FIFTH DIVISION
July 20, 2012

No. 1-11-0128

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of Cook County
Plaintiff-Appellee,	)	
	)	
v.	)	96 CR 26471
	)	
MATTHEW SOPRON,	)	
	)	Honorable
Defendant-Appellant.	)	Joseph G. Kazmierski,
	)	Judge Presiding.

JUSTICE McBRIDE delivered the judgment of the court.
Presiding Justice Epstein and Justice Howse concurred in the judgment.

O R D E R

¶ 1 HELD: (1) Where defendant was unable to show that the evidence in the affidavits supporting his postconviction petition were new, material, noncumulative, and so conclusive that it would provide total vindication and probably change the result on retrial, defendant failed to make a substantial showing of actual innocence; (2) where the evidence allegedly suppressed by the State was not material and the State's failure to disclose was not enough to undermine confidence in the outcome of the trial, defendant failed to make a substantial showing that the State violated *Brady v. Maryland*; and (3) where defendant failed to present clear, factual allegations of perjury and the evidence in the supporting affidavits was not so conclusive that it would probably change the result on retrial, defendant was not entitled to section 2-1401 relief.

¶ 2 Defendant Matthew Sopron appeals from the second-stage dismissal of his combined successive petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq*. (West 2004)) and petition for relief under section 2-1401 of the Civil Code of Procedure (Code) (735 ILCS 5/2-1401 (West 2004)). On appeal, defendant contends that the trial court erred in dismissing his petition because: (1) he made a substantial showing of actual innocence based on the affidavits of Steven Rutledge and Sandra Gizowski;(2) he made a substantial showing his constitutional rights were violated at trial and in the proceedings on his initial and successive postconviction petitions by the State's failure to turn over materials in accordance with *Brady v. Maryland*, 373 U.S. 83 (1963); and (3) he successfully stated a section 2-1401 claim based on the State's use of perjured testimony at trial. We affirm.

¶ 3 Defendant and codefendant Wayne Antusas, who is not a party to this appeal, were charged with multiple counts of first degree murder, attempt first degree murder, and aggravated discharge of a firearm based on a December 1995 shooting which resulted in the deaths of two 13-year-old girls, Carrie Hovel and Helena Martin. After a bench trial, defendant and Antusas were each convicted of two counts of first-degree murder on a theory of accountability.

¶ 4 The State's theory at trial was that defendant, as the leader of a faction of the Almighty Popes (Popes) street gang, gave an order to other gang members to shoot at the van of a rival gang, the Ridgeway Lords (Lords). On December 14, 1995, William Bigeck, Eric Anderson, and Ed Morfin went to Hale Park close to where the Lords parked their van, and Anderson shot at the van three or four times. As a result, Hovel and Martin received fatal gunshot wounds. The facts underlying defendant's conviction were set out in detail on direct appeal. See *People v. Sopron*

and Antusas, No. 1-98-1890 (2001) (unpublished order under Supreme Court Rule 23). We revisit them here only to the extent necessary to resolve the issues on appeal.

¶ 5 The State presented the testimony of three witnesses who heard defendant give what was understood as an order to shoot at the van: William Bigeck, Brian O'Shea, and John Gizowski. William Bigeck testified that on the morning of December 14, 1995, he and Eric Anderson had stolen two loaded guns from the home of a Chicago police officer, a .357 caliber and a .44 caliber. They went to Nick Morfin's house to show him the guns. When they arrived, Brian O'Shea was already there and at some point Ed Morfin also joined them. Bigeck wanted to sell the .44. Nick Morfin called defendant, who soon arrived along with John Gizowski, the leader of a neighboring faction of the Popes, and another male Bigeck did not recognize. Bigeck showed the gun to John Gizowski and defendant but neither purchased it. Defendant wiped off the gun, put it in a rubber glove, and gave it to Morfin who left the room to put it away. Then, as they were "sitting around," defendant said, "someone needs to pull [a] roll on the Ridgeway Lords, needs to take care of them." Bigeck understood that to mean "someone needs to go shoot at the Ridgeway Lords." Anderson said he wanted to do it. Defendant told Anderson, "[g]o ahead, do the shooting, don't get caught, shut your mouth." Defendant went upstairs with Nick Morfin and then left. Nick Morfin returned to the basement and told Bigeck, Anderson, O'Shea, and Ed Morfin that defendant wanted them to go to where the Lords' van was usually parked, near the east end of Hale Park, and "shoot at the van through the gangway and then leave."

¶ 6 On cross-examination, Bigeck explained that he did not implicate defendant or Antusas in his original statement because as the "leaders of the gang" they could kill him. He admitted to

smoking marijuana while he was in jail and being involved in an investigation relating to a marijuana delivery from a corrections officer while incarcerated. Bigeck also admitted that he had lied multiple times in the course of the murder investigation, including initially giving a phony alibi. Bigeck said he would do anything to escape the death penalty.

¶ 7 John Gizowski testified that on December 14, 1995, defendant called him and told him that defendant's friends "had a couple of things that [John] would be interested in" and told John to "[s]top by" Nick Morfin's. John Gizowski called Nick Morfin who also told John to "[s]top on by." Eugene Gizowski, John's brother, drove him to Nick Morfin's at about 2:15 or 2:30 p.m. When he arrived, defendant, Bigeck, Anderson, and Nick Morfin were there. O'Shea was not there. Bigeck showed John a .44, and though John was interested in buying the gun, he did not have the money at that time. The topic of conversation eventually changed to the Lords "driving around," and defendant said, "somebody should take care of the neighborhood" and "light up the van." John and his brother left a few minutes later. John never heard defendant say "pull a roll."

¶ 8 On cross-examination, John admitted that his father was a Chicago police officer and was present when he gave a written statement on September 26, 1996. John further admitted that he was addicted to drugs in 1996 but was not addicted when he signed his statement.

¶ 9 Bryan O'Shea testified that he was at Nick Morfin's on the morning of December 14, 1995. Bigeck and Anderson were talking to Nick Morfin about guns they had stolen. Then defendant arrived with John Gizowski, Eugene Gizowski, and Donald Barnoski. Ed Morfin was also there. O'Shea heard them discussing a price for the gun, but no one bought one. Then, the conversation turned to the Lords and defendant said that someone "should take care of the

Ridgeway Lords." O'Shea understood that to mean that they "should shoot" the Lords. O'Shea left the house soon after. O'Shea did not come forward until he was contacted by investigators, did not want to testify at trial, and was testifying pursuant to subpoena.

¶ 10 On cross-examination, O'Shea admitted to hiring a defense attorney, Larry Axelrood, in relation to the murder investigation and had refused to speak to police without Axelrood. O'Shea gave a statement to the State's Attorney's Office on September 26, 1996, three days after he enrolled in a rehabilitation program because he was addicted to drugs and alcohol. O'Shea admitted he was addicted to drugs in December 1995.

¶ 11 After the findings of guilty, the trial court sentenced defendant and Antusas each to a term of natural life in prison.

¶ 12 In a consolidated direct appeal, defendant and Antusas both claimed that the State's evidence was insufficient to support their convictions. *Sopron and Antusas*, Nos. 1-98-1890 and 1-98-1957, slip op. at 2. In pertinent part, defendant and Antusas specifically argued that "Bigeck was motivated to implicate them in the crimes *** to save himself from imposition of the death penalty." *Sopron and Antusas*, Nos. 1-98-1890 and 1-98-1957, slip op. at 15. In affirming defendants' convictions and sentences, this court found that Bigeck had been sufficiently cross-examined about his motivations for testifying and that his testimony was substantially corroborated by other trial evidence. *Sopron and Antusas*, Nos. 1-98-1890 and 1-98-1957, slip op. at 15, 20.

¶ 13 On February 7, 2001, while the direct appeal was pending, defendant filed his first postconviction petition and section 2-1401 petition. Defendant claimed, among other things,

actual innocence and that the State "knowingly presented" perjured testimony at trial. Defendant supported his petition with the transcript of a tape-recorded conversation held between O'Shea and defense counsel in July 2000 and the affidavit of John Gizowski. In the statement and affidavit, each witness claimed that he testified falsely before the grand jury and at trial, and that he never heard defendant give an order to shoot at the Lords. Both O'Shea and John Gizowski also stated that they had been threatened by Assistant State's Attorney (ASA) Cassidy. John Gizowski further attested that Investigator Bajenski had also threatened him.

¶ 14 On August 14, 2002, defendant filed a motion alleging that on February 13, 2002, his attorneys had received the purported affidavit of Ed Morfin. Defendant "incorporated" the affidavit into his petition in support of his actual innocence claim. In the affidavit, Ed Morfin averred that he was "made" to fabricate testimony against defendant and others, implicating them in the deaths of Hovel and Martin. The affidavit contained the signature of "Edward Morfin" and was notarized on October 19, 1999.

¶ 15 An evidentiary hearing was held on the matter. In regard to the recantations, both O'Shea and John Gizowski testified consistent with their affidavits. However, on cross-examination O'Shea admitted that his attorney, Larry Axelrood, and two other ASAs were present for his interview with ASA Cassidy. John Gizowski admitted on cross-examination that his father was present for the interview and when he signed the statement.

¶ 16 The State called Larry Axelrood, who testified that he was present for O'Shea's interview with Cassidy and never heard Cassidy threaten O'Shea. Axelrood also testified that O'Shea had never indicated to Axelrood that he was lying about the case.

¶ 17 Inspector Leonard Bajenski testified that he drove John Gizowski to the interview with Cassidy and called John's father. Bajenski then conducted an interview with John in the presence of John's father and Cassidy. Bajenski testified that he never threatened John and that no one insisted John provide a statement. John's father only insisted that John tell the truth.

¶ 18 Defendant also called Ed Morfin, who testified that he had never before seen the affidavit that was purported to be his. He did not remember signing it, did not have it executed on his behalf, and had never had a reason to notarize any documents. Although Ed Morfin admitted the signature on the document looked like his, it was not his"because [he] did not sign" the affidavit.

¶ 19 In November 2003, the trial court dismissed defendant's petitions in a written order. On appeal, defendant contended that the evidence he presented showed he was "actually innocent." *People v. Sopron*, No. 1-03-3751, slip op. at 1 (2005) (unpublished opinion under Supreme Court Rule 23). In affirming the trial court's dismissal, this court observed that the trial court did not believe the recantation of O'Shea or John Gizowski and ultimately found that no credible evidence supported defendant's claim of actual innocence. *Sopron*, No. 1-03-3751, slip op. at 10.

¶ 20 In October 2005, defendant filed a combined successive postconviction petition and section 2-1401 petition alleging his actual innocence based on the affidavit of Steven Rutledge. In his affidavit, Rutledge attested that during the summer and fall of 1999 he was in the Department of Corrections at Joliet along with Bigeck and Ed Morfin. Bigeck told Rutledge that defendant "had absolutely nothing to do with the murders [*sic*] sentence he was serving." Bigeck also told Rutledge he was disappointed because he "expected a much lower sentence." Therefore, Bigeck wanted to "trick" Ed Morfin into signing an affidavit stating that they wrongly

accused defendant of being involved in the murders. Rutledge averred that he also spoke to Ed Morfin, and Ed Morfin told him that what Bigeck had "said was true and that [defendant] had nothing at all to do with the murders." Rutledge typed up affidavits for both Bigeck and Ed Morfin, but only Ed Morfin's affidavit was signed and mailed to California, to eventually be sent back to Chicago. In May 2006, the State filed a motion to dismiss defendant's petition.

¶ 21 In May 2009, defendant filed an amended response to the State's original motion to dismiss, supported by the affidavit of Sandra Gizowski, which he alleged was newly discovered evidence that further supported his claim of actual innocence. In her affidavit, Sandra averred that her son, John Gizowski, passed away in April 2005 but that, before his death, he had told her "many times" that the statement he gave to the police about defendant was "in part, false." John lied because "he was threatened by the police." Sandra further attested that:

> "The morning after he was taken into custody and forced to make the statement about [defendant]. John told me the next day what they did to him ***. John told me he never saw [defendant], he went to try and purchase a gun which he did not get and he never saw [defendant], he saw Morfin or Liberto. John never saw [defendant.]"

Sandra explained she had not come forward sooner because her husband did not want her to be involved as her "health was such that [she] may have ended up in the hospital if [she] testified."

¶ 22 In September 2009, the State filed a motion to dismiss defendant's amended petition.

¶ 23 In March 2010, the State filed a disclosure in regards to Bigeck and Ed Morfin. The

disclosure detailed various events that occurred while Bigeck and Ed Morfin were housed in the Inmate Witness Protection Program Living Unit (witness quarters). The State explained that an investigation began in December 2009 after a discovery that "an attempt had been made to send cannabis" into the witness quarters. The intended recipient was neither Bigeck nor Ed Morfin and neither Bigeck nor Ed Morfin were interviewed because they were not living in the witness quarters at the time. Further, the State recounted information that had been previously disclosed to defense counsel on October 17, 1997, regarding a September 1997 allegation that Bigeck had received narcotics from a corrections officer while in the witness quarters. Nothing came from the investigation, which was closed on October 7, 1997.

¶ 24 Finally, the State offered information that had not been disclosed previously, including that, in pertinent part, the following items were recovered from Bigeck's cell in the witness quarters without discipline being imposed: a garbage bag full of "hooch" and a spoiled loaf of bread, a light switch cover and a screw, and 12-15 oranges. However, Bigeck had been placed on lockdown for fighting with another inmate and for having a sling shot in his cell. Ed Morfin was similarly undisciplined for blocking a light fixture and drinking "hooch" in his cell. Ed Morfin was placed on lockdown for various reasons including having a garbage bag containing a large amount of "hooch" in his cell and using vulgar language toward corrections officers.

¶ 25 In April 2010, defendant filed a motion claiming, among other things, that the State had violated *Brady* by not previously disclosing "significant information which undermines the credibility of its primary trial witness, Billy Bigeck."

¶ 26 In December 2010, the trial court dismissed defendant's combined petition. Defendant

has appealed.

¶ 27 Defendant first contends that the trial court erred in dismissing his combined postconviction and section 2-1401 petition because he made a substantial showing of actual innocence based on the newly discovered affidavits of Steven Rutledge and Sandra Gizowski.

¶ 28 The Act contemplates three stages of post-conviction proceedings for non-capital cases. *People v. Pendleton*, 223 Ill. 2d 458, 471-72 (2006). At the first stage, a trial court is required to independently review the petition within 90 days, and may dismiss the petition if it finds the petition is"frivolous and patently without merit." *Pendleton*, 223 Ill. 2d at 472 (citing 725 ILCS 5/122-2.1(a)(2) (West 2004)). At the second stage of postconviction proceedings, a petition will be dismissed if defendant fails to make a substantial showing of a constitutional violation. *Pendleton*, 223 Ill. 2d at 473. The petition must be based on factual allegations, not conclusory statements. *People v. Ivy*, 313 Ill. App. 3d 1011, 1019 (2000). Nonspecific and nonfactual allegations are insufficient to require an evidentiary hearing. *People v. Broughton*, 344 Ill. App. 3d 232, 236 (2003). Additionally, well-pleaded facts not positively rebutted by the trial record must be taken as true. *Pendleton*, 223 Ill. 2d at 473. The second-stage dismissal of a petition is reviewed *de novo*. *Id*.

¶ 29 Actual innocence is cognizable under the Act as a freestanding claim because "a wrongful conviction of an innocent person violates due process under the Illinois Constitution." *People v. Snow*, 2012 IL App (4th) 110415, ¶ 20. A claim of actual innocence must be based on evidence that is newly discovered, material, and not merely cumulative. *People v. Ortiz*, 235 Ill. 2d 319, 333 (2009). Moreover, the evidence must do more than simply impeach a witness. *People v.*

Collier, 387 Ill. App. 3d 630, 637 (2008). It must also be "of such conclusive character that it would provide total vindication or exoneration and probably change the result on retrial." *People v. Munoz*, 406 Ill. App. 3d 844, 851.

¶ 30 Here, we find defendant's supporting affidavits are insufficient to make a substantial showing of his actual innocence as both the Sandra Gizowski and Rutledge affidavits are completely conclusory. In his affidavit, Rutledge averred that Bigeck told him that Bigeck and Ed Morfin "created a story which included falsely accusing" defendant and that defendant "had absolutely nothing to do with the murders sentence he was serving ***." Rutledge made no reference to what story Bigeck and Ed Morfin created or any specifics of the murders. Rather, the remainder of the affidavit focuses on another affidavit that was allegedly signed by Ed Morfin in which he admitted fabricating his testimony against defendant and others, including Antusas and Anderson. Notably, Ed Morfin did not testify at defendant's trial.

¶ 31 In her affidavit, Sandra Gizowski averred John told her that his statements to police were false "in part," that he "repeated the same false statements" when he testified at trial, and that he "never saw [defendant], he went to try and purchase a gun which he did not get and he never saw [defendant]." These statements are mere conclusions. Sandra never explained which part of the statement John claimed was false or what portions of his testimony were false. Moreover, though John allegedly told Sandra that he "never saw [defendant]," it is unclear when or where John was when he did not see defendant. As both affidavits are based on conclusory allegations, they are insufficient to support defendant's actual innocence claim. See *People v. Rissley*, 206 Ill. 2d 403, 412 (2003) (assertions that are nonspecific and nonfactual and only amount to

conclusions are insufficient to require a hearing under the Act).

¶ 32 Additionally, we seriously question whether the testimony contained within the affidavits could even be presented at trial as both affidavits contain inadmissible hearsay. " 'Hearsay evidence is an out-of-court statement offered to prove the truth of the matter asserted, and is generally inadmissible unless it falls within an exception.' " *People v. Anderson*, 367 Ill. App. 3d 653, 664 (2006) (quoting *People v. Lawler*, 142 Ill. 2d 548, 557 (1991)). Generally, hearsay affidavits are insufficient to warrant an evidentiary hearing on a freestanding claim of actual innocence. *People v. Morales*, 339 Ill. App. 3d 554, 564-65 (2003).

¶ 33 Here, defendant presented the affidavits attached to his petition to prove the truth of the matters asserted therein: that Bigeck conspired with Ed Morfin to frame defendant and that Gizowski's trial testimony was not truthful. Although defendant claims that the contents of his supporting affidavits are not hearsay, he fails to cite to any supporting authority or give any reasons in support of his claim. See Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008) (the argument section of appellant's brief "shall contain the contentions of the appellant and the reasons therefor, with citation of the authorities and pages of the record relied on.") Alternatively, defendant argues that both affidavits would be admissible under the statement-against-penal-interest exception to the hearsay rule. We disagree.

¶ 34 An unsworn, out-of-court statement made by a declarant that the declarant, and not the defendant, committed the crime for which the defendant was on trial may be admitted where it was made under circumstances with a "sufficient indicia of trustworthiness" and where justice so requires. *People v. Olinger*, 176 Ill. 2d 326, 357 (1997). To determine the trustworthiness of

such a statement, the Illinois Supreme Court has adopted the four criteria set forth by the United States Supreme Court in *Chambers v. Mississippi*, 410 U.S. 284, 300-01 (1973). These criteria are that: (1) the statement occurred shortly after the crime and was made spontaneously to a close acquaintance; (2) other evidence corroborates the statement; (3) the statement incriminated the declarant and was therefore a declaration against interest; and (4) there was an adequate opportunity to cross-examine the declarant. *Olinger*, 176 Ill. 2d at 357 (citing *Chambers*, 410 U.S. at 300-01). These factors are merely a guideline and all four factors are not required for admissibility. *People v. Wilcox*, 407 Ill. App. 3d 151, 166-67 (2010). "The primary consideration is whether the extrajudicial statement was made under circumstances which provide considerable assurance of its reliability by objective indicia of trustworthiness." *Wilcox*, 407 Ill. App. at 167 (citing *People v. Tenney*, 205 Ill. 2d 411, 435 (2002)).

¶ 35 Neither of defendant's supporting affidavits contain statements made under circumstances with an objective indica of trustworthiness. First, Rutledge's affidavit fails to show that Bigeck made his statements to Rutledge spontaneously or shortly after the crime occurred. The exact date of when Bigeck made his alleged statements to Rutledge is unspecified in the affidavit: Rutledge only avers that he was "sure" he was in the same prison as Bigeck and Morfin "during the summer and fall of 1999." Thus, at the earliest, Bigeck made his statement three-and-a-half years after the shooting and there is no indication in the affidavit that Rutledge was a close acquaintance of Bigeck. Additionally, there is no evidence to corroborate Bigeck's alleged statements to Rutledge. Bigeck's trial testimony does not support his alleged statements to Rutledge and, moreover, Rutledge never averred that Bigeck admitted to testifying falsely at

defendant's trial. The only evidence that could arguably corroborate Rutledge's affidavit is the affidavit allegedly signed by Ed Morfin. However, Ed Morfin did not testify at defendant's trial and, more importantly, at the evidentiary hearing for defendant's first postconviction petition, where Ed Morfin did testify, he stated that he never signed any such affidavit.

¶ 36 Sandra Gizowski averred that the day after John was "forced" to make the statements about defendant, John confided in her that "he never saw" defendant. However, it is worth noting that Sandra's affidavit is dated February 9, 2009, more than 12 years after John allegedly confided in her about being threatened into giving a false statement, 11 years after John testified at trial, and almost 4 years after John passed away. The only explanation given for not coming forward sooner is that Sandra's husband did not want her to "be involved" due to her health. Additionally, the only evidence corroborating John's statements to Sandra is John's own recantation testimony, which was refuted by the testimony of Investigator Bajenski, who was present for the interview between John and ASA Cassidy. Bajenski testified that no one insisted John provide a statement, that John's father was present for the interview, and that Bajenski never threatened John. Under these circumstances, we do not believe either affidavit demonstrates a sufficient indicia of reliability to be considered under the hearsay exception.

¶ 37 Moreover, even if the affidavits were not conclusory and based on inadmissible hearsay, they would still be insufficient to support a claim of actual innocence. First, both affidavits fail to totally exonerate or vindicate defendant. In his affidavit, Rutledge averred Bigeck told him that defendant "had absolutely nothing to do with the murders [*sic*] sentence he was serving." This blanket statement, alone, is insufficient to exonerate defendant. Rutledge's affidavit lacks

reference to any details of the crime, any of the events of December 14, 1995, and fails to specify how defendant was not involved in the crime. Furthermore, defendant was convicted based on a theory of accountability and, significantly, Rutledge does not aver that Bigeck told him defendant was not present at Nick Morfin's house on December 14, 1995. See *People v. Edwards*, 2012 IL 111711, ¶ 39 (where the defendant was convicted of murder on a theory of accountability, a codefendant's affidavit failed to completely exonerate the defendant where the codefendant averred that the defendant "had nothing to do with" the shooting and that the defendant did not take part in the crime).

¶ 38 Sandra Gizowski's affidavit is similarly lacking in its ability to totally exonerate defendant. Sandra averred John told her that he "never saw [defendant], he went to try and purchase a gun which he did not get and he never saw [defendant], he saw Morfin or Liberto. He never saw [defendant]." John, however, did not tell Sandra that defendant was never at Nick Morfin's, just that John did not see defendant when John was there. John's statements to Sandra do not eliminate the possibility that defendant was at Nick Morfin's on December 14, 1995, or that he gave the order when John was not present. *Cf. Munoz*, 406 Ill. App. 3d at 849, 855 (the actual innocence standard was met where, in an affidavit, a newly-discovered witness to a shooting averred that the defendant was not present during the shooting and also identified a man who was not the defendant as the shooter).

¶ 39 Therefore, at best, the affidavits serve only to impeach two of the three State trial witnesses who testified they heard defendant order the shooting, Bigeck and John Gizowski. Rutledge's affidavit merely alleges that Bigeck conspired with Ed Morfin to "frame" defendant.

As we observed before, Ed Morfin did not testify at defendant's trial. Therefore, the affidavit only contradicts Bigeck's trial testimony, in which he stated he was at Nick Morfin's house, saw defendant, and heard defendant say that someone needed to "pull a roll" on the Lords. In the same way, the contents of Sandra's affidavit just contradict John's trial testimony, which was given under oath, that John went to Nick Morfin's at defendant's suggestion and saw defendant there. The evidence presented in the affidavits then addresses "considerations of credibility that go to reasonable doubt, not actual innocence." *Collier*, 387 Ill. App. 3d at 637; see also *People v. Green*, 2012 IL App (4th) 101034, ¶ 36 (where the affidavit the defendant used to support his actual innocence claim could not completely exonerate him and, at best, could only impeach a trial witness to whom the defendant confessed his crime, the defendant failed to meet the actual innocence standard).

¶ 40 Furthermore, we observe that defendant has challenged the credibility or veracity of both Bigeck and John Gizowski's trial testimony on previous occasions. In both instances, his challenge was rejected. Defendant challenged Bigeck's credibility as a witness on direct appeal, arguing that Bigeck falsified his testimony to avoid the death penalty. This court found:

> "Bigeck's testimony was substantially corroborated by other witness testimony, some physical evidence and telephone records. Moreover, a careful reading of the record indicates the trial court assiduously considered all the evidence in this case and particularly scrutinized the witness testimony to assess the credibility of those witnesses." *Sopron and Antusas*, Nos. 1-98-1890 and 1-98-1957,

slip op. at 15.

¶ 41 Sandra's affidavit rehashes the same evidence defendant presented in his first postconviction petition, John Gizowski's recantation of his trial testimony. "Generally, a witness's recantation of his or her prior testimony is viewed as inherently unreliable." *People v. Jones*, 2012 IL App (1st) 093180, ¶ 63 (citing *People v. Steidl*, 177 Ill. 2d 239, 260 (1997)). Additionally, in this case, the trial court has already considered John Gizowski's recantation testimony and found it not credible. This court also affirmed the trial court's credibility determination on appeal from the dismissal of defendant's first postconviction petition, finding, "there is no credible evidence supporting defendant's claims of actual innocence and perjured testimony." *Sopron*, No. 1-03-3751, slip op. at 10.

¶ 42 Finally, although defendant continues to challenge O'Shea's trial testimony as unreliable, we note that after the evidentiary hearing, the trial court found O'Shea's recantation not credible especially considering Axelrood's testimony. As this court observed in affirming the trial court's dismissal of defendant's initial postconviction petition, "[t]he testimony of Axelrod [*sic*] is particularly striking because an independent defense attorney would have little motive to falsify his testimony and no potential bias in favor of the State." *Sopron*, No. 1-03-3751, slip op. at 10. In addition, defendant did not challenge or offer evidence to support a challenge to O'Shea's trial testimony in his current petition and, therefore, nothing in the current proceeding convinces us to depart from our previous considerations of O'Shea's credibility as a witness.

¶ 43 Defendant's two supporting affidavits fail to establish the elements necessary to sustain a claim of actual innocence because defendant has not shown that the evidence contained in the

affidavits could not be discovered earlier, is material and noncumulative, or that the evidence is so conclusive that it totally exonerates defendant and would probably change the result on retrial. Under these circumstances, we find that defendant has failed to make a substantial showing of actual innocence.

¶ 44 Defendant next contends that the trial court erred in dismissing his petition because he made a substantial showing of a constitutional violation based on the State's failure to turn over *Brady* materials.

¶ 45 In *Brady,* the United States Supreme Court held that the State must disclose evidence that is favorable to the accused and " ' material either to guilt or to punishment.' " *People v. Harris,* 206 Ill. 2d 293, 311 (2002) (quoting *Brady*, 373 U.S. at 87). In order to show a *Brady* violation, a defendant must demonstrate that: (1) the undisclosed evidence is favorable to him because it is either impeaching or exculpatory; (2) the State suppressed the evidence willfully or inadvertently; and (3) he was prejudiced by the State's nondisclosure because the evidence is material to guilt. *People v. Jarrett,* 399 Ill. App. 3d 715, 727-28 (2010). "Evidence is material if there is a reasonable probability that the result of the proceeding would have been different had the evidence been disclosed." *Jarrett*, 399 Ill. App. 3d at 728. A reasonable probability exists if the State's failure to disclose the favorable evidence " ' "undermines confidence in the outcome of the trial." ' " *Snow*, 2012 IL App (4th) 110415, ¶ 36 (quoting *Kyles v. Whitley*, 514 U.S. 419, 434 (1995), quoting *United States v. Bagley*, 473 U.S. 667, 678 (1985)).

¶ 46 Here, defendant claims that he was denied due process during his trial and during the proceedings for both his original and successive postconviction petitions because the State failed

to disclose relevant information about "custodial crimes" committed by Bigeck and Ed Morfin while they were in the witness protection quarters of the prison. However, defendant has not cited any authority to support his claim that he is entitled to the same constitutional rights under *Brady* in postconviction proceedings as at trial. In fact, our supreme court has said that "postconviction proceedings are sufficiently removed from criminal trials as to engender different levels of due process protections, and the *Brady* obligations imposed on prosecutors at trial are not constitutionally required during postconviction proceedings." *People v. Ligon*, 239 Ill. 2d 94, 113 (2010) (citing *District Attorney's Office for the Third Judicial District v. Osborne*, 557 U.S. 52 (2009)).

¶ 47 Regardless, defendant's *Brady* claim cannot succeed at any level of proceedings because defendant is unable to show that the evidence disclosed by the State was material. Even if the State had disclosed it previously, there is no reasonable probability that the result of any proceeding would have been different. The evidence disclosed by the State could only serve to impeach one of the three State eyewitnesses who testified at trial, Bigeck, because Ed Morfin did not even testify at defendant's trial. It is worth noting that prior to trial the State disclosed Bigeck's involvement in the investigation of the delivery of marijuana to the witness quarters of the jail, which defense counsel covered in his cross-examination of Bigeck. Defense counsel also cross-examined Bigeck as to his desire to avoid the death penalty and his deal with the State in exchange for his testimony. Especially considering that Bigeck received discipline within the jail for a majority of the disclosed indiscretions, there is not a reasonable probability that the trial outcome would have been different even if defense counsel had impeached Bigeck with the

information revealed in the disclosures. Furthermore, as we previously noted, on direct appeal this court found that Bigeck's testimony was corroborated by other testimony, some physical evidence, and telephone records. *Sopron and Antusas*, Nos. 1-98-1890 and 1-98-1957, slip op. at 15. In light of the trial evidence, we cannot say the State's disclosure undermined confidence in the trial outcome. See *Green*, 2012 IL App 101034, ¶ 40 (there was no *Brady* violation where the State failed to disclose its plea negotiations with a witness, because even if the defendant had used the evidence to impeach the witness at trial, the "additional evidence of defendant's guilt" was such that the trial outcome would not have been different).

¶ 48 Moreover, in the initial postconviction proceedings, the only witness whose credibility may have been affected by the State's disclosures is Ed Morfin. However, Ed Morfin only testified to the fact that he did not have any part in creating or signing the affidavit purported to be his. That Ed Morfin was not prosecuted by the State for his indiscretions while in the witness quarters is not enough to undermine confidence in the outcome of the evidentiary hearing and defendant has provided no specific argument as to why it would. We observe that Ed Morfin received disciplinary action for the majority of his indiscretions in the witness protection quarters. Furthermore, despite defendant's claim that both Bigeck and Ed Morfin "were being investigated for involvement in Cook County jail marijuana-trafficking," the State's disclosure only names Bigeck as being involved in the investigation. As this court observed on appeal from the dismissal of defendant's first postconviction petition, "[d]efendant has simply failed to provide any explanation for how resolution of [the trial court's factual findings as to Ed Morfin's affidavit] would affect the outcome of the proceedings below." *Sopron*, No. 1-03-3751, slip op.

at 12. Because defendant failed to show that the suppressed evidence was material to his cause, he cannot make a substantial showing of a *Brady* violation. Therefore, we find the trial court properly dismissed defendant's postconviction petition without an evidentiary hearing.

¶ 49 Finally, defendant contends that he stated a claim under section 2-1401 of the Code based on"the State's 'unwitting' use of false testimony."

¶ 50 Section 2-1401 creates a procedure for seeking relief from a final judgment more than 30 days after its entry. 735 ILCS 5/2-1401(a) (West 2004); *People v. Clemons*, 2011 IL App (1st) 102329, ¶ 9. A section 2-1401 petition filed in criminal proceedings seeks to correct any errors of fact that occurred in the prosecution of the case that were unknown to the petitioner and the court at the time of trial and which, if then known, would have prevented the judgment from being entered. *People v. Moore*, 2012 IL App (4th) 100939, ¶ 26. "To obtain relief under section 2-1401, the defendant must set forth "specific factual allegations" showing the existence of a meritorious claim or defense and due diligence in both presenting the claim to the trial court in the original action and in filing the petition for relief under section 2-1401. *People v. Pinkonsly*, 207 Ill. 2d 555, 565 (2003). A defendant who bases his prayer for relief from judgment on the use of false testimony " 'must present clear, factual allegations of perjury and not mere conclusions or opinions.' " *Moore*, 2012 IL App (4th) 100939, ¶ 28 (quoting *People v. Thomas*, 364 Ill. App. 3d 91, 104 (2006)). Issues previously raised either at trial or in other collateral proceedings cannot form the basis of a section 2-1401 petition. *People v. Haynes*, 192 Ill. 2d 437, 461 (2000).

¶ 51 Defendant argues that the proper standard is *de novo*, relying on *People v. Vincent*, 226

Ill. 2d 1, 18, (2007). This court has held that a trial court's decision to grant or deny relief under section 2-1401 is reviewed for an abuse of discretion. *People v. Nowicki*, 385 Ill. App. 3d 53, 102 (2008) (citing *Haynes*, 192 Ill. 2d at 461). However, here we need not determine the proper standard as, under either standard, defendant's section 2-1401 claim cannot succeed.

¶ 52 Initially, we believe that defendant has waived this issue. Illinois Supreme Court Rule 341 requires that the argument section of the appellant's brief "shall contain the contentions of the appellant and the reasons therefor, with citation of the authorities and the pages of the record relied on." Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008). Although defendant cites to relevant authority in his brief and explains the details of those cases, he fails to provide a reasoned argument as to how the cited cases are comparable to his own. The only argument defendant provides specific to his cause is that he is entitled to relief under section 2-1401 because the State relied "on testimony furnished by its original trio of drug/abusing-accomplice witnesses" and "failed to reasonably investigate the collective capacities of that witness-trio for giving remarkably false testimonies." Without any further explanation, such a bare-bones conclusion is insufficient to comply with Rule 341 and therefore the issue has been waived.

¶ 53 Waiver aside, defendant still is not entitled to section 2-1401 relief. First, defendant has not presented clear, factual allegations of perjury. The only bases for defendant's claims of perjury are the recantations of Bigeck, John Gizowski, and O'Shea. However, a recantation of prior testimony is not by itself sufficient proof to show that the earlier testimony was perjured. *People v. McLaughlin*, 324 Ill. App. 3d 909, 919 (2001). Moreover, defendant offers no evidence that Bigeck recanted his testimony. According to Rutledge, Bigeck said he and Ed

Morfin "created a story which included falsely accusing" defendant. Rutledge does not aver that Bigeck ever specifically admitted to falsely testifying at trial. In addition, the recantations of John Gizowski and O'Shea have already been considered and found not credible by the trial court, a finding that was affirmed by this court on appeal. *Sopron*, No. 1-03-3751, slip op. at 9-10. Therefore, defendant has not presented clear, factual allegations of perjury but instead has simply supplied conclusions which do not warrant the granting of section 2-1401 relief. See *Thomas*, 364 Ill. App. 3d at 104.

¶ 54 Moreover, defendant supports his allegation with the same "newly discovered" affidavits he used to support his claim of actual innocence under the Act. Where a defendant seeks to set aside a judgment based on newly discovered evidence, relief will be granted only if he shows both that the evidence was unknown to him at the time of trial and that he could not have discovered the new evidence through reasonable diligence. *Nowicki*, 385 Ill. App. 3d at 101-02 (2008). Also, "the new evidence must be so conclusive that it would probably change the result on retrial, must be material, and must be more than merely cumulative to the trial evidence." *Nowicki*, 385 Ill. App. 3d at 102.

¶ 55 As we previously discussed in our rejection of defendant's actual innocence claim, the evidence presented in the supporting affidavits is not material or so conclusive that it would probably change the result on retrial. Bigeck, John Gizowski, and O'Shea all testified to hearing defendant's order on December 14, 1995. All of defendant's previous challenges to the veracity or credibility of their testimony have been rejected by this court. See *Sopron and Antusas*, No. 1-98-1890, slip op. at 15; *Sopron*, No. 1-03-3751, slip op. at 9-10. Defendant's supporting

affidavits, at best, impeach two of the three witnesses who testified to hearing defendant give an order to shoot at the Lords. Evidence that merely impeaches or discredits a witness is insufficient to justify a new trial. *People v. Hallom*, 265 Ill. App. 3d 896, 906 (1994). In light of our prior analysis, we find the trial court properly denied defendant's section 2-1401 petition.

¶ 56 For the foregoing reasons, we affirm the judgment of the trial court.

¶ 57 Affirmed.