2016 IL App (1st) 132875-U

FIFTH DIVISION
November 4, 2016

No. 1-13-2875

IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

	)	Appeal from the
THE PEOPLE OF THE STATE OF ILLINOIS,	)	Circuit Court of
	)	Cook County
Respondent-Appellee,	)	
	)	
v.	)	No. 94 CR 8733 (04)
	)	
SHONDELL WALKER,	)	Honorable
	)	Mary Margaret Brosnahan,
Petitioner-Appellant.	)	Judge Presiding.

JUSTICE REYES delivered the judgment of the court.
Presiding Justice Gordon and Justice Hall concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court's second-stage dismissal of defendant's successive postconviction petition is reversed and remanded for a third-stage evidentiary hearing where defendant provided newly discovered posttrial affidavits of two codefendants indicating that defendant did not participate in the beating of the victim.

¶ 2 Defendant Shondell Walker appeals the second-stage dismissal of his successive petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 1998)).

On appeal, defendant argues the circuit court erred in dismissing his successive petition without a third-stage evidentiary hearing because he presented newly discovered evidence that would change the result on retrial: namely posttrial affidavits of two codefendants indicating that defendant did not participate in the beating of the victim. For the following reasons, we reverse and remand for a third-stage evidentiary hearing on defendant's claim of actual innocence.

¶ 3 I. BACKGROUND

¶ 4 Following a jury trial, defendant was convicted of first degree murder and sentenced to serve 70 years in the Illinois Department of Corrections for his participation in the beating death of a fellow gang member, victim Steven Green. The victim was beaten by his fellow gang members because he had stolen cocaine from a head gang member and had lied about it. Seven individuals were indicted for having participated in the beating or under theories of accountability.

¶ 5 A. Trial Proceedings

¶ 6 The matter proceeded to a jury trial where the State presented the testimony of the following five witnesses.

¶ 7 1. Testimony of Michael Sardin

¶ 8 Michael Sardin (Sardin)[1] testified that on January 23, 1994, he was a member of the Black Disciples street gang. On that day, a mandatory Black Disciples meeting was held at 6:00 p.m. in an apartment at the Robert Taylor Homes located at South Federal Street in Chicago. Sheila Crosby (Crosby), also known as Sheila Bull, resided in the apartment with her children and boyfriend. Defendant, who was the chief of security for three buildings run by the

[1] Michael Sardin is referred to as Michael Sardin and Michael Sarden in the record on appeal. We refer to the affiant as "Sardin" as this is how he spelled his surname in his sworn affidavits that were submitted during defendant's successive postconviction proceeding.

Black Disciples in the area, informed Sardin that he was to attend the meeting. When Sardin arrived at 5:45 p.m., he observed that 25 to 30 other gang members had already gathered in Crosby's apartment, including defendant and codefendant Anthony Horton (Horton). Sardin also observed Crosby in the apartment before the meeting began, but she was instructed to stay in a room at the back of the apartment during the meeting. The furniture in the apartment was pushed against the wall and the gang members formed a circle.

¶ 9 James Blackmun (Blackmun),[2] the gang "coordinator," called the victim to the center. Blackmun then called five other gang members, defendant, Horton, Quincy Ross (Ross), Anthony Jaynes (Jaynes), and Charles Stewart (Stewart), into the middle of the circle. Blackmun informed the victim, "You know you're bogus for selling those drugs." Blackmun instructed the five gang members he had selected to avoid hitting the victim in the head or face. These men, including defendant and Horton, beat the victim with their fists, baseball bats, and a table leg for a minute, changed positions, and then resumed beating the victim for an additional two minutes.

¶ 10 Defendant then instructed Sardin to leave and perform security duties, which meant he was to stand in the back of the building and watch for the police, drug dealers, and other gang members. As Sardin walked to his post, he heard the victim hollering from inside the apartment. Approximately 35 minutes later, Sardin observed defendant and Stewart holding the victim up as they walked him out of the building. Defendant and Stewart put the victim in the back seat of a vehicle owned by defendant's girlfriend and defendant drove away.

¶ 11 Sardin further testified he did not voluntarily come forward with this information to the police. On February 16, 1994, he ran away after seeing the police because he was carrying five bags of marijuana. The police arrested him and escorted him to the police station for questioning

[2] Blackmun is also referred to as "J.D." in the record on appeal.

regarding the victim's death. At that time, Sardin identified defendant, Horton, Ross, and Jaynes in a photo array as having participated in the beating death of the victim. Sardin also identified the victim and the vehicle defendant was driving that evening from the photo array. Thereafter, Sardin testified similarly in a grand jury proceeding and stated that defendant had participated in the beating death of the victim.

¶ 12 The State then questioned Sardin about a written statement he had signed on April 21, 1995, in which he had recanted his prior statements to the police and the grand jury. The recanted statement indicated that the police had beaten Sardin so that he would testify against defendant at the grand jury proceeding and that Sardin did not see "what happened to [the victim]." Sardin had signed this recanted statement in his apartment in the presence of an attorney for one of his codefendants, an investigator, and his grandmother. Sardin testified he had signed the recanted statement because he was "scared." Several days before Sardin signed the recanted statement, Blackmun had threatened to kill Sardin if he testified.

¶ 13 Sardin further testified that, shortly before the trial, Ross had shot Sardin in the neck. Blackmun was with Ross at the time of the shooting. Sardin testified that after the shooting, he hid in a gangway and ran home, where his family called for an ambulance. Sardin thereafter failed to respond to a subpoena because he was "scared" but the police proceeded to take him into custody to ensure that he would testify at trial. As of the date of trial, he was placed in a witness protection program.

¶ 14 Sardin also reiterated the testimony he had provided to the grand jury, which was consistent with his trial testimony. Sardin further testified he had not received any deals from the State's Attorney's office in exchange for his testimonies provided in the grand jury proceeding and at trial. Sardin had not been threatened before the grand jury proceeding.

¶ 15 On cross-examination, Sardin confirmed he had indicated in his recanted statement that he was not present for the beating. Sardin further testified that part of the reason why he felt threatened when he signed the recanted statement was because gang members were outside his door.

¶ 16 2. Testimony of Detective John Halloran

¶ 17 Chicago police detective John Halloran (Detective Halloran) testified he went to Crosby's apartment to investigate the crime scene. Crosby permitted him to "look around" her apartment. The furniture in the apartment was pushed against the wall and the kitchen table was on its side with a leg broken off. There was blood on the floor and the walls. Detective Halloran notified the mobile crime unit to collect evidence from the apartment and transported Crosby and her boyfriend to the police station. After speaking with Crosby, Detective Halloran arranged for Crosby's five children to be taken out of the apartment building and transported to other family members' residences. Halloran denied stating to Crosby that she would lose her children to the Department of Children and Family Services (DCFS). At the police station, Crosby provided some names and nicknames of individuals who were involved in the beating, including defendant and his brother, codefendant Duval Walker (Duval).[3] Crosby also informed Detective Halloran that she observed defendant and three other gang members walk the victim to Crosby's apartment building prior to the beating.

¶ 18 Thereafter, detectives searched for the individuals identified by Crosby and arrested defendant. After advising defendant of his *Miranda* rights, Detective Halloran began interviewing defendant by stating that he understood defendant was a member of the Black Disciples and that he may have been ordered to be at the meeting where the victim was beaten to

[3] Duval is referred to as Duval Walker, Duvall Walker, and Duvall Washington in the record on appeal.

death. Defendant "became upset" and responded he was the chief of security for three buildings controlled by his gang and that "nobody gives him orders." Defendant admitted he was present at the meeting and provided 17 names or nicknames of Black Disciple members that were present at the meeting, including Horton and Duval. Defendant explained to Detective Halloran that the meeting was called because the victim had stolen two ounces of cocaine and the gang collectively decided the victim should be beaten as a form of punishment. Defendant further described to Detective Halloran how the victim was beaten but did not admit that he participated in the beating. Defendant also stated that he drove the victim to the hospital in his girlfriend's vehicle after the beating.

¶ 19 On cross-examination, Detective Halloran testified he had summarized defendant's statements in his police report, but that he had not taken a handwritten or court-reported statement because he believed defendant was only providing a "part of the story and leaving himself out."

¶ 20 3. Testimony of Thomas DeRosa

¶ 21 Thomas DeRosa (DeRosa) testified he is employed with the Cook County State's Attorney's Office as an assistant supervisor of the victim-witness relocation unit. DeRosa testified that on January 25, 1994, Crosby had informed him that she had witnessed Black Disciples members "beating the victim into unconsciousness" and that she could identify ten to fifteen of the participants. Crosby also indicated to DeRosa that her children were threatened by gang members "if she talked."

¶ 22 4. Testimony of Assistant State's Attorney Timothy Moran

¶ 23 Assistant State's Attorney Timothy Moran (ASA Moran) testified he is employed with the Cook County State's Attorney's Office. ASA Moran testified that on January 25, 1994, he

met Crosby prior to her appearance before the grand jury. ASA Moran further identified the transcript from Crosby's grand jury testimony and confirmed that she had answered his questions and had testified at the grand jury.

¶ 24 During the grand jury trial, Crosby testified that on January 23, 1994, she had observed defendant walking with the victim to her apartment before the beating. Crosby was moved to her bedroom by a gang member. She "looked out" her bedroom door several times and observed gang members "violating" the victim. Crosby testified the victim was getting a "crucial pumpkin, better known as a death violation." She explained that during a "crucial pumpkin," a fellow gang member places "his arms underneath the underarm of the person [being] violated and then puts his hands on the back of" the victim's neck, while other gang members beat the victim "with sticks, bats, poles whatever they have use for right then." Crosby further testified that she observed defendant beating and kicking the victim. She also observed Horton participate in the beating. After the victim was removed from the apartment by defendant and two other gang members, Horton returned to her apartment. Horton retrieved the bats, sticks, and the table leg that had been used to beat the victim. He also informed Crosby that she "don't know nothing" and "didn't see nothing."

¶ 25 5. Testimony of Sheila Crosby

¶ 26 Prior to Crosby's testimony, defendant's counsel made a motion *in limine* to exclude evidence that following Crosby's statements to the detectives and grand jury testimony, she was threatened by the brother of a ranking gang member, DeShawn Gardner, and was struck in the head by other gang members. The circuit court stated it would "allow the [evidence] if it's an explanation as to why she's testifying the way she is."

¶ 27 Additionally, defendant's counsel made a second motion *in limine* to exclude evidence

that while Crosby was testifying at a previous trial hearing, codefendant Jaynes placed his index finger to the side of his head with his thumb up in the form of a pistol. The circuit court granted the motion *in limine* as to this evidence because defendant would not have an opportunity to cross-examine Jaynes on his "statement."

¶ 28 Thereafter, Crosby testified and recanted her original grand jury testimony. Crosby stated that on January 23, 1994, approximately 10 to 12 "young men" were at her apartment but she did not know if they were gang members. Defendant "wasn't there that day," and she did not know if he was a gang member. She did not observe how the victim left her apartment that day. When she was provided a photograph and asked if she had identified it as a photograph of defendant at a grand jury proceeding, she answered, "I don't remember, I don't know his name." Crosby further testified the police had instructed her on what to say at the grand jury proceeding. She had followed their instructions because the police threatened to call DCFS to have her children taken away if she went to jail.

¶ 29 Then the State impeached Crosby with her original grand jury testimony she gave on January 25, 1994. This testimony provided that on January 23, 1994, there were 25 to 30 gang members at her apartment, including defendant. Defendant was one of the men beating and kicking the victim. After the beating, defendant and two other gang members carried him out of her apartment. When the State asked if she had testified in front of the grand jury that the gang members instructed her she "don't know nothing, I didn't see nothing," Crosby answered, "[t]hat's true."

¶ 30 Crosby further testified that, following her original statements to the police and the grand jury, she was placed in a witness protection program to protect her from gang retaliation. These efforts, however, failed when gang members found Crosby and informed her that she had to

return to her apartment so they could "watch" her.

¶ 31 The State then questioned Crosby about an incident that occurred on October 6, 1995, a month prior to trial. Crosby testified she was stopped by four Black Disciple gang members who "jumped," "slapped," and did "what they want to do to [her]." She had "two holes" in her head and received 15 stitches for two separate bleeding injuries due to the attack. Crosby testified she had been attacked because the gang members did not want her to testify at trial. Crosby then identified an individual sitting in court as one of her assailants. The circuit court ordered him to stand up and he identified himself as Taboo McNeal (McNeal). Crosby testified that McNeal "bothers [her] all the time" and that although she was afraid to testify at trial she was "going to tell the truth."

¶ 32 On cross-examination, Crosby testified she did not think the gang members attempted to intimidate her because they did not want her to testify against defendant and his codefendants. She stated, "[t]hey probably don't care about them, no way, but I know there's some other ones they don't want me to testify against." She further testified that she did not think defendant had anything to do with the men who attacked her a month before the trial.

¶ 33 6. Defendant's Evidence

¶ 34 Defendant offered no evidence at trial.

¶ 35 7. The Verdict

¶ 36 After hearing closing arguments and considering the evidence, the jury found defendant guilty of first degree murder. After a sentencing hearing, the circuit court imposed an extended term sentence of 70 years in the Illinois Department of Corrections, based on a finding that the offense was brutal and heinous.

¶ 37 B. Direct Appeal

¶ 38 Following his conviction, defendant appealed, arguing (1) the State "capitalized on the non-existent connection" between defendant and the men who had beaten and threatened Crosby and Sardin, and (2) defendant was denied a fair trial because the circuit court failed to inquire whether a juror was adversely influenced. This court affirmed the circuit court's judgment. *People v. Walker*, No. 1-96-0636 (1996) (unpublished order under Illinois Supreme Court Rule 23). Defendant filed a petition for leave to appeal to the Illinois Supreme Court, which was denied.

¶ 39 C. Postconviction Proceedings

¶ 40 1. Defendant's Initial Postconviction Petition

¶ 41 On March 18, 1998, defendant subsequently filed his initial *pro se* petition for postconviction relief. Defendant alleged the circuit court abused its discretion because the prosecutors used perjured testimony at trial and defendant was denied effective assistance of counsel. On May 1, 1998, the circuit court summarily dismissed the petition. Defendant appealed.

¶ 42 On appeal, this court granted the State Appellate Defender's motion to withdraw pursuant to *Pennsylvania v. Finley*, 481 U.S. 551 (1987), found no issues of arguable merit, and affirmed the circuit court's dismissal. *People v. Walker*, No. 1-98-1836 (1999) (unpublished order under Illinois Supreme Court Rule 23).

¶ 43 2. Defendant's Successive Postconviction Petition

¶ 44 A year later, in May 1999, defendant filed his second *pro se* postconviction petition that alleged (1) perjury was admitted at trial, (2) trial counsel was ineffective for failing to call certain witnesses and tender certain jury instructions, denying defendant his right to testify, and failing

to raise in the motion for a new trial the issue of other crimes evidence, (3) defendant was denied a fair trial when the circuit court refused to grant a mistrial where a fearful juror may have expressed fear to other jurors, (4) appellate counsel was ineffective for failing to challenge defendant's sentence as unconstitutional, (5) there were "illegal search and seizures," and (6) defendant's sentence was an abuse of discretion and "constitutionally disparate" from his codefendants.

¶ 45 In support of his claims, defendant attached two affidavits from Sardin to his petition. Sardin recanted his trial testimony in both affidavits. In the first affidavit, dated November 19, 1998, Sardin stated he had not been present for the victim's beating. Sardin indicated he had lied at codefendant Jaynes' trial when he testified that he had observed Jaynes beating the victim at the meeting. Sardin attested he was informed by the ASAs that he would be locked up for contempt or charged with the victim's murder if he recanted his grand jury testimony. Sardin also stated that Blackmun and Ross did not threaten him to recant his original grand jury testimony and that the only threats he received were from the detectives and the ASAs. In the second affidavit, dated March 14, 2000,[4] Sardin stated he had testified against defendant at trial because he was threatened by the detectives and the ASAs that he would be convicted for the murder of the victim if he did not testify before the grand jury with the information they provided him. Sardin reiterated that the threats he received were only from the detectives and the ASAs.

¶ 46 On June 2, 1999, the circuit court noted Sardin's two affidavits could be considered new evidence and appointed the Cook County Public Defender's Office to represent defendant.

[4] The record reveals that the notary signature on Sardin's affidavit dated March 14, 2000, attested that Sardin signed his name on March 14, 2000. We note, however, that this affidavit dated March 14, 2000, was used to support defendant's successive petition that was mailed on April 22, 1999, and filed in May 1999.

¶ 47 On April 15, 2002, the circuit court granted the State's motion to dismiss on grounds of untimeliness. The circuit court also found that *Apprendi* did not apply retroactively and that Sardin's "testimony was clear and convincing" at trial. *Apprendi v. New Jersey*, 530 U.S. 466, (2000).

¶ 48 Defendant, thereafter, appealed the dismissal of his successive postconviction petition, alleging (1) his public defender failed to file a certificate that fully complied with Illinois Supreme Court Rule 651(c) (eff. December 1, 1984) and (2) Sardin's two affidavits constituted newly discovered evidence. Although defendant did not explicitly raise the issue of actual innocence in his successive petition, this court addressed a claim of actual innocence based on Sardin's affidavits. This court affirmed the circuit court's judgment, finding that Sardin's two affidavits were cumulative of his written recantation that was presented at trial. *People v. Walker*, No. 1-02-1320 (2005) (unpublished order under Illinois Supreme Court Rule 23). This court also concluded that the public defender's failure to file a Rule 651(c) certificate was harmless error. *Id*.

¶ 49 On March 28, 2007, however, our supreme court denied defendant's petition for leave to appeal but entered a supervisory order vacating this court's decision and remanding the matter to the circuit court so that defendant's counsel could comply with Rule 651(c). *People v. Walker*, 223 Ill. 2d 678 (2007).

¶ 50 3. Remand in Successive Postconviction Proceedings

¶ 51 On September 13, 2012, defense counsel filed an amended certificate pursuant to Rule 651(c), stating that she was adopting defendant's previously filed *pro se* pleadings along with "additional [a]ffidavits." On March 7, 2013, the State then filed a motion to dismiss.

¶ 52 Thereafter, on April 4, 2013, defendant filed a response claiming that the additional

affidavits required an evidentiary hearing. The affidavits that were submitted were from defendant, Sardin, Horton, and Duval. In defendant's affidavit, he attested he did not participate in the beating. In Sardin's affidavit, unlike in his two previous affidavits, Sardin averred he was present at the beating death of the victim and that defendant did not participate in the beating.

¶ 53 Horton attested he was present at the beating death of the victim and that defendant did not participate in the violation of the victim. Horton stated defendant's only involvement in the incident was in assisting the victim to the hospital. Horton also claimed he is making this statement because "I know that [defendant] did not hit nor kick [the victim]."[5]

¶ 54 Duval averred he participated in the beating, but defendant "did not know anything about the crime." He claimed he was "saying something now because I [felt] guilty because he had nothing to do with it."[6]

¶ 55 On August 29, 2013, the circuit court granted the State's motion to dismiss defendant's successive postconviction petition. In granting the State's motion, the circuit court found defendant had failed to make a substantial showing that newly discovered evidence established his actual innocence. This appeal followed.

¶ 56 II. ANALYSIS

¶ 57 On appeal, defendant argues the circuit court erred in dismissing his petition without an evidentiary hearing because he presented newly discovered evidence that would change the result on retrial.

¶ 58 A. Standard of Review

¶ 59 The Act (725 ILCS 5/122-1 *et seq*. (West 1998)) provides criminal defendants the means

[5] Horton was charged along with defendant and is serving a 35-year sentence in the Illinois Department of Corrections.

[6] Duval was charged in a separate indictment with the victim's murder. He was convicted under a theory of accountability is serving a 23-year sentence.

to redress substantial violations of their federal or state constitutional rights in the proceedings that led to the conviction. *People v. Allen*, 2015 IL 113135, ¶ 20 (citing *People v. Pitsonbarger*, 205 Ill. 2d 444, 455 (2002)). A postconviction proceeding is not an appeal from the judgment of conviction, but is a collateral attack on a prior conviction and sentence. *People v. Tate*, 2012 IL 112214, ¶ 8. "The purpose of the proceeding is to allow inquiry into constitutional issues relating to the conviction or sentence that were not, and could not have been, determined on direct appeal." *People v. Barrow*, 195 Ill. 2d 506, 519 (2001). Accordingly, *res judicata* bars consideration of issues that were raised and decided on direct appeal, and issues that could have been raised on direct appeal but were not presented are considered forfeited. *People v. Simpson*, 204 Ill. 2d 536, 551, 560 (2001).

¶ 60 In noncapital cases, the Act creates a three-stage procedure for relief. *Allen*, 2015 IL 113135, ¶ 21. At the first stage, the circuit court must independently review the defendant's petition within 90 days of its filing and determine whether the petition is "frivolous or is patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 1998); *People v. Hodges*, 234 Ill. 2d 1, 11 (2009). At this stage, the defendant need only state the "gist" of a constitutional claim. *Hodges*, 234 Ill. 2d at 9. Since most petitions at this stage are drafted by *pro se* defendants, the threshold for survival is low. *Id.* If the circuit court determines the petition is either "frivolous or is patently without merit," the petition must be dismissed in a written order. *Id.*; 725 ILCS 5/122-2.1(a)(2) (West 1998). If the petition is not summarily dismissed by the circuit court as frivolous or patently without merit, the petition advances to the second stage. *Hodges*, 234 Ill. 2d at 10.

¶ 61 At the second stage, counsel may be appointed to an indigent defendant (725 ILCS 5/122-4 (West 1998)) and the State is allowed to file a motion to dismiss or an answer to the petition (725 ILCS 5/122-5 (West 1998)). *Hodges*, 234 Ill. 2d at 10-11. To avoid dismissal at

this stage, the circuit court must determine whether the petition makes a substantial showing of a constitutional violation. *People v. English*, 403 Ill. App. 3d 121, 129 (2010). If the circuit court determines the petitioner made a substantial showing of a constitutional violation at the second stage, he is entitled to a third-stage evidentiary hearing. *Id.*; 725 ILCS 5/122-6 (West 1998).

¶ 62 At a third-stage evidentiary hearing, the circuit court serves as a fact finder and accordingly, determines the credibility of witnesses, decides the weight to be given testimony and evidence, and resolves any evidentiary conflicts. *People v. Domagala*, 2013 IL 113688, ¶ 34. It is at this stage that the circuit court must determine whether the evidence introduced demonstrates that the petitioner is entitled to relief under the Act. *Id*.

¶ 63 In the instant case, the circuit court dismissed defendant's successive postconviction petition at the second stage of the proceedings. At the second stage, we review the legal sufficiency of the postconviction petition. *Id*. ¶ 35. Although the petitioner bears the burden of making a substantial showing of a constitutional violation, this does not require the court to engage in any fact-finding or credibility determinations. *Id*. Accordingly, the petitioner's allegations are taken as true, unless the record positively rebuts the allegations. *Id*.; *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006). In other words, the substantial showing of a constitutional violation that is required at this stage is demonstrated by "the legal sufficiency of the petition's well-pled allegations of a constitutional violation, *which if proven* at an evidentiary hearing, would entitle petitioner to relief." *Domagala*, 2013 IL 113688, ¶ 35. (Emphasis in original.)

¶ 64 We review the circuit court's dismissal of a postconviction petition at the second stage under a *de novo* standard. *Pendleton*, 223 Ill. 2d at 473. Under *de novo* review, we perform the same analysis that a trial judge would perform. *People v. Tyler*, 2015 IL App (1st)

123470, ¶ 151. Having set forth our standard of review, we turn to consider whether defendant's claim of actual innocence based upon newly discovered evidence warrants a third-stage evidentiary hearing.

¶ 65 B. Actual Innocence

¶ 66 Defendant argues he made a substantial showing of actual innocence warranting an evidentiary hearing because the affidavits of his codefendants Horton and Duval establish he did not participate in the beating death of the victim. Defendant further contends the affidavits of Horton and Duval exonerate defendant and contradict the State's evidence against defendant, which consist solely of Sardin's recanted trial testimony and Crosby's recanted grand jury testimony. Defendant asserts that accordingly, the proffered testimony of Horton and Duval, if taken as true, would likely lead to a different result in a new trial.

¶ 67 The State responds the circuit court properly rejected defendant's successive claim of actual innocence because the affidavits of Horton and Duval fail to satisfy the requirements of an actual innocence claim. The State maintains the two affidavits do not provide a basis for total vindication or exoneration, but instead attack the strength of the State's evidence at trial. The State further contends the State's evidence did not consist only of recanted statements because Crosby's grand jury testimony was properly admitted as substantive evidence and Sardin's testimony at trial was not a recantation. The State also argues the affidavits of Horton and Duval cannot be taken as true because Crosby's grand jury testimony, which was corroborated by other evidence presented at trial, rebuts the two affidavits. The State argues that accordingly, the affidavits of Horton and Duval would probably not change the result on retrial.

¶ 68 In his reply brief, defendant contends the affidavits of Horton and Duval are "exculpatory in [their] own right" because the two affidavits provide that Horton and Duval were present at

the beating of the victim and that defendant did not participate in the beating. Defendant further argues "there is no legally-sound basis for rejecting the truth or substance of Horton and Duval's affidavits" at this stage of the postconviction proceedings because credibility determinations can only be made at an evidentiary hearing. Defendant also contends total vindication or exoneration is not the applicable standard for reviewing an actual innocence claim, but rather the evidence need only "directly contradict" the evidence at trial, such that evidence of innocence "would be stronger" when weighed against the State's evidence.

¶ 69 Generally, the Act contemplates the filing of only one petition. 725 ILCS 5/122-1(f) (West 1998). Successive petitions are disfavored and therefore to proceed, a petitioner must first obtain leave of court by either asserting actual innocence or satisfying the cause-and-prejudice test. *People v. Wilson*, 2014 IL App (1st) 113570, ¶ 33.

¶ 70 As defendant here presents a claim of actual innocence, to succeed he must present evidence that is (1) newly discovered, (2) material and noncumulative, and (3) of such a conclusive character that it would probably change the result on retrial. *People v. Coleman*, 2013 IL 113307, ¶ 96. Newly discovered evidence means the evidence must have been discovered after trial and could not have been discovered sooner through the exercise of due diligence. *Id.* To qualify as material, the evidence must be relevant and probative of the petitioner's innocence. *Id.* Noncumulative means "the evidence adds to what the jury heard." *Id*. (citing *People v. Molstad*, 101 Ill. 2d 128, 135 (1984)). In determining whether the evidence is conclusive, we consider whether the new 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." *Id.* ¶ 97; *People v. Montanez*, 2016 IL App (1st) 133726, ¶ 23.

¶ 71 Here, the testimony provided in the affidavits of Horton and Duval constitute new

evidence. The two men were codefendants charged with the murder of the victim and they could not have been forced to violate their Fifth Amendment rights to avoid self-incrimination by testifying on defendant's behalf during trial. See *Molstad*, 101 Ill. 2d at 135 (the affidavits of codefendants were newly discovered evidence because "no amount of diligence could have forced the codefendants to violate their fifth amendment right to avoid self-incrimination"). Further, the affidavits of Horton and Duval qualify as material evidence. The two men indicated they were present for or involved in the beating but maintained defendant did not participate in the attack and only assisted the victim to the hospital. Such evidence is relevant and probative of defendant's innocence. *Coleman*, 2013 IL 113307, ¶ 96. Additionally, the affidavits of Horton and Duval (1) directly contradict the original statements provided by Sardin and Crosby that defendant participated in the beating, (2) are not cumulative to Crosby's recantation that defendant was not present at the beating, and (3) are not cumulative to Sardin's recantations that he did not witness the beating. *Id*. Rather, the evidence in the affidavits goes to the ultimate issue in the case, *i.e.*, who participated in the beating death of the victim, and if taken as true, would "produce new questions to be considered by the trier of fact" regarding defendant's guilt. *Molstad*, 101 Ill. 2d at 135. We thus find that the affidavits of Horton and Duval constitute new, material, and noncumulative evidence.

¶ 72 We now turn to determine whether the testimony in the affidavits of Horton and Duval were conclusive enough to "probably change the result on retrial." *Coleman*, 2013 IL 113307, ¶ 96. In making this determination, "[p]robability, 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." *Id* ¶ 97. Further, " '[n]ew evidence need not be completely dispositive of an issue to be likely to change the result upon retrial.' " *Id*. (quoting *People v. Davis*, 2012 IL App

(4th) 110305, ¶¶ 62-64).

¶ 73 We initially note that the State's case against defendant is arguably tenuous. The evidence provided against defendant was comprised solely of eyewitness testimonies provided by Sardin and Crosby that have since been recanted. There was no physical evidence connecting defendant to the beating. Thus, the State's evidence in this regard is not overwhelming. Further, even if we find Sardin's and Crosby's recantations were not credible, the new affidavits provided by Horton and Duval directly contradict the original testimony of Sardin and Crosby on the ultimate issue before the jury, *i.e.*, who participated in the beating death of the victim. Thus, at retrial, even if Sardin's and Crosby's recantations are found not credible, the affidavits of Horton and Duval would cast a shadow on Sardin's and Crosby's original statements and corroborate their recantations at retrial. See *People v. Ortiz*, 385 Ill. App. 3d 1, 12 (2008), *aff'd*, 235 Ill. 2d 319 (2009). As mentioned before, at this stage in the proceedings, the defendant is required only to present newly discovered evidence that would cause the court to view the "evidence presented at trial in a different light and [undercut] the court's confidence in the factual correctness of the guilty verdict." *Coleman*, 2013 IL 113307, ¶ 97. Here, we find that the affidavits provided by Horton and Duval, together with the evidence presented at trial, place the evidence presented by the State in a new light and undercuts our confidence in the factual correctness of defendant's verdict. *Id*. We thus find that the affidavits provided by Horton and Duval are conclusive enough to warrant a third-stage evidentiary hearing. *Id*. ¶¶ 96-97.

¶ 74 The State argues defendant's request for a third-stage evidentiary hearing should be dismissed because it cannot be said that the affidavits from Horton and Duval would probably change the result on retrial. We note, however, that the issue presented here is not whether defendant would be found guilty or not on retrial, but whether the new affidavits of Horton and

Duval warrant a third-stage evidentiary hearing. In this vein, we further note that our findings herein are for the limited purpose of determining that defendant has met the criteria to warrant a third-stage evidentiary hearing. *Molstad*, 101 Ill. 2d at 136. As the supreme court stated in *Molstad*, our finding "does not mean that [defendant] is innocent, merely that all of the facts and surrounding circumstances, including the testimony of codefendants, should be scrutinized more closely to determine the guilt or innocence of [defendant]." *Id.* Rather, it is " '[t]he fact finder [that] will be charged with determining the credibility of the witnesses in light of the newly discovered evidence and with balancing the conflicting eyewitness accounts.' " *Coleman*, 2013 IL 113307, ¶ 114 (quoting *Ortiz*, 235 Ill. 2d at 337). This court is foreclosed from any fact-finding at the second stage of proceedings under the Act. See *Pendleton*, 223 Ill. 2d at 473 (all well-pled facts that are not positively rebutted by the record are taken as true). As mentioned before, it is for the circuit court at a third-stage evidentiary hearing to determine the credibility of witnesses, decide the weight to be given testimony and evidence, and resolve any evidentiary conflicts. *Domagala*, 2013 IL 113688, ¶ 34. Accordingly, we remand this case for a third-stage evidentiary hearing on the issue of actual innocence. *Id.*; 725 ILCS 5/122-6 (West 1998).

¶ 75 CONCLUSION

¶ 76 For the reasons stated above, we reverse the judgment of the circuit court of Cook County and remand for further proceedings consistent with this order.

¶ 77 Reversed and remanded.