2017 IL App (2d) 141026-U
No. 2-14-1026
Order filed May 19, 2017

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. CARL HORAK, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Lake County. No. 08-CF-0292 Honorable Daniel B. Shanes, Judge, Presiding.

JUSTICE BIRKETT delivered the judgment of the court.
Presiding Justice Hudson and Justice Hutchinson concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's *pro se* postconviction petition set forth a claim of actual innocence, so we did not need to determine whether that petition was filed within the time limitations as set forth in the Post-Conviction Hearing Act. 725 ILCS 5/122-1(c) (West 2010). Also, postconviction counsel provided unreasonable assistance of counsel when: (1) she amended the *pro se* petition and failed to attach a letter from defendant's trial attorney that was attached to defendant's *pro se* petition; and (2) she failed to obtain other affidavits to support defendant's claim of actual innocence, or state why she was not able to attach such evidence. Therefore, we vacated the trial court's order granting the State's motion to dismiss, and we remanded this cause for new postconviction counsel to be appointed and a new second stage hearing to be conducted.

¶ 2 Defendant Carl Horak appeals from the granting of the State's motion to dismiss his post-conviction petition. On appeal, defendant contends that post-conviction counsel provided unreasonable assistance in drafting his second amended petition because she failed to properly preserve his *pro se* claim. In response, the State argues that the trial court properly dismissed defendant's post-conviction petition because it was not timely filed. For the following reasons, we vacate the trial court's order dismissing appellant's post-conviction petition and we remand this cause for further proceedings including the appointment of new postconviction counsel.

¶ 3 I. BACKGROUND

¶ 4 On February 13, 2008, defendant was indicted with 13 counts of predatory criminal sexual assault of a child and four counts of aggravated criminal sexual abuse. The predatory criminal sexual assault counts were based on various alleged acts, including three counts based on allegations of mouth-to-vagina contact. Eventually, the State decided to pursue only the predatory criminal sexual assault counts. The matter proceeded to a jury trial.

¶ 5 At trial, the victim, nine-year-old S.J., testified that Tiffany Horak was her mother and defendant was her stepfather. S.J. was then questioned about the difference between a truth and a lie, which she demonstrated. The questioning proceeded to the parts of the male and female body, and S.J. indicated what she called the various parts. S.J. also testified about the difference between "good" and "bad" touches. She said that both of her parents had touched her private areas. S.J. testified that she thought the improper touching occurred when she was in third grade and living in Wauconda.

¶ 6 S.J. recalled an incident where she was called into her parents' room. She was wearing clothes when she entered the room, but her parents were not wearing clothes. Her parents told her to get comfortable, which she understood to mean that she should take off her clothes. Her

parents were laying on a futon on the floor; she climbed into the bed and lay between her parents. The television was on, and a "nasty" video depicting people touching each other was playing. On that occasion, defendant placed his finger inside S.J.'s vagina. S.J. told defendant that it hurt, and he stopped.

¶ 7 S.J. testified that defendant put his finger in her bottom, and that this act happened more than twice. Defendant also touched the inside of her bottom with his tongue; this action also occurred more than two times. Defendant put his penis in her mouth on two occasions, and her mother demonstrated how she was supposed to perform that act. S.J. said that sometimes defendant's penis was hard, and other times it was soft.

¶ 8 Next, S.J. testified about items recovered from her parents' bedroom. She identified four little red balls strung together (listed on the exhibit list as anal beads). The anal beads had been placed in her bottom by defendant, alone, and by defendant and her mother, together. She also said that a small black tube (listed on the exhibit sheet as a "mini-black vibrator") was kept in her parents' bedroom. Both of her parents inserted the tube into her bottom.

¶ 9 Other than her family, no one slept at their house. She denied that defendant's friend, Adam, slept at their house. She explained that there were no extra beds to accommodate anyone else. S.J. testified that her Grandma Betty was the first person she told about the improper touching occurring in her parents' bedroom, saying that Grandma Betty was the only one that she could tell.

¶ 10 Andrea Usry, a detective with the Lake County sheriff's office, testified that her responsibilities included cases involving anyone under the age of 17, either as the perpetrator or as the victim. Usry testified about her background and training, particularly in conducting interviews of young victims of sexual assault. Usry testified that, in her interviews with this

class of victim, she made sure to ask open-ended questions and was careful to avoid any suggestive questions during an interview. Usry testified that she had conducted approximately 60 interviews of child victims of sexual assaults.

¶ 11 Usry testified that, on January 18, 2008, at about 10 p.m., she, along with Detective Skrypek, conducted an hour-long interview with S.J. She first established that S.J. knew and could articulate the difference between telling the truth and telling a lie. Next, she established that S.J. could identify the various parts of a man and a woman's body, as well as the terms she used for them. As the interview progressed, S.J. related that her parents had touched her in her private areas.

¶ 12 S.J. told Usry that defendant had touched her vagina with his hand and with his mouth. According to S.J., the most recent occurrence was during the weekend before the interview. S.J. said that her parents instituted a "special night" with her. The special nights usually occurred on a Friday or a Saturday, and S.J. and her parents would watch a "nasty" movie together. Usry asked S.J. what she meant by "nasty" movies, and S.J. replied that they were "porno" movies where people had sex. S.J. told Usry that, on the "special nights," everyone would be unclothed. Defendant would rub her vagina. One time, defendant put his finger in her vagina, but S.J. told him that it hurt and he stopped. S.J. also told Usry that defendant would put his finger in her "butt." According to S.J., defendant had put his finger in her butt three times. Defendant would lick the crack by her butt. Usry asked S.J. if defendant would also lick in the area of her vagina; S.J. replied, "sometimes a little bit."

¶ 13 S.J. said that she never touched her mother, but she did stick her finger in defendant's butt. When she did this, defendant told her that she had hit his "G-spot." S.J. replied, "G-spot? I didn't know there was a G-spot. I don't even know what a G-spot is." S.J. also told Usry that

she also rubbed defendant's penis and put her mouth on defendant's penis.

¶ 14 According to S.J., these acts occurred while she was in second grade and before third grade began. In addition, the same type of acts had taken place on every weekend from Christmas 2007 through January 18, 2008.

¶ 15 Usry testified that the police obtained a search warrant for defendant's home, which she participated in executing. A number of items were recovered from defendant's residence. Usry identified a case that held several pornographic movie discs and a case that contained several sex toys, including vibrators and anal beads.

¶ 16 Usry testified that, on January 22, 2008, she again met with S.J. In the first interview with S.J. she did not ask her about the color of the vibrators or get any details about how they were used. During this second interview, S.J. informed Usry that the vibrator was white and was about five or six inches in length. S.J. also told Usry that defendant put the vibrator in her bottom once, and her mother and defendant together put the vibrator in her bottom once.

¶ 17 Tiffany Horak testified that she is defendant's wife and the mother of three children, S.J., T.J., and J.H. She had lived with defendant for about 10 years, but S.J. and defendant had lived together for only a year or two. In 2004, Tiffany married defendant. Tiffany said that she had entered into an agreement with the State to plead guilty to one count of predatory criminal sexual assault of a child and to testify truthfully against defendant in exchange for a recommendation from the State that she receive a 14-year term of imprisonment.

¶ 18 Tiffany identified State's exhibit numbers 8 and 9 as documents she prepared setting forth what her truthful testimony was to be. She denied that defendant had ever spoken to her about having sex with both a mother and her young daughter. Tiffany agreed that State's exhibit number 9 indicated that she had mentioned that defendant did speak with her about having sex

with a mother and her young daughter. She attempted to explain the difference in her written statements versus her live testimony as resulting from memory loss due to her consumption of a large quantity of drugs. The examination continued in a similar vein. The prosecutor would ask a question about information from one of Tiffany's written statements, she would deny or not remember having made the statement, but then she agree that it was contained in one of the written statements. For example, information that Tiffany purported not to remember included: that defendant rubbed a vibrator on S.J.'s buttocks; defendant placed his finger in S.J.'s anus; a second incident in which defendant placed his finger in S.J.'s anus; defendant licked S.J.'s anus and vagina; S.J. placed her mouth on defendant's penis; and S.J. placed her finger in defendant's anus. Tiffany also admitted that, shortly before she made her written statements, she told the prosecutor and Usry all of the things that she had just testified that she could not remember.

¶ 19 On cross-examination, Tiffany testified that, until October 2007, she did not have contact with S.J. or her other daughters. After she was reunited with her daughters, Adam Hurtado and Richard Stiltner also lived with her and her family. One of the men would sleep in the dining room and the other would sleep in another room. During the time that Hurtado and Stiltner were living with them, defendant did nothing of a sexual nature with her or S.J. As of December 16, 2007, she and defendant were living at defendant's uncle's house. On that date, she and defendant separated, and she took the children until Christmas Eve, when she and her daughters reunited with defendant.

¶ 20 Tiffany said that she did not show S.J. how to perform oral sex with defendant, and she denied that she told S.J. to stick her finger into defendant's anus. Tiffany maintained that she did not allow defendant to touch S.J. in a sexual manner. She also testified that none of the children was allowed to be in her bedroom, and she never watched a pornographic video with defendant

and S.J at the same time.

¶ 21 Tiffany also testified on cross-examination that she did not write or provide the contents of her written statements. Instead, she maintained that the information had been provided to her. On redirect examination, the prosecutor remarked that her memory appeared to be much clearer on cross-examination than it had been on direct examination, and Horak agreed.

¶ 22 The State rested its case, and defendant moved for a directed verdict. The trial court denied the motion for a directed verdict. Defendant then presented his case.

¶ 23 Adam Hurtado testified that, at the time of trial, he had been living in Island Lake. From November 2007 until January 18, 2008, when defendant and Tiffany were arrested, he had been living at their house. Hurtado said that he slept in the middle room or else he slept on the couch in the living room. While he was living with defendant and Tiffany, he never saw or heard anything inappropriate between S.J. and defendant, including sexual conduct.

¶ 24 Anthony Judd testified that he is defendant's uncle. Judd testified that, on several occasions in December 2007 and January 2008, he visited defendant and Tiffany at their home. In the middle of December 2007, defendant was issued a ticket for drunk driving, and defendant lived with him following the ticket. Judd never observed sexual contact between defendant and Tiffany and their children.

¶ 25 Defendant testified that he married Tiffany in 2004. In late October 2007, Tiffany's daughters moved into their home in Wauconda. Before October 2007, the children had been staying with their grandmother, Betty Emerson. Defendant said that Tiffany had been in prison before the children moved in with them, and Betty Emerson would not let defendant have anything to do with the children. Eventually, however, Tiffany and defendant's mother, Rebecca Horak, got the children from Emerson when they visited Emerson's house accompanied by the

police. After getting the children, defendant did not want to have any contact with Emerson.

¶ 26 Defendant denied that he had any sexual contact with S.J. Defendant specifically denied that he had invited S.J. to join him and Tiffany when they were having sex. Defendant also testified that his wife never invited S.J. into their bedroom.

¶ 27 Defendant said that his wife owned sex toys that she kept in the closet and that they would watch pornographic movies together. Defendant denied, however, that he had any conversations with S.J. about sex. He also denied that he had heard Tiffany talking to S.J. about sex. Defendant testified that, nevertheless, S.J. was "curious about sex." On cross-examination, defendant testified that Hurtado did not sleep at his house every day from November 2007 to January 2008, but that he was away from his house approximately one night a week.

¶ 28 Following argument, the jury convicted defendant of each of the 13 counts of predatory criminal sexual assault of a child. 720 ILCS 5/12-14.1(a)(1) (West 2008). Defendant filed a motion for a new trial. The trial court denied the motion and proceeded to sentence defendant to consecutive eight-year terms of imprisonment on each of the 13 convictions for predatory criminal sexual assault of a child.

¶ 29 On direct appeal, defendant argued that he was not proven guilty beyond a reasonable doubt of three of the thirteen predatory criminal sexual assault charges. This court affirmed. *People v. Horak*, 2-09-0490 (Jan. 28, 2011) (unpublished order pursuant to Supreme Court Rule 23). Defendant thereafter filed a *pro se* post-conviction petition. The petition was filed stamped by the circuit clerk on September 7, 2011. The proof of service indicates that defendant mailed his petition on August 29, 2011, but the proof of service was not notarized.

¶ 30 In the petition, defendant raised six issues. In one of those issues defendant claimed that his trial counsel, Robert Ritacca, had told him that he had spoken to a detective and that detective

told Ritacca that when the police first interviewed S.J., she only accused her mother. However, because S.J. did not want to testify against her mother, the police manipulated S.J. to accuse defendant. In support of this claim defendant attached a letter from Ritacca dated December 17, 2009, to the petition. In that letter Ritacca asserted,

> "I just recently talked to a detective that told me when they talked to your stepdaughter all accusations were against your wife solely and the little girl stated she didn't want to testify against the mother. Then they switched it falsely to you."

¶ 31 The trial court summarily dismissed the *pro se* petition on December 12, 2011. However, on June 14, 2012, this court vacated the summary dismissal because the trial court entered its order after more than 90 days had passed since the petition had been filed, in violation of section 122-2.1(a)(2) of the Post-Conviction Hearing Act. 725 ILCS 5/122-2.1(a)(2) (West 2010). On remand, post-conviction counsel was appointed to represent defendant.

¶ 32 On February 13, 2014, counsel filed an amended post-conviction petition and raised one claim—whether the trial court erred in allowing defendant to waive the conflict of interest created when attorney Ritacca "made himself a witness" in defendant's case. On May 15, 2014, counsel filed a second amended petition. That petition included the same claim as counsel's first petition as well as defendant's six claims that he raised in his *pro se* petition. Counsel explained to the trial court that there was some miscommunication between her and defendant when she filed the first amended post-conviction petition. Specifically, counsel said that defendant wanted her to include all of the issues that he alleged in his *pro se* petition, and because she did not initially, she was filing an amended petition. The State subsequently filed a motion to dismiss the petition.

¶ 33 On October 7, 2014, the trial court entered an order granting the State's motion to

dismiss. In its order, the court first held that defendant's *pro se* postconviction petition was filed one day late. However, it noted that claims of actual innocence were not subject to the time limitations enumerated in the Act, and it characterized defendant's claim about Ritacca's statement as a claim of actual innocence. Nevertheless, the court found that this claim lacked any evidentiary support. The court noted that the letter from Ritacca, while attached to defendant's *pro se* petition, was not attached to counsel's second amended petition. The court continued:

> "Mr. Ritacca's letter gives an unsworn account of a conversation with an unnamed detective about his belief as to the victim's past statements. Even if the court were to overlook the general lack of reliability found in the uncorroborated hearsay statements that are twice-removed from the original declarant, the newly-discovered 'evidence' to which Mr. Ritacca's letter alludes cannot be described as being so conclusive that it would have [*sic*] change the result on retrial. At best, the letter hints at the existence of evidence that might have assisted him in attacking the credibility of the State's witnesses."

¶ 34 The court concluded by holding that in light of the evidence that was actually presented at defendant's trial, the implications of Ritacca's letter did not amount to a colorable claim of actual innocence. Therefore, defendant's amended postconviction petition failed to make a substantial showing of a constitutional violation. Accordingly, the trial court granted the State's motion to dismiss. Defendant filed a motion to reconsider, which was denied. Defendant appeals.

¶ 35 II. ANALYSIS

¶ 36 On appeal, defendant contends that post-conviction counsel provided unreasonable assistance in drafting his second amended petition because she failed to properly preserve his *pro se* claim. Therefore, he requests that this court vacate the trial court's order granting the State's motion to dismiss and remand this cause for new counsel to represent him at a second-stage proceeding.

¶ 37 In response, the State argues that the trial court properly granted its motion to dismiss because defendant's initial *pro se* post-conviction petition was not timely filed. In reply, defendant asserts that: (1) the time limitations in the Post-Conviction Hearing Act (Act) do not apply to his petition because it advances a claim of actual innocence (725 ILCS 5/122-1(c) (West 2010)); and (2) if his petition is subject to the timing requirements in the Act, under the mailbox rule, the petition was timely filed.

¶ 38 I. Claim of Actual Innocence

¶ 39 Here, if we determine that defendant's *pro* se postconviction petition sets forth a claim of actual innocence, we need not determine whether defendant timely filed his petition, since a claim of actual innocence does not apply to the time limitations set out in the Act. See 725 ILCS 5/122-1(c) (West 2010). For that reason, we will first review defendant's contention that his petition should be construed as a claim of actual innocence.

¶ 40 The Act states, in pertinent part:

> "When a defendant has a sentence other than death, no proceedings under this Article shall be commenced more than 6 months after the conclusion of proceedings in the United States Supreme Court, unless the petitioner alleges facts showing that the delay was not due to his or her culpable negligence. If a petition for *certiorari* is not filed, no proceedings under this Article shall be commenced more than 6 months from the

date for filing a *certiorari* petition, unless the petitioner alleges facts showing that the delay was not due to his or her culpable negligence. If a defendant does not file a direct appeal, the post-conviction petition shall be filed no later than 3 years from the date of conviction, unless the petitioner alleges facts showing that the delay was not due to his or her culpable negligence.

This limitation does not apply to a petition advancing a claim of actual innocence." (Emphasis added.) 725 ILCS 5/122-1(c) (West 2010).

¶ 41 The Post-Conviction Hearing Act (Act) provides for a three-stage process to adjudicate a postconviction petition. *People v. Harris*, 224 Ill. 2d 115, 125 (2007). At the first stage, the allegations in the petition are liberally construed and need to only present "the gist of a constitutional claim." *People v. Edwards*, 197 Ill. 2d 239, 244 (2001). At the second stage, an indigent defendant is entitled to appointed counsel, the petition may be amended, and the State may answer or move to dismiss the petition. *People v. Gaultney*, 174 Ill. 2d 410, 418 (1996). Since such representation is a statutory right, the petitioner is entitled to only a "reasonable" level of assistance of post-conviction counsel. *People v. Perkins*, 229 Ill. 2d 34, 42 (2008). Our review of a postconviction petition dismissed at the second stage is *de novo*. *People v. Johnson*, 2017 IL 120310, ¶ 14. At the third stage, the trial court conducts an evidentiary hearing on the petition. *Id*.

¶ 42 It is well settled that a defendant who files a postconviction petition may pursue a claim of actual innocence. *People v. Washington*, 171 Ill. 2d 475, 489 (1996). To succeed under that theory, the evidence must be "(1) newly discovered; (2) not discoverable earlier through the exercise of due diligence; (3) material and not merely cumulative; and (4) of such conclusive

character that it would probably change the result on retrial." *People v. Sanders*, 2016 IL 118123, ¶ 24 (citing *People v. Edwards*, 2012 IL 111711, ¶ 32).

¶ 43 Here, in determining whether defendant's petition constitutes a claim of actual innocence, we need not find that all of the requirements in *Sanders* have been met. Our focus in this appeal is not on whether the allegations in defendant's *pro se* post-conviction petition conclusively established that defendant has a viable claim of actual innocence. Instead, if we find that defendant's *pro se* postconviction petition is not subject to the time limitations in the Act because the allegations in that petition *set out* a claim for actual innocence, then we will turn to the issue of whether postconviction counsel provided "reasonable assistance" to defendant at the second stage hearing below.

¶ 44 Having reviewed the allegations in defendant's *pro se* postconviction petition, we find that he did in fact set out a claim of actual innocence. In the petition, defendant claimed that his trial counsel, Robert Ritacca, told him that he had spoken to a detective, and that detective told Ritacca that when the police first interviewed S.J., she only accused her mother. However, because S.J. did not want to testify against her mother, the police manipulated S.J. to accuse defendant. In support of this claim, defendant attached a letter to the petition from Ritacca dated December 17, 2009. In that letter Ritacca asserted, "I just recently talked to a detective that told me when they talked to your stepdaughter all accusations were against your wife solely and the little girl stated she didn't want to testify against the mother. Then they switched it falsely to you." Here, defendant is clearly claiming that he is innocent of the crimes of which he was convicted, and that he was falsely accused by S.J. after the police were unable to make her incriminate her mother. For these reasons, we find defendant' *pro se* postconviction petition sets out a claim of actual innocence. Therefore, that claim in the petition was not subject to the time

limitations contained in the Act. Having made this determination we will now turn to the merits of defendant's appeal.

¶ 45 II. Unreasonable Assistance of Postconviction Counsel

¶ 46 As we have noted, an indigent defendant who files a postconviction petition that is not summarily dismissed at the first stage of proceedings under the Act is entitled to appointed counsel. 725 ILCS 5/122-4 (West 2010). Since such representation is a statutory right, a defendant is only entitled to a "reasonable" level of assistance of post-conviction counsel. *Perkins*, 229 Ill. 2d at 42 (2008).

¶ 47 To ensure such reasonable assistance, Supreme Court Rule 651(c) (eff. February 6, 2013) requires that postconviction counsel: (1) consult with the defendant either by mail or in person to ascertain his constitutional claims; (2) examine the record of the trial court proceedings; and (3) make any amendments to the *pro se* petition necessary to adequately present the defendant's claims. *People v. Kuehner*, 2015 IL 117695, ¶ 15. "The statute cannot perform its function unless the attorney appointed to represent an indigent petitioner ascertains the basis of his complaints, shapes those complaints into appropriate legal form and presents them to the court." *People v. Suarez*, 224 Ill. 2d 37, 47 (2007) (quoting *People v. Slaughter*, 39 Ill. 2d 278, 285 (1968)).

¶ 48 Under Rule 651(c), counsel is *required* to attempt to obtain evidentiary support for the claims raised in the *pro se* petition. *People v. Johnson*, 154 Ill. 2d 227, 245 (1993). Section 122-2 of the Act provides that the petition "shall have attached thereto affidavits, records, or other evidence supporting its allegations or *shall state why the same are not attached*." (Emphasis added.) 725 ILCS 5/122-2 (West 2010). Also, it is well settled that remand is required where

postconviction counsel fails to fulfill her duties as mandated by Rule 651(c), regardless of whether the claims raised in the petition have merit. *Suarez*, 224 Ill. 2d at 47.

¶ 49 Here, contrary to the State's assertion at oral argument, postconviction counsel did file a certificate pursuant to Illinois Supreme Court Rule 651(c) (eff. Feb. 6, 2013). However, the wording in counsel's certificate was very generic. For example, counsel stated that she consulted with defendant "by phone, mail, electronic means *or* in person to ascertain *his or her* contentions of deprivation of constitutional rights." (Emphasis added.) Also, although postconviction counsel's second amended petition included all of the claims that defendant raised in his *pro se* petition, counsel did not attach any supporting evidence for defendant's actual innocence claim based upon newly discovered evidence, including the most easily accessible piece of evidence—the letter from Ritacca, *a copy of which was attached to defendant's pro se postconviction petition and is a part of the record.*

¶ 50 At oral argument, the State cited to *People v. Malone*, 2017 IL App (3d) 140165, ¶ 10, for the proposition that counsel was not required to go on a "fishing expedition" to find facts and evidence outside the record that might support the defendant's claims. *Id.*

¶ 51 Before addressing the merits of *Malone*, we must note that at oral argument, counsel for the State did not seek to supplement her briefs with this recent case, either in writing or orally. It was only when counsel began discussing this case and this court asked her whether she would like to move to supplement did counsel indicate that she would like to do so. She also did not provide opposing counsel or the court with a copy of the case. As such, we could find that counsel has forfeited any review of this case for her failure to comply with Illinois Supreme Court Rule 341(h)(7) (eff. Jan 1, 2016) (points not argued are forfeited and shall not be raised in the reply brief, in oral argument, or on petition for rehearing.) However, since forfeiture is a

limitation on the parties and not this court's ability to consider an issue (*People v. Woods*, 214 Ill. 2d 455, 470 (2005)), we will consider counsel's reference to *Malone*. Nevertheless, we take seriously counsel's lack of adherence to our Supreme Court Rules and advise her to strictly comply with all of them in the future.

¶ 52 Turning to the merits of *Malone*, in that case appointed postconviction counsel did not make any amendments to the *pro se* defendant's postconviction petition, and he also did not withdraw as counsel. *Malone*, 2017 IL App (3d) 140165, ¶9. The defendant appealed the trial court's order granting the State's motion to dismiss, and alleged unreasonable assistance of post-conviction counsel. Specifically, the defendant claimed that if counsel could not amend the *pro se* petition he should have withdrawn as counsel. *Id.* ¶ 10. In rejecting this argument, the appellate court noted that the defendant did not make any recommendation as to *how* counsel could have improved the petition, other than stating that he did not attach any affidavits supporting the claims. *Id.* The court then held that absent a showing of available material for supporting affidavits, a failure to present affidavits obviously could not be considered neglect by postconviction counsel. *Id.* (citing *People v. Stovall*, 47 Ill.2d 42, 46, (1970)). The court said that postconviction counsel was not required to go on a "fishing expedition" to find facts and evidence outside the record that might support the defendant's claims. *Id.*

¶ 53 The facts of the instant case bear no resemblance to those in *Malone*. Here, postconviction counsel did not need to go on a fishing expedition to find evidence to support the claims in defendant's postconviction petition; instead, such evidence was "low hanging fruit." In addition to failing to attach to the amended postconviction petition the letter that Ritacca allegedly wrote and that was attached to defendant's *pro se* postconviction petition, postconviction counsel also failed to provide reasonable assistance to defendant by not: (1)

attaching an affidavit from Ritacca naming the detective who had told him about the interview, along with an affidavit from that detective describing S.J.'s statements to the police that she did not want to testify against her mother and the police's conduct in "switching" the accusations to defendant; *or* (2) stating in the petition why no affidavits, records or other evidence could not be attached. See 725 ILCS 5/122-2 (West 2010). For these reasons, we find that postconviction counsel provided unreasonable assistance of counsel to defendant at the second stage proceedings.

III. CONCLUSION

¶ 54 In sum, Defendant's *pro se* postconviction petition set forth a claim of actual innocence, so we did not need to determine whether that petition was filed within the time limitations as set forth in the Post-Conviction Hearing Act. 725 ILCS 5/122-1(c) (West 2010). Also, postconviction counsel provided unreasonable assistance of counsel when: (1) she amended the *pro se* petition and failed to attach a letter from defendant's trial attorney that was attached to defendant's *pro se* petition; and (2) she failed to obtain other affidavits to support defendant's claim of actual innocence, or state why she was not able to attach such evidence. Therefore, we vacate the trial court's order granting the State's motion to dismiss, and we remand this cause for new postconviction counsel to be appointed and a new second stage hearing to be conducted.

¶ 55 The judgment of the circuit court of Lake County is vacated and this cause is remanded for further proceedings consistent with this order.

¶ 56 Vacated and remanded.