2016 IL App (1st) 120569-UB

FIRST DIVISION
Rule 23 Order filed March 14, 2016
Modified upon denial of rehearing May 23, 2016

No. 1-12-0569

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Respondent-Appellee,	)	Cook County
	)	
v.	)	No. 06 CR 8073
	)	
JOSE LOPEZ-MEDINA,	)	Honorable
	)	Stanley J. Sacks,
Petitioner-Appellant.	)	Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court.
Presiding Justice Cunningham and Justice Pierce concurred in the judgment.

ORDER[1]

¶ 1 *Held*: Upon reconsideration of defendant's postconviction petition in light of the Illinois Supreme Court's decision in *People v. Allen*, 2015 IL 113135, the trial court's summary dismissal of defendant's postconviction petition is reversed and the matter is remanded for a second-stage hearing; on remand, defendant is entitled to a substitution of the trial judge, as the previous trial judge had prejudiced a central issue in defendant's postconviction case.

[1] In view of Justice Liu's death, Justice Cunningham has read the parties' briefs, the March 14, 2016 Rule 23 Order, and Petitioner-Appellant's Petition For Rehearing, and is acting in Justice Liu's place.

¶ 2 This court entered an order on October 22, 2013 which affirmed the trial court's summary dismissal of defendant-appellant Jose Lopez-Medina's *pro se* petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2010)). *People v. Lopez-Medina*, 2013 IL App (1st) 120569-U. On September 30, 2015, the Illinois Supreme Court entered a supervisory order directing us to vacate our October 2013 order and reconsider the merits of defendant's appeal in light of the court's decision in *People v. Allen*, 2015 IL 113135.

¶ 3 After reconsidering the merits of this appeal under *Allen*, we conclude the trial court erred in dismissing defendant's postconviction petition at the first stage of review. Accordingly, we vacate our October 2013 order and reverse the trial court's dismissal of the petition. We remand this matter for second-stage proceedings and direct this case to be assigned to a different trial judge.

¶ 4 BACKGOUND

¶ 5 A. Trial

¶ 6 On March 5, 2009, after a bench trial, defendant was found guilty of the predatory criminal sexual assault and aggravated criminal sexual abuse of his stepdaughter, K.M.

¶ 7 The State's case included the testimony of K.M., who stated that defendant's conduct began in 2003, when she was nine years old, and continued through 2005. She testified that defendant had sexually fondled her and had inserted his penis into her anus on multiple occasions. The prosecution also presented evidence of a culture taken from K.M.'s rectum in December 2005 that tested positive for chlamydia. Dr. Michelle Lorand, the medical director of the Chicago Children's Advocacy Center, testified that the test results indicate there was sexual activity involving penetration of K.M.'s rectum. In addition, K.M.'s adoptive mother—who was defendant's wife—testified that she had tested positive for vaginal chlamydia in June 2006, and that defendant had been her only sexual partner from 2003 to 2006. Based on this evidence, the

State argued that it was permissible to infer that defendant was the person who had infected K.M. with chlamydia as a result of defendant's assaults and anal penetration.

¶ 8 In his defense, defendant testified that he had never been alone with K.M. at any time during the entire period they lived in the same house. He denied any inappropriate or sexual contact with K.M. He also testified that he was on medication to treat his high blood pressure and diabetes, and that the medication made him impotent and unable to have sexual intercourse with his wife more frequently than once every four-to-six weeks.

¶ 9 The trial court found defendant guilty and denied his motion for a new trial. Defendant received concurrent sentences of 15 years' imprisonment for one count of predatory criminal sexual assault and 5 years' imprisonment for each of three counts of aggravated criminal sexual abuse. An attorney from the State Appellate Defender's office was assigned to represent defendant on appeal. Defendant voluntarily dismissed his initial direct appeal, and instead filed a postconviction petition raising the issue of ineffective assistance of counsel on June 6, 2011.

¶ 10 B. Postconviction Petition

¶ 11 In his *pro se* petition, defendant argued that his trial counsel, Ms. R.,[2] failed to introduce evidence which would have demonstrated that he never had chlamydia and, therefore, could not have infected K.M. with the disease through anal penetration. Defendant also claimed that this exculpatory evidence would have shown that another person—one infected with chlamydia—must have been the individual who sexually assaulted her. Defendant asserted that the "exculpatory medical evidence was in defense counsel [Ms. R.'s] possession," but she "failed to

[2] In this order, we will refer to the attorneys by the initials of their last names for the sake of simplicity. Prior to the entry of the judgment and sentence, defendant was represented by three attorneys. Bruce Jorgensen, his first attorney, withdrew from the case in April 2007. Defendant's second attorney, Adrienne Davis from the Cook County Public Defender's Office, was appointed by the trial court. In May 2008, a third attorney, Sandra Ramos, filed her appearance as co-counsel for defendant and Davis subsequently withdrew from the case. Beginning in May 2008 and through trial, Ramos was defendant's sole counsel.

present this evidence to the trial court," thereby depriving defendant of his "best defense" which would have "attack[ed] the State's inference that [defendant] assaulted K.M."

¶ 12 According to defendant's petition, preparation for this "best defense" began as early as October 31, 2006, when defendant was represented by Mr. J. On that date, the trial court entered an order on defendant's motion to allow "Dr. Whitmore" to "enter the Cook County Jail to examine the Defendant for Chlamydia." Once this had taken place, Mr. J. reported to the court on December 21, 2006 that defendant was swabbed for chlamydia, and the test "came back negative." Mr. J. stated that while a swab test determines whether defendant presently has chlamydia, a blood test would be "conclusive [in determining] whether he ever did have it" because it would determine if the chlamydia antibody or antigen was present in his blood. On January 8, 2007, the court entered an order on defendant's motion to allow Dr. Burton Andersen, Director of Contagious and Infections Disease at the University of Illinois, to enter the jail, "draw blood from Defendant, *** and have the blood sample tested for the presence or [lack thereof] of the Chlamydia Antibody."

¶ 13 Defendant's petition includes a total of 12 attached exhibits, including court transcripts and documents in the record confirming the above facts. The petition also included a letter signed by Dr. Andersen and dated February 9, 2007. In the letter—which was addressed to Mr. J.—Dr. Andersen stated the following in full:

> "I am writing to help in the interpretation of the blood test performed on [defendant] on January 31, 2007. I drew the blood on that day and personally took the specimen to the Quest Diagnostics lab. The results that were sent to me are the following: The antibody tests for Chlamydia trachomatis were all negative. Since IgM, IgG and IgA antibodies were all tested; this test fails to provide any evidence that [defendant] had a recent or previous infection from this microorganism. Two other

> Chlamydia species were also tested, namely, Chlamydia pneumonia and Chlamydia psittaci. These species are not known to cause venereal infections in humans, never-the-less, these tests were also completely negative. If you have any further questions, please do not hesitate to contact me."

Also attached to defendant's petition was a Quest Diagnostics report for a specimen collected and received on January 31, 2007, which contained the blood test results presumably referenced in Dr. Andersen's letter. The report identified defendant as the patient and the Law Office of Mr. J. as the client. It further indicated that defendant's blood samples were tested for IgM, IgG, and IgA antibodies for the three species of chlamydia identified in Dr. Andersen's letter. Each measurement of defendant's antibodies fell in the following Reference Range: "Antibody not detected."

¶ 14 In his petition, defendant explained that on February 23, 2007, Mr. J. informed the trial court that defendant was examined, "[h]is blood was taken, and it came up negative for any antibodies in his blood, indicating that he never had [chlamydia], according to [the] doctor." The State contested these findings. At the next substantive hearing, on April 25, 2007, Mr. J. told the court that he "gave the test results to the prosecutor" to allow the State the "opportunity to have those results and [the] doctor's credentials scrutinized by [the State's] own expert." During this hearing, Mr. J. was given leave to withdraw, and, on the court's suggestion, Mr. J. stated that he would tender his discovery "back to the State" for the prosecutor to give to the appointed public defender.

¶ 15 Over the next several months, the prosecutor and defendant's next attorney, Ms. D., repeatedly represented to the court that discovery was complete and that the State had provided Ms. D. with "everything that [the State] received from Mr. [J.]" On November 29, 2007, Ms. D. stated that she was "seeking to contact" the expert "that the prior attorney Mr. [J.] indicated he

would be using." At the next hearing on December 18, 2007, Ms. D. told the court that she had "been in conversation with Dr. Andersen" and that discovery was complete "[e]xcept for this additional evidence that may be coming from this doctor." Ms. D. said that she would give the State documents from her file "for a blood draw as well as some other things" and "in terms of the doctor's notes, if [they used] that doctor, [she would] get those items to them." As of January 18, 2008, Ms. D. told the court that she was "still waiting on information from [her] expert."

¶ 16 By May 28, 2008, Ms. D. had withdrawn as defense counsel and Ms. R. was defendant's sole attorney in this case. After several hearing dates where Ms. R. indicated she was still going through discovery and collecting information, on August 15, 2008, she told the trial court that she had "all the transcripts" and—in her words—"[t]hat completes everything." Defendant's discovery responses, dated August 28, 2008, stated that there were "no other witnesses at [that] time" besides those individuals listed in the State's discovery responses, "although our investigation continues." The State's discovery responses disclosed "Dr. S. Whitmore, Trinity Hospital" as a possible witness, but did not include Dr. Andersen.

¶ 17 Defendant's trial began on January 21, 2009. According to defendant, at the time of his trial Ms. R. had in her possession all of the medical documentation, including Dr. Andersen's letter and the Quest Diagnostics report, relevant to his defense that he had never been infected with chlamydia and could not have been the perpetrator who sexually assaulted and infected K.M. On the second day of trial, as defendant was testifying, Ms. R. attempted to introduce defendant's blood test results which were "tendered to [her] by the public defender":

> "[MS. R.]: Now, you were subsequently tested for chlamydia, correct, while you were in custody?
>
> A: Yes
>
> [THE STATE]: I object, Judge.

THE COURT: Where do you plan to go with this?

[THE STATE]: Plus I've never been tendered anything, any documentation in regards to this whatsoever, not one piece of information.

THE COURT: Where do you plan to go with this, Ms. [R.]; that he was tested when he got to the jail, supposedly, and what? Where do you plan to go with that?

MS. [R.]: Not the public defender but the attorney prior to that who was handling this file had [defendant] tested. And where am I going with that? He tested negative."

The prosecutor insisted that, although the issue was discussed many times, the State was never tendered with a copy of defendant's medical records, calling it a "complete discovery violation." Ms. R. noted that defendant's records had a similar cover page as his wife's medical records, and she "assumed, because we got these from the State, that these were already in the State's possession."

¶ 18 Defendant referenced the above exchange in his petition and described how the trial court then allowed Ms. R. to explain what the documents were, their significance, and how they were relevant to defendant's case. Ms. R. stated that the tests reflected defendant was negative for chlamydia as of January 2007, and the court proceeded to inspect the documents. The judge then read aloud portions of the Quest Diagnostics report and, while conceding that he was "not a doctor," stated that the report "doesn't mean [defendant] never had [chlamydia]," and continued:

"THE COURT: *** I'm not sure what this means at all, if it means [defendant] never had [chlamydia], he didn't have it in January of 2007, or what it means.

MS. [R.]: Well, without referring to this, then, your Honor, because apparently the State didn't receive it, and I should have been aware of that and certainly asked [the prosecutor]. I was attorney number three. I should have made sure [the State] had all the discovery that we had in our possession.

> THE COURT: But not only that, those tests were done in January of 2007. Whatever the test shows, it's January of 2007. Dr. Lorand saw [K.M.] in December of 2005. *** From December of '05 to January of '07, so we're talking about 13 months [had elapsed between the tests]. The State didn't have it. I'm not sure of the relevance at this point. But in any event, are you withdrawing that question?
>
> MS. [R.]: Yes, I'm withdrawing that question."

In its closing argument, the State referenced Dr. Lorand's testimony that K.M.'s chlamydia was transmitted via anal penetration, and there was "not one piece of evidence to show that anyone else penetrated [K.M.] anally." The State further stated that defendant's wife also contracted chlamydia, and her only sexual partner had been defendant. Therefore, the State argued, while this implication did not prove its case, "those dots are connected, *** they corroborate everything that [K.M.] testified to" regarding defendant's charged offenses. In its ruling, the trial court discussed how K.M. and defendant's wife were both positive for chlamydia, noting that the transmission of the disease "requires skin on skin contact" and the presence of the disease "corroborates a sexual act." The court also paraphrased trial testimony that chlamydia, "in some circumstances, [ ] could go away on its own" and there are "no symptoms for that disease," therefore "the inference is reasonable that [defendant's chlamydia] went away, also." In the hearing on defendant's motion for retrial, the court reiterated that "the only way [chlamydia] could have [infected K.M.] was by penetrations" and despite not knowing "directly" whether defendant had chlamydia, "circumstantially" he assaulted K.M. because both she and defendant's wife contracted the disease.

¶ 19 Defendant argued in his petition that because Ms. R. failed to enter the results of his chlamydia test into evidence, he was not able to present any defense to counter the inference that he had chlamydia and spread the disease to K.M. as a result of the alleged assaults. He contended

that the evidence Ms. R. failed to present at trial would have provided this defense, as it "indicat[ed] that [defendant] never had chlamydia and thus could not have transmitted the disease to K.M.," and, in addition, would have supported the theory that someone other than defendant anally penetrated K.M. Defendant concluded that Ms. R.'s actions "fell below the objective standard of reasonableness" because "there was no discernable [*sic*] explanation as to why defense counsel did not present such exculpatory evidence—especially where it was literally right in front of her face at trial—and where it was a solid defense to the charge that [defendant] was the perpetrator of the sexual abuse." In support of this assertion, defendant attached to the petition notarized affidavits from the Office of the State Appellate Defender attesting that, when that office contacted Ms. R. to inquire about the results of the blood test, Ms. R. provided Dr. Andersen's letter and the Quest Diagnostics report, indicating that she was in possession of these documents prior to trial. Defendant further stated in his petition that Ms. R. " 'manifested a lack of knowledge' about basic facts and procedure" in her failure to introduce this evidence, and by not correcting her error through a posttrial motion.

¶ 20 According to defendant, these deficiencies directly prejudiced him because they deprived him of the chance to rebut key inferences relied upon by the trial court. The failure to present defendant's negative blood test results, and evidence that "antibodies are present in all people who have had chlamydia," means defendant was not afforded the use of this "best defense" that he was not the person who infected K.M. with chlamydia. In a signed affidavit attached to his petition, defendant attested that he informed Ms. R. that he wanted this evidence presented at trial in his defense, and he, "in no way, instructed Ms. [R.] to forgo [*sic*] presenting Dr. Andersen's findings at trial and her failure to offer this evidence was without [his] consent." Accordingly, defendant asserted that he has an "arguable claim" of ineffective assistance of counsel based on Ms. R.'s failure to introduce this evidence.

¶ 21 C. Summary Dismissal of Petition and Appeal

¶ 22 On August 26, 2011, the trial court summarily dismissed defendant's postconviction petition after finding it to be frivolous and patently without merit. The court noted that "counsel's strategic decisions will not be second-guessed," and the failure to call a particular witness can only form the basis of an ineffective assistance of counsel claim if "the trial strategy is so unsound that counsel can be said to have entirely failed to conduct any meaningful adversarial testing of the State's prosecution." The court also found that Dr. Andersen's letter did not qualify as an affidavit because it was not notarized and that defendant failed to explain why an affidavit could not be obtained. The court determined that defendant's petition was "not in conformity with the provisions of the Post-Conviction Hearing Act," and further noted that Dr. Andersen's letter and the Quest Diagnostics report were "to say the least unclear and at the most confusing," and "left factually unexplained *** how one could draw the conclusion that [defendant] *never had chlamydia* of any type of strain." (Emphasis in original.) The court spent a substantial portion of its order addressing the significant conflict between these two documents and the "overwhelming evidence" presented in favor of defendant's guilt, including the "compelling, credible and vivid testimony of [K.M.]" In light of the extensive evidence against defendant, the court found that his petition failed to establish an ineffective assistance of counsel claim.

¶ 23 On appeal, defendant contends that, contrary to the trial court's finding, his petition sets forth an "arguable" claim of ineffective assistance of counsel based on Ms. R.'s failure to introduce the exculpatory evidence showing that he never had chlamydia. He argues that, in order to survive the first stage of postconviction proceedings, a defendant must only show that it is "arguable" both that counsel's performance fellow below an objective standard of reasonableness and that defendant was prejudiced. Defendant emphasized that his prior counsel, Mr. J., anticipated and prepared for this defense by arranging for defendant's initial physical

examination and subsequent blood test by independent experts, and that the tests yielded results favorable to the defense. By providing evidence of Ms. R.'s unjustifiable incompetence or inattentiveness which robbed defendant of the opportunity to present his "best defense," defendant argues, his petition made an arguable claim that he received ineffective assistance of counsel.

¶ 24 This court initially affirmed the trial court's dismissal of defendant's petition on October 22, 2013. *Lopez-Medina*, 2013 IL App (1st) 120569-U. In doing so, we relied on our supreme court's decision in *People v. Enis*, 194 Ill. 2d 361 (2000), which held that where a defendant asserts a postconviction claim based on the allegation that trial counsel failed to investigate and call a witness, the defendant's petition "must be supported by an affidavit from the proposed witness" to allow the reviewing court to "determine whether the proposed witness could have provided testimony or information favorable to the defendant." *Lopez-Medina*, 2013 IL App (1st) 120569-U, ¶ 9 (quoting *Enis*, 194 Ill. 2d at 380). Here, defendant did not provide a notarized affidavit from Dr. Andersen containing his proposed testimony, nor did he explain the absence of any such affidavit. We further noted that the inclusion of the Quest Diagnostics report similarly "[did] not establish that that Dr. Andersen would have testified that defendant never had chlamydia." *Id.* ¶ 10. "Without such an affidavit [from the proposed witness], we simply [could not] say that the doctor could have provided testimony favorable to defendant." *Id.* ¶ 11. We therefore determined that the petition contained insufficient documentary support for defendant's claim, requiring dismissal at the first stage of proceedings. *Id.* ¶ 14.

¶ 25 Now, pursuant to our supreme court's September 30, 2015 supervisory order, we vacate our October 22, 2013 order and reconsider the matter under *People v. Allen*, 2015 IL 113135. Finding *Allen* instructive, we reverse the trial court's summary dismissal of defendant's petition and remand the matter for second-stage proceedings.

¶ 26 II. ANALYSIS

¶ 27 The Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2010)) allows a defendant to assert that his conviction or sentence was improperly affected by a substantial violation of his constitutional rights. *Allen*, 2015 IL 113135, ¶ 20. The Act establishes a three-stage procedure for relief, with the burden on the defendant filing a petition varying by stage. *Allen*, 2015 IL 113135, ¶¶ 20-22.

¶ 28 At the first stage of proceedings, the defendant need only set forth the "gist" of a constitutional claim, and the petition shall be dismissed by the trial court if it determines the claim is "frivolous or is patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2010); see *Allen*, 2015 IL 113135, ¶ 21; *People v. Delton*, 227 Ill. 2d 247, 253-54 (2008). A defendant is not required to provide "formal legal argument or citations to authority" at this stage, but the petition must include a "sufficient factual basis" to support the asserted constitutional claim. *Allen*, 2015 IL 113135, ¶ 24. As part of this factual basis, the Act requires that "[t]he petition shall have attached thereto affidavits, records, or other evidence supporting its allegations or shall state why the same are not attached." 725 ILCS 5/122-2 (West 2010). If the petition lacks evidentiary attachments, the petitioner must explain why he was unable to provide the required support. *Allen*, 2015 IL 113135, ¶ 26. As most petitions at this stage are drafted by *pro se* defendants who are incarcerated, "the threshold for survival [is] low." *People v. Tate*, 2012 IL 112214, ¶¶ 8-9. We review *de novo* the dismissal of a postconviction petition without an evidentiary hearing. *People v. Hall*, 217 Ill. 2d 324, 334 (2005).

¶ 29 We first consider our supreme court's holding in *Allen*, in which the defendant attached, in support of his *pro se* postconviction petition, a non-notarized exculpatory statement—styled as an affidavit—from another individual. *Allen*, 2015 IL 113135, ¶ 31. As in the present case, the trial court in *Allen* dismissed the petition at the first stage of proceedings for being "frivolous and

patently without merit," and the appellate court affirmed on the basis that the exculpatory statement was not notarized and therefore did not qualify as an affidavit pursuant to section 122-2 of the Act. *Id.* ¶¶ 15-17 (citing 725 ILCS 5/122-2 (West 2010)). On review, our supreme court stated that the "[l]ack of notarization here does not prevent the court from reviewing the petition's substantive virtue, as to whether it set[s] forth a constitutional claim for relief." (Internal quotation marks omitted.) *Allen*, 2015 IL 113135, ¶ 34. Rather than require that evidence attached to a petition be in admissible form, the court held that "[i]t is enough for first-stage purposes that the defendant has provided substantive evidentiary content showing his claims are capable of corroboration and independent verification." *Id.* ¶ 37.

¶ 30 We conclude that our supreme court's holding in *Allen* undermines the grounds for our October 2013 order affirming the summary dismissal of defendant's petition. Our prior order relied primarily on defendant's lack of an affidavit from defendant's proposed witness, Dr. Andersen, to conclude that his petition contained insufficient evidentiary support for his claim. *Lopez-Medina*, 2013 IL App (1st) 120569-U, ¶¶ 10-11. However, the *Allen* court determined that the inclusion of "other evidence" in section 122-2 of the Act "indicates the legislature contemplated a wide range of documentary evidence would satisfy the evidentiary requirements of the first stage." *Allen*, 2015 IL 113135, ¶ 36. Using this as our guide, and "under the forgiving standards of the first stage," this court is instructed to "take the allegations of the petition as true and construe them liberally," and "dismiss only if the petition presents no arguable basis either in law or in fact." (Internal quotation marks omitted.) *Id.* ¶¶ 41-43.

¶ 31 A. Sufficiency of the Evidentiary Attachments

¶ 32 The first issue is whether the evidentiary attachments inherently render defendant's petition frivolous or patently without merit. Reviewing the sufficiency of a petition's evidentiary attachments includes determining whether the defendant has provided "a factual basis sufficient

to show the petition's allegations are capable of objective or independent corroboration," and whether the attachments "identify with reasonable certainty the sources, character, and availability of the alleged evidence supporting the petition's allegations." (Internal quotation marks omitted.) *Id.* ¶ 32 (citing *People v. Collins*, 202 Ill. 2d 59, 67 (2002); *Delton*, 227 Ill. 2d at 254). We find that defendant has met these requirements. The position that defendant never had chlamydia is arguably supported by the Quest Diagnostics report and Dr. Andersen's letter. Those pieces of evidence are sufficient to form the arguable factual basis to refute the implication that defendant spread chlamydia to K.M. Furthermore, that defendant's trial counsel was in possession of those pieces of evidence at the time of trial is corroborated by the affidavits from the State Appellate Defender's office, which are also attached to the petition. Accordingly, defendant has provided sufficient evidence to show that this defense was prepared well in advance of trial and that his trial counsel should have been aware of the evidence supporting it.

¶ 33 The State argues that a claim alleging trial counsel failed to investigate and call witnesses must be supported by an affidavit from the proposed witness, and defendant has failed to do so here. We agree that neither the Quest Diagnostics report nor Dr. Andersen's letter qualifies as an affidavit. Also, unlike in *Allen* where the letter attached to the defendant's petition was "styled as an affidavit," neither piece of evidence in this case was intended to imitate an affidavit or serve the purposes of one. However, in light of the holding in *Allen*, we find that this distinction is not dispositive; whether those pieces of evidence hold the legal significance of an affidavit does not affect whether they would "otherwise qualify as sufficient evidence to survive the first stage." *Allen*, 2015 IL 113135, ¶ 31. "At the first stage, the court considers solely the petition's *substantive* virtue," which is whether the defendant has set forth a constitutional claim for relief. (Emphasis in original.) *Id.* ¶ 33. The relevant question in this case is not whether defendant provided an affidavit from a potential witness. This court instead asks whether there was enough

evidence to show that defendant could have presented at trial the defense that he did not have chlamydia, and whether this evidence was available and provided to the court in the petition. We find that both questions can be answered in the affirmative.

¶ 34 The significance of whether an evidentiary attachment like an affidavit is notarized bears on "whether the facts contained in the affidavit are *true*," but this is an issue properly reserved for second-stage proceedings, where the petition is "subjected to adversarial testing through the State's involvement." (Emphasis in original.) *Id.* ¶¶ 32-33. Delineating between the different burdens placed on a defendant at the first and second stages of proceedings does not infringe on the State's ability to effectively contest the petitions, but only affects *when* this may occur. See *Id.* ¶ 38 (noting that "where postconviction counsel is unable to remedy the lack of notarization of an attached statement, dismissal at the second stage is appropriate—filtering out forgeries"); see also *Tate*, 2012 IL 112214, ¶ 12 (declining to "alter the three-stage postconviction structure set forth in the Act" by applying the second-stage standard to the first stage where defendant's petition was prepared by an attorney).

¶ 35 The State further argues that, without an affidavit, the reviewing court cannot determine whether the proposed witness could have provided testimony favorable to the defendant. Indeed, Dr. Andersen's letter shows no agreement that he would testify, and he never stated precisely what he would have testified to had he done so. However, as our supreme court described in *Allen*, whether or not Dr. Andersen indicated in his letter that he would be willing to testify at trial is not the correct threshold. See *Allen*, 2015 IL 113135, ¶ 41. Rather, the court is directed to "take the allegations of the petition as true and construe them liberally" and "dismiss only if the petition presents no arguable basis either in law or in fact." (Internal quotation marks omitted.) *Id.* ¶¶ 41-42. The lack of any agreement to testify from a particular witness does not diminish

this court's ability to determine that sufficient evidence exists to corroborate a defense not presented at trial, and to assess trial counsel's judgment and ability in not presenting that defense.

¶ 36 B. Ineffective Assistance of Counsel

¶ 37 Having determined that the evidentiary attachments are sufficient to support a petition at the first stage of proceedings, we next turn to whether the petition has sufficiently set forth the "gist" of a constitutional claim in light of the standard set forth in *People v. Tate*, 2012 IL 112214. In *Tate*, our supreme court established the standard for first-stage review of a claim of ineffective assistance of counsel, deriving it from *Strickland v. Washington*, 466 U.S. 668 (1984). The *Strickland* standard requires the defendant to "*demonstrate* ineffective assistance by *showing* that his counsel's performance was deficient and that this deficient performance prejudiced the defense." (Emphases in original.) *Tate*, 2012 IL 112214, ¶ 18. Taking into account the three-stage procedure established by the Act, the *Tate* court determined that the *Strickland* standard is properly applied at the second stage of proceedings, where the defendant must "make a substantial showing of a constitutional violation." (Internal quotation marks omitted.) *Id.* ¶ 19. The standard for dismissal at the first stage, comparatively, requires "[a] different, more lenient formulation," amounting to a "lower pleading standard than [required at] the second stage of the proceeding." *Id.* ¶¶ 19-20. Our supreme court explained the standard to be used, referring to it as an " 'arguable' *Strickland* test": at the first stage of proceedings, " 'a petition alleging ineffective assistance may not be summarily dismissed if (i) it is *arguable* that counsel's performance fell below an objective standard of reasonableness and (ii) it is *arguable* that the defendant was prejudiced.' " (Emphases in original.) *Id.* (quoting *People v. Hodges*, 234 Ill. 2d 1, 17 (2009).

¶ 38 In the present case, with respect to the first prong of the test, the State characterizes defense counsel's failure to present the defense as a "tactical decision" and argues that "[s]uch decisions enjoy a strong presumption that they reflect sound trial strategy." However, at the first

stage, a defendant is not required to rebut that presumption. In *Tate*, the State similarly argued during first-stage proceedings that defense counsel had a "sound strategic reason" for not calling exculpatory witnesses, and the court specifically rejected that argument as appropriate for the second stage. *Tate*, 2012 IL 112214, ¶¶ 21-22. It found that "[t]he State's strategy argument [was] inappropriate for the first stage, where the test is whether it is arguable that counsel's performance fell below an objective standard of reasonableness and whether it is arguable that the defendant was prejudiced." *Id.* ¶ 22. Here, we find that the standard articulated in *Tate* has been met. Defendant has provided evidence that his first counsel engaged in months of preparation in anticipation of a defense that was not presented at trial, including arranging first a physical examination of defendant and then a blood test, and consulting with experts to establish the intended defense that defendant did not have chlamydia. Defendant's trial counsel attempted but failed to introduce this defense during trial, and did not seek to introduce any evidence related to the defense in defendant's posttrial motion. Whether the evidence suggests that counsel's failure to present this defense at trial was a matter of strategy is irrelevant; in either case, defendant was deprived of this defense. Furthermore, defendant avers that he intended the evidence supporting this defense to be presented at trial and did not consent to any decision to withhold the evidence. Accordingly, we conclude that defendant's petition sufficiently established that his trial counsel's performance arguably fell below an objective standard of reasonableness.

¶ 39 The State further argues the second prong of the *Strickland* test has not been satisfied because defendant cannot show that he was prejudiced by his trial counsel's failure to present this defense. The State refers to the trial court's dismissal order which stated that the evidence at trial "overwhelmingly established the guilt" of defendant even without any evidence concerning the presence of chlamydia, and "served only to corroborate" the State's case against him. In making

this assessment, the trial court weighed the value of the attached medical evidence and determined that the deprivation of this evidence at trial could not form the basis for defendant's claim of ineffective assistance of counsel. This weighing of the evidence was not necessary or proper. At the first stage, defendant is required only to show that he was arguably prejudiced. A comparative analysis of the evidence must be reserved for second-stage proceedings, where "the defendant bears the burden of making a substantial showing of a constitutional violation." *Allen*, 2015 IL 113135, ¶ 21. At the first stage, however, "the court is to take the allegations of the petition as true and construe them liberally." *Id.* ¶ 41. The evidence here, taken as true and construed liberally, supports the conclusion that defendant was never infected by several strains of chlamydia, which is directly relevant to rebutting the implication that he transmitted the disease to K.M. Without the benefit of an evidentiary hearing, the trial court was not qualified to reach its own conclusions, based on its own interpretation of the medical evidence, regarding whether this evidence negates the possibility that defendant ever had *any* strain of chlamydia. Even so, defendant is not required to present an impenetrable defense in order to successfully show that it is "arguable that defendant was prejudiced" due to the defense not being raised at trial. Finally, we note that the trial court made repeated references to the inference that defendant may have had chlamydia when it announced its verdict, sentenced defendant, and ruled on defendant's posttrial motion. Despite the court's assertion that this information played little or no part in how it reached its verdict, those statements further support our holding that defendant was arguably prejudiced by the failure to present his defense.

¶ 40 This court is not tasked with deciding whether defendant received ineffective assistance of counsel, but only whether his petition meets the threshold requirements necessary to survive the first stage of review. We believe defendant has met this burden.

¶ 41 C. Substitution of Trial Judge

¶ 42 Defendant requests that on remand, this case be assigned to a different judge. Generally, the judge who presided over a defendant's trial should hear his postconviction petition. *People v. Reyes*, 369 Ill. App. 3d 1, 25 (2006). In order to be entitled to a substitution of judge, the defendant "must show that he will be substantially prejudiced if his motion is denied." *People v. Steidl*, 177 Ill. 2d 239, 264 (1997). Substantial prejudice means "something more" than simply that the judge presided over the defendant's trial; it can be a demonstration of "animosity, hostility, ill will, [ ] distrust *** prejudice, predilections or arbitrariness." *Reyes*, 369 Ill. App. 3d at 25. "The decision to disqualify a judge is not one to be made lightly." *Steidl*, 177 Ill. 2d at 264.

¶ 43 Defendant argues that the trial judge in this case already determined that Dr. Andersen's letter and the Quest Diagnostics report fail to establish that defendant had never been infected with chlamydia and could not have transmitted chlamydia to K.M. by way of the alleged assaults, and that the failure to present this evidence at trial did not constitute ineffective assistance of counsel. Defendant points to the trial judge's order denying his petition for rehearing wherein the judge explained how the proffered evidence is "unclear" and "does not set forth sufficient facts to support a conclusion that [defendant] *never had any of several* strands or types of chlamydia," and that the question of whether defendant had chlamydia served only to "corroborate the State's already overwhelming evidence against [defendant]." However, at multiple points during trial and the posttrial hearings, the judge relied on the inference that defendant transmitted chlamydia to K.M. as a basis for defendant's guilt. Defendant argues that, contrary to the trial judge's assertions, the evidence provided in his postconviction petition and the testimony he was deprived of presenting at trial show that defendant "had no antibodies to the disease and thus never had chlamydia," and "[h]ad this evidence been introduced, despite the trial court's misinterpretation of its own findings, [this evidence] would have influenced the

verdict by negating the inference that [defendant] was the person who infected K.M. with chlamydia." Defendant asserts that the trial judge, as evidenced by his statements made at trial, during the posttrial proceedings, and in the order denying defendant's postconviction petition, "prejudiced [defendant's] ineffective assistance of counsel claim" by already "determin[ing] that his claims will fail, regardless of any other evidence presented." According to defendant, the trial judge "improperly prejudged [defendant's] claim" and this case should be assigned to a different judge on remand.

¶ 44 In response, the State asserts that "[t]he record fails to establish any prejudice or prejudgment in the trial court's rulings on the petition." The State claims the trial judge properly judged the evidence before him at each stage of proceedings, and did not show bias when at trial and in ruling on defendant's postconviction petition he failed to find the relevance of Dr. Andersen's letter and the Quest Diagnostics report. According to the State, it was reasonable for the trial court to infer, through circumstantial evidence, that defendant transmitted chlamydia to both K.M. and his wife. The State further claims that the evidence proffered by defendant in his postconviction petition was unclear, confusing, and failed to establish that petitioner never had chlamydia and could not have transmitted the disease to K.M. The State argues that those findings by the trial court "do not demonstrate prejudice against [defendant]," and therefore defendant has failed to meet his burden to establish the right to a substitution of judge.

¶ 45 We agree with defendant that the trial judge appears to have prejudged a central issue in his postconviction case: whether defendant received ineffective assistance of counsel based on counsel's failure to present Dr. Andersen's letter and the Quest Diagnostics report at trial. The trial court stated that these pieces of evidence "do not set forth sufficient facts to support a conclusion that [defendant] *never had any of several* strands or types of chlamydia" and "left factually unexplained as to how one could draw the conclusion that [defendant] *never had*

chlamydia of any type or strain." Even if such a conclusion could be supported, the trial court explained, "[t]he evidence concerning the presence of chlamydia served only to corroborate the State's already overwhelming evidence against [defendant]." However, at the first stage of postconviction proceedings, as we have already established, the petitioner must merely present the gist of a constitutional claim. *Reyes*, 369 Ill. App. 3d at 26. Rather than simply making this determination, the trial judge interpreted the new pieces of evidence and weighed them against the evidence presented at trial, which is more appropriate for second-stage postconviction proceedings, where the trial court is to determine whether the petitioner has made a substantial showing of a constitutional violation, or third-stage proceedings, where an evidentiary hearing is held. See *People v. Edwards*, 197 Ill. 2d 239, 246 (2001). Such analysis of the evidence is premature at the first stage of proceedings, especially in light of the technical nature of the evidence and the trial judge's self-admitted lack of expertise in the area.

¶ 46 We find compelling defendant's comparison of this case to *People v. Reyes*, 369 Ill. App. 3d 1 (2006). In *Reyes*, the defendant filed a postconviction petition which included " 'new evidence' [which] consisted of 23 allegations that *** 'establish[ed] a clear pattern and practice of misconduct and abuse' " by the detective who elicited the defendant's confession. *Id.* at 11. As in this case, the defendant's petition was dismissed at the first stage of proceedings. *Id.* at 12. In making that ruling, the trial court found that "the new allegations against [the detective] were 'not so conclusive as to change the result on retrial,' " and explained that it " '[did] not believe that a reasonable probability exist[ed] that had the court been aware of [those] twenty-three (23) allegations that the result of the hearing on the motion to suppress [the confession] would have been different.' " *Id.* at 25-26. The defendant appealed the dismissal of his petition and requested the case be assigned to a substitute judge on remand. *Id.* at 24. On appeal, the court agreed with the defendant's request, finding that the trial court's conclusions regarding the evidence presented

in the defendant's petition "essentially decided this issue, and, in effect, the entire case." *Id.* at 26. The court found that the trial court's findings were "not appropriate to a first-stage proceeding, where '[s]ubstantive questions relating to the issues raised in the petition are not to be addressed.' " *Id.* (quoting *People v. Smith*, 326 Ill. App. 3d 831, 839-40 (2001)).

¶ 47 In *Reyes*, the court explained that the issue to be addressed at the first stage of proceedings is whether the defendant has "presented the gist of a constitutional claim," not whether the defendant is guilty. *Id.* Similarly, in this case, the trial court was not tasked with determining whether the evidence in defendant's petition conclusively established that defendant never had chlamydia or whether that evidence outweighs the other evidence presented at trial. In doing so, just as in *Reyes*, the trial court "gave the impression of being unwilling to consider" whether defendant had met the first-stage burden. *Id.*

¶ 48 In light of the forgoing, we find it prudent that defendant's postconviction proceedings proceed before a judge other than the trial judge. Therefore, we remand the cause to the presiding judge of the criminal court, with the direction that it be assigned to a different trial judge.

¶ 49 III. CONCLUSION

¶ 50 Accordingly, we vacate our October 22, 2013 order and reverse the trial court's summary dismissal of the defendant's postconviction petition. We remand this cause to the presiding judge of the criminal court for further proceedings and direct that it be assigned to a different trial judge.

¶ 51 Reversed and remanded with directions.