

No. 1-11-3668

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 97 CR 11512
)	
MARICO DAVIS,)	Honorable
)	Stanley J. Sacks,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE ROCHFORD delivered the judgment of the court.
Justices Cunningham and Delort concurred in the judgment.

ORDER

¶ 1 *Held:* We affirmed the second-stage dismissal of defendant's amended postconviction petition where defendant failed to make a substantial showing of actual innocence and where defendant failed to make a substantial showing that the untimely filing of his remaining claims was not due to his culpable negligence.

¶ 2 Defendant, Marico Davis, appeals the second-stage dismissal of his amended postconviction petition. Defendant contends the postconviction court erred in dismissing his amended petition because he made a substantial showing that: (1) the State committed a violation of *Brady v. Maryland*, 373 U.S. 83 (1963); (2) his trial counsel committed ineffective assistance; (3) his trial

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counsel labored under an actual conflict of interest; (4) defendant was actually innocent; and (5) the late filing of the petition was not due to his culpable negligence. We affirm.

¶ 3 Defendant was charged by indictment with two counts of first-degree murder in the shooting death of Antwuan Waters (the victim). At the 1997 bench trial, Regina Waters, the victim's sister, testified that the victim and their cousin, Kendra Arrington, were at Ms. Waters's apartment at 4624 South Ellis Avenue on March 25, 1997. Between 8:15 p.m. and 8:30 p.m. on March 25, 1997, the victim left the apartment to go home. Soon after he left, Ms. Waters heard gunshots. About two minutes later, Reginald Sexton knocked on her door and told her that the victim had been shot. Ms. Waters ran downstairs to the front of the building, where she saw the victim lying on his stomach on the front porch. The victim was not moving or speaking. The paramedics arrived and transported the victim to the hospital. Ms. Waters subsequently learned that the victim had died.

¶ 4 Kendra Arrington, the victim's cousin, testified she was at Ms. Waters's apartment on March 25, 1997. The victim was also there, but he left sometime between 8 p.m. and 8:30 p.m. Shortly after he left, Ms. Arrington heard gunshots coming from the front of the building. After the gunshots stopped, Ms. Arrington looked out a window in the living room and saw three men running north on Ellis Avenue. One of the men wore a white shirt and black jeans. The second man was wearing all-black clothing with a hood. Ms. Arrington could not see what the third man was wearing.

¶ 5 Ms. Arrington testified she saw the three men turn left on 46th Street toward Drexel Boulevard and "they let five shots ring off and they were yelling like they were excited." Mr. Sexton then came to the door and told them the victim had been hit. Ms. Arrington ran downstairs with Ms. Waters and saw the victim lying face-down on the ground. Ms. Waters told her to call an

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ambulance, which she did. Ms. Arrington next saw the victim at his funeral on March 29.

¶ 6 Reginald Sexton, age 16, testified he was a close friend of the victim and he lived in the same apartment building at 4624 South Ellis Avenue as the victim's sister. Mr. Sexton testified that at about 8:30 p.m. on March 25, 1997, he was walking down the stairwell of his apartment building when he saw the victim. They walked downstairs together and went out the front door, where they faced a parking lot. Although it was dark outside, the streetlights on Ellis were on. Lights attached to the apartment building were also on, and the lighting in the parking lot was "bright."

¶ 7 Mr. Sexton testified he saw three people walking south on Ellis, approaching the apartment building. They stopped at a house next to the parking lot. One of them stood on the house porch, one stood between a van and a car, and the third stood near a fence. All three were facing Mr. Sexton. Mr. Sexton recognized the man who stood between the van and car as defendant, whom he had known for at least four years by the nickname "Rico" and who had a chipped tooth on the left side of his mouth and was a gang member. Defendant was wearing a black hooded sweater. The hood was "partially on," but it was not covering any portion of the front of his face. Defendant was 10 or 11 steps away from Mr. Sexton.

¶ 8 Mr. Sexton testified he saw defendant pull a silver and black object out of the front of his pants. Mr. Sexton believed the object was a gun, and he told the victim to run behind a nearby brick wall. Mr. Sexton saw defendant and the man on the porch fire toward him and the victim. Mr. Sexton dove behind the brick wall and was not hit, but the victim was shot. Defendant and the other two men then ran from the scene toward 46th Street, where they fired more shots up in the air. Mr. Sexton ran upstairs and told the victim's sister that the victim had been shot.

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¶ 9 Mr. Sexton testified the police arrived, and he told them he was a witness to the shooting. They took him to the police station, where he gave them the name "Rico" as one of the persons who did the shooting. He described Rico's appearance, including his chipped tooth, and gave an address for him. The police showed Mr. Sexton a photo array and he picked out defendant's photograph. Two days later, on March 27, 1997, Mr. Sexton went to the police station again and picked defendant out of a lineup.

¶ 10 Kenneth Boyd testified that during the evening of March 25, 1997, he was working as a security guard at the Church of God parking lot located between Drexel Boulevard and Ellis Avenue on 46th Street. At about 8:30 p.m., he heard five to six gunshots coming from the south of the parking lot. Shortly after hearing the gunshots, he saw two young men running through a gangway adjacent to the church annex, on the north side of 46th Street. A third man, who was wearing dark clothes and lagging behind the two others, was walking "nonchalantly" before he "picked up speed" in the gangway. The third man was headed north as were the other two men.

¶ 11 Tracey Lewis testified that at about 8:35 p.m. on March 25, 1997, he was about to exit the building at 4520 South Drexel Boulevard when he heard gunshots on the east side of Drexel. Mr. Lewis waited a few seconds and then exited the building and went to his car which was parked in front. As he walked to the car, Mr. Lewis noticed three men walking fast out of a vacant lot on the east side of Drexel. The three men separated, with one of the men walking north on Drexel, another walking straight across Drexel, and the third walking toward a building on the corner of 45th Street and Drexel. Mr. Lewis only recognized one of the men, LaMarcus Riley, who was crossing across Drexel. Mr. Riley was wearing a "three-quarter length" black leather jacket. One of the other males

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was dressed in dark-colored clothing and the third man was wearing a white shirt and baseball cap.

All three men eventually walked to 45th Street and Drexel Boulevard.

¶ 12 Chicago police officer Frank Gurtowski, an evidence technician, testified he responded to the shooting and saw bullet holes in the glass entrance doors of the apartment building at 4624 South Ellis Avenue, as well as in a panel just west of the front door, and in a window frame by the entrance. Officer Gurtowski recovered bullets and metal fragments from inside the entrance hallway to the building, as well as 10 discharged 9 millimeter cartridge cases on the north side of the parking lot, between a car and a Jeep.

¶ 13 Detective George Holmes testified to Mr. Sexton's identification of defendant from the photo array. Detective Samuel Brown testified to Mr. Sexton's identification of defendant from the line-up.

¶ 14 Defendant did not present any evidence, but argued in closing that Mr. Sexton's account of the shooting was inherently incredible. The trial court disagreed, finding Mr. Sexton credible and the circumstances corroborative. Accordingly, the trial court found defendant guilty of first-degree murder and subsequently sentenced him to 35 years' imprisonment.

¶ 15 On direct appeal, we granted defense counsel's motion for leave to withdraw as appellate counsel pursuant to *Anders v. California*, 386 U.S. 738 (1967), and affirmed the judgment of the trial court. *People v. Davis*, No. 1-97-4549 (2000) (unpublished order under Supreme Court Rule 23).

¶ 16 On December 15, 2005, defendant filed a postconviction petition alleging four substantive claims. First, defendant alleged he was denied effective assistance of counsel because his trial counsel, David Cuomo, had a conflict of interest due to his prior representation of LaMarcus Riley during the investigation of the shooting. Defendant alleged that as a result of his prior representation

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of Mr. Riley, Mr. Cuomo failed to argue at trial that Mr. Riley was the person who shot the victim. In support, defendant attached police reports from March and April 1997. The March police report indicated that when officers responded to the crime scene, an unidentified male told them he had seen Mr. Riley fleeing from the scene. The April police report further indicated that on April 1, 1997, police officers were contacted by Mr. Riley's attorney, David Cuomo, who told them Mr. Riley would meet with them the next day. At that meeting, Mr. Cuomo informed the officers that Mr. Riley had been advised to remain silent. According to the police report, Mr. Riley was released from custody on April 3, 1997. Defendant did not attach an affidavit from Mr. Cuomo or Mr. Riley in further support of his ineffective assistance claim.

¶ 17 Second, defendant alleged in his postconviction petition that he was denied his due process rights in violation of *Brady* because the State suppressed an exculpatory report prepared by State's Attorney Investigators Kelly and McGee of their interview with Raymond Lewis on October 3, 1997, at the Cook County Jail. Mr. Lewis told the investigators he was a friend to both defendant and Mr. Sexton. Mr. Lewis related that he and defendant were former members of the Gangster Disciples, and that Mr. Sexton is an active member of the Gangster Disciples. Mr. Lewis revealed that "approximately 6 weeks after the shooting," Mr. Sexton told him that "he did not know who did the shooting but that 'someone had to go down.'" According to Mr. Lewis, Mr. Sexton provided defendant's name to the police because "it was the first name that popped into Sexton's head." The investigative report also states that Mr. Lewis received a call from defendant's attorney in early September 1997. Mr. Lewis told defendant's attorney he would not testify because of "fear of gang reprisal" from Mr. Sexton and his friends.

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¶ 18 Third, defendant alleged in his postconviction petition that his trial counsel provided ineffective assistance by failing to subpoena Mr. Lewis to have him testify to what Mr. Sexton had told him.

¶ 19 Fourth, defendant alleged in his postconviction petition that he was actually innocent. In support, defendant attached affidavits from Reginald Hunt and Joanna Sanders. In his affidavit, Mr. Hunt attested only:

"That my son, Reginald Saxon, told me that he wasn't present at the time of the murder. He said, he wasn't even there so how could he [have] witnessed it. He also told me he wasn't going to court to testify because he didn't know nothing. My daughter, LaShay Matthews, was present during the whole conversation."

¶ 20 In her affidavit, Ms. Sanders attested she was defendant's former girlfriend and that in December 2000, she spoke with Adrienne Parker, who stated she witnessed the victim's shooting and that defendant was not involved. Ms. Sanders attested that she showed Ms. Parker a photograph of defendant, and that Ms. Parker stated defendant "definitely [was] not the person who she had seen at the shooting." The photograph was not attached to the postconviction petition.

¶ 21 Defendant also attached two documents concerning Ms. Parker. In the first, an unidentified author writes in a memo that he or she obtained Ms. Parker's contact information from Ms. Sanders and talked to Ms. Parker on March 15, 2001. Ms. Parker told the author that she lived at 4701 South Ellis Avenue in March 1997, and bought marijuana from "Tony" or "Tone" at the Ellis Towers at that time. One night in March 1997, she went to the Ellis Towers and saw three young men brandishing guns in the south parking lot. Ms. Parker left the scene, and later learned "Tone" had

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been shot to death. In December 2000, she struck up a conversation with Ms. Sanders and told Ms. Sanders she had personally witnessed "Tone's" murder. Ms. Sanders responded that her ex-boyfriend, defendant, had been convicted of the murder and she showed Ms. Parker a photograph of defendant. Ms. Parker stated that defendant was not one of the shooters she had seen.

¶ 22 The second document defendant attached to his postconviction petition was an unsigned affidavit from Ms. Parker attesting to the same facts alleged by the unidentified author in the memo.

¶ 23 Finally, defendant alleged he was not culpably negligent in failing to file his postconviction petition earlier because he relied on his attorney's (Mr. Cuomo's) assurances he was working on defendant's postconviction petition and would file it when ready. Defendant attached a letter from Mr. Cuomo to defendant's mother dated November 18, 1997, in which Mr. Cuomo stated he will continue his investigation into defendant's case in a *pro bono* capacity and will file a postconviction petition when he obtains "new evidence *** strong enough to withstand judicial scrutiny." Mr. Cuomo also stated that should he choose to file a postconviction petition, he will "of course follow up on it and handle it in its entirety." In his own affidavit attached to the postconviction petition, defendant attested that based upon this letter, he "believed there was no time limit" for filing the postconviction petition. Defendant also attached a September 2001 letter to him from Mr. Cuomo, in which Mr. Cuomo wrote that since December, he had finally been able to secure the cooperation of Adrienne Parker, LaShay Matthews, and Joanne Sanders, and that he still was trying to obtain an affidavit from Mr. Sexton. Mr. Cuomo advised defendant he was enclosing a draft postconviction petition that he would like to file by mid-November even if they could not get Mr. Sexton's affidavit.

¶ 24 Defendant further attached a transcript and complaint from ARDC proceedings against Mr.

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Cuomo. The transcript is undated. In pertinent part, Mr. Cuomo testified during the ARDC proceedings as follows:

"Q. Can you tell me what the status of [defendant's] case is?

A. I have not completed the investigation. I stopped doing it last November.¹

Q. Okay.

A. The reason I stopped doing it is twofold. One is that last September, I was very ill *** for about four to five months. And the other part of the reason was that [defendant], I found out, may have been manipulating these witnesses that had been sent to me by members of his family. And I developed some doubt as to whether or not they were telling me the truth.

Q. I see.

A. And as a consequence, I told [defendant] back in November or December that I felt that I had been duped, so to speak, and that I was unwilling to go forward without some additional information that would corroborate what these people were saying. And since then, it's been in limbo.

Q. I see. And in—by 'in limbo,' do you mean—are you continuing to represent [defendant]?

A. Well, I don't feel that I was ever representing him in the first place. If you

¹Although Mr. Cuomo did not specifically state the year in which he stopped the investigation, defendant states on page 35 of his appellant's brief that the year was 2001; specifically, defendant cites to Mr. Cuomo's testimony before the ARDC and states that Mr. Cuomo "testified that he stopped working on the case in late 2001 because he had a prolonged illness and because he 'developed some doubt' about the new witnesses."

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go back to the beginning of my relationship with him, I represented him when he was charged with first-degree murder in the circuit court of Cook County. I represented him through the trial. He was found guilty. I represented him at the sentencing hearing. And following that, I withdrew as his lawyer.

Q. I see.

A. The State Appellate Defender was appointed to represent him in the Illinois Appellate Court. I would—I'm guessing right now, but I would say two weeks to a month or so after he had been sentenced, certain members of his family came to me and said that—that they had located witnesses and wanted me to look into whether or not there was something about those witnesses that I could use to do something for him. And what I agreed to do really was to look into and kind of do an informal investigation on my own time. I think I made that real clear to them. And I did spend quite a bit of time trying to find out one thing or another as to what these witnesses were saying. And I thought in last September or perhaps August that I finally kind of came close to nailing it for him. And then subsequent to that, I found out certain information which led me to think that I had been led down the garden path, so to speak."

¶ 25 Defendant notes that the ARDC proceedings resulted in Mr. Cuomo's disbarment for misappropriating \$450,000 from three other clients between 2001 and 2003.

¶ 26 On January 27, 2006, the postconviction judge (who was the same judge who presided over defendant's trial) summarily dismissed defendant's postconviction petition. Defendant appealed.

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On January 22, 2010, we reversed this summary dismissal and remanded for second-stage proceedings. *People v. Davis*, No. 1-06-0489 (2010) (unpublished order under Supreme Court Rule 23). Because we found that further proceedings were required on the *Brady* claim, we remanded the entire petition without reaching the merits of the other claims. *Id.*

¶ 27 As to the alleged *Brady* violation, we found that the record at that time did not rebut defendant's claim that the State failed to provide the investigators' report of their interview with Raymond Lewis to the defense before sentencing. *Id.* We found that Mr. Lewis, "an apparent neutral party," stated that Mr. Sexton told him he was not a witness to the shooting, and that this statement "obviously calls into question the veracity of Sexton's testimony" and supports defendant's theory of defense at trial that Mr. Sexton was not credible. *Id.* Based on the fact that the trial court's finding of guilt "rested solely on the identification testimony of Sexton," we held that it was at least arguable that Mr. Sexton's statement to Mr. Lewis that he did not witness the shooting "would have substantially reduced or destroyed Sexton's value as a witness and thereby undermined defendant's ultimate conviction." *Id.* Because we could not say "there is no reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different," we reversed the summary dismissal of defendant's postconviction petition and remanded for second-stage proceedings. *Id.*

¶ 28 On July 29, 2010, defendant filed an amended postconviction petition in which he expressly adopted the allegations from the original petition. Defendant also added a new claim that Mr. Sexton's statement identifying him as the shooter was coerced by Chicago police officers working with Jon Burge, who interviewed 16-year-old Mr. Sexton outside the presence of a juvenile officer

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and without his parents.

¶ 29 On October 7, 2010, the State filed a motion to dismiss defendant's amended postconviction petition. As to the *Brady* claim, in particular, the State "emphatically" denied that it had failed to provide the investigators' report to the defense before sentencing. In support, the State attached the following documents to the motion as exhibits: the trial prosecutor's request on September 29, 1997, that investigators interview Mr. Lewis; the investigators' report itself; and both a cover sheet and a sheet confirming that the prosecutor sent a three-page fax to Mr. Cuomo on October 20, 1997. Further, during the hearing on the motion to dismiss, the prosecutor stated that said documents showed that the State had tendered the investigators' report to Mr. Cuomo in advance of the sentencing hearing. Defendant did not dispute the prosecutor's claim at the hearing that the investigators' report had been sent to Mr. Cuomo.

¶ 30 The State also argued that defendant's postconviction and amended postconviction petitions were untimely, that defendant had failed to properly plead an actual innocence claim or ineffective assistance of counsel claims, and that defendant had failed to provide any corroborating documentation supporting his new claim of police coercion.

¶ 31 On October 25, 2011, the postconviction court dismissed defendant's amended postconviction petition. As to the allegation of police coercion, the postconviction court noted there were no affidavits or any other documentation filed by defendant in support thereof, nor was there any evidence anywhere in the record "that the police did anything improper to [Mr. Sexton] at all." We note defendant has not raised the allegation of police coercion as an issue on appeal.

¶ 32 As to the allegation the State committed a *Brady* violation by failing to disclose the

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investigative report of their interview with Mr. Lewis in which he stated Mr. Sexton told him six weeks after the murder that he did not know the identity of the shooters, the postconviction court noted the affidavit from Mr. Lewis filed in support thereof contained "absolute[] hearsay" about "what he claims the witness to the murder told him." Defendant did not file an affidavit from Mr. Sexton. The postconviction court stated:

"And I can say this in all candor: it would not [have] made one slight a bit of difference to me at all, the testimony by Raymond Lewis that he talked to the witness [Mr. Sexton] six weeks later and the guy said I wasn't there. [Mr. Sexton] testified under oath credibly that after the shooting where he saw [defendant] shoot the guy he was with, he ran upstairs and told somebody *** in the victim's family that there was a shooting. So obviously he was there. So that so-called impeachment, if there was any, was hearsay anyway, *** that would not have [changed] my mind in the slightest. *** Let's assume it wasn't hearsay for the sake of discussion. *** Within minutes, actually literally minutes after the shooting, Sexton runs up to the building and tells the victim's people I saw the shooting. So that so-called hearsay conversation with Lewis *** he claims he had with Reginald Sexton, in particular with regard to the murder, at the best might impeach a little bit. But I heard the witness [Mr. Sexton] testify. I saw the witness testify. It did not affect me at all, that so-called statement. But putting that aside, whether it would have affected me or not, it's clearly, unquestionably, undeniably hearsay."

¶ 33 As to the allegation of actual innocence, the postconviction court noted the affidavit filed by Mr. Hunt claiming to have had a conversation in which his son, Reginald Sexton, admitted he did

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not witness the murder, was suspect as Mr. Hunt misspelled the name of his son as Reginald Saxon. Even assuming Mr. Hunt was actually Mr. Sexton's father, the postconviction court noted Mr. Hunt did not state in his affidavit when the conversation with Mr. Sexton occurred, under what circumstances it occurred, and "what murder he is even talking about for that matter." The postconviction court noted that Ms. Sanders's affidavit regarding her conversation in which Ms. Parker stated defendant was not the shooter was hearsay and that Ms. Parker's attached affidavit was not signed. The postconviction court concluded that Mr. Sexton testified credibly regarding his witnessing of the shooting, and that defendant had failed to make a substantial showing of actual innocence.

¶ 34 The postconviction court also found that defendant had failed to make a substantial showing that his trial counsel acted under a conflict of interest, and the court further concluded that defendant's amended postconviction petition was also untimely. Accordingly, the postconviction court granted the State's motion to dismiss the amended postconviction petition. Defendant appeals.

¶ 35 A postconviction proceeding "is not an appeal of a defendant's underlying judgment. Rather, it is a collateral attack on the judgment." *People v. Evans*, 186 Ill. 2d 83, 89 (1999). Such a proceeding "allow[s] inquiry into constitutional issues relating to the conviction or sentence that were not, and could not have been, determined on direct appeal." *People v. Barrow*, 195 Ill. 2d 506, 519 (2001).

¶ 36 In a noncapital case, the Post-Conviction Hearing Act (the Act) (725 ILCS 5/122-1 *et seq.* (West 2010)) creates a three-stage procedure of postconviction relief. In the first stage, the postconviction court independently reviews the petition and determines whether it is "frivolous" or

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"patently without merit." 725 ILCS 5/122-2.1 (a)(2) (West 2010); *People v. Hodges*, 234 Ill. 2d 1, 10 (2009). If the postconviction petition is not so summarily dismissed, it advances as here to the second stage where the State may file a motion to dismiss the petition and the postconviction court must determine whether the petition and any accompanying documents make a substantial showing of a constitutional violation. *Id.* at 10-11 n.3. At the second stage of proceedings, the postconviction court takes "all well-pleaded facts that are not positively rebutted by the trial record" as true. *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006). If the petition fails to make a substantial showing of a constitutional violation, it is dismissed; if such a showing is made, the postconviction petition advances to the third stage where the court conducts an evidentiary hearing. 725 ILCS 5/122-6 (West 2010). A second-stage dismissal of a postconviction petition is reviewed *de novo*. *People v. Coleman*, 183 Ill. 2d 366, 389 (1998).

¶ 37 First, we address whether the postconviction court erred in dismissing defendant's claim of actual innocence.² "The wrongful conviction of an innocent person violates due process under the Illinois Constitution and, thus, a freestanding claim of actual innocence is cognizable under the Post-Conviction Hearing Act." *People v. Barnslater*, 373 Ill. App. 3d 512, 519 (2007). The evidence in support of the claim must be newly discovered, meaning "it must be evidence that was not available at a defendant's trial and that he could not have discovered sooner through due diligence." *People v. Collier*, 387 Ill. App. 3d 630, 636 (2008). The evidence also must be material and non-cumulative

²We address the actual innocence claim separately from defendant's other postconviction claims because, as discussed later in this order, all the other claims were properly dismissed as untimely under the Act whereas the actual innocence claim is not subject to the Act's limitations period. See 725 ILCS 5/122-1(c) (West 2010).

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and "of such conclusive character that it would probably change the result on retrial." *Id.* However, " 'actual innocence' is not within the rubric of whether a defendant has been proved guilty beyond a reasonable doubt. [Citation.] Rather, the hallmark of 'actual innocence' means 'total vindication,' or 'exoneration.' *People v. Savory*, 309 Ill. App. 3d 408, 414-15 (1999)." *Collier*, 387 Ill. App. 3d at 636.

¶ 38 Defendant contends the affidavits of Mr. Hunt and Ms. Sanders are newly discovered, material, and are of such conclusive character as would probably change the result on retrial. As discussed, Mr. Hunt attested that, with his daughter LaShay Matthews present, his son "Reginald Saxon, told [Mr. Hunt] that he wasn't present at the time of the murder." Ms. Sanders attested she is defendant's former girlfriend and that she spoke with Adrienne Parker in December 2000. Ms. Parker told Ms. Sanders that she was at the scene of the shooting. Ms. Sanders showed defendant's photograph to Ms. Parker, who then stated defendant was "not the person who she had seen at the shooting."

¶ 39 Defendant contends that, similar to Mr. Lewis's affidavit which we held in our earlier order arguably "would have substantially reduced or destroyed Sexton's value as a witness and thereby undermined defendant's ultimate conviction" (*Davis*, No. 1-06-0489 (2010) (unpublished order under Supreme Court Rule 23)), we should hold here that the affidavits provided by Mr. Hunt and Ms. Sanders would have destroyed Mr. Sexton's value as a witness and probably changed the result on retrial. Accordingly, defendant argues that we must reverse and remand for a third-stage evidentiary hearing.

¶ 40 We disagree. The earlier order was made in an appeal from the summary dismissal of

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defendant's postconviction petition, in which the postconviction court independently reviewed the petition and determined that it was frivolous or patently without merit, *i.e.*, that it failed to present the gist of a constitutional claim. "The 'gist' standard is 'a low threshold.'" (*People v. Edwards*, 197 Ill. 2d 239, 244 (2001) (quoting *People v. Gaultney*, 174 Ill. 2d 410, 418 (1996))). We determined that the defendant's postconviction petition met this threshold as to the alleged *Brady* violation, and we reversed the summary dismissal and remanded. *Davis*, No. 1-06-0489 (2010) (unpublished order under Supreme Court Rule 23).

¶ 41 By contrast, the present appeal arises from a second-stage dismissal of defendant's amended petition following a hearing on the State's motion to dismiss. At the second stage, defendant must meet a higher threshold of demonstrating a substantial showing of a constitutional violation. *People v. Wright*, 2013 IL App (4th) 110822, ¶ 22. We proceed to consider whether defendant met this higher threshold as to his claim of actual innocence.

¶ 42 As discussed, defendant supported his claim of actual innocence with the affidavits of Ms. Sanders and Mr. Hunt. In dismissing defendant's claim of actual innocence, the postconviction court correctly noted that Ms. Sanders's affidavit contained inadmissible hearsay statements of her conversation with Ms. Parker regarding defendant's innocence of the murder (see *People v. Spears*, 256 Ill. App. 3d 374, 380 (1993) (defining inadmissible hearsay as an out-of-court statement offered to prove the truth of the matter asserted)), and that such hearsay affidavits generally are insufficient to warrant postconviction relief based on a claim of actual innocence. See *People v. Morales*, 339 Ill. App. 3d 554, 565 (2003). The postconviction court further correctly noted that defendant had provided a document supposedly written by Ms. Parker confirming her conversation with Ms.

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Sanders, but that the document was not signed or notarized and could not be considered a valid affidavit. See *Roth v. Illinois Farmers Insurance Co.*, 202 Ill. 2d 490, 493-94 (2002). Defendant also provided an unsigned, handwritten memo detailing the author's conversation with Ms. Sanders about the murder, but said memo contains inadmissible hearsay and is otherwise insufficient and unreliable to support defendant's postconviction claim of actual innocence in the absence of an affidavit explaining the circumstances under which the memo was created. See *People v. Johnson*, 183 Ill. 2d 176, 190 (1998).

¶ 43 Mr. Hunt's affidavit similarly contained inadmissible hearsay statements regarding his conversation with his son, Reginald Sexton, in which Mr. Sexton allegedly stated he did not witness the murder. In considering Mr. Hunt's affidavit, the postconviction court questioned whether Mr. Hunt was actually Mr. Sexton's father, noting he misspelled Mr. Sexton's name in the affidavit. Even assuming Mr. Hunt was Mr. Sexton's father, the court noted Mr. Hunt did not state when and under what circumstances his conversation with Mr. Sexton took place, nor did he state what murder he was talking about. Mr. Hunt referenced his daughter, LaShay Matthews being present during the conversation, but defendant provided no affidavit from Ms. Matthews.

¶ 44 The postconviction court specifically found Mr. Sexton to be a credible witness who had informed the victim's sister of the shooting within minutes of its occurrence, had described defendant to the officers and had included a description of his chipped tooth, and identified defendant as one of the shooters. The court concluded that defendant failed to make a substantial showing that the affidavits of Mr. Hunt and Ms. Sanders, containing the hearsay statements from Mr. Sexton and Ms. Parker, would have changed the result of the trial and so dismissed the claim of actual innocence.

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¶ 45 We agree with the postconviction court. After carefully considering the arguments and evidence presented during the hearing on the State's motion to dismiss, the postconviction court committed no error in finding defendant failed to make a substantial showing of actual innocence. This is especially so where the signed affidavits by Mr. Hunt and Ms. Sanders in support thereof contained inadmissible hearsay statements allegedly made by Mr. Sexton and Ms. Parker regarding defendant's alleged innocence, and where defendant's claim of actual innocence was not supported by any signed affidavits from Mr. Sexton and Ms. Parker themselves. Defendant did not meet his burden of making a substantial showing of actual innocence, in the absence of any admissible evidence contradicting Mr. Sexton's trial testimony identifying defendant as one of the persons who shot at the victim and as one of three men fleeing the scene while shooting their guns in the air, which testimony the postconviction court expressly found to be credible. Mr. Sexton's testimony that he witnessed the shooting was corroborated in part by Ms. Waters and Ms. Arrington, who testified that Mr. Sexton knocked on Ms. Waters's door minutes after the shooting and informed them the victim had been shot. Mr. Sexton's testimony regarding defendant and the other two men fleeing from the scene while firing their weapons in the air was also corroborated by Ms. Arrington's, Mr. Boyd's, and Mr. Lewis's testimony of seeing three men leaving the scene of the shooting, and by Ms. Arrington's testimony that the three men were firing their weapons while fleeing. As Mr. Sexton's, Ms. Waters's, Ms. Arrington's, Mr. Boyd's, and Mr. Lewis's testimony remains uncontradicted by any admissible evidence, we affirm the second-stage dismissal of defendant's claim of actual innocence.

¶ 46 Next, we address whether the postconviction court erred in dismissing defendant's remaining

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postconviction claims on timeliness grounds. Section 122-1(c) of the Act sets forth the limitations period for filing a postconviction petition:

"When a defendant has a sentence other than death, no proceedings under this Article shall be commenced more than 6 months after the conclusion of proceedings in the United States Supreme Court, unless the petitioner alleges facts showing that the delay was not due to his or her culpable negligence. If a petition for certiorari is not filed, no proceedings under this Article shall be commenced more than 6 months from the date for filing a certiorari petition, unless the petitioner alleges facts showing that the delay was not due to his or her culpable negligence.

This limitation does not apply to a petition advancing a claim of actual innocence."

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

¶ 47 The parties agree that under the facts of this case, defendant was required to file his postconviction claims (other than his claim of actual innocence) by February 1, 2001, in order to comply with the limitations period set forth in section 122-1(c). Defendant did not file his initial postconviction petition until December 15, 2005, almost five years (58 months) after the limitations period had expired. Pursuant to section 122-1(c), defendant's untimely postconviction claims may only be considered if the late filing was not due to defendant's "culpable negligence." 725 ILCS 5/122-1(c) (West 2010).

¶ 48 Defendant bears the "heavy burden" to affirmatively show why the tardiness of the petition was not due to his culpable negligence. *People v. Gunartt*, 327 Ill. App. 3d 550, 552 (2002). The phrase "culpable negligence" contemplates "something greater than ordinary negligence and is akin

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to recklessness." *People v. Bocclair*, 202 Ill. 2d 89, 108 (2002). "Lack of culpable negligence is very difficult to establish." *Gunartt*, 327 Ill. App. 3d at 552.

¶ 49 "As the law stands today, a defendant asserting that he was not culpably negligent for the tardiness of his petition must support his assertion with allegations of specific fact showing why his tardiness should be excused." *People v. Hobson*, 386 Ill. App. 3d 221, 233 (2008). See *People v. Walker*, 331 Ill. App. 3d 335, 339-40 (2002) (noting that the relevant inquiry becomes whether, after accepting all well-pleaded factual allegations of defendant's petition regarding culpable negligence as true, those assertions are sufficient as a matter of law to demonstrate an absence of culpable negligence on defendant's part); *People v. Van Hee*, 305 Ill. App. 3d 333, 336 (1999) ("To show the absence of culpable negligence, a petitioner must allege facts justifying the delay."); *People v. McClain*, 292 Ill. App. 3d 185, 188 (1997) (to warrant an evidentiary hearing on the issue of whether the delay in filing postconviction relief was not occasioned by culpable negligence, the defendant "must make a 'substantial showing' by alleging facts demonstrating that to be the case") *overruled in part and on different grounds* by *People v. Woods*, 193 Ill. 2d 483 (2000).

¶ 50 Defendant argues that assessments of culpable negligence normally require credibility determinations that are more appropriately made at a third-stage evidentiary hearing. However, in *People v. Lander*, 215 Ill. 2d 577 (2005), the supreme court upheld the postconviction court's finding during second-stage proceedings that the petitioner there had failed to establish the delay in filing his postconviction petition was not due to his culpable negligence. *Id.* at 579-80. In so ruling, the supreme court impliedly held that assessments of culpable negligence may be made during second-stage proceedings. Accordingly, we consider whether the postconviction court erred during the

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second stage of postconviction proceedings here in finding that defendant failed to allege facts substantially showing the delay in filing his petition was not occasioned by his culpable negligence.

¶ 51 "A trial court's findings of fact regarding whether a petition's untimeliness was due to culpable negligence will not be reversed unless manifestly erroneous [citation], but the trial court's ultimate conclusion as to whether the established facts demonstrate culpable negligence is reviewed *de novo*." *People v. Ramirez*, 361 Ill. App. 3d 450, 452 (2005).

¶ 52 Defendant contends he has alleged facts substantially showing that the delay in filing his postconviction petition was not due to his culpable negligence but, rather, was due to his justifiable reliance on his counsel's, Mr. Cuomo's, statement in the November 18, 1997, letter to defendant's mother that he was investigating new evidence and would file the postconviction petition "[i]f, and only if, that new evidence is strong enough to withstand judicial scrutiny." In support, defendant cites *People v. Hobson*, 386 Ill. App. 3d 221 (2008). In *Hobson*, the petitioner there alleged the reason for his delay in filing his postconviction petition until three to five months after the expiration of the limitations period was that appellate counsel misadvised him that he had three years from the date of his conviction to file his postconviction petition, that he filed his petition within that incorrect deadline and that therefore he had no reason to think his petition was untimely filed. *Id.* at 234. We held that the petitioner alleged enough facts to make a substantial showing he was not culpably negligent for the tardy filing of his petition. *Id.* at 235. In so holding, we analogized the case to *People v. Rissley*, 206 Ill. 2d 403 (2003), in which the supreme court similarly held that the defendant there had established that his delay in filing his petition six days after the expiration of the limitations period was not due to his culpable negligence, where the petition alleged his appellate

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counsel incorrectly told him he had three years from the date of sentencing to file his postconviction petition. *Id.* at 417-18, 421. The supreme court found that the defendant had no reason to question the advice he received from his counsel and that based on this advice he reasonably would have believed he had timely filed his petition. *Id.* at 421.

¶ 53 In contrast to *Hobson* and *Rissley*, defendant's petition here was not late by a few days or months, but by almost five years. Also in contrast to *Hobson* and *Rissley*, defendant's counsel made no misrepresentations regarding the limitations period for filing the postconviction petition. On these facts, this case is similar to *People v. Hampton*, 349 Ill. App. 3d 824 (2004), in which the defendant there appealed the grant of the State's motion to dismiss his postconviction petition as untimely. Defendant admitted the petition was untimely (*id.* at 826) but argued that under *Rissley*, he pleaded sufficient facts that would establish he was not culpably negligent, specifically, that his attorney had failed to tell him of the time constraints for filing his postconviction petition. *Id.* at 826-27. We disagreed, noting that unlike in *Rissley* where the petition was late by six days, the petition in *Hampton* was late by four years and eight months. We noted "it stands to reason that a defendant who waits nearly five years beyond the statutory deadline to file a petition has more explaining to do than one who is late by less than a week. Being tardy by six days is far less inherently suggestive of recklessness than is missing the deadline by several years." *Id.* at 828.

¶ 54 We further noted that unlike in *Rissley*, defendant never alleged his counsel told him anything about when he needed to file his petition, and therefore defendant was "in no worse a position than the vast majority of *pro se* postconviction petitioners, who also lack access to the advice of counsel." *Id.* at 829. We held that the "absence of professional advice would be relevant only if defendant's

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ignorance of the Act's time constraints could excuse his failure to adhere to them. However, it is settled that unfamiliarity with the Act's requirements does not show a lack of culpable negligence."

Id. We noted that to hold otherwise "would vitiate the Act's time constraints because defendants could routinely escape them by 'pleading ignorance.'" *Id.* Accordingly, as defendant's petition was untimely and did not allege facts showing that the untimeliness did not result from his culpable negligence, we affirmed the dismissal order. *Id.*

¶ 55 As in *Hampton*, defendant's delay here in filing his petition almost five years after the expiration of the limitations period is far more suggestive of culpable negligence than the delay of only a few days at issue in *Rissley* or the delay of only a few months at issue in *Hobson*. Also as in *Hampton*, defendant here pleaded no facts indicating a lack of culpable negligence based on his reasonable reliance on specific misrepresentations by Mr. Cuomo regarding the time period for filing his postconviction petition. Defendant asserted in his affidavit that he "believed there was no time limit" for filing a postconviction petition based on the following passage in the November 18, 1997, letter from Mr. Cuomo to defendant's mother, which stated:

"I will continue on in my investigation into the new evidence which has been discovered. If, and only if, that new evidence is strong enough to withstand judicial scrutiny, I will file a post-conviction petition, or any other appropriate petition to bring the new evidence to the judge's attention. Should I chose [*sic*] to file any such action, I will of course follow up on it and handle it in its entirety."

A close reading of this passage shows that while Mr. Cuomo indicated he was working on defendant's postconviction petition and would file it if he determined newly discovered evidence was

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strong enough to withstand judicial scrutiny, he never stated there were no time limitations for filing said petition; in fact, Mr. Cuomo made no representations of any kind therein regarding the time limitations for filing defendant's postconviction petition. Thus, this passage does nothing to substantially show that defendant's belief there was no time limit for filing his postconviction petition was reasonable or that he was not culpably negligent for failing to file said petition until almost five years after the limitations period expired.

¶ 56 Further, even assuming for argument purposes only that the November 18, 1997, letter from Mr. Cuomo to defendant's mother reasonably could have led defendant to believe there was no time limit for filing a postconviction petition while Mr. Cuomo investigated the new evidence, Mr. Cuomo wrote defendant in September 2001 stating he had secured the cooperation of certain witnesses (who apparently would have testified to defendant's actual innocence) and that he wanted to file a postconviction petition two months later, by mid-November 2001. Thus, defendant was made aware in September 2001 of Mr. Cuomo's recommendation that his postconviction petition be filed within two months. Subsequently, in either late November or December 2001, Mr. Cuomo ended his postconviction representation of defendant because he believed the witnesses were not being honest with him. Defendant hired new counsel but waited four more years, until December 2005, before filing his postconviction petition alleging actual innocence, a *Brady* violation, and that Mr. Cuomo had denied him the effective assistance of counsel. Defendant provides no explanation either in his postconviction petition or in his appellant's brief for the four-year delay from September 2001 (when Mr. Cuomo recommended to him that his postconviction petition be filed within two months) to December 2005 in filing his postconviction petition. "[W]hether delay is due to

culpable negligence depends not only on when the claim is discovered [by the defendant] but [also] on how promptly the defendant takes action after the discovery.' " *Ramirez*, 361 Ill. App. 3d at 453-54 (quoting *People v. Davis*, 351 Ill. App. 3d 215, 218 (2004)). Defendant failed to act promptly after he received the September 2001 letter from Mr. Cuomo alerting him to a possible claim of actual innocence, as he waited four more years (for a total of almost five years after the expiration of the statutory limitations period) before filing his postconviction petition. Defendant's delay in filing his postconviction petition until almost five years after the expiration of the limitation period is suggestive of culpable negligence.

¶ 57 Defendant's almost five-year delay in filing his postconviction petition after the expiration of the limitations period distinguishes this case from *People v. Keller*, 344 Ill. App. 3d 824 (2003), cited by defendant. In *Keller*, the defendant there, David Keller, was convicted of first-degree murder and attempted armed robbery on September 24, 1993. *Id.* at 825. The circuit court initially sentenced Mr. Keller to 35 years' imprisonment for first-degree murder and 10 years' imprisonment for attempted armed robbery. *Id.* On April 11, 1996, the circuit court modified Mr. Keller's sentence for first-degree murder to 30 years' imprisonment. *Id.* Throughout all of these proceedings, Mr. Keller was represented by attorney Thomas Hildebrand. *Id.* Mr. Keller did not file a direct appeal of his convictions and sentences. *Id.*

¶ 58 On July 23, 1999, Mr. Keller filed a *pro se* postconviction petition. *Id.* In the petition, Mr. Keller alleged that at the sentencing hearing he had told Mr. Hildebrand he wanted to appeal, that Mr. Hildebrand assured Mr. Keller and his mother that the appeal would be perfected and that it would take three to four years. *Id.* at 825-26. In the early part of 1999, Mr. Keller's mother learned

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that Mr. Hildebrand had never filed a notice of appeal. *Id.* at 826.

¶ 59 The circuit court appointed attorney John Delaney to represent Mr. Keller in the postconviction proceedings. *Id.* Mr. Delaney then filed an amended postconviction petition, reiterating Mr. Keller's claim about Mr. Hildebrand not appealing his case. *Id.* The circuit court held a hearing on the petition, during which the court stated for the record that in exchange for the withdrawal of Mr. Keller's petition, the circuit court would give Mr. Keller another 30 days within which to file his notice of appeal. *Id.* The circuit court also ordered the clerk to file a notice of appeal for Mr. Keller, and the clerk did so. *Id.* Mr. Keller then withdrew his postconviction petition. *Id.*

¶ 60 The appellate court dismissed Mr. Keller's appeal because it was not timely filed, holding that the circuit court had no authority to extend the time to file a notice of appeal. *Id.* (citing *People v. Keller*, 319 Ill. App. 3d 1130 (2001) (unpublished order under Supreme Court Rule 23)).

¶ 61 On July 10, 2001, Mr. Keller, by attorney Curtis Blood, filed an amended postconviction petition, alleging that Mr. Hildebrand had disregarded his directive to appeal his convictions and sentences and that the circuit court had failed to advise him of his right to appeal after he was resentenced. *Id.* The cause proceeded to an evidentiary hearing, at which Mr. Keller testified he had told Mr. Hildebrand he wanted to appeal his convictions and sentences. *Id.* at 826-27. Mr. Keller's mother testified she paid Mr. Hildebrand approximately \$1,300 for transcripts to get the appeal started and that Mr. Hildebrand told her the appeal would take three to five years. *Id.* at 827. Mr. Hildebrand testified he had been retained to represent Mr. Keller at trial, but that he did not recall anyone asking him to represent Mr. Keller on appeal. *Id.* Mr. Hildebrand further testified he was

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not Mr. Keller's counsel for an appeal. *Id.* at 828.

¶ 62 On March 6, 2002, the circuit court dismissed the amended postconviction petition, stating:

"The defendant was granted leave to file an Amended Post[-]Conviction Petition on July 10, 2001 [*sic*]. The granting of leave to file such an Amended Petition does not necessarily of itself indicate that the Court has jurisdiction or *** is granting jurisdiction concerning the petition. *** The Petition filed and presented was an amendment to a then *non[]existing* Petition. Accordingly, it is dismissed. Additionally, even if the Court should liberally construe the pleading as a newly filed Post-Conviction Petition, the time of the filing is far outside the statutory time limits as dictated by the dates of the conviction and disposition several years before.' "

[Emphasis in original.] *Id.* at 828-29.

¶ 63 On April 4, 2002, Mr. Keller filed a motion for reconsideration which the circuit court denied. *Id.* at 829. Mr. Keller appealed, contending Mr. Hildebrand committed ineffective assistance by failing to act on his directive to appeal his convictions and sentences. *Id.*

¶ 64 The appellate court held that the circuit court erred in dismissing the amended postconviction petition. *Id.* at 830. The appellate court noted a postconviction petition can be filed at any time if the " 'petitioner alleges facts showing that the delay was not due to his or her culpable negligence'" (*id.* (quoting 725 ILCS 5/122-1(c) (West 2000)), and that Mr. Keller had alleged such facts, specifically, that the circuit court had failed to properly advise him of his direct appeal rights and that Mr. Hildebrand had failed to comply with Mr. Keller's directive to file a notice of appeal. *Id.* The appellate court further held:

"[I]n the instant case, the only effective relief that this court can give the defendant is to restore his right to a direct appeal. For this reason, we reverse the circuit court's dismissal of the defendant's postconviction petition, and we remand this case to the circuit court to resentence the defendant. The defendant must then file a notice of appeal in accordance with Supreme Court Rule 606(b) (188 Ill. 2d R. 606(b)) to be entitled to a direct appeal of his convictions and sentences." *Id.* at 831-32.

¶ 65 In contrast to *Keller*, the present case does not involve the circuit court's failure to properly advise defendant of his appeal rights, nor does it involve a failure on the part of counsel to comply with the defendant's directive to file a notice of appeal. Instead, the present case involves Mr. Cuomo's promise, as related in his November 18, 1997, letter to defendant's mother, to continue to investigate defendant's case and file a postconviction petition upon obtaining "new evidence *** strong enough to withstand judicial scrutiny." Pursuant to that promise, Mr. Cuomo continued his postconviction investigation and wrote a letter to defendant in September 2001 advising defendant he had obtained the cooperation of certain witnesses (who apparently would have testified to defendant's actual innocence) and that he would like to file a postconviction petition by mid-November 2001. Mr. Cuomo testified before the ARDC that he subsequently developed "some doubt" as to whether the witnesses were telling the truth, and that he told defendant in November or December³ that he was unwilling to go forward without some "additional information that would corroborate what these people were saying." After Mr. Cuomo ended his postconviction

³As discussed earlier in this order, defendant states in his appellant's brief that this conversation with Mr. Cuomo, in which he stated he was ceasing his postconviction investigation, occurred in November or December of 2001.

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representation of defendant in November or December 2001, defendant hired new counsel but waited an additional four years, until December 2005, before filing his postconviction petition alleging actual innocence, a *Brady* violation, and that Mr. Cuomo had denied him the effective assistance of counsel. *Keller* involved no similar delay in the filing of his postconviction petitions, where the facts there show that: Mr. Keller filed his initial postconviction petition within a few months of learning that his counsel had disregarded his directive to file a notice of appeal; he withdrew his postconviction petition pursuant to an agreement between his new counsel and the circuit court to extend the time for filing a notice of appeal; he filed an amended postconviction petition within months of the appellate court's dismissal of his appeal; and he filed a timely notice of appeal from the circuit court's dismissal of his amended postconviction petition. See *Id.* 826-29. In the present case, defendant's delay in filing his postconviction petition until four years after the September 2001 letter from Mr. Cuomo recommending that his petition be brought within two months, and almost five years after the expiration of the statutory limitations period, distinguishes this case from *Keller* and does not support his claim of lack of culpable negligence.

¶ 66 In his reply brief, defendant contends the delay in filing his postconviction petition until December 2005 was due to his new counsel's need to obtain certain police reports concerning Mr. Cuomo's representation of Mr. Riley which would support defendant's claim that Mr. Cuomo was providing ineffective assistance by acting under a conflict of interest at trial. Defendant contends he should not be procedurally defaulted for failing to obtain these police reports prior to the expiration of the statutory limitations period on February 1, 2001, because Mr. Cuomo was representing him during that time and he could not be expected to gather evidence showing his own

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ineffectiveness. See *People v. Lawton*, 212 Ill. 2d 285, 296 (2004) ("An attorney cannot be expected to argue his own ineffectiveness."). However, defendant provides no explanation for why he should not be procedurally defaulted for filing his postconviction claim of ineffective assistance of counsel *four years after* Mr. Cuomo ended his representation of him.

¶ 67 Defendant also contends in his reply brief that the delay before filing his postconviction petition in December 2005 was due to his new counsel's need to obtain Mr. Cuomo's testimony from his disbarment proceedings, which he gave after the ARDC complaint was filed in June 2003. In his testimony before the ARDC, Mr. Cuomo stated he believed his representation of defendant ended after his sentencing, but he also testified he had agreed to perform some "informal" postconviction investigative work to determine whether defendant had any viable postconviction claims. Mr. Cuomo further testified he subsequently stopped working on the case because he suffered a prolonged illness and because he developed some doubt about the new witnesses. Defendant has failed to plead any facts or make any arguments showing how Mr. Cuomo's testimony before the ARDC was in any way relevant to the allegations in his postconviction petition or why new counsel needed to procure Mr. Cuomo's ARDC testimony before filing his postconviction petition. We further note that while Mr. Cuomo's ARDC testimony provides some information as to why he stopped assisting defendant, Mr. Cuomo never admitted therein that he misrepresented the time limitations involved in pursuing a postconviction claim. Thus, Mr. Cuomo's testimony before the ARDC does not support defendant's claim of lack of culpable negligence for filing his petition almost five years after the statutory limitations period had expired.

¶ 68 In sum, defendant has failed to plead any facts that make a substantial showing that his delay

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in filing his postconviction petition for almost five years after the expiration of the statutory limitations period was not due to his culpable negligence. Accordingly, the postconviction court correctly dismissed defendant's postconviction claims as untimely (other than the claim of actual innocence, which, as discussed, was not subject to the Act's limitations period but was properly dismissed on other grounds).

¶ 69 Even if the postconviction claims were not untimely, we would affirm the dismissal order. Defendant's first postconviction claim was that the State committed a *Brady* violation by failing to disclose an exculpatory report prepared by State's Attorney Investigators Kelly and McGee of their interview with Raymond Lewis on October 3, 1997, between defendant's trial and the hearing on his posttrial motion. During that interview, Mr. Lewis told the investigators he was a friend to both defendant and Mr. Sexton and that approximately six weeks after the shooting, Mr. Sexton told him he did not know who did the shooting and that he provided defendant's name to the police because it was the first name that "popped" into his head. After the postconviction court summarily dismissed defendant's postconviction petition, defendant appealed, and we found that the record at that time did not rebut defendant's claim that the State failed to provide the investigators' report of their interview with Mr. Lewis to the defense before sentencing. *People v. Davis*, No. 1-06-0489 (2010) (unpublished order under Supreme Court Rule 23). We reversed and remanded for second-stage proceedings. *Id.*

¶ 70 On remand, defendant filed an amended postconviction petition adopting the allegations from the original petition, and the State filed a motion to dismiss. As to the *Brady* claim, the State "emphatically" denied failing to provide the investigators' report to the defense before sentencing and

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attached the following documents to the motion as exhibits: the trial prosecutor's request on September 29, 1997, that investigators interview Mr. Lewis; the investigators' report itself; and both a cover sheet and a sheet confirming that the prosecutor sent a three-page fax to Mr. Cuomo on October 20, 1997. A hearing was held on the State's motion to dismiss. During the hearing, the prosecutor stated that these documents attached to the motion to dismiss showed that the State had tendered the investigators' report to Mr. Cuomo in advance of the sentencing hearing. Defendant, who was represented by new counsel, Frederick Cohn, did not dispute the prosecutor's claim at the hearing that the investigators' report had been sent to Mr. Cuomo. On this record, defendant has failed to make a substantial showing of a *Brady* violation.

¶ 71 Defendant next claims Mr. Cuomo was ineffective for failing to present this evidence of Mr. Sexton's statement to Mr. Lewis at the hearing on his posttrial motion. To determine whether defendant was denied his right to effective assistance of counsel, we apply the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). Defendant must show first, that "counsel's representation fell below an objective standard of reasonableness" (*Strickland*, 466 U.S. at 688), and second, that he was prejudiced such 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.

¶ 72 To prevail on his claim of ineffective assistance, defendant must satisfy both prongs of the *Strickland* test. If we can dispose of defendant's ineffective assistance claim because he suffered no prejudice, we need not address whether his counsel's performance was objectively reasonable. *People v. Lacy*, 407 Ill. App. 3d 442, 457 (2011).

¶ 73 In dismissing defendant's amended postconviction petition on remand, the postconviction court expressly ruled that Mr. Lewis's statement regarding his conversation with Mr. Sexton was hearsay that "would not have [changed his] mind in the slightest." The postconviction court further noted that it had seen and heard Mr. Sexton's testimony at trial, that it found Mr. Sexton's testimony identifying defendant to be credible, and that Mr. Lewis's statement would not have changed the court's credibility determination. On this record, we cannot say defendant has made a substantial showing that Mr. Cuomo's failure to present Mr. Lewis's statement prejudiced him such that there is a reasonable probability that the result of the hearing on his posttrial motion would have been different. Accordingly, defendant's claim of ineffective assistance fails.

¶ 74 Defendant contends the postconviction court applied the wrong standard in considering his claim of ineffective assistance, that instead of determining whether there is a reasonable probability that the result of the hearing on his posttrial motion would have been different had it heard Mr. Lewis's statement, the court improperly required defendant to show that Mr. Lewis's statement definitely would have led to a different result. Contrary to defendant's argument, our review of the postconviction court's comments reveals no indication that the court required defendant to show that Mr. Lewis's statement definitely would have led to a different result, instead of requiring him to show under *Strickland* that there is a reasonable probability that the result would have been different had it heard Mr. Lewis's statement. Defendant has failed to show that the postconviction court applied an incorrect standard in considering his claim of ineffective assistance.

¶ 75 Defendant's final postconviction claim is that Mr. Cuomo provided ineffective assistance by laboring under an actual conflict of interest due to his representation of another suspect, LaMarcus

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Riley, during the police investigation of this case.

" 'Persons accused of crime enjoy a sixth amendment right to the effective assistance of counsel.' [Citation.] 'Effective assistance means assistance by an attorney whose allegiance to his client is not diluted by conflicting interests or inconsistent obligations.' [Citation.] Illinois recognizes two classes of impermissible conflicts of interest. [Citation.]

The first category of conflict, termed '*per se* conflicts,' consist of those 'certain facts *** [that] engender, *by themselves*, a disabling conflict' (emphasis in original), usually 'the defense attorney's prior or contemporaneous association with either the prosecution or the victim.' [Citation.] 'The justification for treating these conflicts as *per se* has been that the defense counsel in each case had a tie to a person or entity *** which would benefit from an unfavorable verdict for the defendant.' [Citation.] In such cases, the defendant need not show prejudice in order to secure a reversal of his conviction. [Citation.]

The second category of conflict, often called a 'potential,' 'possible,' or 'actual' conflict, describes something short of a *per se* conflict. [Citation.] In such cases, a defendant's convictions may be reversed if the trial court was informed of the problem and failed to take adequate protective steps, or where the court was not apprised and the defendant can show that ' "an actual conflict of interest adversely affected" ' counsel's performance.' [Citations.]" *People v. Gacho*, 2012 IL App (1st) 091675, ¶¶ 27-29.

¶ 76 Defendant here concedes Mr. Cuomo committed no *per se* conflict of interest, but contends Mr. Cuomo committed an actual conflict of interest due to his prior representation of another

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suspect, Mr. Riley, in this case. An actual conflict requires defendant to "point to some specific defect in defense counsel's strategy, tactics, or decision making attributable to the conflict." *People v. Mahaffey*, 165 Ill. 2d 445, 456 (1995). Defendant cannot "attempt[] to create a conflict of interest through conjecture as to what strategy might have been pursued. [The reviewing] court will not overturn a conviction based on hypothetical conflicts." *Id.* at 457.

¶ 77 Defendant argues we should find he made a substantial showing that Mr. Cuomo engaged in an actual conflict by failing to cross-examine Mr. Sexton about whether or not he saw Mr. Riley, and not defendant, fire toward him and the victim and by failing to argue that it was Mr. Riley, and not defendant, who Mr. Sexton saw fire toward him and the victim. We disagree. Such a finding would require conjecture on our part, where there is absolutely no evidence in the record that Mr. Sexton ever identified Mr. Riley as one of the shooters and thus no indication that independent counsel would have pursued the strategy now suggested by defendant. Accordingly, defendant has failed to make a substantial showing of an actual conflict.

¶ 78 For the foregoing reasons, we affirm the circuit court.

¶ 79 Affirmed.