IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellant, -vs- JAMES CHERRY, Defendant-Appellee and Cross-Appellant.	Appeal from the Appellate Court of Illinois, No. 5-13-0085. There on appeal from the Circuit Court of the Twentieth Judicial Circuit, St. Clair County, Illinois, No. 10-CF-1007. Honorable Michael N. Cook, Judge Presiding.

REPLY BRIEF FOR DEFENDANT-APPELLEE ON CROSS APPEALED ISSUE

MICHAEL J. PELLETIER
State Appellate Defender

JACQUELINE L. BULLARD
Deputy Defender

SUSAN M. WILHAM
ARDC No. 6217050
Assistant Appellate Defender
Office of the State Appellate Defender
Fourth Judicial District
400 West Monroe Street, Suite 303
Springfield, IL 62705-5240
(217) 782-3654
4thdistrict.eserve@osad.state.il.us

COUNSEL FOR DEFENDANT-APPELLEE

ORAL ARGUMENT REQUESTED

ARGUMENT

I.

James Cherry's Counsel Failed to Advance His Claims at the *Krankel* Evidentiary Hearing, Such that Cherry's Claims Were Not Subjected to Meaningful Adversarial Testing; this Cause Must Be Remanded for Further Proceedings on Cherry's Claims.

James Cherry's *Krankel* claims were advanced to the second stage, a post-trial evidentiary hearing, where he was entitled to the effective representation of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984). Under this test, a defendant must demonstrate not only deficient representation, but also that counsel's unreasonable performance substantially prejudiced the defendant. However, if counsel completely fails to subject the State's case to meaningful adversarial testing, the *Strickland* test may be set aside for application of the *Cronic* test, where a showing of prejudice is not required. *United States v. Cronic,* 466 U.S. 648, 654 (1984). Here, as Cherry's replacement counsel did nothing to advance his claims of ineffective assistance of trial counsel, Cherry did not receive meaningful representation, and prejudice from this deficient *Krankel* evidentiary hearing can be presumed.

The State asserts that Cherry "was not completely deprived of post-trial counsel's assistance" when his new counsel "filed a motion to reconsider sentence and orally argued defendant's allegations of ineffective assistance," and thus his claims are properly decided under *Strickland* instead of *Cronic*. (State's Brief at 8) That Cherry's replacement counsel earlier argued a motion to reconsider sentence is irrelevant to whether his inaction later deprived Cherry of meaningful representation at his *Krankel* hearing. In his brief, Cherry included his replacement

counsel's actions at that resentencing hearing only because they illustrate how absolutely deficient this representation was, when replacement counsel first argued at resentencing that Cherry was under "extreme intoxication" at the time of the shooting. (Defendant's Brief at 18) This claim has no evidentiary support in the trial record, and replacement counsel made no attempt to substantiate the claim at resentencing. (C. 44) Then, the only claim added by replacement counsel for the *Krankel* hearing was that trial counsel "failed to investigate some medical records that may have shown that Defendant was not under the influence of alcohol." (C. 259) And, once again, replacement counsel did nothing to support this bare statement, which guaranteed that this unsupported claim would fail. Counsel's "efforts" amounted to no representation at all, let alone meaningful adversarial testing as required by *Cronic*.

As the State noted, under *Roe v. Flores-Ortega*, 528 U.S. 470, 483 (2000), where counsel's deficient performance leads to the "denial of the entire judicial proceeding itself," there is no need for a defendant to show he was likely to have succeeded at the proceeding that he was denied, and prejudice is presumed. (State's Brief at 8) Here, the proceeding at issue is the *Krankel* evidentiary hearing. Replacement counsel did not provide the trial court with any support for Cherry's claims, and this failure to advance Cherry's claims doomed them to dismissal. Replacement counsel only added one claim, which was unsupported by the trial record or any outside evidence, and contradicted his earlier motion. His representation amounted to inaction and inaccurate bare assertions, and so completely denied Cherry a fair hearing on his claims that prejudice is presumed.

The State asserts that Cherry provides no authority for "a new, 'relaxed' *Strickland* standard." (State's Brief at 8, footnote 2) However, Cherry cited *People v. Greer*, 212 Ill.2d 192 (2004), *People v. Owens*, 139 Ill.2d 351 (1990), and *People v. Kuehner*, 2015 IL 117695, for his argument that a defendant litigating a post-trial motion still has the presumption of innocence and a constitutional right to the effective assistance of counsel, instead of the lower standard of the statutory right to the reasonable assistance of counsel afforded at the post-conviction stage. (Defendant's Brief at 21-23) The State does not explain why, as here, the constitutional protections of *Strickland* should result in a lower level of representation than the statutory requirements for post-conviction counsel.

Equating Cherry's motion to a first-stage post-conviction petition, the State asserts that Cherry "fared no worse than a pro se postconviction petitioner who raises an ineffective assistance claim and fails to support it." (State's Brief at 10) By analogizing to the *pro se* stage of post-conviction proceedings, the State entirely misses the point of comparing Cherry's representation in this proceeding, where he still retained his constitutional right to the effective assistance of counsel, to that of a post-conviction petitioner, where the petitioner has only a statutory right to the reasonable assistance of counsel.

And Cherry was not *pro se* in this proceeding. Once counsel is appointed to represent a defendant, he no longer has the right to argue motions filed on his behalf. Because Cherry was represented by counsel, Cherry was completely reliant on his *Krankel* counsel to develop and present his claims. His counsel's complete inaction on his behalf precluded any inquiry into his claims, precluded any possibility of showing prejudice, and even waived consideration of these claims in post-

conviction proceedings. *People v. West*, 187 Ill.2d 418, 425 (1999). Cherry would have been better off without counsel, and thus able to present his own claims to the court, or at least to testify and flesh out his claims of ineffective assistance. When Cherry was not able to present his claims, and his counsel did not attempt to present his claims, Cherry's representation was so deficient that he should not be required to prove prejudice.

Indeed, as the State has pointed out, Cherry candidly admits that he "cannot possibly show prejudice" from his counsel's inaction at this *Krankel* evidentiary proceeding. (State's Brief at 7) When counsel adopted the claims in Cherry's letter (C. 259), he affirmed that the claims had legal merit. However, bare assertions of merit would not be sufficient to advance Cherry's claims and, once he affirmed that the claims had merit, Cherry's counsel owed him the duty of advancing these claims with any evidence available to him. The simplest and most obvious method would have been to allow Cherry to testify about his claims. Then counsel would have developed these claims and left this Court with a factual record with which to review Cherry's current dual claims of ineffective assistance of trial and replacement counsel. By doing nothing to flesh out these bare assertions, replacement counsel has left behind a record that cannot be reviewed in any meaningful manner. Prejudice cannot be proven, because replacement counsel failed to elicit any facts with which to refute the trial court's conclusions. When replacement counsel completely failed to subject the claims to meaningful adversarial review, as here, prejudice must be presumed as a result of the inaction. *Cronic*, 466 U.S. at 662. To rule otherwise would allow Cherry's counsel to not only fail to advance his claims, but to waive them in all subsequent proceedings. Inaction

by replacement counsel should not be allowed to block any review of trial counsel's actions, effectively sealing this record from further meaningful review.

James Cherry's post-trial counsel was ineffective at the *Krankel* evidentiary hearing when he did nothing to develop Cherry's bare complaints and therefore made no attempt to show prejudice as required under *Strickland*. Because Cherry's *Krankel* evidentiary hearing was inadequate, due to his post-trial counsel's inaction, this proceeding can be presumed unreliable. James Cherry respectfully requests that this Court remand his cause to the trial court for the appointment of new *Krankel* counsel and a proper adversarial evidentiary hearing on his *pro se* claims of ineffective assistance of trial counsel.

In the Alternative, if James Cherry's Claims Were Denied at a Preliminary Krankel Hearing, the State's Adversarial Participation Requires Remand.

The State disputes that Cherry's *Krankel* claims were advanced to the second stage the evidentiary hearing stage but instead asserts that Cherry received a "threshold *Krankel* determination on the merits of his claim." (State's brief at 10) However, if this hearing was meant to be a preliminary hearing, it was conducted incorrectly. As this Court has found:

> "a preliminary *Krankel* inquiry should operate as a neutral and nonadversarial proceeding. Because a defendant is not appointed new counsel at the preliminary *Krankel* inquiry, it is critical that the State's participation at that proceeding, if any, be *de minimis*. Certainly, the State should never be permitted to take

> an adversarial role against a *pro se* defendant at the preliminary *Krankel* inquiry." *People v. Jolly*, 2014 IL 117142, ¶ 38.

The hearing held on January 16, 2013, differs in many critical ways from this Court's description of a preliminary *Krankel* inquiry in *Jolly*. First of all, Cherry was not *pro se*, and he had new counsel who represented him at the hearing. (C. 259) Secondly, the defendant played no role at all in this proceeding. Cherry was present in court, but was never asked to elaborate on or explain his claims of ineffective assistance of trial counsel. (C. 256, 258) Cherry's new counsel had not been present through the trial, and therefore had no knowledge of the trial proceedings. Yet he participated in this inquiry instead of Cherry, who had been present for his entire trial, and who had presented detailed complaints about his trial counsel's deficient representation.

And finally, it was an adversarial hearing, with both the State and Cherry's counsel arguing the merits of Cherry's claims of ineffective assistance of trial counsel. (C. 260-63) If this January 16, 2013, hearing is interpreted as a preliminary *Krankel* inquiry where Cherry just happened to have new counsel, the State's adversarial participation alone is reversible error which requires "remand for a new preliminary *Krankel* inquiry before a different judge and without the State's adversarial participation." *Jolly*, 2014 IL 117142, ¶ 41, ¶ 46.

Therefore, if this Court agrees with the Appellate Court that this was only a preliminary *Krankel* inquiry, James Cherry asserts that the adversarial nature of this inquiry is reversible error, and respectfully requests that this Court remand for a new preliminary *Krankel* inquiry before a different judge. *Jolly*, 2014 IL 117142, ¶ 41, ¶ 46.

CONCLUSION

For the foregoing reasons, James Cherry, defendant-appellee, respectfully requests that this Court uphold the decision of the Appellate Court, which vacated his conviction for armed violence predicated on aggravated battery, and remand his cause to the trial court for resentencing on the merged count of aggravated battery with a firearm.

He further requests that this Court remand his cause to the trial court for the appointment of new *Krankel* counsel and an adversarial evidentiary hearing on his *pro se* claims of ineffective assistance of trial counsel. In the alternative, if this Court agrees with the Appellate Court that this was only a preliminary *Krankel* inquiry, he respectfully requests that this Court remand for a new preliminary *Krankel* inquiry before a different judge.

Respectfully submitted,

JACQUELINE L. BULLARD
Deputy Defender

SUSAN M. WILHAM
ARDC No. 6217050
Assistant Appellate Defender
Office of the State Appellate Defender
Fourth Judicial District
400 West Monroe Street, Suite 303
P.O. Box 5240
Springfield, IL 62705-5240
(217) 782-3654
4thdistrict.eserve@osad.state.il.us

COUNSEL FOR DEFENDANT-APPELLEE

CERTIFICATE OF COMPLIANCE

I, Susan M. Wilham, certify that this reply brief conforms to the requirements of Supreme Court Rule 341(a) and (b). The length of this brief, excluding pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the reply brief under Rule 342(a) is seven pages.

/s/Susan M. Wilham
SUSAN M. WILHAM
ARDC No. 6217050
Assistant Appellate Defender

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Appellate Court of Illinois, No. 5-13-0085.
Plaintiff-Appellant,	)	There on appeal from the Circuit Court of the Twentieth Judicial Circuit, St. Clair County, Illinois,
-vs-	)	No. 10-CF-1007.
JAMES CHERRY,	)	Honorable Michael N. Cook,
Defendant-Appellee and Cross-Appellant.	)	Judge Presiding.

NOTICE AND PROOF OF SERVICE

TO: Lisa Madigan, Attorney General, 100 W. Randolph St., Chicago, IL 60601;

Lawrence Bauer, Deputy Director, State's Attorneys Appellate Prosecutor, 2032 Larkin Avenue, Elgin, IL 60123;

James Cherry, Register No. B-87961, Hill Correctional Center, P.O. Box 1700, Galesburg, IL 61402

The undersigned certifies that an electronic copy of the Reply Brief and Argument in the above-entitled cause was submitted to the Clerk of the above Court for filing on January 22, 2016. On that same date, we caused to be delivered three copies to the Attorney General of Illinois, and mailed three copies to the State's Attorneys Appellate Prosecutor and one copy to appellee in envelopes deposited in a U.S. mail box in Springfield, Illinois, with proper postage prepaid. The original and twelve copies of the Reply Brief and Argument will be sent to the Clerk upon receipt of the electronically submitted filed stamped Reply Brief and Argument.

/s/Susan M. Wilham
SUSAN M. WILHAM
ARDC No. 6217050
Assistant Appellate Defender
Office of the State Appellate Defender
Fourth Judicial District
400 West Monroe Street, Suite 303
P.O. Box 5240
Springfield, IL 62705-5240
4thdistrict.eserve@osad.state.il.us
(217) 782-3654

COUNSEL FOR DEFENDANT-APPELLEE