

¶ 3 The defendant appealed, alleging that he was not proven guilty beyond a reasonable doubt and that the trial court erred by refusing to grant a continuance to allow him to present further evidence that a key witness had committed perjury. On October 26, 2006, this court affirmed the defendant's conviction and remanded to the trial court for an evidentiary hearing on the defendant's motion for a new trial. *People v. Coyle*, No. 5-04-0501 (Oct. 26, 2006) (unpublished order pursuant to Supreme Court Rule 23). Following a hearing, the motion was denied.

¶ 4 The defendant filed a second appeal. The office of the State Appellate Defender was appointed to represent him. His appointed attorney filed a motion with an attached memorandum pursuant to *Anders v. California*, 386 U.S. 738 (1967), alleging that there was no merit to the appeal and requesting leave to withdraw. This court granted the State Appellate Defender's motion to withdraw as counsel, found no error or potential grounds for appeal, and affirmed the judgment of the trial court. The defendant filed a *pro se* postconviction petition claiming actual innocence and ineffective assistance of counsel. The State filed a motion to dismiss. Following a hearing, the court granted the State's motion. The defendant filed a timely appeal arguing that the trial court improperly dismissed his petition without an evidentiary hearing and that he was denied reasonable assistance of counsel during his postconviction proceedings. We reverse the dismissal of the petition at the second stage of the postconviction process and remand for an evidentiary hearing.

¶ 5 **BACKGROUND**

¶ 6 On July 2, 2002, the defendant was charged with predatory criminal sexual assault of a child for allegedly placing an object in H.J.'s vagina. On July 18, 2002, the indictment was amended to add a count of predatory criminal sexual assault of a child alleging that the defendant committed an act of sexual penetration by placing an object in H.J.'s anus.

¶ 7 On October 20, 2003, and January 15, 2004, there were hearings regarding the

defendant's request to subpoena records from the Department of Children and Family Services (DCFS). The defendant sought to review records relating to an open investigation of sexual abuse at the home where H.J. resided with her parents and extended family. Defense counsel stated that H.J.'s father's minor brother, Richard, Jr., had been removed from the home for sexually abusing his minor brother, Michael. Defense counsel argued that the investigation was relevant because H.J. was only at the defendant's home for babysitting for a few hours, while she lived in the other household. Defense counsel stated that he wanted to find out if Richard, Jr., was removed from the house for sexual penetration, if he was out of the house at the time of the incident with H.J., and, if so, if there were visits to the home and under what terms. Defense counsel stated that H.J.'s maternal grandmother and the defendant's wife, Linda Coyle, gave him a letter that indicated that the home where H.J. was residing was also under investigation for another suspected incident of sexual abuse or molestation. Defense counsel argued that the investigation was relevant to the defendant's opportunity to explore possible defenses open to him in the case. The court ruled that the defense attorney and the State should be allowed to view the DCFS records to determine if any of the records would be discoverable for the purposes of this criminal matter.

¶ 8 At a hearing on January 23, 2004, defense counsel reported to the court that after reviewing the DCFS records, it was clear that Richard, Jr., was not living in the household in July 2002, when H.J. was assaulted. Defense counsel argued that even though the police were aware that DCFS had an open file on sexual molestation at the home where H.J. resided, they never interviewed anyone in that household. He stated that he felt he had the right to ask both the police and DCFS why they never questioned the members of the household where H.J. resided. The State argued that if defense counsel was allowed to inquire why the police did not investigate anyone living in the trailer where H.J. resided, it should be able to ask the police if they focused on the defendant because there was an open

investigation into whether he abused his 15-year-old stepdaughter. The court stated that in order to "keep it a fair playing field," it would allow defense counsel to question why police did not investigate the family members who resided with H.J. but would also allow the State, in rebuttal, to ask why the police focused on the defendant.

¶ 9 At a hearing on February 2, 2004, the court ruled on the parties' motions *in limine*. The court prohibited both counsel from introducing evidence at trial that the defendant had no prior criminal convictions, that DCFS had investigated Richard, Jr., for committing an act of sexual penetration against Michael, that the biological maternal grandfather of H.J. was convicted of aggravated criminal sexual abuse against his daughters Elizabeth and Pamela, who is H.J.'s mother, that the defendant failed a polygraph with the Illinois State Police polygraph examiner, and that the defendant allegedly molested Pamela when she was a child. The parties agreed that if either side wanted to introduce the fact that the defendant was being investigated for sexual abuse of his stepdaughter, they would approach the bench to argue the merits.

¶ 10 The matter proceeded to a jury trial on February 4, 2004. The facts surrounding this case are fully discussed in *People v. Coyle*, No. 5-04-0501 (Oct. 26, 2006) (unpublished order pursuant to Supreme Court Rule 23) (*Coyle I*), and will be repeated here only as they relate to the issues raised in the instant postconviction petition.

¶ 11 At the jury trial, Pamela testified that she is on disability for "being in special ed." She stated that the defendant is her stepfather. She testified that on June 28, 2002, she had to work so she made arrangements with her mother, Linda Coyle, to watch H.J. She stated that she lived in a trailer with H.J., her husband Christopher, who is H.J.'s father, her mother-in-law, and Christopher's siblings Michael, Jacob, Richard, Jr., Debbie, and Christina. She stated that before she dropped H.J. off at her mother's home, she changed her diaper. She said there was no rash or any blood in her genital area. When she arrived at Linda's house,

she handed H.J. to Linda. When she finished working, she went back to her mother's house to pick up H.J. Pamela stated that as soon as they arrived home, she took H.J. out of her car seat and laid her in her crib. She testified that H.J. woke up screaming and crying. Pamela then changed her diaper. Pamela noticed a little bit of blood in the diaper and H.J. tightened up her legs and screamed. After she changed her diaper, Pamela took H.J. into Christopher's mother's bedroom. They played a little, then Pamela took H.J. back to her bedroom and put her to sleep in her crib.

¶ 12 Pamela testified that the next morning between 8 and 10 a.m., H.J. woke up screaming, and Pamela picked her up and fed her. Christopher started to get a bath ready. When he was undressing H.J., he noticed some blood in her diaper. Pamela testified that they decided to take H.J. to the hospital after her bath. At around 2 p.m. they took H.J. to Alton Memorial Hospital. She stated that from the time she brought H.J. home from her mother's house until the time she took H.J. to the hospital, H.J. was never left alone with anyone other than her and Christopher. She stated that later that day, she and H.J. went with a police officer to Cardinal Glennon Hospital. Pamela testified that since this incident there have been no more bloody diapers. She stated that when the police officer dropped her and H.J. off after the hospital visit, he did not speak to anybody except her and Christopher.

¶ 13 Dr. Patrick Masching testified that he is an emergency room physician at Alton Memorial Hospital. He stated that on June 29, 2002, he examined H.J. He stated that, in his records, he noted that her perirectal area was slightly pink and that there was blood in the anus. He also noted a very small fissure of the rectal area.

¶ 14 Chris Johnson, a police officer for the City of Wood River, testified that on June 29, 2002, the police department was contacted by Alton Memorial Hospital about a possible sexual assault. At 6:10 p.m., he went to H.J.'s home and met with her parents. It was determined that H.J. should be taken to Cardinal Glennon Hospital for an examination.

Officer Johnson stated that he took H.J. and her mother Pamela to Cardinal Glennon Hospital. After the hospital examination, Officer Johnson took Pamela and H.J. home and he spoke to H.J.'s father Christopher. He did not interview anyone else at the residence.

¶ 15 Dr. Ashe Kumar-Veerawamy, a pediatric emergency medicine fellow at Cardinal Glennon Hospital, and Dr. Faye Doerhoff, assistant professor of pediatrics at Cardinal Glennon Children's Hospital, testified that they jointly examined H.J. in the evening of June 29, 2002. Both doctors testified that H.J. did not have a diaper rash. Dr. Kumar-Veerawamy stated that H.J. had a 5-millimeter tear at the area of the posterior fourchette, some bruising to her hymenal ring, and a 2-millimeter tear at the top of her anal opening. Dr. Doerhoff testified that H.J. had a blue tinge to her hymen, a red tear at the posterior fourchette, and a small tear in the anal opening. Both doctors testified that the injuries occurred within 24 to 48 hours of H.J. presenting at the hospital. Dr. Kumar-Veerawamy stated that, within a reasonable degree of medical certainty, it was her opinion that H.J. had been sexually abused. Dr. Doerhoff testified, "These are the findings we would expect to see on someone who sustained an injury from inappropriate touching because it is so focused on a very small area that usually is covered." Both doctors testified that there was no evidence of semen or pubic hairs.

¶ 16 Linda Coyle testified that she is married to the defendant. She stated that on June 28, 2002, Pamela brought H.J. to her house around 4:30 p.m. Linda stated that she sat on the couch with H.J. for awhile, then H.J. became fussy so she changed the baby's diaper. This was the only time she changed H.J.'s diaper that evening. Linda testified that H.J.'s bottom was "severely red from front to back." She did not see any blood in the diaper or any type of injuries to H.J. Linda stated that after changing H.J.'s diaper, she took the baby back to the couch and watched television. The defendant came home at around 5:30 p.m. Linda stated that H.J. fell asleep in the swing at around 6:30 p.m. The defendant and Linda ate

dinner, and when she was cleaning up, her daughter Elizabeth arrived. Linda testified that Elizabeth stayed until about 9:30 or 9:45 p.m. Linda stated that once Elizabeth left, she sat on the couch and watched a movie. Linda stated that H.J. woke up and she picked her up from the swing and laid her in the playpen, where she fell back to sleep. Linda stated that she sat back down on the couch and watched a movie until Pamela arrived at 10:30 p.m. to pick up H.J. Linda testified that she did not fall asleep during the time she babysat H.J. She stated that the defendant never touched H.J.

¶ 17 Officer Johnson testified that, when he interviewed Linda on July 1, 2002, she told him that she did not fall asleep or go to the bathroom while caring for H.J. He stated that Linda returned to the police station on July 2, 2002, and asked to speak to detectives because she had forgotten to include some facts in her initial statement. Officer Johnson stated that Linda told him that she forgot to mention that her daughter Elizabeth had been at her house for 30 to 45 minutes while she was caring for H.J. Officer Johnson stated that Linda told him that after Elizabeth left, she fell asleep on the couch with the defendant lying next to her and was awakened by dogs barking when Pamela came to pick up H.J. Linda denied telling the police that she fell asleep.

¶ 18 During a sidebar, defense counsel stated that he wanted to ask Officer Johnson who else he interviewed who might have had contact with H.J. from the time she left the defendant's home until she went to Alton Memorial Hospital the next day. The State argued that if defense counsel asked if he interviewed each member of the household where H.J. lived, it should be allowed to ask Officer Johnson why he did not interview these people. Defense counsel asserted that:

"I think it violates Fifth Amendment rights to be on trial for two separate cases here on these proceedings, and I mean, I don't care if he is under investigation for another case or not, you don't just not interview people that the child was around for 12 hours

the next day. It's an elimination of suspects."

The court responded:

"You play the hand you're dealt. You do not get to pick what evidence is in a case. Okay? The evidence is what it is. If you're throwing out there that the officer was not properly investigating this case, they can come back with why. It's a level playing field. Now we don't know what the officer is going to say. You're saying that then you can say why didn't you interview so and so, why didn't you interview so and so, and why didn't you interview witness one, two and three, and they can't ask him why. They have to sit here and be mute as to why, and the question is left out there that the jury is left with is they didn't investigate these people and they don't know why. You don't believe that would be prejudicial to the State? We had a narrow area we had to follow in evidence, but trials don't always go that way. If you want to ask the question, I stated a lot of times before, that if you wanted to ask those questions and delve into that area, that they would be able to explain why. We don't know what the officer is going to say. "

Defense counsel did not ask Officer Johnson why he did not interview the people living with H.J. at the time of the sexual abuse.

¶ 19 Christopher Jones, H.J.'s father, testified that on June 29, 2002, he changed H.J.'s diaper and it was bloody. He stated that prior to that incident, he had never seen blood in H.J.'s diaper and that there had been no problems with the child's genitalia, buttocks, anus, or vagina.

¶ 20 Elizabeth Arnold testified that she is the defendant's stepdaughter and Pamela's sister. She stated that on June 28, 2002, she went to the defendant's house at around 6 or 7 p.m. and left around 9 or 10 p.m. She stated that H.J. was asleep the entire time she was at the house and that she never saw the defendant touch her. She stated that Linda was awake the entire

time she was there.

¶ 21 The defendant testified that he arrived home at about 5:30 p.m. on June 28, 2002. He stated that he went to Kentucky Fried Chicken to pick up dinner and, when he returned, Linda was caring for H.J. She changed H.J.'s diaper, and the defendant threw it away. The defendant held H.J. while Linda prepared a bottle. When the bottle was prepared, the defendant handed H.J. back to Linda, who fed and rocked her. Linda put H.J. in the swing, where she fell asleep. He stated that he did not hold H.J. any other time that evening and that he did not touch her inappropriately. He said that Elizabeth came over and stayed 1½ to 2 hours. He stated that Linda was awake this whole time. The defendant testified that after Elizabeth left, he was tired, and he and Linda laid down on the couch. He stated that he must have fallen asleep because the next thing he knew, Pamela was standing at the door holding H.J. The defendant testified that, to his knowledge, Linda did not fall asleep the entire time she was babysitting.

¶ 22 Officer Johnson testified that he interviewed the defendant on June 29, 2002, and on July 1, 2002, and that the defendant never mentioned that Elizabeth stopped by the house on June 28, 2002. Officer Johnson also testified that the defendant told him in the original interview that he did not change H.J.'s diaper and he never saw Linda change her diaper. Additionally, Officer Johnson said that the defendant never mentioned holding H.J.

¶ 23 The jury found the defendant guilty of predatory criminal sexual assault of a child involving anal penetration and guilty of predatory criminal sexual assault of a child involving vaginal penetration.

¶ 24 On March 5, 2004, the defendant filed a motion for a new trial alleging numerous errors. The defendant argued that the court's ruling restricting the defendant's ability to inquire about any DCFS investigations in the home in which H.J. resided unfairly prejudiced him. He further argued that he was unfairly prejudiced by the court's erroneous rulings that

defense questions of certain witnesses "opened the door" to the State's redirect or recross examination concerning the defendant's status as a suspect in a separate sexual assault. On May 25, 2004, the defendant filed a motion to continue the hearing on the motion for a new trial alleging that on May 17, 2004, Pamela appeared at the defense counsel's office unannounced and told his staff that she had information which contradicted some of her trial testimony. Defense counsel stated that on May 18, 2004, he met with Pamela and determined that good cause existed for allowing the motion to continue.

¶ 25 On May 25, 2004, there was a hearing on the motion to continue. Defense counsel told the court that Pamela came to his office and delivered a written statement. He later met with her and learned that she was now stating that she had noticed blood in H.J.'s diaper earlier in the week before H.J. went to the defendant's home. The court asked why Pamela was not present. Defense counsel explained that she had separated from Christopher, was living with Linda, and feared for her safety. The State argued that Elizabeth brought Pamela to defense counsel's office both times, that Linda was present in the courtroom, and that the family could have brought Pamela to court. It argued that Pamela changed her story because she was going through a divorce and had to depend on Linda and Elizabeth, who both believed in the defendant's innocence. The State asserted that the reason the family did not bring Pamela to court was because she was not "going to perjure herself on the witness stand." The court denied the motion for a continuance.

¶ 26 The court then heard the motion for a new trial. Two exhibits were admitted into evidence. The first was a memorandum from defense counsel's secretary, Sandy, regarding a meeting with Elizabeth and Pamela on May 17, 2004. Sandy wrote that Elizabeth advised her that Pamela wanted to make a statement that the defendant did not abuse H.J. Sandy advised them that she needed to contact defense counsel. She phoned him, but he was in court so she left a message. Sandy scheduled a time when they could return to speak with

defense counsel. Sandy wrote that Pamela advised her that she had taken H.J. "to the emergency room on one or more occasions subsequent to [the defendant's] arrest, because the sexual abuse of [H.J.] had continued after [the defendant] was in custody." (Emphases in original.) Sandy noted that Pamela said the hospital reported the abuse to DCFS and Elizabeth stated that she had documentation from DCFS regarding the emergency room visit in her car. Sandy wrote that Pamela said she was not contacted about the trial until two days before it started and that she tried to tell the State that the defendant was not guilty but was told "it didn't matter, and if she were to testify to that, it would only make the trial longer." Elizabeth handed Sandy a written statement that Pamela confirmed she prepared. A copy of the statement was attached to Sandy's memorandum.

¶ 27 Pamela's handwritten statement was dated May 17, 2004. Her statement read as follows:

"This is what happened Friday night when I went to pick my daughter up from my mom[']s house[.] [S]he was acting kind of funny and that whole week I did see a [little] blood in her stool. But I was scared to say anything. I'm a little scared to say anything now [b]ut I am. I'm [afraid] of [getting] killed for this or losing my kids. My lawyer lied to me though saying if I do this she'll help me get a place and a job[.] I feel so used by people and so [lonely]. [H.J.] did [scream] and cry that Friday night also. And [ever since the defendant] went to jail that night the next day [Michael] kept on trying to kill [H.J.] [putting] a rope around her neck and I start finding cuts on her and his mom let him hit her in the head. He also [tried] killing the one in my [stomach] by trying to step on me while I was sleeping. Good thing I moved when I did. [Ever since] I got into this [family] my life been going down hill. Now that I want out he won't let me. But on that Saturday [morning] there was more blood in her diaper than yesterday[']s. Fridays look like the rest of the day I seen it. I [tried]

telling [the State] that but [nobody] wanted to listen[] to me. I'll [write] more later."

(Misspelled words are corrected in brackets.)

¶ 28 The second exhibit admitted into evidence was a copy of the notes Sandy took during defense counsel's meeting with Pamela. In the memorandum, Sandy wrote that Pamela stated that she told the State, prior to trial, that she did not believe the defendant had abused H.J. because H.J. "[c]ontinued to hurt in the genital area after" the defendant was in custody. Pamela told defense counsel that the State advised her not to change her testimony. Sandy wrote that Pamela told her that Michael put a rope around H.J.'s neck, tried to step on Pamela's stomach when she was pregnant in an effort to kill the baby, and had abused other children related to him by touching them and being mean to them. Michael lived with H.J. at the time of the abuse. Sandy noted that Pamela had stated, "There had been blood in [H.J.'s] diaper the week preceding the night that [the defendant] allegedly abused [H.J.]. Friday['s] diaper had not been any worse than any other diaper the preceding week, but Saturday's diaper was 'bad.' " Sandy wrote that Pamela told her: "[H.J.] was taken to the Emergency Room on one other occasion after [the defendant] was arrested, because there were signs of abuse. This occurred approximately one week to one month prior to [the defendant's] trial. At this time Pam & [Christopher] were still residing with [Christopher's] family (including Michael) at Beck's Lode." Sandy wrote that Pamela stated that she was currently living with her friend Tony, that she saw Linda once or twice per week, and that she had not been pressured by Linda into giving this statement.

¶ 29 Defense counsel told the court that Elizabeth brought Pamela to his office both days. Defense counsel pointed out that Pamela's letter and statement to him that she had seen blood in H.J.'s diaper the week before June 28, 2002, was contrary to her trial testimony that she had never seen blood in H.J.'s diaper before she picked her up from the defendant's house on that date. He argued that Pamela knew this evidence yet chose not to share it with the court,

investigators, or the police who interviewed her about the incident. He stated that Pamela was fearful of Christopher's family when she came to his office, and she had indicated that fear in her letter. He argued that the information Pamela was disclosing was sufficient grounds for a new trial.

¶ 30 The State argued that Pamela was not a key witness in its case. It argued that the injuries sustained as testified to by the physicians were the key evidence in the case. The State argued that Pamela is going through a divorce and "the only way she can get back to her family is to say" that the defendant did not abuse H.J. It argued that Pamela's statement was not credible and did not warrant a new trial. Defense counsel stated, "I don't think there was ever a whole lot of doubt in the jury's mind as to this child being injured." He argued that the key point was when the bleeding started and where the child was at the time it started. Defense counsel went on to argue that the information that Pamela gave him related to the court's ruling restricting his ability to inquire about investigations in the home in which H.J. resided, and therefore, the ruling prejudiced the defendant.

¶ 31 Defense counsel further argued that the court ruling prohibiting the defendant from inquiring into any police investigation of the people in the household where H.J. resided was not rationally related to whether the defendant faced charges in a separate case. The State pointed out that the court had informed defense counsel that if he wanted to get into why the police did not talk to all of the people living in the trailer with H.J., the police might have stated that they concentrated on the defendant because of the charges against him involving his stepdaughter. Defense counsel argued that the fact that the defendant was under investigation for another case of sexual abuse was not an excuse for the police failing to investigate the people who lived with H.J.

¶ 32 The court ruled that "there was other significant testimony that resulted in the verdict besides the testimony of Pamela Jones." It denied the motion for a new trial. The court then

continued with the sentencing hearing. The defendant was sentenced to 20 years' imprisonment in the Department of Corrections for each count, with the sentences to run consecutively.

¶ 33 On June 24, 2004, the defendant filed a motion to reduce or reconsider his sentence. The motion was argued and denied. The defendant appealed. On October 26, 2006, this court filed an unpublished order *Coyle I*. This court found that, when viewed in the light most favorable to the defendant, the evidence adduced at trial was sufficient to establish the defendant's guilt beyond a reasonable doubt. This court also examined the defendant's claim that the trial court abused its discretion by denying his motion to continue, because by doing so, the court deprived him of his opportunity to explore, at an evidentiary hearing, whether Pamela perjured herself at trial. This court found that the trial court did abuse its discretion by not granting the defendant's motion to continue in order to have an evidentiary hearing. The court found that the issue of when the blood was first observed in H.J.'s diaper was key to implicating the defendant in the crimes and that Pamela's testimony, that she noticed blood in the baby's diaper only after picking her up from the defendant's residence, made him the most likely suspect. The court noted that if the police had known that Pamela had noticed blood in H.J.'s diaper prior to H.J. being in the defendant's presence, the list of potential suspects would have included everyone who might have had contact with H.J. in the 48 hours prior to her medical examination. The court further noted that the police never investigated the individuals living in the trailer with H.J. and they never found or examined any of H.J.'s diapers from the period preceding June 29, 2002, to establish whether the abuse occurred prior to the defendant's contact with H.J. The court held, "Given the circumstances of this case and the fact that the defendant was convicted on little more than his opportunity to commit the crimes, it is crucial that the trial court investigate the claims raised by the victim's mother to ensure that the abuse is not continuing and that the time line set out at the trial is

indeed accurate." *Coyle I*, No. 5-04-0501, order at 10. The court remanded the cause to the trial court to conduct an evidentiary hearing on the defendant's motion for a new trial.

¶ 34 On July 12, 2007, the trial court conducted an evidentiary hearing on the defendant's motion for a new trial. Pamela testified that H.J. had been adopted by another family. Pamela testified that Linda, Elizabeth, and her grandmother, Nellie Forest, pressured her into going to defense counsel's office and telling him that she had found blood in H.J.'s diaper prior to the time she left H.J. at the defendant's house. She admitted that she told defense counsel that Michael "had been mean and done things to [H.J.]" and that she was not pressured into saying that. She testified that Michael was around H.J. in the days before June 28, 2002. Pamela acknowledged that she told defense counsel that she had taken H.J. to the emergency room after the defendant had been arrested and that the hospital staff found that H.J. had vaginal bruising and tearing. She stated that she did not remember where she resided when this occurred. She stated that DCFS became involved and warned her to stay away from Linda. The letter that Pamela wrote dated May 17, 2004, was admitted into evidence. She stated that she was pressured into writing the letter by Linda, Elizabeth, and Nellie and that they told her what to write and if she did not write it, she would not have a place to live. She stated that they threatened her and that she was scared of them. Pamela testified that she did not remember where she resided when she wrote the letter, but that she and Christopher were still together. Pamela testified that she went to defense counsel's office with her sister Elizabeth and that Elizabeth was there to make sure she "said what was in the letter." She stated that she found out about the hearing on the motion for a new trial through Elizabeth. She said that Elizabeth told her that if she did not stick to what she wrote in the letter she might go to jail. Pamela stated that the testimony that she gave at the defendant's trial was the truth. The court denied the motion for a new trial.

¶ 35 The defendant appealed. The Office of the State Appellate Defender filed a motion

with an attached memorandum pursuant to *Anders v. California*, 386 U.S. 738 (1967), alleging that there was no merit to the appeal and requesting leave to withdraw as counsel. On September 18, 2008, this court filed an unpublished order, *People v. Coyle*, No. 5-07-0447 (Sept. 18, 2008) (unpublished order pursuant to Supreme Court Rule 23) (*Coyle II*). The court examined the entire record on appeal and found no error or potential grounds for appeal. It granted the State Appellate Defender's motion to withdraw as counsel and affirmed the judgment of the trial court. The court found that the newly discovered evidence upon which the defendant's amended motion for a new trial was based consisted of Pamela's statements to defense counsel that she had seen blood in H.J.'s diaper on two occasions when the defendant had no access to her. The court noted that at the evidentiary hearing on the motion, Pamela repudiated her statements to defense counsel, stating she had been pressured into making those statements by family members to whom she felt beholden because they had given her a place to live. The court held, "Under these circumstances, we cannot say that the trial court abused its discretion in finding that the defendant failed to meet his burden of rebutting the presumption that the verdict was correct and that the new evidence would likely change the result of the trial." *Coyle II*, No. 5-07-0447, order at 5.

¶ 36 On March 6, 2009, the defendant filed a *pro se* postconviction petition alleging actual innocence and ineffective assistance of counsel during remand for an evidentiary hearing. He argued that the record revealed the presence of individuals, including registered sex offenders, who had access to and contact with H.J. before and on June 28, 2002. He included citations to the record. He argued that his counsel unreasonably failed to investigate those individuals who had contact with H.J. prior to and on June 28, 2002. The defendant further argued that his defense counsel could have located and subpoenaed witnesses such as Linda, Nellie, and Elizabeth. He asserted that defense counsel neglected to interview these potential witnesses who had material information that could have impeached Pamela's allegations of

changing her recantation due to threats. Finally, the defendant argued that he was prejudiced by defense counsel's failure to investigate and order subpoenas and DNA testing. The defendant attached an affidavit from Elizabeth stating that she did not pressure, threaten, or harass Pamela to write the letter and that the only people present when Pamela wrote the letter were Pamela and herself. Elizabeth wrote that Pamela wrote the letter of her own free will and that she went to defense counsel's office of her own free will. Elizabeth stated that Pamela told her that she thought Michael sexually abused H.J. and that she did not think it was the defendant.

¶ 37 An attorney was appointed to represent the defendant. On January 12, 2010, the State filed a motion to dismiss the defendant's postconviction petition, arguing that the facts and issues raised in the defendant's petition had been raised directly or indirectly before the appellate court and denied. The State asserted that no new facts or issues were presented which raised the gist of a constitutional claim, and therefore the defendant's petition was patently without merit and frivolous. On February 22, 2010, the State filed an amended motion to dismiss arguing that defense counsel's performance did not fall below an objective standard of reasonableness.

¶ 38 On May 25, 2010, defense counsel filed a certificate under Illinois Supreme Court Rule 651(c) (eff. Dec. 1, 1984) stating that he had consulted with the defendant, examined the record, and made all the necessary amendments to the defendant's postconviction petition. Counsel did not amend the defendant's postconviction petition.

¶ 39 On May 25, 2010, the court heard the State's motion to dismiss the defendant's postconviction petition. The State argued that the defendant's claim that his actual innocence could be proved through the use of DNA testing had been reviewed on appeal and denied, and that the State Appellate Defender had submitted a motion stating that there was no merit to this argument and requesting to withdraw. Furthermore, the State asserted that it had

checked with the Wood River police department, and any evidence from the file had been destroyed, so there were no items with DNA that could be tested. The State further argued that defense counsel's performance did not fall below the standard of reasonableness and there was no argument to be made that he had been prejudiced in any way by the assistance that he received from counsel either at trial or during any of the posttrial matters. The State argued that there were no new facts or issues raised that supported a constitutional claim. Defense counsel argued that the defendant's counsel on remand had only called Pamela in regard to the inconsistent statements and had failed to call other potential witnesses. The court granted the State's motion to dismiss, finding that no factual basis was offered to support the postconviction petition's conclusions and contentions. It held that, as to the issue of DNA testing, the matter was presented at trial and on appeal. It found that the evidence was destroyed, so there was no ability to conduct tests and found no fault in the manner of earlier testing. The court held that defense counsel was not ineffective. The defendant filed a timely notice of appeal.

¶ 40

ANALYSIS

¶ 41 The defendant argues that the trial court erred in granting the State's motion to dismiss his postconviction petition because he is entitled to an evidentiary hearing on his claim that defense counsel failed to investigate, interview, or subpoena witnesses who also had the opportunity to commit the crimes.

¶ 42 The Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 to 122-8 (West 2008)) provides an opportunity for a defendant to assert that his conviction was the result of a substantial deprivation of his constitutional rights. *People v. Edwards*, 197 Ill. 2d 239, 243-44 (2001). In postconviction proceedings, the adjudication of the postconviction petition follows a three-stage process. *Edwards*, 197 Ill. 2d at 244. At the first stage, the trial court must review the postconviction petition within 90 days of its filing and determine whether

it is "frivolous or is patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2008). If the petition is not dismissed at the first stage, the State shall either answer or move to dismiss the petition. *People v. Coleman*, 183 Ill. 2d 366, 379 (1998). At a dismissal hearing, the trial court may not engage in any fact-finding because all well-pleaded facts are to be taken as true at this point in the proceeding. *Coleman*, 183 Ill. 2d at 380-81. "A petition that is not dismissed at the first or second stage advances to the third stage, at which an evidentiary hearing is held." *People v. Ramirez*, 402 Ill. App. 3d 638, 641 (2010). "Although a post-conviction petitioner is not entitled to an evidentiary hearing as a matter of right, this court has repeatedly stressed that a hearing is required whenever the petitioner makes a substantial showing of a violation of constitutional rights." *Coleman*, 183 Ill. 2d at 381.

¶ 43 If a postconviction petition is dismissed at the second stage, a reviewing court should employ plenary review and may substitute its judgment for that of the lower court. *Coleman*, 183 Ill. 2d at 388-89.

¶ 44 The allegations set forth in the defendant's postconviction petition involve claims of ineffective assistance of counsel. Claims of ineffective assistance of counsel are reviewed under the two-part test established in *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Curry*, 178 Ill. 2d 509, 518 (1997). Based on the second stage procedural posture of the instant case, the relevant question is simply whether the allegations contained in the petition, viewed in conjunction with the trial record, make a substantial showing that the defendant was denied the effective assistance of counsel. *Coleman*, 183 Ill. 2d at 381. To prevail on a claim of ineffective assistance of counsel under *Strickland*, a defendant must show both that counsel's performance fell below an objective standard of reasonableness and that the deficient performance prejudiced the defendant. *Strickland*, 466 U.S. at 687-88. To prove that defense counsel's performance was deficient, the defendant must show that the record demonstrates that his attorney did not provide effective assistance of counsel based on

prevailing professional norms. *People v. Gordon*, 378 Ill. App. 3d 626, 639 (2007).

¶45 The defendant alleged in his postconviction petition that trial counsel failed to conduct an adequate investigation into the people who resided with H.J. during the period in question. "Whether defense counsel was ineffective for failure to investigate is determined by the value of the evidence that was not presented at trial and the closeness of the evidence that was presented." *People v. Morris*, 335 Ill. App. 3d 70, 79 (2002). Attorneys have a duty to conduct factual and legal investigations of all readily available sources of evidence that might benefit their clients. *Morris*, 335 Ill. App. 3d at 79-80. "The failure to interview witnesses may indicate incompetence, particularly when the witnesses are known to trial counsel and their testimony may be exonerating." *People v. Steidl*, 177 Ill. 2d 239, 256 (1997).

¶46 In the instant case, the evidence at trial was very close. This court noted on direct appeal that "the defendant was convicted on little more than his opportunity to commit the crimes." *Coyle I*, No. 5-04-0501, order at 10. This court stated that:

"It was the mother's testimony that she noticed blood in H.J.'s diaper only after picking her up from the defendant's residence that made him the most likely suspect. Had blood been noticed prior to the child being in the defendant's presence, the list of potential suspects grows to include everyone that might have had contact with the child 48 hours prior to when the child was examined by the doctors. We note that the police never investigated the individuals living in the trailer where Pamela resided with H.J." *Coyle I*, No. 5-04-0501, order at 10.

¶47 The record reveals that H.J. resided in a three-bedroom trailer with her mother Pamela, her father, Christopher, Christopher's mother Judith Turner, Judith's husband Richard Turner, Sr., Christopher's brothers Michael and Jacob, and his sisters Debbie and Christina. Defense counsel was aware that H.J. resided with her extended family. The record reflects that in 2003, defense counsel began to question whether someone who resided

with H.J. was responsible for sexually abusing her. At an October 20, 2003, hearing he asked to review DCFS records to see if Richard, Jr., who had been removed from the home for sexually abusing Michael, had any home visits during the time frame in which H.J. was abused. At a hearing on January 15, 2004, defense counsel told the court that Linda gave him a letter that indicated that the Jones family, where H.J. was residing at the time of the offense, was under investigation for suspected sexual abuse or molestation. At a hearing on January 23, 2004, defense counsel argued that he should have the right to ask the police why they never investigated any of the people living in the household where H.J. resided. While defense counsel questioned why the police failed to investigate the individuals who had contact with H.J. in the 48 hours preceding her visit to the hospital for sexual abuse, there is no indication in the record that defense counsel investigated any family member other than Richard, Jr., who was determined not to have had contact with H.J.

¶ 48 After the defendant's trial and while the motion for a new trial was pending, Pamela went to defense counsel with information that cast doubt on the defendant's guilt. In her handwritten letter dated May 17, 2004, Pamela wrote that she had seen blood in H.J.'s diaper the week before June 28, 2002. This was prior to the time the defendant had any contact with H.J. At the May 25, 2004, conference with defense counsel, Pamela told him that H.J. was taken to the emergency room after the defendant was arrested because of signs of sexual abuse. Pamela and Elizabeth gave defense counsel a computer printout from the Illinois State Police website regarding a Richard Turner. Richard Turner is listed as a sexually violent person convicted of indecent liberties with a child and aggravated criminal sexual abuse. The victim is listed as under the age of 18. There is a handwritten note on the printout that reads "We believe this is 'Buddy' Chris Jones's step-dad." Pamela also told defense counsel that Michael was sexually abused by his stepbrother, that Michael had abused other children, that Michael stepped on her stomach while she was pregnant in an

attempt to kill the baby, and that Michael had put a rope around H.J.'s neck. At the July 12, 2007, hearing on the defendant's motion for a new trial, Pamela testified that H.J. was taken to the emergency room after the defendant was arrested, and the hospital staff told her that H.J. was bruised and torn in her vaginal area. On direct appeal, this court remanded for an evidentiary hearing and stressed that "it is crucial that the trial court investigate the claims raised by the victim's mother to ensure that the abuse is not continuing and that the time line set out at the trial is indeed accurate." *Coyle I*, No. 5-04-0501, order at 10.

¶ 49 The record shows that defense counsel knew which individuals had access to H.J. at the time she was abused, knew that Pamela cast suspicion on two of those individuals, and knew that H.J. had been examined for another incident of sexual abuse after the defendant was arrested and had no access to H.J. The record does not rebut the defendant's claim that trial counsel failed to interview, subpoena, or otherwise investigate any of the individuals residing with H.J. at the time of her abuse. The record raises questions of fact as to why defense counsel did not contact these witnesses and whether it was sound trial strategy not to investigate them.

¶ 50 The defendant argues that defense counsel was ineffective for failing to call Elizabeth at the July 12, 2007, hearing on the defendant's motion for a new trial. At that hearing, Pamela testified that she was "pressured" by Elizabeth into making some, but not all, of the assertions contained in her written statement recanting her trial testimony. In an affidavit attached to the postconviction petition, Elizabeth stated that she did not pressure Pamela into writing the letter and that Pamela wrote the letter of her own free will. Elizabeth's affidavit raises questions of fact as to whether Pamela told the truth at trial, in her statement recanting her trial testimony, or in her testimony recanting parts of the recantation.

¶ 51 The record raises questions of fact as to whether it was sound trial strategy for defense counsel not to call Elizabeth as a witness at the hearing on the defendant's motion for a new

trial and not to investigate the people residing with H.J. at the time of the abuse. The record raises questions of fact as to whether defense counsel's strategy undermined the defendant's right to a fair trial. At this second stage of the postconviction process, we conclude that defense counsel's representation as alleged fails to satisfy the objective standard of reasonableness required under the deficiency prong of the *Strickland* test.

¶ 52 We next address whether the prejudice prong of the *Strickland* test has been satisfied. To establish prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

¶ 53 Defense counsel stated at the hearing on remand that there was never "a whole lot of doubt in the jury's mind" that H.J. was sexually abused. He pointed out that the key issue concerned when the bleeding started and where H.J. was at the time it started. The jury's decision rested upon the judgment of the credibility of the witnesses who came before it, especially Pamela's testimony that she had never seen blood in H.J.'s diaper until June 28, 2002. Pamela later recanted that testimony and stated she had seen blood in H.J.'s diaper in the week preceding June 28, 2002. Pamela told defense counsel that she did not believe that the defendant had abused H.J., and she cast suspicion on Michael. At the hearing on remand, she recanted her recantation. However, at that hearing, Pamela testified that she took H.J. to the emergency room after the defendant was arrested, at which time the medical staff found vaginal bruising and tearing. The questions raised by the defendant's postconviction petition, in conjunction with Pamela's handwritten letter dated May 17, 2004, Pamela's statements to defense counsel and his secretary, and Pamela's testimony at the trial and remand proceedings, raise questions of fact that can only be resolved by consideration of matters that are outside the record. As this court stated in the direct appeal, the defendant

"was convicted on little more than his opportunity to commit the crimes." *Coyle I*, No. 5-04-0501, order at 10. We cannot conclude that defense counsel's failure to investigate the people living in the trailer with H.J. at the time of the sexual abuse or his failure to call Elizabeth at the hearing on remand did not affect the outcome of the trial.

¶ 54 The allegations of ineffective assistance of counsel satisfy both prongs of the *Strickland* test in the context of the second stage of the postconviction process and demonstrate a substantial showing of a constitutional violation. Based on the record, we find the petition survives second-stage dismissal and should advance to the third stage of the postconviction process for an evidentiary hearing.

¶ 55 The State argues that Illinois law prohibits consideration of the defendant's claims that his attorney was ineffective on remand for failing to call witnesses because he failed to attach affidavits from those witnesses showing that they were available to testify and could have given testimony that would have changed the result of the proceeding. At issue, however, is whether the defendant's attorney was ineffective for failing to investigate the individuals who resided with H.J. at the time the abuse occurred. Under these circumstances, the affidavit would have to come from counsel, who was alleged to be ineffective. "Failure to attach independent corroborating documentation or explain its absence may, nonetheless, be excused where the petition contains facts sufficient to infer that the only affidavit the defendant could have furnished, other than his own sworn statement, was that of his attorney." *People v. Hall*, 217 Ill. 2d 324, 333 (2005).

¶ 56 Section 122-2 of the Act provides that a postconviction petition "shall have attached thereto affidavits, records, or other evidence supporting its allegations or shall state why the same are not attached." 725 ILCS 5/122-2 (West 2008). Affidavits, records, and other evidence are distinguished from one another in the provision through the legislature's use of the disjunctive conjunction "or." *People v. Acosta*, 331 Ill. App. 3d 1, 5 (2001) (noting that

section 122-1(c) of the Act distinguishes between three possibilities for the timing of the filing of a postconviction petition through the use of the disjunctive conjunction "or"). Thus, the allegations in the petition must be supported by the record in the case or by its accompanying affidavits. *Coleman*, 183 Ill. 2d at 381.

¶ 57 In the instant case, the defendant's postconviction petition is supported by the record and an affidavit from Elizabeth. The record contains documents and statements indicating that H.J. lived with eight others during the 48-hour period surrounding her abuse, that Michael lived in the trailer and was around H.J. during this period, that Michael put a rope around H.J.'s neck, that Michael had abused other children, that Michael was a victim of sexual abuse, that Pamela found blood in H.J.'s diaper in the week preceding June 28, 2002, and that H.J. had been sexually abused while the defendant was in jail. It is clear from the record that defense counsel was aware of this information. There is nothing in the record to rebut the defendant's claims that his defense counsel failed to investigate the individuals residing with H.J. at the time of the abuse. The record and Elizabeth's affidavit provide adequate documentary support for the defendant's postconviction petition.

¶ 58 The defendant next argues that he was denied reasonable assistance of counsel during the proceedings on his postconviction petition and requests that the trial court's order granting the State's motion to dismiss his postconviction petition be reversed and the cause remanded for a third stage evidentiary hearing. Because we are reversing and remanding for a third stage evidentiary hearing for the reasons previously stated, we need not address this issue.

¶ 59

CONCLUSION

¶ 60 At this stage of the proceeding, taking all well-pleaded facts as true, we find the allegations of the petition are supported by the record and accompanying documents and demonstrate a substantial showing of a constitutional violation. For the reasons previously

discussed, we find this petition should advance to the third stage of the postconviction process for an evidentiary hearing. We emphasize that we take no position on the defendant's ability to prove his ineffectiveness claim, and we make no determination regarding the outcome of that hearing. We reverse the judgment of the trial court dismissing the postconviction petition and remand for an evidentiary hearing.

¶ 61 Reversed and remanded with directions.