Q. Through looking at the DNA, were you able to find any DNA other than the victim's DNA?
>
> A. No.
>
> Q. So there was nothing that was inconsistent other than the victim's DNA, is that correct?
>
> A. Only the victim's DNA was observed.

Q. No other DNA?

A. No other DNA.

Q. So your conclusion is even though semen was found you cannot determine who the source, who the actual person is of that semen, is that correct?

A. Correct.

THE COURT: So your conclusion as to the stain in the panties was sperm?

THE WITNESS: Well, the conclusion—

THE COURT: Or it was semen?

THE WITNESS: It's semen. And I can't make any conclusions who the semen donor could be because I have no DNA."

¶ 6 On cross-examination, Wilson testified that when she does her analysis she cannot tell how old a semen specimen might me. Wilson agreed she could not say to any reasonable degree of medical certainty that the semen stain in the victim's underwear was deposited on August 19, 1998 and that the semen could have been deposited prior to that date. On re-direct, Wilson testified that semen can only come from a male.

¶ 7 In closing argument the State argued in part as follows:

> "The one thing he didn't know that would occur when he was pulling out a drip did fall on the panties, which was down on the ankle right above the pants, that little drip that occurred. Yeah, *** we could not find DNA it; however, that expert testified that positively is male semen. And [C.K.] testified she hadn't had sex for seventy-two hours.
>
> So what does counsel want you to believe? That she walked around with those same panties wearing them for seventy-two hours if she had sex before that?

> No, judge. That semen that was found, it's male semen, it's fresh semen, it's the defendant's semen.
>
> There definitely was sex in there, semen was found in there. We can't find male sperm. That third test was just able to find the semen. Maybe if we would have been able to find that, the water, the stains on the ground, however, he cleaned it all up, then we would have been able to find the DNA, but clearly, judge, the key physical evidence is semen and [C.K.] testified seventy-two hours prior she did not have sex, judge. What's he want you to believe, that she has been walking around for seventy-two hours with the same pair of underpants with the semen stain there? No, judge."

¶ 8 In its oral ruling, the trial court began by noting that defendant had executed a jury waiver, that defendant was apprised of his right to testify, and that defendant chose not to testify. The court addressed the fact that instead of calling the police the victim went home to her mother and found that "does not cast a negative inference on the case." The court continued:

> "I note that [C.K.] testified clearly and concisely. I note that Sergeant Higgins said that she was visibly upset. I note that her mother said that she was visibly upset. I note that even though there was not DNA evidence, that there was evidence of semen found in her pants.
>
> * * *
>
> Accordingly, it's the decision of this court that I have weighed all the factors and I find the defendant, Marvin Ware, guilty as charged."

¶ 9 Defendant filed a petition for postconviction relief and a motion for DNA testing pursuant to section 116-3 of the Code of Criminal Procedure (725 ILCS 5/116-3 (West 2008)). The trial court summarily dismissed defendant's petition for postconviction relief and denied his

motion for DNA testing, and defendant appealed. While that appeal was pending, defendant filed a new motion for DNA testing pursuant to section 116-3. This court affirmed the summary dismissal of defendant's initial *pro se* postconviction petition and dismissed defendant's appeal of the denial of his motion for DNA testing as moot based on the pendency of the second motion for DNA testing in the trial court. The trial court denied defendant's second motion for DNA testing on the grounds the testing defendant requested had already been done and could not produce newly discovered evidence that was material to a free-standing claim of actual innocence. Defendant again appealed.

¶ 10 On appeal we found that identity was a central issue in the case because defendant maintained his innocence and argued false accusation by the complainant, and the identity evidence rested solely on complainant's testimony and information she relayed to others; therefore, defendant met the first requirement for establishing a *prima facie* case for DNA testing under section 116-3. This court then found that the evidence to be tested—the semen sample from C.K.'s underpants—was subject to a sufficiently secure chain of custody. Next, this court found that "newer DNA testing, specifically Y-STR testing, with the potential to find previously undetected male DNA and the potential to exclude defendant would be material in this case." *People v. Ware*, 2012 IL App (1st) 103021-U, ¶ 24. This court stated that "[a] conclusive determination of whether defendant's DNA is present in the semen sample in complainant's underwear would be both new and noncumulative and would be materially relevant to defendant's claim of actual innocence. [Citation.]" *Id.* However, defendant's second motion requested STR testing, which had already been completed, and not specifically Y-STR testing. This court remanded the case to the trial court with directions to allow defendant to amend his section 116-3 motion to specifically request Y-STR testing and upon such amendment, for the

trial court to order that DNA testing be conducted, "as all other requirements for section 116-3 testing have been met." *Id.* ¶ 27.

¶ 11 Upon remand, defendant filed a motion for discovery seeking "all discovery materials," including Chicago Police Department inventory sheets, medical test results, the State Crime Laboratory file, all notes, reports, or other documents regarding the forensic materials that were recovered and preserved, and all other related materials. Defendant also filed a motion for Y-STR DNA testing. The State tendered DNA reports and materials to the defense. Defendant filed a motion to impound the physical evidence, to allow a defense expert to examine the evidence, and for additional discovery.

¶ 12 Defendant's motion to impound asserted that the lab reports the defense received show that additional testing "makes it clear that the semen stain on the complainant's panties did not come from [defendant] and instead probably came from *** Larry Berry, whose DNA profile was in the Illinois Offender Database and according to trial testimony was living in the same house with the complainant on the date the crime allegedly occurred." Defendant's motion to impound also stated that the State had tested a pair of boxer shorts "alleged to have been taken from [defendant.]" The motion states that the Illinois State Police Crime Laboratory report states that stains containing C.K.'s DNA were purportedly found on the boxer shorts. The motion sought "discovery from the State for all chain of custody documents related to" the boxer shorts. The State did not object to impounding the evidence to allow the defense expert to examine the evidence. The State also provided documents which it stated "detail the recovery of and chain of custody for the underwear recovered from" defendant.

¶ 13 In October 2015 defendant filed a motion for leave to file a successive postconviction petition and a combined petition for postconviction relief and petition for relief from judgment pursuant to section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2014)).

Petitioner attached supporting exhibits to his petition for postconviction relief and petition for relief from judgment which included the "Illinois State Police Laboratory File on Post-Conviction DNA Testing," the "Affidavit of Dr. Karl Reich," and "Additional Physical Evidence Submitted to the Illinois State Police Crime Laboratory by the State." In pertinent part, defendant's postconviction allegations were that he was denied due process by the perjury of State agent, Barbara Wilson, the fact that the prosecution failed to disclose evidence favorable to him and the fact that his trial lawyer failed to provide effective assistance of counsel by failing to discover that evidence. Defendant also alleged that newly discovered evidence that DNA testing actually excluded defendant as a contributor to the semen stain on the complainant's underwear demonstrates his actual innocence. Defendant also alleged that the "true facts," that he was excluded as the donor of the DNA in the semen stain, that the State's forensic scientist lied about those facts, and the complainant's lie that she had not had sex with anyone within 72 hours, constitute facts which would have prevented the judgment against him had they been presented to the trial court.

¶ 14 The trial court denied defendant leave to file the successive postconviction petition. The court also granted judgment on the pleadings in favor of the State on defendant's petition for relief from judgment. When it denied defendant leave to file a successive petition and granted judgment for the State on the petition for relief from judgment, the trial court stated that a jury heard evidence that defendant was excluded as being the donor of the DNA material found in the complainant's underwear but nevertheless found him guilty. The court's statement is contrary to the record which shows that Barbara Wilson, the State's DNA witness, testified at defendant's bench trial that she could not make any conclusions who the semen donor could be because she had no DNA. In its oral ruling the trial court stated, in part, as follows:

"The evidence in the trial was *** no DNA other than that of the complaining witness.

The victim was visibly upset and apparently called her boyfriend who is apparently the subject of the postconviction petition saying that there is, perhaps, his DNA there and not the defendant's.

* * *

The issue that came up was about testing regarding the semen stain. *** The only DNA that was discerned to be in this particular patch of the crotch of the panties was *** the victim's. Not the defendant's. In fact the defendant was excluded.

* * *

Now the defendant has alleged that because of the new DNA, the DNA reveals that someone else may have been the perpetrator. However, when one looks at this, whether or not the victim had sex with a partner, perhaps Mr. Berry, within 72 hours—although she testified she didn't—is an impeachment issue.

* * *

The jury heard this evidence and quite frankly excluded everything and regarded the fact that the defendant was excluded from the DNA, and the DNA that I see does not say that Mr. Berry committed the act, although the defense is alleging there is a basis for her to do that and put it on the defendant because Mr. Berry is the boyfriend.

And interestingly enough on the defendant's boxer shorts, I believe are 5 or 6 locations of DNA that check to the victim, the complaining witness in this case.

> Now none of that was put in the record at trial. But that is part of the record now that this court has to consider.
>
> * * *
>
> The only issue that possibly could result from the new testing, there are two: 1, that the complaining witness had sex with Mr. Berry prior or within the 72 hours which is an impeachment issue, and 2, that the defendant's boxer shorts now reveal several locations of the complaining witnesses' DNA which would corroborate the entire situation."

¶ 15 This appeal followed.

¶ 16 ANALYSIS

¶ 17 Defendant argues the trial court erroneously denied him leave to file a successive postconviction petition because his petition and supporting documentation set forth a cognizable claim of actual innocence, and the trial court's ruling on his petition for relief from judgment pursuant to section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2014)) is erroneous because the petition sets forth a meritorious claim that new evidence exists that probably would have prevented entry of the judgment at defendant's trial. "[A] section 2-1401 petition differs from a postconviction petition. A postconviction petition requires the court to decide whether the defendant's constitutional rights were violated at trial (see 725 ILCS 5/122-1(a) (West 2002)); a section 2-1401 petition, on the other hand, requires the court to determine whether facts exist that were unknown to the court at the time of trial and would have prevented entry of the judgment." *People v. Pinkonsly*, 207 Ill. 2d 555, 566 (2003). We address each of defendant's pleadings in turn.

¶ 18 Motion for Leave to File Successive Postconviction Petition

¶ 19 We will review the trial court's order denying defendant leave to file a successive postconviction petition *de novo*. *People v. Warren*, 2016 IL App (1st) 090884-C, ¶¶ 71-75.

> "The Post-Conviction Hearing Act (the Act) provides that, generally, a defendant may only file one postconviction petition. [Citation.] In order to file a successive postconviction petition, a petitioner must first obtain 'leave of court.' [Citation.] One way a petitioner may obtain leave of court is by raising a colorable claim of actual innocence. [Citation.] When a petitioner seeks leave of court based on a claim of actual innocence, 'leave of court should be denied only where it is clear, from a review of the successive petition and the documentation provided by the petitioner that, as a matter of law, the petitioner cannot set forth a colorable claim of actual innocence.' [Citation.]" *Id.* ¶ 70.

To establish a claim of actual innocence, the evidence supporting defendant's claim must be (1) newly discovered, (2) material and not merely cumulative, and (3) of such a conclusive character that it would probably change the result at a retrial. *Id.* ¶ 76. "At the initial stage of the proceedings, where the defendant seeks leave to file the successive petition, a defendant is not required to conclusively prove his case." *Id.* Rather, leave of court should be granted when the defendant's supporting documentation raises the *probability* that it is more likely than not that no reasonable juror would have convicted him in light of the new evidence. *Id.*

¶ 20 "Newly discovered evidence must be evidence that was not available at defendant's trial and that the defendant could not have discovered sooner through diligence. [Citation.] Generally, evidence is not 'newly discovered' when it presents facts already known to the defendant at or prior to trial, though the source of those facts may have been unknown, unavailable, or uncooperative. [Citation.]" (Internal quotation marks omitted.) *People v. House*, 2015 IL App (1st) 110580, ¶ 40. In this case, the State does not argue that the DNA test

excluding defendant as a contributor to the semen stain on C.K.'s underwear is not newly discovered evidence. We agree that the DNA evidence is newly discovered.

¶ 21 In this case, a DNA test result excluding defendant as a contributor to the semen stain was not known to defendant or available to him at defendant's trial. Defendant, as did the State, reasonably relied on the report and testimony of State forensic scientist Dr. Barbara Wilson stating that the only DNA identified from C.K.'s underwear was that of C.K. Regarding the question of whether the test results could have been discovered through diligence, defendant has claimed in these proceedings that trial counsel was ineffective in failing to discover the forensic scientist's notes and the full scope of what testing on C.K.'s underwear revealed. Defendant's posttrial expert Dr. Karl Reich opined the "notes and data in what appears to be Dr. Wilson's own handwriting document the *** production of a DNA profile that deliberately removed exculpatory results form a mixed DNA profile." However, this court has recognized "that the newly-discovered-evidence requirement may work an injustice if applied inflexibly, and that relaxation of this requirement may be necessary where a defendant's presentation of evidence is hindered by his attorney's performance." *Warren*, 2016 IL App (1st) 090884-C, ¶ 136. Additionally, the State has forfeited an argument the DNA test results could have been discovered through diligence by failing to raise it in its appellee's brief. See Ill. S. Ct. R. 341(i) (eff. July 1, 2008).[1] We find defendant has satisfied the first criteria for establishing a claim of actual innocence.

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[1]Without addressing its merits, we note that the State argues Wilson testified that there was no DNA "that would enable her to determine the source of the semen." We construe the State to draw on a distinction between DNA that would permit identification of who a contributor is, and DNA that would permit identification of who a contributor is not, to argue that there is no evidence, including defendant's expert's affidavit, Wilson intended to make a false or inaccurate statement or knew that she did. The State makes this argument to refute defendant's claim it

¶ 22 Nor does the State argue that the DNA evidence is not material, or is merely cumulative. "Material means the evidence is relevant and probative of the petitioner's innocence. [Citation.] Noncumulative means the evidence adds to what the jury heard. [Citation.]" *Id.* (quoting *People v. Coleman*, 2013 IL 113307, ¶ 96). In this case, the trier of fact heard that the contributor of the semen stain on C.K.'s underwear could not be identified through DNA. The State argued that although the contributor could not be identified, the presence of semen in C.K.'s underwear, combined with her testimony that she had not had intercourse with anyone within the 72 hours preceding the alleged assault, proved that the assault occurred as C.K. testified. Evidence that DNA analysis excludes defendant as a contributor to the semen stain would add to what the trier of fact heard. "Evidence is relevant if it has any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. Ill. R. Evid. 401 (eff. Jan. 1, 2011)." *People v. Anderson*, 2017 IL App (1st) 122640, ¶ 63. In this case, the DNA evidence is relevant and probative of defendant's innocence because it makes it less probable the assault occurred as C.K. testified. We find defendant has satisfied the second criteria for establishing a claim of actual innocence.[2]

¶ 23 We turn to a consideration of whether the DNA evidence excluding defendant as a contributor of the semen stain in C.K.'s underwear is of such a conclusive character that it would probably change the result at a retrial. Defendant argues that "[k]nowing that the semen stain did not come from Ware would undermine the only inculpatory evidence from trial, refute the

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knowingly used perjured testimony; the State does not assert the exclusion of defendant as a contributor to the semen stain was discoverable through diligence.

[2]Further, as defendant notes, this court has already found that "[a] conclusive determination of whether defendant's DNA is present in the semen sample in complainant's underwear would be both new and noncumulative and would be materially relevant to defendant's claim of actual innocence." *Ware*, 2012 IL App (1st) 103021-U, ¶ 24.

State's theory of the case, and almost certainly change the result on retrial." He also argues that a DNA match for "a plausible alternate suspect *** would also cast the entire trial in a different light."

¶ 24 The State responds that posttrial DNA testing on evidence gathered prior to trial produced both exculpatory and inculpatory evidence. Specifically, testing on boxer shorts defendant allegedly wore on the day of the assault revealed that C.K.'s DNA was on the boxer shorts. The State argues that "[b]ecause a retrial would also include the new inculpatory evidence from defendant's boxer shorts, he cannot meet his burden of proving that the new exculpatory evidence would probably change the result at a retrial." The State further argues that the new inculpatory evidence relegates the evidence that defendant is excluded as a contributor to the semen stain on C.K.'s underwear to mere impeachment of C.K.'s testimony that she did not have intercourse with anyone within the 72 hours preceding the assault, and notes that "[e]vidence that merely impeaches a witness will typically not be of such conclusive character as to justify postconviction relief. [Citation.]" *People v. Collier*, 387 Ill. App. 3d 630, 637 (2008).

¶ 25 At this stage of postconviction proceedings, the question is, "did [the] request for leave of court and [the] supporting documentation raise the probability that it is more likely than not that no reasonable juror would have convicted [defendant] in the light of the new evidence?" *People v. Edwards*, 2012 IL 111711, ¶ 31. To answer that question, the court may not consider evidence that is not part of the record of the proceedings from which defendant seeks postconviction relief.[3] *People v. Sanders*, 2016 IL 118123, ¶ 40 ("the standard at the second stage of

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[3]In support of the argument the trial court erred in considering the new inculpatory evidence, defendant's opening brief cites an unpublished order of this court for the proposition that review of an order denying leave to file a successive postconviction petition is based solely on the defendant's pleadings. We "remind defendant that unpublished Rule 23 orders are not precedential and may not be cited by parties except to support contentions of double jeopardy,

postconviction proceedings is that all well-pleaded allegations of the petition and accompanying affidavits are taken as true unless positively rebutted by the record of the proceedings. *** [T]he standard refers only to the record of the proceedings from which the petitioner seeks postconviction relief and not any other related proceedings."). *Sanders* was an appeal from a judgment granting the State's second-stage motion to dismiss a second successive postconviction petition alleging newly discovered evidence of actual innocence. *Id.* ¶¶ 1, 14. The trial court granted the State's motion to dismiss the successive petition based on a credibility determination it made in a separate proceeding regarding an affiant who had provided an affidavit in support of the petition at issue. *Id.* ¶ 19. The parties disputed whether the trial court could rely on its credibility finding regarding the affiant made in a separate proceeding. *Id.* ¶ 38. The *Sanders* court held that the trial court's credibility determination in a related proceeding "cannot be substituted for a third-stage evidentiary hearing in petitioner's case. [Citation.]" *Id.* ¶ 42. The court held that in allowing the State's motion to dismiss "the trial court erred in considering matters outside the record of petitioner's case." *Id.* ¶ 43.

¶ 26 Although *Sanders* involved a motion to dismiss a successive petition, we find that the same rule applies when the trial court is to determine whether leave to file a successive postconviction petition should be granted. "Both the second stage and a motion for leave to file a successive petition require a review of 'the petition and any accompanying documentation.' [Citations.]" *People v. Jones*, 2016 IL App (1st) 123371, ¶ 60. Further, second-stage proceedings present a higher barrier for a postconviction petitioner to overcome. *Id.* ¶ 60. "For the second stage to not be superfluous for a successive petition, it must be that the 'substantial showing' required at the second stage is greater than the 'probability' required for a successive

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res judicata, collateral estoppel, or law of the case. [Citation.]" *People v. Wilder*, 356 Ill. App. 3d 712, 718-19 (2005) (citing Ill. S. Ct. R. 23(e) (eff. July 1, 2011)).

petition to receive leave for filing. [Citation.]" *Id.* If the trial court may not consider matters outside the record of the proceedings from which postconviction relief is sought when the petitioner must make a greater showing than the showing required to obtain leave to file a successive petition, it would be illogical to allow the trial court to consider evidence outside the record of the proceedings at issue when a defendant is merely seeking leave to file a successive petition. "Since a filed successive petition has already satisfied a higher standard, the first stage is rendered unnecessary and the successive petition is docketed directly for second-stage proceedings." *Id.* ¶ 57. Therefore, to hold otherwise would mean that the trial court could consider matters outside the record of the proceedings at issue to determine whether a petition states a colorable claim of actual innocence, but would be prohibited from considering such evidence when ruling on a motion to dismiss filed by the State. We may not "construe a statute in a manner that leads to absurd results. [Citation.]" *People v. Jackson*, 2015 IL App (3d) 130575, ¶ 38. See also *People v. Jackson*, 2016 IL App (1st) 143025, ¶ 43 ("From the perspective of the orderly administration of justice, it makes sense to review primarily at this very preliminary stage the documents filed by defendant rather than the entire trial court record."). Additionally, "the Act contemplates that factual and credibility determinations will be made at the evidentiary stage of the post-conviction proceeding, and not at the dismissal stage." *People v. Coleman*, 183 Ill. 2d 366, 390-91 (1998). To permit the court to weigh the allegations in the petition and the documents filed specifically in support of those allegations against other evidence, that was not offered in support of the allegations in the petition or part of the original trial, even if that evidence is attached to the petition, would permit a factual and credibility determination that should not be made at this stage (*Warren*, 2016 IL App (1st) 090884-C, ¶ 77), and in this case it would allow the trial court to do so without defendant having the opportunity to contest the accuracy of the testing on the boxer shorts or the chain of custody.

¶ 27 We hold that at this stage, when the court is determining whether the petition states a colorable claim of actual innocence such that leave to file a successive petition must be allowed, the court is only to consider the well-pled allegations in the complaint and the documentation in support of those allegations to determine if they are positively rebutted by the record of the proceedings from which relief is sought (the trial) and whether the defendant has stated a colorable claim of actual innocence.

¶ 28 The new evidence on which the State relies is not part of the record of defendant's first trial. Therefore, the trial court erred in relying on evidence that was inadmissible at this stage of postconviction proceedings, and this court will not consider the newly discovered inculpatory evidence in our review of the trial court's judgment at this stage. Absent consideration of the new evidence obtained from the boxer shorts, we find that evidence defendant was not a contributor to the semen found in C.K.'s underwear is of such a conclusive character that it would probably change the result at a retrial. Defendant did not argue consent but maintained that the offense did not occur. Throughout its closing argument the State argued that the fact semen was found in C.K.'s underwear combined with her demeanor when reporting the assault proved that the assault did occur as C.K. testified despite the fact testing on the underwear could not point to a specific offender. The newly discovered evidence excluding defendant as a contributor to the semen stain undermines the entire basis of defendant's conviction. We hold the trial court improperly considered evidence outside the proceedings leading to defendant's conviction and that defendant stated a colorable claim of actual innocence such that leave to file a successive postconviction petition claiming actual innocence based on newly discovered evidence should have been granted.

¶ 29 The exceptions to the filing of successive postconviction petitions apply to claims, not to the petition as a whole. *People v. Pitsonbarger*, 205 Ill. 2d 444, 462 (2002). Therefore, we must

review the remaining claims in defendant's petition to ascertain whether an exception applies to those claims. *Id.* "[T]he cause-and-prejudice test is the analytical tool that is to be used to determine whether fundamental fairness requires that an exception be made to section 122-3 so that a claim raised in a successive petition may be considered on its merits." *Id.* at 459. "Cause" in this context "refers to any objective factor, external to the defense, which impeded the petitioner's ability to raise a specific claim in the initial post-conviction proceeding." *Id.* at 462. "Prejudice, in this context, would occur if the petitioner were denied consideration of an error that so infected the entire trial that the resulting conviction or sentence violates due process." *Id.* at 464. At this stage of proceedings, the allegations of fact in the petition are liberally construed in favor of the petitioner and taken as true, and the court is foreclosed from engaging in any fact-finding. See *Coleman*, 183 Ill. 2d at 380-81 ("at the dismissal stage of a post-conviction proceeding *** the circuit court is concerned merely with determining whether the petition's allegations sufficiently demonstrate a constitutional infirmity which would necessitate relief under the Act"). Accordingly we turn next to defendant's claims he satisfied the cause-and-prejudice test for his claims (1) the State knowingly used perjured testimony, (2) the State violated defendant's due process rights by failing to turn over exculpatory evidence, and (3) defendant's trial counsel was ineffective for failing to discover the falsehood in the State's expert's testimony.

¶ 30 (1) Knowing Use of Perjured Testimony

¶ 31 First, defendant argues the fact forensic scientist Dr. Wilson manipulated the results of her testing to hide the fact her results excluded defendant as a contributor of the semen found in C.K.'s underwear is an objective factor that prevented him from raising his claim the State used perjured testimony to secure his conviction in his initial postconviction petition. Defendant further argues the use of perjured testimony to obtain a criminal conviction, even if the State did

not know that Wilson's testimony was perjured—so long as Dr. Wilson knew it, is a violation of due process that is sufficient to support a finding of prejudice. The State responds its expert testified "in accordance with her report that the semen stain did not contain sperm or anything else that contained DNA that would enable her to determine the source of the semen." Defendant's expert opined that the State's expert's notes show that she identified a mixed DNA profile then manipulated the results to remove exculpatory results. Specifically, Dr. Reich averred, in pertinent part, as follows:

> "6. I relied [for my opinions] on the *** hard copy data for the work performed by Dr. Wilson.
>
> 7. [T]he data produced by the genetic analyzer used by Dr. Wilson to analyze the semen stain on the complainant's panties clearly demonstrate that there was male DNA present in the tested stain in addition to DNA perfectly consistent with the complainant. The petitioner, Marvin Ware is excluded by these data as being a contributor to the tested stain.
>
> 8. The notes and data in what appears to be Dr. Wilson's own handwriting document the methodical, step by step production of a DNA profile that deliberately removed exculpatory results from a mixed DNA profile obtained from an intimate sample of the alleged victim.
>
> 13. The DNA profile [from the original electropherogram] is obviously from at least two contributors *** and one of the contributors must be male ***.
>
> 15. Contrary to Dr. Wilson's trial testimony in which she claimed that no DNA except that consistent with the complainant was evident, a second, male contributor is clearly present and evident in the electropherogram.

> 16. Dr. Wilson had developed a DNA profile from a known and chain of custody confirmed sample taken from petitioner Ware. His DNA profile could, and can, be compared to the partial profile observed as the minor contributor ***.
>
> 17. Mr. Ware is excluded as a contributor to sample W98-1124 2A, semen on panties.
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> 18. As a highly trained and experienced DNA analyst Dr. Wilson was certainly aware of these facts. According to the data and what appear to be Dr. Wilson's own notes, Dr. Wilson used less total DNA in a brand new PCR amplification which eliminated the evidence of the male profile; because the male contributor was the minor component of the original mixture, adding less total DNA would reduce the male DNA profile to below the level of detection *** thus making the exculpatory data disappear. Dr. Wilson was then able to claim that her testing showed no evidence of any DNA profiles other than the one consistent with that of the complainant.
>
> 24. Dr. Wilson's own generated data in this case demonstrates conclusively that her testimony was false ***."

¶ 32 The State argues the defense expert is "not competent to testify as to Wilson's intentions, credibility, or truthfulness." The State also argues, without supporting facts, that the defense expert's "testimony benefitted from the advances in scientific DNA analysis in the many years that separated Wilson's analysis and testimony from [his] review of her work." This final contention is not helpful because defendant's expert based his opinions on Dr. Wilson's notes and the original analysis. Further, the fact the State's expert testified "in accordance with her report" is not a basis for finding that defendant's claim is contradicted by the record. In this case, the defense expert's opinion that Dr. Wilson falsified her report is based on a review of the

original analysis and Dr. Wilson's notes of the analysis of the semen. That Dr. Wilson testified consistently with the report she allegedly manipulated to generate false data does not contradict the defense expert's analysis of the original DNA analysis and Dr. Wilson's notes.

¶ 33 Although the State argues that expert testimony about a witness's credibility is inadmissible, what the authority it relies upon actually says is "expert testimony pertaining to the credibility of a witness is inadmissible where it does not present a concept beyond the understanding of the average person." *People v. Cox*, 197 Ill. App. 3d 1028, 1034 (1990). "Expert testimony is admissible where the expert speaks to his or her knowledge as applied to the facts of a case without improperly commenting on witness credibility." *People v. Cardamone*, 381 Ill. App. 3d 462, 506 (2008). In *People v. Smith*, 236 Ill. App. 3d 35, 40 (1992), a licensed psychologist testified that he believed the child complainant told him the truth when the child told the psychologist about a sexual assault. The court addressed whether the trial court erred by allowing the psychologist to render an opinion on an ultimate issue: that the child told the truth about the defendant's conduct. *Id.* at 42. The court held the trial court did not err because the "opinion as to whether R.B. was telling the truth was within the area of his expertise as a child psychologist. Also, because the trier of fact was the court and not a jury, there was little or no chance that his opinion was overly invasive." *Id.* at 42. Dr. Reich's opinion that Dr. Wilson must have known that a male DNA profile was present in the semen stain and that defendant was excluded as a contributor to that DNA profile was based on an application of Dr. Reich's knowledge and experience and within his area of expertise as a molecular biologist. Further, the defense expert's opinion is not a direct commentary on Dr. Wilson's believability. See *People v. Simpkins*, 297 Ill. App. 3d 668, 683 (1998). Rather, it is circumstantial evidence—that is, it describes the data from the DNA tests and how that data was analyzed, allegedly manipulated, recorded, and ultimately testified to by the State's expert. If

other evidence—particularly the analysis results and Dr. Wilson's notes—corroborate the expert's statements, a trier of fact could reasonably view that evidence as supporting defendant's claim the State's expert knowingly perjured herself. See *id.* Therefore, the defense expert's opinion is not an improper comment on witness credibility and is admissible.

¶ 34 We find defendant has shown cause for his failure to raise a claim the State's forensic scientist perjured herself and the original DNA analysis excluded him as a contributor to the semen stain in C.K.'s underwear in earlier proceedings. Evidence that the original DNA analysis shows that defendant could have been excluded as a contributor to the DNA originally identified from the semen stain in C.K.'s underwear, and that Dr. Wilson concealed that evidence, is newly discovered evidence. *Cf. People v. Leason*, 352 Ill. App. 3d 450, 455 (2004) (finding claim did not involve any newly discovered evidence and, therefore, the defendant was unable to establish cause for his default). The State's expert's failure to report the full scope of her findings and alleged manipulation of the evidence to hide it was an objective factor which impeded defendant's ability to raise the specific claim in the initial postconviction proceeding. We also find the alleged error so infected the entire trial that the resulting conviction or sentence violates due process. "The rule is well-established that the State's knowing use of perjured testimony to obtain a criminal conviction constitutes a violation of due process of law. [Citation.] A conviction obtained by the knowing use of perjured testimony must be set aside if there is any reasonable likelihood that the false testimony could have affected the jury's verdict. [Citation.]" *People v. Olinger*, 176 Ill. 2d 326, 345 (1997). Therefore, defendant has shown prejudice from his inability to raise this claim. *Pitsonbarger*, 205 Ill. 2d at 464 ("Prejudice, in this context, would occur if the petitioner were denied consideration of an error that so infected the entire trial that the resulting conviction or sentence violates due process."). Defendant has satisfied the

cause and prejudice test for his claim the State knowingly used perjured testimony. Therefore, leave to file this claim in a successive postconviction petition should have been allowed.

¶ 35 (2) *Brady* Violation

¶ 36 Defendant argues his claim the State violated *Brady v. Maryland*, 373 U.S. 83 (1963), "similarly provides a basis for a successive petition under the cause and prejudice test." The United States Supreme Court in *Brady* "set forth this general rule: 'the suppression by the prosecution of evidence favorable to an accused upon request 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.' [Citation.]" *People v. Hobley*, 182 Ill. 2d 404, 432 (1998).

> "To establish a *Brady* violation, suppressed evidence must be both favorable to the accused and material. Favorable evidence is material in this context 'only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.' [Citation.] A 'reasonable probability' of a different result is a 'probability sufficient to undermine confidence in the outcome.' [Citation.] In making a materiality determination, a court considers the cumulative effect of all suppressed evidence favorable to the defense, rather than considering each piece individually. [Citation.]
>
> The prosecution cannot escape its duty under *Brady* by contending that the suppressed evidence was known only to police investigators and not to the prosecutor. [Citation.] As the Supreme Court explained ***, 'any argument for excusing a prosecutor from disclosing what he does not happen to know about boils down to a plea to substitute the police for the prosecutor, and even for the

> courts themselves, as the final arbiters of the government's obligation to ensure fair trials.' [Citation.]" *Id.* at 432-33.

¶ 37 The State argues defendant cannot show that the forensic expert's analysis in 1998 excluded him as a source; therefore, defendant's argument the State had a duty to learn of the favorable evidence fails because defendant failed to demonstrate that at the time of trial the underlying test results constituted exculpatory evidence. "At the initial stage of the proceedings, where the defendant seeks leave to file the successive petition, a defendant is not required to conclusively prove his case." *Warren*, 2016 IL App (1st) 090884-C, ¶ 76. Rather, leave of court should be granted when the defendant's supporting documentation raises the probability that it is more likely than not that no reasonable juror would have convicted him in light of the new evidence. *Id.*

> "To meet the cause-and-prejudice test for a successive petition requires the defendant to 'submit enough in the way of documentation to allow a circuit court to make that determination.' [Citation.] *** [W]e conclude that leave of court to file a successive postconviction petition should be denied when it is clear, from a review of the successive petition and the documentation submitted by the petitioner, that the claims alleged by the petitioner fail as a matter of law." *Smith*, 2014 IL 115946, ¶ 35.

We find defendant has met this threshold.

¶ 38 Based on a review of the successive petition and the documentation submitted by defendant, the claim of a *Brady* violation does not fail as a matter of law. See *Smith*, 2014 IL 115946, ¶ 35. The claims in the successive petition and the supporting documentation establish that evidence that was both favorable to defendant and material was known to the State's forensic expert. The State's argument its expert testified truthfully based on the scientific

methods available at the time is misleading. Although new DNA testing was conducted on C.K.'s underwear, defendant's expert's opinions are based on a review of the data generated from the original tests Dr. Wilson conducted and her notes of that analysis. It is that information, available prior to trial that defendant claims the State failed to disclose. The State had an obligation to disclose that information, known to its expert, at that time. The State's arguments concerning Illinois Supreme Court Rule 417 (eff. Mar. 1, 2001), are inapposite.

¶ 39 Defendant has shown cause for failing to raise this claim in earlier proceedings and that prejudice would result from the inability to raise this claim. *Supra* ¶ 33. Leave to file a successive postconviction petition alleging a *Brady* violation should have been granted.

¶ 40 (3) Ineffective Assistance of Counsel

¶ 41 The State's argument defendant's alternative claim of ineffective assistance of counsel fails because it "relies on over 15 years' of hindsight, including advances in DNA analysis and the changes in discovery rules for DNA evidence" is unavailing. See *supra* ¶ 37. Defendant specifically alleges trial counsel was ineffective in failing to subpoena Dr. Wilson's records or seeking to interview Dr. Wilson, or obtaining an independent expert to review the results of the *original* analysis. That claim is not based on any advances in technology or hindsight. Defendant's expert averred that Dr. Wilson's notes from 1998 prove that her original analysis revealed a male DNA profile that excluded defendant as a contributor to the semen stain. It is that evidence defendant claims trial counsel should have investigated, not the results of modern DNA testing as the State suggests. Moreover, defendant's claims in the successive petition are not based on any allegation concerning a failure to comply with Rule 417.

¶ 42 We have already found cause for defendant's inability to raise a claim based on the DNA evidence excluding him as a contributor to the semen stain on C.K.'s underwear, and that the inability to address a claim defendant was deprived of that evidence would prejudice him

because the error that so infected the entire trial that the resulting conviction or sentence violates due process. See *supra* ¶ 33. The same analysis applies to defendant's claims of a *Brady* violation and his alternative claim his trial counsel was ineffective in failing to discover the exculpatory evidence. Accordingly, we hold defendant has satisfied the cause and prejudice test for the claims in his successive postconviction petition and that leave to file the petition should have been granted.

¶ 43 Petition for Relief From Judgment

¶ 44 Defendant also argues his petition for relief from judgment pursuant to section 2-1401 of the Code of Civil Procedure should have been granted. "Relief under section 2-1401 is predicated upon proof, by a preponderance of evidence, of a defense or claim that would have precluded entry of the judgment in the original action and diligence in both discovering the defense or claim and presenting the petition." *People v. Vincent*, 226 Ill. 2d 1, 7-8 (2007). "Section 2-1401 of the Code of Civil Procedure *** provides a comprehensive statutory procedure by which final orders and judgments may be challenged more than 30 days after their entry. *People v. Harvey*, 196 Ill. 2d 444, 447 (2001) (stating that section 2–1401 provides a civil remedy, which also applies to criminal cases).

> "In order to justify setting aside a judgment on the basis of newly discovered evidence, it must be shown that the new evidence was not known to the petitioner at the time of trial and could not have been discovered by the petitioner with the exercise of reasonable diligence. [Citation.] Further, the new evidence must be so conclusive that it would probably change the result if a new trial is granted, must be material to the issues, and must be more than merely cumulative to the trial evidence. [Citation.] The petition's allegations must be proved by a

> preponderance of the evidence. [Citation.]" *People v. Waters*, 328 Ill. App. 3d 117, 127 (2002).

¶ 45 A section 2-1401 petition filed more than two years after the challenged judgment cannot be considered absent a clear showing that the person seeking relief was under a legal disability or duress or the grounds for relief were fraudulently concealed." *Pinkonsly*, 207 Ill. 2d at 562. The State did not argue defendant's petition for relief from judgment was untimely. (Nor did the State challenge whether the new DNA evidence excluding defendant as a contributor to the semen stain on C.K.'s underwear is newly discovered evidence. The only criterion under section 2-1401 the State contested in this appeal was whether the evidence is likely to change the result if a new trial is granted.) "If the party opposing the section 2-1401 petition does not raise the limitations period as a defense, it may be waived." *Pinkonsly*, 207 Ill. 2d at 562. The State argues that because defendant included his petition for relief from judgment with his successive postconviction petition, which he had not yet received leave to file, it would have been "inappropriate" for the State to file a written response. We find no basis for that assertion. As the State itself notes, the trial court treated the two pleadings separately. We see no reason the State could not have done the same. "If the State wished to argue that the defendant's section 2-1401 petition was untimely, it should have done so before the trial court, where any amendments could have been made and any factual disputes could have been resolved. [Citation.] The State waived its timeliness argument." *Id.*

¶ 46 The State's failure to answer the petition constituted an admission of all well-pleaded facts and rendered the petition ripe for adjudication. *Vincent*, 226 Ill. 2d at 9-10. "[S]everal types of final dispositions are possible in section 2-1401 litigation. In fact, there are five: the trial judge may dismiss the petition; the trial judge may grant or deny the petition on the pleadings alone (summary judgment); or the trial judge may grant or deny relief after holding a

hearing at which factual disputes are resolved. [Citations.]" *Id.* at 9. In this case the trial court denied the petition on the pleadings.

> "Judgment on the pleadings is proper where the pleadings disclose no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. [Citations.] In ruling on a motion for judgment on the pleadings, the court will consider only those facts apparent from the face of the pleadings, matters subject to judicial notice, and judicial admissions in the record. [Citation.] All well-pleaded facts and reasonable inferences therefrom are taken as true. [Citations.] On review, we must determine whether any issues of material fact exist and, if not, whether the movant was entitled to judgment as a matter of law." *Gillen v. State Farm Mutual Automobile Insurance Co.*, 215 Ill. 2d 381, 385 (2005).

When the trial court enters a judgment on the pleadings in a section 2-1401 proceeding, that order will be reviewed, on appeal, *de novo*. *Vincent*, 226 Ill. 2d at 18.

¶ 47 Defendant's petition for relief from judgment alleges that the true results of Wilson's testing and the new testing on the semen stain, both of which show that defendant is excluded as a contributor of the semen and the latter showing that the contributor of the semen was the complaining witness's adult houseguest, are newly discovered facts that would have prevented the entry of the judgment against him. The trial court found that defendant was diligent in discovering his claim and presenting the petition. We agree. We also find that the evidence is not cumulative because the DNA test results at issue were not available at defendant's trial. *People v. Warren*, 2016 IL App (1st) 090884-C, ¶ 81 ("Evidence is considered cumulative if it "adds nothing" to what the jury heard at trial."). In this case the trier of fact heard that the contributor of the semen stain on C.K.'s underwear could not be identified through DNA. New

evidence that DNA analysis excludes defendant as a contributor to the semen stain would add to what the trier of fact heard and is therefore not cumulative. We hold the trial court's judgment in favor of the State on the petition for relief from judgment was error because the trial court's judgment was based on a misapprehension of material facts from defendant's trial.

¶ 48 Defendant's petition for relief from judgment argues that evidence he did not contribute to the semen stain would severely undercut the credibility of C.K.'s claim to have been sexually assaulted as she described, the evidence would have suggested a different offender, and it would offer a possible explanation both for C.K.'s demeanor when reporting the alleged assault and for implicating defendant. DNA evidence that both exculpates the defendant and points to another offender is precisely that type of evidence which normally results in relief under section 2-1401. For example, in *Davis*, 2012 IL App (4th) 110305, the defendant had been convicted of murder and filed a petition under section 2-1401 of the Code based on newly discovered DNA evidence "excluding him as the donor of semen and blood left on the bedding where the rape and murder of the victim took place." *Davis*, 2012 IL App (4th) 110305, ¶ 1. The trial court denied the defendant's petition, finding the newly discovered DNA evidence was "not of the conclusive character, required by the law, that would probably result in a disposition other than conviction were the murder charge to be retried." (Internal quotation marks omitted.) *Id.* ¶ 6. The *Davis* court concluded the State used all of the evidence, but particularly the DNA evidence, to posit its theory of the case at the defendant's trial. *Id.* ¶ 52. The court found that the "DNA evidence arguably now excludes [the] defendant and includes [a new suspect] and cannot be assessed in a vacuum. It changes how a jury would view all the evidence. Given the State's theory of the case, the new DNA evidence undermines confidence in the outcome of the trial." *Id.*

¶ 49 Despite the fact that newly discovered DNA evidence that tends to exonerate the defendant is the type of case that normally warrants relief under section 2-1401 and a new trial,

in this case, the trial court granted judgment on defendant's petition in favor of the State on the pleadings alone. We believe this was because, when the trial court made its oral ruling, it was obviously mistaken about material facts from the record. In ruling on the 2-1401 petition the trial court found that the evidence at trial was that defendant "was excluded" as a contributor of the semen stain in C.K.'s underwear. The court stated: "If you look at all the records and all of the reports done by Ms. Wilson and her testimony, she clearly excluded the defendant from this. *** He was not the cause of the stain ***." However, the trier of fact actually heard that the contributor of the semen stain on C.K.'s underwear could not be identified through DNA; leaving open the possibility that defendant was the contributor of the semen stain. The trial court also found that, rather than pointing to Berry as a possible offender, the only question raised by identifying Berry as the contributor of the semen stain was whether C.K. could be impeached on her claim she did not have intercourse within 72 hours of the alleged attack. The State has pointed to no evidence of any consensual sexual relationship between C.K. and Berry in the record. The record is to the contrary where both C.K. and her mother identified Berry as a friend of the family. Even if there were evidence to support it, the existence of a prior relationship with Berry does not necessarily exclude the possibility the semen stain at issue resulted from a sexual assault; but it does severely alter the State's case in a way that is likely to lead to a different result on retrial. And, if C.K. was sexually assaulted, the new DNA evidence points to a different offender.

¶ 50 The newly discovered DNA evidence is relevant and probative of defendant's innocence because it makes it less probable the assault occurred as C.K. testified. In its closing argument the State argued the fact semen was found in C.K.'s underwear combined with her demeanor when reporting the assault proved that the assault occurred as C.K. testified despite the fact testing on the underwear could not point to a specific offender. The new DNA evidence points

to a specific potential offender and would also explain C.K.'s demeanor. The new exculpatory DNA evidence changes how a trier of fact would view all of the evidence, particularly C.K.'s testimony. Thus the newly discovered DNA evidence excluding defendant as a contributor to the semen stain undermines the entire basis of defendant's conviction. See *id.* ("DNA evidence arguably now excludes [the] defendant and includes [a new suspect] and cannot be assessed in a vacuum. It changes how a jury would view all the evidence. Given the State's theory of the case, the new DNA evidence undermines confidence in the outcome of the trial.").

¶ 51 The State argues that posttrial DNA testing on evidence gathered prior to trial produced both exculpatory and inculpatory evidence. Specifically, testing on boxer shorts allegedly seized from defendant revealed that C.K.'s DNA was on the boxer shorts. The State contends the trial court properly considered that evidence because defendant attached it to his petition. The State also contends the trial court properly denied defendant's petition for relief from judgment because "his proffered newly discovered evidence is not so conclusive that it would change the result at a retrial" in light of this evidence. We disagree with both of the State's contentions. First, this allegedly new evidence was never part of defendant's trial may not be used at this juncture to defeat defendant's 2-1401 petition. When the case is decided on the allegations in the petition, it would be inappropriate for the court to weigh evidence that was not part of defendant's trial against the newly discovered DNA results, alleged in the petition, in ruling on the petition for relief from judgment. *Vincent*, 226 Ill. 2d at 9-10. "[T]he State's failure to answer the petition constituted an admission of all well-pleaded facts [citation] and rendered [the] petition ripe for adjudication. The State's failure to answer made the issue for the court is a question of whether the allegations in [the] petition entitled him to relief as a matter of law." *Id.* at 9-10. The court has also held that "[w]hen a section 2-1401 petition is filed and the new evidence to be considered is DNA testing results, the trial court must consider the *trial evidence*

in light of the new DNA results to determine whether they are so conclusive as to warrant a new trial." (Emphasis added.) *People v. Davis*, 2012 IL App (4th) 110305, ¶ 27. The trial court should rule on the 2-1401 petition without any consideration of the State's new evidence.

¶ 52 Second, even if the trial court does consider the boxer shorts evidence, we do not agree it would necessarily preclude defendant's requested relief. The issue here is whether it is more likely than not the new exculpatory DNA evidence is conclusive enough that it would probably, not conclusively, change the result upon retrial. See *People v. Coleman*, 2013 IL 113307, ¶ 97 (successive motion for postconviction review based on actual innocence).[4]

> "It is important to clarify what is meant by the phrase 'probably change the result' upon retrial. In the context of a *Brady* violation (*Brady v. Maryland*, 373 U.S. 83 (1963)), the Supreme Court of the United States recently explained, [a] reasonable probability does not mean that the defendant would more likely than not have received a different verdict with the evidence, only that the likelihood of a different result is great enough to undermine[ ] confidence in the outcome of the trial. [Citations.] The phrase is also explained or clarified in the same way in *Strickland v. Washington*, 466 U.S. 668, 694 (1984), in the context of an

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[4] "In practice, the trial court typically will review the evidence presented at the evidentiary hearing to determine first whether it was new, material, and noncumulative. If any of it was, the trial court then must consider whether that evidence places the evidence presented at trial in a different light and undercuts the court's confidence in the factual correctness of the guilty verdict. *** But the trial court should not redecide the defendant's guilt in deciding whether to grant relief. See [*People v.*]*Molstad*, 101 Ill. 2d [128,] 136 [(1984)] ('this does not mean that [the defendant] is innocent, merely that all of the facts and surrounding circumstances *** should be scrutinized more closely to determine [his] guilt or innocence'). Indeed, the sufficiency of the State's evidence to convict beyond a reasonable doubt is not the determination that the trial court must make. If it were, the remedy would be an acquittal, not a new trial. [Citation.] Probability, not certainty, is the key as the trial court in effect predicts what another jury would likely do, considering all the evidence, both new and old, together. [Citation.]" *People v. Coleman*, 2013 IL 113307, ¶ 97 (citing *People v. Davis*, 2012 IL App (4th) 110305, ¶¶ 62-64).

> ineffective assistance of trial counsel claim." (Internal quotation marks omitted.) *Davis*, 2012 IL App (4th) 110305, ¶ 63.

Again, the exculpatory DNA evidence not only removes the State's primary argument in support of defendant's guilt, it changes how a trier of fact would view all of the evidence, particularly C.K.'s testimony, and the probability of a different result could remain.

¶ 53 The State further argues that the "new inculpatory evidence" relegates the evidence that defendant is excluded as a contributor to the semen stain on C.K.'s underwear to mere impeachment of C.K.'s testimony that she did not have intercourse with anyone within the 72 hours preceding the assault, and notes that "[e]vidence that merely impeaches a witness will typically not be of such conclusive character as to justify postconviction relief. [Citation.]" *People v. Collier*, 387 Ill. App. 3d 630, 637 (2008). Defendant's newly discovered evidence does not merely impeach C.K.'s testimony she did not have intercourse in the 72 hours preceding the alleged assault regardless of whether the trial court considers the boxer shorts evidence. "A distinction is to be drawn between evidence which impeaches a witness in the sense that it affects the credibility of the witness, and evidence which is probative in that it presents a state of facts which differs from that to which the witness testified." (Internal quotation marks omitted.) *Waters*, 328 Ill. App. 3d at 128 (quoting *People v. Smith*, 177 Ill. 2d 53, 82-83 (1953)). Newly discovered evidence that contradicts a witness by showing facts warrants a new trial when it appears that such new evidence has sufficient probative force or weight to produce a result different from that obtained at the trial which has been had. *Id.* C.K. testified defendant sexually assaulted her resulting in the semen stain on her underwear. The new DNA test results pointing to Berry as the contributor of the semen stain present a new state of facts which differ from that to which C.K. testified. Therefore, the new DNA evidence is not mere impeachment evidence

affecting C.K.'s credibility as to whether she had intercourse in the 72 hours preceding the alleged assault. *Id.*

¶ 54 To obtain relief under section 2-1401 defendant must prove by a preponderance of the evidence that the newly discovered evidence is material, not cumulative, and so conclusive that it would probably change the result if a new trial is granted. A judgment on defendant's 2-1401 pleading alone was only proper if the pleading disclosed no genuine issue of material fact and that the movant was entitled to judgment as a matter of law. We find the trial court erroneously found the State was entitled to judgment as a matter of law where defendant presented new, noncumulative, exculpatory DNA evidence. The trial court's judgment on defendant's 2-1401 petition was obviously based on a misapprehension of material facts from the trial. Therefore, the trial court's entry of judgment on defendant's petition for relief from judgment in favor of the State is reversed and the cause remanded for further proceedings consistent with this order.

¶ 55 Defendant asks that we remand this case to a different trial judge. Defendant argues the record demonstrates the trial judge appears to have prejudged the central issue in this case, namely, whether the new evidence is sufficient to warrant relief. Defendant argues remand to a different judge is required because the trial judge "has already adjudicated the ultimate factual issues." Defendant argues the fact the trial judge allegedly "invented a theory of the case wherein the teenage victim was having a consensual sexual relationship with her parents' 41-year-old friend—with no testimony in the record supporting" it—demonstrates the trial judge's bias against defendant. Defendant asserts the trial judge "untimely weighed the exonerating evidence at issue in this case and has already rejected it."

¶ 56 The authority granted to this court pursuant to Illinois Supreme Court Rule 366(a)(5) (eff. Feb. 1, 1994) "includes the power to reassign a matter to a new judge on remand." *Eychaner v. Gross*, 202 Ill. 2d 228, 279 (2002). "[O]rdinarily the fact that a judge has ruled adversely to a

party in either a civil or criminal case does not disqualify that judge from sitting in subsequent civil or criminal cases in which the same person is a party." *Id.* at 280. To obtain a remand to a new judge a defendant must show either "animosity, hostility, ill will, or distrust" or "prejudice, predilections or arbitrariness." (Internal quotation marks omitted.) *People v. Reyes*, 369 Ill. App. 3d 1, 25 (2006) (citing *People v. Vance*, 76 Ill. 2d 171, 181 (1979); *People v. McAndrew*, 96 Ill. App. 2d 441, 452 (1968)). We believe the trial court's error resulted from its mistaken recollection of the evidence presented at defendant's trial, not "animosity, hostility, ill will, or distrust" or "prejudice, predilections or arbitrariness." *Id.* There is nothing to suggest the trial court will repeat that error. Defendant's request for his case to be assigned to a different judge is denied.

¶ 57 We order the trial court to bifurcate proceedings on defendant's petition for relief from judgment and any further proceedings on defendant's motion for leave to file a supplemental postconviction petition, if further proceedings on the postconviction petition are necessary following further proceedings on the petition for relief from judgment.

¶ 58 CONCLUSION

¶ 59 For the foregoing reasons, the circuit court of Cook County is reversed and the cause remanded for further proceedings.

¶ 60 Reversed and remanded.