No. 3–08–0261

Order filed January 21, 2011

IN THE APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2011

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	for the 10th Judicial Circuit,
	)	Peoria County, Illinois
Plaintiff-Appellee,	)	
	)	
v.	)	No. 01–CF–583
	)	
PAYSUN LONG,	)	Honorable
	)	James E. Shadid,
Defendant-Appellant.	)	Judge, Presiding.

PRESIDING JUSTICE CARTER delivered the judgment of the court.
Justice Holdridge specially concurred in the judgment.
Justice McDade dissented.

ORDER

Held: Because the defendant was not prejudiced by the State's failure to correct false testimony at trial, appellate counsel was not ineffective; and because postconviction counsel was not obligated to raise additional allegations of ineffective assistance of appellate counsel, postconviction counsel provided reasonable assistance; therefore, the circuit court's dismissal of the defendant's postconviction petition at the second stage of proceedings was proper.

The defendant, Paysun Long, appeals from a judgment dismissing his petition for postconviction relief. He raises two issues on appeal: (1) whether he was denied the effective assistance of appellate counsel on direct appeal due to counsel's failure to raise the claim that the defendant was denied a fair trial because the State allowed a witness's false testimony to go uncorrected; and (2) whether postconviction counsel failed to provide reasonable assistance by failing to amend the defendant's *pro se* postconviction petition to include additional claims of ineffective assistance of appellate counsel. We affirm.

FACTS

Following a jury trial in 2001, the defendant was found guilty of first degree murder and was sentenced to 51 years of imprisonment. This court reversed the conviction and remanded for a new trial. *People v. Long*, No. 3–02–0132 (2003) (unpublished order under Supreme Court Rule 23). On retrial, the defendant was again found guilty by a jury of first degree murder and sentenced to 51 years of imprisonment. This court affirmed the conviction. *People v. Long*, No. 3–04–0381 (2006) (unpublished order under Supreme Court Rule 23).

Pertinent to the instant appeal, at the defendant's second trial, Brooklyn Irby testified on direct examination that she was at the Taft Homes on the night of June 11, 2001. Irby testified that she saw the defendant shoot Larriec Sherman from behind. Irby walked over to Sherman, who appeared to be dead. Irby left the Taft Homes area, and did not speak to police that night. Irby spoke to the police on a later date, after she had written a letter to someone about the shooting.

On cross-examination, Irby testified that she spoke to the police approximately two weeks after the shooting at the Peoria police department, and that she told the officers that she had seen the defendant shoot Sherman. Irby denied that she told two prosecutors and an investigator from the State's Attorney's office in November 2001 that she had lied to the police. She denied that she told the investigator that she had lied to the police because an officer had threatened to have her children taken from her. Defense counsel asked Irby numerous times whether she had told the prosecutors and the investigator that she had lied to the police when she told them that she had seen the defendant shoot Sherman. Irby repeatedly denied that she had recanted her statement.

On redirect examination, the State restricted its questioning to one issue. The State asked Irby whether the police already had the letter Irby had written to a friend that described the shooting when Irby spoke to the police the first time. Irby replied, "Yes."

The defendant called Frank Walter, an investigator for the Peoria County State's Attorney's office, to testify. Walter testified that he spoke to Irby on November 26, 2001, when he served her with a subpoena. Irby told Walter that she had lied to the police when she made her initial statement that she saw the defendant shoot Sherman. Irby was concerned, upset and did not want to be involved. Walter asked Irby to meet with the prosecutors. Irby informed the prosecutors and Walter that she had lied to the police. Walter also testified that one of the prosecutors directed him to write a report about Irby's recantation. Neither party asked Walter if Irby told him that a police officer had threatened to have her children taken away.

In April 2007, the defendant filed a *pro se* petition for postconviction relief. 725 ILCS 5/122–1 *et seq*. (West 2006). In that petition, the defendant claimed: (1) appellate counsel was ineffective for failing to raise the claim that the evidence at trial was insufficient to prove the defendant guilty of first degree murder beyond a reasonable doubt; and (2) appellate counsel was ineffective for failing to raise the issue that the State allowed Brooklyn Irby to testify falsely at the defendant's second trial. On June 25, 2007, the court found that the *pro se* petition presented the gist of a constitutional claim and appointed counsel for the defendant. On April 11, 2008, postconviction counsel filed an affidavit pursuant to Supreme Court Rule 651(c) (eff. Dec. 1, 1984), stating that she had consulted with the defendant to ascertain his contentions of deprivation of his constitutional rights, had examined the record, and had made any amendments to the *pro se* petition that were necessary for the adequate presentation of the defendant's contentions. Postconviction counsel did not file an amended postconviction petition. The State filed a motion to dismiss the postconviction petition. The court granted the State's motion and dismissed the petition without holding an evidentiary hearing. The defendant appealed.

ANALYSIS

On appeal, the defendant contends that the trial court erred by dismissing his petition at the second stage of postconviction proceedings, without an evidentiary hearing. A postconviction petition is a collateral proceeding and does not relitigate a criminal defendant's innocence or guilt. *People v. Lucas*, 203 Ill. 2d 410, 418 (2002). "The purpose of the post-conviction proceeding is to permit inquiry into constitutional issues involved in the original conviction and sentence that were not, nor could have been, adjudicated previously on direct appeal." *Lucas*, 203 Ill. 2d at 417-18. "The dismissal of a postconviction petition is warranted at the second stage of the proceedings only when the allegations in the petition, liberally construed in light of the trial record, fail to make a substantial showing of a constitutional violation." *People v. Hall*, 217 Ill. 2d 324, 334 (2005). We review the dismissal of a postconviction petition without an evidentiary hearing *de novo*. *Hall*, 217 Ill. 2d at 334.

First, the defendant claims that he made a substantial showing of a constitutional violation because he was denied the effective assistance of appellate counsel in that appellate counsel failed to raise as an issue on direct appeal that the defendant was denied a fair trial where the State allowed Brooklyn Irby's false testimony to go uncorrected. To prevail on a claim that appellate counsel was ineffective, the defendant "must show that counsel's failure to raise the issue on appeal was objectively unreasonable and that this decision prejudiced him." *People v. Jones*, 219 Ill. 2d 1, 23 (2006). Appellate counsel is not obligated to raise every conceivable issue on appeal. *Jones*, 219 Ill.2d at 23. To prove prejudice, the defendant must show that the underlying issue is meritorious. *Jones*, 219 Ill.2d at 23.

The State's knowing use of perjured testimony to obtain a conviction violates a criminal defendant's due process rights. *People v. Barrow*, 195 Ill. 2d 506, 529-30 (2001). In addition, the State has an obligation to correct false testimony, even when the State did not solicit the testimony. *Lucas*, 203 Ill. 2d at 416-24. However, the supreme court has never held that the State's failure to correct false testimony is automatically reversible error. Rather, "[a] conviction obtained by the knowing use of perjured testimony must be set aside if there is any reasonable likelihood that the false testimony could have affected the jury's verdict." *People v. Olinger*, 176 Ill. 2d 326, 345 (1997). The standard "any reasonable likelihood that the false testimony could have affected the judgment of the jury" is equivalent to the harmless error standard. *Lucas*, 203 Ill. 2d at 422. "The same principles also apply when the State, although not soliciting the false testimony, permits it to go uncorrected when it occurs." *Barrow*, 195 Ill. 2d at 530. Further, these principles apply even where the false testimony goes only to the witness' credibility. *Olinger*, 176 Ill. 2d at 345. In the context of a postconviction petition, the supreme court has stated, a "defendant is only entitled to an evidentiary hearing if there is a substantial showing of a reasonable likelihood that the false testimony could have affected the judgment of the jury." *Lucas*, 203 Ill. 2d at 424.

In this case, the defendant did not make a substantial showing of a reasonable likelihood that Irby's false testimony–that she never recanted her statement to police–could have affected the jury's verdict. Illinois courts have held that the State's knowing use of perjured testimony, although a due process violation, does not constitute reversible error where the violation was harmless error. See *Lucas*, 203 Ill. 2d at 421-27 (credibility of witness who testified falsely not crucial where evidence against defendant was overwhelming); *Barrow*, 195 Ill. 2d at 532 (assuming testimony was false, error was harmless where evidence against the defendant was overwhelming); cf. *People v. Jimerson*, 166 Ill. 2d 211, 228 (1995) (use of uncorrected false testimony was not harmless where the credibility of the witness was crucial to the State's case); *Olinger*, 176 Ill. 2d at 349 (false testimony not harmless error where witness's testimony and credibility was crucial to the State's case). This court has twice before stated that the evidence against the defendant was not overwhelming, and we will not revisit that question. Regardless, Irby's false testimony–that she never recanted–was harmless in this case because her false testimony was impeached by the testimony of investigator Walter and thus corrected at trial.

At the defendant's second trial, Irby repeatedly denied on cross-examination that she recanted her initial statement to police. This testimony directly conflicts with her testimony at the defendant's first trial, where she testified that she told prosecutors and investigator Walter that she had lied to the police when she told them that the defendant had shot Sherman. The State made no efforts at the second trial to correct Irby's false testimony that she had never recanted. However, the defendant called Walter to testify, and he testified that Irby had recanted her initial statement to police that she had seen the respondent shoot Sherman. Thus, the jury was informed that Irby had recanted to Walter and the prosecutors her identification of the respondent as the shooter, and the jury had the necessary information to weigh Irby's credibility. The jury was also reminded in closing arguments of Walter's testimony that Irby had recanted. Based upon these circumstances, the defendant has not established there was a reasonable likelihood that Irby's false testimony that she did not recant her identification of the defendant could have affected the jury's verdict. Because this issue was not meritorious, the defendant has also failed to show that he was prejudiced by appellate counsel's failure to raise this issue on direct appeal. Therefore, the petition did not make a substantial showing of a constitutional violation, and the trial court correctly dismissed the postconviction petition.

Our determination that the defendant was not prejudiced in this case by the State's failure to correct Irby's false testimony should not be read to diminish the State's duty to correct such false testimony. It is the State's obligation to correct false testimony when it occurs. *Barrow*, 195 Ill. 2d at 530; *Olinger*, 176 Ill. 2d at 345; *Lucas*, 203 Ill. 2d at 422; *Napue v. Illinois*, 360 U.S. 264, 269 (1959); see also Ill. S. Ct. R. of Prof. Conduct 3.8(a) ("The duty of a public prosecutor or other government lawyer is to seek justice, not merely to convict."). In this case, the false testimony was corrected by the defense attorney's examination of the investigator prior to jury deliberations. Under the specific facts and circumstances of this case, the defendant was not prejudiced.

Next, the defendant contends that postconviction counsel did not provide reasonable assistance because counsel did not amend his *pro se* postconviction petition, pursuant to Supreme Court Rule 651(c) (eff. Dec. 1, 1984), to include additional claims of ineffective assistance of appellate counsel. Specifically, the defendant maintains that appellate counsel should have raised the following issues: (1) the admission of hearsay evidence to establish the defendant's motive for shooting Sherman; (2) the State shifted the burden of proof in closing arguments; and (3) the State improperly commented in closing arguments on evidence not introduced at trial.

"There is no constitutional right to counsel in postconviction proceedings." *People v. Vasquez*, 356 Ill. App. 3d 420, 422-23 (2005). Rather, Rule 651 requires counsel in postconviction proceedings to provide a reasonable level of assistance. *Vasquez*, 356 Ill. App. 3d at 423. Rule 651(c) requires that postconviction counsel consult with the defendant either by mail or in person to ascertain his contention of deprivation of constitutional right, examine the record of the proceedings at trial, and make any amendments to the petitions filed *pro se* that are necessary for an adequate presentation of defendant's contentions. Ill. S. Ct. R. 651(c) (eff. Dec. 1, 1984). Under this rule, "[p]ost-conviction counsel is only required to investigate and properly present the *petitioner's* claims." *People v. Davis*, 156 Ill. 2d 149, 164 (1993). "While postconviction counsel *may* conduct a broader examination of the record [citation omitted], and may raise additional issues if he or she so chooses, there is no obligation to do so." *People v. Pendleton*, 223 Ill. 2d 458, 476 (2006). However, counsel must amend a *pro se* petition where necessary "to shape the petitioner's claims in the appropriate legal form." *People v. Turner*, 187 Ill. 2d 406, 417 (1999).

In this case, the defendant's *pro se* postconviction petition raises two claims of allegedly ineffective assistance of appellate counsel. The defendant claimed appellate counsel was ineffective by failing to raise on direct appeal: (1) an attack on the sufficiency of the evidence; and (2) a claim that the State violated the defendant's due process rights by failing to correct Irby's false testimony. The *pro se* petition is detailed and specific as to the defendant's claims of constitutional violations and does not hint at other alleged violations not clearly articulated by the defendant. Cf. *People v. Jennings*, 345 Ill. App. 3d 265, 274 (2003) (counsel failed to amend to allege a disparate sentencing claim where *pro se* allegations showed that petitioner wanted to challenge his sentence and record contained letter from petitioner's mother to counsel questioning disparate sentence of petitioner and co-defendants).

Furthermore, postconviction counsel did not fail to amend the petition in any manner necessary to shape the defendant's *pro se* claims into the appropriate legal form. Cf. *Turner*, 187 Ill. 2d at 412-15 (counsel failed to make routine amendments to overcome waiver of petitioner's claims). None of the additional allegations of ineffective assistance of appellate counsel raised in the instant appeal needed to be raised in the petition to fully present the defendant's specific claims in a legally sufficient manner. Postconviction counsel was not obligated to comb the record for additional allegations of ineffective assistance of postconviction counsel in this case, and her performance did not fall below the level of reasonable assistance required by Rule 651.

CONCLUSION

Based upon the above analysis, the defendant's postconviction petition failed to make a substantial showing of a constitutional violation. In addition, postconviction counsel did not provide unreasonable assistance by failing to include additional allegations of ineffective assistance of appellate counsel. The trial court properly dismissed the postconviction petition. Accordingly, the judgment of the Peoria County circuit court is affirmed.

Affirmed.

JUSTICE McDADE, dissenting:

The majority has found that defendant's appellate counsel was not ineffective for failing to raise the issue that the State denied defendant a fair trial by failing itself to correct testimony it knew to be false. Slip order at 7. The majority makes that finding despite acknowledging that "the State's knowing use of perjured testimony ***violates a criminal defendant's due process (slip order at 5) and its recognition that "[i]t is the State's obligation to correct false testimony when it occurs" (slip order at 7). While admitting that appellate counsel failed to raise an unquestionable due process violation, the majority finds that the error was "harmless *** because [the] false testimony was *impeached* *** and thus *corrected* at trial." (Emphases added.) Slip order at 6. The majority has also found that postconviction counsel was not ineffective in failing to amend defendant's *pro se* postconviction petition to include additional claims of ineffective assistance of appellate counsel. Slip order at 9. I disagree with the majority's finding that the issue of the State's failure to satisfy its obligation was not meritorious, and that, therefore, defendant failed to show that he was prejudiced by appellate counsel's failure to raise the issue on direct appeal. Slip order at 7. I believe the issue was not only meritorious, it would, if raised during defendant's 2006 direct appeal from his second conviction, have, resulted in a second reversal of defendant's conviction and a remand for yet another new trial.

I will begin by reiterating the substance of the law the majority has itself set out.

To prevail on a claim that appellate counsel was ineffective, the defendant "must show that counsel's failure to raise the issue on appeal was objectively unreasonable and that this decision prejudiced him." *People v. Jones*, 219 Ill. 2d 1, 23 (2006). To prove prejudice, the defendant must show that the underlying issue is meritorious. *Jones*, 219 Ill. 2d at 23.

The State's knowing use of perjured testimony to obtain a conviction violates a criminal defendant's due process rights. *People v. Barrow*, 195 Ill. 2d 506, 529-30 (2001). In addition, *the State* has an obligation to correct false testimony, even when *the State* did not solicit the testimony. *People v. Lucas*, 203 Ill. 2d 410, 416-24. In the context of a postconviction petition, the supreme court has stated, a 'defendant is only entitled to an evidentiary hearing if there is a substantial showing of a reasonable likelihood that the false testimony could have affected the judgment of the jury.' *Lucas*, 203 Ill. 2d at 424 (2002). (Emphases added.) . "A conviction obtained by the knowing use of perjured testimony must be set aside if there is any reasonable likelihood that the false testimony could have affected the jury's verdict." *People v. Olinger*, 176 Ill. 2d 326, 345 (1997). The standard "any reasonable likelihood that the false testimony could have affected the judgment of the jury" is equivalent to the harmless error standard. *Lucas*, 203 Ill. 2d at 422. "The same principles also apply when *the State*, although not soliciting the false testimony, permits it to go uncorrected when it occurs." *Barrow*, 195 Ill. 2d at 530. Further, these principles apply even where the false testimony goes only to the witness's credibility. *Olinger*, 176 Ill. 2d at 345.

Although the majority writes that the "false testimony was *impeached* *** and thus *corrected* at trial" (emphases added) (slip order at 6), the clear import of existing law is that *the State* has the obligation to correct the perjured testimony. That duty surely is not discharged when the defense attempts to demonstrate the perjury and that attempt is neither substantiated nor corroborated by the State nor commented on by the trial judge. The duty is surely not discharged when the State positively asserts the truthfulness of the witness on some issues while refusing to even acknowledge the known perjury on another. Moreover, the State's failure to carry out its duty demonstrates that the prosecutors did not want to confirm to the jury that one of their four shaky witnesses was not only willing to lie to them under oath – she had actually done so.

In cases such as this one, the denial of due process does not result from the false testimony's *impact* on the fairness of the trial. The denial of due process results from the State's *knowing use* of false testimony. The supreme court "has held that, if a prosecutor knowingly permits perjured testimony to be used in a criminal prosecution, 'it is incontrovertible that defendant's trial lacked the fundamental fairness implicit in constitutional guarantees of due process of law ***' [Citation.]" *People v. Jimerson*, 166 Ill. 2d 211, 223-24 (1995). The court has held that the State "knowingly uses" false testimony when it fails to correct false testimony even if that testimony is not directly inculpatory of the defendant and only goes to the credibility of the witness giving the false testimony. *People v. Simpson*, 204 Ill. 2d 536, 552 (2001) ("Where the State allows false testimony to go uncorrected, the same principles apply"); *People v. Nowicki*, 385 Ill. App. 3d 53, 96 (2008) ("it is equally well established that the aforementioned principles apply even where the witness' false testimony goes only to that witness' credibility").

Moreover, *Olinger* does not stand for the proposition implicit in the majority's holding that a conviction obtained by the knowing use of false testimony may *only* be set aside if there is a reasonable likelihood that the false testimony impacted the jury's verdict. Slip order at 6. In *Olinger*, the supreme court found that the defendant did prove that the false testimony likely impacted the jury's verdict, but it did so only in the context of addressing the State's argument in that case that the failure to correct the false testimony was harmless error. *Olinger*, 176 Ill. 2d at 348. The court did not hold that the defendant was *required* to make that showing. On the contrary, the court held explicitly that "to establish a violation of due process, the prosecutor actually trying the case need not have known that the testimony was false; rather, knowledge on the part of any representative or agent of the prosecution is enough." *Olinger*, 176 Ill. 2d 326, 347.

The testimony's substantive impact on the fairness of the trial may give rise to a separate claim of a denial of due process. But for purposes of defendant's argument, we need not address the impact of the false testimony on his trial--yet. The State does not deny its failure to correct Irby's false testimony in defendant's second trial. The court has held that a constitutional violation of this type *requires* a new trial. *Jimerson*, 166 Ill. 2d at 224. There is no question that had counsel raised the issue on direct appeal, defendant would have been entitled to a new trial. Clearly, then, on this basis alone defendant's appellate counsel's failure to raise the issue on appeal constituted deficient performance that prejudiced defendant. *People v. Wilder*, 356 Ill. App. 3d 712, 719-20 (2005) ("to establish that appellate counsel was deficient, the defendant must demonstrate that his allegation *** was meritorious and that this court would have found as such had appellate counsel raised the issue on direct appeal").

But I believe there are also grounds for a reversal with remand not for an evidentiary hearing but rather for a new trial. The State's case was a teetering edifice built primarily on the insubstantial foundation of the testimony of four witnesses who had demonstrably contradicted themselves and one another throughout the investigation of the murder and during both of Paysun Long's trials. In the original appeal we reversed defendant's conviction and remanded the case for a new trial on the basis of prosecutorial misconduct. Now we consider the denial of defendant's post-conviction petition concerning alleged errors at his second trial which were not raised by appellate counsel and again we are proposing to vindicate the State's conduct, even though the majority acknowledges that "[t]his court has twice before stated that the evidence against the defendant was *not* overwhelming." (Emphasis added.) I would add to that the fact that *there was no physical evidence linking this defendant to the shooting*. His conviction rested on the occurrence testimony of four women, every one of whom demonstrably lied either in statements, at trial, or both.

There is no dispute that Brooklyn Irby committed perjury in defendant's second trial. Nor is there any dispute that she was presented as a witness by the State. Nor is there any dispute that the truthfulness of at least a portion of her testimony was challenged by defense counsel during cross-examination. She lied, the State knew she lied, and the State did not disavow or correct her perjury while she was on the stand, even though it did engage in re-direct examination. There also appears to be no dispute that the State never expressly corrected the testimony or confirmed the existence of the perjury at any other time. Quite to the contrary. Mr. Ierulli, in the initial portion of the State's closing argument, set the stage for defendant's anticipated "hand wringing" over the fact that "these witnesses they (sic) have recanted on other occasions, they have said other things." Then without ever acknowledging that Irby had just lied repeatedly under oath, he told the jury that only they are the "judges of the believability" of the witnesses, leaving the jurors to somehow discern what he had the *legal obligation* to tell them – that Irby had lied under oath.

He then discussed the testimony of Sheila Cooks and Shawanda Walker. Incredibly, he argued that Ms. Walker's testimony, which the State solicited, was "textbook of being untruthful," that he had "lost track of Shawanda's excuses," and she told "multiple, multiple stories." He urged the jury to decide that *this* State's witness had lied under oath – had committed perjury – at trial but that her inconsistent videotaped statement was believable on the basis of her differing body language. To facilitate that comparison, he played a portion of the videotaped statement without the audio.

In stark contrast to his sharp attack on the unproven “untruthfulness” of Ms. Walker, when Mr. Ierulli finally got to the subject of Brooklyn Irby, he did not acknowledge that she had demonstrably lied under oath. Rather he said:

> "*Mr. Cusack* will argue that Brooklyn Irby came to the State’s Attorney’s office and said on an earlier occasion prior to her testifying and said, I wasn’t telling the police the truth. Well, she came in here and raised her hand and told you what happened and you saw her testimony. Maybe she thought if she told the State’s Attorney’s office she wasn’t telling the truth she wouldn’t have to testify. But when she came in here and was under oath, *she told you what she saw* and that was consistent with what Keyonna told you[1] and that was consistent with what Shawanna told you and that was consistent with the physical evidence[2] (Emphasis added.)”

Without confirmation by the State of Irby’s perjury, and given the State’s failure to thus corroborate the truth of the testimony of its investigator, defendant’s claim that Irby had perjured

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[1]In fact, it wasn’t, because Irby testified that no woman was sitting and holding Sherman’s head after he was shot – she actually refuted Keyonna’s key testimony.

[2]The only physical evidence was that Sherman was shot four times in the back and the trajectory showed the bullets traveled from south to north. There was no physical evidence implicating defendant.

herself in the courtroom would carry no more weight than his argument that all of the witnesses had lied. For his trial to be fair, the jury needed to be fully informed of all facts bearing on the credibility of the witnesses. Thus, defendant needed the *State* to acknowledge and confirm to the jury that its witness had in fact lied to them under oath; it was not sufficient that his attorney impeached her testimony while the State continued to proclaim her veracity.

Following Mr. Cusack's closing argument for the defendant, Ms. Mermelstein wrapped up the closing for the State. She began her argument by ridiculing defendant's contention that prior inconsistent statements should have some impact on the credibility of the testimony the jury heard, saying, "I will have to start this off by saying according to the Cusack principle of law, you can't believe a thing I am about to tell you because I have to stand here and tell you at the outset that I, Nancy Mermelstein, have previously told a lie. You talk to my parents. I have told some doozies." She went on to say:

> "*** I would submit if we looked around this room and if we had to inquire of everybody in the room, I wonder if we could say those of you who have never told a lie under any circumstance, some serious, some not serious, stand up; and I would submit to you there ain't anybody out there who is going to be able to do that."

That argument, of course, ignores the fact that Irby lied to the jury after she had taken a solemn oath to tell them the truth. Ms. Mermelstein does not contend that she or all the other presumed liars in the courtroom and on the jury deviated from the truth while under oath.

She never also confirmed for the jury that Irby *had* lied to them in that courtroom, under oath, and that the State knew she had lied. In fact she said, "And she testified here yesterday to what she saw that night of June 1, 2001. 'I saw Paysun shoot Larry Sherman in the back.' " She *implied* to the jury that Irby had testified truthfully without ever letting them know that she had lied, under oath, to them, multiple times in that very courtroom during that very trial. She finished up her argument by again emphasizing what terrible human beings the witnesses were:

> "These people ought to stick to the truth because they really can't get their lies together, because it was the truth that was consistent. It was the truth that came out. It was the truth that Paysun Long fired the shots that killed Larry Sherman."

Thus, she and Mr. Ierulli vouched, totally improperly, for the truth of those portions of the four witnesses' testimony that suited them. *People v. Barraza*, 303 Ill. App. 3d 794, 797 (1999) (generally, a prosecutor may not vouch for the credibility of a witness or express personal opinions about the case). But what did the prosecutors say here? Believe what Brooklyn said on the stand and disregard everything else. Reject what Shawanda said on the stand and only believe what she said in her videotaped statement. Believe everything that Keyonna told you *except* the part where she testifies there was no one there except herself – because the State needs to have the other three witnesses there and I need to keep emphasizing that there were 40 to 60 people there who "don't know nothing about birthing no babies, Miss Scarlet."

The problems with this case are that: (1) The State improperly conscripted the jurors as members of its team by essentially conceding the weakness of the case against Paysun Long but arguing that weakness was not its fault. There are all these 40-60 potential witnesses standing around who don't want to be involved, who don't value the life of this young man enough to come forward. Those who *have* taken the stand are such bad liars they can't even keep their lies together. And, by the way, the lies told by the witnesses need not cause you concern about their general credibility because all of us (including me - a respected prosecutor) told fibs as children and maybe some lies as adults and *we* could be believed in court. We will tell you what parts of their testimony you can believe and what you should ignore, and together we can find justice for this young victim by convicting the person *we* know to be his killer, even though the evidence is not there. (2) Brooklyn Irby, who was called by the State, lied on the stand, the State *knew* she lied and not only did they not disclose the perjury, the Assistant State's Attorneys vouched for the truth of her testimony that Paysun Long shot Larry Sherman. The State benefitted by being able to manipulate questions of Irby's credibility without destroying it altogether by telling the jury she had in fact lied to them under oath. (3) Given the fact that Long's defense was grounded in the lack of credibility of the State's four "occurrence" witnesses, his claim that Irby had lied on the stand would be lost in (a) his claims that all of them lied, and (b) the State's selective attacks on those portions of the testimony of the four witnesses that did not fit ~~in~~ either their theory or their proof.

The fact is that the case against Long was *under*whelming. We have so found on three separate occasions. To convict Paysun Long, the State needed Brooklyn Irby's testimony that he was the one who shot Larry Sherman and it could not allow her "credibility" on that point to be undermined by confirming to the jury that she had, in fact, already lied to them multiple times under oath on another matter. Taken in context, the State's failure to either disclose or verify Irby's perjury *to the jury* very likely made a difference in the outcome. The transcript discloses (clearly, in my opinion) that the State advanced the *general* incredibility of its witnesses while refusing to acknowledge the specific perjury of one of them and asserting the unconfirmed perjury of another, and then helped the jurors cherry-pick the evidence by telling them what parts of their witnesses's stories were true and what should be rejected.

I want to emphasize here that I have no intention of reweighing the evidence from defendant's second trial. Rather I am contending that the State's own failure to correct the perjury or to clearly confirm that the perjury occurred after its witness was impeached was not, in the context of the trial or the direct appeal of defendant's second conviction, harmless error. It seems incredible to me that the State's substantiation of the admitted fact that one of its witnesses had lied to the jury under oath would not have made a difference in the outcome; particularly when that acknowledgment would have accompanied Mr. Ierulli's explicit closing contention (not an established fact) that Shawanda Cross had lied on the stand. It also seems to me that, given the absence of any direct evidence connecting defendant to the crime and the State's repeated assertion of the unreliability of its own witnesses, we cannot now or in the future know whether or not this defendant killed Larry Sherman. In my opinion, on the basis of this record, the State could not (and certainly did not) prove this defendant committed this crime beyond a reasonable doubt.

In such a circumstance, what we all agree is that a due process violation looms extremely large. At this, the second stage of a postconviction proceeding, all well-pleaded facts not positively rebutted by the trial record must be taken as true. *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006). I believe I have shown that the record confirms defendant's allegations and that he has made a substantial showing of a due process violation.

For the foregoing reasons, I believe it is clear that defendant's petition satisfies his burden to make a substantial showing of a constitutional violation. I would find that the trial court's judgment dismissing defendant's postconviction petition for failure to make a substantial showing of a claim of ineffective assistance of appellate counsel was erroneous. Based on my finding, I would not reach the question of whether postconviction counsel was ineffective in failing to amend defendant's *pro se* petition. I would reverse the judgment dismissing the postconviction petition and remand the cause for third stage postconviction proceedings. Accordingly, I dissent.

JUSTICE HOLDRIDGE, specially concurring:

I agree that the trial court's order dismissing Long's postconviction petition should be affirmed for the reasons stated in Justice Carter's opinion, and I join that opinion. I write separately to further clarify the standards reviewing courts must apply in determining whether the State's failure to correct false testimony requires the reversal of a conviction and to explain why the State's error did not require reversal under these standards. I also write to clarify the scope of the State's duty to correct false testimony.

A conviction obtained by the knowing use of perjured testimony must be set aside "if there is any reasonable likelihood that the false testimony could have affected the jury's verdict." *People v. Olinger*, 176 Ill. 2d 326, 348 (1997). This standard is equivalent to the harmless error standard. Thus, if the State's failure to correct perjured testimony is harmless beyond a reasonable doubt, the conviction stands.

Applying this standard, our appellate court has repeatedly held that the State's failure to correct false testimony bearing on a witness's credibility is harmless, and therefore not reversible, when the testimony is corrected by some other means during the trial. See, *e.g.*, *People v. Spain*, 285 Ill. App. 3d 228, 240 (1996) (the State's failure to correct the false testimony of its witness that the State had not promised him any beneficial treatment in exchange for his testimony was harmless since the jury heard during cross-examination that the State had promised him beneficial treatment); *People v. Williams*, 332 Ill. App. 3d 254, 265 (2002) (witness's allegedly uncorrected false testimony did not contribute to jury's verdict where jury was made aware that the witness ultimately benefitted from his cooperation with the authorities by receiving a reduced sentence and, therefore, had sufficient information before it to assess credibility and reliability of the witness's testimony); see also *People v. Hansen*, 352 Ill. App. 3d 40, 52 (2004).

In this case, Irby's false testimony was impeached by the testimony of Frank Walter, an investigator for the Peoria County State's Attorney's office. Walter testified that Irby told him and two prosecutors that she had lied to the police when she identified Long as the shooter. Under these circumstances, Irby's false testimony that she never recanted her statement could not have contributed to the jury's verdict. Thus, the State's failure to correct Irby's false testimony on re-direct examination, while improper, was harmless.

The dissent suggests that if Long's counsel had raised the issue on his direct appeal, reversal would have been automatic regardless of the effect of the State's error on the jury's verdict. For the reasons set forth above and in Justice Carter's opinion, I disagree.

The dissent also maintains that the State's error cannot be considered harmless in this case because the State did not "confirm that perjury occurred" by acknowledging during its closing argument that Irby had "repeatedly lied under oath." However, in determining the effect of perjured testimony on the verdict, the dispositive issue is whether the false testimony has been corrected or impeached, not whether the State "confirms" or "acknowledges" the impeachment. See, *e.g.*, *Spain*, 285 Ill. App. 3d at 240. In any event, Irby's testimony was impeached by the testimony of Walter, who was an investigator for the State's Attorney's office. Thus, an agent of the State—and an employee of the very office that was prosecuting Long—confirmed that Irby had lied under oath. Under these unique circumstances, any further acknowledgment of Irby's perjury by the prosecutors themselves would have been superfluous.

The dissent also suggests that the State acted improperly when it tried to rehabilitate Irby during its closing argument. During closing, one of the prosecutors argued that Irby was telling the truth when she testified that she saw Long shoot the victim and speculated that Irby might have lied to Walter and the two State's Attorneys in an attempt to avoid having to testify at trial. In concluding that this argument was improper, the dissent appears to suggest that the State's duty to correct false testimony includes a duty to impeach its own witness by questioning the veracity of *all* portions of that witness's testimony, even those portions that it does not know to be false. I disagree. Although the State has an obligation to correct perjured testimony, it does not have a broader obligation to impeach its own witness more generally or to affirmatively argue that its witness cannot be trusted to tell the truth. *Cf. People v. Pecoraro*, 175 Ill. 2d 294, 313 (1997) (acknowledging that the State has an obligation to correct false testimony but ruling that "[u]nder our adversarial system, the State is not required in the first instance to impeach its own witness with all evidence bearing on their credibility").

There may be instances where the State goes too far in rehabilitating a witness after her false testimony is impeached. For example, it would be improper for the State to deny that the witness lied under oath or to argue that the false testimony at issue was, in fact, true. Such was not the case here, however. After Walter testified, the State never denied that Irby recanted her initial statement when she met with Walter and the two State's Attorneys. In fact, the prosecutor conceded that fact during closing arguments, thereby implicitly acknowledging that Irby had lied under oath. The prosecutor merely suggested that Irby's testimony as to certain *other* matters (*i.e.*, her eyewitness account of the murder) was true and that Irby had lied when she recanted her initial statement. That was not improper.

None of this is meant to excuse or minimize the State's dereliction of its duty in this case. Like both of my colleagues, I am disturbed by the State's failure to correct testimony that it knew to be false. However, although the State's conduct in this case was improper and regrettable, it was harmless under the circumstances presented in this case. Accordingly, Long's postconviction petition was properly denied.