APPENDIX CONTENTS

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 13-3327

PAYSUN LONG,

Petitioner-Appellant,

v.

RANDY PFISTER, Warden, Stateville Correctional Center,

Respondent-Appellee.

Appeal from the United States District Court
for the Central District of Illinois.
No. 11-CV-1265 — **Michael M. Mihm**, *Judge*.

ARGUED SEPTEMBER 7, 2016 —
DECIDED OCTOBER 20, 2017

Before WOOD, *Chief Judge*, and BAUER, EASTERBROOK, KANNE, ROVNER, WILLIAMS, SYKES, and HAMILTON, *Circuit Judges*.*

EASTERBROOK, *Circuit Judge*. Larriec Sherman was shot to death in June 2001. Four witnesses identified Paysun Long as the gunman; their statements were recorded on video. Two of the four recanted before Long's trial. The other two—

---

* Circuit Judge Flaum heard argument in this appeal but later recused himself and has not participated in its decision.

Keyonna Edwards and Brooklyn Irby—testified, while the video statements of the two recanting witnesses were introduced. Irby, too, had recanted before trial, telling Frank Walter, an investigator for the State's Attorney, that police officers had coerced her to name Long as the shooter. But Irby testified consistently with her video statement. On cross-examination she conceded recanting but told the jury that her original statement was true and her recantation false. The jury believed the testimony that Irby and Edwards gave in open court, convicting Long of murder.

A state court vacated this conviction because the prosecutor had argued, without support in the record, that the recanting witnesses feared Long and his friends. At Long's second trial the evidence proceeded as at the first. Edwards and Irby identified Long in court as the killer; the other witnesses' video statements were introduced. But this time, when asked on cross-examination about her recantation, Irby denied telling Walter that she had been coerced to identify Long. The defense called Walter, who testified that Irby had indeed told him that her identification had been coerced. The prosecutor did not contest Walter's testimony either on cross-examination or during closing argument. The jury convicted Long a second time, and he was sentenced to 51 years in prison. The state's appellate court affirmed on direct appeal and affirmed again after a judge denied Long's application for collateral relief. 409 Ill. App. 3d 1178 (2011).

A district court denied Long's application for relief under 28 U.S.C. § 2254, but a panel of this court reversed. 809 F.3d 299 (7th Cir. 2015). The

panel concluded that, by not spontaneously correcting Irby's testimony, the prosecutor violated the rule of *Napue v. Illinois*, 360 U.S. 264 (1959), and successors such as *Giglio v. United States*, 405 U.S. 150 (1972). The panel understood these cases to establish that, whenever any witness makes a statement that the prosecutor knows is untrue, the Due Process Clause of the Fourteenth Amendment requires the prosecutor to correct that statement immediately. That was not done in Long's second trial, and the panel held that Long therefore is entitled to collateral relief. To reach this conclusion the panel also had to address Long's procedural default in state court, which it did by holding that Long's appellate lawyer had rendered ineffective assistance by not making a *Napue* argument on direct appeal.

Because this case entails federal collateral review of a state conviction, we start with 28 U.S.C. § 2254(d), which as amended in 1996 by the Antiterrorism and Effective Death Penalty Act (AEDPA) provides:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States[.]

The Appellate Court of Illinois ruled that any error was harmless in light of the other evidence inculpating Long. *Davis v. Ayala*, 135 S. Ct. 2187 (2015),

holds that a harmless-error decision is one "on the merits" as § 2254(d) uses that phrase. The state court concluded that Long had a good position as a matter of state law, because *People v. Lucas*, 203 Ill. 2d 410, 424 (2002), holds that a prosecutor must correct false testimony that the defense elicits. Given the harmless-error ruling, however, that conclusion did not benefit Long. The panel of our court, by contrast, went straight to federal law under *Napue* and its successors, and after holding that the prosecutor had violated the rule of *Napue* stated that Long is entitled to a new trial. The panel did not mention the doctrine of harmless error or apply the standard of *Brecht v. Abrahamson*, 507 U.S. 619 (1993). Our order setting this case for rehearing en banc vacated the panel's decision.

Long contends that the state courts rendered decisions "contrary to" *Napue* and similar decisions. Of course the state judges didn't disparage or contradict *Napue*; by citing *Lucas* the Appellate Court ruled in Long's favor, though as a matter of state law. The state court did not analyze *Napue* at all. (It was cited once but not elaborated on, given *Lucas*.) But we know from *Harrington v. Richter*, 562 U.S. 86, 97–100 (2011), that it does not matter whether a state court discusses federal precedent; § 2254(d)(1) applies whenever the state court makes a decision on the merits, no matter what the state judiciary says. *See also Johnson v. Williams*, 568 U.S. 289 (2013). So we start with the merits—and because we conclude that the Supreme Court has not "clearly established" that the doctrine of *Lucas* is a rule of federal constitutional law, we need not address harmless error (or for that matter the procedural-default issue).

Long understands *Napue* and its successors to establish that the prosecutor must immediately correct any false testimony—and that it does not matter whether the defense already knows the truth, or whether the jury learns the truth before deliberating. It is not hard to find statements that, taken at a high level of generality, could be so understood. The Court summarized the *Napue* principle this way in *California v. Trombetta*, 467 U.S. 479, 485 (1984): "The most rudimentary of the access-to-evidence cases impose upon the prosecution a constitutional obligation to report to the defendant and to the trial court whenever government witnesses lie under oath." This statement does not contain exceptions for testimony elicited by the defense, or testimony known by the defense to be false, or testimony corrected before the jury deliberates. But then the Supreme Court has never considered any of those possible qualifications. All *Napue* itself holds is that perjury known to the prosecution must be corrected before the jury retires. The Court did not say when or by whom. And *Giglio* identifies as the constitutional problem a prosecutor's deliberate deception of the jurors, which can't occur when the truth comes out at trial and the prosecutor does not rely on the falsehood.

In *Napue* and its successors: (a) the false testimony was elicited by the prosecutor (we discuss an exception shortly); (b) the truth was unknown to the defense; (c) the prosecutor asked the jury to rely on the false testimony; and (d) the jury never learned the truth. In this case, by contrast, the false testimony was elicited by the defense, which knew the truth, and the prosecutor, instead of relying on the false testimony, accepted Walter's testimony about

Irby's recantation but argued that her in-court identification was nonetheless correct.

One passage in *Napue*, 360 U.S. at 269, could be read to imply that a prosecutor must correct testimony no matter who solicited it. The Court wrote: "The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected". This language must be understood in light of the citation the Court gave: *Alcorta v. Texas*, 355 U.S. 28 (1957). In *Alcorta* the prosecutor had told the witness not to be forthcoming and deliberately elicited a misleading statement; the defense and the jury never learned the truth, something *Alcorta* stressed. Read in context, the passage in *Napue* implies that a prosecutor must furnish the truth whether a falsehood had been elicited deliberately (in bad faith) or inadvertently. This is how *Brady v. Maryland*, 373 U.S. 83, 87 (1963), understood it, remarking that when the prosecution withholds exculpatory evidence there is a constitutional problem "irrespective of the good faith or bad faith of the prosecution." It is accordingly not proper to read this passage of *Napue* as establishing that it is irrelevant who elicits the false testimony, whether the defense knows the truth, and whether the truth is presented to the jury. Those issues were not before the Court or expressly decided.

It is similarly inappropriate to understand *Giglio* as holding anything about these matters. There the false testimony was elicited by defense counsel, but the Court made nothing of that fact, whose significance the parties had not briefed; instead it ruled for the defense because the prosecutor embraced the witness's false statement and argued it to the jury as

a basis of conviction, even though at least one of the prosecutors understood that the truth was exculpatory and unknown to the defense. The witness testified that no promises had been made; one prosecutor (who made them) knew otherwise, yet at trial the prosecution told the jury that the absence of a promise made the witness's testimony especially credible. The Justices concluded that *Brady* required the truth's disclosure and forbade the prosecutor from arguing that the witness had not been promised favorable treatment.

This case therefore entails four questions that have never been expressly decided by the Supreme Court:

- Do *Napue* and its successors apply when the defense rather than the prosecutor elicits the false testimony?
- Must the prosecutor correct false testimony when defense counsel already knows the truth?
- Does the Constitution forbid a conviction obtained when the prosecutor does not correct but also does not rely on the falsehood?
- Does the Constitution forbid a conviction obtained when all material evidence is presented to the jury before it deliberates?

Long believes that all four of these questions should be answered yes but does not contend that any of them has been answered in the defendant's favor by the Supreme Court. Instead he believes that, once a general principle has been established, a court of appeals can resolve subsidiary issues such as these.

That's a possibility the Supreme Court has rejected as inconsistent with the statutory rule that, to support collateral relief, a principle must be "clearly established … by the Supreme Court of the United States" rather than by an intermediate federal court. The Justices insist that a principle be made concretely applicable to the problem at hand before it may be used on collateral review. A recent example in this sequence said, when summarily reversing an appellate decision:

> The Ninth Circuit pointed to no case of ours holding [that the prosecutor must specify in advance of trial the precise theory of liability on which it would rely]. Instead, the Court of Appeals cited three older cases that stand for nothing more than the general proposition that a defendant must have adequate notice of the charges against him. … This proposition is far too abstract to establish clearly the specific rule respondent needs. We have before cautioned the lower courts … against "framing our precedents at such a high level of generality." *Nevada v. Jackson*, 133 S. Ct. 1990, 1994 (2013).

Lopez v. Smith, 135 S. Ct. 1, 4 (2014). *See also, e.g.*, *Woods v. Donald*, 135 S. Ct. 1372 (2015).

We appreciate that, if a general proposition inevitably entails some concrete application, then there's no need to wait for the Justices to apply the principle in the inevitable way. But it is not obvious to us that the *Napue* principle requires a new trial when the prosecutor fails to correct a falsehood, but

the defense knows about that falsehood and corrects it. To the contrary, this court held in *United States v. Saadeh*, 61 F.3d 510, 523 (7th Cir. 1995), that there is no constitutional violation in that situation. *See also United States v. Adcox*, 19 F.3d 290, 296 (7th Cir. 1994). The proposition that defense counsel's knowledge of the truth is irrelevant therefore cannot be taken as clearly established by the *Napue* principle itself. Nor does the *Napue* principle establish that it is irrelevant whether the truth is presented in open court before the jury deliberates.

Another way to ask whether the application of *Napue* when the defense knows the truth is so obvious that it must be taken as already established is to examine how the Justices have handled a related subject. The *Napue-Giglio* rule is a cousin to the *Brady* doctrine, which requires the prosecution to reveal material exculpatory evidence. The Justices themselves treat *Napue* and *Brady* as two manifestations of a principle that prosecutors must expose material weaknesses in their positions. *See, e.g.*, *Strickler v. Greene*, 527 U.S. 263, 298–99 (1999).

The Supreme Court has considered whether *Brady* requires the prosecution to disclose (or put before the jury) exculpatory or impeaching information known to the defense. The answer is no. *See, e.g.*, *United States v. Agurs*, 427 U.S. 97, 103 (1976) (*Brady* applies only to information "unknown to the defense"). Our circuit has made the same point and added that there is no disclosure obligation under *Brady* if the defense easily could have found the information, even if it didn't find it in fact. *See, e.g.*, *United States v. Morris*, 80 F.3d 1151, 1170 (7th Cir. 1996). Other circuits agree. *See, e.g.*, *United*

States v. Wilson, 901 F.2d 378, 380 (4th Cir. 1990). Given how *Brady* is understood, an intermediate appellate court could not confidently predict that *Napue* and *Giglio* will be treated differently—let alone so confident that we could declare (as § 2254(d) requires) that this has *already* been clearly established by the Supreme Court.

In this case what occurred may well have helped the defense rather than the prosecutor. Irby's false testimony enabled the defense to depict her either as a perjurer (if she remembered what had happened) or as having a faulty memory (if she had forgotten); this could have helped the defense diminish the force of Irby's identification. It is awfully hard to see why events that may have helped the defense should lead to collateral relief in the absence of any clearly established legal transgression.

When presented with the four open issues we have identified, the Supreme Court may resolve some or all of them in favor of a defendant in Long's position. But it has not done so to date, and § 2254(d)(1) accordingly prohibits a grant of collateral relief. We do not attempt to determine how those questions would or should be resolved.

Long presents other contentions that the panel resolved against him. 809 F.3d at 313–16 (quotation from *Gone with the Wind*; prosecutor's anecdote; prosecutor's reference to a letter not in evidence; ineffective assistance of trial counsel). We agree with the panel's resolution of those issues and reinstate that portion of its opinion without reproducing the discussion here.

AFFIRMED

HAMILTON, *Circuit Judge*, joined by ROVNER and WILLIAMS, *Circuit Judges*, dissenting.

The bar for federal habeas relief is high, requiring the petitioner to show the state courts unreasonably applied controlling Supreme Court precedent. 28 U.S.C. § 2254(d)(1). Petitioner Long has cleared that high bar. I respectfully dissent.

Nearly sixty years ago, the Supreme Court held that a State deprives a person of liberty without due process of law if it convicts him by knowingly using false testimony, and it imposed on the prosecutor the duty to see that perjured testimony is corrected. *Napue v. Illinois*, 360 U.S. 264, 269 (1959). In this case, a key prosecution witness lied about a point critical to her credibility. She swore to the jury, repeatedly, that she had been consistent in identifying petitioner Long as the person who murdered Sherman. Those were lies, and the prosecutors knew they were lies. Yet the prosecutors did nothing to see that the lies were corrected.

The state courts actually recognized the due process violation but erred, as our panel explained, by excusing the violation as harmless. The majority affirms the results in the state court by first rejecting the state courts' actual reasoning and then hypothesizing possible distinctions that might be drawn between this case and the *Napue* line of cases.

Yet *Napue* itself considered and rejected the grounds the majority relies upon to excuse the Illinois courts' failure to follow it. It does not matter, the Supreme Court said, which side elicited the false testimony. *Id.* at 269. Nor does it matter whether the defense knew of the false testimony or whether the

jury heard evidence contradicting the false testimony. *See id.* at 269–70. What this jury never heard was a prosecutor or judge saying that the witness had lied to the jury. Moreover, the case against Long was so fragile that the *Napue* violation cannot reasonably be deemed harmless. The state courts' denial of post-conviction relief to Long was contrary to *Napue*, so federal habeas relief is necessary under 28 U.S.C. § 2254.

Part I of this dissent lays out the facts of the witness's perjury during Long's trial. Part II summarizes the Supreme Court's decision in *Napue*. Part III rejects the majority's efforts to limit *Napue* to excuse the state courts' failure to follow it.

I. THE PERJURY IN LONG'S TRIAL

We review here the conviction of Paysun Long for the murder of Sherman in Long's second trial. (The second trial was needed because of prosecutorial misconduct in closing argument in the first trial.) No physical evidence tied Long to the murder. The prosecution relied heavily on two witnesses—Keyonna Edwards and Brooklyn Irby—who testified that they had seen Long shoot Sherman. Edwards had her own credibility issues, since some details of her account were not corroborated by anyone else present, but our focus here is on Irby.[1]

Irby testified that she was walking through the Taft Homes housing development in Peoria on June 11, 2001 when she saw Long shoot Sherman. On

---

[1] Two other prosecution witnesses testified that Long was not the shooter, but the prosecution was allowed to put into evidence earlier recorded statements by those witnesses saying that he was.

cross-examination, defense counsel asked Irby whether she had previously told the prosecutor herself and an investigator that she had lied when she first told investigators in June 2001 that she had seen Long shoot Sherman. Supp. App. 132–36. Irby repeatedly denied that she had done so. Those sworn answers were lies, and the prosecutor knew it. Yet the prosecutor did nothing to correct Irby's false denials of having changed her story, even in redirect examination of Irby.

Long's attorney did what he could to attack Irby's lies and thus her credibility. After the State had finished presenting its case, the defense called Frank Walter, the prosecution's investigator who had talked with Irby. Walter testified that Irby had recanted her identification of Long. App. Dkt. 13–12 at 330–34. That's how the evidence closed: Irby said she had never changed her story, and Walter said she had.

During closing arguments, the prosecution did not even acknowledge Irby's lies, let alone correct them. The prosecution first tried to finesse the problem, saying that the defense counsel would

> *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 [Edwards] told you and that was consistent with what she has told you and that was consistent with what Shawanda [Walker] told you and that was consistent with the physical evidence.

Supp. App. 149–50 (emphases added). Missing from that careful dance around Irby's perjury is any acknowledgment that Irby had lied under oath to the jury. The prosecutors' handling of Irby contrasts with their sharp attacks on other witnesses, including prosecution witnesses, for being untruthful. *See* App. Dkt. 13–12 at 349–51. The prosecutors knew how to tell the jury that other witnesses had lied to them, but they never admitted to the jury that Irby had lied to the jury.

During the defense closing argument, the defense pointed out Irby's lies and reminded the jury that Walter, the prosecution's investigator, had testified that Irby had changed her story: she had told him and the prosecutor that she had lied in June 2001 about seeing Long shoot Sherman. Yet in her trial testimony she lied by denying that.

During the rebuttal argument, the prosecutor soft-pedaled the perjury. She said that Irby had recanted her story back in November 2001 when she was served with a subpoena, but immediately emphasized that Irby had (supposedly) told the truth when she was under oath. Supp. App. 171. The prosecutor *still* never acknowledged that Irby had lied to the jury in her trial testimony.

To sum up, then, a key prosecution witness lied about a point critical to her credibility, and the prosecution knew she was lying. Yet the prosecution took no steps to correct the perjury.

II. NAPUE V. ILLINOIS

Under the Antiterrorism and Effective Death Penalty Act of 1996, known as AEDPA, federal courts must accept a state court's decision on the merits of a habeas petitioner's claim unless the state court decision was contrary to or an unreasonable application of clearly established law under Supreme Court authority, or based on an unreasonable finding of fact. 28 U.S.C. § 2254(d). Petitioner Long is not asking the federal courts to make new law on his behalf. He asks us only to enforce the Supreme Court's 1959 decision in *Napue v. Illinois*.

Napue was, like this case, a murder prosecution in Illinois. A police officer had been fatally shot in a robbery attempted by several men. The principal State's witness was a man named Hamer who was already serving a prison sentence for the same murder. Hamer testified that Napue had been one of the robbers. During Napue's trial, the prosecutor asked Hamer whether he had received any promises of leniency in return for his testimony. Hamer said no. But that was false, and the prosecutor did nothing to correct that lie. The jury was told, however, that a public defender had promised "to do what he could" for Hamer.

The prosecution later asked to have Hamer's sentence reduced based on the promise that Hamer had denied receiving in Napue's trial. When Napue heard of the effort to reduce Hamer's sentence, he

sought relief from his own conviction. The state courts denied relief, but the Supreme Court reversed in a unanimous opinion by Chief Justice Warren. The Court began from the foundation that "a conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment." 360 U.S. at 269, citing *Mooney v. Holohan*, 294 U.S. 103 (1935), and other cases.

The next sentence in the opinion addresses the problem here: "The same result obtains when the State, *although not soliciting false evidence*, allows it to go uncorrected when it appears." *Id.* (emphasis added), citing *Alcorta v. Texas*, 355 U.S. 28 (1957), and other cases. (The Court later explained that this holding in *Napue* was a deliberate extension of the older ruling in *Mooney*. *Brady v. Maryland*, 373 U.S. 83, 87 (1963).)

Napue then rejected other attempts to excuse the use of the false testimony. First, it made no difference that the false testimony addressed Hamer's credibility rather than his substantive testimony. 360 U.S. at 269. "A lie is a lie, no matter what its subject, and, if it is in any way relevant to the case, the district attorney has the responsibility and duty to correct what he knows to be false and elicit the truth." *Id*. at 269–70, quoting *People v. Savvides*, 136 N.E.2d 853, 854 (N.Y. 1956).

Then the Court rejected another theory for avoiding the perjury, that merely contradictory evidence would correct the problem: "we do not believe that the fact that the jury was apprised of other grounds for believing that the witness Hamer may have had an interest in testifying against petitioner

[Napue] turned what was otherwise a tainted trial into a fair one." *Id.* at 270. The Court finally rejected the state court's conclusion that the false testimony would not have affected the verdict, *id.* at 271–72, since the conviction of Napue depended so heavily on whether the jury believed Hamer. *See also Wearry v. Cain*, 577 U.S. —, —, 136 S. Ct. 1002, 1006 (2016) (noting that *Napue* harmless error standard also applies to *Brady* claims).

III. THE MAJORITY'S EFFORTS TO LIMIT NAPUE

Since 1959, *Napue* has been understood to impose on prosecutors an obligation to *correct* prosecution evidence that they know is false. In this case, the prosecution failed to fulfill that obligation. The state appellate court actually acknowledged the *Napue* violation, but refused, over a powerful dissent, to correct the error on the theory that the violation was harmless. *People v. Long*, 2011 WL 10457885, at *3, *4 (Ill. App. Jan. 21, 2011) (citing state cases that applied *Napue*).[2]

---

[2] The majority cites *Harrington v. Richter* and *Johnson v. Williams*, ante at 4, for the idea that AEDPA deference under § 2254(d)(1) applies "whenever the state court makes a decision on the merits, no matter what the state judiciary says." Both cases dealt with summary, unexplained orders issued by busy state courts. In such cases, considering possible explanations for a state court's unexplained denial of a federal constitutional claim helps preserve comity between federal state courts. Here, however, the Illinois court actually acknowledged the constitutional problem. It found a due process violation but concluded that the violation did not matter. In a case such as this, "where the state court's real reasons can be ascertained," we should look to the "actual arguments or theories that supported the state court's decision" and not to secondary or hypothetical ra-

The majority does not try to excuse the *Napue* due process violation as harmless, as the state court did. Instead, the majority offers four supposed distinctions that might allow some other hypothetical state court to deny relief to Long and thus to avoid federal habeas relief in light of 28 U.S.C. § 2254(d)(1). On examination, however, it becomes clear that *Napue* rejected the most important of them. The last distinction evaporates when we ask what it means to present "the truth" in an adversarial trial and what counts as "correcting" perjury under *Napue*.

The majority first asks whether "*Napue* and its successors apply when the defense rather than the prosecutor elicits the false testimony?" Ante at 8. *Napue* itself answered that question: "The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears." 360 U.S. at 269. Nothing in the *Napue* opinion suggests that the prosecution's constitutional duty of candor depends on which lawyer asked the question that drew the lie. *See Brady*, 373 U.S. at 87 (noting that this holding in *Napue* extended prior rule in *Mooney* that prohibited prosecutors from offering knowingly perjured testimony). The majority tries to explain away the broad phrasing of the *Napue* opinion by pointing to the citation to *Alcorta v. Texas*, 355 U.S. 28 (1957), and reads the teaching of *Napue* on this point as if it were confined to the facts of *Alcorta*. The better course is to assume that the Supreme Court noticed whether it was phrasing its teaching in *Napue* broadly or narrowly. We should

---

tionales. *Hittson v. Chatman*, 576 U.S. —, —, 135 S. Ct. 2126, 2127–28 (2015) (Ginsburg, J. concurring in denial of certiorari) (internal quotations and ellipses omitted).

not strain so hard to narrow it.

In fact, the Supreme Court has already confronted a case in which the prosecution violated *Napue* without itself offering the perjured testimony. In *Giglio v. United States*, 405 U.S. 150, 151–52 (1972), a key prosecution witness lied on cross-examination by denying he had received any promise of leniency. The prosecution did nothing to correct the lie because the trial prosecutor did not know of the promise. The Supreme Court reversed and remanded for a trial because of the perjury brought out by defendant's cross-examination.

The majority next asks, "Must the prosecutor correct false testimony when defense counsel already knows the truth?" Ante at 7. This is a red herring that simply misses the point of *Napue*. The majority bases this supposed distinction on the theory that the *Napue* rule is a "cousin to the *Brady* doctrine." Ante at 8, citing *Brady*, 373 U.S. 83. *Brady* requires the prosecution to disclose to the defense evidence that tends to exculpate the accused, including evidence relevant to witness credibility. The doctrines are in fact linked. In *Giglio*, the Supreme Court explained that *Mooney* had held that deliberately deceiving a court and jury by presenting evidence known to be false is incompatible with "rudimentary demands of justice," and that *Napue* had extended that rule to cases where "the State, although not soliciting false evidence, allows it to go uncorrected when it appears." 405 U.S. at 153, quoting *Napue*, 360 U.S. at 269.

While the doctrines are linked, they are not identical. *Giglio* held that *Brady* applies even where the government's failure to disclose exculpatory evi-

dence was inadvertent, *id.* at 154, and disclosure to the defense is sufficient to comply with *Brady*. *E.g.*, *United States v. Walter*, 870 F.3d 622, 629 (7th Cir. 2017); *Holland v. City of Chicago*, 643 F.3d 248, 255 (7th Cir. 2011). That's why *Brady* does not apply to information already known to the defense. *United States v. Agurs*, 427 U.S. 97, 103 (1976); *Walter*, 870 F.3d at 629. But when the prosecution *knows* that a prosecution witness has lied to the court and jury, which everyone agrees happened in this case, *Napue* applies. It imposes a duty on the prosecution not merely to *inform* the defense but to ensure that the perjury is *corrected*. 360 U.S. at 269.

If mere disclosure of the perjury to the defense were enough, as it is under *Brady* and as the majority suggests here, the logic of the rule would allow the prosecution to disclose the perjury and just stand aside while the defense tries to rebut it. That is simply not a reasonable reading of *Napue*, which again instructs that the prosecution may not allow the perjury "to go uncorrected when it appears." 360 U.S. at 269. In fact, the majority cites no case that actually interprets *Napue* as it suggests, allowing the prosecution merely to disclose the perjury to the defense without actually correcting the perjury.

Napue addresses not what the defense knows but the integrity of the evidence before the jury. *Napue* teaches that the prosecution has an obligation to ensure that false testimony is corrected. Nothing in the opinion suggests that the obligation is removed if the defense knows the truth and has the opportunity to offer contradictory evidence. What matters is the risk that the jury will use the false evidence to convict. The *Napue* Court put the obligation squarely on

the prosecution to see that the false evidence is corrected, without the majority's proposed qualification.

The majority next asks: "Does the Constitution forbid a conviction obtained when the prosecutor does not correct but also does not rely on the falsehood?" Ante at 7. Again, the *Napue* opinion answers this question: "The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears." 360 U.S. at 269. The key phrase is "allows it to go uncorrected." That flatly contradicts the majority's suggestion that *Napue* left the prosecution room to avoid its obligation to correct false evidence by merely refraining from asking the jury specifically to rely upon the perjured testimony.

Finally, the majority asks: "Does the Constitution forbid a conviction obtained when all material evidence is presented to the jury before it deliberates?" Ante at 7. That proposed distinction might have a superficial plausibility, but it is also plainly contrary to *Napue*. It also ignores the reality of a jury trial in our adversarial system. Under the majority's theory, *Napue* might allow prosecutors to respond to known perjury by merely allowing the defense to contradict the perjury. It does not. *Napue* made clear that the prosecution has a duty to correct the perjury.

A jury that hears evidence merely contradicting the perjury cannot be said to *know* the truth. Nor can mere contradiction reasonably be deemed to be a "correction." The prosecution here never admitted to the jury that Irby lied to them. The jurors heard Irby repeatedly claim under oath that she had told a consistent story, and they heard investigator Walter tes-

tify that she had not been consistent. The judge instructed the jurors that it was up to them to evaluate the credibility of the witnesses and that the lawyers' arguments were just argument, not evidence.

In the post-conviction proceedings, and with the benefit of hindsight, the lawyers and judges know that Irby lied to the jury. That fact is "as clear and certain as a piece of crystal or a small diamond." *See Nix v. Whiteside*, 475 U.S. 157, 190 (1986) (Stevens, J., concurring). But the jurors just heard conflicting testimony from Irby and Walter. The prosecution even told them in closing argument that a witness's prior inconsistent statements should not affect her credibility! To the jury, whether Irby had lied to them was not a certain fact but only a possibility. It was one of those "mixtures of sand and clay" more familiar to trial lawyers and judges. *See id.* As Justice McDade explained in her dissent in the Illinois Appellate Court, due process and *Napue* are violated if the prosecutor can leave "jurors to somehow discern what he had the *legal obligation* to tell them—that Irby had lied under oath." *Long*, 2011 WL 10457885, at *8 (McDade, J., dissenting) (emphasis in original). The Supreme Court made the same point more recently. The Court explained that due process of law usually relies on the presentation of contradictory evidence, but noted the exception for perjury by prosecution witnesses, where due process calls for much stronger medicine. *Perry v. New Hampshire*, 565 U.S. 228, 237 (2012).

In short, the majority's suggestions that *Napue* leaves the state courts room to avoid following it on the facts of this case are without support. *Napue* expressly rejected several of the suggestions, and its

logic clearly rejects the last.

IV. REMAINING ISSUES

The panel explained why Long's due process claim under *Napue* was not procedurally defaulted. 809 F.3d at 308–09. And the *Napue* due process violation cannot reasonably be dismissed as harmless or non-prejudicial under any available standard, whether under *Napue* itself, 360 U.S. 272 (false testimony "may have had an effect on the outcome of the trial"), *Brecht v. Abrahamson*, 507 U.S. 619, 622 (1993) (whether error "had substantial and injurious effect or influence"), or *Chapman v. California*, 386 U.S. 18, 24 (1967) ("harmless beyond a reasonable doubt").

The Illinois Appellate Court acknowledged in three different appeals, and this court's panel explained, that the case against Long was weak. *See Long*, 2011 WL 10457885, at *3 ("not overwhelming"); Supp. App. 63 (affirming second verdict: evidence in second trial was "closely balanced"); Supp. App. 49 (reversing original verdict: evidence in first trial was "closely balanced"); *Long*, 809 F.3d at 311 (noting that case against Long was "weak"). No physical evidence tied Long to the murder. All four of the State's eyewitnesses posed problems. Two testified that they did *not* see Long shoot Sherman. Edwards had her own credibility problems. And Irby lied to the jury. The State's failure to correct Irby's perjury likely influenced the jury. It was not reasonable of the state court to find that merely offering contradictory evidence (from investigator Walter) was sufficient to cure the *Napue* due process violation. *See Long*, 809 F.3d at 311.

In evaluating and rejecting the possibility of harmless error, we consider the trial record as a whole. *Napue*, 360 U.S. at 272; *see also Giglio*, 405 U.S. at 154 (reversing where perjured testimony was key to prosecution's case); *Long*, 809 F.3d at 311. We should not close our eyes to other instances of prosecutorial overreach, including two outrages from the rebuttal closing argument, when the defense could not respond.

First, the prosecution pulled a blatantly racist stunt, comparing those present when the police arrived to the slave characters in *Gone with the Wind*, quoting from the scene where Scarlett O'Hara tells the slave Prissy to help her deliver Melanie Wilkes's baby. Prissy famously tells "Miss Scarlett" that she "don't know nothin' 'bout birthin' babies," and is promptly slapped. *See* Supp. App. 168; *see also* Supp. App. 70–71 (McDade, J., dissenting from affirmance on direct appeal) (prosecutor's use of *Gone with the Wind* passage was "blatant appeal to racism" that worked). And a few moments later, the prosecutor went so far as to describe a letter Irby had written that was not even in evidence. The judge had to interrupt and told the jury to disregard that blatant attempt by the experienced lead prosecutor to put unadmitted hearsay in front of the jury, Supp. App. 171, but she got the jury's attention. During deliberations, the jury asked to see that letter.

In short, Long was not convicted in a fair trial. We should order that he receive a new trial.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 13-3327

PAYSUN LONG,

Petitioner-Appellant,

v.

KIM BUTLER,

Respondent-Appellee.

Appeal from the United States District Court
for the Central District of Illinois.
No. 11-cv-1265-MMM — **Michael M. Mihm**, *Judge*.

ARGUED DECEMBER 8, 2014 —
DECIDED OCTOBER 27, 2015

Before BAUER and Hamilton, *Circuit Judges*, and ELLIS, *District Judge*.*

ELLIS, *District Judge*. Petitioner-Appellant, Paysun Long ("Long") seeks reversal of the district court's denial of his petition for writ of habeas corpus filed pursuant to 28 U.S.C. § 2254. Long brings due process claims related to the prosecution's failure to correct perjured testimony and use of racially-

---

* The Honorable Sara L. Ellis, of the United States District Court for the Northern District of Illinois, sitting by designation.

charged and improper comments during the trial, as well as ineffective assistance of trial and appellate counsel claims. We reverse and remand with instructions to the district court to grant the writ of habeas corpus. The district court's writ should order that Long is released unless Illinois gives notice of its intent to retry Long within a reasonable time to be set by the district court.

I. BACKGROUND

Long has already been tried twice for the murder of Larriec Sherman ("Sherman"). Sherman was shot in the Taft Homes housing development in Peoria, Illinois, on June 11, 2001. When the responding officer arrived at the scene, Sherman lay outside on the ground near a bicycle. Fifty to sixty people were gathered around Sherman, who was transported to a nearby hospital where he died from multiple gunshot wounds.

Long was first tried for first degree murder in December 2001. No physical evidence tied Long to the crime, but the state presented four witnesses who identified him as the shooter. Two of those four witnesses named Long as the shooter during the investigation, but recanted at trial. Witness Brooklyn Irby ("Irby") identified Long as the shooter, but then testified on the stand that she told the State's Attorneys and their Investigator Frank Walter ("Walter") that her story about seeing Long shoot Sherman was a lie. In closing argument, the prosecutor made several improper statements not supported by the record evidence, including that two of the witnesses changed their stories out of fear,

resulting in the reversal of Long's conviction and a new trial.

The current petition is based on Long's second trial in January 2004. The State again presented the four eyewitnesses, one of whom maintained her identification of Long. That witness, Keyonna Edwards ("Edwards") stated she was walking on the sidewalk when she saw Sherman riding a bicycle behind her. According to her testimony, she then heard gunshots, turned around, and from a distance of about six feet saw Long shoot Sherman from behind. Edwards stated she then cradled Sherman's head in her hands and noticed he had a gun in his pocket. She testified that another individual approached and took that gun, then she left the scene before the police arrived. The two witnesses who recanted their identifications of Long during the first trial continued to deny having seen him shoot Sherman, despite their prior videotaped statements that Long approached Sherman and shot him from behind.

The fourth eyewitness, Irby, testified that she was walking through the Taft Homes when she saw Long shoot Sherman from behind as Sherman was riding his bicycle. Irby did not notice anyone cradling Sherman's head and when she approached Sherman, she saw a gun on the ground. Irby stated she then left the area. Although Long's defense counsel cross-examined Irby about her prior trial testimony recanting her identification of Long, she denied ever telling the State's Attorneys and State's Attorney Investigator that her prior identification was false and compelled by police threats to have her children removed from her care. The same

prosecutor who examined Irby in the first trial also examined Irby in the second trial, but did not correct Irby's denial of her prior sworn testimony. After the end of the State's case-in-chief, defense counsel presented Investigator Walter, who testified that Irby recanted her identification of Long at Long's first trial.

During closing arguments, the prosecutor made a series of comments along the theme that no evidence or theory was presented that another individual committed the crime. In addition, during rebuttal argument, the prosecutor used a personal anecdote about her experience with another murder case involving a reluctant witness. Also during rebuttal, in the context of discussing the crowd of people surrounding Sherman's body, the prosecutor referenced a scene in the movie "Gone With the Wind," where the slave Prissy tells Miss Scarlett she "don't know nothing about birthing no babies," stating:

> Officer Wetzel told you when he got there there were 40 to 60 people around Mr. Sherman. And sorry, Miss Scarlet, but we don't know nothing about birthing no babies, we just don't [know] nothing. 40–60 people standing around that night ... So, on the night of June 11, 2001, although there are 40 to 60 people around this dead young man or dying young man, nobody knew nothing, nobody came forward, nobody knows nothing.

SA.168–69. The prosecutor also referred to the contents of a letter written by Irby that had not been admitted into evidence, at which point the judge *sua sponte* objected to the hearsay reference. During jury deliberations, the jury sent the judge a note asking why the letter was not entered into evidence, but could still be referenced. The trial judge responded that the jury "should consider the testimony and exhibits that have been admitted in evidence according to the written instructions that you received." SA.108.

The jury found Long guilty and the judge sentenced him to fifty-one years in prison.

Long raised two issues on direct appeal. First, appellate counsel challenged the *Gone With the Wind* and personal anecdote references in the prosecution's closing statement. Second, appellate counsel asserted an ineffective assistance of trial counsel claim based on trial counsel's failure to call Long's sister, who would have corroborated Irby's statement that she did not see anyone cradling Sherman's head after he was shot. The Illinois Appellate Court affirmed Long's conviction, finding his arguments regarding the closing argument comments waived because he failed to object at trial and raise the issue in post-trial motion practice, and otherwise not so improper as to require reversal, and finding the ineffective assistance of counsel claim adequately determined by the judge post-trial. Long filed a petition for leave to appeal ("PLA"), which was denied.

Long filed a timely *pro se* state post-conviction petition that argued appellate counsel was

ineffective for failing to present the claims that the evidence at trial was insufficient to convict and that the State allowed the perjured testimony of Irby. Counsel was appointed, but he did not file an amended petition. The petition was dismissed.

Long appealed this dismissal, arguing that appellate counsel was ineffective for failing to appeal the perjured testimony issue, and that post-conviction counsel was ineffective for failing to amend the petition to include claims based on the hearsay letter reference, comments in closing argument that there was no evidence of another perpetrator and references to facts not in evidence, and ineffective assistance of trial counsel. A divided panel of the Illinois Appellate Court upheld the dismissal of Long's state post-conviction petition, holding that Long was not prejudiced by the State's failure to correct the false testimony at trial, therefore appellate counsel was not ineffective, and post-conviction counsel provided reasonable assistance because he was not obligated to raise additional allegations of ineffective assistance of appellate counsel. The Illinois Supreme Court denied Long's PLA.

Long filed the instant petition *pro se* on July 19, 2011, arguing: (1) he was denied a fair trial due to the State's knowing use of Irby's perjured testimony and improper comments in closing argument, including the *Gone With the Wind* reference; (2) ineffective assistance of appellate counsel for failing to argue the perjured testimony issue; and (3) ineffective assistance of post-conviction counsel for failing to amend the petition to include additional allegations of ineffective appellate

counsel. The district court dismissed Long's petition, finding the prosecutorial misconduct claims were procedurally defaulted and meritless, as Long had not shown a reasonable likelihood that Irby's testimony or the closing argument comments prejudiced the trial outcome. The district court also found Long's ineffective assistance of counsel claim, although not procedurally defaulted, to be without sufficient merit to overturn the state court. The district court dismissed petitioner's post-conviction counsel ineffective assistance claim as procedurally barred.

II. ANALYSIS

On the appeal of a writ of habeas corpus denial, the Court reviews a district court's rulings on issues of law *de novo* and findings of fact for clear error. *Denny v. Gudmanson,* 252 F.3d 896, 900 (7th Cir. 2001). The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") established that a federal court may grant habeas relief on a claim adjudicated by a state court on the merits only if that adjudication "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). "When the case falls under § 2254(d)(1)'s 'contrary to' clause, we review the state court decision *de novo* to determine the legal question of what is clearly established law as determined by the Supreme Court and whether the state court decision is 'contrary to' that

precedent." *Denny,* 252 F.3d at 900. Factual findings by the state court that are reasonably based on the record are presumed correct unless rebutted by clear and convincing evidence. *See id.*; 28 U.S.C. § 2254(e)(1). AEDPA "stops short of imposing a complete bar on federal court relitigation of claims already rejected in state proceedings," but imposes a difficult standard that requires the petitioner to show the state court ruling "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility of fairminded agreement." *Harrington v. Richter,* 562 U.S. 86, 131 S. Ct. 770, 786–87, 178 L. Ed. 2d 624 (2011).

However, a federal court may not consider the merits of a habeas claim unless that federal constitutional claim has been fairly presented to the state courts through one complete round of review, either on direct appeal or through post-conviction proceedings. *O'Sullivan v. Boerckel,* 526 U.S. 838, 844–45, 119 S. Ct. 1728, 144 L. Ed. 2d 1 (1999); *Malone v. Walls,* 538 F.3d 744, 753 (7th Cir. 2008). "Fair presentment contemplates that both the operative facts and the controlling legal principles must be submitted to the state court." *Malone,* 538 F.3d at 753 (citation omitted) (internal quotation marks omitted). Failing to properly present the federal claim at each level of state court review results in procedural default, which can only be overcome if the petition demonstrates cause for and prejudice from the default, or a miscarriage of justice due to actual innocence. *Lewis v. Sternes,* 390 F.3d 1019, 1026 (7th Cir. 2004). Cause is "ordinarily established by showing that some type of external

impediment prevented the petitioner from presenting his federal claim to the state courts." *Id.* "Prejudice is established by showing that the violation of the petitioner's federal rights worked to his *actual* and substantial advantage, infecting his entire trial with error of constitutional dimensions." *Id.* (citation omitted) (internal quotation marks omitted). This Court's review of the question of procedural default is *de novo*. *Malone,* 538 F.3d at 753.

If the district court did not have the opportunity to consider an argument on the merits, it is forfeited in this Court. *Pole v. Randolph,* 570 F.3d 922, 937 (7th Cir. 2009) ("A party may not raise an issue for the first time on appeal.").

A. The *Napue* Claim & The Ineffective Assistance of Appellate Counsel Claim Based on the *Napue* Claim

1. Prosecution's Failure to Correct Perjured Testimony

Long asserts that he was denied a fair trial because of the prosecution's knowing use of perjured testimony. According to Butler, the perjured testimony claim is procedurally defaulted because, although Long's post-conviction briefs argued appellate counsel was ineffective for failing to present this argument, the failure to raise this issue separately from an ineffective assistance claim is not fair presentment to the state court, citing *Lewis v. Sternes,* 390 F.3d 1019 (7th Cir. 2004). Long argues that he presented the Illinois courts with the operative facts and controlling legal standards necessary to evaluate this claim and therefore it is

not defaulted, citing *Malone v. Walls,* 538 F.3d 744 (7th Cir. 2008).

In *Lewis,* this Court found that petitioner had defaulted claims raised in his post-conviction petition only as examples of ineffective assistance of counsel, explaining, "[a] meritorious claim of attorney ineffectiveness might amount to cause for the failure to present an issue to a state court, but the fact that the ineffectiveness claim was raised at some point in state court does not mean that the state court was given the opportunity to address the underlying issue that the attorney in question neglected to raise." 390 F.3d at 1026. We went on to find that the ineffective assistance of counsel claims were themselves defaulted because they were not presented in the correct appellate proceeding. *Id.* at 1026, 1029–30. Although we found procedural default in *Lewis,* that case did not announce a broad rule that a constitutional claim embedded in an ineffective assistance claim has never been fairly presented to the state courts.

On the contrary, in *Malone,* we reviewed *Lewis* and another ineffective assistance of counsel/embedded constitutional claim fair presentment challenge, finding for the petitioner. The State argued the ineffective assistance of trial counsel claim was procedurally defaulted because it had not been presented as independent from the claim that appellate counsel was ineffective for failing to raise that claim. 538 F.3d at 753–54. However, we found that "a fair reading of the record" revealed the state courts had been given a full opportunity to consider this issue because the petitioner made it clear that he was seeking redress

of his trial counsel's errors in failing to present certain witnesses by extensively detailing the factual basis of trial counsel's errors, and by citing the appropriate federal case and standard for a trial counsel ineffective assistance finding. *Id.* at 754. We distinguished *Lewis* by explaining there the claims had been defaulted "because they had not been presented as independent claims for relief, but only as examples of counsel's failures." *Id.* at 755. Malone's presentation of the ineffective assistance of appellate counsel claim was "as a means for the court to reach the ineffective assistance of trial counsel, i.e., as the cause for failing to raise the ineffective assistance of trial counsel claim." *Id.* Because *Malone* "makes clear that he is asking the court to redress the failure of his trial counsel, an issue the court can reach if it determines that his appellate counsel also was ineffective[,] [h]is presentation, therefore, does not suffer from the infirmities that we identified in the petitioner's submissions in *Lewis*." *Id.*

As in *Malone,* Long has raised an ineffective assistance of appellate counsel claim as a means for the Court to reach the perjured testimony claim. *See* 538 F.3d at 750.[1] Long's operative petition is his

---

[1] Butler also argues that *Malone* should be considered an outlier because there the Illinois Appellate Court considered the ineffective assistance of trial counsel claim only by relaxing its state procedural requirements because appellate counsel filed an affidavit admitting his error in not bringing the claim. However, this reasoning is not reflected in the *Malone* decision. And appellate counsel's *mea culpa* would not have been the trigger for that review. Rather, any appellate ineffective assistance claim would spark a similar analysis of an allegedly waived issue, whether or not the claiming petitioner had such

self-drafted petition because appointed counsel never amended, therefore it should be given a "generous interpretation" in this Court. *See Lewis,* 390 F.3d at 1027. The ineffective assistance of Long's appellate counsel, discussed below, gave him "cause" for failing to raise the *Napue* claim in the state courts. Although embedded in his ineffective assistance of counsel claim, Long fairly presented the factual and legal basis for the perjured testimony claim to the Illinois state court and, importantly, that court considered the issue on its merits.

The Court examines four factors to determine whether a petitioner has fairly presented his federal claim to the state courts: "1) whether the petitioner relied on federal cases that engage in a constitutional analysis; 2) whether the petitioner relied on state cases which apply a constitutional analysis to similar facts; 3) whether the petitioner framed the claim in terms so particular as to call to mind a specific constitutional right; and 4) whether the petitioner alleged a pattern of facts that is well within the mainstream of constitutional litigation." *Ellsworth v. Levenhagen,* 248 F.3d 634, 639 (7th Cir. 2001). Long cited *Napue v. Illinois,* 360 U.S. 264, 79 S. Ct. 1173, 3 L. Ed. 2d 1217 (1959), which examines a prosecutor's knowing use of perjured testimony as a Fourteenth Amendment issue. Long used Illinois

---

straightforward evidence of ineffectiveness. *See Malone,* 538 F.3d at 750 (explaining, "[g]enerally, defendant's failure to raise this issue on direct appeal would result in waiver. However, the waiver rule is relaxed when a defendant alleges that failure to raise an issue on appeal constituted the ineffective assistance of counsel").

cases on the same issue. *See, e.g., People v. Olinger,* 680 N.E.2d 321, 331, 176 Ill. 2d 326, 223 Ill. Dec. 588 (1997) (citing *Napue*); *People v. Jimerson*, 652 N.E.2d 278, 284, 166 Ill. 2d 211, 209 Ill. Dec. 738 (1995) (same). Long explicitly framed this as a due process issue and his facts fit squarely within the *Napue* framework.

Furthermore, when considering Long's case, the appellate court engaged in the same kind of analysis as in *Malone,* discussing whether the perjured testimony issue was so prejudicial that the verdict should be overturned. SA.81–84. In so doing, the court reiterated the circumstances of Irby's testimony at both trials, the State's failure to correct that testimony, and Long's rebuttal witness. SA.83–84. The court concluded petitioner did not show a reasonable likelihood that Irby's false testimony would have changed the verdict and declared, "[b]ecause this issue was not meritorious," appellate counsel was not ineffective. SA.84. It is clear from the opinion that the Illinois Appellate Court squarely considered the factual and legal basis of this claim. We find, therefore, that Long's due process claim is not procedurally defaulted and consider its merits.

A federal court may grant a writ of habeas corpus on an issue adjudicated on the merits by the state court only if the adjudication of that claim "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). We review the

state court's legal conclusions *de novo*. *Hall v. Washington,* 106 F.3d 742, 748 (7th Cir. 1997). In *Hall,* we explained:

> The statutory "unreasonableness" standard allows the state court's conclusion to stand if it is one of several equally plausible outcomes. On the other hand, Congress would not have used the word "unreasonable" if it really meant that federal courts were to defer in all cases to the state court's decision. Some decisions will be at such tension with governing U.S. Supreme Court precedents, or so inadequately supported by the record, or so arbitrary, that a writ must issue.

Id. at 748–49.

The Illinois Appellate Court's finding that the Irby perjury issue was "not meritorious" was an unreasonable application of clear Supreme Court precedent holding that "a conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *See United States v. Agurs,* 427 U.S. 97, 103, 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1976). "[A] conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment." *Napue,* 360 U.S. at 269. A constitutional violation occurs if the State allows perjured testimony to go uncorrected, even if it did not solicit the false evidence. *Id.* Either way, the

perjured testimony prevents "a trial that could in any real sense be termed fair." *Id.* at 270 (quoting *People v. Savvides,* 136 N.E.2d 853, 855, 1 N.Y.2d 554, 154 N.Y.S.2d 885 (N.Y. 1956)).

During Long's first trial, Irby identified Long as the shooter, but then testified that she told the State's Attorneys and Investigator Walter that she lied about seeing Long shoot Sherman in the back. During the second trial, the same State's Attorney put Irby on the stand, where Irby told her initial story about seeing Long shoot Sherman. The State's Attorney did not ask Irby any questions about her recantation under oath at the first trial. Defense counsel cross-examined Irby on her prior assertion that her story was a lie, but Irby denied telling anyone from the State's Attorney's Office that she did not, in fact, see Long shoot the victim. Again, the State's Attorney did not correct Irby's testimony. Rather, in closing, the prosecutor referenced the defense's cross-examination of Irby on her statements to Walter, without mentioning the prior trial testimony. SA.149–50. The prosecutor then argued that Irby was credible and affirmatively relied on Irby's changing story to bolster her credibility, arguing: "Maybe [Irby] 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[.]" SA.150.

A government lawyer's use of perjured evidence is a threat to the concept of ordered liberty. *See Napue,* 360 U.S. at 269. This threat is just as pernicious if the testimony goes only to the credibility of the witness, because "[t]he jury's

estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend." *Id.* Illinois separately acknowledges the State's obligation in this regard, *see, e.g., People v. Steidl,* 685 N.E.2d 1335, 1345, 177 Ill. 2d 239, 226 Ill. Dec. 592 (1997) ("If a prosecutor knowingly permits false testimony to be used, the defendant is entitled to a new trial."), and has incorporated this concept into its rules of professional conduct, *see* Ill. Supreme Ct. Rules of Prof'l Conduct R. 3.8(a) ("The duty of a public prosecutor is to seek justice, not merely to convict.").

That defense counsel later did what he could to minimize the damage of Irby's perjured testimony does nothing to reduce the State's duty to correct the perjured testimony. Just because the jury heard Walter explain during the defense case that Irby's story had changed does not turn "what was otherwise a tainted trial into a fair one." *Napue,* 360 U.S. at 270; *see also United States v. Freeman,* 650 F.3d 673, 680–81 (7th Cir. 2011) (finding reasonable possibility that perjured testimony affected jury decision, even though the government stipulated to facts contradicting that testimony at a later point in the case). Additionally, the fact that the jury heard from another witness who challenged Irby's recollection merely set up the kind of credibility comparison that is the bread and butter of a trial—it does not address the problem that the jury should never have heard that testimony in the first place. Even if this evidence was only used by the jury to

assess Irby's credibility, the State's failure to correct that evidence was a clear due process violation and the Illinois court's decision to the contrary was unreasonable. *Napue,* 360 U.S. at 270.

But the import of this evidence goes beyond credibility. The case against Long was weak. The Illinois Appellate Court itself noted the evidence against Long was "not overwhelming." SA.83. Without any physical evidence linking Long to the crime, the State had to rely on the testimony of two eyewitnesses, Irby and Edwards. Edwards' testimony about the scene—that she saw Long shoot Sherman, that she then cradled his head until officers arrived at the scene—was brought into question by the other witnesses' stories and was also different from her testimony at the first trial. The State's other two witnesses refused to name Long as the shooter at the second trial. So that left Irby as the only witness whose testimony was not directly contradicted or questioned. The Court considers the trial record as a whole when evaluating the effect of the perjured testimony on the jury's verdict. *See Napue,* 360 U.S. at 266, 272 (eyewitness's testimony "extremely important" to State's case); *Giglio v. United States,* 405 U.S. 150, 154, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972) (perjured testimony was key to prosecution's case). Irby's testimony and credibility were vital to the State's case.

Furthermore, Irby's recantation—had the State honestly presented it to the jury—would have corroborated the other two eyewitnesses who also changed their initial testimony naming Long as the shooter. The cumulative weight of Irby's perjured testimony creates a reasonable likelihood that, with

so little other evidence, the State's failure to fairly present her shifting story influenced the jury's verdict.

Therefore, even though our review is deferential under AEDPA, the Illinois Appellate Court's determination that the State's failure to correct the perjured testimony did not influence the jury's decision was an unreasonable application of *Napue*. Long is entitled to habeas relief on this claim.

2. Ineffective Assistance of Appellate Counsel

Long also brings a separate ineffective assistance of appellate counsel claim based on the perjured testimony claim. Butler does not argue that this claim is procedurally defaulted—indeed, the appellate court specifically considered and rejected it. SA.78.

On habeas review, a federal court determines whether the state court's application of the ineffective assistance standard was unreasonable, not whether defense counsel's performance fell below *Strickland v. Washington,* 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), standards. *See Harrington v. Richter,* 562 U.S. 86, 101, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011) ("Under AEDPA, though, it is a necessary premise that the two questions are different. For purposes of § 2254(d)(1), an *unreasonable* application of federal law is different from an *incorrect* application of federal law." (citation omitted) (internal quotation marks omitted)). The state court is granted "deference and latitude that are not in operation when the case

involves review under the *Strickland* standard itself." *Id.* To find a state court's application of *Strickland* unreasonable is a high bar requiring "clear error." *See Allen v. Chandler,* 555 F.3d 596, 600 (7th Cir. 2009). The unreasonable application of federal law will lie "well outside the boundaries of permissible differences of opinion" and will be a clearly established Supreme Court precedent unreasonably extended to an unsuitable context or the unreasonable refusal to extend that rule somewhere it should have applied. *Id.* at 602.

Ineffective assistance of counsel claims are mixed questions of fact and law reviewed *de novo,* "with a strong presumption that the attorney performed effectively." *Allen,* 555 F.3d at 600. When considering ineffective assistance claims, a court must determine whether counsel's performance fell below an "objective standard of reasonableness" and that this performance prejudiced the petitioner, i.e. "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland,* 466 U.S. at 688, 694.

The Illinois Appellate Court held that appellate counsel was not ineffective because the issue of whether Irby's uncorrected testimony prejudiced the trial was not meritorious. For the same reasons discussed *supra,* the Illinois Appellate Court's finding that the prosecution's actions did not prejudice the trial outcome, and therefore that this issue was not meritorious, was clear error and a misapplication of the Supreme Court's holding in *Napue.*

Furthermore, appellate counsel's failure to bring this claim cannot be considered trial strategy or objectively reasonable performance. *See Sanders v. Cotton,* 398 F.3d 572, 585 (7th Cir. 2005) (failure to make "an obvious and clearly stronger argument" was deficient performance (citation omitted)). Appellate counsel is not required to raise every non-frivolous issue and her performance "is deficient under *Strickland* only if she fails to argue an issue that is both 'obvious' and 'clearly stronger' than the issues actually raised." *Makiel v. Butler,* 782 F.3d 882, 898 (7th Cir. 2015). The *Napue* issue was obvious from the trial record itself. The question of whether the perjured testimony prejudiced Long's defense was also clearly stronger than the claims that were raised.

Appellate counsel brought only two issues on direct appeal: (1) challenging the "Gone With the Wind" and personal anecdote references in the prosecution's closing statement and (2) ineffective assistance of trial counsel for failing to call Long's sister as a witness to corroborate Irby's testimony that she did not see anyone cradling Sherman's head at the scene. The appellate court rejected both arguments, although over a strongly worded dissent that described the prosecutor in closing as having "put her thumb on the scale and tip[ped] the balance in favor of the State with a wholly improper—and I submit grossly prejudicial—argument." SA.69. A challenge to the prosecutor's misconduct in allowing the perjured testimony would have been a powerful challenge to the conviction. Considering the dissenting justice's reaction to the other comments, it is likely that this claim, especially when considering

the weak case against Long, would have prompted a finding of prejudice.

The second issue was not strong: the testimony of Long's sister would have been used to corroborate Irby's version of the scene and to undermine the prosecution's only eyewitness who did not eventually recant. However, the detail of Edwards' testimony that this evidence would attack—the cradling of the victim's head—does not directly call into question her identification of Long as the shooter or significantly undercut her credibility. Long's sister was a family member and therefore open to allegations of bias. In addition, trial counsel's strategy would not have been to bolster Irby's testimony: this witness would eventually name Long as the shooter and her changing story made her an unpredictable witness. This claim was weak at best. It was most likely that the appellate court would not have found prejudice even if this choice of witnesses could be considered ineffective assistance.

Appellate counsel brought one claim on appeal that prompted a strong dissent, therefore this case does not rise to the level of *Shaw v. Wilson,* where counsel argued a frivolous claim rather than one that was "genuinely arguable under the governing law." *See* 721 F.3d 908, 916 (7th Cir. 2013). However, the failure to bring the strong *Napue* due process claim on appeal cannot be characterized as strategic, rather it was deficient performance.

We hold the State's failure to correct Irby's denial of her recantation prejudiced Long and the Illinois Appellate Court's finding otherwise is not a

reasonable application of the *Strickland* prejudice standard. Long is entitled to habeas relief on his claim of ineffective assistance of appellate counsel based on the failure to challenge the State's use of perjured testimony.

B. Remaining Claims

1. Prosecution's Use of Quote from *Gone With the Wind* & Personal Anecdote From Another Trial

Long also asserts violations of his due process rights under *Darden v. Wainwright,* 477 U.S. 168, 106 S. Ct. 2464, 91 L. Ed. 2d 144 (1986), because, during closing argument, the prosecution used a reference to *Gone With the Wind* to comment on the professed ignorance of the crowd of witnesses to the shooting and a personal anecdote from another murder trial to imply that Long had intimidated witnesses. Butler contends these claims are procedurally defaulted because the Illinois Appellate Court disposed of them on an independent and adequate state ground. We agree that because these claims are defaulted and Long has not shown excuse for the default, the Court cannot consider them.

During Long's direct appeal the Illinois Appellate Court rejected these two claims as waived because Long had not objected at trial or included these claims in his post-trial motions. SA.62. A state court's rejection of an argument on this basis is an adequate and independent state law ground that results in default for federal habeas purposes. *See Kaczmarek v. Rednour,* 627 F.3d 586, 592 (7th Cir. 2010). That the appellate court then reviewed the

waiver for plain error does not create a merits determination that would cure default. *See Miranda v. Leibach,* 394 F.3d 984, 992 (7th Cir. 2005) ("[A]n Illinois court does not reach the merits of a claim simply by reviewing it for plain error."). These two claims are procedurally defaulted.

Long cannot escape this clear default, and so instead seeks to excuse it by asserting that his trial, appellate, and then post-conviction counsel were ineffective in bringing these claims. A state court procedural default may be excused if the petitioner can demonstrate "cause," defined as "some objective factor external to the defense [that] impeded counsel's efforts to comply with the State's procedural rule," *Coleman v. Thompson,* 501 U.S. 722, 753, 111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991), and "prejudice," that the errors at trial "worked to his *actual* and substantial disadvantage, infecting" the trial with "error of constitutional dimensions," *Lewis,* 390 F.3d at 1026. However, Long did not raise the claims of ineffective assistance of trial and appellate counsel through one complete round of state court review and therefore these claims, too, are defaulted. *See Gray v. Hardy,* 598 F.3d 324, 330 (7th Cir. 2010) ("But to use the independent constitutional claims of ineffective assistance of trial and appellate counsel as cause to excuse a procedural default, [petitioner] was required to raise the claims through one full round of state court review, or face procedural default of those claims as well.").

Long argues, however, that ineffective assistance by post-conviction counsel is the cause for the default of the ineffective appellate counsel claim,

and the Court should consider this issue now because post-conviction proceedings were the first time that particular claim could have been brought, citing *Martinez v. Ryan,* 132 S. Ct. 1309, 182 L. Ed. 2d 272 (2012) and *Trevino v. Thaler,* 133 S. Ct. 1911, 185 L. Ed. 2d 1044 (2013). As we recently explained, "[i]n *Martinez* and *Trevino,* the Supreme Court held that procedural default caused by ineffective postconviction counsel may be excused if state law, either expressly or in practice, confines claims of trial counsel's ineffectiveness exclusively to collateral review." *Nash v. Hepp,* 740 F.3d 1075, 1079 (7th Cir. 2014) (noting Wisconsin law required defendants to bring ineffective assistance of trial counsel claims on direct review and finding default). This is because "the collateral proceeding is in many ways the equivalent of a prisoner's direct appeal as to the ineffective assistance claim." *Hodges v. Colson,* 727 F.3d 517, 531 (6th Cir. 2013) (citing *Martinez,* 132 S. Ct. at 1317) (internal quotation marks omitted).

Despite the narrow holding of *Martinez* and *Trevino,* Long argues that this Court should extend these cases beyond those instances where state procedural rules dictate ineffective assistance of trial counsel claims be brought on collateral review to cover post-conviction counsel's failure to bring ineffective assistance of appellate counsel claims. The majority of other circuits that have examined this question have refused to expand this narrow exception to the general prohibition against excusing procedural default via post-conviction ineffective assistance claims. *See Dansby v. Hobbs,* 766 F.3d 809, 833 (8th Cir. 2014) (joining the Fifth, Sixth, and Tenth Circuits in refusing to extend *Martinez* to

appellate ineffective assistance claims); *Hodges,* 727 F.3d at 531. Long argues that we should instead follow the Ninth Circuit in finding the reasoning in *Martinez* applies equally to a claim of ineffective assistance of appellate counsel. *See Ha Van Nguyen v. Curry,* 736 F.3d 1287, 1295–96 (9th Cir. 2013). However, this Court has recently interpreted *Martinez* and *Trevino* as holding "that procedural default caused by ineffective post-conviction counsel may be excused if state law, either expressly or in practice, confines claims of trial counsel's ineffectiveness exclusively to collateral review," *Nash,* 740 F.3d at 1079, and we do not see any reason to depart from that understanding, or the majority of circuits, here. The default of these claims is not excused under *Martinez.*

2. Prosecution's Reference to a Letter Not in Evidence & Improper Shifting of the Burden of Proof

Long further argues that the prosecutor referenced the contents of a letter that was not in evidence to bolster the credibility of a key witness. In rebuttal closing, the prosecution explained that Irby wrote a letter to a friend in which she stated that she saw a man shoot another man four times in the back. SA.170–71. Neither the letter nor its contents had been admitted into evidence, so the judge *sua sponte* made and sustained an objection to the prosecution's improper reference to facts not in evidence. SA.171. Long argues the prosecutor's statements had a clear effect on the jury, because the jurors sent a note to the trial judge asking why the letter was not entered into evidence but could be

referenced. SA.108. Long also asserts that the State improperly shifted the burden of proof to him by repeatedly referencing the lack of evidence of another shooter.

Butler contends these claims are forfeited because neither was presented to the district court as either a claim of prosecutorial error or ineffective assistance of trial or appellate counsel. *See Pole,* 570 F.3d at 937 ("[W]here a party raises a specific argument for the first time on appeal, it is waived even though the 'general issue' was before the district court[.]" (citing *Domka v. Portage County, Wis.,* 523 F.3d 776, 783 (7th Cir. 2008))). However, a petition prepared without the assistance of counsel is owed a "generous interpretation," *see Lewis,* 390 F.3d at 1027, and these claims—although not listed separately—were presented as part of the prosecutorial misconduct count. *See* SA.10, 15–16. Therefore, even if the district court did not specifically address these claims in its opinion, Long did not forfeit these claims.

Butler further argues that these claims are procedurally defaulted because Long failed to present them through one complete round of state court review. Butler maintains Long asserted these claims as examples of a state law-based post-conviction counsel ineffective assistance claim, which did not fairly present what is now a federal due process claim to the Illinois state courts.

We agree and find that these claims are procedurally defaulted. During his state post-conviction appeal, Long included these two alleged prosecutorial missteps in his claim for failure of post-

conviction counsel to render reasonable assistance. *See* Doc. 13–7, at Count II. Long based his claim on Illinois law, which provides that appointed post-conviction counsel must give a reasonable level of assistance to the petitioner. *See People v. Owens,* 564 N.E.2d 1184, 1189, 139 Ill. 2d 351, 151 Ill. Dec. 522 (1990) (explaining, "[t]he right to the assistance of counsel at trial is derived from the sixth amendment of the United States Constitution, whereas the assistance of counsel in post-conviction proceedings is a matter of legislative grace and favor which may be altered by the legislature at will" (citation omitted) (internal quotation marks omitted)). This claim was presented only as a state claim—Long cited no federal law and the Illinois Appellate Court treated it only as a state law claim. *See* SA.85–86. The Illinois courts did not have a fair opportunity to consider a federal basis for these two claims. *See Malone,* 538 F.3d at 753 (fair presentment of a claim requires that "both the operative facts and the controlling legal principles must be submitted to the state court" (citation omitted)); *Wilson v. Briley,* 243 F.3d 325, 328 (7th Cir. 2001) (claim not fairly presented when petitioner failed to cite any federal cases). Long makes a general argument that his trial and appellate counsel's ineffectiveness should excuse this default. However, as discussed *supra,* the Court declines to extend *Martinez* and *Trevino* beyond their narrow holdings focused on the first opportunity to challenge trial counsel's ineffectiveness on collateral review. These claims are procedurally defaulted and we will not consider them.

3. Ineffective Assistance of Counsel

Long asserts an ineffective assistance of trial counsel claim for counsel's failure to object to the prosecution's improper statements during closing argument and an ineffective assistance of appellate counsel claim for failing to bring this claim against his trial counsel. Butler contends these claims are procedurally defaulted because Long did not present them through one complete round of state review.

In his post-conviction appeal, Long included a claim that post-conviction counsel was ineffective for failing to bring an appellate counsel ineffective assistance claim. Doc. 13–7 at 74–89. Although it may be broadly argued that this claim subsumes within it the facts of an ineffective assistance of trial counsel claim, as discussed above, the post-conviction ineffectiveness claim was based solely on Illinois law, therefore it did not fairly present both the factual and legal basis of this claim to the state court. *See Malone*, 538 F.3d at 753. The appellate counsel ineffectiveness claim is closer to the surface, but again, this claim was never presented as a federal claim, and the Illinois Appellate Court did not have the opportunity to consider it, therefore there is no exhaustion and the claim is defaulted. And although Long argues generally that this default should be excused by those same counsels' ineffectiveness, the trial counsel issue should have been brought on direct appeal, *see Nash*, 740 F.3d at 1079; *Murphy v. Atchison*, No. 12 C 3106, 2013 WL 4495652, at *22 (N.D. Ill. Aug. 19, 2013) ("In Illinois, collateral proceedings are not the first opportunity to raise an ineffective assistance of counsel claim. Thus,

numerous courts in this district have held that *Martinez* is inapplicable to federal habeas corpus petitions filed by Illinois prisoners." (citations omitted)), and the Court declines to extend *Martinez*/*Trevino* to cover the appellate counsel ineffectiveness claim.

Long's ineffective assistance of counsel claims based on due process violations by the prosecution during closing argument are procedurally defaulted and will not be considered.

III. CONCLUSION

For the foregoing reasons, the state courts unreasonably applied Supreme Court precedent in finding that the State's knowing use of perjured testimony did not prejudice Long at trial and that appellate counsel was not ineffective for failing to challenge the State's use of perjured testimony. Therefore, we REVERSE the district court's judgment on those issues and REMAND with instructions to grant the writ. The district court's writ should order that Long is released unless Illinois gives notice of its intent to retry Long within a reasonable time fixed by the district court.

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS
PEORIA DIVISION

PAYSUN LONG,	)	
Petitioner,	)	
v.	)	**Case No. 11-CV-1265**
DAVE REDNOUR, Warden Menard Correctional Center,	)	
Respondent.	)	

ORDER

This is a matter now before the Court on Paysun Long's ("Long" or "Petitioner") Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254. (ECF No. 1). For the reason's set forth below, Long's Petition is DENIED.

STANDARD OF REVIEW

The Antiterrorism and Effective Death Penalty Act ("AEDPA") of 1996 modified a federal court's role in reviewing state prisoner habeas applications in order to prevent federal habeas "retrials" and to ensure that state-court convictions are given effect to the extent possible under law. *Bell v. Cone*, 535 U.S. 685, 693-694 (2002). Under AEDPA, federal courts must show a high measure of deference to the fact findings made by the state courts. *Sanchez v. Gilmore*, 189 F.3d 619, 623 (7th

Cir. 1999). To procure habeas relief under AEDPA, a petitioner is required to show that state court determinations under review are either "contrary to" or employed an "unreasonable application of" federal law as determined by the United States Supreme Court. § 2254(d)(1). A petitioner can also attack a state court's adjudication on the grounds that it is based "on an unreasonable determination of the facts," but such attacks must be accompanied by a rigorous burden of proof: state court factual findings are presumed to be correct unless the petitioner rebuts the presumption with "clear and convincing" evidence. § 2254(e)(1).

Although state court legal conclusions, as well as mixed questions of law and fact, are reviewed *de novo*, that standard is also tempered by AEDPA's deferential constraints: the "criterion for assessing the reasonableness of a state court's application of Supreme Court case law, pursuant to § 2254(d)(1), is whether the determination is at least minimally consistent with the facts and circumstances of the case." *Sanchez,* 189 F.3d at 623 (internal citation omitted). As a consequence, federal review is now severely restricted; the fact that a federal court may think certain things could have been handled better by the state trial judge or by the prosecuting attorney or by a state reviewing court means very little. *Id.*

Before reaching the merits of a petition for writ of habeas corpus brought under 28 U.S.C. § 2254, a district court must consider "whether the petitioner exhausted all available state remedies and whether the petitioner raised all his federal claims during the course of the state proceedings."

Farrell v. Lane, 939 F.2d 409, 410 (7th Cir. 1991), quoting *Henderson v. Thieret*, 859 F.2d 492, 496 (7th Cir. 1988). If the answer to either of these questions is "no," then the failure to exhaust state remedies or procedural default bars the petition. *Id.*

Exhaustion of a federal claim occurs when it has been presented to the highest state court for a ruling on the merits or when it could not be brought in state court because a remedy no longer exists when the federal petition is filed. *Id.* Procedural default occurs when a claim could have been but was not presented to the state court and cannot, at the time the federal petition is filed, be presented to the state court. *Resnover v. Pearson*, 965 F.2d 1453, 1458 (7th Cir. 1992). This occurs when a petitioner fails to pursue each appeal required by state law, *Jenkins v. Gramley*, 8 F.3d 505, 507-08 (7th Cir. 1993), or when he did not assert the claim raised in the federal habeas petition in the state court system. *Resnover*, 965 F.2d at 1458-59 ("Procedural default, on the other hand, occurs when a claim could have been but was not presented to the state court and cannot, at the time that the federal court reviews the habeas petition, be presented to the state court. Without a showing of 'good cause' for the default and prejudice to the petitioner, an issue that could have been, but was not presented to the state court, cannot be addressed in federal habeas corpus proceedings. *Wainwright v. Sykes*, 433 U.S. 72, 87, 97 S. Ct. 2497, 2506, 53 L. Ed. 2d 594 (1997). *See also, Norris v. United States*, 687 F.2d 899, 901 (7th Cir. 1982)").

BACKGROUND

On June 11, 2001, at approximately 11 p.m., Peoria Police Officer Shawn Wetzel received a report of an injured person at the Taft Homes area in Peoria, Illinois. The officer arrived at the scene to find 50 to 60 people gathered around an individual who had been shot. The individual, Larriec Sherman ("Sherman"), was lying on his back next to a bicycle. Sherman was transported to the hospital and died of multiple gunshot wounds.

Petitioner was charged with first-degree murder in the death of Sherman. In 2001, Long was tried before a jury in the Circuit Court of Peoria County, Illinois and found guilty. He was sentenced to a fifty-one year term of imprisonment. Long appealed to the Appellate Court of Illinois – Third Judicial District. (ECF Nos. 8-1 at 1-24, 8-2 at 23-47, and 8-4 at 271-281); *See The People of the State of Illinois v. Paysun Long,* No. 3-02-0132 (Ill. App. 3rd Dist. Aug. 29, 2003); *see also, The People of the State of Illinois v. Paysun Long*, No. 3-04-0381 (Ill. App. 3rd Dist. May 9, 2006) and *The People of the State of Illinois v. Paysun Long*, 2011 WL 10457885 (Ill. App. Dist. Jan. 21, 2011). The Court reversed Long's conviction and granted a new trial. *See id*. Long was again tried before a jury and again found guilty of first degree murder. He was again sentenced to a term of fifty-one years. *Id*. Long appealed the judgment of the second trial arguing that: (1) the prosecutor had made improper comments during closing argument and (2) that the trial court failed to properly inquire into his claim of ineffective assistance of counsel. The appellate court affirmed the conviction. *Id*. Petitioner filed a petition for

leave to appeal to the Illinois Supreme Court. The Illinois Supreme Court denied this request. (ECF No. 8-2 at 22). In April 2007, Long filed a post-conviction petition in the Circuit Court of Peoria County pursuant to the Illinois Post-Conviction Hearing Act arguing that: (1) his appellate counsel was ineffective for failing to argue that the evidence was insufficient evidence to support his conviction; and (2) his appellate counsel was ineffective for failing to argue that the State allowed a witness to testify falsely. *See* 725 ILCS 5/122-1 et seq. Petitioner was appointed counsel to represent him during his post-conviction proceeding. Ultimately, the petition was dismissed. *Long*, 2011 WL 10457885 (Ill. App. Dist. Jan. 21, 2011). Petitioner appealed the judgment arguing that: (1) appellate counsel was ineffective for failing to argue on direct appeal that the State knowingly permitted a witness's false testimony to go uncorrected; and (2) post-conviction counsel was ineffective for failing to amend the post-conviction petition to include additional claims of ineffective assistance of counsel. The appellate court affirmed. *Id*. Petitioner filed a petition for leave to appeal to the Illinois Supreme Court and it was denied. *See People v. Long*, 949 N.E.2d 1101 (Ill. 2011).

Long has now filed the instant petition in which he argues that he was denied his constitutional right in the following three areas: (1) pervasive pattern of prosecutorial misconduct throughout the trial proceeding by knowingly permitting a witness' false testimony to go uncorrected and to making improper comments to the jury during closing arguments; (2) appellate

counsel failed to raise apparent and meritorious claims on direct appeal; and (3) unreasonable representation of appointed counsel during the post-conviction proceedings. (ECF No. 1). This Order follows.

DISCUSSION

I. Allegations of Prosecutorial Misconduct

Long argues that he was denied due process because the prosecutors allowed the false testimony of witness Brooklyn Irby ("Irby") to go uncorrected. Irby testified during Long's second trial that she was at Taft Homes on the night of June 11, 2001. *See Long*, 2011 WL 10457885, *1. Irby further testified she saw the Petitioner walk up behind Sherman and shoot him. *Id.* Irby left the area and did not speak to the police that night. *Id.* Irby ultimately spoke to the police approximately two weeks after the incident. *Id.* Notably, at the second trial, Irby denied that she had met with two prosecutors and an investigator from the State's Attorney's office in November 2001 and them that that she had previously lied to the police because she had been threatened with having her children taken away. *Id.* Indeed, Irby was asked several times by defense counsel whether she had told the investigator and prosecutors that she had lied to the police, and she repeatedly denied the same. *Id.*

At the second trial, Petitioner called Frank Walters ("Walters"), an investigator of the Peoria County State's Attorney's office to testify. *Id.* Walters testified that he had spoken with Irby on November 26, 2001. *Id.* Walters testified that Irby told him that she had lied to the police when she

made her initial statement that Long had shot Sherman. *Id*.

In his April 2007 Petition for Post-Conviction relief, Petitioner raised the claim that his appellate counsel was ineffective for failing to raise the claim that the Irby was allowed to testify falsely during his second trial. *Id.*, *2. Long raised the same issue on appeal of the judgment dismissing his petition for post-conviction relief. *Id*. The Respondent argues that Petitioner did not raise the specific claim that he was denied due process because the prosecutors' conduct in allowing the testimony. (ECF No. 8 at 8).

The record is clear that Petitioner did not raise his due process claim regarding prosecutorial misconduct during any of the state court proceedings. In fact, in both his petition for post-conviction relief and the appeal therefrom, Petitioner framed his claim regarding the testimony as an ineffective assistance of counsel claim. While his ineffective assistance claim may involve the underlying due process claim, it is not the same. *See Lewis v. Sternes*, 390 F.3d 1019, 1026 (7th Cir. 2004) ("[ ] [A]n assertion that one's counsel was ineffective for failing to pursue particular constitutional issues is a claim separate and independent of those issues. A meritorious claim of attorney ineffectiveness might amount to cause for the failure to present an issue to a state court, but the fact that the ineffectiveness claim was raised at some point in state court does not mean that the state court was given the opportunity to address the underlying issue that the attorney in question neglected to raise."). As such, Petitioner's claim is procedurally defaulted and cannot be raised in his federal petition. Petitioner

does not establish "good cause" for the default. Furthermore, Petitioner cannot show prejudice for reasons more fully detailed below.

Even if the claim was not procedurally defaulted, this Court finds that the claim would also be dismissed on its merits. Both Illinois and Federal law provide, "when a conviction is obtained through the knowing use of false testimony, it must be set aside 'if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.'" *Griffin v. Pierce*, 622 F.3d 831, 842 (7th Cir. 2010) (quoting *United States v. Agur*, 427 U.S. 97, 103 (1976)); *see also People v. Lucas*, 203 Ill. 2d 410, 272 Ill. Dec. 298, 787 N.E.2d 113 (2002). The standard that the Petitioner must meet to show that the testimony affected the trial is similar under both Illinois and Federal law. Indeed, in order to obtain a new trial, the Petitioner must establish that:

> (1) [T]he prosecution presented false testimony or failed to disclose that false testimony was used to convict, (2) the prosecution knew or should have known that the testimony was false, and (3) there is a reasonable likelihood that the testimony could have affected the jury's judgment.

Griffin, 622 F.3d at 842; *see also People v. Olinger*, 176 Ill. 2d 326, 345, 223 Ill. Dec. 588, 680 N.E.2d 321 (1997). In denying the Petitioner's claim, the Third District explained:

> 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, 272 Ill. Dec. 298, 787 N.E.2d 113 (credibility of witness who testified falsely not crucial where evidence against defendant was overwhelming); *Barrow*, 195 Ill. 2d at 532, 255 Ill. Dec. 410, 749 N.E.2d 892 (assuming testimony was false, error was harmless where evidence against the defendant was overwhelming); *cf. People v. Jimerson*, 166 Ill. 2d 211, 228, 209 Ill. Dec. 738, 652 N.E.2d 278 (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, 223 Ill. Dec. 588, 680 N.E.2d 321 (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.
>
> * * *
>
> 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

People of the State of Illinois v. Long, 2011 WL 10457885, *2-3. The Court agrees with the Illinois

Court's analysis of the weight of the testimony of Irby. Indeed, the record is clear that the jury was fully informed that Irby had recanted her testimony. Based on both the Illinois and Federal standard, the Court finds that the state court's determinations under review were not "contrary to" or employed an "unreasonable application of" federal law as determined by the United States Supreme Court. § 2254(d)(1). Accordingly, the claim regarding this testimony must be dismissed.

Petitioner also argues that the prosecutors made improper comments to the jury during closing argument. Petitioner specifically argues that the prosecutor's closing argument, which included a passage from Gone with the Wind ("And sorry, Miss Scarlet, but we don't know nothing about birthing no babies, we just don't nothing."), was improper because it was tantamount to a "racial slur." Petitioner also complains about statements made by the prosecutor about her own experiences in prosecuting other murder cases (Petitioner indicates that the prosecutor stated "I prosecuted one murder case and I thought that I had a great witness, it was the defendant's - - or the victim's best friend and he sat in my office and said he's dead, it's over leave me alone."). (ECF No. 1 at 21).

Petitioner's claim regarding the prosecutor's closing argument is also ultimately defaulted because he failed to object to the comments at trial or include the issue in his post-trial motion. (*See* ECF No. 8-1 at 7); *see also People v. Enoch*, 122 Ill. 2d 176, 186, 522 N.E.2d 1124, 1130 (1988). Because Petitioner failed to raise the arguments at the appropriate time, on direct appeal, the Appellate

Court of Illinois, Third District found that the issue had been waived. As a result, the Appellate Court of Illinois, Third District's determination that the issue had been waived is an "adequate and independent state ground" barring further review from this Court. *See Miranda v. Leibach*, 394 F.3d 984, 992 (7th Cir. 2005) (citing *Lambrix v. Singletary*, 520 U.S. 518, 523 (1997). Notably, the Appellate Court of Illinois, Third District also reviewed the matter under the plain error rule, but that does not constitute a merits determination for purposes of procedural default. *Miranda*, 394 F.3d at 992 ("As we have previously recognized, an Illinois court does not reach the merits of a claim simply by reviewing it for plain error. *See, e.g., Neal v. Gramley*, 99 F.3d 841, 844 (7th Cir. 1996); *see also Rodriguez v. McAdory*, 318 F.3d 733, 735 (7th Cir. 2003)."). As such, the Court finds that this claim should be dismissed. Parenthetically, the Appellate Court of Illinois, Third District's decision was split. Petitioner arguments closely mirror those of the dissenting judge. *Long*, 2011 WL 10457886, *5-10. While the dissenting judge's opinion raises many good points, ultimately this Court's review is to determine whether the majority opinion was "contrary to" or employed an "unreasonable application of" federal law.

The Court also finds that if the claim were to be reviewed on the merits, it would also fail. Claims of prosecutorial misconduct are reviewed under the framework of *Darden v. Wainwright*, 477 U.S. 168 (1986). In *Bartlett v. Battaglia*, the Seventh Circuit explained:

> *Darden* established a framework to evaluate "whether the prosecutors'

> comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" 477 U.S. at 181, 106 S. Ct. 2464 (quoting *Donnelly v. DeChristofro*, 416 U.S. 637, 94 S. Ct. 1868, 40 L. Ed. 2d 431 (1974)). The *Darden* test has two prongs. First, the court evaluates whether the prosecution's statements were improper. Second, if the comments were improper, the court asks whether the defendant was prejudiced by them. *Ruvalcaba v. Chandler*, 416 F.3d 555, 565 (7th Cir. 2005).

Bartlett, 453 F.3d 796, 800 (7th Cir. 2006). In examining whether there was prejudice resulting from the comments, the Court must analyze the following factors:

> (1) [W]hether the prosecutor misstated the evidence, (2) whether the remarks implicate specific rights of the accused, (3) whether the defense invited the response, (4) the trial court's instructions, (5) the weight of the evidence against the defendant, and (6) the defendant's opportunity to rebut.

Darden, 477 U.S. at 181-82; *Howard v. Gramley*, 225 F.3d 784 (7th Cir. 2000).

In order to fully examine the comments made by the prosecutor, the Court would note that the remarks were made by the prosecutor during her rebuttal and were as follows:

When Officer Wetzel- and I like the fact that Mr. Cusack [defense counsel] said all the police officers that testified up here yesterday were telling the truth except evidently Detective Grow who had this sort of big conspiracy to hunt out somebody. Officer Wetzel told you when he got there there were 40 to 60 people around Mr. Sherman. And sorry, Miss Scarlet, but we don't know nothing about birthing no babies, we just don't nothing. 40-60 people standing around that night. And I wrote down when Mr. Ierulli [one of the prosecutors] was examining one of the witnesses when- maybe it was Mr. Cusack- oh, well, you were there, why didn't you do something, why didn't you tell the police what you saw that night, and I wrote this down, two sentences, her response was, "I was not concerned, it was not my problem." A 19-year-old is lying dead on the sidewalk but I was not concerned it was not my problem. So, on the night of June 11, 2001, although there are 40 to 60 people around this dead young man or dying young man, nobody knew nothing, nobody came forward, nobody knows nothing. 40 to 60 people. I was not concerned. It was not my problem. And Mr. Cusack talks about the witnesses that we have brought you. Well, the witnesses that we brought you were determined by this defendant's actions, just as it is in every

> case that I have ever prosecuted in 23 years they have just. I prosecuted one murder case and I thought that I had a great witness, it was the defendant's- or the victim's best friend and he sat in my office and said he's dead, it's over leave me alone. Now, if the police would take this attitude on this investigation, they got there June 11, 2001; 40-60 people don't know nothing about the murder, the homicide of Larry Sherman. Should they have just said, gosh and golly, it's over, we go home now, unsolved murder? No.

(ECF No. 8-1 at 5). In its review on direct appeal, the Appellate Court of Illinois, Third District found that:

> Placed into context, we believe that the significance of the prosecutor's quote from Gone With the Wind was to emphasize the crowd's claim of ignorance, not to emphasize the race or status of the witnesses or the parties involved in this incident. Brooklyn Irby testified that there were several people outside in the area when the shooting occurred. Officer Wetzel testified that there were 40-50 people gathered around the victim when he arrived at the scene and that no one came forward to tell him what had happened. The prosecutor's remark was a proper comment on the evidence that was presented. We find no error in this

particular comment. *See People v. Hrobowski*, 216 Ill. App. 3d 711, 729-730, 575 N.E. 2d 1306, 1319-1320 (1991) (viewed in context, prosecutor's remarks did not constitute racial slurs).

The other remark that the defendant complains of is the prosecutor's use of a personal anecdote regarding reluctant witnesses. Specifically, the defendant complains of the prosecutors statement, "I prosecuted one murder case and I thought that I had a great witness, it was the defendant's- or the victim's best friend and he sat in my office and said he's dead, it's over leave me alone." The defendant argues that the purpose of this comment was to improperly bolster Edwards' testimony and that it constituted reversible error. While we agree that the prosecutor was attempting to make her point in an improper manner, we do not agree that reversal is required.

Generally, a prosecutor may not vouch for the credibility of a witness or express personal opinions about the case. *People v. Barraza*, 303 Ill. App. 3d 794, 797, 708 N.E.2d 1256, 1258 (1999). Even if a remark exceeds the bounds of proper argument, the verdict must not be disturbed unless the remark caused substantial prejudice to the defendant, taking into account the content and context of the remark, its relationship

to the evidence, and its effect on the defendant's right to a fair and impartial trial. *Williams*, 192 Ill. 2d at 573, 736 N.E.2d at 1015. Substantial prejudice occurs where the result of the trial would have been different absent the complained-of remark. *Williams*, 192 Ill. 2d at 573, 736 N.E.2d at 1015; *People v. Dunsworth*, 233 Ill. App. 3d 258, 266, 599 N.E.2d 29, 35 (1992).

In the present case, there is no question that the prosecutor's use of a personal analogy was improper. We fail to understand why the prosecution would jeopardize its case by making such a comment, especially in a situation such as this, where the case has been reversed once before for the exact same thing. Although the remark was clearly improper, we do not believe that a reversal is warranted. It was readily apparent to the jury from the words and actions of the lay witnesses that appeared before them that each witness was reluctant to testify and did not want to be involved in this case. The jury was also presented with testimony that no one at the scene came forward to provide information on what had happened to Sherman. Based on the evidence that was presented, the prosecutor could have properly commented on the reluctance of the witnesses to testify or to be involved in

> the case. Thus, there is a fundamental difference between the comments that were before us in the previous appeal (*see Long*, pp. 6-9) and the comments that are before us here. Unlike the previous appeal, in this appeal there is evidence in the record to support the point that the prosecutor was trying to make. The prosecutor merely made her point in an improper manner by drawing on a personal analogy. This was an isolated comment in the entire closing argument which the prosecutor did not dwell on. Further, the jury was duly admonished that the arguments of the attorneys are not evidence and that they must disregard any comment made by the attorneys that is not based on the evidence. Keeping those admonishments in mind, we cannot say that the results of the trial would have been different had this one improper comment not been made. *See Hrobowski*, 216 Ill. App. 3d at 726, 575 N.E.2d at 1317-1318 (instruction that closing arguments are not evidence and that any statement not based on the evidence should be disregarded tends to cure possible prejudice from improper remarks).
>
> (ECF No. 8-1 at 9-11).

Undoubtedly, "[t]he requirement that a habeas court find that the state court's decision 'unreasonably applied clearly established federal law' is a 'difficult

standard to meet; 'unreasonable' means 'something like lying well outside the boundaries of permissible differences of opinion.'" *Bartlett*, 453 F.3d at 800 (citations omitted). In this case, the Appellate Court of Illinois, Third District's determination that the comment related to Gone with the Wind highlighted the witnesses' cooperation cannot be said to be outside the permissible boundaries. And while finding the prosecutor's comments regarding a previous uncooperative witness improper, the Appellate Court of Illinois, Third District's conclusion that the comment was not prejudicial is not outside the bounds that would warrant habeas relief. Accordingly, the Court must dismiss this claim.

II. Ineffective Counsel

Petitioner also argues that he was denied his constitutional right to effective assistance of counsel (appellate counsel) on his direct appeal because his counsel failed to raise "apparent and meritorious" claims on direct appeals related to the perjured testimony of Irby. In reviewing a claim for ineffective assistance of counsel, the Court uses a two-part test as outlined in *Strickland v. Washington*, 466 U.S. 668 (1984). First, the petitioner must establish "that the counsel's performance was deficient." *Id.* at 687. If the petitioner can show that counsel's assistance was ineffective, then he must also show that "the deficient performance prejudiced the defense." *Id.* The petitioner must establish both prongs of this test. Notably, the Court uses a highly deferential standard in its analysis of counsel's decisions. *Id.* at 689. In determining whether an attorney's

assistance was ineffective, the Court must make every attempt "to eliminate the distorting effects of hindsight." *Id.* As such, Long "must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy." *Id.* (citing *Michel v. Louisiana*, 350 U.S. 91, 101 (1955)). The Court uses "[p]revailing professional norms" to determine whether assistance is deficient or reasonable. *Brown v. Finnan*, 598 F.3d 416, 422 (7th Cir. 2010). This determination is based on the counsel's overall assistance and not a "specific failing." *Id.* (citing *Pole v. Randolph*, 570 F.3d 922, 934 (7th Cir. 2009)).

Prejudice is established if the petitioner can show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. A reasonable probability falls somewhere between a preponderance of the evidence and "some conceivable effect." *Id.* at 693-94. Generally, "[t]he bar for establishing that a state court's application of the *Strickland* standard was 'unreasonable' is a high one, and only a clear error in applying *Strickland* will support a writ of habeas corpus." *Allen v. Chandler*, 555 F.3d 596, 600 (7th Cir. 2009). Essentially, "this Court is obligated to affirm the district court's decision to deny the writ, so long as the [State] Court of Appeals 't[ook] the [constitutional standard] seriously and produce[d] an answer within the range of defensible positions." *Murrell v. Frank*, 332 F.3d 1102, 1111 (7th Cir. 2003) (citing *Mendiola v. Schomig*, 224 F.3d 589, 591 (7th Cir. 2000)). As part of this deference, a federal court must assume that all factual determinations made

by the state courts, including credibility determinations, are correct, unless rebutted by clear and convincing evidence. *Id.*

Notably, Petitioner raised his ineffective assistance of counsel claim in his post-conviction petition. (ECF No. 8-4 at 271-281); *see also Long*, 2011 WL 10457886, *3. The Appellate Court of Illinois, Third District concluded that:

> 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.

Long, 2011 WL 10457886, *3. This Court agrees. First, as noted above, the Court finds that Petitioner's claim is without merit because the record is clear that the jury was fully informed that Irby had recanted her testimony. It is entirely reasonable that the appellate counsel decided to forgo such a claim to focus on more meritorious claims. Moreover, in this case, the state court did a thorough examination of Petitioner's claim before determining that there was no prejudice. *See supra*, pp. 6-7. Petitioner cannot establish the requisite prejudice under the *Strickland* standard and there is no reason to overturn the outcome of the state proceeding.

III. Representation of appointed counsel during the post-conviction proceedings.

Long makes it clear that his third grounds for relief relates to the representation he received by counsel during his "collateral post conviction proceedings." *See* (ECF No. 1 at 12). In the end, it is

clear that "[t]he ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254." 28 U.S.C. § 2254(i). The Petitioner suggests that the Supreme Court case of *Martinez v. Ryan*, ___U.S. ___, 132 S. Ct. 1309, 182 L. Ed. 2d 272 (2012)[1] may allow him an opportunity to advance on his claims. Notably, the Martinez case arose from a conviction in Arizona. *Id*. at ___, 132 S. Ct. at 1313. In Arizona, claims of ineffective assistance of counsel may *not* be raised on direct appeal. *Id*. The Supreme Court specifically explained:

> Where, under state law, claims of ineffective assistance of trial counsel must be raised in an initial-review collateral proceeding, a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective.

In Illinois, a defendant is not prohibited from raising a claim of ineffective-assistance-of-counsel claims in his direct appeal. *See Butler v. Hardy*, 2012 WL 3643924, at *3 (N.D. Ill. Aug. 22, 2012); *see also*, *People v. Nuckles*, 2012 WL 6858181 (Ill. App.

---

[1] The Court also considered the impact of the related U.S. Supreme Court of *Trevino v. Thaler*, ___ U.S. ___, 133 S. Ct. 1911, 185 L. Ed. 2d 1044 (2013).

Ct. Dec. 21, 2012); *People v. Miller*, 370 Ill. Dec. 695, 988 N.E.2d 1051, 1062 (Ill. App. Ct. 2013). In this case, Long asserts that his counsel in his collateral proceedings was ineffective for failing to include additional allegations of ineffective assistance of counsel that he had suffered throughout his various proceedings. Petitioner specifically attacks the trial counsel's failure to challenge certain hearsay evidence, objects to the prosecution's alleged shifting of the burden of proof, and objects to the reference to a letter that was not introduced into evidence. These claims could have been raised on direct appeal and Petitioner's failure to do so is a procedural bar that is not excused under *Martinez* or *Trevino*. Accordingly, the claim must be dismissed.

Notably, the Appellate Court examined these claims in the review of judgment dismissing the petition for postconviction relief. *Long*, 2011 WL 10457885, *4-5. In its decision, the Appellate Court of Illinois, Third District explained:

> 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, 291 Ill. Dec. 821, 824 N.E.2d 1071 (2005). Rather, Rule 651 requires counsel in postconviction proceedings to provide a reasonable level of assistance. *Vasquez*, 356 Ill. App. 3d 423, 291 Ill. Dec. 821, 824 N.E.2d 1071. 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, 189 Ill. Dec. 49, 619 N.E.2d 750 (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, 308 Ill. Dec. 434, 861 N.E.2d 999 (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, 241 Ill. Dec. 596, 719 N.E.2d 725 (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, 280 Ill. Dec. 616, 802 N.E.2d 867 (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, 241 Ill. Dec. 596, 719 N.E.2d 725 (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.

The findings of the Appellate Court of Illinois, Third District cannot be said to be outside the permissible boundaries; nor are they inconsistent with the recent U.S. Supreme Court cases of *Martinez* or *Trevino.* As a result, the claim must be dismissed.

Certificate of Appealability

To obtain a certificate of appealability, a petitioner must make "a substantial showing of the denial of a constitutional right." 28 U.S.C § 2253(c)(2). The petitioner must also show that

"jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). "Where a plain procedural bar is present and the district court is correct to invoke it to dispose of the case, a reasonable jurist could not conclude either that the district court erred in dismissing the petition or that the petitioner should be allowed to proceed further." *Id.* Because the Court finds that procedurally barred from being his claims, there is no basis for which this Court can issue a certificate of appealability.

CONCLUSION

For the reasons set forth above, Long's Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 (ECF No. 1) must be DISMISSED with prejudice. This case is now terminated.

ENTERED this 26th day of September 2013.

/s/ Michael M. Mihm
Michael M. Mihm

United States District Judge

APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

The PEOPLE of the State of Illinois, Plaintiff–Appellee,

v.

Paysun LONG, Defendant–Appellant.

No. 3–08–0261.
|
Jan. 21, 2011.

Appeal from the Circuit Court for the 10th Judicial Circuit, Peoria County, Illinois, No. 01–CF–583, James E. Shadid, Judge, Presiding.

Presiding JUSTICE CARTER delivered the judgment of the court:

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 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

---

[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.

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 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 redirect 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.

IN THE TENTH JUDICIAL CIRCUIT
OF THE STATE OF ILLINOIS

PEORIA COUNTY, ILLINOIS

THE PEOPLE OF THE STATE OF ILLINOIS,	)	
Plaintiff**s**,	)	
	)	Case No. 01-CF-583
v.	)	
PAYSUN S. LONG,	)	
Defendant.	)	

JURY TRIAL

REPORT OF PROCEEDINGS of the hearing had before the HONORABLE MICHAEL E. BRANDT, Judge of said Court, on the 14th of January, 2004.

* * *

And Brooklyn Irby, let's talk about that, please. 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 and that was consistent with what she has told you and that was consistent with what Shawanda told you and that was consistent with the physical evidence.

Ladies and gentlemen, any of these witnesses is enough to convict this man beyond a reasonable doubt, individually or collectively, and all of their testimony is consistent with the physical evidence which can't lie to you. The physical evidence can't lie to you. It doesn't have a motive or a bias.

* * *

UNITED STATES CONSTITUTION
AMENDMENT XIV

Section 1. … nor shall any State deprive any person of life, liberty, or property, without due process of law; ….

* * *

28 U.S.C. § 2254(d)(1)

* * *

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--

> **(1)** resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

* * *