Corrected Appellee brief
filed by order of 6/4/2025.

No. 130067

IN THE SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	)	**On *Appeal from the Appellate***
	)	***Court Of Illinois, First District,***
Plaintiff-Appellee,	)	**Case No. 1-18-1070**
	)	
	)	
	)	***There on Appeal from the Circuit***
v.	)	***Court of Cook County, Illinois,***
	)	**Case No. 12 CR 1655501**
MATTHEW SMITH,	)	
	)	**The Hon. Michelle M. Pittman,**
Defendant-Appellant.	)	**Judge Presiding**

CORRECTED BRIEF AND ARGUMENT FOR DEFENDANT-APPELLEE

STEVEN A. GREENBERG
NICHOLAS BURRIS
GREENBERG TRIAL LAWYERS
53 W. JACKSON BLVD., SUITE 315
CHICAGO, ILLINOIS 60604
(312) 879-9500
Steve@Greenbergcd.com

Attorney for Defendant-Appellee

E-FILED
6/4/2025 2:02 PM
CYNTHIA A. GRANT
SUPREME COURT CLERK

ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Constitutions and Rules

Cases

Treatises

ISSUES PRESENTED

THE COURT COMMITTED STRUCTURAL ERROR WHEN IT EXCLUDED SMITH'S MOTHER FROM THE PROCEEDINGS

SMITH RAISED FOUR OTHER CLAIMS OF ERROR BEFORE THE APPELLATE COURT: (1) THAT A LINEUP HE WAS PLACED IN WAS UNDULY SUGGESTIVE; (2) THAT EXPERT TESTIMONY WAS NOT PROPERLY DISCLOSED; (3) IMPROPER CLOSING ARGUMENT (THAT THE COURT TERMED "SERIOUS ERROR"); AND (4) THAT A PHOTO SHOULD NOT HAVE BEEN PROVIDED TO THE JURORS WHILE THEY WERE DELIBERATING. THE APPELLATE COURT RULED IN HIS FAVOR ON EACH ISSUE. INDEPENDENTLY. EACH OF THE ERRORS DENIED SMITH A FAIR TRIAL AND WOULD HAVE REQUIRED REVERSAL. THUS, REGARDLESS OF WHETHER HE WAS DENIED A PUBLIC TRIAL, REVERSAL IS STILL REQUIRED

I. STATEMENT OF FACTS [1]

Matthew Smith was indicted for first-degree murder, attempted first-degree murder, and aggravated battery in connection with the death of Kevin Guice, which occurred following a disturbance at a bar called The Pressbox. The aggravated battery charge was dismissed before the trial, and the attempted murder charge was dismissed during the trial. On September 15, 2017, a jury convicted Smith of the first-degree murder. The trial court sentenced him to 30 years in prison in the Illinois Department of Corrections.

Motion to Suppress Identification

Smith filed a pre-trial motion to suppress two physical lineups conducted at the Harvey police station, which was denied. Even though the suspect was described as having a mohawk hairstyle and wearing a red shirt, both lineups failed to include anyone with a mohawk other than Smith. In the second lineup, Smith was required to wear a red shirt that had been recovered, which matched the description of the shirt witnesses said the shooter wore. No one else wore red. Also, the other individuals in the lineup were much older than Smith. Three trial witnesses identified Smith in this lineup.

THE TRIAL

1. The Exclusion of Smith's Mother from the Trial

Before jury selection, defense counsel requested that Trae Smith, the defendant's mother, be allowed to remain in the courtroom. The State argued that Trae was a witness. Defense counsel contended the characterization was unrealistic. The prosecutor acknowledged the unlikelihood of her testifying but explained that Trae was present at the police station during Smith's interactions with law enforcement, which were recorded on

[1] Smith has only included those limited facts needed for the issues raised.

video, and while Smith had made no statements during the interview and had requested an attorney if Smith's testimony conflicted with the recorded interview—during which he remained silent—there was a possibility that Trae could be called as a witness. Even though it made no sense, the trial court excluded Ms. Smith from the proceedings. The court instructed the State to notify it if it decided not to call her as a witness at any point during the trial. As a result, Trae was excluded from the courtroom, starting with jury selection. (R. 334-337).

2. Opening Statements

During the opening, beginning what turned out to be a pattern, the State told the jurors about an undisclosed incriminating statement it claimed Smith had made, using the 'n-word.' (R. 629). When counsel objected to the statement not being tendered in discovery, the State claimed they were informed of the statement "today," still not explaining why they had not informed the defense after learning of it.

The State told the jurors they would hear testimony about an incident at a bar called The Pressbox, where Smith approached Mr. Guice (the victim) in a parking lot outside when he shot and killed him. The State said a second person would testify Smith shot Guice (they never did), and there would also be testimony about a second shooter in the "far back end of the parking lot," which the prosecutor said was unrelated to the case (so why mention). (R. 631-639).

In her opening statement, Smith's attorney described the situation as "complete chaos," both inside and outside of The Pressbox. Glass bottles, chairs, and punches were being thrown, while a security guard deployed pepper spray. The large crowd inside the venue rushed outside into the parking lot when more than one person fired multiple shots.

Counsel argued that Smith was not the shooter of Mr. Guice and that the witnesses' perceptions were influenced by loud music, alcohol, the dark and crowded club, pepper spray, the crowd's frantic escape, and a "dark and chaotic parking lot." (R. 640-641).

3. The Evidence

Arlanza Townsend's Testimony—Townsend testified that on August 10, 2012, he attended an anniversary event at The Pressbox with Mr. Guice, who was the president of a social club gathering there. He estimated there were around 150 attendees. During a moment of silence for a deceased member, someone in the crowd shouted an obscenity, leading to a fight. Townsend was in the deejay booth when a security guard used pepper spray or mace, prompting him, Mr. Guice, and others to exit. Outside, he observed a man in a red shirt, later identified as Smith, running toward a vehicle. Smith emerged with a silver gun and fired toward Townsend. Townsend recognized Smith and identified him in a lineup the next day. (R. 653-672).

Latrice Perdomo's Testimony—Ms. Perdomo, the vice president of the social club, attended the event at The Pressbox. During a moment of silence, a man yelled obscenities, leading to a fight. Security responded with mace, prompting Mr. Guice to gather the female members, including Ms. Perdomo, to exit.

Outside, they saw ongoing fighting and heard shots being fired into the air, though Ms. Perdomo could not identify the shooter. A young man with a mohawk, wearing a red, white, and blue button-up shirt, ran up and fired shots at Mr. Guice, who was about five feet away. The shooter fled, and shortly after a car sped away, hitting people as it left. Ms. Perdomo identified Smith in a lineup; he was the only one wearing a red shirt and a mohawk. (R. 705; 725-736).

Salenthia Davis' Testimony—Ms. Davis, a social club member at The Pressbox, testified, despite objections, that when Mr. Guice requested a moment of silence, a man wearing a red and white shirt and sporting a mohawk shouted, "F… that. You're not going to have a moment. I'm not trying to hear it." Following a brawl, she saw the man with the mohawk and red and white shirt, along with a tall man with dreadlocks, leaving The Pressbox. Shortly after, Mr. Guice and other social club members also exited the premises. Later that evening, she identified the individual with the mohawk and red and white shirt in a lineup. (750-763).

Motion for a Mistrial—After Ms. Davis testified, the counsel requested a mistrial because (again) they had not been informed the statement "F… that…" would be attributed to Smith. They noted that the statement's wording was not provided; they were only aware that someone had shouted. The State admitted, "I don't believe that that's specifically listed in any of the reports." The request for a mistrial was denied. (R. 767-772).

Aaliyah Ali's Testimony—Ms. Ali was at The Pressbox when she heard someone shout obscenities, prompting her to go outside as the crowd poured out. She observed a man with dreadlocks wearing a blue shirt and heard a shot ring out. (R. 775-781). She noticed another individual in a red and white shirt with a mohawk, whom she identified as Smith, pointing a gun and shooting at Mr. Guice. Later that evening, she identified Smith in a lineup. (R. 782-787). Ms. Ali did not remember informing the officers that she saw two shooters or that she had not seen anyone with a gun before hearing the shots. (R. 796-798).

Forensic Scientist Mary Wong—Ms. Wong was qualified as an expert in primer and gunshot residue analysis (R. 917). She tested the recovered red shirt and both of Smith's hands for gunshot residue. The samples from his hand's right and left back contained particles characteristic of background samples. This led her to conclude that Smith "may not have discharged a firearm with either hand. If he did, then the particles were either removed by activity, not deposited, or not detected by the procedure" (R. 924).

The State was then allowed to have Ms. Wong testify that during her 2004 training, she learned that laboratories frequently reported positive findings from a single tri-component particle (R. 933-936). Additionally, she noted that in a review of 100 gunshot residue kits at her lab, only 34 percent tested positive (R. 937-938). Not surprisingly, the information had not been disclosed.

Officer Gregory Williams—Officer Williams testified that he observed Smith, wearing a white tank top and tan pants, fleeing from the front passenger side of a car (R. 996-999). After taking Smith to his squad car, Officer Williams returned to the vehicle and discovered a silver revolver lying on the floor of the passenger side beneath the dashboard. He noted six spent cartridge cases in the revolver's cylinder. Smith was subsequently taken to the Harvey police station and placed in Officer Randle-El's custody (R. 1002-1006).

During cross-examination, Officer Williams stated that when he arrived at The Pressbox, the scene was chaotic, with people screaming. He estimated there were about 100 people outside and did not recall previously stating that 200 to 300 people were present. He did not speak to any of the individuals who were screaming. Officer Williams did not witness anyone firing the revolver or anyone holding a gun. (R. 1009-1012).

Officer Dominique Randle-El's Testimony—Officer Randle-El was the booking officer. He testified that when Smith was arrested a photograph was recovered, along with three one-dollar bills, a cell phone, a fake I.D., gum, candy, earrings, a battery, and a phone cover. (R. 1023-1028).[2]

Officer Daniel Walz's Testimony—On August 11, 2012, at approximately 1:26 a.m., he received a dispatch call reporting a "large fight" at The Pressbox. Upon his arrival, he witnessed a chaotic scene with a large group of people. He pursued a vehicle until it stopped near a gas station. The front passenger, who was wearing a white tank top, fled while Officer Walz secured the driver and a backseat passenger who attempted to escape. (R. 1033-1038). After Officer Williams arrested the front-seat passenger, he returned to the vehicle and assisted Officer Walz in conducting a search. They recovered a revolver located in the "front passenger area," as well as a red and white shirt found on the front floorboard. (R. 1039-1044). Officer Walz stated that the scene was highly chaotic, with people screaming, some running, and vehicles hastily departing the parking lot.

Deputy Chief Jason Banks Testimony—Deputy Chief Banks was working in the Investigations Division of the Harvey Police Department at the time of the incident. He conducted the lineups Smith was placed in. (R. 1059-1060). The second lineup was conducted at approximately 10:00 p.m., and the fillers in this lineup differed from those in the first. Smith was in the fourth position. (R. 1067). Ms. Perdomo, Ms. Ali, and Ms. Davis each identified Smith in this lineup; the others who viewed it did not testify. (R. 1069, 1072-1074). Smith was the only person in the second lineup wearing red clothing or having a hairstyle resembling a mohawk or high fade. (R. 1088-1092).

[2] The photo was the photo that was the subject of a pre-trial request to exclude, depicting Smith and others, and gang signs. It was marked as State Ex. 63. It was not published to the jury.

After the State rested and Smith told the trial court he would not be testifying, his mother was allowed to return to the courtroom, before the defense began presenting their case. (R. 1144-1145). The defense called one witness, an investigator.

4. Closing Arguments

The State argued that Smith instigated a violent encounter by shouting obscenities during a moment of silence, which escalated into a fight. When Mr. Guice went outside to assist female social club members to their vehicles, Smith, identifiable by his red shirt, ran up and shot Mr. Guice, who then collapsed and later died. Smith removed his red shirt as he fled, apprehended in a white t-shirt (R. 1175-1178). Witnesses Ms. Perdomo, Ms. Ali, and Mr. Townsend observed the shooting, and lineups confirmed Smith's identification. The prosecutor noted that although Ms. Wong testified that three tri-particle components are typically needed for a positive gunshot residue result, the jury could weigh the presence of one tri-particle component (R. 1178-1180).

The defense countered that the chaotic atmosphere inside The Pressbox, marked by darkness, running, and screaming, could have contributed to a misidentification (R. 1189-1192). Discrepancies existed between witness accounts: Mr. Townsend, positioned two car lengths away, claimed the shooter retrieved a gun from a vehicle before firing, though he did not see who was targeted. In contrast, Ms. Perdomo, who walked with Mr. Guice to her car, testified that the shooter approached and fired directly without retrieving a weapon from a vehicle (R. 1192-1194, 1203-1204). Further complicating matters, Ms. Davis initially told the defense investigator that three people were involved but testified to seeing only two, describing an individual in a red and blue flannel shirt, not Smith, who wore a red, white, and black shirt with tan pants. (R. 1197-1199). The defense challenged the

lineups as suggestive, arguing Smith was the only participant with a mohawk and the identifications were tainted by prior discussions about the incident. (R. 1201-1202). Additionally, ten .380 cartridge cases were found approximately 80 feet from where Mr. Guice fell, suggesting a different gun could have been used by an alternate shooter. (R. 1205-1206).

In rebuttal, the State asserted that acquittal was only possible if "all four people lied, lied to your face," a comment that was objected to but overruled. (R. 1209, 1214). Referring to the defense theory as "fairytales," the State faced more objections, which were also overruled. (R. 1212-1213). Regarding the GSR, the State argued that though only one component was found on Smith's right hand, this did not preclude him from firing a gun, noting Smith's actions to possibly conceal evidence, like hand-rubbing and changing clothes. (R. 1224). The State emphasized that out of 100 submitted GSR kits, only 34 had positive findings, contending this was not "CSI" precision but still indicative that Smith might have fired the gun. It asserted that lineup fillers were sufficiently similar to Smith. (R. 1223-1228). The prosecutor vouched for his own case, telling jurors: "The difference between me and the defense attorney is that there is no question the defendant killed Kevin Guice" (R. 1229). He warned the jurors that only they could protect society—he *and* the judge were helpless. (R. 1230). Objections were repeatedly overruled.

The State painted Smith as a fugitive, emphasizing his flight from a stopped vehicle and implying continued evasion: "To this day…he's still running," as if he did not have a right to a trial. The defense objected, but it was overruled. The State then concluded, "He's still running from justice," telling the jury that they alone had the power to hold Smith accountable for killing Kevin. The only path to acquittal, the State argued, was "if you

ignore the testimony that you have, if you find the four people who were in front of you liars." (R. 1228-1230).

5. The Jury's Note

During deliberations, the court received a note from the jury requesting the "photo taken inside the bar," which both the court and the State believed referred to the photograph recovered from Smith, identified as State Exhibit 63. It showed Smith, in the red shirt, with a group of other young men who were flashing gang signs. (C. 169). Earlier, the trial court had ruled that the jurors would not receive this photo because there had been no testimony regarding when or where it was taken.

The State argued that the photograph should be provided to the jury because it was properly admitted and relevant to the case. They contended that there was an appropriate foundation for its admission since it had been recovered from Smith along with other items, such as a fake ID, and showed him wearing a red shirt. In contrast, the defense counsel claimed that an insufficient foundation had been established, arguing that the photograph was more prejudicial than probative and irrelevant. They also pointed out that the court had previously determined that the time and place of the photo's capture were unknown. Although the court acknowledged this point, it reversed its earlier decision and ruled that the photograph would be presented to the jury.

6. **The Verdict**

The jury convicted Smith of first-degree murder. (C. 229-231; R. 1283). He was sentenced to 30 years in prison in the Illinois Department of Corrections. (C. 296; R. 1374).

ARGUMENT

> A defendant in a criminal case, whether guilty or innocent, is entitled to a fair, orderly, and impartial trial conducted according to the law. *People v. Bull*, 185 Ill. 2d 179, 214, 705 N.E.2d 824, 235 Ill. Dec. 641 (1998).

The right to a fair trial is a cornerstone of our justice system, enshrined in the Constitution, and vital to maintaining public confidence in the law. It ensures that every individual is protected from wrongful conviction and governmental overreach regardless of circumstance. A fair trial is not a privilege but an essential safeguard. This right upholds the integrity of our judicial system, embodying the principle that no one should be deprived of liberty without due process of law.

The State sees this as a case of overwhelming guilt and one that never should have been tried. Its brief indulges this trial as nothing more than a required formality. It treats "harmless error" like the civil summary judgment standard—but in reverse. According to the State, instead of a pre-trial summary judgment motion, in a criminal case, the trial proceeds first, followed by a reviewing court issuing what is essentially a summary judgment ruling, because regardless of the errors, they are harmless since the defendant did it. However, the State overlooks the principle established in *Powell v. Alabama*, 287 U.S. 45 (1932): "Even the most undeserving are entitled to the fundamental rights of the accused."

Matthew Smith had a jury trial because he was entitled to have twelve citizens determine whether the government could prove, beyond a reasonable doubt, in a fair proceeding where both sides followed the same set of rules, that he was guilty. The essential question was not whether he committed the act, but whether the State could demonstrate his guilt beyond a reasonable doubt. However, in this case, the State did not

adhere to the established rules, and this, along with other errors, undermines any confidence in the outcome of the trial.

Without conceding anything, there is some truth to the old saying: "When the law is on your side, argue the law; when the facts are on your side, argue the facts; when neither is on your side, take it to a jury." This is because nobody can predict how a jury will decide a case. Experienced trial lawyers have lost cases they were certain they would win and won cases they expected to lose. However, this assumes a fair and level playing field—one where cases are tried according to the rules, both sides play fairly, and the judge rules down the middle. If that doesn't happen, suggesting that the outcome would have been the same anyway is unjust. That viewpoint substitutes the judgment of a legal professional for that of twelve citizens, which is why a defendant chooses not to request a bench trial; they want their fate decided by a jury of their peers. Harmless error should only apply to *de minimis* mistakes in a jury trial.

While some might argue that juries occasionally acquit defendants who seem clearly guilty, this possibility underscores why we rely on juries: jury trials ensure that diverse, impartial peers assess the evidence, offering a check against governmental overreach and prosecutorial misconduct. The principle that a defendant is "innocent until proven guilty" sets a high bar for conviction, which means that even in cases with substantial evidence, the jury must be convinced beyond a reasonable doubt. This system is designed to err on the side of caution

Smith leads with this point because his trial was severely flawed. Before the appellate court, he pointed out numerous errors, each of which warranted a reversal of his conviction. The appellate court recognized the exclusion of his mother from the

proceedings as a structural error and ordered a new trial. It also addressed four other significant errors, agreeing that each was substantial, and ruled in favor of Smith. However, the appellate court did not consider all the alleged errors. Nevertheless, the outcome was rare: a complete acknowledgment of errors, with none rejected.

It is unusual for a court to agree that five considerable errors occurred in a single trial. This court should not ignore that assembly of mistakes. The appellate court's opinion reveals compound problems, raising noteworthy concerns about the reliability of the process and result. These are not simply minor bungles or technicalities; they indicate a fundamental breakdown.

Each error, standing alone, represented a failure, and the court only needed to find a structural error to reverse. But make no mistake—each error called for reversal. The prosecutor went too far, too often. They hid evidence, failed to disclose statements, and said improper things in closing. The prosecution's actions went beyond mere zeal and crossed into the indecorous. Add in the trial court's errors and complacency, which cannot be dismissed, and there is no question that the proceedings were flawed.

The State's manipulation of the exclusion of Smith's mother from the courtroom was not some incidental error. It was a deliberate, tactical decision to give the jury the false impression that Smith stood alone in his defense, abandoned even by his mother. Then, in a cynical twist, they allowed her to reenter the courtroom only after the prosecution's case, leading the jury to believe that she could not even bear to hear the accusations against her son. This was a deliberate attempt to skew the jury's perception, unmoored from any legitimate need or legal justification.

The prosecution's handling of the gunshot residue expert was not any less egregious. They brought in an expert to present the results of a negative test to the jury. This was not done to add value to their case but rather to introduce undisclosed and damaging evidence that implied it was a positive test. This ambush left the defense unable to address or challenge the clandestine evidence, violating the State's discovery obligation and undermining the prospect of a fair trial.[3]

During the closing argument, the prosecutor confidently informed the jurors of his belief that the witnesses were credible and that the defendant was guilty of murder. He urged them to support him *and* the judge by finding Smith guilty. Then, without hesitation, he made a claim that any novice prosecutor would know is inadmissible: that the jurors would have to conclude that all the prosecution's eyewitnesses were lying to find the defendant not guilty. This assertion was deliberate and was repeated numerous times. The prosecutor concluded his rebuttal argument with it, leaving it as the final thought to resonate with the jury. Objections to the argument were overruled, which meant to the jurors that what the prosecutor said was spot-on, reinforced by the overruled objection(s).

When reviewing this record, it is clear this trial was riddled with prosecutorial misconduct (and other errors), not designed to secure justice but to ensure a conviction.

[3] There were two instances during the trial when undisclosed statements were introduced. Although neither was addressed on appeal, they also demonstrate the prosecutor's disregard for the rules and intent to manipulate the proceedings. During the opening statements, the State informed the jurors about an undisclosed incriminating statement allegedly made by Smith, which included the use of the 'n-word' (R. 629). When the defense counsel pointed out that this statement had not been disclosed beforehand, the State responded that they had only learned of the statement "today" without explaining why it was not disclosed. Later, during witness testimony, the issue again arose. After eliciting a statement the prosecutor was aware of but had not disclosed, the State conceded, "I don't believe that that's specifically listed in any of the reports," but again did not explain why the statement had not been disclosed (R. 767-772).

The fact that the appellate court reversed on just one issue does not diminish the gravity of the others. Each error was a strike against the objectivity of the trial, and the snowballing effect cannot be overlooked. The law demands that a conviction be earned through an objective and just process, and this trial fell far short of that standard.

The State argues that the appellate court was incorrect in identifying any errors or, if errors did exist, in considering them harmful. While the State rightly asserts that a defendant is entitled to a fair trial—not a perfect one—it cannot be disputed that this trial was far from fair or perfect. Considering the numerous errors present, accepting a harmless error argument would imply that the trial was meaningless. It suggests that Smith was not entitled to a trial at all. Essentially, the State implies: "Everyone is entitled to a trial purely because they have the right to one, but for some individuals, it doesn't matter whether their trial is fair because the evidence against them is overwhelming. A trial is merely a formality we must fulfill, and once we've conducted it, we can claim, 'You had your trial, even if it was flawed, and during the appellate review, we can say you never had a chance to win, so it's irrelevant that your trial was mishandled.'" Agreeing with this perspective would lead to the troubling conclusion that, for certain individuals, a trial becomes an illusory process.

Finding the errors harmless would allow this Court to rule on the case as if it were deciding a motion for summary judgment, which denies the due process that our system of laws guarantees.

Indeed, how can we be sure that the witnesses' identifications in court were not influenced by what they saw at the lineup? How can we know that some jurors' decisions were not swayed by the belief that Smith fired a gun, particularly if they thought the gunshot residue test was positive? Who can say that jurors did not believe the State had a

lesser burden of proof or did not think they needed to find all witnesses lying? There is no way of knowing whether the jurors thought they had to decide the witnesses were lying. After all, objections to all these were overruled. [4]

These intentional and calculated actions by the prosecution, combined with the errors by the trial court—including the improper denial of a motion to suppress a suggestive lineup, providing the jurors with a photograph during deliberations that had not been identified during the trial, and the court misstating the burden of proof during defense counsel's closing—undermined the entire proceeding. It was cumulative error, "In general, that individual trial errors that do not entitle a defendant to appellate relief may do so if the errors, when considered in the aggregate, "have the cumulative effect of denying [the] defendant a fair trial." *People v. Speight*, 153 Ill. 2d 365, 376, 606 N.E.2d 1174, 180 Ill. Dec. 97 (1992); see *People v. Albanese*, 102 Ill. 2d 54, 83, 464 N.E.2d 206, 79 Ill. Dec. 608 (1984) ("it is true that trial errors may have a cumulative effect when considered together"); *United States v. Sepulveda*, 15 F.3d 1161, 1196 (1st Cir. 1993) ("a column of errors may sometimes have a logarithmic effect, producing a total impact greater than the arithmetic sum of its constituent parts")." *People v. Quezada*, 2024 IL 128805, ¶ 46

This Court has repeatedly explained that decisions regarding the defendant's conduct are for the jurors to make. "In a case tried by a jury, it is the province of the jury, not the judge, to decide the guilt or innocence of the accused." *People v. Lockett*, 82 Ill .2d 546, 552 (1980), citing *People v. Pappas*, 381 Ill. 90, 96 (1942). "The severity of the errors

[4] The State improperly referred to defense counsel's theory of the case as "fairytales" multiple times, which was objected to and overruled. (R. 1212-1213). "He's still running, running from justice. Guess what? Twelve of you are the only people in this world who can stop him, who can hold him responsible for killing Kevin. Nobody else can. I can't. The judge can't. Nobody else can. The twelve of you can." The only way Matthew was not guilty was "if you ignore the testimony that you have, if you find the four people who were in front of you liars." (R. 1228-1230).

is a threat to the fairness and integrity of the trial process. An error may involve a [ ] unimportant matter, but still affect the integrity of the judicial process and the fairness of the proceeding if the controversy is determined in an arbitrary or unreasoned manner." *People v. Lewis*, 234 Ill. 2d 32, 48 (2009). Here, while there may have been a jury trial, it was nothing more than a facsimile. "In *People ex rel. Daley v. Joyce*, 126 Ill.2d 209, 212–13, 127 Ill. Dec. 791, 533 N.E.2d 873 (1988), we discussed the right to trial by jury, stating, 'We are dealing here with one of the most revered of all rights acquired by a people to protect themselves from the arbitrary use of power by the State.'" *People v. Bracey*, 213 Ill. 2d 265, 269 (2004).

As in *Blue*, this Court must again find "Each of the errors detailed [below], in and of themselves, cast doubt upon the reliability of the judicial process. Cumulatively, we find that the errors created a pervasive pattern of unfair prejudice to defendant's case." Every issue raised justifies a reversal. When considering the errors collectively, a new trial is necessary to uphold the integrity of the judicial process. See *People v. Blue*, 189 Ill. 2d 99, 139 (2000). To otherwise turn a blind eye to this case's overwhelming and consequential errors renders the right to a fair trial pointless. The sheer number and scale of the errors reveal a process that robbed Smith of a rightful trial. It made his jury trial no more than a kangaroo court.

I. THE COURT COMMITTED STRUCTURAL ERROR WHEN IT EXCLUDED SMITH'S MOTHER FROM THE PROCEEDINGS

Standard of Review: The exclusion of the public from a trial is a structural error not subject to harmless error review. *United States v. Gonzalez-Lopez*, 548 U.S. 140, 149

(2006), while mere error in excluding witnesses is subject to an abuse of discretion standard. *Smith v. City of Chicago,* 299 Ill.App.3d 1048, 1053 (1998).

A. SMITH'S MOTHER WAS NOT A WITNESS

Smith's mother wanted to attend her son's trial. Unfortunately, she was excluded before jury selection under a specious suggestion by the prosecution that she was a "possible witness." (R. 347). The State did not seek to exclude her as a witness during the pretrial proceedings, any evidentiary hearing, or jury selection. (R. 210). She was not listed as a witness in the State's two answers. Instead, moments before the trial began, the State argued that Smith's mother should be excluded because she might be called to impeach her son's potential testimony regarding an interrogation that never occurred:

> Prosecutor: So, Judge, what I was saying, there was some interaction between the defendant and his mother as to what should be done, should she talk to the police, should she not talk to the police. It's unlikely that she would be called by the State even if the defendant testifies, but there is a potential that, yes, if the defendant said [testified to] something different than what's on that [electronically recorded interview "ERI"], we may call the mother to testify to impeach the defendant as to the circumstances of what was happening at the police department during that questioning." (R. 335).

This explanation is unclear and confusing. It discusses the mother's dilemma about whether to speak with the police, Smith's decision not to talk to law enforcement, and what occurred at the police station.

Still, Smith never provided a statement, and his mother did not communicate with the police. There was no questioning or speaking involved. All the ERI contained was an invocation of Smith's constitutional right and nothing admissible. There was nothing for him to contradict had he testified, or for her to explain. The State created details as they went along in a disingenuous ploy to have her excluded.

While defense counsel said she 'understood' the prosecution may 'believe' she was a witness, counsel called the belief unrealistic (counsel was likely trying to be polite and professional). The reality was that there was nothing that she would be called to testify about. Still, the trial court excluded the mother, requesting that if the State determined it would not call her as a witness, it would immediately advise the court so the mother could reenter. (R. 337). Not surprisingly, the State never introduced in their case-in-chief any portion of Smith's time at the police station and agreed that his mother could return to the courtroom after it rested. (R. 1145).

Understandably, Smith's mother wanted to attend her son's trial, yet she was excluded based on a vague possibility that she might be an "unlikely witness." It was a sham reason calculated to exclude her.

The appellate court rightly identified the issue as implicating the defendant's right to a "public trial." *People v. Smith*, 2023 IL App (1st) 181070 ¶ 28, addressed below. In its well-reasoned decision, the court concluded that "the State failed to show that there was any reasonable probability that Trae Smith would actually testify." *Id.* at ¶24. Even more damning, the appellate court laid bare the sheer absurdity of the State's position: "The State's reasons were so far-fetched that she could not be deemed a potential witness." *Id.* She was not listed as a witness in the state's answer, nor was she mentioned as one until the trial commenced.

This was not a close call. To analyze this as a witness exclusion issue is to reward the State for deceiving the trial court, acting in bad faith. Its reasons before the trial court were nonsensical. The record is clear—there was nothing for her to testify about. She was not privy to any statement or admission from Smith because there were none. Other than

the line-ups, the State did not introduce evidence regarding his time at the police station because it was irrelevant. (R. 334).

While the law intends that jurors should decide the case solely on the evidence presented from the witness stand, the reality is far different. Jurors are human beings prone to observation and instinct. They scrutinize everything—the defendant's demeanor, the expressions of the lawyers and the judge, the reactions of the victim's family, and, crucially, they will notice the absence of a mother at her own son's murder trial. They will not just notice—they will speculate. Smith's mother's absence during the prosecution's case and reappearance likely raised an inevitable flood of prejudicial questions in their minds: Did she refuse to hear the horrible truths about her son? Did she know something incriminating? Or worse, did she disapprove of her son's actions so strongly that she couldn't bear to offer her support? At the bottom, jurors were left to see a person stranded without support, and they could only speculate why. It left him alone, without family support.

The jurors never saw a loving mother by Smith's side, offering a critical counterbalance to the victim's grieving family. And she, in turn, was robbed of the right to be present at the most significant event in her son's life. This exclusion was not trivial. "It would be Orwellian to describe as tenuous the connection between these parents or these siblings and the criminal trial of the defendant. We will not do so. Additionally, defendant's parents and siblings were not 'simply curious' because of the nature of the criminal trial; they were present out of an interest—and likely a concern—for defendant that long predated the beginning of this cause." *People v. Revelo,* 286 Ill. App. 3d 258, 265–66, 676 N.E. 2d 673 (2nd Dist. 1996).

Still, before this Court, the State again prioritizes the discretionary exclusion of witnesses over the defendant's right to a public trial. Although they briefly touch upon the latter, their argument remains anchored in excluding witnesses rather than addressing the structural error that occurred when his public trial was denied.

The State presents two new, absurd justifications for why Smith's mother might have been called as a witness. St. Br. pg. 17. First, the State speculates that since she saw him at the police station, her testimony could have been used to impeach him—depending on whether he testified and what he said regarding his time there. Second, the State now suggests that had Smith denied ownership of a red and white shirt (which witnesses claimed the shooter wore), his mother might have been called to impeach that testimony. This reasoning is nothing more than the State grasping at new straws. There is no evidence that the State had ever spoken to her about the shirt, nor was there any credible reason to believe she had information. There is no reason to believe she had ever seen him in the red shirt and, certainly, no reason to believe she would willingly testify against her son. To speculate that she could have been called to impeach her son when the State had never spoken to her is sheer foolishness. The State has no good faith basis to make that argument here; they have no factual predicate. It assumes that she knew the information the State never sought in the first place.

Indeed, the absurdity of what the State now claims is self-evident. If the State believed she would testify that the red shirt belonged to her son, why didn't the State call her to say that? Why wait for him to deny it before calling her? As for the second reason, why would the State agree that she could reenter the courtroom and observe the trial before the defense began its case? If the State was concerned that she needed to be excluded

because she might have to impeach the defendant, why allow her to return to the courtroom before the defense began its case? [5]

These flimsy justifications are no better than the specious, *post-hoc* rationales the State offered before the appellate court, including 1) that Smith and his mother discussed whether he should remain silent; 2) that Smith might have testified about being beaten or mistreated by the police; and 3) that Smith could have testified about an unrecorded statement. None had any merit. His decision to remain silent is irrelevant in any context; he did not make a statement, so he would not have claimed he was coerced by mistreatment, and his mother would have no knowledge of an unrecorded statement because the entirety of her involvement was recorded. Anyway, it is confounding how Smith could have testified about an unrecorded statement. If it were exculpatory, it would be inadmissible, and if it was inculpatory, why would he testify about it? Was he going to get on the stand and say, "I told the police I did it, but it was off camera?" Even if he confoundingly did so, the State surely would not impeach him.

A pattern of inventing hypotheticals to rationalize the unjustifiable exclusion of a mother from her son's trial illustrates the transparency of the argument. The appellate court saw through this charade, and this Court should do the same. The State drummed up specious reasons with no meat on the bones. It never intended to call Smith's mother because she could never be a witness. It excluded her in bad faith. The State should not now benefit by framing the issue as whether the court abused its discretion in excluding a witness, thereby lowering its burden concerning its own misconduct and bad faith.

[5] The State will argue it is because the defendant said he was not going to testify, but until the defense rested, that decision was not final, making any re-entry premature.

Illinois Rule of Evidence 615 addresses the exclusion of witnesses. "At the request of a party, the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion." Ill. R. Evid. 615. The purpose of the rule is to discourage fabrication and prevent a witness from shaping their testimony to conform to the testimony of other witnesses. *Smith v. City of Chicago*, 299 Ill.App.3d 1048, 1053 (1998).

The exclusion of witnesses from the courtroom during trial is a long-time practice designed to preclude a witness from shaping his or her testimony to conform to evidence otherwise introduced. *People v. Johnson*, 47 Ill.App.3d 362, 369, 362 N.E. 2d 701 (5th Dist. 1977). There is not an "absolute right to have the witnesses excluded." *In Re N.F.*, 2020 Ill.App (1st) 182427, citing *People v. Mack*, 25 Ill.2d 416 at 422. Here, the court's decision to exclude the mother was arbitrary, fanciful, unnecessary, and unreasonable. It was so because there was no chance the mother would be called as a witness.

But if this Court treats it as one, "Where the record discloses an arbitrary denial of a motion to exclude witnesses, as in the present case, it is not necessary for the defendant to establish he has been prejudiced thereby. Such a showing would be impossible or inordinately difficult to make in any case, for it cannot be shown how the testimony might have been different had the motion been allowed." *People v. Dixon*, 23 Ill.2d 136 (1961). Then the opposite must also be true, where the judge grants the contested request as a matter of course, they have not done so based on judicial discretion. The same result should apply, and Smith should not have to demonstrate any prejudice.

B. SMITH WAS DENIED A PUBLIC TRIAL

The Sixth Amendment to the federal constitution ensures the right to a public trial. U.S. Const., amend. VI. The protections conferred by the public trial guarantee are to (1) ensure a fair trial, (2) remind the prosecutor and judge of their responsibility to the accused and the importance of their functions, (3) encourage witnesses to come forward, and (4) discourage perjury. *Waller v. Georgia*, 467 U.S. 39, 46 (1984); *Radford*, at ¶ 25.

This trial was a public proceeding. "The criminal court audience is not just normatively important; it is constitutionally important. The criminal court audience is protected by both the defendant's right to a public trial under the Sixth Amendment and the public's right to access criminal proceedings – the 'freedom to listen' – under the First Amendment. As a result, the audience can and should be a central constitutional mechanism for popular accountability in modern criminal justice." Jocelyn Simonson, *The Criminal Court Audience in a Post-Trial World*, 127 Harv. L. Rev. 2173, 2176 (2014), cited in *People v. Radford*, 2020 IL 123975 ¶18 (J. Neville, dissenting). The denial of a public trial is a structural error. *Weaver v. Massachusetts*, 137 S.Ct. 1899, 1908 (2017); *United States v. Gonzalez-Lopez*, 548 U.S. 140, 149 (2006).

There is a presumption that all trials are open to the public. *Press-Enterprise Co. v. Superior Ct.*, 464 U.S. 501 (1984); *People v. Radford*, 2020 IL 123975, ¶ 25. The presumption can only be overcome when an overriding interest is specifically articulated as a reason to close the proceeding. *People v. Holveck*, 141 Ill.2d 84 (1980).

The exclusion denied Smith his right to a public trial. In *People v. Evans*, the court excluded the defendant's step-grandmother during jury selection, citing a lack of space in the courtroom. Reversing, the appellate court found even a single-day exclusion violated

the defendant's right to a public trial. *Evans*, 2016 IL App (1st) 142190, ¶ 19. The exclusion was not trivial; it was a structural error. In People v. Taylor, 244 Ill. App. 3d 460 (1st Dist. 1993), the court held that the exclusion of the defendant's mother and stepfather during the trial did not violate his right to a public trial, as they had been listed as witnesses in the answer. Instead, the court considered their exclusion to be a discretionary exclusion of witnesses. However, the court reversed the decision because the defendant's siblings had been excluded during voir dire, though they were not witnesses; an overriding interest did not justify the closure, and the court neglected to consider alternatives. Both cases demonstrate that excluding even a single family member can constitute a constitutional violation.

Other jurisdictions also share this perspective. In *Addy v. State*, 849 S.W.2d 425 (Tex. Crim. App. 1983), the prosecutor requested the exclusion of six spectators—friends of the defendant—arguing that there was a "great possibility" they would be called as witnesses, despite there being no basis for this claim. On appeal, the court viewed the issue as one of a deprivation of a public trial, noting that there was no compelling reason to exclude these individuals. The court reversed. The case resembles the case before this Court, where the prosecutor secured exclusion through a complete misrepresentation.

In *State v. Sams*, 802 S.W.2d 635 (Tenn. Crim. App. 1990), the prosecutor subpoenaed the defendant's grandmother, aunt, and brother and then requested their exclusion. Later, when a second aunt and the defendant's stepmother arrived, the prosecutor subpoenaed them, leading to their exclusion. The prosecutor informed the judge that he "very well may" call these individuals as witnesses, even though he had no intention of doing so. The court concluded that the exclusion was merely a "subterfuge" to prevent the

defendant's relatives from being present in the courtroom, thereby depriving the defendant of a public trial. Again, the case closely parallels the case before this Court, in which the prosecutor excluded the defendant's mother for no legitimate reason.

In the present case, excluding a family member did not meet the stringent criteria established in *Waller*. No overriding interest was advanced, the exclusion was broader than necessary, and the trial court failed to consider less restrictive alternatives. Under the established precedent, the exclusion was unconstitutional.

Importantly, the interest of Smith's mother exceeded that of the "simply curious." She wished to be "present out of an interest – and likely a concern – for the defendant that long predated the beginnings of this cause." *People v. Revelo*, 286 Ill.App.3d 258, 265-266 (1996). Having Smith's mother in the courtroom would have offered him a sense of comfort and could have helped to calm his nerves. Her presence might have also made him more relatable to the jurors, allowing them to see that he had a mother who cared for him. This portrayal could have countered the impression that he was someone whose family had abandoned him, either due to guilt or a perception that he was no longer worth their concern. The exclusion of Smith's mother also deprived him of emotional and moral support during a critical moment. Additionally, her presence might have impacted how witnesses testified for similar reasons. This is all his prejudice. *People v. Chennault*, 24 Ill. 2d 185, 187 (1962).

"Structural errors are not subject to harmless-error review." *People v. Averett*, 237 Ill. 2d 1, 14 (2010), citing *People v. Rivera*, 227 Ill. 2d 1, 19-20 (2007). The presumptive result of this exclusion is a reversal of the conviction. The appellate court was right to identify this clear error as the reason for the reversal. Smith was denied his right to a public

trial, and this violation is never considered harmless. As a result, he is entitled to a new trial.

II. SMITH RAISED FOUR OTHER CLAIMS OF ERROR BEFORE THE APPELLATE COURT: (1) THAT A LINEUP HE WAS PLACED IN WAS UNDULY SUGGESTIVE; (2) THAT EXPERT TESTIMONY WAS NOT PROPERLY DISCLOSED; (3) IMPROPER CLOSING ARGUMENT (THAT THE COURT TERMED "SERIOUS ERROR"); AND (4) THAT A PHOTO SHOULD NOT HAVE BEEN PROVIDED TO THE JURORS WHILE THEY WERE DELIBERATING. THE APPELLATE COURT RULED IN HIS FAVOR ON EACH ISSUE. INDEPENDENTLY. EACH OF THE ERRORS DENIED SMITH A FAIR TRIAL AND WOULD HAVE REQUIRED REVERSAL. THUS, REGARDLESS OF WHETHER HE WAS DENIED A PUBLIC TRIAL, REVERSAL IS STILL REQUIRED.

***Standards of Review**:*

The Shirt: The trial court's decision whether to answer and how to answer a question from the jury during deliberations will not be disturbed absent an abuse of discretion. *People v. Landwer*, 279 Ill. App. 3d 306, 314 (1996); *People v. Ware*, 2019 IL App (1st) 160989, ¶19. The trial court has discretion to assess a jury's request to review evidence, including which exhibits jurors may have in the jury room. *People v. Rouse*, 2014 IL App (1st) 121462, ¶ 77. *People v. Cavitt*, 2021 IL App (2d) 170149-B, ¶136.

The Lineup: This Court employs a two-part standard of review when considering whether a lineup was suggestive. The trial court's factual findings are reviewed to determine if they are against the manifest weight of the evidence, and the legal question of whether suppression is warranted is reviewed *de novo*. *People v. Lawson*, 2015 IL App (1st) 120751 ¶39.

Expert Testimony: The admission of expert scientific testimony is subject to a dual standard of review: the decision whether an expert is qualified to testify in a specific area is reviewed for an abuse of discretion. The court's *Frye* analysis is subject to *de novo* review. *In Re Commitment of Simons*, 213 Ill.2d 523 (2004).

Closing Argument: Improper remarks during closing arguments are subject to a *de novo* standard of review. *People v. Wheeler*, 226 Ill.2d 92 (2007).

A. THE APPELLATE COURT CORRECTLY DETERMINED THAT HAVING SMITH WEAR THE RED SHIRT, WHICH MATCHED THE DESCRIPTION GIVEN BY WITNESSES REGARDING THE SHOOTER'S SHIRT, WAS UNDULY SUGGESTIVE. THIS RED SHIRT WAS PRESENTED AT TRIAL AS THE SHOOTER'S SHIRT WHILE HE STOOD AGAINST A WHITE WALL ALONGSIDE OTHERS WEARING WHITE, GRAY, AND BLACK SHIRTS.

On appeal, Smith challenged the two lineups he was placed in. The appellate court agreed that the second lineup was unduly suggestive because the police had Smith wear the red shirt that was the shirt the State introduced at trial as the killer's shirt (St. Ex. 3). The others in the lineup each wore an achromatic color, making Smith stand out. (R. 239-243). "Taking together that the shirt was recovered as evidence, witnesses described Smith wearing such a shirt prior to the lineup, and its stark contrast to the fillers, Smith was spotlighted in the second lineup. Accordingly, we find that the second lineup was unduly suggestive." *People v. Smith*, 2023 IL App (1st) 181070, ¶ 42.

The court instructed the State on remand to provide clear and convincing evidence that the witnesses identified Smith based on their independent recollection. It noted that three witnesses who identified Smith during the second lineup testified at trial. Each of these witnesses had viewed the lineups and identified Smith as either being present at The Pressbox or as the shooter.

The identifications were also recounted by a detective, who explained that Ms. Pedermo had "said that the subject in Position 4 was later identified as Smith was the individual firing a gun at the club at the Pressbox…at the victim, Mr. Guice." (R. 1069-1070). He explained Ms. Ali (R. 1073) and Ms. Davis (R. 1075) had viewed the lineup and identified Smith as being present and running from the social club.

The State argues that the lineup was not suggestive because the red shirt Smith wore was, according to the police, part of Smith's "personal property," characterizing its wearing as Smith's voluntary choice. But that ignores what really happened. It was the police who decided to make that shirt part of Smith's "personal property."

This evidence should have been properly documented and preserved for scientific examination rather than being placed with Smith's personal property or given to him to wear. It is reasonable to infer that the police intentionally gave Smith the shirt to wear during a lineup instead of treating it as an item of evidence. The shirt was swabbed for gunshot residue, so obviously, the police believed it was a piece of evidence. (R. 918)[6] It should have been handled differently. But it wasn't because the police wanted people to see the suspect in that clothing. The police intentionally violated evidentiary protocols to have a sham lineup.

The State blames Smith for wearing the red shirt, suggesting that he voluntarily chose to wear it as his own. However, the record does not indicate that this choice was Smith's. This is merely the State's theory. The shirt was recovered from the car Smith was

[6] The Illinois State Police directive regarding clothing as evidence of gunshot residue states that the item should be placed in a paper bag for preservation. It should not be disturbed or given to anyone to wear during a lineup.
https://isp.illinois.gov/StaticFiles/docs/ForensicServices/ForensicScienceCommandManuals/Command%20Directives.pdf pg. 174 chart

in. The police, by having him wear it, effectively made it his. This situation differs from cases where someone is arrested wearing the same clothing when placed in a lineup. In this instance, the police selected the clothing Smith would wear for the lineup and claimed it was his own, even though Smith never claimed or admitted that the shirt belonged to him. The only evidence linking the shirt to him is its presence in the car. Smith was not wearing the shirt when he was arrested; it was recovered from the car he had been in, near someone else, the driver. (Sup. R. 42-48).

The State claims that Smith only wore the shirt because he asked for a shirt when he was cold at the police station.[7] But the state had made that shirt Smith's shirt. Their whole theory is resting on the assumption that it already was his shirt. If it wasn't his shirt, then for all Smith knew, he asked for a shirt and the police gave him a shirt that was lying around at the police station. Put another way, the State's reasoning is circular; it assumes that Smith already knew that the shooter had been identified as wearing a red shirt and, therefore, would have known that there was a problem with his wearing a red shirt.

In the State's view, he should have said to the detectives, "Give me a different shirt" or "Hey, let's make sure this lineup is not unduly suggestive. Why don't you give me something else to wear other than the red shirt? I don't want people to identify me based on this shirt. I'm not sure if they have because you're not discussing the investigation with me since I invoked my rights, but just in case..."

The appellate court noted that the police did not "compel" Smith to wear the shirt, *Smith*, at ¶41. However, the court also rightly pointed out that the police, responsible for

[7] The State claimed they did not learn that Smith asked for the shirt until just before the detective testified about the lineup at trial, telling the defense as they began his direct. (R. 1077-1079). They claimed to have not known this when the parties litigated the pretrial motion.

ensuring a fair lineup was conducted, could have clothed Smith in something else for the lineup. They could have had him take it off. After all, they knew that this was the exact shirt that witnesses had identified the shooter as wearing. This makes it possible that the witnesses were identifying the shirt rather than the individual wearing it in the lineup.

When interviewed, none of the witnesses described anything distinctive besides the shirt and the mohawk, the features unique to Smith in both lineups. Each witness made a limited observation and testified to a highly charged event, a chaotic scene, a split-second look at the supposed shooter, the presence of pepper spray, and a dark night. Mr. Townsend, feeling the effects of pepper spray at the scene of the commotion, was hiding in the footwell of his vehicle after hearing shots fired when he claimed to have seen the shooter. (R. 663-665). Ms. Perdomo explained that she was suffering from the effects of mace to the point that she was choking. She mentioned that she exited the building with Guice, although Mr. Townsend also claimed he left with Guice, and neither mentioned the other in their story. While she heard gunshots, she was unable to see the shooter's face. She described a "boy" wearing a "bright red and blue button-up shirt" (which others described as a polo shirt) with a mohawk. Ms. Davis described the scene as chaotic. She saw a man in a red shirt and mohawk yelling before he exited The Pressbox. Finally, Ms. Ali testified that she witnessed someone in a red and white shirt with a mohawk firing a gun amid the commotion.

The Supreme Court discussed suggestive lineup procedures in *United States v. Wade*, 388 U.S. 218, 87 S. Ct. 1926 (1967).[8] This Court recognized that "the theme running

[8] "That all in the lineup but the suspect were known to the identifying witness, that the other participants in a lineup were grossly dissimilar in appearance to the suspect, that only the suspect was required to wear distinctive clothing which the culprit allegedly wore, that the witness is told by the police that they have caught the culprit after which the defendant is brought before the witness alone or is viewed in jail, that the suspect is pointed out before or during a lineup, and that

through all the examples is the strength of suggestion made to the witness. Through some specific activity on the part of the police, the witness is shown an individual who is more or less spotlighted by the authorities." *People v. Johnson*, 149 Ill. 2d 118, 147 (1992). Here, the suggestion was having Smith wear the recovered shirt, which the State described as "a very distinctive white and red shirt" (R. 609). No one else in the lineup was remotely similar.

The law does not require the lineup of individuals to be identical to the witnesses' descriptions, but "if the defendant is the only one in the lineup required to wear the clothing that the suspect reportedly wore, the lineup may be unduly suggestive." *People v. Clifton*, 2019 IL App (1st) 151967, ¶63, 144 N.E. 2d 508, citing *Johnson*, 149 Ill.2d 118 (itself citing *United v. Wade*, 388 U.S. 218 (1967). The ultimate evaluation of whether the lineup is suggestive requires the examination of the totality of the circumstances. *Johnson*, at ¶63. See also *People v. McBride*, 2010 NY Slip Op 3473, ¶ 6, 14 N.Y.3d 440, 448, 902 N.Y.S.2d 830, 835, 928 N.E.2d 1027, 1032 ("Of course, where a suspect is the only one in a lineup wearing the same "distinctive clothing" as described by a witness to the crime, a lineup is unduly suggestive as a matter of law (*People v Owens*, 74 NY2d 677, 678, 541 NE2d 400, 543 NYS 2d 371 [1989])").

The appellate court correctly focused on the red shirt and mandated a more fulsome inquiry as to whether the identifications were admissible. Other factors make it clear that the lineup was unduly suggestive beyond the red shirt. The State ignores these other important reasons. In addition to the red shirt, three of the fillers in the lineup were between

---

the participants in the lineup are asked to try on an article of clothing which fits only the suspect." *Wade,* 388 U.S. at 233, 18 L. Ed. 2d at 1160-61, 87 S. Ct. at 1935-36.

5 and 14 years older than Smith, and the fourth was 30 years older. None of the others had a Mohawk hairstyle. *Smith*, at ¶34.

Here, the State's singular focus is on the red shirt, ignoring the other issues with the lineup, that Smith was the only one with a hairstyle, clothing, and close in age, to what was described by the witnesses. (and there were substantial weight differences with most of the participants). Because they view this only in a vacuum, the cases they cite do not offer any support. For example, the State cites *People v. Peterson*, 311 Ill. App. 3d 38, 40 (1999) as collecting cases about suggestive lineups involving clothing and noting that none of those called suppression. However, in each case, the clothing was merely similar in some respect to that described; it was not the actual clothing the witnesses had identified. Further, in each, the lineup was not otherwise suggestive, meaning that it did not suffer from the same infirmities present here, the vast disparity in age and hairstyle, a trifecta of differences.

The State raises concerns about the appellate court's reliance on *People v. Ayoubi*, 2020 IL App (1st) 180518 and *United States v. Wade*, 388 U. S. 218 (1967). In *Ayoubi*, the defendant contested the trial court's decision to reject his motion to suppress a photo array. He argued that the array was biased because he was the only person wearing a "green hoodie." Holding the array was not suggestive, the court pointed out that there was no evidence that the police had access to a different photo, the defendant had not been instructed to wear a green hoodie, and it was uncertain whether the green area was a hoodie or just a green background. *Ayoubi* at ¶ 35. Regarding the physical lineup Ayoubi challenged, the court observed that although there were differences in the participants' weights, each person was wearing a loose-fitted black T-shirt provided by the police,

making the weight variances difficult to discern. The court considered any other distinctions to be minimal. The appellate court compared *Ayoubi,* highlighting the suggestive clothing, significant age gaps, and distinctive hairstyle in this case as part of the overall circumstances that differentiated the two cases.

In *Wade*, the court recognized, among other things, that having people who are dissimilar while having the suspect wear clothing like the culprit's would be suggestive. *Id* at 233.

The court was correct in determining that the procedure was suggestive. It found that the lineup administrator was aware that the shooter had been identified by two distinct characteristics: a specific hairstyle and a red shirt. Despite this knowledge, the administrator included Smith in a lineup with individuals who lacked either characteristic, and who significantly differed from Smith in age and size. As noted in ¶¶ 33-34, the court found, while the physical similarities need not be exact, the red shirt stood out significantly against the other participants, who were dressed in monochromatic colors. *Smith*, at ¶33.

Moreover, the red shirt was not just any ordinary shirt, but a distinctive two-toned garment—white with logos from the chest up and bright red with lettering from the chest down. As the court concluded, Smith was "not merely wearing a red shirt that happened to match the witness descriptions; he was wearing the exact red shirt involved in the crime." *Smith*, at ¶ 40.

It is as if he were a suspect positioned among four fillers who are simply standing with their arms crossed while the suspect was required to mimic shooting at the lineup viewers. Or a drive-by shooter is displayed sitting inside the car used for the crime, while

the fillers are depicted sitting casually on a park bench. It was glaringly obvious that this was done intentionally.

Last, the state writes that even if there was an error the trial court does not need to review the issue because any error was harmless. That is not the case because here, although the evidence may have been overwhelming that Mr. Smith was present, it was not overwhelming that he was the shooter who caused Mr. Guice's death. It was undisputed that he was with multiple people, two of which were wearing red shirts, and that there were multiple shooters. Further, there is no evidence in this record to suggest that their in-court identifications were somehow extracted from the suggestive procedure. No one identified him before the procedure, no one ever identified him outside of it, and there was no foundation that the witnesses would have been able to do so absent the procedure, as the appellate court found.

Accordingly, the fruits of the lineup identification should be suppressed.

B. THE APPELLATE COURT CORRECTLY CONCLUDED THAT IT WAS WRONG TO GIVE THE JURORS A PHOTOGRAPH OF SMITH WEARING THE RED SHIRT, POSING WITH A GROUP WHO WERE MAKING GANG SIGNS. THIS OCCURRED DURING THEIR DELIBERATIONS, WHEN THEY REQUESTED A "PHOTO TAKEN INSIDE THE BAR." SINCE THIS PHOTOGRAPH HAD NOT BEEN PUBLISHED OR EXPLAINED DURING THE TRIAL, THE DECISION TO PROVIDE IT WAS IMPROPER.

When Smith was arrested, a photograph was among the items recovered and inventoried. In the photo he is seen with others, wearing the red shirt described by witnesses. The other individuals in the photograph were flashing gang signs. This photo was included as part of Group Exhibit 63 but was not published to the jurors. There was no testimony regarding where or when the photo was taken or what it depicted.

After the jurors were instructed, the parties discussed the exhibits that should be made available during deliberations. Concerning the photo, the trial court observed, "There is no testimony of the witness (sic) [where this] photograph was taken. It is of his person; however, I don't find this is properly submitted back to the jury…it looks as if he has the same shirt on, but this could have been taken a year prior to this. It does not show that it was taken the night of. There is no one who testified that this photograph was taken that night." (R. 1260-61). The jurors were not provided with the photo.

While deliberating, a jury note asked for the "photo taken inside the bar." (R. 1270; C. 228. But there had not been any testimony of a photo taken "inside the bar." The prosecutor argued for it to be given to the jurors because "the foundation is that he has these on his person when he is arrested… They are relevant for the identification of this defendant" while observing "whether the photo was taken that night or some other night, it doesn't matter." (R. 1267). The State conceded that it did not lay a foundation that the photo was taken that night, and there was no evidence the photo was "taken inside the bar." Still, the trial court provided the photo to the jury.

Before the appellate court, Smith contended that the problem was "multi-level." He pointed out that the court supplied a photo without evidence that it was taken inside the bar and admitted a photo that contained prejudicial innuendo of gang involvement without providing a limiting instruction.

The appellate court agreed with the former and did not reach the latter, writing: "Although the photo was properly admitted into evidence, responding with it to the jury's question as phrased supplied additional evidence than what was presented at trial. This answered a factual question and filled in an evidentiary blank left by the State." *Smith* at ¶

64. As support, the court cited *People v. Maldonado*, 402 Ill. App. 3d 411, 434 (2010) ("[the appellant] has not cited us a case, nor can we find one, that permits a trial court, after the close of evidence and closing arguments, to fill in evidentiary blanks left by a party.")

Arguing that the appellate court was wrong, the State maintains because the question was for the "photo taken inside the bar," it is a stretch to conclude the jurors were referring to "the PressBox" bar, which was the only bar mentioned at the trial. That argument is bizarre. What other bar could it be? According to the State, because there was no testimony where the photo was taken, it is wrong to presume that the jurors would have concluded it was taken at The PressBox. (The State then fails to explain why it would be a relevant photo). Indeed, if it wasn't from The Pressbox that evening, it was just a picture of Smith and a bunch of people.

The prosecutor correctly acknowledged that there was no evidence to prove that the exhibit was a photograph taken that night. The trial court also recognized this and initially refused to allow the photo to be shared with the jury during deliberations. While identity was a point of concern, the specific issue was the identity of the shooter. Although Smith did not dispute that he was wearing a red shirt that night, the defense argued that he had been misidentified as the shooter. Sending this photo back without any context unfairly strengthened the identification.

But beyond all of this was the prejudice from the picture. First, it was prejudicial because the court provided it in response to the jurors' request for the picture taken "inside of the bar" without any evidence that this picture was taken inside of the bar. In other words, the trial court, by insinuation, provided a factual answer that had not been testified to. It placed Smith within the bar without any witness testimony. The jury asked, 'can we

see the picture of Smith inside the bar,' and the court answered, 'sure, here it is' when it provided this photo. *People v. Cavitt*, 2021 IL App (2d) 170149-B, ¶ 154 ("It was highly improper for the court to comment or opine on how much emphasis the jury should place on the video and to note that it was 'significant,' because the comments interfered with the jury's exclusive fact finding role."); *Starr* v. *United States*, 153 U.S. 614, 626 (1894) ("The influence of the trial judge on the jury is necessarily and properly of great weight.")

Beyond that, the picture depicted individuals flashing gang signs. While there was no specific testimony that these were gang signs, it was obvious. The trial judge recognized it. The State did not dispute this in either court below. To presume that nobody on the jury would infer bad things from the obvious display of gang signs is naïve.

Society looks at gangs with "considerable disfavor." *People v. Morales*, 2012 IL App. (1st) 101911, ¶40. "Gang membership evidence is admissible only when there is sufficient proof that the membership is related to the crime charged." *People v. Smith*, 141 Ill. 2d 40, 58 (1990). Here, there was none.

The prosecution argued that the evidence was important for establishing "identity." However, they did not explain how the photograph proved Smith's identity or why this was necessary. There was no evidence in the case that demonstrated the relevance or significance of this photograph. The prosecution used the photo to suggest to the jurors that Smith was not merely a minor in a bar but a 16-year-old connected to a gang or gang member, even though the gang and membership had no relevance to the case.

The State does not ever address the gang innuendo found in the photograph.

The State argues any error was harmless. The argument falls flat. Focusing solely on the red shirt is a transparent attempt to sidestep all the prejudice. Smith wearing a red

shirt is partial to the real damage the photo achieves, placing Smith at the scene where the altercation began, with a group of thugs. At least one witness, Davis, testified that Smith interrupted the moment of silence, sparking the entire confrontation. The photo was a visual confirmation of his presence during a key moment. This was not merely a trivial detail but a crucial evidence reinforcing the narrative against Smith. To assert that this error was "harmless" is not only dismissive but dangerously misleading. The prejudicial impact of placing Smith in that setting, confirmed by visual evidence, is anything but harmless—it was extraordinarily damaging to the defense. Equally, the way it was done cannot be lost, it did not come from the mouth of a witness subject to cross-examination but came from the judge telling the jurors that this is what the photo depicted as a proven fact.

Add the fact that the State conveniently ignored the gang innuendo mentioned earlier, which adds significant weight to the photograph's prejudicial impact, and it is obvious the error was not harmless.

C. THE DEFENDANT WAS DENIED DUE PROCESS DUE TO SEVERAL ERRORS DURING THE CLOSING ARGUMENTS. HOWEVER, THE APPELLATE COURT FOCUSED ONLY ON THE INSTANCE WHEN THE PROSECUTOR TOLD THE JURORS THAT THEY WOULD HAVE TO FIND THE STATE'S WITNESSES TO BE LYING IN ORDER TO DECLARE THE DEFENDANT NOT GUILTY. THE STATE ACKNOWLEDGES THIS ERROR BUT ARGUES THAT IT WAS HARMLESS, A CLAIM THAT THE LOWER COURT DISAGREED WITH. SINCE THE LOWER COURT HAD ALREADY REVERSED THE DECISION, IT DID NOT ADDRESS THE NUMEROUS OTHER ERRORS THAT OCCURRED DURING THE CLOSING ARGUMENTS, WHICH ALSO WARRANTED A NEW TRIAL.

1. THE PROSECUTION’S CLOSING

During the closing arguments, the prosecutor made a series of statements that denied Smith a fair trial. These statements were objected to and raised on appeal, although

the appellate court did not address all of them. The prosecutor(s) repeatedly told the jurors that they could only find Smith not guilty if they concluded that the State's witnesses were liars, which the appellate court recognized as a "serious error" that "risks denying a defendant a fair trial." (R. 1209; 1228). Smith, at ¶59. But beyond that, the court did not consider how the prosecutor improperly vouched for his own case (R. 1229), how they argued that defense counsel only offered fairytales (R. 1212), how he offered his own opinion of the evidence to the jurors, telling them: "The difference between me and the defense attorney is that there is no question the defendant killed Kevin Guice" (R. 1229); or how he warned the jurors that they could only do justice if they agreed with him, and that only they could protect society—the prosecutor *and* the judge were helpless. (R. 1230).

A prosecutor cannot offer his own opinion as to the guilt or innocence of a defendant. *People v. Bitakis*, 8 Ill. App. 3d 103 (1972); *People v. Jones*, 108 Ill. App. 3d 880, 888 (1982). They cannot inflame the jury's emotions, shift the burden, or denigrate defense counsel. *People v. Kliner*, 185 Ill.2d 1, 705 N.E. 2d 772 (1998); *People v Wheeler*, 226 Ill.2d 92 (2007). Nor can they inject their opinion when they "expressly state that he is asserting his personal view." *People v. Pope*, 284 Ill.App.3d 695, 707 (1996); *People v. Deramus*, 214 IL App (1st) 130995, ¶51. "The tactic of expressing personal beliefs, or invoking the integrity of the State's Attorney's Office, to attack the credibility of a witness has been condemned." *People v. Wilson*, 199 Ill.App.3d 792 (1990), 557 N.E.2d 571, citing *Berger v. United States*, 295 U.S. 78 (1934).

The appellate court did not address when the prosecutor promoted an us-versus-them mentality, or invoke the judge, "Twelve of you are the only people in this world who can stop him, who can hold him responsible for killing Kevin. Nobody else can. I can't.

The judge can't. No one else can. The 12 of you can" was wrong. (R. 1230). The prosecutor created "a situation where jurors might feel compelled to side with the State and its witnesses in order to ensure their own safety." *People v. Wheeler*, 226 Ill.2d 92, 129 (2007). See also *People v. Thomas*, 146 Ill.App.3d 1087, 1089 (1986) (The prosecutor's statement, "There is nobody here for the people, just you," was deemed a plain error. The propagation of an "us-versus-them" mentality was deemed incongruous with the equitable tenets of the trial process). The prosecutor did not ask the jurors to evaluate the evidence and reach a verdict. Instead, he sought to manipulate the jurors into a guilty verdict. See *People v. Johnson*, 208 Ill.2d 53, 80-82 (2013)."A prosecutor should refrain from argument which would divert the jury from its duty to decide the case on the evidence, by injecting issues broader than the guilt or innocence of the accused under the controlling law, by making predictions of the consequences of the jury's verdict." *People v. Martin*, 29 Ill.App.3d 825, 829 (1975).

The last unaddressed argument was the prosecutor calling the defense argument a "fairytale." In *People v. Conrad*, 81 Ill.App.3d 34 (1968), a defendant charged with murder raised an insanity defense. A psychiatrist appointed by the court testified that the defendant was not insane at the time of the offense. Attacking the testimony in the closing argument, the defense counsel told the jurors that they had heard fairytales and fiction. The prosecutor's objection was sustained. On appeal, the court found the argument was not an allowable comment upon the quality or quantity of the evidence.

Here, it was suggested that the entire defense had been fabricated. But it was simple and straightforward—wrong person. To belittle it with name-calling was inappropriate and baseless.

Which brings Smith to the part of the argument the lower court discussed. The prosecutor trashed his burden and placed it upon the defense:

> *The Prosecutor*: In addition to this being a whodunit, it assumes two things. One, that we completely disregard what these four people testified to; and, two, let's not mince words, in order for you to find him not guilty, you have to find that what they are saying is that all four people lied, lied to your face. That is what you have to find.
>
> *Defense Counsel*: Objection.
>
> *The Court*: Objection is overruled.
>
> *The Prosecutor*: Let's not mince words. That's exactly what they want you to believe.
>
> *Defense Counsel*: Objection.
>
> *The Prosecutor*: They lied.

(R. 1214). It was repeated in rebuttal, finishing with the thought, "The only way this is whodunit is if you ignore the testimony that you have, if you find the four people who were in front of you liars. Find him guilty. Hold him responsible for what he did, for killing Kevin." R. 1230

Telling the jurors that to acquit the defendant they must decide that the State's witnesses were lying is a misstatement of law that denies the defendant a fair trial. *People v. Banks*, 237 Ill. 2d 154, 184-185 (2010). The State agrees. St. Br. pg. 38. But it calls the comment "inadvertent," without explanation or support, apparently as an excuse, and then offers no excuse for when the comment was repeated.[9] It is difficult how something can be inadvertent when it is repeated.

[9] The prosecutor led right up to it, recognized it was improper, then decided to say it anyway, as reflected by the "let's not mince words here" preamble. They then repeated the argument three times. To call that inadvertent is laughable.

Instead, for the second time, the State blames Smith, this time for not repeating at trial his just overruled objection, which would have been futile, likely annoyed the jurors, and, when overruled, reinforced the veracity of the improper comment. Thus, the failure to object should not be a bar.[10]

The concluding remark the jurors were left with was the burden was on the defense to prove all the State's witnesses were liars and that only if the defense met that burden could the jurors find Smith not guilty. No court has ever found this to be a permissible or harmless argument. See *People v. Ferguson*, 172 Ill. App. 3d 1, 13 (1988) ("The cases are clear in their universal condemnation of this form of argument"); *People v. Cole,* 80 Ill. App. 3d 1105, 1108 (1980*)* ("For the prosecutor in this case to inform the jury that in order to believe the defense witnesses the jury must find that each of the State's witnesses were lying in such a misstatement of law as to prejudice the defendant and deny him a fair trial. (*United States v. Vargas* (7th Cir. 1978), 583 F.2d 380. See also *United States v. Phillips* (7th Cir. 1975), 527 F.2d 1021.)"); *People v. Lark*, 127 Ill. App. 3d 927, 931-32 (1984) (It was an error when the prosecutor said, "The hardest thing about my job, Ladies and Gentlemen of the Jury is listening to people, attorneys stand here and say police officers get up on that stand, take an oath and commit perjury, that my witnesses get up on the stand, take an oath and commit perjury.").

[10] "We may consider the issue as plain error under the second prong of the test, since for a prosecutor to say that, in order to believe the defense witnesses or to acquit the defendant, the jury would have to find that all the State's witnesses were lying is such a misstatement as may deny the accused a fair trial. *Wilson*, 199 Ill. App. 3d 792, 796, 557 N.E.2d 571, 574; *Cole*, 80 Ill. App. 3d 1105, 400 N.E.2d 931 at 933, 36 Ill. Dec. 351; *Montgomery*, 254 Ill. App. 3d at 791-792, 626 N.E.2d at 1262-63." *People v. Miller*, 302 Ill. App. 3d 487, 496-97 (1998).

Notwithstanding its concession and the body of caselaw against it, the State argues the comment was permissible since the prosecutor only argued that the jury would have to know the State's witnesses were lying "to believe the defendant's theory of the case." St. Br. pg. 41 The "theory" was he did not do it, meaning if the State were correct, the comment would be allowed in every case. That is not the law.

In *People v. Coleman*, 158 Ill. 2d 319 (1994), this Court drew the line—a prosecutor cannot tell the jurors that to acquit the defendant the jury *must* find that the State's witnesses are lying. It is a misstatement of law and a serious error that distorts the burden of proof. *Coleman,* at 346. See also *People v. Siefke*, 195 Ill. App. 3d 135 (1990).

The defendant chose not to testify, and the defense did not present any alternative version that denied the shooting took place. The prosecutor did not argue that the defendant's testimony had to be contrasted with the prosecution witnesses. The prosecutor did not argue that the jurors had to compare different versions of witness testimony. Instead, with the trial court's approval, the prosecutor told the jurors that to acquit the defendant they would have to affirmatively conclude that each of the prosecutor's witnesses who testified about the shooting had lied. It concluded its presentation to the jurors by leaving them with this thought, and the court's overruling of the objections only solidified it. As was noted above, "'The influence of the trial judge on the jury is necessarily and properly of great weight,' *Starr* v. *United States*, 153 U.S. 614, 626, and jurors are ever watchful of the words that fall from him." *Bollenbach v. United States*, 326 U.S. 607, 612 (1946).

It was not harmless. The jurors could have believed the witnesses who said they saw Smith at the club and in the parking lot (Davis) but not those who said he did the

shooting. They could have believed some of the testimony and not all or concluded that some witnesses were mistaken. The jurors could have reached various conclusions and still found Smith not guilty. They could have believed all the witnesses and found him not guilty. The one thing they did not have to do was decide that all the witnesses who testified were lying as a precondition to declaring the defendant not guilty.

The State pulled out every argument it knew it could not make and made them.

2. THE COURT MINIMIZED THE BURDEN OF PROOF DURING THE DEFENSE CLOSING

The prosecution's burden shift cannot be viewed in a vacuum. Before the appellate court, Smith also challenged the trial court's diminution of the State's burden. Although raised, the appellate court did not address the issue.

During the defense counsel's argument, she had stated: "It is the State's burden of proving beyond a reasonable doubt that Smith did these things, that he was in that car that was fleeing and hitting people, that he was the person who pulled the trigger of the gun that killed Kevin Guice." (R. 1199). When the State objected, it was sustained, without any guidance for the jurors.

The trial court erred in sustaining the prosecution's objection when defense counsel rightfully argued that the State had to prove beyond a reasonable doubt that Smith was the one who pulled the trigger and killed Kevin Guice. It directly undermined the burden of proof by sustaining the objection to the argument that the State had to prove beyond a reasonable doubt Smith was the shooter.

This misstep presented the jury with the impression the prosecution was relieved of its obligation to prove the identity of the shooter beyond a reasonable doubt. *People v. Weinstein*, 35 Ill.2d 467 (1966), holds that any suggestion that shifts or diminishes the

State's burden of proof—no matter how fleeting—constitutes reversible error. Similarly, in *People v. Parks*, 65 Ill.2d 132 (1976), this Court made it clear that a court has an absolute duty to ensure that the jury is fully and properly instructed on the State's burden of proof.

The objection created an unavoidable conflict with the general instruction regarding reasonable doubt. Contradictory instructions related to the burden of proof are prejudicial, as the jury may struggle to reconcile them. In *People v. Jenkins*, 69 Ill.2d 61, 66 (1977), the jury received conflicting written instructions, which this Court found were likely to cause confusion and resulted in reversible error.

It is important to note that counsel was talking about reasonable doubt. Defense counsel informed the jurors about what the prosecution needed to prove, but the court responded by stating, 'No, that's not correct; they don't have to prove that beyond a reasonable doubt.' The fact that this instruction was delivered in a different form than a written instruction should not diminish its significance. The message conveyed by the court carried the same authority as if the judge had formally read the instruction after the arguments. It was an instruction from the court. This is particularly significant because there is no separate reasonable doubt instruction, and the jurors were not told what evidence in the State's case had to be proven beyond a reasonable doubt, only what elements.

The gravity of this error becomes apparent if one imagines the situation in reverse. Had the prosecutor argued that it was not the State's burden to prove beyond a reasonable doubt that Smith pulled the trigger, any court would have immediately sustained an objection or reversed. In this case, the trial court sustained the prosecutor's objection when the defense counsel tried to correctly explain the same burden, which had the exact same

effect of diminishing the prosecution's constitutional duty. *People v. Williams*, 120 Ill.App.3d 900, 904 (1st Dist. 1983).

Smith was the only one charged, and the prosecution did not proceed under any accountability theory. It was clear that proving Smith as the shooter beyond a reasonable doubt was central to the case, and any deviation from that standard stripped him of his constitutional right to a fair trial. As such, this court must reverse the conviction and remand for a new trial.

D. THE PROSECUTORS VIOLATED THEIR DISCOVERY OBLIGATION BY ELICITING UNDISCLOSED TESTIMONY FROM THE GUNSHOT RESIDUE EXPERT. ADDITIONALLY, THE APPELLATE COURT ERRONEOUSLY HELD THAT THE EXPERT COULD TESTIFY TO A STANDARD LOWER THAN THE SCIENTIFIC STANDARD GENERALLY ACCEPTED IN ILLINOIS.

On appeal, Smith challenged testimony from Mary Wong, a forensic scientist called as the State's gunshot residue expert. Smith argued that Wong should not have been allowed to testify that other labs found positive GSR when only one particle was present, while Illinois required three. He also complained that since one particle was found during the testing done on him, the failure to disclose that Wong was going to opine that one particle was sufficient for a positive finding, while her report concluded that Smith's test was negative because three particles were required, was a discovery violation. The appellate court disagreed with the former but agreed with the latter. The State refers to this as "the appellate court's last ruling," although it was not, and as with the other four issues, the State writes the lower court got it wrong.

Wong's disclosed written opinion, repeated when she testified, was that "the kit administered to Mr. Smith indicates that he may not have discharged a firearm with either hand. If he did, then the particles were wither (sic) removed by activity, or not deposited or not detected by the procedure." (R. 924). She then explained that to have a positive result for gunshot residue she had to find "three tri-component particles." *Id*. But then, over objection, she was permitted to tell the jurors that a single particle was a positive finding elsewhere and that she had found a single particle present in this case. (R. 933-34). Her testimony was that her expert opinion could be positive for GSR somewhere else; that Illinois was stricter. It suggested that she thought Smith had fired a gun but that the stricter

standard (i.e., the law in Illinois) did not allow her to say so—it was the opposite of her disclosed opinion.

Smith had been swabbed for gunshot residue soon after his arrest. The shirt he was wearing at the time of the shooting was also swabbed. (R. 923). Wong performed the GSR testing. (R. 913). She explained to the jurors that "gunshot residue is a general term that is used to describe anything that is discharged from the gun" and that she was "looking at three elements of interest, lead, barium, and antimony." (R. 918-921). Wong told them that her "findings for the right back sample and the left back sample is that they both contained particular characteristics of background samples. This leads me to the conclusion that the kit administered to Mr. Smith indicates that he may not have discharged a firearm with either hand. If he did, then the particles were either removed by activity, were not deposited, or were not detected by the procedure." (R. 924). Wong continued, "In order to return a finding for a positive for primer gunshot residue, I must find three tri-component particles." (R. 924). This was all consistent with what had been disclosed in her written report and what was generally accepted in the scientific community in Illinois. "Evidence of gunshot residue analysis has long been accepted in courts." *People v. Smith*, 2023 IL App (1st) 181070, ¶ 52.

But the State asked Wong whether she found any particles. When she replied, "I found one particle on the right-hand sample," she was allowed to explain that while the Illinois State Police require "three particle components" for a positive finding, some laboratories allowed for a positive finding with only one component.[11] (R. 934). From this,

[11] Wong said that the one-particle standard was something she learned in her training in 2004. (R. 933). She did not testify whether one particle was the standard in some other lab(s) or State(s), nor was she asked.

the State argued in closing that the lack of three particles "In no way means that he did not fire a gun," referencing Wong's testimony. (R. 1223).

Smith raised a *Frye* challenge on appeal that the court rejected. In Illinois, the three-particle threshold is generally accepted in the scientific community, and, therefore, it is the three-particle threshold that an expert can opine on. To opine on anything else is to give an opinion on something that is not generally accepted. While it might be fair game for *opposing* counsel to ask about other standards during cross-examination, it is not appropriate for the proponent of the testimony to water down the threshold to explain away negative evidence. Wong was testifying to a possible scientific result that was never approved versus the applicable scientific standard. "The standards exist, not for their own sakes, but in service of the truth-seeking function, which they promote by ensuring that blood, breath, and urine tests are conducted in a manner that produces reliable results. *** We are, therefore, reluctant to relax the standards when doing so would require an inquiry into the scientific basis for a particular standard. *Ebert*, 401 Ill.App.3d at 965, 341 Ill.Dec.671, 931 N.E.2d 279." *People v. Clairmont*, 2011 IL App (2d) 100924 ¶21; Ill. R Evid 702.

If the three-particle standard is not the only standard on which expert may base their opinion, why has a court decided the issue of admissibility?

By way of example, consider a DUI case where the State is proceeding under a *per se* theory, and the defendant's blood alcohol content (BAC) test yielded a result of .04. Would the State be permitted to call an expert to testify that, while under Illinois law the .08 threshold does not presume intoxication, other states have a .04 threshold, and under those standards the defendant would be presumptively intoxicated? Absolutely not. Such

testimony would be inadmissible because it would confuse the issue and invite the jury to speculate about laws and standards that do not apply.

Yet, that is precisely what the State did here. By presenting speculative testimony about an unknown lab's potential standard in a different jurisdiction, the State effectively urged the jury to disregard the clear lack of scientific proof under Illinois law and consider non-existent, lower standards from elsewhere.

The appellate court's decision allows a dangerous departure from established scientific standards. Jurors can certainly weigh conflicting expert opinions based on competing but accepted scientific principles. However, the court here allowed the jury to consider two conflicting opinions from the same expert—even though only one had been properly vetted through Illinois's rigorous "general acceptance" standard. In essence, the court improperly conferred upon the jury the authority to override the established scientific determination that a three-particle combination is the accepted standard for gunshot residue. This overstepped the proper function of the jury.

For gunshot residue analysis, this variance is particularly perilous. Expert testimony made clear that there are seven possible combinations of lead, barium, and antimony, six of which occur in everyday life. The tri-component standard—the presence of lead, barium, and antimony together—is the only combination that is not found naturally in everyday environments. As Ms. Wong testified, “there is one combination that is found in a particle that contains lead, barium, and antimony together, and that is what we call a tri-component particle that is usually found when a percussion-type instrument [gun] is discharged” (R. 921). The failure to adhere to this standard exposes the jury to scientific conjecture rather than fact, undermining the integrity of their decision-making process and the foundational

principles of expert testimony. The appellate court should not allow this one particle testimony.

The witness was also allowed to testify, once again without prior disclosure, that only approximately 34% of all gunshot residue kits yield a positive test. (R. 937-938). Wong did not articulate whether that was for one particle or three. The State also seized upon this during the closing, arguing that this low rate meant that the science was inconclusive, and the conclusion did not mean that Smith had not fired the gun.

Disclosure in a criminal case is governed by Supreme Court Rule 412, which provides, in relevant part, that the State shall disclose "any reports or statements of experts, made in connection with the particular case, including the results of physical or mental examinations and of scientific tests, experiments, or comparisons, and a statement of qualifications of the expert." Ill. S. Ct. R. 412(a)(iv). The discovery rules are designed to protect the accused against surprise, unfairness, and inadequate preparation. *People v. Hurd*, 187 Ill.2d 36, 63 (1999). The Committee Comments to the rule explain, "[W]ithout the opportunity to examine such evidence prior to trial, counsel has the very difficult task of rebutting evidence of which he is unaware. In the interest of fairness paragraph (a), subparagraph (iv), requires the disclosure of all such results and reports, whether the results or report is 'positive,' or 'negative,' and whether or not the State intends to use the report at trial." Ill. S. Ct. R. 412(a)(iv), Committee Comments, at 347-48.

When Wong testified that she found one element and other labs accepted one element as a positive finding, she was testifying "to a conclusion that stands in complete opposition to the conclusion stated in her own official report." *People v. Lovejoy*, 235 Ill.2d 97, 119 (2009). In *Lovejoy,* this Court reversed a capital murder case, noting that the

discovery rules are not intended to allow ambush. There, after tendering a report that stated a negative finding for blood, an expert opined at trial that it was a false negative, without prior disclosure.

Before the appellate court, Smith argued that his case and *Lovejoy* were "extraordinarily similar." The undisclosed opinion completely undermined what had been disclosed, and it allowed the State to present complete and utter speculation under the guise of expert opinion. The appellate court agreed. It found that the "overall effect" of Wong's testimony was that despite the negative results, Smith likely fired a gun. "Considering the entirety of her testimony then, Wong's wiggle-worded opinion that 'Smith may not have discharged a firearm' is hardly consistent with the disclosed negative result. To be sure, her testimony sent just the opposite message." *Smith* at ¶ 55.

In this court, the State argues that *Lovejoy* is "a much different case" because in that case, the testimony was "in complete opposition" to the report. According to the State, Wong's testimony did not contradict her report since she said Smith's sample had tested negative, regardless of her testimony that it could otherwise be considered a positive result. The State also argues that even if there was a discovery violation, Smith cannot claim prejudice because he did not request a continuance and was not prejudiced.

The State did not argue a waiver for failing to request a continuance in the court below because a continuance would have been a futile act. In the middle of trial the defense could not have secured an expert. And even if the defense could have, they did not need an expert to offer the same disclosed opinion, namely that Smith's test was negative. Nor did they need an expert to explain to the jurors that Illinois required three particles, and perhaps Wong had once been taught something different. "A defendant's failure

to request a continuance does not waive objection to a discovery violation if a continuance cannot correct the prejudice. See *People v. Weaver*, 92 Ill. 2d 545, 559-60, 442 N.E.2d 255, 65 Ill. Dec. 944 (1982); *People v. Smiths*, 299 Ill. App. 3d 914, 921, 702 N.E.2d 291, 234 Ill. Dec. 125 (1998)." *People v. Mitts*, 327 Ill. App. 3d 1, 10 (2001); *People v. Steel* (1972), 52 Ill. 2d 442, 450; and *People v. Robinson*, 157 Ill. 2d 68, 78 (1993).

The prejudice is glaring—Smith consistently denied firing a gun, and the scientific evidence did not establish he did. Yet, the State introduced speculative testimony suggesting that an expert might have concluded otherwise under the standards of an undisclosed lab. This vague assertion left the jurors grappling with the notion that perhaps Illinois standards are unduly rigorous, creating a dangerous opening for speculation. Jurors were left free to infer that while Illinois may demand a higher threshold for scientific certainty, experts in other states could have opined that Smith fired a weapon.

This was all calculated. There was no reason to call this witness to establish a negative result, and that fact certainly did not help the prosecution. They obviously called her to plant a positive finding in the jurors' heads, regardless of the science.

Showing its importance and that this was all premeditated, the GSR became an early-on focus during the prosecutor's closing. After the typical introduction and brief comments to the jurors about how the prosecutor viewed their role, they began talking about circumstantial evidence. First, they referred to the defendant's alleged flight, that he fled from the scene in a vehicle going 80 miles an hour, overlooking that Smith was not the driver. Then, the very next thing the prosecutor said was, "take into consideration the testimony of Mary Wong, who is a forensic scientist with the Illinois State Police Forensic Science Center, and she explained to you that when she tested the gunshot residue kit from

this defendant, for her to say it is a positive, she needs three. There was one. You can take that into consideration, ladies and gentlemen." (R. 1178). They were not arguing because they were implying innocence 'there was only one – a negative result – means he did not fire a gun.' They had planted the seed one particle could be a positive, and they were reinforcing it.

The State returned to this during rebuttal: "Let's talk about the GSR evidence that they talked about. It's true; only one of these components Ms. Wong testified to was found on the defendant's right hand. I'm not going to suggest that that's sufficient to make a *definitive* finding that the defendant came in contact with gunshot residue… He had one. Fine. That in no way means that he did not fire a gun." (R. 1223).

The witness was called in bad faith, not so that the prosecution could let the jurors know about the negative GSR test, but so that they could let the jurors know that it could have been a positive GSR test. The reason this was not disclosed ahead of time was because the prosecution did not want to afford the defense any opportunity to forestall this improper testimony though a motion in *limine*. This is another example of the trial court prosecutor acting shamefully.

III. CONCLUSION

The Appellate Court found that excluding Mr. Smith's mother from the trial denied him his constitutional right to a public trial, amounting to structural error and requiring a new trial. This Court should affirm that determination because when viewing the record it becomes clear that the mother's exclusion was designed to deny Mr. Smith his right to a public trial and not merely some measure to exclude a possible witness. There was simply

no interest in excluding her as a "witness" where there was no rational reality where she would have been called.

Even if this Court may disagree with the appellate court's decision of structural error, there still remains an array of substantial errors the appellate court already found and the additional errors remaining to be determined. This is a case where multiple pieces of inflammatory evidence were introduced by surprise, incorrect expert testimony was allowed without a basis and without disclosure, with the defendant's identifications raising serious questions as to their authenticity and accuracy, and one where the State clearly felt the need to pull out all the stops to obtain a conviction. It now argues the evidence was overwhelming, which begs the obvious: why would this prosecutor go so far outside of and beyond the law in presenting the evidence and arguing it if it truly believed the evidence was so clearly overwhelming? Considering the raft of errors, there is no question that Mr. Smith did not receive a fair trial and that the interests of justice require that his convictions be vacated.

Respectfully submitted,

s/ Steven Greenberg
One of Appellant's Attorneys

GREENBERG TRIAL LAWYERS
Steven Greenberg
Nicholas Burris
53 W. Jackson Blvd., Suite 315
Chicago, Illinois 60604
Steve@GreenbergCD.com
Nick@GreenbergCD.com
o. (312) 879-9500
c. (312) 399-2711

CERTIFICATE OF COMPLIANCE

I, Nicholas V. Burris, as an attorney of record, certify that the Reply Brief on Appeal filed in the above-entitled matter on behalf of the Defendant-Appellee complies with Supreme Court Rule 341(a) and (b). The length of the brief is 55 pages.

s/ Nicholas V. Burris
One of Appellee's Attorneys