2014 IL App (2d) 131088-U
No. 2-13-1088
Order filed November 12, 2014

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. CHARLES GRANTER, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Kane County. No. 07-CF-2053 Honorable Karen M. Simpson, Judge, Presiding.

JUSTICE SPENCE delivered the judgment of the court.
Justice Jorgensen concurred in the judgment.
Justice McLaren dissented.

ORDER

¶ 1 *Held*: The court did not err in summarily dismissing defendant's postconviction petition, as (1) defendant did not sufficiently allege his actual innocence based on newly discovered evidence; (2) defendant's *Brady* claim was neither favorable nor material to have deprived him of due process; and (3) defendant's claim that his trial counsel was ineffective for failing to call a witness was frivolous and patently without merit. Therefore, we affirmed.

¶ 2 Following a bench trial, defendant, Charles Granter, was convicted of one count of predatory criminal sexual assault (720 ILCS 5/12-14.1(a)(1) (West 2006)) against minor B.S.; one count of predatory criminal sexual assault (720 ILCS 5/12-14.1(a)(1) (West 2006)) against

minor T.W.; and two counts of aggravated criminal sexual abuse (720 ILCS 5/12-16(c)(1)(i) (West 2006)) against T.W. He was sentenced to life imprisonment for each of the two counts of predatory criminal sexual assault and four years' imprisonment for each of the two counts of aggravated criminal sexual abuse, to run concurrently. On direct appeal, we affirmed the trial court's decision. *People v. Granter*, 2012 IL App (2d) 100086-U (unpublished order under Supreme Court Rule 23). Defendant subsequently filed a petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2012)). Defendant argued that he was actually innocent based on newly discovered evidence; that the State violated *Brady v. Maryland*, 373 U.S. 83 (1963); and that his trial counsel was ineffective. The trial court dismissed the petition. We affirm.

¶ 3 I. BACKGROUND

¶ 4 A. Trial

¶ 5 We begin by setting forth the facts as stated in defendant's direct appeal. Defendant was charged by indictment with three counts of predatory criminal sexual assault and five counts of aggravated criminal sexual abuse. Defendant's trial began on March 31, 2009.

¶ 6 1. State's Evidence

¶ 7 B.S. was born on December 4, 1995. Patricia S., B.S.'s mother, testified that for about three years prior to the incident involving B.S., she knew defendant and his wife, Anita (the Granters), from church. During the four or five months prior to this incident, defendant and Anita would spend time with her children approximately once a week. She stated that her children stayed overnight at defendant's house once, in February 2007. She also stated that defendant and Anita would take the three younger children, B.S., Rebecca, and Joey, shopping or to the movies. They gave the children clothing and stuffed animals as gifts for different holidays

or for their birthdays. She stated that she did not find anything unusual about that and "they seemed like very nice people" with no grandchildren of their own.

¶ 8 Ashley S., B.S.'s 18-year-old sister, testified that in April 2007, after school one day, she had a discussion about defendant with B.S., Rebecca and Joey. Ashley thought that the elementary school got out at 3:30, but "that was awhile ago." Rebecca and B.S. both told Ashley that they did not want to "go back" to defendant's house and that they thought defendant was "weird." When Rebecca made the statement, B.S. "got a little upset" and questioned her about why she did not want to go back. About one-half hour later, B.S. came into Ashley's room, handed her a note, and left the room. Ashley read the note which said, "[h]e touches me, I don't know what he does to Rebecca." Ashley telephoned her mother at work, who returned home about one hour later.

¶ 9 Ashley testified that defendant and his wife had befriended her family and that they went to church together. Defendant gave her a "dog tag" necklace with her name on it and a stuffed gorilla. She also stated that defendant had given her "friendly" hugs when she saw him at church, but that nothing he did on those occasions was improper.

¶ 10 Patricia S. testified that on April 19, 2007, she received a call at work from her daughter Ashley. When she returned home from work, Ashley handed her a note in B.S.'s handwriting. Patricia then asked B.S. to explain the note; B.S. told her that defendant had touched her by inserting his finger in her vagina. B.S. was teary-eyed when she said this but did not cry. Patricia then called the family doctor, who advised her to take B.S. to the hospital. She did so, and the hospital personnel contacted the police.

¶ 11 Patricia also testified that the elementary school B.S. attended got out at 2:10 p.m. Patricia would regularly return home around 5 p.m. Patricia testified that B.S. had received clothing from the Granters, including a swimsuit.

¶ 12 B.S. testified that at the time of trial, she was 13 years old and in seventh grade; in 2007 she was 11 years old. She testified that she knew defendant from church and spent time at his house, sometimes with her siblings and his wife present. She testified that on March 16, 2007, around 4 p.m., defendant picked her up after school from her house and they went to Target, where defendant bought her a skirt and two shirts. They stayed at Target about 20 minutes and then went to his house because "he said he was waiting for a call." No one else was there, and defendant told her to try on the clothes. She tried them on in his bedroom and then walked out of the bedroom to show defendant. He said that she looked cute. She thought she tried on two outfits that afternoon, and she thought they were the two he had purchased. She stated that he also asked her to put on a swimming suit that he had previously purchased without her knowledge, but she refused because he had "touched" her. She then was asked to "try to put Charlie touching you into the right order of when things happened." In response to these questions, B.S. testified that defendant "touched" her twice; first, after she tried on the first outfit, and then she told him that she "was going to go try on the other one, and I went to go try on the other one, and he touched me again."

¶ 13 When asked "how he touched you," B.S. described the touching as "[h]e reached his hand up my skirt and in my underwear." She stated that defendant did not say anything when he did this, and her reaction was "I told him I was going to go change." She came back out in a new outfit, and he touched her again "[t]he same way." She stated that he used his hand to touch her, and his finger entered her vagina. She then testified that on the same date defendant also touched

her breast under her shirt and bra that she wore to school. She stated that this occurred after she had changed clothes and she was "[i]n a chair." She told defendant to stop, but he did not stop. B.S. did not remember if defendant touched any other part of her body that day. She stated that before they left, defendant asked her to change into the swimming suit, but she did not do so. B.S. testified that defendant had given her other clothing as gifts, but she denied receiving any gifts from defendant for school or for holidays.

¶ 14 B.S. also testified that, on the same day, defendant took pictures of her with a Polaroid type camera that developed the pictures right away. She did not see the pictures but described her pose as "[o]ne with my legs closed and one with 'em like, like open, from the knees down, and then one with [my legs] at my side." The poses were defendant's idea. She testified that defendant "put the pictures in a photo album and then put it in a closet in his room." Defendant drove her home about 20 to 30 minutes later. On cross-examination, she stated that defendant went in her house with her; her father and her siblings were home at that time. Her mother returned around 5:30 p.m.

¶ 15 People's Exhibits 3 through 10, all articles of clothing, were admitted into evidence with the stipulation that they were obtained from B.S.'s mother. B.S. identified some of the items as clothing defendant presented to her at his house on March 16 that they had not bought at Target together that day. B.S. was inconsistent in her testimony regarding whether two of the articles of clothing were actually bought at Target that day and whether she tried them on at defendant's house on March 16.

¶ 16 On cross-examination, B.S. stated that she brought the clothes from Target home with her in a bag and put everything away in her drawers. She further stated that on the day she told her mother about the touching, she went through her drawers and picked out the clothes that

defendant bought her. When asked if she had told anyone about the touching before telling Ashley, B.S. stated that she told Rebecca one time when they were both at the Granters' house. However, B.S. next stated that she did not go back to the house after the assault and then that she did not remember if she did.

¶ 17 Further, on cross-examination, B.S. stated that she was "elevenish" when defendant took photographs of herself, Anita, her sister and brother, but she did not remember exactly when they were taken. They were taken at defendant's house. She stated that defendant bought "dog tags" for all five S. children. She stated that at about 3:30 p.m. on March 16, 2007, she walked home after school, about three to five blocks. When she arrived home her father, sisters, and brother were home. About 4 p.m.[1], defendant picked her up to go shopping at Target on Randall Road in Aurora. They spent about 15 minutes shopping and then checked out. Counsel continued to question B.S. at length about the timing of all the events she had testified to on direct.

¶ 18 B.S. testified that in March and April of 2007, she knew T.W. from church and saw her only at church. At the time of trial, they attended school together and saw each other in the hallway and at lunch, but they were not friends and did not talk to each other. They had never spoken to each other about what had happened to them.

¶ 19 Pam Ely, investigator for the Child Advocacy Center (CAC), testified that she interviewed B.S. for about 25 minutes on April 23, 2007, at the Kane County Child Advocacy Center. The interview was not taped. B.S. told Ely that she knew defendant through church and that on March 16, 2007, defendant took her shopping at Target where he bought her two articles of clothing, a skirt with fringe on the hem and a shirt with a bunny and the words "best friends"

[1] She first testified that the time was 3 p.m. until defense counsel stated that was impossible because she could not have arrived at home by that time.

on the front. B.S. said that they then went to his house where he "surprised her with several other articles of clothing." She tried on "a short skirt with frills on the bottom and a shirt with a bunny that said best friends" and asked him how she looked. B.S. told Ely that defendant told her she looked good. She told Ely that he then "put his hand up her skirt, and through the waistband of her underwear and that he touched her vagina with his hand and she said his finger went inside her vagina." She also told Ely that defendant took instant photographs of her sitting on the bed with her legs pulled up and apart, and "then also off to the side," wearing the outfit she had tried on. B.S. said that defendant kept the photographs and put them in an album that was on a table near the couch. B.S. told her that earlier in the day defendant had tickled her and had put his hand inside her shirt and touched her breast. She told Ely that he had touched her "butt" when he put his hand inside her underwear. According to B.S., defendant said that he only touched her because he loved her so much, and he would keep buying her things if she did not tell. B.S. related to Ely that she was at defendant's house for one or two hours before he brought her home.

¶ 20 On cross-examination, Ely identified items of clothing that had been collected from B.S.'s mother. These items included a t-shirt that did not say "best friends," three skirts without fringe, and three bathing suits pieces.

¶ 21 T.W. was born on May 12, 1996. Lucinda W., T.W.'s mother, testified that between May 2005 and April 2007, she lived in North Aurora with her two children, T.W. and Dolante, and her boyfriend, Joe. Lucinda stated that her father had formerly lived in the same neighborhood near defendant and knew defendant from "a long time ago." She first met defendant when she visited her father. She testified that T.W. sometimes went to church with Anita, defendant's wife. T.W. would also go to defendant's house on occasion to play or when she was bored. She

stated that defendant and Anita had given T.W. many clothes, including swimsuits, and a pair of high-heeled shoes. Lucinda also stated that defendant gave money to T.W. for her birthday and that he gave a watch to her son, Dolante. She listed defendant as T.W.'s godfather for an emergency contact at school. Lucinda testified that T.W. began visiting the Granters when she was about nine, but she visited less often closer to April 2007.

¶ 22 T.W. testified that she lived with her mother; her brother, Dolante; her stepfather, Joe; and her stepbrother Joe, Jr. At the time of trial she was 12 years old and in seventh grade. She stated that she visited defendant at his house "a lot" and that his wife was there "sometimes" but not always. She testified that defendant would touch her with his hands, specifically "[her] breasts, [her] vagina, and [her] butt." He would also touch her with "his private part." The first time this happened they were in his room; she did not remember what either of them was wearing. At that time, Anita was at work. She testified that defendant would tell her to "come here" and would touch her under her clothes with his hands. She testified that another name for defendant's "private part" was "penis," and he touched her "vagina." She stated that "[h]e would try to put it in" and that he did put his private part into her private part "[a] little bit" and that "[i]t hurt." She also stated that he put his finger in her "private part" a couple of times, and that it hurt. On cross-examination, she stated that she did not remember telling Assistant State's Attorneys Schmidt and Partida on January 12, 2009, that defendant did not touch her "inside her private part."

¶ 23 T.W. also stated that defendant asked her to touch "[h]is private part" with her hand, and he told her to "go up and down" and showed her how to do it. T.W. stated that defendant kissed her on the lips and put his tongue in her mouth. T.W. also stated that defendant took her picture "[l]ots of times" with a Polaroid camera, while she was naked. She never saw the pictures but

defendant put them in a box. She did not know where the box was kept. On cross-examination, she stated that she was not sure how many times he took pictures of her with no clothes on. He would take the pictures in his bedroom and then put them in a black box; T.W. did not know what material the box was made of. She also stated that defendant took pictures of her with her clothes on when his wife was home. T.W. remembered telling Pam Ely that defendant's penis had brown spots on it, and at trial she described them as "small" and "tiny."

¶ 24 T.W. stayed overnight at defendant's house "[a] couple times" and then went to church the next morning. On cross-examination, she stated that Anita took her to church on Sundays and Wednesdays and that defendant went to church with them only once. She also testified that she stayed overnight once and slept on the couch; Anita took her to church early and then dropped her off at home. Anita also took her to church on Wednesday evenings, between 10 and 20 times. Anita taught the kindergartners or preschoolers. T.W.'s mother, stepfather and brother did not go to church.

¶ 25 T.W. also stated that defendant gave her gifts, specifically high-heeled shoes and bathing suits. One of the shoes, two bathing suits, and the bottom to another bathing suit were admitted into evidence without objection. T.W. stated that she lost the missing shoe and the top to the third bathing suit. On cross-examination, she stated that she never wore the shoes but she showed them to her mother once, who thought they were "too grown." She also stated that she lost one shoe in her closet.

¶ 26 T.W. testified that defendant took her shopping to buy clothes; Anita did not accompany them. She tried on the clothes in the store to make sure they fit, and she only wore one outfit later, a "skort" and shirt. She stated she wore one of the bathing suits in her pool at home.

¶ 27 On cross-examination, T.W. testified that she knew B.S. from Wednesday night church but was not sure when they first met. She would also see B.S. at Sunday services.

¶ 28 Investigator Ely testified that she interviewed T.W. for one-half hour on April 30, 2007, on the front porch of the apartment where T.W. had been living since she was seven years old. The interview was conducted at T.W.'s home because "we had trouble locat[ing] her, we had stopped by the home on numerous occasions and found no one home. When we found someone home, we decided to do the interview right there." The interview took place outside on her porch in order to have some privacy. Ely asked T.W. her name, age, and school. She then asked about the neighborhood, and if she knew the neighbors. T.W. told Ely that "she knew one neighbor named Charlie, that he lived down by the river and he would bring her shopping" and that he bought her clothes and swimsuits. He would have her try them on for him at his home. T.W. told Ely that defendant also bought her a pair of black and pink high heels.

¶ 29 Ely then asked T.W. if she had "any problems with Charlie." Ely testified that prior to that question, T.W. had not said anything about problems with defendant. T.W. then said that defendant "had been touching her private," by which she meant vagina, "lots of times." She said that the touching started when she was seven, when he put his hand inside her shirt, and ended in April 2007. She also told Ely that on one occasion, he "tried to put his stuff inside of her private." She stated that defendant "made her touch his private part" and move her hand up and down. She also said that his penis had brown spots and that defendant had kissed her and put his tongue in her mouth. This happened four times when she was nine and ten years old. She said that he had taken lots of pictures with an instant camera of her "butt and private" after he "made her strip." T.W. said that defendant would put them in a box in his bedroom and said that "he

would hide them in a place where no one would ever find them." Defendant said that he loved her and not to tell anyone.

¶ 30 On cross-examination, Ely stated that no one had made a complaint to the authorities about defendant and T.W. T.W. told Ely that defendant hid the photographs in "a box" in his bedroom. Ely did not ask T.W. if she ever saw the box, nor did she ask T.W. to describe it. Ely testified that three photographs were found in defendant's home pursuant to a search warrant. One depicted T.W. and two depicted B.S. Nothing was unusual or improper about the pictures.

¶ 31 Robert Jones, Aurora Police Department investigator, testified that he was assigned to the Kane County Child Advocacy Center for 12 years. On April 24, 2007, he interviewed defendant. He testified that defendant stated that he knew B.S.'s family from church for two to three years. Defendant told him that B.S. "would run and jump on him," and he believed that she "had a crush" on him. Defendant also stated that he had put his arms around B.S. one time and "might have" touched her breasts, although he said she "really didn't have anything" and "they were like two fried eggs thrown against the wall." He initially denied that he "had ever touched her butt" but then said he "may have smacked her on the butt while he was playing around."

¶ 32 Jones further testified that defendant said that he did take B.S. shopping at Target in March 2007 and bought her clothes, but he denied the allegation that she had tried on any clothes at his house on March 16, 2007. He stated that he and B.S. went to his house for approximately one-half hour before they went to Target, at about 11 a.m., so he could take his pills and wait for a telephone call. Jones asked defendant if he touched B.S. that day, and he told Jones that he had tickled her on her stomach, over her clothes, and kissed her on the forehead. He had a couple of photographs of the S. children sitting around a card table.

¶ 33 Jones stated that he, Ely, and two North Aurora police officers executed a search warrant at defendant's house on the same day as the interview. Jones testified that a box containing a Polaroid camera was found in the master bedroom closet. A small photo album containing 14 photographs of a nude white adult female was also found and admitted into evidence over objection. Also, two photos of B.S. and her siblings depicting the S. children playing a board game with defendant's wife, and a framed photograph of T.W., fully clothed and posing appropriately, were admitted into evidence without objection.

¶ 34 On cross-examination, Jones testified that defendant explained that the nude photographs of a woman in the album were photos of his wife taken 40 years earlier. Jones also testified that a thorough search was conducted, and that they were specifically looking for improper pictures of B.S. and of T.W., but none were found. Defendant did not know that a search would be conducted that day. Defendant said that he helped out the S. family because the family was going through a hard time, with only Patricia working.

¶ 35 Jones also stated that defendant told him that he knew T.W., that she lived up the block, that she often came down to his house to play tetherball and with her dogs, and that she lied "a lot." Defendant also told Jones that T.W. had a crush on him.

¶ 36 Jones and Ely interviewed defendant again on April 30, 2007. At that interview, defendant stated that he knew T.W. from the neighborhood and had taken her to Target to buy clothes that she picked out. Defendant told Jones that T.W. told him about her grandfather "doing stuff to her." When asked when he had last had sex with his wife, defendant said that it was at 4 a.m. that day. Defendant told Jones that Anita wanted to know what the investigators wanted with 40-year-old pictures. He also told Jones that he had been married for 37 years and that he enjoyed touching his wife, not someone 50 years younger.

¶ 37 Jones testified that on May 12, 2008, pursuant to court order, he took photographs of defendant's penis. Jones stated that he did not see any spots on defendant's penis, and no spots were evident on the photographs. Jones testified further that he timed the trip from Target to defendant's house at seven minutes in what he described as average traffic; he made the trip at 10:30 a.m. on a weekday, and he did not pull into the Target parking lot.

¶ 38 Dr. Darryl Link specialized in internal medicine and pediatrics and was certified by the court as an expert in the field of child sexual abuse and treatment. Dr. Link testified that he examined T.W. on May 16, 2007. Her general exam was normal; her ano-genital exam was normal with two exceptions. First, Dr. Link stated that "the area that demands the most attention" is the hymen, but the scope of his examination was limited because T.W. was not cooperative in allowing a full examination. She was unable to relax her pelvic muscles, which happens in about 1 in 10 cases. Second, there was an abnormality in the posterior fourchette area, which Dr. Link described as a lesion. That type of lesion is often a wart caused by the human papilloma virus (HPV). He testified that he could not determine whether it was HPV by merely looking at the lesion. The best way to determine whether this type of growth is caused by HPV is by a tissue biopsy, which was negative. However, Dr. Link testified that only a positive result is conclusive; a negative report does not mean that it is not HPV. He then stated:

> "The establishment of this as an HPV-related lesion would be very consistent with child sexual abuse, but since we don't have that information, then, then best I could say is that my exam does not rule out child sexual abuse."

¶ 39 On cross-examination, Dr. Link admitted that the history he was given included "multiple occasions of digital and penile penetration of [T.W.'s] vagina" by defendant. He testified that he recommended to T.W. and her mother a definitive evaluation of the lesion by a specialist. Dr.

Link testified that such warts are contagious and are contracted only through direct contact with someone who has HPV. He also stated that developed HPV lesions are visible on a male, and that there is no treatment that would guarantee there would not be a recurrence of the virus, but that cryo-surgery (freezing), caustic agents, and laser treatments are all used as treatment. All of those treatments left a "[s]mall percentage" risk of recurrence. It was possible there would not be any visible evidence of having the virus because some treatments do not leave scarring. Also, the body can spontaneously eradicate lesions and "[i]t may take a number of months or years," but the body "will eradicate most HPV lesions from the body, eventually" without "any visible evidence of it."

¶ 40 The principal of the elementary school the S. children attended in 2007 testified that school ended at 2:10 p.m. at that time. Students who were bussed to another campus for classes, including B.S., would return to the school "within ten to 15 minutes of" that time.

¶ 41 2. Defense Evidence

¶ 42 Dr. Peter Starrett, a general practitioner for 50 years, testified that since May 2000 he had treated defendant for hypertension and high cholesterol. One of the side effects of the medications he prescribed for defendant was impotence, and he stated that defendant told him "it doesn't work." He told defendant that the choice was to take a blood pressure pill or have a "stroke or something" from hypertension. Dr. Starrett stated that in April 2008 defendant asked him for a test for venereal disease or genital warts. Dr. Starrett then gave defendant a complete physical and referred him to Dr. Steinberg, a urologist, who tested defendant for sexually transmitted diseases. In Dr. Starrett's opinion, defendant never had a venereal disease, including genital warts. He also stated that warts are extremely contagious.

¶ 43 On cross-examination, Dr. Starrett stated that he did not specialize in sexually transmitted diseases, and that was the reason he referred defendant to a urologist. He stated that the tests done on defendant were for syphilis, HIV antibody, hepatitis B surface, anti-CV, trichomonas and chlamydia, among others, and that all tests were non-reactive. He stated that the urologist's report indicated defendant was visually examined for genital warts, or human papilloma virus (HPV), and that he had none.

¶ 44 Anita Granter, defendant's wife of 38 years, testified that she worked at UPS. She was a team leader for the Wednesday evening youth activities at her church. The S. children attended these evening classes, as did T.W. The S. parents would pick up their children, and Anita would drive T.W. home. T.W. lived about a block away from their house and would come over two to three times per week, after Anita got home.

¶ 45 Anita testified that they had kept the S. children overnight two weekends, and she denied that they had come to their house at any other time. She got home at 4:30 p.m. on March 16, 2007, and B.S. was not there. Anita and defendant bought gifts for the S. children. Anita stated that Patricia gave them the clothes and shoe sizes for B.S., Rebecca and Joey over the phone, which defendant then wrote down. That list was admitted into evidence. Anita identified a copy of a Wal-Mart receipt from March 30, 2007, in the amount of $163.96, also admitted into evidence.

¶ 46 Anita further testified that she had sexual relations with defendant. Neither she nor defendant ever had genital warts. Defendant never had brown spots on his penis.

¶ 47 Anita testified that she timed the trip from B.S.'s school to Target at 2:10, when the school let out, and it took 20 minutes. It took about 10 minutes to go from Target to her house.

She did the same thing using a more direct route, and it took her a total of 25 minutes. Anita also timed the walk from the S. children's school to their house; it took 22 minutes.

¶ 48 John Varnas testified that he had been friends with defendant since 1973 and would go over to his house every weekday. He went to defendant's house on March 16, 2007, at about noon. They went to a junk yard for about 30 minutes and then went back to defendant's house. Defendant took him home at 3:30 p.m.

¶ 49 On cross-examination, Varnas testified that T.W. was sometimes at defendant's house while Anita was at work. She would arrive while he was there and leave right after him. He looked at a calendar to help him remember what he had been doing on the date in question.

¶ 50 Defendant testified that he was 63 years old at the time of trial. He had been married to Anita for 38 years, and they lived at the same address for 32 years. He stated that he met B.S.'s parents at church in January 2007. Anita regularly attended church and became friends with B.S.'s family. B.S.'s father had heart and back problems and was not able to work; as a result, their family was in a "desperate" financial condition. Defendant and Anita tried to help the family by buying gifts for Valentine's Day and clothes for B.S., Rebecca, and Joey, the three youngest children. Defendant stated that on March 30, 2007, he and Anita took them shopping at Wal-Mart and spent $163.96 on Easter outfits. Anita shopped with B.S. and Rebecca, and Joey stayed with defendant.

¶ 51 On another date in February or March 2007, defendant took B.S. to Target and bought her some clothes. It was a weekday when the children did not have school, and he picked up B.S. from her house at 10:30 a.m. He stated that he stopped at his house before going to Target because he needed to eat and also wait for a phone call. He and B.S. left at 11:30 a.m. and went to Target. B.S. picked out some clothes, and he bought them for her. He described a denim skirt

with fringe on the bottom and a shirt with a bunny that said "best friends forever" on the front. Defendant then drove B.S. home, arriving at her house at about 12:45 p.m. He denied buying swimsuits for either B.S. or T.W., and he denied taking inappropriate photographs of either girl. Defendant testified that he never inappropriately touched either girl, and he never had genital warts or brown spots on his penis. He denied seeing B.S. on March 16, 2007; instead, between 11:30 a.m. and 3:30 to 3:45 p.m. on that date, he helped Varnas move some items. They also went to the salvage yard and watched television during that time. Defendant further testified that when T.W. came over, she would arrive after Anita got home.

¶ 52 On cross-examination, defendant stated that he had known T.W.'s grandfather since he was a child; he met T.W. and her mother, Lucinda, through him. Lucinda and T.W. referred to defendant as T.W.'s "godfather," which was an indication of friendship as opposed to a church ceremony. Lucinda and T.W. were having financial problems, so defendant purchased school supplies and clothes for T.W. In addition, T.W. stayed overnight at defendant's house on three occasions because Anita took her to church the next morning. Defendant further testified that the individuals searching his property did not search his vehicles or the four sheds on his property, although he gave them permission to.

¶ 53 B. Trial Court's Ruling

¶ 54 On July 29, 2009, the trial court found defendant guilty of four counts and not guilty of two counts. Regarding counts I and II, the court stated:

> "As to Count 1, predatory criminal sexual assault, Court finds the defendant is guilty, proof has been made beyond a reasonable doubt that the proof is within the bill of particulars, ***.
>
> The Court finds that sexual penetration is [*sic*] defined in the statute, 720 ILCS

5/12-13(f) did occur by the specific act of defendant placing his finger in the vagina of [B.S.].

I found *** the individuals heard to be credible and believable with corroboration from Pam Ely. On Count [II], aggravated criminal sexual abuse, [the] Court makes a finding of not guilty.

There is a failure of proof. [B.S.] has testified that the event, and this was the alleged fondling of breasts of [B.S.] occurred, but neither the mother nor Pam Ely had corroborated that testimony.

The same, there was testimony from [B.S.] that defendant had tickled her inside her shirt; however, the Court has reasonable doubt as to whether or not there was knowing fondling of breasts as required by statute and there will be a finding of not guilty as to Count[II] ."

Defendant was granted a directed finding on count III at the end of the State's case.

¶ 55 Regarding offenses against T.W., the trial court found defendant guilty of count IV, stating:

"Sexual penetration did occur by defendant placing his penis in and on the vagina of [T.W.].

As her testimony indicated it went in a little bit and it hurt, and this was corroborated by Pam Ely's interview. [The] Court believes that the sexual penetration did occur."

¶ 56 As to count V, which alleged that defendant "committed an act of sexual penetration with T.W. *** in that he put his finger in the sex organ of T.W," the trial court found defendant not guilty because of failure of proof. In so finding, the trial court stated that "[T.W.]'s testimony

did not say that he went in her vagina, although Pam Ely's interview did include that." The trial court pointed out that the statutory definition of sexual penetration requires "some intrusion, however slight" and that it had a "reasonable doubt as to whether there was any such intrusion." Count VI was dismissed at the end of the State's case. The trial court then found that counts VII and VIII were proved beyond a reasonable doubt because evidence was presented with corroboration from the "Pam Ely interview." Further remarks from the trial court were as follows:

> "These, I have considered factors as I am required to, including 725 ILCS 5/115-7.3, regarding other crimes with analysis of the probative value versus undue prejudice in considering the proximity in time, the degree of factual similarity, the Court has found and has concluded that the ages of the two victims are similar, that the *** *modus operandi* was to try on clothes, buy clothes and have them to [*sic*] the defendant's house, there were pictures taken and that no one else was home at the time and these are all among the factors that were considered."

¶ 57 The trial court found B.S. and T.W. to be credible and believable. Referring to T.W.'s testimony, the trial court stated:

> "Issues were raised regarding genital warts or spots on the penis of the defendant. Regarding [T.W.]'s description. There was no detail given at the trial except on cross-examination where the questions were asked *** about the spots; she said they were small, and further description was invited, they were tiny and small; and that she had never seen a penis before, so the Court was unable then to match up medical testimony as to the exclusion of, likelihood of the event taking place, based on the medical observations of defendant, and his penis and the tests run versus what [T.W.] was referring to, especially without further

detail."

¶ 58 The trial court further found John Varnas' recollection "not persuasive" in that the alibi evidence did not exclude the opportunity for the crimes to occur.

¶ 59 Defendant's amended posttrial motion was denied on January 20, 2010. On appeal, defendant argued that the evidence was insufficient to find him guilty beyond a reasonable doubt of any of the four counts. With one justice dissenting, we affirmed defendant's convictions. *Granter*, 2012 IL App (2d) 100086-U (McLaren, J., dissenting).

¶ 60 C. Postconviction Petition

¶ 61 On June 25, 2013, defendant filed a petition under the Act. Defendant alleged that he was actually innocent, that the State violated *Brady v. Maryland*, 373 U.S. 83 (1963), and that his counsel was ineffective. Defendant supported his arguments by including the reports of Dr. Steinberg, who examined defendant, affidavits from investigator James Kirby, who interviewed Lucinda W. and Joel Brackenridge, and Joel Brackenridge's arrest record.

¶ 62 In claiming his actual innocence, defendant stated there were several factors to suggest that Joel Brackenridge was the one who had been abusing T.W. First, Joel Brackenridge was the identical twin brother of Joe Brackenridge (the boyfriend of T.W.'s mother Lucinda W.), and Joel Brackenridge was also a registered sex offender who was living only miles away from T.W. during the period of May 2005 through April 2007, when she was allegedly abused. Second, Joel Brackenridge pled guilty to aggravated criminal sexual abuse, admitting that he committed sexual acts with a family member under age 13. Third, Joel Brackenridge lied to investigator Kirby when he stated that he could not have abused T.W. because he was in prison at that time; Joel Brackenridge was actually released around May 2005 and not incarcerated again until November 30, 2007.

¶ 63 Defendant also cited evidence that he never had a sexually transmitted disease, as supported by a report from Dr. Steinberg, whereas T.W. possibly had a contagious sexually transmitted disease. T.W. further claimed that defendant had brown spots on his penis, whereas the evidence at trial showed that he did not.

¶ 64 Defendant additionally argued that Lucinda W.'s May 23, 2012, statements to investigator Kirby contradicted prior testimony. Specifically, Lucinda W. told investigator Kirby that she had been present for all of Ely's interviews of T.W., whereas Ely said that she had interviewed T.W. alone on April 30, 2007. Lucinda W. further said that she had not heard T.W. allege abuse by defendant and was "shocked" when T.W. told Ely she had been abused by defendant. However, Lucinda W. testified at a pre-trial hearing that T.W. had told her about potential sexual abuse by defendant in 2006 and that Lucinda W. did not tell the authorities. Lucinda W. also told Kirby that she had not heard of T.W. having a sexually transmitted disease, but her claim was not in line with Dr. Link's trial testimony that he was concerned T.W. had a sexually transmitted disease and had recommended Lucinda W. take her to a specialist. Defendant argued that Lucinda W.'s contradictions indicated that she was attempting to conceal the truth that T.W. was actually abused by Joel Brackenridge. According to defendant, under the State's theory, T.W. voluntarily chose to repeatedly visit defendant despite the abuse, but it is far more likely that T.W. escaped abuse at home when she visited him but was just afraid to talk about it in her family's presence.

¶ 65 Defendant also argued *Brady* was violated because the State must have known about Joel Brackenridge since Brackenridge was prosecuted in the same jurisdiction as defendant. Thus, defendant maintained that had the trier of fact been made aware of a registered sex offender's proximity to T.W., the court could have concluded that T.W.'s sexual knowledge and her report

that her abuser had "brown spots on his penis" were both unrelated to defendant, and it would have explained how T.W. had a sexually transmitted disease when defendant did not.

¶ 66 As for the ineffective assistance of counsel claim, defendant postulated that had his counsel called Dr. Steinberg as a witness, it would have produced a different outcome at trial. Defendant attached an exhibit indicating that Dr. Steinberg examined defendant on August 4, 2008, and May 8, 2009, and did not find any evidence that defendant had a sexually transmitted disease. Defendant argued that since Dr. Steinberg's testimony would have established that T.W.'s testimony was false, yet Dr. Steinberg was not called to testify, defendant would have been found not guilty but for his attorney's deficient performance.

¶ 67 D. Trial Court's Ruling

¶ 68 After reviewing the postconviction petition, the trial court summarily dismissed it. With respect to defendant's claim of actual innocence, the court stated defendant had not introduced newly discovered evidence that would have contradicted the State's other evidence against him, exonerated him, or made it more likely than not that no reasonable juror would have convicted him. In so concluding, the court stated as follows. The exercise of due diligence could have revealed T.W. lived close to a family member who was a convicted sex offender. Even if defendant's claims could be considered newly discovered evidence, defendant had not attached affidavits to his petition that would tend to exonerate him or were of such a conclusive character as to change the trial's results. Defendant had attached only the orders remanding custody of Joel Brackenridge for failure to register as a sex offender in 2006.

¶ 69 The court also rejected defendant's claim that his trial counsel was ineffective for failing to call Dr. Steinberg as a witness. The court stated that the decision to not call a witness would not support a claim of ineffective counsel unless, for example, the witness would support an

otherwise uncorroborated defense. The court then concluded that, since Dr. Starrett's testimony relied heavily on Dr. Steinberg's reports that defendant did not have a venereal disease, Dr. Steinberg's testimony would have been strictly cumulative in nature.

¶ 70 Defendant timely appealed.

¶ 71 II. ANALYSIS

¶ 72 On appeal, defendant challenges the trial court's dismissal of his postconviction petition under the Act. The Act provides a statutory remedy to criminal defendants who claim that their constitutional rights were substantially violated during trial. *People v. Edwards*, 2012 IL 111711, ¶ 21. A proceeding under the Act is a collateral attack on a conviction and sentence allowing inquiry into constitutional issues that were not, and could not have been, adjudicated on direct appeal. *People v. Taylor*, 237 Ill. 2d 356, 372 (2010).

¶ 73 "The Act provides a three-stage process for adjudicating postconviction petitions." *People v. Hommerson*, 2014 IL 115638, ¶ 7. At the first stage, the trial court independently assesses whether the petition's allegations, when liberally construed and taken as true, adequately present a constitutional claim for relief. *Id.* The court must look at the petition's "substantive virtue" rather than its "procedural compliance." *Id.* If the court determines the petition is "frivolous or is patently without merit" (725 ILCS 5/122-2.1(a)(2) (West 2012)), it must dismiss the petition. *Id.* A petition is frivolous or patently without merit only if it has no arguable basis either in law or in fact. *People v. Hodges*, 234 Ill. 2d 1, 12 (2009). A petition which is not dismissed at the first stage proceeds to the second stage, where the State answers the petition or may file a motion to dismiss. 725 ILCS 5/122-5 (West 2012); *Hommerson*, 2014 IL 115638, ¶ 8. If the trial court denies the State's motion or a motion was not filed, the petition proceeds to the third stage where the court conducts an evidentiary hearing on the petition's

merits. 725 ILCS 5/122-6 (West 2012); *Hommerson*, 2014 IL 115638, ¶ 8. Here, defendant's petition was dismissed at the first stage. We review the dismissal of a postconviction petition *de novo*. *Id*. ¶ 6.

¶ 74 A. Actual Innocence

¶ 75 Defendant contends that his petition stated the gist of a constitutional claim of actual innocence, since Joel Brackenridge must have sexually abused T.W., rather than him, which is supported by the contradictory statements Lucinda W. made to investigator Kirby.

¶ 76 The due process clause of the Illinois Constitution affords postconviction petitioners "the right to assert a freestanding claim of actual innocence based on newly discovered evidence." *People v. Ortiz*, 235 Ill. 2d 319, 333 (2009). In order for a claim of actual innocence to succeed, a defendant must present new, material, and noncumulative evidence "that is so conclusive it would probably change the result on retrial." *People v. Coleman*, 2013 IL 113307 ¶ 96. The Illinois Supreme Court in *Coleman* defined the terms new, material, noncumulative, and conclusive:

> "New means the evidence was discovered after trial and could not have been discovered earlier through the exercise of due diligence. [Citation.] Material means the evidence is relevant and probative of the petitioner's innocence. [Citation.] Noncumulative means the evidence adds to what the [trier of fact] heard. [Citation.] And conclusive means the evidence, when considered along with the trial evidence, would probably lead to a different result. [Citation.]" *Id*.

An actual innocence claim "is extraordinarily difficult to meet" and courts of review rarely grant postconviction relief. See *id.* ¶ 94 (noting that only three reported cases had granted actual innocence postconviction relief since 1996). Our supreme court has also noted the United States

Supreme Court's emphasis that " 'claims of actual innocence are rarely successful' " due to the unavailability of reliable evidence in a majority of cases, with reliable evidence being " 'exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence.' " *People v. Edwards*, 2012 IL 111711, ¶ 32 (quoting *Schlup v. Delo*, 513 U.S. 298, 324 (1995)).

¶ 77 We disagree with defendant's assertion that his evidence was newly discovered, material, and noncumulative sufficient to have stated a claim of actual innocence.

¶ 78 First, defendant's evidence related to Brackenridge cannot be considered new. New evidence must be evidence that "could not have been discovered earlier through the exercise of due diligence." *Coleman,* 2013 IL 113307, ¶ 96. Defendant challenges the trial court's statement that the information regarding Brackenridge could have been discovered through due diligence because of the close proximity of Brackenridge, a registered sex offender, to T.W. Without directly addressing the trial court's statement regarding the proximity of Brackenridge, defendant counters that Brackenridge would have been incarcerated for most of the pretrial hearings and trial, and thus unavailable to make the "inculpatory statements he made to investigator Kirby." We disagree with defendant's assertions. Joe Brackenridge, who defendant readily admits to be the identical twin brother of Joel Brackenridge, was listed as a State's witness prior to trial. Yet, defendant has not indicated why he could not have discovered the existence of Brackenridge, a registered sex offender, who was a family member, living nearby T.W. Nor has defendant explained why incarceration would have precluded questioning someone he believes would entirely exonerate him. Thus, defendant has not shown that this evidence could not have been discovered through due diligence.

¶ 79 Second, as we discuss, defendant's claims about Brackenridge are not so conclusive so as to lead to a different result on retrial. See *Coleman*, 2013 IL 113307, ¶ 96. Defendant argues

that the evidence shows that T.W. was indeed sexually assaulted, just not by him, and there was no evidence that T.W. was sexually assaulted by two people. According to defendant, the trial court ignored evidence that Brackenridge likely abused T.W.; that T.W. obtained a sexually transmitted disease from Brackenridge; that T.W. was thinking of Brackenridge when describing brown spots on his penis; that T.W.'s inappropriate amount of knowledge of sexual matters originated from Brackenridge; and that T.W.'s testimony was not credible because defendant's name came up only after her interview with Ely.

¶ 80 Defendant supports his arguments by attaching Brackenridge's arrest record and an affidavit from investigator Kirby. Investigator Kirby's affidavit states that during his interview with Brackenridge, Brackenridge stated he knew T.W. and was aware of the criminal proceedings. Brackenridge stated, though, that he "was not the one" who had abused T.W., and further explained he could not have abused her since he was imprisoned from 2002 through 2010. However, Brackenridge's arrest record shows he was released from prison sometime before April 2006, when he was arrested for failure to register as a sex offender. At some point after his April 2006 arrest, Brackenridge was released on bond, and then in November 2007 his bond was revoked and he was sentenced to 30 months in jail.

¶ 81 Rather than conclusive, defendant's claims regarding Brackenridge are speculative at best. Contrary to defendant's assertion, Brackenridge directly denied sexually assaulting T.W. While the attached evidence appears to demonstrate that Brackenridge either lied or was mistaken about his dates of imprisonment, the fact that he was a close proximity family member and registered sex offender who was apparently aware of T.W. and the trial's proceedings is not evidence so conclusive to defendant's own actual innocence that it would likely change the result on retrial.

¶ 82 Regarding defendant's argument that he did not have a sexually transmitted disease even though evidence suggested T.W. did, it should be noted we addressed this issue in defendant's direct appeal and concluded that, according to the evidence, it was "quite possible" T.W. did not have HPV; that defendant's acts could have ended before she contracted the disease; and that it was also possible defendant had a sexually transmitted disease at one time. See *Granter*, 2012 IL App (2d) 100086-U, ¶ 71. Even otherwise, the trial court weighed these potentially contradictory facts before defendant's conviction, therefore such evidence could not be "newly discovered" for purposes of defendant's postconviction petition. See *Ortiz*, 235 Ill. 2d at 334 (" 'newly discovered' " evidence [is] defined as evidence that has been *discovered since the trial* and that the defendant could not have discovered sooner through due diligence." (Emphasis added.)).

¶ 83 Moreover, as the State points out, even if, *arguendo*, Brackenridge was sexually abusing T.W., this would not undermine the evidence that defendant had also abused T.W. Further, T.W. was not the only victim defendant was convicted of sexually assaulting, and we noted the similarities in defendant's behavior towards T.W. and B.S. in defendant's direct appeal. See *Granter*, 2012 IL App (2d) 100086-U, ¶ 67. Here, defendant does not challenge the convictions relating to B.S. except for stating that his "new evidence *** casts doubt on the already weak evidence presented at trial." Defendant then concludes that if he is innocent of the allegations against T.W., he is therefore innocent of the allegations against B.S. However, defendant does not explain how B.S.'s allegations do not corroborate T.W.'s allegations. Furthermore, as noted, defendant's medical evidence regarding whether he or T.W. had a sexually transmitted disease did not raise a reasonable doubt sufficient to undermine the trial court's conviction. See *id.* ¶ 71. Nor did T.W.'s testimony that she observed brown spots on defendant's penis, even though

evidence showed a lack of brown spots on defendant's penis, raise a reasonable doubt of defendant's guilt. See *id*. ¶ 74. For these reasons, defendant's arguments against Brackenridge do not contradict the State's evidence, nor are they so conclusive as to lead to a different result.

¶ 84 Finally, defendant argues the contradictory statements made by Lucinda W. to investigator Kirby supports his actual innocence claim. Kirby's affidavit includes Lucinda W.'s statements that she was present at the interviews between T.W. and Ely; she had not heard of T.W.'s allegations against defendant before Ely's interview; and she denied T.W. had a sexually transmitted disease, including denying ever hearing T.W. may have had a sexually transmitted disease. While Lucinda W.'s three statements appear to contradict some of the State's evidence below, Lucinda W.'s testimony below and the apparent contradictions were all related to collateral issues for the State's case, and thus any impeachment would not be so conclusive in nature so as to probably change the result on retrial. See *People v. Collier*, 387 Ill. App. 3d 630, 637 (2008) ("Evidence that merely impeaches a witness will typically not be of such conclusive character as to justify postconviction relief.").

¶ 85 B. *Brady* Claim

¶ 86 Defendant next argues that his petition presented a non-frivolous claim the State violated *Brady* by not disclosing "Joel Brackenridge's status as a sex offender or his relationship and access to T.W.," because defendant could have been acquitted had the evidence pertaining to Brackenridge been disclosed at the time of trial.

¶ 87 The United States Supreme Court established in *Brady* that the State has a duty to disclose favorable evidence to a defendant. *Brady*, 373 U.S. at 87. The State's adherence to *Brady* serves the interests of justice. *People v. Beaman*, 229 Ill. 2d 56, 73 (2008) (citing *Strickler v. Greene*, 527 U.S. 263, 281 (1999)). Failing to disclose evidence that is material

either to guilt or punishment violates a defendant's due process rights, regardless of whether the State acted in good faith or bad faith. *Brady*, 370 U.S. at 87. Our supreme court has held that to establish a *Brady* violation, a defendant must show that: "(1) the undisclosed evidence is favorable to the accused because it is either exculpatory or impeaching; (2) the evidence was suppressed by the State either wilfully or inadvertently; and (3) the accused was prejudiced because the evidence is material to guilt or punishment." *Beaman*, 229 Ill. 2d at 73-74. Illinois codified the requirements of *Brady* in Supreme Court Rule 412. Ill. S. Ct. R. 412(c) (eff. Mar.1, 2001) ("[T]he State shall disclose to defense counsel any material or information within its possession or control which tends to negate the guilt of the accused as to the offense charged or which would tend to reduce his punishment therefor.").

¶ 88 The State disputes that evidence concerning Brackenridge was suppressed, because defendant was aware of Brackenridge prior to trial. The State argues that defendant could have interviewed Joe Brackenridge, who was listed as a State witness prior to trial, and that defendant referred to Joe Brackenridge's "twin that is a pedophile" at the sentencing hearing. We need not determine whether the State is correct that defendant could have discovered Brackenridge, because regardless of whether the evidence surrounding Brackenridge was suppressed, defendant has failed to establish that such evidence was favorable to him or that it would have been material under *Brady*.

¶ 89 *Beaman* offers insight into what evidence is favorable and material. See *Beaman*, 229 Ill. 2d at 74, 76. Favorable means evidence that is either exculpatory or impeaching. *Id*. at 73-74. Offering an alternative suspect that shows someone else committed the charged offense could be considered favorable evidence. *Id*. at 75-76. However, when offering an alternative suspect, evidence cannot be "too remote or speculative." *Id*. at 75. *Beaman* held "[e]vidence is material

if there is a reasonable probability that the result of the proceeding would have been different had the evidence been disclosed." *Id*. at 78. When determining materiality, a court must look at the cumulative effect of the proffered evidence. *Id*. To satisfy materiality, a defendant must demonstrate the evidence would reasonably undermine the verdict below. *Id.*

¶ 90 Defendant's evidence surrounding Brackenridge is "too remote and speculative" to be exculpatory. Defendant's evidence of Brackenridge as an alternative suspect is limited to stating, without proof, that Brackenridge lied to investigator Kirby when Brackenridge said he could not have abused T.W. since he was incarcerated during the time frame in question; that T.W. must have become knowledgeable of inappropriate sexual matters through Brackenridge; that Brackenridge was the origin of T.W.'s sexually transmitted disease; and that T.W. must have been describing Brackenridge's penis when she referenced "brown spots." First, as we stated, Brackenridge did not admit to abusing T.W., and it was never determined conclusively that T.W. had a sexually transmitted disease. Second, defendant can only postulate that T.W. was referring to Brackenridge's penis, or that T.W. learned of sexual matters from Brackenridge. Therefore, even though evidence surrounding Brackenridge would, at first glance, seem favorable as exculpatory in offering an alternative suspect, defendant's assertions are too speculative to be considered favorable. See *Beaman*, 229 Ill. 2d at 75-76.

¶ 91 In addition, defendant's evidence of an alternative suspect to support a *Brady* violation is not material and therefore not prejudicial. As we stated when discussing defendant's actual innocence claim, even if defendant's allegations against Brackenridge were true, defendant has not offered evidence that Brackenridge sexually assaulting T.W. would mean defendant could not also have been sexually assaulting her. Furthermore, the State produced sufficient evidence at trial including the mutually corroborating testimony of both victims leading to defendant's

conviction. Therefore, defendant did not sufficiently allege a claim that there is a reasonable probability that the evidence surrounding Brackenridge would undermine confidence in the verdict below. See *Beaman,* 229 Ill. 2d at 78.

¶ 92 C. Ineffective Assistance of Counsel

¶ 93 Last, defendant argues that his postconviction petition presented a non-frivolous claim his trial counsel was ineffective. For a claim of ineffective assistance of counsel, a defendant must satisfy the two-prong test set forth in *Strickland v. Washington,* 466 U.S. 668 (1984). *People v. Hodges,* 234 Ill. 2d 1, 17 (2009). When the claim involves trial counsel, the defendant must first establish that, despite the strong presumption that counsel acted competently and that the challenged action was the product of sound trial strategy, counsel's representation fell below an objective standard of reasonableness under prevailing professional norms such that he or she was not functioning as the counsel guaranteed by the sixth amendment. *People v. Manning*, 227 Ill. 2d 403, 416 (2008). Second, the defendant must establish prejudice by showing a reasonable probability that the proceeding would have resulted differently had it not been for counsel's unprofessional errors. *People v. Henderson,* 2013 IL 114040, ¶ 11. A failure to establish either prong of the Strickland test precludes a finding of ineffective assistance of counsel. *Id*. In the first stage of postconviction proceedings, we look at whether it is "arguable" that the two prongs were satisfied. *People v. Wright,* 2013 IL App (4th) 110822, ¶ 22.

¶ 94 Trial counsel's decision to present a witness remains a strategic choice that is "generally not subject to attack on the grounds of ineffectiveness of counsel." *People v. Gonzalez*, 407 Ill. App. 3d 1026, 1038 (2011). "Errors in strategy do not constitute ineffective assistance of counsel." *Id*. However, "an attorney may be deemed ineffective for failing to present

exculpatory evidence, such as failing to call witnesses to support an otherwise uncorroborated defense theory." *People v. Harmon*, 2013 IL App (2d) 120439, ¶ 26.

¶ 95 Defendant argues that Dr. Steinberg's unheard testimony would have "completely rebutted" the State's case since T.W. had a sexually transmitted disease and Dr. Steinberg's potential testimony would have established defendant did not have a sexually transmitted disease. It is clear defendant presupposes that T.W. had a sexual transmitted disease, and that Dr. Steinberg's potential testimony would have presented new information for the trier of fact. To begin with, we again note the inconclusiveness of whether T.W. had a sexually transmitted disease. However, since failure of either prong of the *Strickland* test precludes a finding of ineffective assistance of counsel (*Henderson*, 2013 IL 114040, ¶ 11), we need only address whether defense counsel was arguably deficient for failing to call Dr. Steinberg to testify.

¶ 96 In setting forth his argument, defendant attached to his postconviction petition Dr. Steinberg's reports from his two medical examinations of defendant. Dr. Starrett, defendant's physician, referred defendant to Dr. Steinberg, a board-certified urologist, for tests to determine whether defendant had a sexually transmitted disease, specifically HPV. On August 4, 2008, after evaluating defendant, Dr. Steinberg's impression was that defendant's examination did not indicate the presence of a sexually transmitted disease, and he concluded that defendant would not need further treatment. On May 8, 2009, Dr. Steinberg evaluated defendant using the same test and examination from defendant's prior visit, and Dr. Steinberg again concluded that defendant did not have HPV. At trial, Dr. Starrett testified that he sent defendant to Dr. Steinberg in order to be tested for a sexually transmitted disease. Dr. Starrett testified that in his medical opinion defendant never had a sexually transmitted disease. Dr. Starrett's statement was based, in part, on Dr. Steinberg's report.

¶ 97 We cannot find that defendant's counsel was arguably objectively unreasonable for failing to call Dr. Steinberg, who would have testified that defendant did not have a sexually transmitted disease, when defendant's own physician, relying on Dr. Steinberg reports, testified that defendant did not have a sexually transmitted disease. Dr. Steinberg's potential testimony would not have presented an uncorroborated and exonerating defense, because the potential testimony would have been cumulative as to what the trier of fact had already heard. Because defendant has not arguably established that his trial counsel fell below an objective standard of reasonableness, defendant has not arguably satisfied the first prong of the *Strickland* test, and his ineffective assistance of counsel claim necessarily fails. See *Manning*, 227 Ill. 2d at 416.

¶ 98 III. CONCLUSION

¶ 99 For the foregoing reasons, we affirm the judgment of circuit court of Kane County dismissing defendant's postconviction petition in the first stage of postconviction proceedings.

¶ 100 Affirmed.

¶ 101 JUSTICE McLAREN, dissenting.

¶ 102 While recognizing that an actual innocence claim is "extraordinarily difficult to meet," (*supra* ¶ 76), I believe that our *de novo* review of the petition dictates reversal of the trial court's first-stage dismissal of defendant's postconviction petition.

¶ 103 To survive the first stage, a *pro se* litigant's petition need only present the gist of a constitutional claim. 725 ILCS 5/122-2.1 (West 2008). Presenting the "gist" of a constitutional claim is a low threshold, and only limited detail is necessary for the petition to proceed beyond the first stage of post-conviction review, as opposed to setting forth a claim in its entirety. *Hodges*, 234 Ill.2d at 11; *People v. Williams*, 364 Ill.App.3d 1017, 1022 (2006). The allegations

in the petition must be taken as true and liberally construed. *People v. Edwards*, 197 Ill.2d 239, 244, 258 (2001). At issue is whether defendant's petition met this low threshold.

¶ 104 The majority references the holding that "a *pro se* petition seeking postconviction relief under the Act for a denial of constitutional rights may be summarily dismissed as frivolous or patently without merit only if the petition has no arguable basis either in law or in fact" (*Hodges*, 234 Ill. 2d at 11-12). *Supra* ¶ 73. However, this legal tenet deserves more than the lip service provided by the majority.

¶ 105 The United States Supreme Court has defined a frivolous claim as one that "lacks an arguable basis either in law or in fact." *Neitzke*, 490 U.S. at 325. According to the Court, such claims include those "based on an indisputably meritless legal theory" as well as claims "whose factual contentions are clearly baseless," *e.g.*, "claims describing fantastic or delusional scenarios." *Neitzke*, 490 U.S. at 327-28. *Hodges*, 234 Ill. 2d at 13. The *Hodges* court added the following footnote to its discussion of the meaning of "frivolous" in this context:

> " '[A] finding of factual frivolousness is appropriate when the facts alleged rise to the level of the irrational or the wholly incredible. * * * An *in forma pauperis* complaint may not be dismissed, however, simply because the court finds the plaintiff[']s allegations unlikely. Some improbable allegations might properly be disposed of on summary judgment, but to dismiss them as frivolous without any factual development is to disregard the age-old insight that many allegations might be 'strange, but true; for truth is always strange, Stranger than fiction.' Lord Byron, Don Juan, canto XIV, stanza 101 (T. Steffan, E. Steffan & W. Pratt eds.1977).' Denton, 504 U.S. at 33, 112 S.Ct. at 1733–34, 118 L.Ed.2d at 350. Denton, like Neitzke, is a 42 U.S.C. § 1983 case." *Hodges*, 234 Ill. 2d at 13.

¶ 106 That defendant is represented by counsel at this stage does not change the threshold standard by which we are guided in our analysis. Our supreme court has stated that, at the summary dismissal stage of the post-conviction proceeding, the trial court does nothing more than allow the trial court to act "strictly in an administrative capacity by screening out those petitions which are without legal substance or are obviously without merit." *People v. Tate*, 2012 IL 112214, ¶ 12 (citing *People v. Rivera*, 198 Ill. 2d 364, 373 (2001)).

¶ 107 The emergence of Joel Brackenridge as being a "close proximity family member and registered sex offender who was apparently aware of T.W. and the trial's proceedings" (*supra* ¶ 81) is significant. The majority quotes *Coleman*, 2013 IL 113307 ¶ 96, as follows: "New means the evidence was discovered after trial and could not have been discovered earlier through the exercise of due diligence." *Supra* ¶ 76. I fail to see how the majority (and the trial court) believes that defendant could have found Joel Brackenridge through "due diligence." I believe that in this regard defendant is being subjected to an impossible standard. Further, the majority notes that the attached evidence, in the form of the investigator's affidavit, appears to demonstrate that Brackenridge either lied or was mistaken about his dates of imprisonment. *Id*. The majority also notes that in the interview with the investigator Brackenridge directly denied sexually assaulting T.W. *Id*. In my view, the majority gives too much weight to the denial of a convicted sex offender when, in the same interview, he either lied or was mistaken about residing in Aurora near T.W. for almost two years, from May 2005 through April 2007. I submit that the facts that Brackenridge was T.W.'s stepfather's twin brother; was not incarcerated at the time of the occurrences; and had been convicted of aggravated criminal sexual abuse, violating the sex offender registration act, and failure to report a change of address/employment, if known to the trier of fact, could have led to a different result.

¶ 108 As stated in my dissent in *People v. Granter*, 2012 IL App (2d) 100086-U (unpublished order under Supreme Court Rule 23), I believe that the State did not sustain its burden of proving defendant guilty beyond a reasonable doubt. I continue to believe that the trial court improperly considered T.W.'s and B.S.'s repetition of the accusation to be "corroboration" rather than merely enhancing the credibility of the witnesses. I also believe that Ely's questioning of T.W. was suggestive and that Ely's testimony regarding T.W.'s prior consistent statements should have been excluded. However, the question we must answer is not the same as that posed in a second stage postconviction proceeding, *i.e.*, whether the petition and any accompanying documentation make "a substantial showing of a constitutional violation." *Tate*, 2012 IL 112214,¶ 10.

¶ 109 "At the dismissal stage of a post-conviction proceeding, all well-pleaded facts that are not positively rebutted by the original trial record are to be taken as true." *Coleman*, 183 Ill. 2d at 385. I do not believe that the allegations in defendant's petition are irrational or wholly incredible. The affidavits of the investigator regarding T.W.'s mother's interview and Joel Brackenridge's interview establish an arguable basis such that defendant's petition should proceed to the second stage and he should be granted an evidentiary hearing.

¶ 110 Regarding defendant's assertion that trial counsel was ineffective, I believe the petition sufficiently alleges a deficiency in counsel's performance. As the majority recognizes, in order to meet the *Strickland* test for ineffective assistance of counsel, the defendant must *demonstrate* ineffective assistance by *showing* that his counsel's performance was deficient and that this deficient performance prejudiced the defense. See *id.* ¶ 18. *Supra* ¶ 93.

¶ 111 The supreme court in *Tate* held that the above correctly describes the *Strickland* test as it would be applied at the *second* stage of postconviction proceedings, where, in order to avoid

dismissal, the petition must make a substantial showing a of a constitutional violation. *Id*. ¶ 19. However, at this *first* stage, a different, more lenient formulation applies. *Id*. "At the first stage of postconviction proceedings under the Act, 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." (Emphasis in original.) *Id.*. I believe that this "arguable" *Strickland* test applies here. The "potentially contradictory facts" referred to by the majority (*supra* ¶ 82) were the confusing reports of doctor visits and tests that were done, or not done, on T.W. and defendant, as well as the existence or non-existence of a sexually transmitted disease. Thus, the failure to call Dr. Steinberg to testify as to his own findings regarding defendant's physical condition was arguably ineffective. Judging this first-stage postconviction allegation of ineffective assistance of counsel by the appropriate lower pleading standard, I would reverse the dismissal of this petition.

¶ 112 For these reasons, I believe that defendant has met the burden of stating the gist of a constitutional claim and that defendant's petition was not frivolous or patently without merit. I believe his petition should be advanced to the second stage of postconviction proceedings, docketed for further consideration, and the State ordered to answer or otherwise respond.