2016 IL App (1st) 130533-U
No. 1-13-0533

THIRD DIVISION
May 4, 2016

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. JABARI BROWN, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Cook County. No. 95 CR 35387 The Honorable Maura Slattery Boyle, Judge Presiding.

JUSTICE PUCINSKI delivered the judgment of the court.
Presiding Justice Mason and Justice Lavin concurred in the judgment.

ORDER

¶ 1 *Held:* The only two claims appealed from in the dismissal of defendant's post-conviction petition were properly dismissed at the second stage of proceedings where, even taking his allegations as true, defendant failed to make a substantial showing that his due process rights were violated under *Brady v. Maryland*, 373 U.S. 83 (1963), by the non-disclosure of certain police reports because these reports were not material. (1) First, defendant failed to attach the necessary affidavit pursuant to section 122-2 of the Post-Conviction Hearing Act (725 ILCS 5/122-2 (West 2000)) to support his contention of perjury of a witness and non-disclosure of police reports of a key eyewitness's gun arrest declaring his membership in the Blackstones gang, when at trial he denied current membership in the gang. Also, even taking defendant's allegations as true of the witness's perjury and the non-disclosure of the reports of the witness's gun arrest, defendant failed to make a substantial showing that his due process rights were violated under *Brady* where this evidence was not material and could not reasonably be taken to put this whole

case in such a different light as to undermine the court's finding of defendant's guilt where the witness's membership was in the same gang as defendant's and there was no evidence of any intra-gang feud or personal animosity between the witness and defendant. (2) Second, taking as true defendant's allegation of the non-disclosure of the police reports of the arrests of two members of the Four Corner Hustlers gang for criminal damage to another key eyewitness's car, defendant failed to make a substantial showing that his due process rights were violated under *Brady* where these reports also were not material and could not reasonably be taken to put this whole case in such a different light as to undermine the court's finding of defendant's guilt. The reports would not have assisted defendant in presenting these gang members or any other member of the Four Corner Hustlers as an alternative suspect. The damage to the witness's car occurred a month after the drive-by shooting and there was no evidence of any gang rivalry at the time of the shooting, no evidence of any connection between these individuals or their gang to the shooting of the victim, and no evidence that the witnesses were in fact the intended targets of the drive-by shooting.

¶ 2 BACKGROUND

¶ 3 Defendant, Jabari Brown, appeals the dismissal of his post-conviction petition. Defendant was charged by indictment with two counts of first-degree murder for the killing of Sharon Edgerton. Defendant waived his right to a jury trial and was tried in a bench trial. Defendant was found guilty of murder by the trial court and was sentenced to 45 years in prison. Defendant previously directly appealed and this court affirmed his conviction. Defendant later filed a *pro se* post-conviction petition that was summarily dismissed by the trial court, and defendant appealed that dismissal. This court reversed the dismissal of that post-conviction petition and remanded the case for appointment of counsel and further proceedings. See *People v. Brown*, 336 Ill. App. 3d 711 (2002). Appointed counsel filed supplements to that original post-conviction petition in 2006, 2010, and 2011. The last supplement to the post-conviction petition was also dismissed by the court. This last supplement to the post-conviction petition is at issue in this appeal. The relevant facts are summarized as follows:

¶ 4 On September 2, 1995, the victim, Sharon Edgerton, was killed in a drive-by shooting at 10457 South Maryland Avenue, outside the Pullman Wheelworks Homes. Edgerton was friends with Marvin Gilmore and his girlfriend, Monee Washington, who lived together in the complex.

¶ 5 Gilmore and Washington witnessed the shooting. On the day of the shooting at around 7 p.m., Washington and Edgerton were walking along the west side of Maryland Avenue near 105th Street. Gilmore was on the east side of the street, outside the entrance doors to the building of the Pullman Wheelworks Homes. Washington and Gilmore saw a gold-colored Lexus approach them, followed by a black Mercedes. Both Washington and Gilmore observed that the gold Lexus did not have any license plates. Gilmore saw that the gold Lexus turned the corner at a high rate of speed, but then it slowed down along the street. He saw three or four people inside the car, including defendant who was on the passenger side.

¶ 6 Both Gilmore and Washington saw the shooter pointing a gun out the front passenger car window towards the west side of the street in an area where there were children and teenagers. Gilmore saw the shooter fire four or five gunshots. He then saw a second car, and gunshots coming out of that car as well. Gilmore saw Edgerton running across the street. Washington also saw Edgerton run across the street and, as she ran, the shooter began firing out of the driver's side window. Gilmore saw that the shooter had changed position and started shooting at people on the east side of the street, where there was another group of people. Gilmore was helping people get into the building to escape the shooting. Gilmore estimated that the shooting lasted approximately 45 to 60 seconds. The next time Washington observed Edgerton, she was in the hallway of the building and had been shot.

¶ 7 When police arrived at the scene, Gilmore told the police that defendant was the shooter and described him as chubby, with short hair and big eyes. Chicago Police Officer Cato arrived at the scene and overheard Gilmore providing defendant's identity and description to the other police officers on the scene.

¶ 8 Both Washington and Gilmore identified a photograph of the gold Lexus as the car involved in the shooting. Gilmore told police that he recognized the shooter as defendant. Gilmore said that the shooter was in the front passenger seat of the Lexus, not the driver's seat. Gilmore was shown a black-and-white photograph of defendant. Gilmore testified at trial that the photograph "[s]ort of and sort of [did] not" look like defendant and could not make a positive identification based upon this photograph. The police later showed Gilmore a photo array and Gilmore identified defendant as the shooter.

¶ 9 On December 4, 1995, Gilmore and Washington viewed a lineup separately and both identified defendant as the shooter. Gilmore testified that they arrived at the police station separately. Washington testified at trial that when she viewed the lineup there was no doubt in her mind that defendant was one of the shooters.

¶ 10 At trial, Washington testified that she saw the shooter and the gun on the passenger side of the gold Lexus, and identified the shooter as defendant. Washington testified that defendant initially shot out of the passenger window, but when people started running he then shot out of the driver's window. Washington did not know who defendant was trying to shoot. When Washington saw defendant shooting toward the other side of the street where everyone was running toward the door of the building, she was scared and stayed behind. Washington testified that she did not run to the east side of the street toward the open door of the building because it was apparent to her that "whoever they was shooting at, was in the crowd."

¶ 11 On cross-examination of Washington, the defense attempted to impeach her with her statement to police officers, ostensibly from a police report, on the day of the shooting that "there were three persons in the Lexus. She said that the driver was light complected and was wearing a T-shirt." However, there was no indication in this statement that Washington ever identified the

driver as the shooter, instead of the individual in the passenger seat. Washington denied ever having even described the driver to the police. In any event, Washington maintained that defendant was in the front passenger seat and was first shooting toward the west side of the street and then switched position to fire out of the driver's side window at the east side of the street. The defense then impeached Washington with her statement to a defense investigator recanting her identification of defendant and stating she could not identify the shooter. Washington insisted at trial that she never stated that the driver was the shooter. Washington testified that on the day of the shooting she told the police that the shooter was in the passenger seat and described him as "kind of brown skinned with big eyes and he was kind of big." Washington testified that she never saw the driver.

¶ 12 Gilmore testified that he saw defendant in the passenger seat of the gold Lexus and that defendant shot out of the passenger window toward the west side of the street, where Washington and Edgerton were standing. Shots were fired from the Mercedes as well. Gilmore testified that defendant changed his position and then fired toward the east side of the street where Gilmore was standing, and where Edgerton ran toward the entrance to the building.

¶ 13 Gilmore further testified that he was able to identify defendant from when Gilmore and defendant were both members of the Blackstones gang. Gilmore testified that defendant was a member of the Blackstones gang and that Gilmore used to be a member of the Blackstones as well. Gilmore testified at trial that he was a Blackstone from the early 1980s to the end of 1992 or 1993, and that he had stopped being a member of the gang in 1993, over two years before trial. Gilmore testified that he had not had "run-ins" with defendant. Gilmore also knew defendant because defendant previously had a girlfriend who lived in the neighborhood and Gilmore would see him when defendant visited his girlfriend.

¶ 14 The defense attempted to impeach Gilmore with his statement to detectives on the date of the shooting regarding whether the gold Lexus drove up first, or whether the Mercedes was the first car. Gilmore testified that he told the detectives that shots were fired out of both cars, and that the shots fired out of the Lexus were first fired toward the west side of the street and then the east side of the street. Gilmore testified he could not recall whether the Lexus was first or the Mercedes was first because it was immediately after the shooting.

¶ 15 Both Gilmore and Washington admitted under cross-examination that, in February 1998, they signed and submitted statements to a defense investigator, Tony Mannina, recanting their identifications of defendant and stating that they could not identify anyone in the Lexus. Gilmore's statement said that at the time of the shooting he was in the hallway and that he ducked down to avoid being shot and that he only saw two or three people in the gold Lexus and could not identify anyone in the car. Washington's statement stated that she could not identify the shooter.

¶ 16 On redirect, Gilmore and Washington both testified that a person named "Tone" had come by their home a few days before the investigator came, threatened them and offered them money. Gilmore knew Tone from when he belonged to the Gangster Disciples and had not seen Tone in years. Tone approached Gilmore and Washington while they were outside their residence and said to Gilmore," Hey man, long time no see." After Washington went inside the residence, Tone said the following to Gilmore:

> "We need you to sign these statements saying you didn't see nothing. None of this happened. This is what [we] want you to say, All you got to do. You couldn't see nothing. I was in the hallway. You ducked down. Anybody going to duck because of bullets, you know."

¶ 17 Tone also told Gilmore that it was best for him not to come to court, and that he would be saving his own life as well as the life of his family. Washington overheard Tone say that she would be safe if she signed the statement. Tone promised to give Gilmore $1,000 after the statements were signed. Washington testified that Tone said he would be back with some "affidavits" for Gilmore and her to sign. Tone left and then came back but said the "lawyer couldn't do it that day," but asked if they would sign statements if he could get the "lawyer" to come another day.

¶ 18 When Gilmore and Washington informed the prosecutor of this visit and conversation with Tone, the prosecutor advised them to sign the statement if Tone came back and to place any money received and affidavits in an envelope, seal it, and turn everything over to the police or the assistant State's Attorneys.

¶ 19 Gilmore and Washington were then visited at their residence by a defense investigator, Tony Mannina, on September 28, 1998, the day before they were supposed to appear before the grand jury on this case. Gilmore and Washington both signed statements that they were unable to identify the shooter. Gilmore testified that he signed the recantation pursuant to instructions from the prosecutor in the case. Washington testified that she signed the defense investigator's statement because of the visit by Tone. Gilmore and Washington were relocated by the Cook County State's Attorney's Office.

¶ 20 Gilmore and Washington testified in front of the grand jury regarding both the shooting and the offer of money from Tone in exchange for their statements recanting their identifications of defendant.

¶ 21 Harvey Police Commander Andrew Joshua testified that he knew defendant. Joshua testified that around the time of the shooting, he had seen defendant riding as a passenger in a

gold Lexus driven by a person named Stuart Stewart. In 1997, Commander Joshua, Assistant State's Attorney Linus Kelecius, and Chicago Police Detective Martinez visited Stewart's home at 14934 South Paulina, Harvey Illinois. When they arrived, they saw a gold Lexus parked in the driveway. They took photographs of the car and wrote down the vehicle identification number. The photograph taken of the gold Lexus was shown to Gilmore and Washington, and they testified that it looked the same as the vehicle used in the shooting.

¶ 22 Catherine Fulgenzi, keeper of the records for the Illinois Secretary of State, testified that the Secretary of State's records showed that a person named Thaddo Stewart, with the address of 14934 South Paulina, Harvey Illinois, owned a 1994 gold Lexus. The car was purchased on August 31, 1995 from a car dealership, which was before the date of the murder. The dealership submitted an application for license plates, but those plates were not issued until October 11, 1995, after the murder. At the time of the murder of Edgerton this car did not have license plates.

¶ 23 The parties stipulated that Detective McCann would testify that on September 3, 1995, he spoke with Washington at the scene and that Washington told him that she saw the driver of the gold car with his left hand on the wheel and firing a gun with his other hand out of the driver's window. Detective McCann would further testify that Washington told him that the driver was light-complected and wearing a white t-shirt.

¶ 24 The parties stipulated that Dr. Murray Uckerman, an expert in the field of forensic pathology, would testify that he conducted an autopsy of the victim's body and recovered a bullet fragment. In Dr. Uckerman's expert opinion, the victim died of a gunshot wound to her back.

¶ 25 The parties also stipulated that Joseph Bembynista, a forensic evidence investigator, would testify that he recovered one spent cartridge casing at 10457 South Maryland, along with

two spent .9 mm cartridge casings at 10503 South Maryland. Bembynista checked all of the casings for ridge impressions but was unable to find any.

¶ 26 The parties further stipulated that Ernest Warner, an expert in the field of firearms examination, would testify that none of the firearms evidence was suitable for comparison and identification.

¶ 27 In closing argument, the prosecutor described the occurrence as a random shooting and called Gilmore "heroic" for having the courage to "turn on his former Blackstones" to implicate defendant.

¶ 28 The trial court found defendant guilty, noting in its finding that Gilmore identified defendant as the shooter to police shortly after the incident took place. The court sentenced defendant to 45 years' imprisonment.

¶ 29 Defendant filed a direct appeal, and his conviction was affirmed in an unpublished Rule 23 order. *People v. Brown*, 312 Ill. App. 3d 1202 (2000). The full order affirming his conviction is not part of the record, but defendant stated in his brief on appeal in this case that he "is attempting to secure a copy of the order and will supplement it to the record when it becomes available." His petition for leave to appeal was denied by the Illinois Supreme Court on October 4, 2000.

¶ 30 On March 26, 2001, defendant filed a *pro se* post-conviction petition raising numerous allegations of trial counsel's ineffectiveness. The trial court dismissed the petition, but the dismissal was reversed on appeal and the case was remanded. *People v. Brown*, 336 Ill. App. 3d 711 (2002).

¶ 31 On remand, defendant retained private defense counsel. Counsel filed three supplemental petitions on behalf of defendant. In one of those supplements, defendant stated that he no longer

wanted to pursue the claims originally raised in his *pro se* petition. The third and last supplement to defendant's post-conviction petition was filed on June 7, 2011. Counsel also filed a Rule 651(c) certificate (Ill. S. Ct. R. 651(c) (eff. April 26, 2012)). The court below considered the post-conviction petition as amended by all these supplements.

¶ 32 Defendant's petition raised four claims. As relevant to this appeal, defendant alleged (1) a *Brady* claim based on the State's failure to disclose evidence that the Four Corner Hustlers were targeting Gilmore and Washington and (2) a claim that the State knowingly used perjured testimony and violated *Brady* where Gilmore falsely testified that he stopped being a member of the Blackstones gang in 1993.

¶ 33 The State filed a motion to dismiss on March 27, 2012. The State argued that there was no substantial showing of a *Brady* violation or any deal between Gilmore and the State. On January 10, 2013, after hearing argument on the motion to dismiss, the court granted the State's motion and dismissed the entirety of defendant's post-conviction petition.

¶ 34 Defendant appealed. Defendant's notice of appeal states that the appeal is from the January 10, 2013 order of the circuit court granting the State's motion to dismiss his post-conviction petition, but in defendant's brief on appeal he argues only the dismissal of two of his claims in his post-conviction petition as error, that the State (1) presented perjured testimony of Gilmore that he was no longer in a gang, and (2) failed to disclose evidence that Gilmore and Washington were being targeted by members of the Four Corner Hustlers. Therefore, we limit our analysis of the propriety of the dismissal of his post-conviction petition to those two arguments made by him on appeal. See Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013) ("Points not argued are waived and shall not be raised in the reply brief, in oral argument, or on petition for rehearing.").

¶ 35 ANALYSIS

¶ 36 Defendant argues that the court erred in dismissing his petition at the second stage of his post-conviction proceedings without a hearing. Defendant argues that he made a substantial showing that his due process rights were violated by the following alleged *Brady* violations by the State: (1) the State permitted its main witness, Marvin Gilmore, to perjure himself when he claimed he was not a member of the Blackstones gang when this shooting occurred; and (2) the State failed to disclose favorable evidence pointing to a member of the Four Corners Hustlers gang as a suspect.

¶ 37 The Post-Conviction Hearing Act (the Act) (725 ILCS 5/122-1 *et seq*. (West 2000)) provides a means by which a defendant may challenge his or her conviction or sentence for violations of federal or state constitutional rights. *People v. Pendleton*, 223 Ill. 2d 458, 471 (2006) (citing *People v. Whitfield*, 217 Ill. 2d 177, 183 (2005)). An action seeking post-conviction relief is a collateral proceeding and not an appeal from the earlier judgment. *People v. Williams*, 186, Ill. 2d 55, 62 (1999). To be entitled to post-conviction relief, a defendant must demonstrate that he or she has suffered a substantial deprivation of his federal or state constitutional rights in the proceedings that produced the conviction or sentence being challenged. 725 ILCS 5/122-1(a) (West 2006); *Pendleton*, 223 Ill. 2d at 471 (citing *Whitfield*, 217 Ill. 2d at 183). " 'The function of a post-conviction proceeding is not to relitigate the defendant's guilt or innocence but to determine whether he was denied constitutional rights.' " *People v. Thompkins*, 161 Ill. 2d 148, 151 (1994) (quoting *People v. Shaw*, 49 Ill. 2d 309, 311 (1971)).

¶ 38 The Act provides for three stages of proceedings in noncapital cases. *Pendleton*, 223 Ill. 2d at 471-72. At the first stage, the trial court has 90 days to review a petition and may

summarily dismiss it if the trial court finds that the petition is frivolous and patently without merit. 725 ILCS 5/122-2.1(a)(2) (West 2000); *Pendleton*, 223 Ill. 2d at 472. At the first stage, the focus is on whether the petition sets forth a "gist" of a constitutional claim. *People v. Boclair*, 202 Ill. 2d 89, 99-100 (2002). If the court determines that the defendant satisfied the minimum pleading threshold, then the petition will be placed on the docket for second-stage proceedings. 725 ILCS 5/122-2.1(b) (West 2006). If the trial court does not dismiss the petition within the 90-day period under the Act, the trial court must docket it for further consideration, which is what happened in this case. See 725 ILCS 5/122-2.1(b) (West 2000); *Pendleton*, 223 Ill. 2d at 472.

¶ 39 When a post-conviction petition proceeds to the second stage, the Act provides that counsel may be appointed for defendant, if defendant is indigent. See 725 ILCS 5/122-2.1(b); 725 ILCS 5/122-4 (West 2006); *Pendleton*, 223 Ill. 2d at 472. The right to counsel in post-conviction proceedings is wholly statutory. *People v. Lander*, 215 Ill.2d 577, 583 (2005). Supreme Court Rule 651(c) requires appointed counsel: (1) to consult with petitioner by mail or in person; (2) to examine the record of the challenged proceedings; and (3) to make any amendments "that are necessary" to the petition previously filed by the *pro se* defendant. 134 Ill. S. Ct. R. 651(c) (eff. Dec. 1, 1984); *People v. Perkins*, 229 Ill. 2d 34, 42 (2007). During this stage, the circuit court must determine whether the petition and any accompanying documentation make "a substantial showing of a constitutional violation." *People v. Edwards*, 197 Ill.2d 239 (2001) (citing *People v. Coleman*, 183 Ill.2d 366, 381 (1998)).

¶ 40 During the second stage of post-conviction proceedings, the State may either answer the petition or file a motion to dismiss. 725 ILCS 5/122-2.1(b) (West 2008); *People v. Edwards*, 197 Ill. 2d 239, 245-46 (2001). If the State moves to dismiss, the trial court may hold a dismissal hearing, which is still part of the second stage. *Coleman*, 183 Ill. 2d at 380-81. "[A] motion to

dismiss raises solely the question of the sufficiency of the pleadings, as a matter of law, and admits the pleadings solely for purposes of deciding the legal question." *People v. Smith*, 352 Ill. App. 3d 1095, 1102 (2004) (citing *Coleman*, 183 Ill.2d at 390).

¶ 41 Section 122-2 of the Act requires that the petition must have attached "affidavits, records, or other evidence supporting its allegations or shall state why the same are not attached." 725 ILCS 5/122-2 (West 2000). See also *People v. Collins*, 202 Ill. 2d 59, 66 (2002). Credibility determinations are not made at the second stage of post-conviction review. *People v. Childress*, 191 Ill. 2d 168, 174 (2000). At this stage, all well-pled facts in the petition are taken as true unless positively rebutted by the record. *Pendleton*, 223 Ill. 2d at 473. "[N]onfactual and non-specific assertions amounting to mere conclusions are insufficient to require a hearing under the Act." *People v. Wilson*, 307 Ill. App. 3d 140, 145 (1999).

¶ 42 A defendant is not entitled to an evidentiary hearing as a matter of right. *People v. Whitehead*, 169 Ill. 2d 355, 370-71 (1996). A hearing is required only when the petitioner makes a substantial showing of a violation of constitutional rights, based on the record and supporting affidavits. *Coleman*, 168 Ill. 2d at 382. If a substantial showing of a constitutional violation is set forth, the petition is advanced to the third stage, where the circuit court conducts an evidentiary hearing. *Edwards*, 197 Ill. 2d at 246; 725 ILCS 5/122-6 (West 2006). If the defendant fails to make a substantial showing of a constitutional violation, the petition is dismissed. *Edwards*, 197 Ill. 2d at 246. The dismissal of a post-conviction petition is warranted only when the petition's allegations of fact – liberally construed in favor of the petitioner and in light of the original trial record – fail to make a substantial showing of imprisonment in violation of the state or federal constitution. *Coleman*, 183 Ill. 2d at 382. We review a trial court's dismissal of a post-conviction petition at the second stage *de novo*. *Pendleton*, 223 Ill. 2d at 473.

¶ 43 Under *Brady v. Maryland*, 373 U.S. 83 (1963), the prosecution must disclose evidence that is both favorable to the accused and "material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady*, 373 U.S. at 87. Illinois codified *Brady* in Illinois Supreme Court Rule 412(c), which requires the State to "disclose to defense counsel any material or information within its possession or control which tends to negate the guilt of the accused as to the offense charged." Ill. S. Ct. R. 412(c) (eff. March 1, 2001). The *Brady* rule applies in three different circumstances: (1) where a defendant claims that the undisclosed evidence demonstrates that the prosecution's case included perjured testimony and the prosecution knew or should have known of the perjury; (2) where a defendant made a pretrial request for specific evidence and the prosecution did not comply; and (3) where the defendant either made no request or only a general request for *Brady* material and exculpatory material is withheld by the prosecution. *People v. Simms*, 192 Ill. 2d 348, 388-89 (2000).

¶ 44 We look to the supporting documents attached to defendant's post-conviction petition to determine whether there is a substantial showing of his two alleged *Brady* violations, addressing each one in turn.

¶ 45 I. Gilmore's Alleged Perjury Regarding Non-Membership in a Gang

¶ 46 Defendant's first argument is that the State committed a *Brady* violation in presenting Gilmore's perjured testimony that he stopped being a member of the Blackstones gang in 1993. To support this claim of a constitutional violation, defendant attached to his petition an arrest report and case report for Gilmore's arrest on October 14, 1995, six weeks after the murder of Edgerton, for possessing a firearm without a permit. The arrest report states: "Subject Self Admitted Member of the Black Stones Street Gang." Defendant also attached a case report for this arrest. The case report stated that officers were investigating a report of criminal damage to a

vehicle when neighbors told them that a male had come out displaying a hand gun in the air and shouting gang slogans, and this individual was identified as Gilmore. When officers asked Gilmore to produce the handgun and he did, "offender then admitted to be an active member of the BLK STONES."

¶ 47 The Due Process Clause prohibits the State from knowingly eliciting, or failing to correct, false testimony from one of its witnesses. U.S. Const. Amends. V, XIV; *Napue v. Illinois*, 360 U.S. 264, 269 (1972); *People v. Brown*, 169 Ill. 2d 94, 103 (1995). The State's duty to correct false testimony extends to falsehoods that go "only to the credibility of the witness." *Napue*, 360 U.S. at 270. "The State's knowing use of perjured testimony to obtain a criminal conviction constitutes a violation of due process." *People v. Smith*, 352 Ill. App. 3d 1095, 1101 (2004) (citing *People v. Jimerson*, 166 Ill. 2d 211, 223 (1995)). If an allegation of perjured testimony is proven by a defendant, the prosecution is charged with knowledge of the perjured testimony, whether it knew of it or not, "since the prosecution is charged with knowledge of its agents, including the police. *Smith*, 352 Ill. App. 3d at 1101 (citing *People v. Olinger*, 176 Ill. 2d 326, 348 (1997); *People v. Ellis*, 315 Ill. App. 3d 1108, 1113 (2000); and *People v. Torres*, 305 Ill. App. 3d 679, 685 (1999)). A post-conviction claim based on the use of perjured testimony—presumed true at the second stage—may be dismissed if the alleged false testimony is not material. *Smith*, 352 Ill. App. 3d at1102 (citing *Coleman*, 183 Ill. 2d at 394).

¶ 48 Defendant also argues that his due process rights were violated by the State's nondisclosure of these reports because they were material evidence favorable to the defense which could have been used to impeach Gilmore at trial. Due process is violated when the State fails to disclose material evidence favorable to the defense, and this includes impeachment

evidence bearing only on a witness' credibility. *Brady*, 373 U.S. at 87; *U.S. v. Bagley*, 473 U.S. 667, 676-77 (1985).

¶ 49 The State argues that defendant's petition was properly dismissed for two reasons: (1) defendant's petition is legally insufficient because defendant failed to provide any documentation or affidavits as required by section 122-2 of the Act to support his allegation that the prosecution did not disclose these prior police reports regarding Gilmore's gang affiliation; and (2) the defendant failed to show any constitutional violation because the testimony by Gilmore regarding whether or not he was currently in a gang was not material. We agree.

¶ 50 First, defendant failed to file any documents or affidavits with his petition that support his claim that the State failed to disclose Gilmore's prior arrest reports. Section 122-2 of the Act requires the petition shall have attached "affidavits, records, or other evidence supporting its allegations or shall state why the same are not attached." 725 ILCS 5/122-2 (West 2000)). Defendant did not attach to his petition any affidavits of his trial counsel to support his claim that these reports were never received during discovery in this case. Defendant only attached the reports themselves, which prove nothing regarding whether they were disclosed or not disclosed. In his reply brief, defendant points to his own affidavit, attached to his second supplement filed by counsel, averring that his trial attorneys were not furnished these reports and that "to [his] knowledge" his attorneys were not provided these reports. Defendant was represented by counsel during his trial. Defendant's affidavit is insufficient to establish what was, or was not, disclosed to his attorneys. Under Illinois Supreme Court Rule 415(c), discovery materials furnished to an attorney remain in the exclusive custody of counsel. See Ill. S. Ct. R. 415(c) (eff. Oct. 1, 1971). Defendant did not provide any affidavit from his counsel averring that the reports were never received. See *People v. Page*, 193 Ill. 2d 120, 160 (2000) (rejecting a post-conviction *Brady*

claim where the petitioner "offer[ed] no basis upon which to conclude that his trial counsel did not in fact possess these police reports.").

¶ 51 Second, we agree that Gilmore's testimony that he was not currently in the Blackstones gang was not material. Favorable evidence is considered material if there is a reasonable probability that disclosure would change the outcome of the trial. *Kyles v. Whitley*, 514 U.S. 419, 433 (1995). See also *People v. Simms*, 192 Ill. 2d 348, 388-89 (2000) (the test for materiality is whether there is any reasonable likelihood that the false testimony could have affected the judgment). "Materiality 'is not a sufficiency of evidence test.' " *Smith*, 352 Ill. App. 3d at 1102 (quoting *Kyles*, 514 U.S. at 434). "Materiality is demonstrated 'by showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.' " *Smith*, 352 Ill. App. 3d at 1102 (quoting *Kyles*, 514 U.S. at 435). The "touchstone of materiality is a 'reasonable probability' of a different result." *Kyles*, 514 U.S. at 434.

¶ 52 Defendant maintains that this evidence would have affected the outcome of his trial for two reasons:

> "First, evidence that Gilmore perjured himself obviously would have undermined, if not completely destroyed, his overall credibility with the court. Second, the fact that Gilmore was an active Blackstone at the time of this shooting would have put this supposedly random shooting in an entirely different light and raised the possibility that Gilmore could have had a reason to falsely identify [defendant] as the shooter – it is common knowledge that there can be rival factions among the same gang."

¶ 53 We do not find that the evidence of Gilmore's stated gang affiliation would have either destroyed Gilmore's credibility or put the case in a whole different light as to undermine

confidence in the court's finding of guilt. As the State argues, the issue of gang affiliation arose only in the context of Gilmore's testimony regarding how he knew defendant and was able to identify him. Even assuming that Gilmore lied about leaving the Blackstones in 1993, as we must in reviewing a petition dismissal at the second stage, this evidence was not material. Rather, the descriptions by Gilmore and Washington of defendant and the gold Lexus were crucial in defendant's conviction. The police traced the gold Lexus to a known associate of defendant's, with whom defendant was seen riding in the gold Lexus previously, and at the time of the shooting the Lexus indeed had no license plates, just as Gilmore and Washington described. Gilmore and Washington both also described defendant and identified defendant in a lineup. Washington testified that there was "no doubt" in her mind that it was defendant when she identified him in the lineup, and she did not have any gang involvement whatsoever. Whether or not Gilmore was still a member of the Blackstones at the time of the shooting had no effect on his description of defendant or his description of the vehicle.

¶ 54 Further, simply speculating that there was a "possibility" that Gilmore "could have had a reason" to falsely identify defendant because there "can be" rival factions within the same gang is not enough to undermine confidence in the outcome of defendant's trial. There was no other evidence of any such hypothetical intra-gang warfare within the Blackstones at the time of the shooting, or of any personal animosity between Gilmore and defendant. In fact, Gilmore testified that he had not had any "run-ins" with defendant.

¶ 55 Any impeachment regarding Gilmore's statements of ongoing membership in the Blackstones would not have undermined Gilmore's corroborated descriptions of defendant and the vehicle. The defense impeached Gilmore with his statement to the defense investigator that he ducked and did not see the shooter, and this impeachment did go to Gilmore's identification of

defendant. However, given the circumstances of the statement to the investigator, the court apparently decided that Gilmore's other statements to the police and lineup identification of defendant were more credible.

¶ 56 At best, the additional evidence of Gilmore's statements in the reports declaring his gang membership would have gone to Gilmore's general credibility. But, given the certainty of not only his but also Washington's identification of defendant, and the corroboration of defendant's link to the gold Lexus, we cannot conclude that there is any reasonable probability that the outcome of defendant's trial would have been different.

¶ 57 We hold that defendant failed to make a substantial showing that his due process rights were violated under *Brady* by the alleged perjured testimony of Gilmore or by the alleged non-disclosure of Gilmore's arrest report and case report for his arrest on October 14, 1995.

¶ 58 II. Evidence Of An Alternative Suspect

¶ 59 Next, defendant argues that his due process rights were violated where the prosecution failed to disclose evidence that Gilmore and Washington were being targeted by a rival gang, the Four Corner Hustlers. According to defendant, this evidence was material because it was exculpatory as it provided an alternative suspect. Again, we look to the materials attached to defendant's post-conviction petition, taking the allegations as true, in reviewing a dismissal pursuant to a motion to dismiss at the second-stage of post-conviction proceedings.

¶ 60 To support this second claim, defendant attached to his post-conviction petition police reports of a complaint by Washington on October 3, 1995, reporting 20 offenders shattering the windows of her car with bricks while it was parked outside her home at 901 East 104th Street. Defendant also attached a supplementary report dated October 5, 1995, listing Washington as the victim and stating that an 18-year-old Hispanic male named Jose Carrasco was arrested and that

Washington identified him at the scene as one of the offenders. Carrasco was 5'8" tall, 200 pounds, and light-complected. Another report stated that Washington identified a person named Carlos Alcanter as one of the offenders. Both of these reports indicated that Carrasco and Alcanter were members of the Four Corner Hustlers gang. Both Carrasco and Alcanter were charged with criminal damage to property. According to defendant, these reports could have provided an alternative suspect, a motive for the shooting, and an explanation that the shooter fired shots at both sides of the street because he was trying to shoot both Gilmore and Washington. Defendant also argues that Carrasco "better matched Washington's initial descriptions of the shooter as being light complected."

¶ 61 The State argues that there was no *Brady* violation because the evidence was not material; tying the individuals in these reports to the shooting of Edgerton is too remote and speculative and was not supported by the evidence at trial. In reviewing the dismissal at the second stage, we assume that defendant's allegations in his post-conviction petition of this non-disclosure are true.

¶ 62 In reply, defendant argues that the State mistakenly believes that *Brady* requires the prosecution to turn over only evidence that would be admissible at trial. While the State's citation to cases determining proper exclusion of evidence based on the evidence being too speculative may not be exactly on point, we discern that the State's argument is directed not at admissibility but materiality, which is indeed a consideration in analyzing whether there was a *Brady* violation. See *Brady*, 373 U.S. at 87 ("material either to guilt or to punishment"). Illinois Supreme Court Rule 412(c) further defines materiality as "tend[ing] to negate the guilt of the accused as to the offense charged." Ill. S. Ct. R. 412(c) (eff. March 1, 2001).

¶ 63 We do acknowledge defendant's point, however, that there is a distinction between *Brady* materiality and admissibility of evidence at trial, which is an important point. As stated by the Illinois Supreme Court in *People v. Beaman*, 229 Ill. 2d 56 (2008), "even if some of the undisclosed evidence would have been inadmissible at trial, it still may have been favorable to petitioner in gaining admission of critical alternative suspect evidence." *Beaman*, 229 Ill. 2d at 75. We therefore do not rely on any of the State's authorities cited in support of its argument. Instead, we determine whether there was a *Brady* violation and use the appropriate standard of whether the undisclosed evidence ' "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.' " *Smith*, 352 Ill. App. 3d at 1102 (quoting *Kyles*, 514 U.S. at 435).

¶ 64 Here, even assuming the nondisclosure of the arrest reports of the Carrasco and Alcanter as true, there was no *Brady* violation because these reports were not material and cannot reasonably be taken to put the whole case in such a different light as to undermine confidence in the court's finding of guilt. These police reports do not tend to negate the guilt of defendant and do not support any inference that Carrasco was actually the shooter and that the shooting occurred because Washington and Gilmore were being targeted by the Four Corner Hustlers at the time of the drive-by shooting. Defendant argues in reply that the reports "would have helped counsel in 'gaining admission of critical alternative suspect evidence' " because "counsel could have used the reports as a basis for investigating the animosity between the Four Corner Hustlers and Gilmore and Washington." Defendant also argues that the reports were material because they are "evidence that Gilmore and Washington were in conflict with a street gang at the time of this shooting" and that "a gang-motivated shooting makes *much* more sense than a random shooting with no motive." (Emphasis in original.) But there was no evidence, even in the reports

themselves, that there was any such animosity between the Four Corner Hustlers and Gilmore and Washington at any time, much less at the time of the shooting. The arrests of Carrasco and Alcanter for the damage to Washington's vehicle on October 3, 1995 occurred a month *after* the shooting of Edgerton on September 2, 1995. There was no evidence of any gang rivalry between the Blackstones and the Four Corner Hustlers even generally. Contrary to defendant's speculation, the reports are not evidence that Gilmore and Washington were in a conflict with a gang at the time of the shooting.

¶ 65 Further, the reports do not connect either Carrasco and Alcanter or the Four Corner Hustlers as having anything to do with the shooting. Contrary to defendant's contention, Washington never described the shooter as being light-complected. At best, the description Washington may have given was that the *driver* of the vehicle was light-complected, which was brought out during the defense's attempted impeachment of Washington with her statement to an officer that the driver was light-complected. But Washington always maintained that the *shooter* was in the front passenger seat, whom she identified as defendant, and so any description of the driver does not contradict her description of the shooter. According to the reports, Carrasco is a light-complected Hispanic male, and defendant is African American.

¶ 66 We conclude that these reports would not have assisted defendant in presenting Carrasco or any member of the Four Corner Hustlers as an alternative suspect. See *Beaman*, 229 Ill. 2d at 75. This additional evidence does not "put the whole case in such a different light as to undermine confidence in the verdict." *Kyles*, 514 U.S. at 435. Defendant did not make a substantial showing that his due process rights were violated by a *Brady* violation in the non-disclosure of these reports.

¶ 67 CONCLUSION

¶ 68 Defendant's post-conviction petition was properly dismissed at the second stage of proceedings on both claims raised on appeal.

¶ 69 First, defendant failed to attached the necessary affidavit to support his contention that the police reports of both Gilmore's gun arrest declaring his membership in the Blackstones gang were not disclosed. Also, even taking defendant's allegations as true of the non-disclosure of the reports of both Gilmore's gun arrest, defendant failed to make a substantial showing that his due process rights were violated under *Brady* where these reports were not material because cannot reasonably be taken to put this whole case in such a different light as to undermine the court's finding of defendant's guilt.

¶ 70 Second, taking as true defendant's allegation of the non-disclosure of the police reports of members of the Four Corner Hustlers committing criminal damage to Washington's car, defendant failed to make a substantial showing that his due process rights were violated under *Brady* where these reports also were not material as they would not have assisted defendant in presenting Carrasco or any member of the Four Corner Hustlers as an alternative suspect.

¶ 71 Affirmed.