No. 126291

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellant, -vs- TODD L. JOHNSON, Defendant-Appellee.	))))))))))	Appeal from the Appellate Court of Illinois, No. 3-16-0675. There on appeal from the Circuit Court of the Tenth Judicial Circuit, Peoria County, Illinois, No. 15 CF 164. Honorable John P. Vespa, Judge Presiding.

BRIEF AND ARGUMENT FOR DEFENDANT-APPELLEE

JAMES E. CHADD
State Appellate Defender

THOMAS A. KARALIS
Deputy Defender

JAY WIEGMAN
Assistant Appellate Defender
Office of the State Appellate Defender
Third Judicial District
770 E. Etna Road
Ottawa, IL 61350
(815) 434-5531
3rddistrict.eserve@osad.state.il.us

COUNSEL FOR DEFENDANT-APPELLEE

ORAL ARGUMENT REQUESTED

E-FILED
3/26/2021 2:15 PM
Carolyn Taft Grosboll
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ISSUES PRESENTED FOR REVIEW

WHETHER DEFENDANT IS ENTITLED TO A NEW TRIAL BASED ON COUNSEL'S FAILURE TO REQUEST DNA TESTING BECAUSE HE HAS DEMONSTRATED PREJUDICE WHERE THERE IS A REASONABLE PROBABILITY THAT DEFENDANT – WHO WAS ARGUABLY DISCOVERED IN POSSESSION OF BOTH A BB GUN AND A FIREARM AND WAS THUS ALTERNATIVELY CHARGED WITH AGGRAVATED ROBBERY AND ARMED ROBBERY – WOULD HAVE BEEN ACQUITTED OF, AT A MINIMUM, THE OFFENSE OF ARMED ROBBERY IF THE SWABS HAD BEEN TESTED.

STATEMENT OF FACTS

Any facts in addition to those described in the State's brief that are necessary for an understanding of the issues presented in this appeal will be included, together with appropriate record references, in the argument portion of this brief.

ARGUMENT

DEFENDANT IS ENTITLED TO A NEW TRIAL BASED ON COUNSEL'S FAILURE TO REQUEST DNA TESTING BECAUSE HE HAS DEMONSTRATED PREJUDICE WHERE THERE IS A REASONABLE PROBABILITY THAT DEFENDANT – WHO WAS ARGUABLY DISCOVERED IN POSSESSION OF BOTH A BB GUN AND A FIREARM AND WAS THUS ALTERNATIVELY CHARGED WITH AGGRAVATED ROBBERY AND ARMED ROBBERY – WOULD HAVE BEEN ACQUITTED OF, AT A MINIMUM, THE OFFENSE OF ARMED ROBBERY IF THE SWABS HAD BEEN TESTED.

STANDARD OF REVIEW

Whether a defendant received ineffective assistance of counsel at trial is a mixed question of law and fact, subject to independent *de novo* review. *Strickland v. Washington*, 466 U.S. 668, 698 (1984).

ARGUMENT

Shortly after a gas station attendant was struck in the head with a gun by an offender who was robbing the store (R305, 310, 416; People's Ex. No. 1), the police recovered two guns at a home in which the defendant lived; a 9-millimeter firearm was found boxed, in a drawer, under clothing, in the bedroom of Angel Patterson, the person who owned the home, and, in the detached garage – where police had observed the defendant shortly before his arrest – police found a BB gun (R305, 310, 356-57, 386-89, 391, 403-04, 408, 413, 416; St. Ex. 1). Paul Tuttle, the crime scene officer, testified that he did not "do a test" on the BB gun (R413). However, Tuttle swabbed the handle, the slide, and the top of the of the firearm for potential DNA, even though biological material was not seen by the naked eye (R405-06). He swabbed the firearm "in case there was something there I could not see" (R415). Tuttle had been advised that the complainant had been struck in the head by the weapon, which is "why it was swabbed" (R416). The crime scene officer did not examine the firearm for fingerprints because, in his

experience, fingerprints could not be obtained from firearms made by that manufacturer due to the pistol's surface (R416-17). Tuttle's "choice was swab it for the potential DNA or do the fingerprints," and he felt he "would more likely get DNA than fingerprints off that particular gun" (R417). The existence of the swabs was disclosed to defense counsel, but the swabs were never submitted for testing (R415).

Trial counsel was ineffective for failing to request DNA testing of swabs taken from a firearm allegedly used as a bludgeon where counsel incorrectly believed that the swabs had been tested and revealed no biological evidence. The Appellate Court properly determined that trial counsel rendered deficient performance where he failed to request DNA testing of the swabs. *People v. Johnson*, 2020 IL App (3d) 160675, ¶ 36, 51. Further, as the majority found, Johnson was prejudiced by counsel's deficient performance where the rules of discovery allow for a defendant to request scientific testing of evidence, the court likely would have allowed for such testing if there had been a timely request, and there is a reasonable probability that the defendant would, at a minimum, have been acquitted on the armed robbery count had the swabs been tested. *Johnson*, 2020 IL App (3d) 160675, ¶¶ 37-38, 40. Accordingly, this Court should affirm the judgment of the Appellate Court, Third Judicial District, which ordered that the defendant be given a new trial. *Johnson*, 2020 IL App (3d) 160675, ¶ 47.

The United States and Illinois Constitutions grant criminal defendants the right to the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 690-91 (1984); U.S. Const. amends. VI, XIV; *People v. Albanese*, 104 Ill. 2d 504, 525 (1984); Ill. Const. 1970, art. I, § 8. A defendant is denied effective assistance if (1) counsel's representation "fell below an objective standard of reasonableness," and (2) absent counsel's deficient performance, there is a "reasonable probability" that the outcome

of trial would have been different. *Strickland*, 466 U.S. at 687-89. A reasonable probability is one that undermines confidence in the result of the trial. *People v. Pollards*, 367 Ill. App. 3d 17, 21 (1st Dist. 2006).

Consideration of both prongs of the *Strickland* analysis demonstrates that Todd Johnson received ineffective assistance of counsel where counsel's performance was deficient and, but for that deficiency, there exists a reasonable likelihood that the result at trial would have been different. Accordingly, the majority of the Appellate Court properly vacated the defendant's convictions and remanded this matter for a new trial. The defendant therefore respectfully requests that this Court affirm the judgment of the Appellate Court.

Ordinarily, reviewing courts first consider, as did the court below, whether counsel's performance was deficient, only moving on to the question of prejudice if it was. In its brief, however, the State first addresses *Strickland's* prejudice prong, noting that because a defendant who seeks a new trial based on allegations of ineffective assistance must show both that counsel's performance was deficient and that counsel's errors prejudiced him, the State need not address counsel's performance where a petitioner is not prejudiced (St. Br. 9). Indeed, before the Appellate Court, Third District, the State effectively forfeited any argument that failing to test the swabs taken from the firearm constituted deficient performance by failing to challenge the defendant's argument that counsel provided ineffective assistance (St. Br. 9). See *Johnson*, 2020 IL App (3d) 160675, ¶ 36, fn. 1. As a result, the State in its opening brief focused first on prejudice (St. Br 9-13). Johnson will address the State's arguments in the order they were presented.

A. The Appellate Court Majority Properly Found That Defendant Was Prejudiced By Counsel's Failure to Request DNA Testing Because Defendant Demonstrated a Reasonable Probability That the Result of the Trial Would Have Been Different Had Counsel Timely Requested Testing of the DNA Swabs.

To establish that he was denied the effective assistance of counsel, defendant must show that absent counsel's deficient performance, there is a "reasonable probability" that the outcome of trial would have been different. *Strickland*, 466 U.S. at 687-89. A reasonable probability is a probability sufficient to undermine confidence in the outcome. The prejudice prong of *Strickland* entails more than an "outcome-determinative" test; the defendant must show that counsel's deficient performance rendered the result of the trial unreliable or the proceeding fundamentally unfair. *People v. Richardson*, 189 Ill. 2d 401, 411 (2000).

In its brief, the State acknowledges that, in the instant case, Johnson must demonstrate that, had counsel requested DNA testing, there is a reasonable probability that the result of the proceeding would have been different (St. Br. 13). However, the State then declares, in reliance upon *People v. Scott*, 2011 IL App (1st) 100122, ¶ 31, that Johnson's claim "fails at the outset because he has not demonstrated that DNA evidence exists to be tested" (St. Br. 13). Given the unique circumstances of the instant case, however, *Scott*'s ruling is inapposite because Johnson's best defense relies on the *absence* of DNA, rather than its *presence*. See *People v. Smith*, 2014 IL App (1st) 113265 (2014), ¶¶ 31-32 (DNA testing of a sweatshirt and gloves was materially relevant in part because "defendant's argument does not center solely on the presence of another person's DNA on those items but, rather, on the ramifications of the absence of the DNA from those items."). If the swabs did not contain DNA, then this fact would have strongly bolstered defendant's cause. The gun had ridges that would have held DNA transferred from the attendant as a result of repeatedly being struck in the head (R530). The firearm was recovered soon after the robbery, and thus, there was little time to scour the firearm clean of DNA evidence (R299-300, 332-33, 351-60, 386-89, 391).

Additionally, this Court should reject the State's reliance upon *Scott* – the sole authority upon which the dissent relied when it concluded that Johnson had not been prejudiced by counsel's failure to request DNA testing on the swabs taken from the firearm – as it is readily distinguishable from the instant case. *People v. Johnson*, 2020 IL App (3d) 160675, ¶¶ 51, 53 (Schmidt, J., dissenting). In *Scott*, the Appellate Court, First District, affirmed a first-stage dismissal of a post-conviction petition alleging ineffective assistance because counsel failed to pursue DNA testing on a blue shirt allegedly worn by the shooter in a murder case in which the defendant asserted that the presence or absence of his DNA on the blue shirt was highly relevant to the case, as the presence of someone's DNA other than defendant's on the shirt might suggest that someone else was the shooter. *Scott*, 2011 IL App (1st) 100122, ¶ 30. The *Scott* Court reasoned that because no DNA testing had yet been performed, it was unknown if sufficient DNA remained on the shirt to be tested and unclear that any test results would be exculpatory, and the defendant's argument was speculative; Scott therefore could not establish prejudice under *Strickland*. *Scott*, 2011 IL App (1st) 100122, ¶ 31. The State's reliance upon *Scott* is misplaced, however, because the *Scott* decision also relied on the fact that the record in that case showed, "the blue shirt was handled by multiple individuals during its recovery and was later placed on defendant's shoulders during a lineup." *Scott*, 2011 IL App (1st) 100122, ¶ 31. The State here points to no such evidence that might call into question the ability to reliably test the firearm for DNA evidence, and thus this Court should reject the rationale of *Scott*.

In addition to *Scott*, the State points to *People v. Olinger*, 176 Ill. 2d 326, 363 (1977), in support of its argument that a defendant claiming prejudice for counsel's failure to request forensic testing may not speculate that the results of such testing would

have been favorable to him (St. Br. 11). In *Olinger*, the defendant filed a post-conviction petition in which he alleged, among other things, that his trial counsel was ineffective because he failed to pursue the argument that law enforcement officials did not investigate all possible leads from unidentified fingerprints lifted from one of the crime scenes involved in his prosecution for the murders of three people. *Olinger*, 176 Ill. 2d at 363. Olinger argued that, had his trial counsel pursued this strategy of questioning whether police performed an adequate investigation, counsel could have raised a reasonable doubt of defendant's guilt. *Olinger*, 176 Ill. 2d at 363. This Court found that Olinger failed to meet the prejudice prong of the *Strickland* test because he merely posited that some of the unidentified fingerprints "could have belonged to a person . . . responsible for the murder." *Olinger*, 176 Ill. 2d at 363. Finding this assertion to be "pure speculation," this Court found that Olinger's petition fell far short of the demonstration of actual prejudice required by *Strickland*. *Olinger*, 176 Ill. 2d at 363. Conversely, in the instant case, the DNA evidence defendant seeks is not speculative because the absence of the instant complainant's DNA from the firearm would allow a jury to reasonably conclude that the defendant had not used the firearm, even if it concluded that the defendant was the perpetrator.

The State is wrong when it asserts that the defendant's claim – that DNA is likely present on the swabs taken by crime scene investigator Tuttle – is speculative because the officer testified that he saw no apparent blood or other bodily fluid on the gun (St. Br. 14). The value of DNA testing is that it has "become so sensitive that biological evidence too small to be seen with the naked eye can be used to link suspects to crime scenes." John Butler, Fundamentals of Forensic DNA Typing 80 (2010). That Tuttle could not detect the presence of biological material on the firearm simply by looking

at it does not mean that it was not present. In fact, Tuttle swabbed the firearm specifically "in case there was something there I could not see," because he was aware that the complainant had been struck in the head by the weapon, which is "why it was swabbed" (R416). Of the options available to him, Tuttle thought he "would more likely get DNA than fingerprints off that particular gun" because of the ridges on the firearm's handle (R417). While it is true that the officer could not tell for certain, without testing, whether biological evidence would be found on the gun, he clearly believed the probability of finding evidence from swabbing the firearm was sufficient to justify the preservation of the evidence; conversely, he did not test for fingerprints because the likelihood of finding fingerprints was too remote (R415-17). There is thus a reasonable likelihood that, had the firearm come into contact with the complainant, his DNA would be present, and thus DNA testing would have been appropriate in the instant case. Indeed, there is no dispute that testing of the swabs would have occurred had counsel made the appropriate request. *Johnson*, 2020 IL App (3d) 160675, ¶ 37, citing Ill. S. Ct. R. 412 (eff. Mar. 1, 2001). Nor is there any question that the circuit court would have granted a request for DNA testing had one been timely made (R526-27, 530).

Moreover, the absence of DNA on the firearm would create a strong probability of a different result at trial, given that the complainant testified that the perpetrator struck him repeatedly over the course of the robbery, causing him to bleed from a scrape (R305, 310). This testimony was supported by the surveillance footage (St. Ex. 1). The Appellate Court majority properly found that if the gun found in Patterson's drawer was discovered to not contain Ferguson's DNA, this would be convincing evidence that the gun was not the one wielded during the robbery. *Johnson*, 2020 IL App (3d) 160675, ¶ 38. In the instant case, a negative DNA result on the testing of the firearm swabs would create

a reasonable probability of a different result at trial, and thus Johnson was prejudiced by trial counsel's failure to test the swabs obtained by the State and disclosed to counsel.

While the absence of biological evidence from a single item may not have a significant impact in most cases, because there can be many reasons why fingerprints or DNA do not transfer to an item, the absence of DNA from the firearm has special significance in the instant case because the police found a similarly colored BB gun (which is generally not considered a firearm for the purposes of the armed robbery statute (430 ILCS 65/1.1 (2014)), in a garage where officers observed the defendant unloading something from his car shortly after the offense and just before his arrest. 720 ILCS 5/2-7.5; 720 ILCS 5/18-2(a)(2) (2014). Johnson was charged with, and convicted of armed robbery, which requires the carrying of an actual firearm in the commission of a robbery. Thus, in order to find defendant guilty of armed robbery, the jury would have to find that defendant bludgeoned the complainant with the actual firearm. Johnson was also charged with aggravated robbery, which is committed where a person merely indicates "to the victim that he or she is presently armed with a firearm or other dangerous weapon." 720 ILCS 5/18-1(b)(1) (2014). If defendant carried the BB gun in the course of the robbery, he would be guilty only of aggravated robbery. As a result, the absence of Ferguson's DNA on the firearm would cast doubt that defendant perpetrated the armed robbery. Thus, DNA testing on the firearm was of extreme importance in the instant case.

Thus, as found by the Appellate Court majority, even if the jury could still conclude that defendant was the perpetrator, the lack of Ferguson's DNA on the firearm would severely undermine the notion that defendant carried the firearm, rather than the BB gun, during the robbery. *Johnson*, 2020 IL App (3d) 160675, ¶ 40. This would create

a strong chance that the jury would conclude that defendant had instead used the BB gun in the robbery. *Johnson*, 2020 IL App (3d) 160675, ¶ 40. Not only would that conclusion require an acquittal on the armed robbery charge and a conviction only on the lesser aggravated robbery charge, it would also dispense with the 15-year firearm enhancement attached to defendant's sentence. *Johnson*, 2020 IL App (3d) 160675, ¶ 40, citing 720 ILCS 5/18-2(a)(2), (b)(2014).

Similarly, in *People v. Johnson*, 401 Ill. App. 3d 685 (2d Dist. 2010), the Appellate Court, Second District, found that defendant made a substantial showing that he was prejudiced by his attorney's failure to obtain and present fingerprint evidence that clearly indicated that there were five identifiable prints on the complainant's car but that none of them belonged to the defendant. In that case, the Court found that the absence of the defendant's fingerprints on the complainant's car "could lend some support to the defense theory that defendant was not in [the complainant's] car and that the encounter took place in the laundry room." *Johnson*, 401 Ill. App. 3d at 695. In that case, the Appellate Court stated that if the jury determined that the State failed to prove that defendant was ever in the complainant's car, then a kidnaping charge could not have been sustained: "Even if the jury did not believe that the oral sex was consensual, if it believed that the act occurred in the laundry room, it may still have found the defendant not guilty of aggravated kidnaping." *Johnson*, 401 Ill. App. 3d at 695. In the same way, were the jury to find that the instant complainant's DNA was not on the firearm, the jury could have found the defendant not guilty of armed robbery. Thus, the defendant has demonstrated a reasonable probability that DNA testing would have produced favorable results and that there was a reasonable probability of acquittal on the armed robbery charge (St. Br. 13).

The State asserts that "any defendant, including one who claims counsel was ineffective for failing to request forensic testing," must affirmatively show prejudice, and that the Appellate Court majority "impermissibly relieved defendant of his obligation to affirmatively show prejudice and instead adopted a test that presumed the results of hypothetical testing would be favorable to the defense" (St. Br. 10). The premise of the State's argument – that the defendant must demonstrate that the swabs contain DNA and that the test results would have been favorable to the defendant – misstates both the law and the Appellate Court majority's determination (St. Br. 13). As the Appellate Court majority noted, "the prejudice component of the ineffectiveness test does not require a defendant to establish that the result at a new trial would 'necessarily' be different. Rather, defendant must only show a reasonable probability of such a different result." *Johnson*, 2020 IL App (3d) 160675, ¶ 38, citing *People v. Enis*, 194 Ill. 2d 361, 376 (2000). Indeed, prejudice to the defendant may be found even where the chance that minimally competent counsel would have won a different verdict is "significantly less than 50 percent," as long as a different verdict would be reasonable. *Miller v. Anderson*, 255 F.3d 455, 459 (7th Cir. 2001). All that a defendant needs to show is that the chance of a different outcome was "better than negligible." *United States ex rel. Hampton v. Leibach*, 347 F.3d 219, 246 (7th Cir. 2003).

In further support of this assertion, the State cites to cases that do not include defendants who claimed that trial counsel was ineffective for failing to request forensic testing (St. Br. 10). Rather, the State relies primarily on cases in which the defendants pled guilty and could not establish that they were prejudiced where there was no showing in the record that they would have proceeded to trial and would have been acquitted, but for counsel's alleged deficiencies (St. Br. 10, citing *People v. Hale*, 2013 IL 113140,

¶ 263 ("The record discloses that defendant clearly and expressly, on many occasions, professed his innocence and indicated a *desire* for trial" [emphasis in original]); *People v. Bew*, 228 Ill. 2d 122, 135 (2008) (no evidence in record that the parties were engaged in active or serious plea negotiations, or that the defendant would have accepted a plea had one been offered); *People v. Palmer*, 162 Ill. 2d 465, 479-81 (1994)(counsel advised the defendant that a guilty plea was the best possibility for avoiding the death penalty). These cases do not support the State's claim that defendant bears the burden to "affirmatively demonstrate" that he was prejudiced by defendant's failure to request forensic testing (St. Br. 10).

The State asserts that its case at trial did not require that the gun in Patterson's drawer be definitively linked to the robbery (St. Br. 15). But without it, the evidence was sufficiently close on the armed robbery count that there was a reasonable probability that the result of the proceeding would have been different. Aaron Ferguson could not identify the robber (R308). Earl Hensley and Fred May saw defendant get into his car on Wilson, but they did not see him commit any offense, they did not see a gun in his hand, and they did not see a black briefcase (R317-19, 327-29, 332-33, 339-42, 346). Although the briefcase is large and clearly visible on the security camera, it was not recovered (R389, 393; People's Ex. No. 1, Defendant's Ex. Nos. 6, 7). Nor, was any cash recovered from defendant.

This dearth of evidence connecting the defendant to the robbery distinguishes the instant case from several cited by the State (St. Br. 10). In *People v. Patterson*, 2014 IL 115102, ¶ 87, this Court held that even if trial counsel had been ineffective for failing to file a motion to suppress, because the evidence was so overwhelming, defendant would have been found guilty if counsel had succeeded in suppressing certain evidence.

In *People v. Wallace*, 201 Ill. App. 3d 943, 952 (2d Dist. 1990), the Appellate Court, Second District, found that defendant presented mere speculation that post-conviction counsel failed to present evidence or supporting documents of which he was aware or should have been aware when he filed the post-conviction petition. And, in *People v. Gordon*, 2016 IL App (1st) 134004, ¶ 47, the Appellate Court, First District, concluded that counsel was not ineffective because the evidence of defendant's guilt was so overwhelming, "there was no reasonable probability that the outcome of his trial would have been different but for counsel's promise in opening statement that defendant would testify." In contrast, the evidence was sufficiently close on the armed robbery count that there was a reasonable probability that the result of the proceeding would have been different had counsel moved for DNA testing of the firearm found in Patterson's drawer.

More importantly, there was scant evidence that defendant committed the offense with the 9-millimeter firearm. Ferguson did not identify the gun. The video is inconclusive as to whether the 9-millimeter was the gun used in the robbery. In fact, still photographs show that the gun the offender used had a silver ejector, but the gun found in defendant's house was all black, except for tell-tale orange markings that are not visible on the video (C218; 220-25; R415; People's Ex. Nos. 1, 14-15, Defendant's Ex. No. 5). The firearm was recovered from the bottom of a dresser drawer, underneath a pile of undisturbed clothes (R452). And, Angel Patterson testified that defendant did not know about the gun (R452).

Also, defendant was seen by two detectives retrieving a black object or bag from his car and walking toward his garage (R356, 371-72, 380). The only thing found in the garage was the BB gun (R388-89, 391). While the BB gun did appear broken, it

very well may have been destroyed after Ferguson was hit on the head (C219; People's Ex. No. 20, Defendant's Ex. No. 24).

Furthermore, the jury found defendant guilty of aggravated robbery, after the State argued in closing that the "aggravated robbery goes toward that BB gun" (R475). Too, it was not given the definition of a firearm, and, therefore, based on the instructions, the jury could have found that defendant committed the armed robbery with the BB gun. It is also apparent that the jury was concerned about the relationship between the untested swabs and the firearm as shown by its question: "Why wasn't anything tested for DNA?" (C172-73). Given all of these facts, if counsel would have had the swabs tested, there is a reasonable probability that neither defendant's nor the victim's DNA would have been found on the firearm, and the jury would have acquitted him on the armed robbery count.

The State asserts that the defendant cannot affirmatively show prejudice because of the possibility that the defendant's DNA would be found on the firearm (St. Br. 11-12). Although the defendant's vehement insistence that the firearm be tested strongly suggests that neither his nor Ferguson's DNA would be found on the firearm, the Appellate Court majority acknowledged this possibility, but also noted the paradox that would result from a requirement that the defendant present the results of those tests to support his claim of prejudice, given that it "is the lack of those test results that forms the very basis of the claim." *Johnson,* 2020 IL App (3d) 160675, ¶ 41. As a result, the majority found that, in unusual circumstances such as occurred in the instant case, a defendant need only demonstrate that a negative DNA result would probably change the outcome of the trial. *Johnson*, 2020 IL App (3d) 160675, ¶ 41. This finding is in accord with the

principles of *Strickland*, because the lack of testing in the instant case clearly undermines confidence in the result of Johnson's trial.

The State asserts that requiring defendant to show prejudice in the form of favorable test results would not foreclose the possibility of a defendant ever bringing a claim like Johnson's (St. Br. 11). To the extent that the State is arguing that a defendant can argue on direct appeal that counsel was ineffective for failing to request a DNA test without knowing what the results would be, the State is wrong, given that this is exactly the result the State seeks. Holding that a defendant must present the results of a test counsel did not request in order to support his claim of prejudice would effectively foreclose the possibility of bringing a claim like Johnson's on direct appeal.

Citing *People v. Tate*, 2012 IL 112214, ¶¶ 14-15, the State asserts that the defendant's claim can be brought in a post-conviction proceeding, and that, as the dissent noted, defendant could request scientific testing via 725 ILCS 5/116-3 (2014). As noted by the majority, such "speculation is impracticable and inequitable." *Johnson*, 2020 IL App (3d) 160675, ¶ 41. Moreover, as was held in *Tate*, a defendant risks forfeiture of his claim if he fails to raise a constitutional claim alleging ineffective assistance of counsel on direct review. *Tate*, 2012 IL 11214, ¶¶ 14-15; *People v. Veach*, 2017 IL 120649, ¶ 47. Further, while collateral review is appropriate in cases where a defendant's claim is dependent upon facts not found in the record, the instant record sufficiently demonstrates prejudice. *Tate*, 2012 IL 11214, ¶¶ 14-15.

In summary, the defendant, Todd Johnson, was clearly prejudiced by counsel's deficient performance where, had counsel sought testing of the swabs, discovery rules allowed for such testing, and the circuit court likely would have allowed such testing had a timely request been made. Further, while the crime scene officer's testimony

demonstrated a reasonable likelihood that DNA could be found on the firearm, the absence of any DNA evidence would also be highly important in determining whether the defendant committed the offense. The evidence, particularly as it related to whether a firearm was used in the robbery, was sufficiently close that there is a reasonable probability that the result would have been different. Todd Johnson has therefore demonstrated that he was prejudiced by counsel's deficient performance.

B. The Appellate Court Majority Properly Found That Counsel's Performance Was Deficient, Where Counsel Failed to Understand That a Firearm Had Been Swabbed in an Effort to Determine the Presence of DNA, but the Swabs Had Not Been Tested.

The first component of a defendant's claim that counsel was ineffective is a requirement that the defendant show that counsel's performance was deficient. *Strickland*, 466 U.S. at 687. In the instant case, Johnson made a substantial showing that counsel's performance fell below an objective standard of reasonableness because counsel failed to request a DNA test of the swabs taken from the firearm. While counsel noted that the complainant had been hit in the head several times with the gun and that the gun had ridges that would have held DNA (R530), counsel apparently never recognized that discovery tendered to the defendant showed that the gun was swabbed for DNA, but the swabs had not been tested (R528, 531-32). When defense counsel went back and reviewed discovery, after the end of the trial, counsel realized that the gun had indeed been swabbed for DNA evidence (R534)[1]. Thus, counsel erroneously believed that there

[1]Counsel's inattentiveness to detail is further shown in an amended motion to quash arrest (that was ultimately stricken on the State's motion), in which counsel stated that the firearm "was tested for fingerprints and none of the Defendant's fingerprints or D.N.A. was found on the same. Further, that on information and belief, the victim's D.N.A. was not found of [*sic*] the same" (C90). This seems to be "boilerplate" language, given that the evidence clearly showed the gun was not tested for fingerprints.

had been no DNA to test where the record reveals that discovery documents stated the gun had been swabbed for DNA and that the swabs were available for testing.

"Counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 691. Thus, an attorney has an affirmative duty to conduct both factual and legal investigations on behalf of his client, to investigate all readily available sources of evidence that might benefit the client, and to use and introduce that evidence to develop a sound defense strategy. *People v. Makiel*, 358 Ill. App. 3d 102, 108 (1st Dist. 2005). In the instant case, counsel's performance was deficient where he failed to recognize that the firearm had been swabbed, but that the swabs had not been tested, and thus failed to obtain evidence beneficial to the defendant.

And, defendant was adamant that the DNA swabs should be tested, even before the jury reached its verdict. Just after the jury began its second day of deliberations, defendant asked the court to suspend the jury's deliberations so that it could order the swabs tested because it would have made his case "a lot more clear" (R526). When the court denied defendant's request, it noted that defendant was "pretty unhappy" with its ruling; the defendant was frustrated with the matter to the point where he was crying (R527-28). After the verdict, defendant sent three letters to the court proclaiming his innocence and requesting that the court order tests of the DNA swabs collected from the gun (Manilla Envelope marked Ex.1). In allocution, defendant repeatedly asked the court to have the swabs tested (R620-26). Thus, it is apparent that defendant believed that DNA testing would have been exculpatory. Because "[c]ounsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant," the defendant's protestations clearly demonstrate

that counsel's failure to request DNA testing of the firearm that police believe was used to batter the complainant fell below an objective standard of reasonableness. *Strickland*, 466 U.S. at 691. Counsel should have recognized that swabs were taken but not tested, and he knew, or should have known, that defendant adamantly believed neither his nor the victim's DNA would have been found on the firearm. Had counsel not performed deficiently he would have requested that the swabs be tested.

The majority of the Appellate Court readily concluded that trial counsel rendered deficient performance because his failure to request DNA evidence was the result of an oversight rather than strategy. *Johnson*, 2020 IL App (3d) 160675, ¶ 36. The dissent agreed that counsel's failure to request DNA testing on the swabs taken from the gun could not have been a matter of trial strategy, as the record shows that counsel was unaware that any swabs were available for testing. *Johnson*, 2020 IL App (3d) 160675, ¶ 51 (Schmidt, J., dissenting). In finding that counsel's performance was deficient, the majority noted that the State did not dispute that counsel rendered deficient performance. *Johnson*, 2020 IL App (3d) 160675, ¶ 37.

Nor did the State assert that trial counsel's performance was not deficient in its petition for leave to appeal (St. Br. 19). As a result, this argument has been forfeited. See *People v. Carter*, 208 Ill. 2d 309, (2003)(The State forfeited its argument that the evidence was insufficient to support an involuntary manslaughter instruction where the State failed to respond in the appellate court to defendant's argument that the evidence justified the instruction, and failed to raise the issue in its petition for leave to appeal or at any point until its opening brief in the Supreme Court).

Before this Court, however, the State, citing *People v. Artis*, 232 Ill. 2d 156, 164 (2009), now argues that it "'may raise any issues properly presented by the record

to sustain the judgment of the trial court, even if the issues were not raised before the appellate court,'" in cases such as this, where "'the appellate court reverses the judgment of the trial court, and the appellee in that court brings the case to this court as appellant'" (St. Br. 19-20). And, citing *People v. McCarty*, 223 Ill. 2d 109, 122 (2006), the State asserts that this Court may review an issue that the appellant has forfeited by omitting it from a petition for leave to appeal, as occurred in the instant case (St. Br. 19-20).

These cases are distinguishable from the instant case. In *Artis,* the defendant sought to prevent the State from arguing in favor of abrogating the one-act, one-crime doctrine articulated in *People v. King*, 66 Ill. 2d 551 (1977). *Artis*, 232 Ill. 2d at 163-64. The *Artis* Court noted that because this Court established the one-act, one-crime rule in *King*, the appellate court could not overrule *King*, and thus the State had no choice in the appellate court but to concede that *King* was good law. In the instant case, however, the conceded not because, as in *Artis,* to do otherwise would have been folly, but because the State never made the argument at all, and thus the argument was forfeited. *Artis*, 232 Ill. 2d at 164. And in *McCarty*, this Court found that a challenge to the constitutionality of a statue may be raised at any time. *McCarty*, 223 Ill. 2d at 123. As there is no challenge to the constitutionality of a statute, here, *McCarty* is inapposite. Nonetheless, recognizing that this Court is not bound by a party's concession and may affirm the circuit court's judgment on any basis found in the record, defendant will address the State's assertion that counsel's failure to request DNA testing of the firearm did not constitute deficient performance.

The State correctly observes that counsel's performance is measured by an objective standard of competence under prevailing norms, and that the defendant must overcome the strong presumption that the challenged inaction may have been the product of sound

trial strategy (St. Br. 16, citing *People v. Manning*, 241 Ill. 2d 319, 326-27 (2011)). The State also claims, as the Appellate Court majority acknowledged, that in some circumstances, counsel could reasonably decline to seek testing of the swabs (St. Br. 17). *Johnson*, 2020 IL App (3d) 160675, ¶ 35. This presupposes that counsel made the conscious and informed decision to decline to seek testing of the swabs. In the instant case, however, the record flatly contradicts such a presumption. See *People v. Waldrop*, 353 Ill. App.3d 244, 249 (2d Dist. 2004) (the presumption that counsel did not present support for post-conviction claims, not because he did not attempt to obtain them but because they were not available, was "flatly contradicted by the record," where counsel opined on the record that affidavits are not mandatory "unless you are basically alleging an alibi defense that somebody did not call, and this is what the witnesses would say and those witnesses sign off on it.").

In the instant case, the record flatly contradicts the State's argument that "counsel was aware that Tuttle had swabbed the gun and failed to test the swab to determine whether blood or DNA was present, as his questions to Tuttle on cross-examination made clear" (St. Br. 17, citing R415-16). Shortly after that cross-examination concluded, while the jury deliberated, counsel discussed with the court the defendant's request to suspend proceedings after learning via Tuttle's testimony that swabs were available (R526). Counsel explained:

> It's a function of sometimes when officers – when people come and testify, we find things out that are a little different than the discovery. I was under the impression that there was no DNA sample, and not that it was a DNA sample that wasn't tested."

(R528). Thus, the record flatly contradicts the claim that counsel's decision to decline to seek DNA testing was knowing and informed. Rather, it constituted deficient performance.

Citing *Harrington v. Richter*, 562 U.S. 86, 110 (2011), the State asserts that even if counsel misapprehended the availability of potential DNA evidence, this shortcoming did not render his overall performance deficient because *Strickland* calls for an inquiry into the objective reasonableness of counsel's performance rather than counsel's subjective state of mind. *Harrington* is inapposite. In *Harrington*, trial counsel's mistaken belief that the prosecution would not present forensic testimony was not so fundamental as to call the fairness of the trial into doubt in part because the prosecution itself did not expect to make that presentation and had made no preparations for doing so on the eve of trial, and in part because it is not always necessary for a party to rebut one expert with another, particularly since cross-examination may be more productive in many cases. *Harrington,* 562 U.S. at 110. *Harrington* stands in stark contrast to the instant case, in which defense counsel misunderstood that significant evidence was available to support the defendant's insistent claims that neither he nor the complainant had come into contact with a firearm that belonged to the owner of the home in which the defendant was found.

The State quotes *Roe v. Flores-Ortega*, 528 U.S. 470, 481 (2000): "The relevant question is not whether counsel's choices were strategic, but whether they were reasonable." In *Flores-Ortega*, the Court considered counsel's failure to file a notice of appeal without respondent's consent. *Flores-Ortega*, 528 U.S. at 473. Although it refused to determine that a failure to consult with a criminal defendant before declining to file a notice of appeal constituted ineffectiveness *per se,* the majority stated that it expected that courts evaluating the reasonableness of counsel's performance using the inquiry it set forth would find, in the vast majority of cases, that counsel had a duty to consult with the defendant about an appeal. *Flores-Ortega*, 528 U.S. at 481. In the

instant case, defendant personally made clear that testing the firearm for DNA was his best defense. Given that "[c]ounsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied the defendant," instant counsel's "choice," was not reasonable. *Strickland*, 466 U.S. at 691.

The State claims that counsel's "general decision to pursue no forensic testing that risked bolstering the State's circumstantial case could be reasonable even if he were uncertain or even mistaken as to whether DNA was specifically on the swab taken of the gun," because a court reviewing the record before it might still conclude that counsel performed in an objectively reasonable manner (St. Br. 18). Notably, however, no member of the reviewing Appellate Court concluded that counsel performed in an objectively reasonable manner, and the State on direct appeal did not argue that counsel's performance was objectively reasonable. *Johnson*, 2020 IL 160675, ¶¶ 36, 51. Where, as here, counsel's failure to request DNA testing was the result of oversight rather than strategy, his performance was deficient.

In summary, defense counsel's performance was deficient. It cannot be justified as a matter of strategy. And it clearly prejudiced Johnson, because a negative DNA result would have likely changed the outcome of the trial in this unique case. Accordingly, this Court should affirm the judgment of the Appellate Court, Third Judicial District, which ordered that the defendant be given a new trial. *Johnson*, 2020 IL App (3d) 160675, ¶ 47.

CONCLUSION

For the foregoing reasons, Todd L. Johnson, defendant-appellee, respectfully requests that this Court affirm the judgment of the Illinois Appellate Court, Third Judicial District, and remand the matter for a new trial.

Respectfully submitted,

THOMAS A. KARALIS
Deputy Defender

JAY WIEGMAN
Assistant Appellate Defender
Office of the State Appellate Defender
Third Judicial District
770 E. Etna Road
Ottawa, IL 61350
(815) 434-5531
3rddistrict.eserve@osad.state.il.us

COUNSEL FOR DEFENDANT-APPELLEE

CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342, is 24 pages.

/s/Jay Wiegman
JAY WIEGMAN
Assistant Appellate Defender

No. 126291

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellant, -vs- TODD L. JOHNSON, Defendant-Appellee.	))))))))))	Appeal from the Appellate Court of Illinois, No. 3-16-0675. There on appeal from the Circuit Court of the Tenth Judicial Circuit, Peoria County, Illinois, No. 15 CF 164. Honorable John P. Vespa, Judge Presiding.

NOTICE AND PROOF OF SERVICE

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

Mr. Thomas D. Arado, Deputy Director, State's Attorneys Appellate Prosecutor, 628 Columbus, Suite 300, Ottawa, IL 61350, 3rddistrict@ilsaap.org;

Ms. Jodi Hoos, Peoria County State's Attorney, 111 Courthouse, 324 Main St., Peoria, IL 61602-1366, sao@peoriacounty.org;

Mr. Todd L. Johnson, Register No. N74250, Shawnee Correctional Center, 6665 State Route 146 East, Vienna, IL 62995

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. On March 26, 2021, the Brief and Argument was filed with the Clerk of the Supreme Court of Illinois using the court's electronic filing system in the above-entitled cause. Upon acceptance of the filing from this Court, persons named above with identified email addresses will be served using the court's electronic filing system and one copy is being mailed to the defendant-appellee in an envelope deposited in a U.S. mail box in Ottawa, Illinois, with proper postage prepaid. Additionally, upon its acceptance by the court's electronic filing system, the undersigned will send 13 copies of the Brief and Argument to the Clerk of the above Court.

/s/Nicole Weems
LEGAL SECRETARY
Office of the State Appellate Defender
770 E. Etna Road
Ottawa, IL 61350
(815) 434-5531
Service via email will be accepted at
3rddistrict.eserve@osad.state.il.us