2019 IL App (2d) 160673-U
No. 2-16-0673
Order filed February 8, 2019

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. JOHN L. MARKIEWICZ, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Kane County. Nos. 89-CF-617 Honorable Marmarie J. Kostelny, Judge, Presiding.

JUSTICE McLAREN delivered the judgment of the court.
Justices Jorgensen and Spence concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court erred in denying defendant the third-stage hearing that we had ordered on the claims in his first amended postconviction petition, which hearing defendant did not waive or forfeit by filing a second amended petition raising additional claims; but defendant forfeited any argument that he was entitled to a third-stage hearing on those additional claims, as he did not explain why any of those claims had sufficient merit.

¶ 2 Defendant, John L. Markiewicz, appeals a judgment granting the State's motion to dismiss his second amended petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2012)). We affirm in part, reverse in part, and remand with directions.

¶ 3 Defendant was charged with the first-degree murder (Ill. Rev. Stat. 1987, ch. 38, ¶ 9-1(a)(1), (a)(2)) of Debra Shelton. At his jury trial, the State's theory of the case was that defendant murdered Shelton because she knew about the recent abduction and murder of Frank Mahlendorf in Wisconsin. The evidence showed that Shelton was last seen alive on March 30, 1988, and that her decomposed body was discovered concealed in a large drum on the banks of the Fox River. The State contended that Shelton died because defendant repeatedly injected her with cocaine. Dr. Lawrence Blum testified that, based his autopsy of Shelton, her death was caused by an acute cocaine overdose.

¶ 4 The State called Ray Katzensky and Paul Schmitz, the former testifying in exchange for immunity in both the Mahlendorf and Shelton cases and the latter in exchange for immunity in the Shelton case. According to these two witnesses, they accompanied defendant to collect a drug debt from Mahlendorf. The three men drove Mahlendorf to Schmitz's home in South Elgin, where they bound, beat, and abducted Mahlendorf; Shelton accompanied them to Wisconsin, where they dropped her off, drove to a lake, and fatally shot Mahlendorf. Defendant, Schmitz, and Shelton drove to Iowa and disposed of the gun.

¶ 5 Schmitz testified that defendant told him that Shelton needed to be killed because she knew about Mahlendorf's abduction and murder. Schmitz also testified that, on the evening of March 30, 1988, defendant and Shelton accompanied him to his home, where, having previously drunk LSD-laced champagne at a party, Shelton was repeatedly injected with cocaine by defendant and died. Three days later, the three men placed her body into the drum and rolled it into the Fox River. A month afterward, defendant and Katzensky retrieved the drum and buried it on land. In April 1989, Katzensky led the police to the drum. Later, Blum's autopsy and a toxicological analysis found no signs of blunt trauma, stabbing, gunshot wounds, disease, or

heart problems, but did find cocaine and benzoyl ecognine, a product of the chemical breakdown of cocaine.

¶ 6 The jury found defendant guilty. He was eligible for the death penalty because he had murdered Shelton to prevent her from assisting the State in prosecuting him for Mahlendorf's murder (see Ill. Rev. Stat. 1987, ch. 38, ¶ 9-1(b)(8)), but the jury could not find that no mitigating factors existed (see *id.* ¶ 9-1(c)). After a hearing, the trial court sentenced defendant to life imprisonment.

¶ 7 On appeal, defendant argued that (1) the trial court erred in admitting evidence of other crimes; (2) the court should have granted him a hearing on his *pro se* posttrial allegation that his attorneys, John Paul Carroll and M. Lee Witte, were ineffective; (3) Carroll and Witte were ineffective for (a) failing to object to the introduction of other-crimes evidence; (b) failing to pursue a motion *in limine* to preclude the State from eliciting information about defendant's reputation for drug dealing and violence; and (c) failing to object when the State withdrew a proposed limiting instruction on the use of other-crimes evidence; (4) in closing argument, the State improperly attempted to minimize its burden of proof and improperly highlighted the fact that he did not testify; and (5) at sentencing, the judge erred in refusing to consider certain evidence in mitigation. We rejected defendant's first four claims of error but agreed with the fifth. We affirmed his conviction, reversed his sentence, and remanded for resentencing by a different judge. *People v. Markiewicz*, 246 Ill. App. 3d 31 (1993).

¶ 8 On remand, on December 30, 1997, the trial court sentenced defendant to life imprisonment.

¶ 9 In the meantime, defendant had initiated proceedings under the Act. In April 1994, he filed a *pro se* petition. On January 28, 1998, his appointed attorney, Michael Blake, filed an

amended petition. The amended petition raised the following claims: (1) the trial court denied defendant his right to a public trial by excluding his mother from the courtroom during jury selection; (2) the court denied him due process by refusing his request for a bill of particulars and refusing to dismiss the indictment after the State told the court that it was unable to provide a bill of particulars; (3) his trial attorneys were ineffective for insufficiently presenting a motion filed by his original attorney to quash grand jury subpoenas and suppress telephone records obtained through the subpoenas; (4) the attorneys were ineffective for not properly impeaching Alvin Ray Smith (a fellow jail inmate who testified to incriminating statements that defendant allegedly made) or moving to suppress his testimony; (5) the attorneys were ineffective for failing to call any of 10 allegedly favorable witnesses at trial; (6) the attorneys were ineffective for failing to call a toxicologist to interpret the toxicology results; (7) defendant's appellate counsel was ineffective for failing to raise the denial of a bill of particulars; (8) the trial court denied defendant a fair sentencing hearing by refusing to appoint a mitigation expert; (9) the court improperly cut short defendant's statement in allocution; and (10) the evidence did not prove defendant guilty beyond a reasonable doubt.

¶ 10 The trial court summarily dismissed both the *pro se* petition and the amended petition. On appeal, we held that the court had erred. We explained that proceedings under the Act have three stages. In the first stage, the trial court decides on its own, without input from the State or further pleadings from the defendant, whether a petition is frivolous and therefore is to be summarily dismissed. During this stage, the court may not appoint counsel for a *pro se* defendant. *People v. Markiewicz*, No. 2-98-0308 (2000) (unpublished order under Illinois Supreme Court Rule 23), slip op. at 2-3. If the court declines to dismiss the petition, it proceeds to the second stage and may appoint counsel for an indigent defendant; counsel may amend the

petition, and the State may move to dismiss it for failing to make a substantial showing of a constitutional violation. *Id.* at 3. If the court does not dismiss the petition, the proceedings move to stage three, an evidentiary hearing on the petition. *Id.*; see 725 ILCS 5/122-6 (West 2000).

¶ 11 We held that, in this case, the trial court had advanced the proceedings to stage two by declining to dismiss the *pro se* petition and appointing counsel for defendant. Yet the court then "treated the second stage of the proceedings as if it were the first stage." *Markiewicz*, No. 2-98-0308, slip op. at 3. By summarily dismissing the petition and the amended petition only after appointing counsel, the court had violated the Act. *Id.* at 4. We noted that, under the Act, if the defendant files an amended petition in stage two and the State does not timely move to dismiss it, the proceedings must move to stage three. Here, the State had not timely moved to dismiss. Therefore, we vacated the dismissal and remanded the cause. Our order stated, "[W]e must vacate the court's judgment and remand the cause for a hearing on the petition in accordance with section 5/122-6 of the [Act] (725 ILCS 5/122-6 (West 1992 [*sic*]))." *Id.* at 6. On March 7, 2000, the day that we issued the order, we issued our mandate stating that "in accordance with the views expressed in the attached Decision the judgment of the trial court is Vacated and Remanded with Directions." Thus, we clearly directed the trial court to hold an evidentiary hearing on the amended petition.

¶ 12 On remand, however, that did not happen. On November 30, 2000, defendant filed a *pro se* motion to reconsider his sentence in the underlying case (before a different judge). On January 26, 2001, on defendant's motion, the trial court discharged Blake and appointed Ronald Dolak to represent defendant. On March 31, 2003, the trial court entered an order stating that any further proceedings in this case would be premature as long as the motion to reconsider his sentence was pending and barring Dolak from incurring any further expenses in the

postconviction proceeding until the court allowed him to do so. On February 3, 2006, Dolak filed an amended motion to reconsider the sentence. On October 3, 2006, the court denied it. On appeal, we affirmed defendant's sentence. *People v. Markiewicz*, No. 2-06-1086 (2009) (unpublished order under Illinois Supreme Court Rule 23).

¶ 13 On April 10, 2012, Dolak moved for leave to file a second amended postconviction petition. Dolak's motion alleged that Blake had failed to consult fully with defendant and that the first amended petition was deficient and did not include all of defendant's desired claims. The State filed a response in opposition, contending that, as it had been 12 years since we remanded for postconviction proceedings, his request was tardy. On May 11, 2012, however, the court granted the motion.

¶ 14 On June 15, 2012, Dolak filed the second amended petition. It was 90 pages long, exclusive of exhibits. It included the following claims. For obvious reasons, we shall not set them out fully.

¶ 15 The first claim was that the trial court violated defendant's right to a public trial by excluding his mother from the courtroom during jury selection. The second claim was that defendant's trial attorneys rendered ineffective assistance. This claim included 30 instances of allegedly deficient performance. While most were new, the claim reiterated the first amended petition's assertions of ineffectiveness in regard to the failure to pursue the motion to quash the grand jury subpoenas and suppress the telephone records; the insufficient impeachment of Smith; the failure to call any of the 10 allegedly exculpatory potential witnesses; and the failure to call a toxicology expert. However, the second amended petition did not allege that appellate counsel had been ineffective for failing to raise any of these 30 instances of trial counsel's ineffectiveness, although it did raise appellate counsel's alleged ineffectiveness in other respects.

¶ 16 The third claim was that Carroll had denied defendant his right to counsel of his choice by failing to inform him that Carroll was on federal probation and had obtained special permission to practice law in Illinois. The fourth claim was that the trial court had denied defendant due process by restricting his cross-examination of certain State witnesses. The fifth claim was that the State violated due process by not fully disclosing its agreement with Smith. The sixth claim was that appellate counsel had been ineffective for failing to raise the State's refusal to provide a bill of particulars; failing to argue the inapplicability of the factor that the trial court had held qualified defendant for the death penalty and life imprisonment; failing to argue that the maximum sentence was 60 years; failing to argue that the trial court had erred in restricting defendant's cross-examination of certain witnesses; failing to argue that defendant's trial attorneys had been ineffective for not moving to dismiss the case on speedy-trial grounds; failing to argue that the State used its peremptory challenges to exclude women from the jury; and failing to "federalize" the issues that appellate counsel did raise. The seventh claim was that the State had not proved the existence of the death-penalty/life-imprisonment factor. Finally, the eighth claim was that the State used its peremptory challenges to exclude women from the jury.

¶ 17 The State filed a lengthy motion to dismiss the second amended petition, contending primarily that the claims were barred by either *res judicata* (having been decided on direct appeal) or forfeiture (having been available on direct appeal but not having been raised), were refuted by the record, or involved harmless error.

¶ 18 The trial court granted the State's motion to dismiss. The court observed that, in our March 7, 2000, order, we directed that the amended petition proceed to a stage-three evidentiary hearing. The court stated that it was obligated to obey the clear directions in an appellate court mandate. Nonetheless, the court continued, Dolak was allowed to file the second amended

petition, which was complete in itself and did not even refer to the first amended petition, much less incorporate it. Thus, the first amended petition had been withdrawn and superseded, and it had ceased to be part of the record.

¶ 19 The court held that, although we had ordered a stage-three hearing on the first amended petition, defendant had instead chosen to file a new petition. Because this type of action "is contemplated to occur during the second stage of the proceedings under the Act, [he had] elected to return to the second stage and afforded the State the opportunity to file a motion to dismiss."

¶ 20 The court then turned to the merits of the State's motion. It held as follows. The first claim did not sufficiently allege that the judge had actually prevented defendant's mother from attending jury selection. The second claim consisted of ineffective-assistance sub-claims that either had been or could have been raised on direct appeal. The former were barred by *res judicata* and the latter by forfeiture. Moreover, none of the sub-claims could show the prejudice needed for an ineffective-assistance argument, because, as this court had noted on defendant's first appeal, the evidence "was not closely balanced." See *Markiewicz*, 246 Ill. App. 3d at 39. Next, the counsel-of-choice claim was insufficient, because defendant had not alleged when he learned of Carroll's alleged shortcomings and the trial court in no way impeded his choice of Carroll. Next, the claims that the court erred in limiting defendant's cross-examination, that the State did not disclose the entire agreement with Smith, that the State failed to prove the existence of the death-penalty/life-imprisonment factor, and that the State abused its peremptory challenges all could have been raised on direct appeal. Finally, as to the claim that appellate counsel had been ineffective in various respects, the court held that the propriety of defendant's life sentence had been resolved on direct appeal and that defendant had not sufficiently alleged prejudice as to the other matters.

¶ 21 Defendant timely appealed.

¶ 22 On appeal, defendant contends primarily that the court erred in dismissing those claims in the second amended petition that he had earlier raised in the first amended petition. He argues that our March 7, 2000, order entitled him to an evidentiary hearing on those claims and that he did not lose that entitlement by filing the second amended petition, which carried over most of the first amended petition's claims. He also contends that the new claims raised in the second amended petition were sufficient to entitle him to an evidentiary hearing. In the alternative, defendant contends that, should we hold that Dolak's filing the second amended petition abandoned or forfeited his right to an evidentiary hearing on the claims raised in the first amended petition, we should hold that Dolak violated his right to the reasonable assistance of postconviction counsel. In this eventuality, he requests that we remand the cause for a hearing on the claims that were included in the first amended petition.

¶ 23 The State responds that, by filing the second amended petition, defendant abandoned the first amended petition and forfeited his right to a hearing on any of its claims. The State argues that our order did not resolve any of these claims on their merits and that our instruction to proceed to stage three was based solely on the State's failure to move to dismiss the first amended petition at stage two. The State agrees with the trial court that, through the filing of the second amended petition, the proceedings reverted to stage two. The State also agrees with the trial court that nothing in the second amended petition required the court to hold an evidentiary hearing. Finally, the State contends that defendant's alternative argument does not warrant any relief, because defendant does not specify which of his numerous claims actually had sufficient merit or why it (or they) did.

¶ 24 We grant defendant part of the relief that he requests. Defendant is entitled to an evidentiary hearing on the claims in his first amended petition insofar as they were again raised in the second amended petition, but not on any claims raised solely by the second amended petition. As we shall explain, this does not bar defendant from raising, or the trial court from considering, factual issues that the new claims raised, insofar as they are relevant to the claims that will be before the court on remand.

¶ 25 To explain our decision, we must address a matter that neither side mentions: did the trial court's action on remand exceed our mandate, in light of our order of March 7, 2000? We must consider this question *sua sponte* as it goes to the trial court's jurisdiction. When a reviewing court issues a mandate, it vests the trial court with jurisdiction only to take action that conforms to the mandate. *People v. Abraham*, 324 Ill. App. 3d 26, 30 (2001). On remand, a trial court has no authority to act beyond the scope of the mandate. *People v. Gonzalez*, 407 Ill. App. 3d 1026, 1037 (2011); *Abraham*, 324 Ill. App. 3d at 30. If the mandate is phrased in general terms, then the trial court should examine the reviewing court's opinion or order and determine what further proceedings would be consistent with it. *Gonzalez*, 407 Ill. App. 3d at 1037.

¶ 26 Here, our mandate simply required the trial court to proceed in accordance with "the views expressed in the attached Decision." Therefore, we consult the order. It remanded the cause for a "hearing on the [first amended] petition in accordance with section 5/122-6 of the [Act]." *Markiewicz*, No. 2-98-0308, slip op. at 6. The hearing, of course, was not held. But the trial court did entertain defendant's request to file a new petition with both the claims of the first amended petition and a multiplicity of new claims. The court did so over the State's objection.

¶ 27 We are not aware of a case with a similar procedural history. However, *Gonzalez*, which is the closest fit, is of assistance. There, at stage two, the trial court denied the State's motion to

dismiss the defendant's amended postconviction petition but also denied the petition. On appeal, we vacated the judgment and remanded for an evidentiary hearing. We held that the trial court's precipitate action had denied the defendant a proper stage-three hearing. *Gonzalez*, 407 Ill. App. 3d at 1029-30.

¶ 28 On remand, the court allowed the defendant to file a second amended petition. The petition repeated the first amended petition's claim of actual innocence and added a claim of ineffective assistance of counsel. The State moved to strike the new claim, contending that it was untimely because the cause had already proceeded to stage three. Eventually, with the State's acquiescence, the court allowed the defendant to withdraw the second amended petition and to file an amended petition with both the old and the new claim. The court allowed the State to move to dismiss the ineffective-assistance claim and held a combined hearing on the motion and evidentiary hearing on the actual-innocence claim. *Id*. at 1030-31. However, at the hearing, the court noted that it would have granted the motion to dismiss the ineffective-assistance claim but instead advanced the claim to the third stage along with the actual-innocence claim. *Id*. at 1033-34. The court then denied the amended petition. *Id*. at 1034.

¶ 29 On appeal, we first held that the trial court had properly found that the defendant did not prove his actual-innocence claim. *Id*. at 1037. We then turned to the trial court's ruling on the ineffective-assistance claim. The State argued that our mandate limited the court to holding an evidentiary hearing on the actual-innocence claim and that the court had exceeded its authority by allowing the defendant to amend his petition to add the ineffective-assistance claim. We held that, because the mandate and our order were both general, they required the court to hold an evidentiary hearing on the actual-innocence claim but did not bar the court from enlarging the scope of the hearing by allowing the defendant to amend his petition to add the ineffective-

assistance claim. *Id*. at 1038. (We then held that the court did not err in denying that claim. *Id*. at 1039.)

¶ 30 *Gonzalez* does not fit this case precisely, of course, but we consider it sufficiently analogous to serve as precedent. Here, we ordered the trial court to hold an evidentiary hearing on the first amended petition. Like our mandate in *Gonzalez*, our mandate (which was subsumed in our order) did not prevent the court from allowing defendant to amend his petition to include other claims. It did not limit the scope of the evidentiary hearing or any other further proceedings. This is not to say that defendant would be entitled to an evidentiary hearing on any of the numerous claims that he added on remand: as in *Gonzalez*, the State was entitled to move to dismiss those claims, as they were still in stage two of the Act's three-stage procedure. We do not read our order of a hearing on the preexisting claims to rule out further proceedings on other claims; such an implied limitation would be no more supportable than the one that we declined to draw in *Gonzalez*.

¶ 31 The trial court recognized the scope of our mandate and also recognized that defendant sought to add new claims that our mandate did not specifically encompass. The court also noted correctly that these new claims were presented not in a proposed amendment to the first amended petition but in what was labeled a "second amended petition" that did not explicitly incorporate the first amended petition and indeed did not explicitly refer to the first amended petition at all. Thus, the court concluded that defendant had waived or forfeited his right to an evidentiary hearing on the first amended petition.

¶ 32 The court's decision was not without support. On remand, defendant did not request an evidentiary hearing on the first amended petition; indeed, he filed a new postsentencing motion in the underlying case, causing the court to effectively stay the proceedings in this case by

ordering Dolak not to incur any more expenses without the court's approval. The motion was not heard until 2006. Further, when Dolak returned to working on the postconviction proceedings, he did not request a hearing date on the first amended petition. Instead, he spent several more years investigating new claims and then, in April 2012, slightly more than 12 years after we issued our order and remand, he filed the second amended petition.

¶ 33 The trial court confronted a unique, if not bizarre, set of facts when it ruled on the second amended petition. Obviously, defendant had not acted altogether consistently with our order granting him a third-stage evidentiary hearing on his first amended petition. There was surely some reason for the court to conclude that, by declining for more than a decade to request that hearing, he had knowingly forgone the right that we had granted him—*i.e.*, he had waived his guarantee of a third-stage hearing on the merits of the multiple claims in his first amended petition and had decided instead to subject those claims to second-stage scrutiny via the State's motion to dismiss them (along with the new claims). Waiver is the voluntary relinquishment of a known right. *People v. Blair*, 215 Ill. 2d 427, 444 n. 2 (2005). A party may waive a right by engaging in conduct inconsistent with the intent to enforce the right. *People v. Nitz*, 317 Ill. App. 3d 119, 130 (2000).

¶ 34 Nonetheless, we do not accept the trial court's conclusion that defendant moved the entire decades-long proceeding back to stage two when he filed the second amended petition. Several considerations are pertinent.

¶ 35 First, it does not appear that the court relied solely on a theory of waiver or on the totality of defendant's conduct when it found that the proceeding had run backward. Instead, it appears that the court reasoned that the very filing of the second amended petition, which did not *explicitly* incorporate or refer to the first amended petition, proved defendant's intent and had the

effect of nullifying the first amended petition and all proceedings on it thereafter. However, this conclusion did not follow. In *Gonzalez,* the defendant's filing of an amended petition that incorporated both the original pre-remand claim and a new claim did not require the *entire* proceeding to revert to stage two. Instead, the court could still hold the stage-three hearing on the claim that had survived to that point and consider the new claim as one subject to the State's motion to dismiss, as that claim had not yet been advanced to the third stage. Thus, the addition of the new claims did not necessarily withdraw the old ones.

¶ 36 We recognize that in *Gonzalez* the defendant initially filed a second amended petition and then received permission to withdraw that new filing and instead incorporate his new claim into an amended version of the original petition. Here, defendant filed a second amended petition that added new claims to the already-existent ones that this court had ordered advanced to a third-stage hearing. Defendant did not request or receive leave to refile his first amended petition with the new claims added, as did the defendant in *Gonzalez*. However, we simply cannot accept that this essentially formal distinction should lead to a different result. In each case, we awarded the defendant a stage-three hearing on his claims, then on remand he sought to add new claims. In either type of situation, we believe, the defendant should not lose the stage-three hearing that we ordered, and the State should have a full opportunity to move to dismiss the claims that were not subject to our mandate.

¶ 37 Second, although defendant's actions were less than wholly consistent with the exercise of his right to a stage-three hearing on his original claims, there are factors cutting strongly against finding waiver. One, of course, is our order of March 7, 2000, which could reasonably have been interpreted by defendant and Dolak to assure them that a stage-three hearing on the preexisting claims was required and that, although defendant might knowingly forgo this right,

the trial court would not deny it to him based on debatable inferences from his actions. This was especially so because Dolak reasonably believed that the first amended petition was deficient both in presenting its claims and in omitting other potentially meritorious claims.

¶ 38 Finally, as defendant argues, forgoing the guarantee of a stage-three hearing on his first amended petition, in return for raising claims that might or might not survive stage two, would appear to be unreasonable assistance of counsel. See generally *People v. Nitz*, 2011 IL App (2d) 100031, ¶ 18 (stage-two petitioner under Act is entitled to reasonable assistance of counsel). We do not decide this matter definitively, but our resolution of the issue obviates our need to explore this fact-specific multi-issue quagmire.

¶ 39 We therefore hold that the trial court erred in denying defendant a stage-three evidentiary hearing on the claims that he raised in his first amended petition and again in his second amended petition.

¶ 40 We proceed to the remaining claims, which the trial court also dismissed. In contending that the court erred in doing so, defendant notes that it relied on forfeiture and *res judicata* to bar the multiple new claims of ineffective assistance of counsel. Defendant argues that these procedural bases for dismissal were unsound: first because the second amended petition alleged that defendant's counsel had been ineffective for failing to raise these claims on appeal, and second because the claims relied in part on matters outside the record on direct appeal.

¶ 41 Defendant, however, overlooks that we review the trial court's judgment, not its reasoning, and we may affirm on any basis called for by the record. See *People v. Anderson*, 401 Ill. App. 3d 134, 138 (2010); *People v. Cleveland*, 342 Ill. App. 3d 912, 915 (2003). At most, defendant's arguments would establish that the trial court's reasoning was erroneous, but not that

it actually erred as to any of the numerous claims that he raised for the first time on remand.[1] Crucially, defendant does not contend that any of these claims actually made a substantial showing of a constitutional violation (see *People v. Edwards*, 197 Ill. 2d 239, 246 (2001)). Points not raised in an appellant's brief are forfeited. Ill. S. Ct. R. 341(h)(7) (eff. May 25, 2018); *In re K.E.-K.*, 2018 IL App (3d) 180026, ¶ 21. By failing to contend that any of the new claims had sufficient merit to advance to a third-stage hearing, defendant has forgone any opportunity to obtain a reversal as to any such claim. As a court of review, we shall not search the voluminous record and construct arguments on his behalf. We hold not that all of defendant's new claims were legally insufficient, but only that he has forfeited any contention that any of them were legally sufficient—and therefore any basis on which to disturb the trial court's judgment.

¶ 42 We add a crucial note of explanation. In holding that defendant is not entitled to a stage-three hearing on his new claims, we do *not* hold that the subject matter of any of these claims is necessarily off limits to defendant or the trial court. At oral argument, defendant contended that these new claims were so "intertwined" with the old ones that his entitlement to a stage-three hearing on the old ones necessarily entailed an entitlement to a hearing on the new claims as well. Defendant did not elaborate on this contention or specify which new claims were "intertwined" with which old ones, or how.

¶ 43 We do not accept defendant's contention that the *new claims* are independent legal bases for relief that may be considered on remand. However, we recognize that the new claims contain

[1] Also, based on our reading of the second amended petition, defendant's first assumption is incorrect: it does not appear to us that the second amended petition asserted that appellate counsel had been ineffective for failing to raise the new claims on defendant's direct appeal—or even any new claim.

numerous *factual assertions* that might be highly relevant to the claims that defendant raised in his first amended petition and repeated in the second amended petition. To the extent that these factual matters are intertwined with the claims that defendant may raise at the evidentiary hearing—indeed, to the extent that these factual matters are legally relevant to the claims that he may raise—there is surely no bar to his raising them and to the trial court, in its discretion, admitting evidence thereon. Thus, although the stage-three hearing will be limited to the *claims* that were raised in both the first and second amended petitions, it need not exclude particular facts that were alleged by the new claims and that are connected to the claims that have been preserved. Again, we stress that deciding which facts are appropriate to consider is committed to the trial court's discretion to resolve under the customary tests of admissibility based on legal relevance.

¶ 44 We reverse the trial court's dismissal of any claims that defendant raised in his first amended petition. We affirm the dismissal of all other claims. We remand with directions to the trial court to hold an evidentiary hearing on the former set of claims.

¶ 45 Affirmed in part and vacated in part; cause remanded with directions.