No. 124112

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellant, -vs- AARON JACKSON Defendant-Appellant	))))))))))	Appeal from the Appellate Court of Illinois, No. 5-15-0274. There on appeal from the Circuit Court of the Twentieth Judicial Circuit, St. Clair County, Illinois, No. 10-CF-425. Honorable John Baricevic, Judge Presiding.

REPLY BRIEF FOR DEFENDANT-APPELLANT

JAMES E. CHADD
State Appellate Defender

CATHERINE K. HART
Deputy Defender

SUSAN M. WILHAM
Assistant Appellate Defender
Office of the State Appellate Defender
Fourth Judicial District
400 West Monroe Street, Suite 303
Springfield, IL 62704
(217) 782-3654
4thdistrict.eserve@osad.state.il.us

COUNSEL FOR DEFENDANT-APPELLANT

E-FILED
12/2/2019 5:01 PM
Carolyn Taft Grosboll
SUPREME COURT CLERK

ORAL ARGUMENT REQUESTED

I.

(Replying to State's Argument II.)

The Prosecutor Committed Reversible Error When He Made Comments in Closing Argument that Were Not Based on the Evidence or Introduced at Trial, In a Case with Closely-Balanced Facts.

In his opening brief, defendant argued that the Prosecutor's closing arguments exaggerated the little physical evidence linking Aaron Jackson to Mayor Thornton's car, giving the jury a mistaken impression of the strength of this evidence, and noted that the appellate court agreed that the Prosecutor's argument misrepresented the trial testimony in two instances–when he stated that the DNA profile from Aaron Jackson's jeans "matched" Mayor Thornton and when he stated that Aaron Jackson's fingerprint on Mayor Thornton's car was "a fresh print." *People v. Jackson*, 2018 IL App (5th) 150274, ¶ ¶ 76-78.

The State asserts that "defendant has forfeited any argument that the prosecutors comments are 'clear and obvious error' because his brief simply identifies the challenged comments and provides no argument or authority for his claim that the statements were error, let alone 'clear and obvious error.'" (State's Brief at 16) However, the appellate court found, and the defendant's brief clearly cited, that the Prosecutor misstated critical evidence in closing argument, thus accepting defendant's argument that error occurred, while failing to conduct a subsequent review to determine whether plain error occurred: "We do not believe either of the two comments we have found to be inaccurate would have been prejudicial enough to warrant reversal even if counsel had objected, and they certainly did not rise to the level of plain error." Defendant's Brief at 13, citing *Jackson*, 2018 IL App (5th) 150274, ¶ 78.

In its opening brief to this Court, the defendant then focused his argument on the point raised in his petition for leave to appeal–that error was found, but the appellate court failed to then conduct any further review to determine if plain occurred. The State has cited no authority that requires the defendant to relitigate an argument that was decided in his favor below, and the State has not attempted to cross-appeal this portion of the case. Ill. S. Ct R. 315(h). Therefore, review of this error proceeds to whether Aaron Jackson can establish plain error.

A.

The prosecutor's misstatements require reversal of Aaron's Jackson's conviction because evidence of his guilt was closely balanced.

The State asserts that Aaron Jackson's contention that he did not shoot Mayor Thornton is "improbable and completely uncorroborated," and that the jury would have to believe six "impossible" points "to conclude that defendant is innocent." (State's Brief at 21-22) The standard set out by the State, however, is overly stringent. When a defendant claims first-prong plain error, "a reviewing court must decide whether the defendant has shown that the evidence was so closely balanced the error alone severely threatened to tip the scales of justice" and if the defendant meets that burden, "prejudice is not presumed; rather, [t]he error is actually prejudicial." *People v. Sebby*, 2017 IL 119445, ¶ 51,quoting *People v. Herron*, 215 Ill.2d 167, 193 (2005).

Moreover, the defense presented evidence rebutting the State's six points, showing that the evidence here is closely balanced. The State first argues that the jury would have to believe that Gilda "Lott lied when she testified that she saw defendant emerge from Mayor Thornton's car and limp away." (State's Brief at 21) Lott, who admitted that she had memory problems, testified that she saw

defendant exit the driver's side door of the car, which is contrary to Nortisha Ball's testimony. (R. 1317-19, 1329) And Lott's testimony was called in question by Michael Thomas Boyne, an investigator who was present when Jackson's defense attorney interviewed Lott; Boyne testified that Lott told them over the telephone that she did not see anything and she did not know anything, but was trying to help her case and get released from jail . (R. 1741) When Boyne spoke with Lott in person, she told him she saw the accident but did not see anyone leave the car and, although she knew Aaron Jackson, she did not see him that night. (R. 1743-44) Lott testified that, after the accident, she called the police from Shopwise Market. (R. 1336-37) But Ashraf Saleh, the night shift clerk at the Shopwise Market testified that he called the police himself, and no one asked him to call 911. (R. 1736, 1738) The evidence as to Lott's credibility, and of whether Lott saw Aaron Jackson exit the car, is at least closely balanced.

The State's second contention is that the jury would have to believe that Nortisha Ball lied when she said she saw Aaron Jackson. (State's Brief at 21) And the evidence is closely balanced here because Nortisha Ball testified at the second trial that she lied at the first trial, in her statements to the police, and in her letter to the trial court, although her mind was now clearer. (R. 1401) Nortisha admitted that she did originally tell the officers that she saw "Chill" get out of the car, but now she was not sure if it was him. (R. 1360-61, 1383) Nortisha testified that her videotaped statement to Agent Bates identifying Jackson "was not true." (R. 1377) She testified that the letter she wrote to the trial court was not true. (R. 1411) Nortisha explained that Detective McAfee told her to name Aaron Jackson, or she would go to jail. (R. 1395) Whether Nortisha Ball identified Aaron Jackson is at least closely balanced.

The State asserts that "Ball's recantation plainly was driven by fear" (State's Brief at 23), and then implies that she was in fear of Aaron Jackson. This rank speculation is belied by Nortisha's testimony that Detective McAfee threatened her with arrest if she did not identify Aaron Jackson. (R. 1394-95) She testified that she told Agent Bates that she saw "Chill' because McAfee told her to do so, and she circled Aaron's photo at McAfee's direction. (R. 1397, 1400) The State's assertion that Jackson presented no exculpatory evidence ignores the cross-examination of Nortisha Ball and her clear testimony that she only identified Aaron Jackson out of fear that McAfee would arrest her. (R. 1394-97)

The State next states that a jury would have to believe there was an innocent explanation for the blood spot on Jackson's jeans, for the gunpowder residue, and the fingerprint on the outside of the mayor's car. (State's Brief at 21) The defense presented explanations for these three items of evidence at trial. Although the left front portion of Aaron Jackson's Tshirt, the right thigh area of his jeans, and his left hand had gunshot residue, this could occur if Jackson "handled, fired, or [was] in close proximity when a weapon was discharged." (R. 1683-85, 1691) Illinois State Police trace evidence analyst Robert Berk agreed that there could be a transfer of gunshot residue particles if a police officer fired a gun and later handcuffed a suspect. (R. 1292)

The DNA evidence was a small stain which produced a partial DNA profile that did not exclude Mayor Thornton, with a relatively low population frequency of one in 46,000 black, one in 73,000 white, and one in 17,000 Hispanic individuals. (R. 1576) The State's expert could not state that the blood was a match for Mayor Thornton because the profile was incomplete at some loci with some alleles

unidentified. (R. 1578, 1582, 1584, 1588-91) The State asserts that the chance that the blood on Jackson's jeans came from another source "is almost zero." (State's Brief at 24) The State offers no citation, either to the record or another source, for this speculation, and it should be disregarded. *People v. Ward,* 215 Ill.2d 317, 332 (2005) (A point raised on appeal that is not supported by citation to relevant authority is waived under Supreme Court Rule 341(h)(7)).

As for the fingerprint evidence, 57 lifts were taken from the car, and 26 contained prints suitable for comparison. (R. 1608) One of the 26 suitable lifts did match Aaron Jackson, although the age of the print could not be determined. (R. 1610-14) The State's speculation that the unsuitable prints could belong to Jackson is mere conjecture, should be disregarded. (State's Brief at 24) As in the closing argument, the State is exaggerating the evidence to paint an inaccurate picture of the strength of its case.

This Court has found that the only question in a first-prong case, once clear error has been established, is whether the evidence is closely balanced. *Sebby*, 2017 IL 119445, ¶ 69. "Prejudice rests not upon the seriousness of the error but upon the closeness of the evidence. What makes an error prejudicial is the fact that it occurred in a close case where its impact on the result was potentially dispositive." *Sebby*, 2017 IL 119445, ¶ 68. Although the court below focused only on the error and failed to conduct a review of the closeness of the evidence, the evidence here was closely balanced because "credibility was the only basis upon which [his] innocence or guilt could be decided." *People v. Naylor*, 229 Ill.2d 584, 608 (2008). And here, Gilda Lott and Nortisha Ball were simply not credible witnesses to whether Aaron Jackson exited Mayor Thornton's car when they testified

that he used two different doors, and they contradicted each other on their locations from which they witnessed the car crash, and whether they were together at the time of the crash. (R. 1312, 1317, 1338, 1351, 1397-99) Moreover, Nortisha completely recanted her testimony that Aaron Jackson exited the car at all, testifying that she identified him to Agent Bates because Detective McAfee told her to do so. (R. 1397, 1400)

The court below has already found that the Prosecutor misstated critical evidence in its closing argument. *Jackson*, 2018 IL App (5th) 150274, ¶ ¶ 76, 78. These were not isolated, unrelated errors. Instead, the Prosecutor took two pieces of physical evidence and misstated the clear testimony of the State's expert witnesses to place Aaron Jackson at the crime scene, on that day, with the victim's blood on his clothing. These misstatements helped the State overcome the weaknesses in their eyewitness testimony, and were prejudicial in this case with its closely-balanced facts. Therefore, this Court should find that the evidence here is closely-balanced, and vacate Aaron Jackson's conviction due to the prosecutorial misconduct in closing argument.

B.

These errors require reversal of Aaron's Jackson's conviction because they were serious and calculated to exaggerate the scant evidence from the crime scene.

The State asserts that the cases cited by the defendant are "inapposite" because they involve "a pervasive course of egregious misconduct," which implies that such a level of misconduct did not occur here. (State's Brief at 26) But the misstatements here were not isolated errors. The Prosecutor's pattern of misconduct exaggerated and misrepresented the scant physical evidence in this case– a small blood drop with a low population frequency that did not exclude Mayor Thornton

and Jackson's fingerprint on the outside of the mayor's car. In order to place Aaron Jackson at the crime scene, the Prosecutor needed the blood to be a "match" and the print to be "fresh." While the State witnesses were unable to testify to these conclusions, the Prosecutors argued them as fact to the jury. This pervasive pattern of misconduct denied Aaron Jackson a fair trial and requires reversal and remand for a new trial. See *People v. Blue*, 189 Ill.2d 99, 139 (2000).

C.

Aaron Jackson's attorney was ineffective when he failed to object to the Prosecutor's repeated misstatements of the evidence.

Defendant relies on the arguments set forth in his opening brief.

II.
(Replying to State's Argument I.)

Aaron Jackson Was Not Proven Guilty Beyond a Reasonable Doubt when the Alleged Eye-Witnesses Contradicted Each Other and the Physical Evidence Linking Him to the Crime Scene Was Weak and Did Not Place Him Inside the Car.

In his opening brief, Aaron Jackson asserted that he was not proven guilty beyond a reasonable doubt when the State's two witnesses to Mayor Thornton's shooting, Gilda Lott and Nortisha Ball, contradicted each other and thus provided unreliable testimony. In response, the State asserts that "defendant's arguments regarding Lott's and Bell's (sic) credibility were for the jury to resolve, not reviewing courts." (State's Brief at 12) However, as this Court has found, "[w]hile credibility of a witness is within the province of the trier of fact, and the finding of the jury on such matters is entitled to great weight, the jury's determination is not conclusive. Rather, we will reverse a conviction where the evidence is so unreasonable, improbable, or unsatisfactory as to justify a reasonable doubt of defendant's guilt." *People v. Smith*, 185 Ill.2d 532, 542 (1999).

In *Smith*, Virdeen Willis, Jr. was fatally shot outside of the Shamrock Lounge. Although there were several witnesses to the events inside the bar before the shooting, including a bartender who was watching the defendant and his two companions because he feared they were planning to rob the bar, only Debrah Caraway testified that she witnessed the shooting. *Smith*, 185 Ill.2d at 538-39. Debrah testified that a man came out of the lounge alone, and was followed seconds later by a man she recognized as Smith, who walked up to the first man and shot him. *Smith*, 185 Ill.2d at 539.

When analyzing the evidence against Smith, this Court found that the "most glaring deficiency in the evidence involves Debrah's account of how the shooting occurred," when two eye-witnesses testified that Willis left the bar with two companions. *Smith*, 185 Ill.2d at 542. Additionally, the bartender testified that Smith and his two companions left the bar four to five minutes before Willis and his companions, and the State argued that the bartender had been watching Smith closely due to his belief that a robbery was about to occur. *Smith*, 185 Ill.2d at 543. Debrah was further impeached by her conflicting statements about her drug use on the night of the shooting, the fact that she did not report the shooting that evening and continued to drink at another bar with her sister, and her motive to deflect blame from her sister and her boyfriend. This Court reversed Smith's conviction, concluding that, "given the serious inconsistencies in, and the repeated impeachment of, Debrah Caraway's testimony, we find that no reasonable trier of fact could have found her testimony credible." *Smith*, 185 Ill.2d at 545.

Similarly, here both Gilda Lott and Nortisha Ball had serious inconsistencies in their testimonies which clearly impeached the other. Gilda Lott, who admitted that she gave an earlier statement that a man got out of the second car and helped Jackson into it, testified that Aaron Jackson got out of the driver's side of Thornton's car, which would have required him to crawl past Mayor Thornton's body and the deployed airbag. (R. 1317-19, 1329) However, Nortisha Ball stated that the person who exited the car used the passenger side door. (R. 1351) Lott testified that Nortisha was talking with her when the car hit the tree, and they were in a field outside her daughter's house, at 1535 N. 47th. (R. 1312, 1338) But Nortisha testified that she did not know Gilda Lott, she did not see anyone around Lott's purported location at the time of the car crash, and she was by herself at the corner of 48th Street and Caseyville Avenue. (R. 1397-99)

The State further argues that, based on Nortisha Ball's letter to the trial court soon after the first trial, "it is reasonable to conclude that she recanted due to threats from defendant or his family." (State's Brief at 13) This assertion ignores the fact that Nortisha repeatedly stated on cross-examination that she was not threatened "in the streets." (R. 1401-02) Nortisha explained that she wrote the letter because she was scared when her name was in the newspaper, and that the letter was not true. (R. 1410-11)

The State asserts that defendant conceded that bloodstain on Aaron's jeans was evidence that he had been inside the Thornton vehicle. (State's Brief at 15, quoting Defendant's Brief at 24) The entire quote from defendant's brief was, "There was no evidence that Aaron Jackson had been inside the Thornton vehicle, other than the blood spot on his jeans, a spot with an extremely low population frequency." It is clear that this sentence, pulled out of context from Defendant's brief, is not a concession but a statement on the paucity of evidence and specifically the weakness of the DNA evidence.

The State further asserts that the defendant asking this Court to draw inferences from the record "arguably favorable to him" is "contrary to the governing *Jackson* standard." (State's Brief at 13, referencing *Jackson v. Virginia*, 443 U.S. 307 (1979)) However, as this Court has found, balancing the requirement to "allow all reasonable inferences from the record in favor of the prosecution," while not allowing unreasonable inferences, leads to the conclusion that "if only one conclusion may reasonably be drawn from the record, a reviewing court must draw it even if it favors the defendant." *People v. Cunningham*, 212 Ill.2d 274, 280 (2004). And here it is reasonable to conclude that the lack of evidence placing Aaron Jackson inside Mayor Thornton's vehicle, along with the unbelievable and contradictory testimony of the two alleged eye-witnesses, does not prove that Aaron Jackson shot Mayor Thornton beyond a reasonable doubt. For these reasons, his conviction should be reversed.

III.

Because Aaron Jackson Showed a Possibility That His Trial Attorney Neglected His Case, the Trial Court Erred When it Refused to Appoint Counsel to Investigate Jackson's Claims That His Trial Attorney Was Ineffective.

The State begins its argument by asserting that Aaron Jackson has "forfeited his new argument that the trial court erred by considering the merits of his ineffective assistance allegations." (State's Brief at 28) In Aaron Jackson's opening brief in the appellate court, he did cite to the "lacks merit" language in *People v. Nitz*, 143 Ill.2d 82, 134 (1991), and set out the familiar *Strickland* standard. (Defendant's appellate brief at 48-49) However, Jackson consistently argued that he showed possible neglect of his case, so that he was entitled to the appointment of counsel to further explore his claims of ineffective assistance of counsel. (Defendant's appellate brief at 48-49, 53-54)

Moreover, Jackson's petition for leave to appeal clearly set out that the proper standard at the preliminary inquiry was "possible neglect" and not ineffective assistance. (Defendant's petition for leave to appeal, 2-4) As such, this issue is properly before this Court. See, *People v. Donoho*, 204 Ill.2d 159, 169 (2003). Additionally, as this Court has found, "[w]aiver limits the parties' ability to raise an issue, not this court's ability to consider an issue." *Donoho*, 204 Ill.2d at 169, citing *People v. Kliner*, 185 Ill.2d 81, 127 (1998). If this Court concludes that this issue is not properly before this Court, Aaron Jackson asks that the Court resolve this issue in light of the frequency with which it occurs and the need to provide lower courts with resolution.

A.

The standard of review for determining error and the standard of harmless error for determining if relief is warranted are distinct standards.

As the State noted, in the appellate court Jackson stated that the manifestly erroneous standard is used to assess whether claims would be meritorious, such that reversal of the court's decision is warranted. (State's Brief at 37, citing (Defendant's Appellate Brief at 48, 54) However, here the reviewing court held Jackson's claims to the standard of ineffective assistance. *Jackson*, 2018 IL App (5th) 150274 ¶ 107, citing *People v. Crutchfield*, 2015 IL App (5th) 120371, ¶ 20. However, Jackson, as a *pro se* defendant at a preliminary *Krankel* inquiry, only had to meet the lower threshold of possible neglect to move on to an evidentiary hearing where he would be represented by counsel. *Jolly,* 2014 IL 117142, ¶ 29. Therefore, since the reviewing court applied the wrong test, and this Court is reviewing the propriety of that review, the standard of review is *de novo*. *Jolly*, 2014 IL 117142, ¶ 28.

B.

Aaron Jackson showed possible neglect of his case, but the trial court and the appellate court erroneously applied the higher standard of ineffective assistance of counsel.

Aaron Jackson only had to meet the lower threshold of possible neglect in order to have counsel appointed to assist him in arguing his claims of ineffective assistance of counsel at an evidentiary hearing. "If the allegations show possible neglect of the case, new counsel should be appointed." *People v. Jolly,* 2014 IL 117142, ¶ 29, quoting *People v. Moore*, 207 Ill.2d 68, 77–78 (2008). "*Krankel* serves the narrow purpose of allowing the trial court to decide whether to appoint independent counsel to argue a defendant's *pro se* posttrial ineffective assistance claims." *Jolly*, 2014 IL 117142, ¶ 39, quoting *People v. Patrick*, 2011 IL 111666, ¶ 39.

The State relies upon *People v. Chapman*, 194 Ill.2d 186, 230-31 (2000), to assert that the proper inquiry is whether defendant's claim "lacks merit." (State's Brief at 31) While repeatedly citing the "no merit" language of *Chapman*, the State omits that this Court reviewed the allegations for "possible neglect" and concluded, "[d]efendant's allegations did not show possible neglect of the case." *Chapman*, 194 Ill.2d at 230-231. And the court below failed to review Jackson's claims for possible neglect, instead holding them to the higher standard of ineffective assistance. *Jackson*, 2018 IL App (5th) 150274 ¶ 122.

The State has attempted to reframe the defendant's argument, from whether he has to show "possible neglect" or the higher standard of "ineffective assistance," into an argument that the merits of a claim cannot be reviewed at this preliminary inquiry. (State's Brief at 29) This is a misstatement of defendant's argument. However, since two different hearings are contemplated, with and without counsel, it is evident that the "possible neglect" standard that a *pro se* defendant must meet at the preliminary inquiry stage is necessarily a lower standard than the standard for the second hearing–the evidentiary hearing with counsel appointed to assist the defendant in determining whether his trial counsel was ineffective. The preliminary inquiry serves as a screening of the merits of the defendant's claim of possible neglect. *Jolly,* 2014 IL 117142, ¶ 29. But it is not meant to be a final review of the merits of the allegations of ineffective assistance of counsel., or there would be purpose for further *Krankel* proceedings.

At a preliminary *Krankel* inquiry, the "possible neglect" standard that must be met by a *pro se* defendant is something less than *Strickland* ineffectiveness, which only applies after the appointment of new counsel to assist the defendant

in presenting his claims. Much like the first stage of the post-conviction process, the preliminary *Krankel* inquiry reviews a *pro se* claim for possible neglect, to see if the appointment of counsel is necessary to further refine and present these claims of ineffective assistance. *See, People v. Tate*, 2012 IL 112214, ¶ 20. This "possible neglect" standard–which is analogous to the "arguable" *Strickland* test applicable for first-stage post-conviction petitions alleging ineffective assistance of counsel–was met by Aaron Jackson. Therefore, his cause should be remanded to the trial court for the appointment of counsel and an evidentiary hearing on the merits of his claims of ineffective assistance of counsel.

IV.

The State's Adversarial Participation in a Preliminary *Krankel* Inquiry Is Not Subject to Harmless Error Review.

In his opening brief to this Court, Aaron Jackson noted that the appellate court agreed that the State's participation in his preliminary *Krankel* inquiry was more than *de minimis*, but then conducted a harmless error review and concluded that the trial court still would have found no merit to Jackson's assertions of ineffective assistance regardless of the State's improper adversarial participation. (Defendant's Brief at 33, citing *People v. Jackson*, 2018 IL App (5th) 150274, ¶ ¶ 88, 103-05. Quoting *People v. Jolly*, 2014 IL 117142, ¶ 39, Jackson argued that the State's adversarial participation left the parties without an objective record for harmless error review. (Defendant's Brief at 35)

The State asserts that Jackson has forfeited this argument, as he argued in the appellate court that *Jolly* allows harmless error review. (State's Brief at 46-47, quoting Defendant's Reply Brief in 5-15-0274) The State quotes from a portion of Defendant's brief, and the complete section is needed for proper context:

> "Although the Court in *Jolly* found that the State's adversarial input was subject to harmless-error review, it noted that a "record produced at a preliminary *Krankel* inquiry with one-sided adversarial testing cannot reveal, in an objective and neutral fashion, whether the circuit court properly decided that a defendant is not entitled to new counsel." *Jolly,* 2014 IL 117142, ¶¶ 39, 45."
> (Defendant's Reply Brief in 5-15-0274, Page 20.)

Having reviewed this argument, Defendant concedes that he misstated the law in this earlier reply brief. This Court in *Jolly* was distinguishing *People v. Nitz*, 143 Ill.2d 82 (1991), where "there was no concern with the adequacy of the record from the preliminary *Krankel* proceeding or with the manner that the proceeding was conducted." *Jolly*, 2014 IL 117142, ¶ 44.

This Court in *Jolly* found that the State's adversarial participation thwarted the court's ability to produce a neutral, objective record for the reviewing Court, and thus required remand for a new hearing, before a new judge, and without the State's participation. *Jolly*, 2014 IL 117142, ¶ 46. Similarly here, as the lower court found, the State participated in more than *de minimus* "adversarial advocacy." *Jackson*, 2018 IL App (5th) 150274, ¶ ¶ 90-92. Therefore, the record produced here is insufficient for harmless error review.

Moreover, if this Court does find this issue is forfeited, Jackson notes that this Court has found that "forfeiture is an admonishment to the parties but not a limitation on this court's jurisdiction." *People v. Gawlak*, 2019 IL 123182, ¶ 26, quoting *People v. Robinson*, 223 Ill.2d 165, 174, (2006). Therefore, he asks that this Court review this issue in light of its importance and the likelihood that it will continue to occur, particularly since there is a split of opinion within the lower courts. *People v. Skillom*, 2017 IL App (2d) 150681, ¶ 28 (the trial court's *Jolly* error was harmless) and *People v. Gore*, 2018 IL App (3d) 150627, ¶ 39 (argument that any error was harmless beyond a reasonable doubt is foreclosed by *Jolly*.)

The State concedes in its brief that "errors in *Krankel* proceedings are subject to harmless error review, provided the record is sufficiently developed to evaluate the defendant's claims." (State's Brief at 47) However, as this Court found in *Jolly*, "[a] record produced at a preliminary *Krankel* inquiry with one-sided adversarial testing cannot reveal, in an objective and neutral fashion, whether the circuit court properly decided that a defendant is not entitled to new counsel." *Jolly,* 2014 IL 117142, ¶ 39*, citing People v. Patrick,* 2011 IL 111666, ¶ 39. This type of error simply will never produce the type of neutral record required for harmless error review.

The State then attempts to frame the Prosecutor's input as "limited" and occurring at "the very end of the hearing." (State's Brief at 49) However, the State admits that the Prosecutor gave his opinion on Jackson's claims and argued that defense counsel was "a tenacious opponent" who provided "an excellent defense." (State's Brief at 50) This is similar to the improper State participation in *Jolly*, where "[t]he State also presented evidence and argument contrary to defendant's claims and emphasized the experience of defendant's trial counsel." *Jolly*, 2014 IL 117142, ¶ 40. As this Court found, "this is contrary to the intent of a preliminary *Krankel* inquiry" and "we cannot conclude that the circuit court's error in this case was harmless beyond a reasonable doubt." *Jolly*, 2014 IL 117142, ¶ 40.

The State sets out hypotheticals where the State participates in a preliminary *Krankel* inquiry, and then asserts that defendant's theory "would require automatic reversal and remand for appointment of new counsel to pursue plainly meritless claims." (State's Brief at 47-48) However, that is not the remedy set out by this Court, or sought by this defendant. Reversal under *Jolly* based on the State's improper adversarial participation requires "remand for a new preliminary *Krankel* inquiry before a different judge and without the State's adversarial participation." (Defendant's Brief at 38, citing *Jolly*, 2014 IL 117142, ¶ 46.

Moreover, the State's hypotheticals overlook the purpose of the preliminary *Krankel* inquiry–to learn if defense counsel committed possible neglect of the defendant's case. *Jolly,* 2014 IL 117142, ¶ 29. The State's theoretical comments and actions shed no light on the decision-making process of the defense attorney, which is the subject of the preliminary inquiry. If the defense attorney made critical decisions without reviewing applicable caselaw or the discovery to determine if

his position was legally and factually proper for the case, then he very well could have committed "possible neglect." The inquiry is needed for the defendant to present his allegations, and for defense counsel to explain his decisions and actions on the case. And, as the appellate court found here, it is error when "the State was permitted to argue against the defendant's position in a hearing in which he appeared *pro se* without having waived the right to counsel." *Jackson*, 2018 IL App (5th) 150274, ¶ 103.

This Court should reverse the judgments of the trial court and the appellate court denying the appointment of new counsel, and remand for further proceedings because the trial court erred when it allowed the inquiry to become adversarial and the appellate court erred when it found that such an error is subject to harmless error review.

CONCLUSION

For the foregoing reasons, Aaron Jackson, Defendant-Appellant, respectfully requests that his conviction be reversed because he was not proven guilty beyond a reasonable doubt. Even if the evidence does not support reversal, the State misstated critical pieces of evidence in closing argument, and the evidence here was at least closely balanced so that Aaron Jackson's conviction should be reversed and this cause remanded for a new trial.

Additionally, the failure of both the trial court and the appellate court to apply the possible neglect test requires reversal of the denial of Aaron Jackson's *Krankel* motion and remand for appointment of counsel to investigate his claims for a *Krankel* evidentiary hearing. In the alternative, because his preliminary *Krankel* inquiry was tainted by the State's adversarial participation, Aaron Jackson respectfully requests that this Court reverse the trial court's denial of his *Krankel* motion and remand this cause for a new inquiry before a new trial court, without improper State participation.

Respectfully submitted,

CATHERINE K. HART
Deputy Defender

SUSAN M. WILHAM
Assistant Appellate Defender
Office of the State Appellate Defender
Fourth Judicial District
400 West Monroe Street, Suite 303
Springfield, IL 62704
(217) 782-3654
4thdistrict.eserve@osad.state.il.us

COUNSEL FOR DEFENDANT-APPELLANT

CERTIFICATE OF COMPLIANCE

I certify that this reply brief conforms to the requirements of Rules 341(a) and (b). The length of this reply brief, excluding pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, and the certificate of service, is nineteen pages.

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

No. 124112

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellant, -vs- AARON JACKSON Defendant-Appellant	))))))))))	Appeal from the Appellate Court of Illinois, No. 5-15-0274. There on appeal from the Circuit Court of the Twentieth Judicial Circuit, St. Clair County, Illinois, No. 10-CF-425. Honorable John Baricevic, Judge Presiding.

NOTICE AND PROOF OF SERVICE

Mr. Kwame Raoul, Attorney General, 100 W. Randolph St., 12th Floor, Chicago, IL 60601, eserve.criminalappeals@atg.state.il.us;

Mr. David J. Robinson, Deputy Director, State's Attorney Appellate Prosecutor, 725 South Second Street, Springfield, IL 62704, 4thdistrict@ilsaap.org;

Mr. James A. Gomric, St. Clair County State's Attorney, 10 Public Square, Belleville, IL 62220, james.gomric@co.st-clair.il.us;

Mr. Aaron Jackson, Register No. B26006, Menard Correctional Center, P.O. Box 1000, Menard, IL 62259

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. On December 2, 2019, the Reply Brief was filed with the Clerk of the Supreme Court of Illinois using the court's electronic filing system in the above-entitled cause. Upon acceptance of the filing from this Court, persons named above with identified email addresses will be served using the court's electronic filing system and one copy is being mailed to the defendant-appellant in an envelope deposited in a U.S. mail box in Springfield, Illinois, with proper postage prepaid. Additionally, upon its acceptance by the court's electronic filing system, the undersigned will send 13 copies of the Reply Brief to the Clerk of the above Court.

/s/ Rachel A. Davis
LEGAL SECRETARY
Office of the State Appellate Defender
400 West Monroe Street, Suite 303
Springfield, IL 62704
(217) 782-3654
Service via email will be accepted at
4thdistrict.eserve@osad.state.il.us