THIRD DIVISION
March 28, 2018

No. 1-15-1306

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Respondent-Appellee,	)	Cook County
	)	
v.	)	No. 02 CR 26546
	)	
MICHAEL EASTERLING,	)	The Honorable
	)	Brian Flaherty,
Petitioner-Appellant.	)	Judge Presiding.
	)	

JUSTICE FITZGERALD SMITH delivered the judgment of the court.
Presiding Justice Cobbs and Justice Lavin concur in the judgment.

ORDER

¶ 1 Held: On review of dismissal of postconviction petition at second stage of proceedings, no error is found where the allegations in the petition, supported by affidavits, fail to make a substantial showing of actual innocence or of any constitutional deprivation to warrant a third-stage proceeding.

¶ 2 Petitioner Michael Easterling flied a *pro se* postconviction petition for relief from judgment under the Post-Conviction Hearing Act (Act), 725 ILCS 5/122-1 *et seq.* (West 2010), relating to his conviction for predatory criminal sexual assault of a child, 11-year-old S.T., whom he impregnated. The trial court appointed postconviction counsel to represent petitioner. Defense counsel filed a certification pursuant to Supreme Court Rule 651(c) certifying that, after consultation with petitioner, he would not be filing an amended or supplemental petition. Thereafter, the State filed a motion to dismiss the petition. The court granted the State's motion to dismiss, and dismissed petitioner's postconviction petition. Petitioner appeals, contending that the court erred in failing to advance his postconviction claims of actual innocence and ineffective assistance of counsel to an evidentiary hearing. For the following reasons, we affirm.

¶ 3 I. BACKGROUND

¶ 4 After a bench trial in 2005, petitioner was found guilty of predatory criminal sexual assault of a child for having sexual intercourse with 11-year-old S.T., with whom he lived. The trial court sentenced petitioner to 15 years' incarceration.

¶ 5 Briefly, the following evidence was adduced at trial. In February 2002, petitioner had two children with his girlfriend, Norelle.[1] Norelle was the victim's older sister. On Father's Day of that same year, petitioner had spent the day drinking in Chicago, and had passed out. Norelle and others drove him home and left him in the basement where he had sexual intercourse with the 11-year-old victim.

¶ 6 The day before trial started, against his counsel's advice, petitioner asked to speak with the court. The court obliged, and petitioner asked a question about his right to "fight the issue to be able to use consent as a defense in this charge." The court responded:

[1] Multiple spellings of Norelle's name appear in the record. For the reader's ease, we use a single spelling here.

"THE COURT: I guess- - let me explain the law to you.

Do you understand that, all right, consent is a legitimate defense if it's another adult, do you understand, if it's a person who is 17 years of age or older, but by law a person under 17 cannot legally consent.

I don't care if it's an 11 year old with her own American Express Card and rented the hotel room and drove you to there and bought you dinner; because of her age, she cannot consent under the law.

It's just like a person who is maybe in a comatose condition, you know, who is 25, they can't consent because of their condition.

But under the law, a person under 17 cannot consent, you know.

DEFENDANT EASTERLING: Okay.

THE COURT: That's the law, because the law protects children from adults.

DEFENDANT EASTERLING: Okay.

THE COURT: That's the law. So I don't care how willing she was, I don't care if you paid her, if she was a prostitute, and they have child prostitutes, runaways; but because of their age, I don't care how agreeable they are. That's the law, they cannot legally consent. That's the law in every state of the union, all 50 states.

In other countries, it may be a defense, but not in the United States, sir.

Okay?

DEFENDANT EASTERLING: Okay."

¶ 7 The State presented evidence at trial establishing petitioner's paternity to the victim's child to a probability of 99.99 percent.

¶ 8 The victim testified that, in February 2002, she lived with her father, some of her eleven sisters, some of their children, and her father's girlfriend on Paxton Street in Calumet City. Petitioner, who was the father of two of the victim's sister Norelle's children, lived in the basement. The victim testified that, when she was 11 years old, she and petitioner had sexual intercourse on Norelle's bed when nobody else was home. She testified that she was in the basement doing laundry when she and petitioner started playing a video game together, and then kissed. She testified that both she and petitioner removed their own clothes while they were standing, had sex on the bed, then washed up and got dressed. This intercourse resulted in a pregnancy and the subsequent birth of a child when the victim was 12 years old. The victim testified petitioner did not smell like alcohol, was not passed out, and affirmatively acknowledged that petitioner was awake before intercourse while they were playing a game and during intercourse on the bed.

¶ 9 The State entered petitioner's birth certificate into evidence, which showed he was born in August 1980, making him 21 years old at the time of the offense. The victim's birth certificate and that of the child were also entered, showing the child was born in December 2002, and the victim was born in December 1990, making the victim 12 years old at the time of the child's birth.

¶ 10 Assistant State's Attorney Cordelia Coppleson testified that she was called to the police station in September 2002 regarding a sexual assault case. Once there, she met with petitioner, who provided her with a statement that she reduced to writing. That statement was published to the jury and provided, in part:

> "This statement [is] taken regarding the sexual intercourse with [S.T.] which occurred on February 1st to March 30th of 2002, at 567 Paxton Avenue, Calumet City.

* * *

My name is Michael Easterling. I am 22 years old. I live at 567 Paxton Avenue in Calumet City. I have lived there off and on for the last six years. I lived there with Nathaniel Jordan and Claudette Thomas, Mr. Jordan's girlfriend. Her daughter, [S.T.], lives there too. She is eleven. My girlfriend, Norelle, lives there, so does Dina Brielle Jordan, Norelle's sister, who is 14.

* * *

Back in February of 2002, I started having sex with [S.T.] [S.T.] is eleven years old. I have known her since 1995. I started dating Norelle Jordan in 1996. She is Nathaniel Jordan's daughter, and [S.T.'s] mom lives with Nathaniel s boyfriend and girlfriend. I have lived with them and [S.T.] since 1998. I know [S.T.] is 11 years old.

[S.T.] was acting like she wanted me. * * * One time I was in bed with Norelle and she was asleep, and [S.T.] was sleeping on the floor. She started to touch - - she started trying to touch my penis, and I told her to stop. That's when I woke up. She had her mouth on my penis That's how this whole thing got started.

One time when we were in the basement at 567 Paxton in Calumet City, Norelle and I were in bed. [S.T.] was down in the room. I was sleeping on the floor because Norelle and I were in a fight. [S.T.] came over to me while Norelle was sleeping and got under my covers. She started kissing me and touching me. And then I pulled my penis out of my underwear and I put it in her vagina. She had been sucking on my neck, and then I had sex with her. We had sex until she said it hurt, and that is when we stopped. I did not ejaculate.

> She tried to get me to have sex with her after that, but I said no that night. I had sexual intercourse with her about six or seven times after that first time between February, 2002, and the end of March, 2002.
>
> * * * [E]ach time we had sex, it was at 567 Paxton in Calumet City. By sexual intercourse, I mean putting my penis inside of her vagina and then ejaculating. I used condoms every time with her except for the first time.
>
> Now, I know she is pregnant. I don't think that I am the father, but I know that with blood and DNA, they'll figure it out and I might be the father, and that is why I am telling about what happened. I kept having sex with her because I didn't want her to tell anyone because I didn't want to go to jail, and there was no one I could tell."

A copy of the statement was entered into evidence.

¶ 11 Petitioner testified on his own behalf, explaining that in 2002, he lived part-time at the Paxton house "for parole because I couldn't parole to Indiana" where his mother lived. He had been released from jail in December 2001. He said sometimes 30 people stayed at the Paxton house, and people would be "sleeping all over the floor." He lived there with Norelle, whom he had dated since 1998. He had known S.T. since 1999 or 2000. According to petitioner, he first became aware he and S.T. had intercourse on Father's Day 2002, when, a couple of days after Father's Day, she asked him, "When are you going to give me some of that again?" He asked her to repeat what she said, and S.T. responded, "You weren't that drunk." He thought about the conversation later and remembered he went to a party on Father's Day and had gotten intoxicated. He said S.T.'s sister and some other girls picked him up in Chicago where he had passed out and brought him back to the Paxton house. He said some men carried him down to the basement. As he was thinking back on that day, he inspected the underpants he had been wearing

and saw stains on them. He testified he did not have any recollection about having intercourse with S.T. on Father's Day, and in fact does not recall ever having intercourse with S.T. On cross-examination, petitioner admitted that he fraudulently used the Paxton address in order to comply with parole requirements.

¶ 12 In rebuttal, the State entered certified copies of petitioner's four prior convictions into evidence, that being an aggravated unlawful use of a weapon conviction, a conviction for manufacture and delivery of a controlled substance, and two possession of controlled substance convictions.

¶ 13 The court found the evidence "overwhelming with the DNA, birth certificates, and the testimony of the victim herself." It found petitioner guilty of predatory criminal sexual assault. Following a sentencing hearing, petitioner was sentenced to 15 years' imprisonment.

¶ 14 Petitioner appealed and the State Appellate Defender's Office was appointed to represent him. The Appellate Defender filed a motion for leave to withdraw as counsel pursuant to *Anders v. California*, 386 U.S. 738 (1967), after concluding that there were no meritorious issues to be raised. Petitioner filed a *pro se* brief. We granted the State Appellate Defender's motion, finding that there were no issues of arguable merit, and affirmed the judgment. *People v. Easterling*, No. 1-05-3771 (2007) (unpublished order under Supreme Court Rule 23).

¶ 15 Petitioner then filed a petition for relief from judgment pursuant to section 2-1401 of the Code of Civil Procedure. 735 ILCS 5/2-1401 (West 2006). By that petition, petitioner alleged that, if the trial court had known: (a) that the victim's father wanted petitioner to receive a lesser sentence, and (b) that petitioner was drunk at the time he had sexual intercourse with the 11-year-old victim, the trial court would have given him a lesser sentence. He also argued that his defense that the sexual contact occurred when he was drunk would have been corroborated by

the victim's two sisters. Petitioner attached signed affidavits from the victim's father and two sisters, as well as an unnotarized letter from the victim recanting a portion of her trial testimony. In one of the affidavits, Dinebrielle Jordan attested, in part, that the victim told her she had sex with petitioner while petitioner was drunk on Father's Day of 2002. In another affidavit, Norelle Jordan attested, in part, that the victim told her she had sex with petitioner on Father's Day in June 2002 after petitioner "had got [so] intoxicated at a party in Chicago" and Norelle and others had to pick him up and drive him home "because he had passed out from drinking an using numerous drugs." In the unnotarized letter from the victim to petitioner, the victim apologized to petitioner for lying at trial about petitioner not being drunk, and explained that she lied because a lawyer told her she would get in trouble if she testified that he was drunk.

¶ 16 The circuit court recharacterized the petition as a postconviction petition and summarily dismissed it. Petitioner appealed the summary dismissal, arguing that the circuit court failed to properly admonish him pursuant to *People v. Shellstrom*, 216 Ill. 2d 45 (2005), and *People v. Pearson*, 216 Ill. 2d 58 (2005), concerning his right to withdraw his *pro se* petition for relief from judgment and file a postconviction petition in its stead. On appeal, this court agreed with petitioner, vacated the summary dismissal, and remanded for proper admonishments, as well as the opportunity to amend or withdraw the pleading. *People v. Easterling*, 2009 IL App (1st) 071967-U (unpublished order under Supreme Court Rule 23).

¶ 17 On remand, petitioner mailed a *pro se* postconviction petition, dated July 7, 2010, and file stamped by the clerk's office on August 11, 2010. By that petition, petitioner alleged his trial counsel was ineffective for: (1) failing to challenge the indictment because he was overcharged with predatory criminal sexual assault even though there was no evidence of force; (2) failing to present the testimony of Norelle Jordan; (3) failing to subpoena the victim's medical records

relating to the birth of N.T. because it would have shown that the birth was pre-mature; (4) failing to raise the argument that the trial court employed the incorrect mental state; (5) failing to present a letter from the victim's father asking the trial court for leniency at sentencing. Petitioner also argued that his appellate counsel was ineffective for failing to raise these issues on direct appeal; the trial court erred in failing to allow him to present the defense of consent; and that he is actually innocent based upon a letter from the victim in which she stated that she lied at trial; and that the trial court erred by failing to admonish him about mandatory supervised release. Petitioner attached affidavits from the victim, Norelle Jordan, and Dinebrelle Jordan to this petition, as well a document entitled "Statement" from the victim's father.[2]

¶ 18 Briefly, the letter from S.T. attached to petitioner's postconviction petition is dated December 20, 2005, but notarized on January 11, 2010. In that letter, S.T. apologized to petitioner for lying at trial that he was not drunk and they were playing video games.[3] She attested that petitioner's trial counsel told her that, if S.T. testified that petitioner was drunk when they had sexual intercourse, then S.T. would "get in trouble." Specifically, she writes:

> "I know you probably mad at me cause you in jail because of me. I am very sorry. The reason why I lied at court is because your lawyerlady Nadine said if I tell them people you was drunk when we [had intercourse] I was gonna get in trouble. So I lied about you not being drunk an us playing the game cause I was scared. An plus I ain't want nobody to think I'm some kind of hoe or something."

¶ 19 The unnotarized statement from the victim's father, dated March 4, 2003, reads:

> "I am writing this statement to request that the court be as lenient as possible regarding the sexual misconduct cases involving [petitioner]. I am also the father and sole

[2] These supporting documents are the same documents defendant attached to his section 2-1401 petition.
[3] This letter is quoted in part above.

support of both my daughters as well as their babies. Although [petitioner] has a record, none of his prior cases were at all related to this type of conduct. It would serve no purpose to incarcerate this young man for a lengthy period. It would be much better if he could be put into a position where he could assist me in the support of these several minor children. If possible, I would like to speak in person to let his honor the judge know how the family and I feel. Thank you."

¶ 20 In one of the sister's affidavits, notarized on December 18, 2006, Dinebrielle Jordan attested, in part, that:

"[The victim] said out of her own mouth that on Fathers day of 2002 she had sex with [petitioner] while he was drunk in my sister Norelle Jordan's room on the floor [petitioner] was drunk from a party he went to in the city of Chicago that night. She bragged about how good sex is when a guy is drunk and how [petitioner] just laid there on the floor and let her do what she wanted to him. At first I thought that it is was just another lie but I thought hard about what [the victim] had said an I remembered that me, my sister Norelle an a few other people had to go pick [petitioner] up from the city of Chicago on Fathers day because he had passed out from using ecstasy, smoking weed and drinking at a party in the projects. That's when I figured out that [the victim] wasn't lying about [petitioner] maybe the father of the child and that Fathers day was the only time [the victim] could have gotten pregnant by [petitioner] because that's the only time he was out our house and me or Norelle wasn't with him the whole time."

¶ 21 In the other affidavit, also notarized on December 18, 2006, the other sister, Norelle Jordan attested in part:

> "Later on in the month of September of 2002 [the victim] changed the name of the person who she was pregnant by this time she was accusing my boy friend which was Michael Easterling at the time. When I confronted [the victim] about her accusation that she was making she ignored me and stayed clear of my path to dodge my questions about her and [petitioner]. In December of 2002 [the victim] finally confessed to me about what happened between her and [petitioner]. What [the victim] told me out of her own mouth was that back in June 2002 on Fathers day that while [petitioner] had got very intoxicated at a party in Chicago that I myself an a few other people had to go assist [petitioner] had to go assist [petitioner] from because he had passed out from drinking an using numerous drugs. [The victim] explained to me that after we took [petitioner] into the basement of me and my families home and into my bedroom that she went in the room when it had gotten late to where [petitioner] was sleeping on the floor at and had sex with him. She explained to me in detail how she took the lead in the sexual act and [petitioner] just lay there as if he wasn't really into what was going on. When I asked [the victim] why she had done this she said she didn't know the only response I could get from her was [petitioner] was cute to her at the time."

In her opinion, S.T. was not lying about petitioner being the father of the baby because she recalled having to go pick petitioner up on Father's Day 2002 because he was drunk, and she thought that was the only time petitioner was in the house without herself or Norelle being around him the entire time.

¶ 22 Counsel was appointed to represent petitioner. In August 2013, petitioner's counsel filed a Rule 651(c) certificate certifying that he consulted with petitioner by letter, telephone, and in person to ascertain his contentions of deprivation of constitutional rights, examined petitioner's

trial transcripts, the case procedural history, and common law records. Counsel further indicated that, after examining petitioner's *pro se* petition, he determined that petitioner's postconviction petition raised a substantial legal question, but that he would not be filing a supplemental petition.

¶ 23 In September 2013, the State filed a motion to dismiss the postconviction petition, alleging the petition should be dismissed because: (1) it is untimely; (2) the allegations of ineffective assistance of trial counsel should fail where the underlying allegations have no merit; (3) the claim of trial court error is ill-founded; (4) petitioner's attempt at claiming actual innocence is improperly pled; and (5) petitioner's claim that his rights were violated by the addition of a term of mandatory supervised release is meritless.

¶ 24 In March 2015, the postconviction court concluded the petition was both late and lacking in substantive merit, and granted the State's motion to dismiss.

¶ 25 Petitioner appeals.

¶ 26 II. ANALYSIS

¶ 27 i. The Actual Innocence Claim

¶ 28 On appeal, petitioner first contends that the postconviction court erred in dismissing his postconviction petition where he made a substantial showing of actual innocence. Specifically, petitioner argues that an evidentiary hearing is warranted where the victim (whom petitioner refers to as the "complaining witness") recanted, explaining that she lied at trial because she thought she would get in trouble if she told the truth and because she did not want anybody to think ill of her. Additionally, argues petitioner, his actual innocence claim is strengthened where the victim's sister "indicates that she acknowledged the lie as early as 2006." Petitioner urges to find that, if "the trier of fact had been presented with this information, it would create (at the very

least) a reasonable doubt concerning [petitioner's] guilt and, thus, probably would change the result on retrial." We disagree.

¶ 29 We begin by noting the well-established principles regarding postconviction proceedings. The Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq*. (West 2010)) provides a means by which a defendant may challenge his conviction for "substantial deprivation of federal or state constitutional rights." *People v. Tenner*, 175 Ill. 2d 372, 378 (1997); *People v. Jones*, 213 Ill. 2d 498, 503 (2004); see also *People v. Coleman*, 206 Ill. 2d 261, 277 (2002). A postconviction action is a collateral attack on a prior conviction and sentence and " 'is not a substitute for, or an addendum to, direct appeal.' " *People v. Simmons*, 388 Ill. App. 3d 599, 605 (2009) (quoting *People v. Kokoraleis*, 159 Ill. 2d 325, 328 (1994)).

¶ 30 Proceedings under the Act are commenced by the filing of a petition in the circuit court I which the original proceeding took place. *Jones*, 213 Ill. 2d at 503. The Act creates a three-stage process. *People v. Makiel*, 358 Ill. App. 3d 102, 104 (2005). The instant case involves a second-stage dismissal. A petition that survives dismissal during the preliminary stage proceeds to the second stage of the postconviction proceedings, during which counsel maybe appointed for the indigent petitioner, and the petition may be amended. 725 ILCS 5/122-1 *et seq*. (West 2010). During this stage, the State may file a motion to dismiss the petition. 725 ILCS 5/122-1 *et seq*. (West 2010). To survive such motion, a petitioner must make a "substantial showing" that his constitutional rights were violated by supporting his allegations with the trial record or appropriate affidavits. *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006); *People v. Simpson*, 204 Ill. 2d 536, 546-47 (2001). At this second stage of proceedings, all well-pleaded facts that are not positively rebutted by the trial record are taken as true. *Pendleton*, 223 Ill. 2d at 473; *People v. Coleman*, 183 Ill. 2d 366, 379 (1998). An evidentiary hearing is only required when the

allegations in the petition, supported by the trial record and accompanying affidavits, make a substantial showing of a violation of a constitutional right. *People v. Hobley*, 182 Ill. 2d 404, 427-28 (1998). We review a circuit court's dismissal of a postconviction petition at the second stage *de novo*. *People v. Sanders*, 2016 IL 118123, ¶ 31. "The circuit court may properly dismiss a postconviction petition where the allegations contained therein are contradicted by the record from the original trial proceedings." *People v. Tate*, 305 Ill. App. 3d 607, 611 (1999).

¶ 31 Here, petitioner contends he established his actual innocence. The wrongful conviction of an innocent person violates due process. *People v. Washington*, 171 Ill. 2d 475, 481 (1996). The due process clause of the Illinois Constitution allows a prisoner to present a freestanding claim of actual innocence based on newly discovered evidence. *People v. Ortiz*, 235 Ill. 2d 319, 330 (2009); *People v. Burrows*, 172 Ill. 2d 169, 199 (1996) (a proper claim under the Act may include a claim of actual innocence based on newly discovered evidence).

¶ 32 The focus of a freestanding claim of actual claim of actual innocence is on the new evidence itself, and whether it would totally vindicate or exonerate the defendant. *People v. Anderson*, 401 Ill. App. 3d 134, 140 (2010). At the second stage of a postconviction actual innocence inquiry, the relevant question is "whether the petitioner has made a substantial showing of actual innocence such that an evidentiary hearing is warranted." *People v. Lofton*, 2011 IL App (1st) 100118, ¶ 34. Newly discovered evidence cannot be used to relitigate the sufficiency of the evidence adduced at trial. *People v. Coleman*, 2013 IL 113307, ¶ 97 ("Indeed, the sufficiency of the State's evidence to convict beyond a reasonable doubt is not the determination that the trial court must make. If it were, the remedy would be an acquittal, not a new trial"). The evidence supporting a claim of actual innocence must be newly discovered, material, and not merely cumulative, and of sufficiently conclusive character that it would

probably change the result of a retrial. *People v. Edwards*, 2012 IL 111711, ¶ 32. Our supreme court has explained:

> "Substantively, in order to succeed on a claim of actual innocence, the defendant must present new, material, noncumulative evidence that is so conclusive it would probably change the result on retrial. [Citation.] 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 jury heard. [Citation.] And conclusive means the evidence, when considered along with the trial evidence, would probably lead to a different result. [Citation.]" *Coleman*, 2013 IL 113307, ¶ 96.

¶ 33 Here, petitioner contends he established his actual innocence based on newly discovered evidence where the victim testified at trial that petitioner was awake when they had intercourse, but the evidence presented in the petition, that is, her letter written to petitioner, shows petitioner was not awake during intercourse. Petitioner also claims he makes a substantial showing that the evidence was discovered after trial and could not have been discovered any earlier because the alleged recantation took place after trial. Finally, petitioner claims to have made a substantial showing that the evidence is sufficiently conclusive to warrant a new trial where this alleged recantation came from the State's "key witness."

¶ 34 Even if we were to find that this evidence was newly discovered and that the claim is freestanding, petitioner's claim fails because it is neither material nor conclusive. See *Coleman*, 2013 IL 113307, ¶ 96 ("Material means the evidence is relevant and probative of the petitioner's innocence. [Citation.] *** And conclusive means the evidence, when considered along with the

trial evidence, would probably lead to a different result. [Citation.]" Petitioner argues that the victim's personal letter written to petitioner in 2005, coupled with Norelle and Dinebrielle's affidavits show that he was unconscious at the time of intercourse. Specifically, in his reply brief, petitioner urges us to find that he cannot be guilty of predatory criminal sexual assault based on the premise that he committed an act of penetration for the purpose of sexual gratification or arousal, as required by the statute under which he was convicted, because "a man lying unconscious does not evince a culpable mental state." Essentially, petitioner argues that his unconscious state rendered him unable to commit any volitional act.

¶ 35 Petitioner testified at trial that he first learned he and S.T. had intercourse on Father's Day 2002, when, a couple of days after Father's Day, she asked him, "When are you going to give me some of that again?" He asked her to repeat what she said, and S.T. responded, "You weren't that drunk." He thought about the conversation later and remembered he went to a party on Father's Day and had gotten intoxicated. He said S.T.'s sister and some other girls picked him up in Chicago where he had passed out and brought him back to the Paxton house. He said some men carried him down to the basement. After reflecting on that day, he inspected the underpants he had been wearing and saw stains on them. He testified he did not have any recollection about having intercourse with S.T. on Father's Day, and in fact does not recall ever having intercourse with S.T.

¶ 36 Initially, we note a discrepancy regarding the petitioner's characterization on appeal that he presented evidence at trial that he was "completely unconscious when the intercourse occurred" and that "he was unconscious and has no recollection of having sex with [the victim]." In fact, our reading of the trial record, as noted above, demonstrates that petitioner testified he

passed out at a party in Chicago and was driven back to the Paxton house. He did not testify that he was unconscious once he was at the Paxton house.

¶ 37 Regardless, we also find that the letter the victim wrote to petitioner does not constitute a "recantation affidavit" or constitute compelling evidence that petitioner was unconscious. The letter is dated December 20, 2005, when the victim had just turned 15 years old. The letter in its entirety reads as follows:

> "Hi! Michael,
>
> How are you doing? Fine I hope. Me and [the baby] are ok. I know you probably mad at me cause you in jail because of me. I am very sorry. The reason why I lied at court is because your lawyer lady Nadine said if I tell them people you was drunk when we [f****] I was gonna get in trouble. So I lied about you not being drunk and we playing the game. I was scared. An plus I ain't want nobody to think I'm some kind of hoe or something. Sometimes I wish I could go back to that night on Father's day and make all this go away but I can't. Everybody think it's your fault that I got pregnant but it's really mine. Norrie use to always be telling me about you an stuff and that's what made me like you and do what I did. Anyway, [the baby] is getting real big you should see her. She look just like you every body always say that to me. I'm going to send you some pictures of us soon. I hope you keep them an like them. If you need some one to write you can write me. [The baby] know of you but she don't know how you look or how you are. But I hope when you get out she can get to know you better. Everything cool out here kid. I just wish you was out here like everybody else. Well it's getting late an I'm about to go but please please write me back at the address on this letter.
>
> Love always

[the baby and the victim]

P.s. I'm *** very sorry for everything."

¶ 38 In no way is this letter "of such conclusive character that it will probably change the result on retrial." See *People v. Anderson*, 375 Ill. App. 3d 990, 1006 (2007); see also *People v. Barnslater*, 373 Ill. App. 3d 512, 520 (2007) (A claim of actual innocence is not a challenge to whether the defendant was proved guilty beyond a reasonable doubt, but rather an assertion of total vindication or exoneration). At its most basic level, the letter does not even affirm that petitioner was unconscious at the time of intercourse. Instead, according to the victim, petitioner was drunk, which is far different than unconscious.

¶ 39 Nor does Norelle's affidavit support petitioner's claim that he was "unconscious," as he argues on appeal. Instead, Norelle's affidavit states:

"What [the victim] told me out of her own mouth was that back in June 2002 on Fathers day that while Michael had got very intoxicated at a party in Chicago that I myself an a few other people had to go assist petitioner from because he had passed out from drinking an using numerous drugs. [The victim] explained to me that after we took [the petitioner] into the basement of me and my families home and into my bedroom that she went in the room when it had gotten late to where Michael was sleeping on the floor at and had sex with him. She explained to me in detail how she took the lead in the sexual act and [petitioner] just lay there as if he wasn't really into what was going on."

¶ 40 Like the victim's letter, Norelle's affidavit, at most, shows that petitioner was "very intoxicated" at a party in Chicago. Norelle and some friends picked him up and drove him back to the Paxton house where he went to sleep in Norelle's basement bedroom. Taking the affidavit as true, eventually the victim went into the bedroom and "took the lead in the sexual act."

Petitioner did not seem to be "really into what was going on." This does not support petitioner's contention that he was an unconscious victim, but rather that he was a more passive participant in the sexual act.

¶ 41 Likewise, Dinebrielle's affidavit does not support petitioner's assertion that he was unconscious on the floor. By her affidavit, Dinebrielle attested:

> "[The victim] said out of her own mouth that on Fathers day of 2002 she had sex with Michael while he was drunk in my sister Norelle Jordan's room on the floor Michael was drunk from a party he went to in the city of Chicago that night. She bragged about how good sex is when a guy is drunk and how Michael just laid there on the floor and let her do what she wanted to him. At first I thought that it is was just another lie but I thought hard about what [the victim] had said an I remembered that me, my sister Norelle an a few other people had to go pick Michael up from the city of Chicago on Fathers day because he had passed out from using ecstasy, smoking weed and drinking at a party in the projects. That's when I figured out that [the victim] wasn't lying about Michael maybe the father of the child and that Fathers day was the only time [the victim] could have gotten pregnant by Michael because that's the only time he was out our house and me or Norelle wasn't with him the whole time."

¶ 42 Like the letter from the victim and the affidavit from Norelle, Dinebrielle's affidavit shows that petitioner was drunk and, at most, a passive participant in the sexual intercourse. It does not indicate that petitioner was completely unconscious on the floor, as petitioner asserts.

¶ 43 After considering the affidavits presented in support of petitioner's petition, we find that these affidavits do not support petitioner's claim of actual innocence. The most we can garner from a liberal reading of the affidavits and letter presented here is that petitioner was intoxicated

at a party in Chicago. His friends picked him up and brought him back to the Paxton house, where he went to sleep in the bedroom. At some time that night, he and the victim had sex. The 11-year-old victim may have "taken the lead" in the act and petitioner may have been a passive participant, but a close reading of these affidavits and letter shows that they do not support petitioner's theory that he was an unconscious victim on the floor. This evidence is neither relevant nor probative of petitioner's innocence, nor, if offered, would it be likely to lead to a different result at trial.

¶ 44 Moreover, petitioner fails to make a substantial showing of actual innocence here, where, even if it is true that he was intoxicated at the time he had sexual intercourse with the 11-year-old victim, this would not exonerate him from the charge against him. To be found guilty of the predatory criminal sexual assault of a child, a person 17 years of age or older must "commit an act of contact, however slight, between the sex organ or anus of one person and the part of the body of another for the purpose of sexual gratification or arousal of the victim or the accused, or an act of sexual penetration, and," in pertinent part, "the victim is under 13 years of age[.]" 720 ILCS 5/12-14.1 (2002). Voluntary intoxication is not a defense. See 720 ILCS 5/6-3 (West 2002) ("A person who is in an intoxicated or drugged condition is criminally responsible for conduct unless such condition is involuntarily produced and deprives him of substantial capacity either to appreciate the criminality of his conduct or to confirm his conduct to the requirements of law.").[4]

¶ 45 Even if S.T. were a willing participant in the sexual encounter, her young age renders her incapable of giving legal consent and, therefore, provides no defense to petitioner's actions. See 720 ILCS 5/12-17 (West 2002). He testified he had known the victim since 1999 or 2000, which means he knew her when she was 9 or 10 years old. He makes no argument that he thought she

[4] Defendant does not argue that his *intoxication* was involuntary; he argues only that his intoxication rendered the sexual act itself involuntary.

was of an age to consent or that he did not know she was only 11 years old when he had intercourse with her. The victim lacked the capacity to consent to sexual activity with an adult, and said sexual activity was proven at trial both through testimony and DNA evidence that the victim's child was fathered by petitioner. Such sexual activity is indefensible. See, *e.g.*, *People v. Reed*, 148 Ill. 2d 1, 14 (1992) (Even if the child were to be the "aggressor" in sexual activity, such sexual activity between minor and adult is "indefensible.").

¶ 46 We find no error in the dismissal of petitioner's claim of actual innocence.

¶ 47 ii. The Ineffective Assistance of Trial Counsel Claim

¶ 48 Petitioner next contends that the second-stage dismissal of his petition must be reversed because his pleadings and affidavits substantially established he was deprived of the effective assistance of trial counsel. Petitioner specifically maintains that his trial counsel was ineffective for failing to call Norelle Jordan as a witness. Petitioner supports this claim with a transcript page purporting to show Norelle had been subpoenaed to appear at his trial, as well as the affidavit from Norelle "indicating [S.T.] admitted that she got pregnant after having sex with [petitioner] while he was unconscious." He argues: "Had the trier of fact been presented with this information, it would have impeached [S.T.'s] trial testimony and substantially bolstered [petitioner's] testimony that he was unconscious at the time."

¶ 49 We must first resolve the important threshold matter of whether this petition should be dismissed on untimeliness grounds pursuant to section 122-1 of the Act. Under section 122-1 of the Act, a postconviction proceeding may not be commenced outside the time limitation period stated in the Act unless the petitioner alleges sufficient facts to show that the delay in filing his initial petition was not due to his culpable negligence. 725 ILCS 5/122-1(c) (West 2010); *People v. Rissley*, 206 Ill. 2d 403, 420-21 (2003). Section 122-1(c) of the Act provides in pertinent part:

> "*** 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." 725 ILCS 5/122-1(c) (West 2010).

¶ 50 Our supreme court has defined culpable negligence as "comtemplat[ing] something more than ordinary negligence and is akin to recklessness." *People v. Boclair*, 202 Ill. 2d 89, 106, 108 (2002) ("Culpable negligence has been defined as '[n]egligent conduct that, while not intentional, involves a disregard of the consequences likely to result from one's actions.' Black's Law Dictionary 1056 (7th ed. 1999). Culpable negligence has also been defined as 'something more than negligence' involving 'an indifference to, or disregard of, consequences.' 65 C.J.S. *Negligence* § 19 (2000)"). Our supreme court has made it clear that it is imperative to construe "culpable negligence" broadly so as to ensure that defendants will not be unfairly deprived of the opportunity to have their constitutional claims adjudicated. *Rissley*, 206 Ill. 2d at 421.

¶ 51 A petitioner asserting he was not culpably negligent for the tardiness of his petition must support his assertion with allegations of specific facts showing why his tardiness should be excused. *People v. Walker*, 331 Ill. App. 3d 335, 339-40 (2002) (noting that the relevant inquiry

becomes whether, after accepting all well-pleaded factual allegations of the defendant's petition regarding culpable negligence as true, those assertions are sufficient as a matter of law to demonstrate an absence of culpable negligence on defendant's part). While not dispositive, the length of the delay in filing may suggest recklessness on a defendant's part. *People v. Hampton*, 349 Ill. App. 3d 824, 828 (2004). "A trial court's findings of fact regarding whether a petition's untimeliness was due to culpable negligence will not be reversed unless manifestly erroneous (*People v. Caballero*, 179 Ill. 2d 205, 214 (1997)), but the trial court's ultimate conclusion as to whether the established facts demonstrate culpable negligence is reviewed *de novo*. (*People v. Wilburn*, 338 Ill. App. 3d 1075, 1077 (2003))." *People v. Ramirez*, 361 Ill. App. 3d 450, 452 (2005). The record here does not reflect that the court conducted a hearing or made any specific findings as to the timeliness issue. Thus, our review is *de novo*. *People v. Gerow*, 388 Ill. App. 3d 524, 527 (2009).

¶ 52 Petitioner concedes that his petition is untimely, but argues that, although his original filing was not timely brought, this untimeliness should be excused because he was not culpably negligent for the delay. Specifically, petitioner explains that he diligently presented the claims at issue in this appeal in the initial, timely petition, filed shortly after his direct appeal was denied in 2007. However, the circuit court recharacterized the petition as a postconviction petition and summarily dismissed it. Petitioner appealed the summary dismissal to this court, arguing that the circuit court failed to properly admonish him pursuant to *Shellstrom*, 216 Ill. 2d 45, and *Pearson*, 216 Ill. 2d 58, concerning his right to withdraw his *pro se* petition for relief from judgment and file a postconviction petition in its stead. On appeal, on March 31, 2009, we agreed with petitioner, vacated the summary dismissal, and remanded for proper admonishments, as well as the opportunity to amend or withdraw the pleading. *People v. Easterling*¸ 2009 IL App (1st)

071967-U (unpublished order under Supreme Court Rule 23). Petitioner did so, mailing a *pro se* postconviction petition, dated July 7, 2010, and file stamped by our clerk's office on August 11, 2010. Petitioner argues that, "once he had the opportunity to withdraw the initial petition, it took [petitioner] less than a year to craft the new petition that it is at issue in this appeal, even though he was indigent and incarcerated during that entire period. Most of the evidence he cites was attached to the 2007 petition, but the legal status of that petition was not resolved until 2009. This two-year gap, directly caused by the circuit court's inadequate admonishments, cannot fairly be attributed to [petitioner]. The *pro se* petition sufficiently explains that the petition was not filed sooner, because he was waiting for this Court to resolve the status of his initial petition, and because certain additional documents needed to be notarized. Indeed two of the documents attached to the post-conviction petition were notarized in 2010, shortly before the *pro se* post-conviction petition was filed." He argues, then, that he was not culpably negligent in filing his petition beyond the statute of limitations due to the "convoluted procedural history of this case."

¶ 53 We are inclined to agree with petitioner that the untimeliness of this petition is not due to his culpable negligence, considering the posture of this case during the ensuing years following the affirmance of his direct appeal. We note that, once this court vacated the summary dismissal, and remanded for proper admonishments and the opportunity to amend or withdraw the pleading, petitioner did so without delay.

¶ 54 Equally important, however, the State does not respond to petitioner's timeliness arguments, nor even acknowledge that the petition is untimely. Because "time is not an inherent element of the right to *bring* a post-conviction petition," "time limitations in the Act should be considered as an affirmative defense and can be raised, waived, or forfeited, by the State."

Boclair, 202 Ill. 2d at 101. The State has done so here, and we will consider petitioner's ineffective assistance of counsel claim on the merits.

¶ 55 To establish a claim of ineffective assistance of counsel, a defendant must show that (1) his attorney's representation fell below an objective standard of reasonableness; and (2) he was prejudiced by this deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *People v. Coulter*, 352 Ill. App. 3d 151, 157 (2004). To satisfy the first prong, a defendant must overcome the presumption that contested conduct which might be considered trial strategy is generally immune from claims of ineffective assistance of counsel. *People v. Martinez*, 348 Ill. App. 3d 521, 537 (2004); *People v. Banks*, 343 Ill. App. 3d 765, 775 (2003). Failure to make the requisite showing of either deficient performance or sufficient prejudice defeats the claim. *People v. Palmer*, 162 Ill. 2d 465, 475-76 (1994). Effective assistance of counsel in a constitutional sense means competent, not perfect, representation. *People v. Easley*, 192 Ill. 2d 307, 344 (2000). Courts indulge in the strong presumption that counsel's performance fell within a wide range of reasonable professional assistance. *Strickland*, 466 U.S. at 690; *People v. McGee*, 373 Ill. App. 3d 824, 835 (2007). "Based on the second-stage procedural posture of the instant case, the relevant question is whether the allegations of the petition, supported by the trial record and the accompanying affidavits, demonstrate a substantial constitutional deprivation which requires an evidentiary hearing." *Makiel*, 358 Ill. App. 3d at 106 (citing *Coleman*, 168 Ill. 2d at 381); *People v. Tate*, 2012 IL 112214, ¶ 10.

¶ 56 Generally, counsel's decision regarding whether to present a particular witness is a matter of trial strategy, which enjoys a strong presumption that it is the product of sound trial strategy and not incompetence, and will not support a claim of ineffective assistance of counsel. *People v. Enis*, 194 Ill. 2d 361, 378 (2000). The decision whether "to call a witness is a tactical and

strategic decision in which defense counsel is given wide latitude in making decisions." *People v. Davis*, 228 Ill. App. 3d 123, 130 (1992). However, counsel may be deemed ineffective for failure to call a witness who could corroborate an otherwise uncorroborated defense. *People v. Brown*, 336 Ill. App. 3d 711, 718 (2002) (although counsel's decision whether to present a particular witness is generally not subject to an ineffective assistance claim, "counsel's tactical decisions may be deemed ineffective when they result in counsel's failure to present exculpatory evidence of which he is aware, including the failure to call witnesses whose testimony would support an otherwise uncorroborated defense"). "Whether a failure to investigate the testimony of a potential witness amounts to incompetence depends on the value of the evidence to the case." *People v. Marshall*, 375 Ill. App. 3d 670, 676 (2007) (citing *People v. Steidl*, 177 Ill. 2d 239, 256 (1997)). Decisions that counsel makes regarding trial strategy are " 'virtually unchallengeable.' " *McGee*, 373 Ill. App. 3d at 835 (quoting *Palmer*, 162 Ill. 2d at 476. In fact, even mistakes in trial strategy or tactics will not, of themselves, establish that counsel was ineffective. *Palmer*, 162 Ill. 2d at 476. There is a strong presumption that counsel's conduct falls within the range of reasonable assistance. *McGee*, 373 Ill. App. 3d at 835.

¶ 57 Initially, we note that Norelle Jordan did not attest that trial counsel was aware of her potential testimony at the time of trial, or even that she would have been willing to have so testified. Trial counsel is not ineffective for failure to elicit testimony of which he is unaware. *People v. Humphries*, 257 Ill. App. 3d 1034, 1043 (1994). Moreover, Norelle's affidavit is insufficient and unsupportive of petitioner's defense. Specifically, petitioner incorrectly relies on the affidavit to establish that he was unconscious at the time he had intercourse with S.T. The affidavit, however, fails to support this this. Instead, Norelle's affidavit merely states, at most, that petitioner was "very intoxicated" when he was at a party earlier in the day on Father's Day

2002, prior to having intercourse with the victim; it does not state that petitioner was unconscious during the sex act. Rather, Norelle attests that petitioner returned from the party and went to sleep in her basement bedroom, that eventually the 11-year-old victim went into the bedroom and "took the lead in the sexual act," and she attests that S.T. told her petitioner did not seem to "really [be] into what was going on." This does not support petitioner's contention that he was an unconscious victim, but rather that he was a more passive participant in the sexual act.

¶ 58 Regardless, petitioner's claim fails because he cannot establish that he was arguably prejudiced by counsel's failure to call Norelle where, even if Norelle had testified at trial, her testimony would not have been exculpatory. See *People v. Flores*, 153 Ill. 2d 264, 283 (1992) (To succeed on a claim of ineffective assistance of counsel, a petitioner must show there is a reasonable probability that, absent the errors, the outcome of the trial would have been affected). As noted above, Norelle's potential testimony, as represented in her affidavit, amounts to testimony that defendant was intoxicated earlier in the evening, was brought home, went to sleep, and then had intercourse with an 11-year-old child, during which he was not "really into what was going on." This amounts to a defense of voluntary intoxication, which is not a defense to the predatory criminal sexual assault of a child. See 720 ILCS 5/12-14/1 (2002); 720 ILCS 5/6-3 (West 2002) ("A person who is in an intoxicated or drugged condition is criminally responsible for conduct unless such condition is involuntarily produced and deprives him of substantial capacity either to appreciate the criminality of his conduct or to confirm his conduct to the requirements of law.").

¶ 59 Whether or not S.T. was a willing participant or even the aggressor in this sexual encounter, because she was only 11 years old and petitioner was an adult, she lacked to legal ability to consent to this sexual activity. See, *e.g.*, *Reed*, 148 Ill. 2d at 14 (Even if the child were

to be the "aggressor" in sexual activity, such sexual activity between minor and adult is "indefensible."). Even if trial counsel had called Norelle to testify, her testimony would not have changed the result of the trial. Petitioner has made no substantial showing that he received ineffective assistance based on trial counsel's failure to present the testimony of Norelle Jordan. This claim was properly dismissed.

¶ 60 III. CONCLUSION

¶ 61 The allegations in petitioner's petition, supported by affidavits, fail to make a substantial showing of actual innocence or of any constitutional deprivation to warrant a third-stage proceeding, when viewed against the full and complete record before us. The trial court properly dismissed petitioner's second-stage postconviction petition.

¶ 62 For all of the foregoing reasons, the decision of the circuit court of Cook County is affirmed.

¶ 63 Affirmed.