No. 126715

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellant, -vs- TWIQWON R. FANE, Defendant-Appellee.	))))))))))	Appeal from the Appellate Court of Illinois, No. 2-18-0151. There on appeal from the Circuit Court of the Fifteenth Judicial Circuit, Stephenson County, Illinois, No. 16 CF 283, 16 CM 1034. Honorable Val Gunnarsson, Judge Presiding.

BRIEF AND ARGUMENT FOR DEFENDANT-APPELLEE

JAMES E. CHADD
State Appellate Defender

THOMAS A. LILIEN
Deputy Defender

DARREN E. MILLER
Assistant Appellate Defender
Office of the State Appellate Defender
Second Judicial District
One Douglas Avenue, Second Floor
Elgin, IL 60120
(847) 695-8822
2nddistrict.eserve@osad.state.il.us

COUNSEL FOR DEFENDANT-APPELLEE

ORAL ARGUMENT REQUESTED

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Carolyn Taft Grosboll
SUPREME COURT CLERK

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POINTS AND AUTHORITIES

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1. Whether the appellate court correctly held that it was improper for the trial court to instruct the jury with a non-IPI accomplice instruction which directed the jury to consider with caution and suspicion the testimony of Twiqwon Fane's witness (McGee) whose testimony exonerated Fane.

2. Whether the State forfeited its harmless error argument by not raising in it its petition for leave to appeal or, alternatively, whether the appellate court correctly found that the error was not harmless where the evidence against Fane was circumstantial and depended on the credibility of the witnesses and where McGee's exonerating testimony constituted the entire defense.

IPI CRIMINAL NO. 3.17

IPI Criminal No. 3.17
Testimony Of An Accomplice
When a witness says he was involved in the commission of a crime with the defendant, the testimony of that witness is subject to suspicion and should be considered by you with caution. It should be carefully examined in light of the other evidence in the case.

Committee Note
Instruction and Committee Note Approved October 17, 2014.

The Committee decided that accomplice testimony represents an area of evidence that requires judicial comment. See *People v. Wilson*, 66 Ill.2d 346, 362 N.E.2d 291 (1977). The term "accomplice" was eliminated from the instruction.

In *People v. Rivera*, 166 Ill.2d 279, 292, 652 N.E.2d 307 (1995), the supreme court held that an accomplice's testimony should be cautiously scrutinized regardless of which side he testifies for. As a result, the Committee now recommends that this instruction be given any time an accomplice testifies.

The appellate court has held that trial counsel renders ineffective assistance of counsel when counsel fails to tender Instruction 3.17 under certain circumstances. *People v. Campbell*, 275 Ill. App.3d 993, 999, 657 N.E.2d 87 (5th Dist.1995). The defendant is entitled to have Instruction 3.17 given to the jury (1) if the witness, rather than the defendant, could have been the person responsible for the crime, or (2) if the witness admits being present at the scene of the crime and could have been indicted either as a principal or under a theory of accountability, but denies involvement. See *People v. Montgomery*, 254 Ill. App.3d 782, 790, 626 N.E.2d 1254 (1st Dist.1993); *People v. Lewis*, 240 Ill. App.3d 463, 467, 609 N.E.2d 673 (1st Dist.1992).

For an example of the use of this instruction, see Sample Set 27.02.

STATEMENT OF FACTS

Summary of post-trial, appeal, and issues before this Court

After a jury found Twiqwon Fane guilty of various charges, Fane was sentenced to an extended-term sentence of 40 years for home invasion, and concurrent sentences of 10 years for residential burglary, five years for aggravated battery, and five years for attempt robbery. (R. 962; C. 287) The remaining convictions merged. (C. 287) Fane argued in his motion for new trial that it was improper to instruct the jury with a modified version of IPI 3.17. (C. 273) After hearing Fane's motion to reconsider sentence, the court reduced the sentence for home invasion from 40 years to 30 years. (R. 978; C. 299)

The appellate court reversed Fane's convictions and remanded for a new trial. *People v. Fane*, 2020 IL App (2d) 180151, ¶¶ 43-44. On appeal, the State agreed that the trial court violated Supreme Court Rule 431(b) because it neglected to ask the requisite questions to one panel of prospective jurors. *Id.*, at ¶ 1. However, the appellate court did not decide whether plain error occurred because it resolved the appeal on the other raised issue. *Id.* The appellate court held that trial court erred when it instructed the jury with a non-IPI modified accomplice instruction for a defense witness (McGee) whose testimony did not implicate Fane. *Id.*, at ¶¶ 33-39. Additionally, the appellate court held that the error was not harmless. *Id.*, at ¶ 40.

The State filed a petition for leave to appeal (PLA) with this Court. In its PLA, the State argued that the appellate court's decision is directly contrary to *People v. Rivera*, 166 Ill.2d 270 (1995) and *People v. Touhy*, 361 Ill. 332 (1935).

(St. PLA at 1-2, 5-8) The State did not argue that if the instruction was erroneously given, the error is harmless. This Court granted the State's PLA on January 27, 2021. *People v. Fane*, 163 N.E.3d 739 (Table), 444 Ill. Dec. 176. In its brief, the State continues to assert that the appellate court's decision misconstrued *Rivera* and *Touhy* and that the modified accomplice instruction was proper. (St. Br. at 5-11) The State also alternatively argues that if the instruction was erroneously tendered, the error is harmless. (St. Br. at 11-13) Fane responds that the appellate court correctly held that the non-IPI accomplice instruction was improperly tendered and that the error was not harmless, and that the State forfeited the harmless error argument because it did not raise that issue in the PLA. The trial facts are set forth below.

Jury trial facts

Voncile Modlinger testified that she moved into 339 East Pershing in Freeport with her then-husband over 50 years ago. (R. 539) In November 2016, her home was broken into on two separate occasions. (R. 539) The first incident was on November 12, 2016. (R. 539-540) During that incident, the intruders took money and phones from her. (R. 540) Because she remained frightened from that incident, she slept with her phone, thereafter. (R. 540)

The second incident (the subject of this appeal) occurred on November 18, 2016. (R. 540) While Modlinger was in bed, she heard a noise inside her house and immediately called 911. (R. 540) One man appeared at the end of her bed, and a second man came into the bedroom behind the first man. (R. 541) She recognized the second man because he had asked her for $1,000 during the November

12 incident. The first man was wearing a "white thing" that covered his face and threw a plastic laundry basket that was near the bed at Modlinger's face. (R. 541-543) Modlinger stated that both intruders were younger black men. (R. 542) Modlinger claimed the other (unmasked) man said, "This is my cousin, now don't you hurt her." (R. 544-545) Modlinger got out of bed and the masked man searched under her mattress. (R. 546) The masked man grabbed her and took her into the hallway. (R. 546) The unmasked man was going through her bookcase and a jar that contained some change. (R. 546) In the hall, the masked man's arm was around her neck and he lifted her up and down, causing her great pain in her legs and a feeling that she was dying. (R. 546-547) He picked her up and tossed her hard; she was dazed and next saw the police inside her house. (R. 547) Modlinger's face hurt and was bleeding, and her legs hurt as a result of the incident. (R. 548) A picture of Modlinger's face depicts bruising around her left eye and left side of her forehead. (St. ex. 109) Modlinger was over 60 years of age at the time of the offense. (R. 557)

Freeport police sergeant Timothy Weichel testified that he was dispatched to Modlinger's home at 2:33 a.m. on November 18, 2016. (R. 445) From outside the residence, Weichel could hear a female screaming inside the house. (R. 446) The curtain for the window on the Pershing-side door opened and Weichel saw a black man with a long goatee and no mask (Drean McGee). (R. 446-448, 456) Weichel pointed his gun at McGee and told him to get on the ground, but McGee fled out of the house. (R. 447) Weichel kicked the door in order to enter. (R. 459) Weichel did not see another man inside the residence but believed somebody else

was inside because the woman continued to scream as if she was being attacked while he saw McGee. (R. 447) Weichel knew McGee fled outside because he heard the east door open while he was at the north door. (R. 448) Weichel went inside the residence, and Modlinger told him that the men had fled. (R. 448)

Weichel then left from the north side of the residence and checked yards to the east of the house. (R. 449) Weichel continued northeast, in the direction from which he heard leaves crunching and dogs barking. (R. 449-450) The area from which Weichel heard crackling leaves was "very dense with trees and other things like that." (R. 462) Weichel radioed for backup to set up a perimeter. (R. 450) About five minutes after McGee fled from the house, Corporal Johnson radioed that he saw two subjects running in a field by the parking lot to St. Joseph's Provena. (R. 450-452) Weichel then went to the area of St. Joseph's Provena. (R. 452) When Weichel arrived, Johnson had two suspects, being McGee and Fane, seized. (R. 452) Both men were taken to the police station. (R. 453) Later, Weichel found a white t-shirt in the area near where Fane was arrested, between a building for Provena and a shed. (R. 453) Officer Hodges placed the shirt into evidence. (R. 453)

Corporal Ben Johnson of the Freeport Police Department testified that he was dispatched to assist in locating the suspects. (R. 469-470) A little before 2:30 a.m. on November 18, 2016, Johnson went to Jefferson Street, just east of Rotzler. (R. 469-470) He heard dogs barking from the southeast, and he walked eastbound on Jefferson towards Provena. (R. 470) While walking towards Provena, Johnson saw two people wearing dark clothing sprinting across the field directly

west of Provena. (R. 470) Johnson radioed in that he saw the suspects and pursued them. (R. 470-471)

When Johnson arrived at the parking lot on the west side of Provena, the two men were crouched down by a parked truck, as if trying to hide. (R. 470) The two people ran eastbound through the Provena parking lot when they saw Johnson walking towards them. (R. 471) Johnson ran after them and ordered them to stop. (R. 471) The men continued to run and ran between two buildings at Provena into an indented area that led to the entrance to Provena. (R. 471-472) The men were essentially cornered between the buildings. One man (McGee) stood in the open area while the other man (Fane) went between the building and a shed. (R. 472) Using his taser, Johnson ordered the men to the ground and ordered Fane to come out from behind the shed. (R. 472) Fane and McGee complied with Johnson's orders. (R. 472) Johnson then radioed that he needed assistance handcuffing McGee and Fane. (R. 473) Fane and McGee were handcuffed after another officer arrived to assist. (R. 473)

Freeport police officer James Darren Hodges testified that he went to the corner of Galena and Jefferson after Corporal Johnson radioed for assistance regarding two fleeing suspects. (R. 494-945) Hodges saw two people running east. (R. 495) Thereafter, Hodges went to Provena and assisted in the arrest of McGee and Fane, and he drove Fane to the police station. (R. 495) While en route, Fane told Hodges that he wanted him to call two ladies, one named Lizzy and one Fane's girlfriend, Gabby. (R. 496) Fane told Hodges that Gabby's car had been stolen that night. (R. 496) Hodges later returned to Provena where he photographed

and collected the white t-shirt. (R. 497-498; St. exs. 1, 110-111) Hodges placed the white t-shirt inside a locked evidence locker. (R. 501-505)

Freeport police officer Daniel Moore testified that at about 2:30 a.m. on November 18, 2016, he spoke with Modlinger at her house. (R. 566) While speaking with her, Moore found keys on the living room floor. (R. 566) Moore took the keys and they worked for the Saturn VUE that was parked on High Street. (R. 567-568)

Gabrielle Gill testified that she was Fane's girlfriend on the date in question. (R. 560) On November 17, 2016, Gill spent the night at Fane's house. (R. 560) Somebody asked Gill if she could use her car, and Gill replied that she could. (R. 561) Gill went to sleep and the car was gone when she awoke the next day. (R. 561) Fane's cousin had permission to take and use Gill's car, but Fane did not have permission because he did not have a driver's license. (R. 562) Fane did have permission to take the car so long as his cousin drove. (R. 562) Gill knew McGee to be Fane's cousin. (R. 562) At 4:00 a.m. on November 18, Gill went to Pershing and High Street with Fane's sister, Lizzy Winston. (R. 562) Gill saw her car was at that location. (R. 562) Gill identified St. ex. 6 as the keys to her Saturn VUE. (R. 563-564)

Freeport detective Tim Krieger took buccal swabs from McGee and Fane. (R. 575-579; St. exs. 4-5) Blake Aper, a forensic scientist with the Illinois Crime Lab, testified that he processed the white shirt and the buccal swabs. (R. 606-616; St. exs. 1, 4, 5) He swabbed the inner collar of the shirt and placed the swab in a UV tube for subsequent testing. (R. 612-613; St. ex. 1A) He also created sub-exhibits of the buccal swabs for subsequent testing. (R. 614-616; St. exs. 4A,

5A) Heather May, a forensic scientist with the Illinois Crime Lab, extracted and tested DNA from the shirt collar and compared the DNA to the DNA in the buccal swabs. (R. 619-627; St. exs. 1A, 4A, 5A) May identified DNA profiles of at least three people, with two males being contributors to the mixture. (R. 626-627) May concluded that Fane and McGee could not be excluded as being contributors of the male DNA. (R. 627-628)

Fane called 911 operator Alan Guilfoyle as a witness. Guilfoyle testified that he heard the suspects refer to each other as "bro" and "cuz" but did not hear anybody saying, "This is my cousin." (R. 650-653)

Drean McGee also testified for the defense. (R. 666) McGee pleaded guilty to home invasion and residential burglary for the incident at issue, and he was sentenced to 10 years of imprisonment. (R. 667) McGee testified that on November 17, 2016, he was at his cousin's house in Freeport with Fane, Lizzy Winston, Gabrielle Gill, James Beales, and people with the first names of Daveon, Raman, and Brittany. (R. 668) Thereafter, McGee, Fane, Beales, and Brittany and went to Logan's Bar together in Gill's car. (R. 669) Brittany drove Gill's car to Logan's Bar, and McGee, Fane, and Beales were passengers. (R. 669) Brittany drove the three others from Logan's Bar and dropped herself off at home. (R. 770) From there, Beales drove, and they dropped off Fane in the area of Galena and Rotzler. (R. 671) Beales then drove McGee around the area for about 20 minutes while the two of them smoked blunts, then they went to Read Park. (R. 672) Beales and McGee were "scheming" at Read Park, meaning they were planning to commit a home invasion. (R. 673)

Beales and McGee then drove to High Street, parked the car, and went to Modlinger's house at 339 East Pershing. (R. 673) McGee followed Beales to that house. (R. 674) They both took t-shirts with them that they obtained from a pile of dirty clothes in the back of Gill's car, with McGee taking a white shirt. (R. 674-675) Beales used one of the shirts to cover his face. (R. 675) McGee did not use the shirt to conceal his face because the house was dark and McGee was "black, black." (R. 678) The windows were locked so McGee held the screen door while Beales kicked it in. (R. 673-674) Beales touched Modlinger and dragged her out of her bed. (R. 675-676) After being inside the home for 10 to 15 minutes, McGee pulled back the curtain to the door to look outside. (R. 676) A police officer shined a light on McGee's face and McGee ran away and twice yelled for "Cuz" (Beales) to "come on." (R. 676-677) At that time, Modlinger was still hollering because Beales was "still beating her or something." (R. 677) McGee ran across the street while Beales ran down the street. (R. 677) McGee had the white t-shirt inside his left sleeve as he ran. (R. 678) McGee ran to the parking lot to Sleezer Home, and after hearing dogs barking he continued to run to Provena. (R. 679) McGee was crouching in the area of Provena when he saw Fane. McGee told Fane to be quiet and pointed at the police. (R. 680) The police yelled, "stop," and Fane and McGee ran and were ultimately cornered by the police. (R. 680) McGee threw the shirt to Fane. (R. 680) McGee does not have a blood relationship with Fane, although he does have a blood relationship with Fane's half-sister because she has a different father. (R. 681)

During cross-examination, McGee acknowledged that he also referred to

Fane as "Cuz" and "Bro." (R. 685) McGee referred to other people by those terms as well. (R. 710) It was Beales' idea to break into 339 East Pershing, and McGee had never been to that house before that incident. (R. 690) McGee did not wear a mask while inside that residence. (R. 690) Fane was selling cannabis in the area and believed he was being set up when he saw the police. (R. 699) When they were trapped, McGee threw the t-shirt to Fane so Fane could throw it on the roof because Fane was closer to the roof. (R. 703) McGee did not notice if Fane had any burs on his sweatshirt. (R. 706) McGee acknowledged that he had prior convictions for burglary and residential burglary. (R. 709)

Over objection by the defense, the State was permitted to place into evidence in its rebuttal case Fane's sweatshirt, which apparently had burs on it. (R. 716) Officer Hodges testified that he collected a black hoodie from Fane at the jail and placed it into evidence. (R. 724; St. ex. 7) Hodges opened the package containing the sweatshirt before the jury, and it had burs on it. (R. 726)

Over Fane's objection, the jury was instructed with a modified version of IPI 3.17 (the accomplice testimony instruction). (C. 194; R. 738-762) The standard version of IPI 3.17 is as follows:

> When a witness says he was involved in the commission of a crime with the defendant, the testimony of that witness is subject to suspicion and should be considered by you with caution. It should be carefully examined in light of the other evidence in the case.

IPI Criminal No. 3.17 (4th ed.). The modified version of IPI 3.17 tendered to the jury is as follows:

> When a witness says he participated in the commission of a crime in which the defendant is charged, the testimony of that witness is subject to suspicion and should be considered by you

> with caution. It should be carefully examined in light of the other evidence in the case. (C. 195)

The court held that it was proper to give the modified version of IPI 3.17 regarding McGee's testimony. (R. 755) Defense counsel objected to giving any version of IPI 3.17, particularly a modified version. Defense counsel noted that Fane's entire defense rested on the credibility of McGee and argued it was not proper to undermine Fane's case with this instruction. (R. 756-758)

The jury found Fane guilty of home invasion (Count 2), residential burglary (Count 3), conspiracy to commit residential burglary (Count 4), attempt robbery (Count 5), aggravated battery — victim 60 years of age or older (Count 6), aggravated battery — masked (Count 7), and resisting and obstructing. (R. 861-863; C. 251-255, 258, 260) Fane was found not guilty of home invasion — entered (Count 1). (R. 862; C. 256)

Fane's counsel filed a timely motion for new trial on November 3, 2017. (C. 273) Fane argued in this motion that it was improper to instruct the jury with a modified version of IPI 3.17. (C. 273) The court denied the motion for new trial. (R. 908)

A sentencing hearing was conducted on December 14, 2017. (R. 909) The court found that an extended-term sentence was appropriate for home invasion because Modlinger was 60 years of age or older (730 ILCS 5/5-5-3.2(b)). (R. 960-961) Fane was sentenced to an extended-term sentence of 40 years for home invasion, and concurrent sentences of 10 years for residential burglary, five years for aggravated battery, and five years for attempt robbery. (R. 962; C. 287) The remaining convictions merged. (C. 287)

A timely motion to reconsider sentence was filed on January 12, 2018. (C. 290) A hearing was conducted on February 26, 2018. The court acknowledged that it wrongly asserted at the sentencing hearing that Fane had no potential for rehabilitation. (R. 978) Accordingly, the court reduced the sentence for home invasion from 40 years to 30 years. (R. 978; C. 299)

ARGUMENT

I.

The appellate court correctly held that it was error for the trial court to instruct the jury with a modified non-IPI version of IPI 3.17 that directed it to consider Drean McGee's testimony with caution and suspicion, despite the fact that McGee was a defense witness whose testimony exonerated Fane.

Drean McGee testified for the defense that he and James Beales committed the charged offenses and that Twiqwon Fane was not involved. (R. 666-681) According to IPI 3.17 (the accomplice instruction), *"[w]hen a witness says he was involved in the commission of a crime with the defendant*, the testimony of that witness is subject to suspicion and should be considered" with caution. IPI Criminal No. 3.17 (4th ed.) (Emphasis added). IPI 3.17 was not applicable to McGee because he did not testify that he was involved in the commission of a crime with Fane. Indeed, McGee testified that he was *not* involved in the commission of a crime with Fane. Nevertheless, the trial court tendered a modified, non-IPI version of IPI 3.17 to the jury. This modified instruction told the jury, "*When a witness says he participated in the commission of a crime with which the defendant is charged*, the testimony of that witness is subject to suspicion and should be considered by you with caution. It should be carefully examined in light of the other evidence in the case." (Emphasis added) (C. 195) By so modifying IPI 3.17, the circuit court instructed the jury to consider McGee's testimony, which constituted Fane's entire defense, with suspicion and caution. The appellate court correctly held that the accomplice instruction should not have been given and that it was error to give the modified version. *People v. Fane*, 2020 IL App (2d) 180151, ¶39.

As discussed below, the law overwhelmingly supports the appellate court's finding that an accomplice instruction should not be tendered when the purported accomplice testifies that the defendant was not involved in the crimes. Nevertheless, the State sought leave to appeal with this Court by arguing only that the appellate court's decision is directly contrary to *People v. Rivera*, 166 Ill.2d 270 (1995) and *People v. Touhy*, 361 Ill. 332 (1935). (St. PLA at 1-2, 5-8) The State makes a similar argument in its brief. (St. Br. at 6-9) The State also urges this Court to reverse the appellate court because even if the instruction was erroneous, the error was harmless. (St. Br. at 9-13) For the reasons detailed below, the appellate court correctly held it was error to give a non-IPI accomplice instruction, the State forfeited its argument that the error was harmless because it did not raise that issue in its PLA, and even if not forfeited, the appellate court properly held that the error was not harmless.

1. The State's brief does not address the law regarding when it is appropriate for a trial judge to substitute a non-IPI instruction for an IPI instruction, or what is the standard of review when a court so acts.

The trial court did not instruct the jury with the IPI instruction 3.17 regarding accomplice testimony; rather, it tendered to the jury a non-IPI instruction regarding purported accomplice testimony. The State's argument that the jury was properly instructed does not even discuss when it is appropriate to reject an IPI instruction in favor of a non-IPI instruction. This Court has set forth the pertinent law regarding non-IPI instructions.

Under certain circumstances, a trial court has the discretion to give nonpattern instructions. *People v. Pollock*, 202 Ill.2d 189, 211–12 (2002). When

a nonpattern instruction is challenged on appeal, the standard of review is abuse of discretion. *Id*. But "where an appropriate IPI instruction exists on a subject upon which the trial court has determined the jury should be instructed, the IPI must be used." *Id*. This is true because the pattern instructions were drafted so as to clearly state the law. *Id*. "If IPI instructions contain an applicable instruction on a subject about which the trial court determines the jury should be instructed, the trial court must use that instruction, unless the court determines that the instruction does not accurately state the law." *People v. Bannister*, 232 Ill.2d 52, 81 (2008). "Although the giving of jury instructions is generally reviewed for an abuse of discretion, when the question is whether the jury instructions accurately conveyed to the jury the law applicable to the case, our review is *de novo*." *People v. Pierce*, 226 Ill.2d 470, 475 (2007). Supreme Court Rule 451(a) states in pertinent part that when the IPI "contains an instruction applicable in a criminal case, giving due consideration to the facts and the governing law, and the court determines that the jury should be instructed on the subject, the IPI Criminal instruction shall be used, unless the court determines that it does not accurately state the law." *People v. Harris*, 225 Ill.2d 1, 43 (2007); Sup. Ct. Rule 451(a).

No law holds that the State is entitled to a modified version of IPI 3.17 simply because IPI 3.17 does not fit into the State's case. In order to determine whether it was appropriate to give a non-IPI accomplice instruction in lieu of the accomplice instruction in IPI 3.17, this Court must find that IPI 3.17 did not accurately state the law and the issue becomes whether the non-IPI instruction accurately stated the law and whether it accurately conveyed to the jury the law

applicable to the case. Thus, contrary to the State's assertion that the standard of review is abuse of discretion, (St. Br. at 5-6), the standard of review is *de novo*. *Pierce*, 226 Ill.2d at 475.

2. IPI 3.17 accurately states the law, and the appellate court correctly found that the trial court improperly gave an alternative non-IPI accomplice instruction.

IPI 3.17 (the accomplice instruction) is as follows:

> *When a witness says he was involved in the commission of a crime with the defendant*, the testimony of that witness is subject to suspicion and should be considered by you with caution. It should be carefully examined in light of the other evidence in the case. IPI (Criminal) 3.17 (4th ed.) (Emphasis added).

Historically, the purpose of the accomplice instruction is to warn the jury that an accomplice may have a strong motive to provide false testimony for the State in exchange for immunity or some other lenient treatment. *People v. Hunt*, 2016 IL App (2d) 140786, ¶ 52. See also *People v. McClain*, 269 Ill. App.3d 500, 506 (4th Dist. 1995) ("the jury should be instructed to view an accomplice's testimony with suspicion because an accomplice may seek to gain immunity or leniency by falsely accusing others and procuring their conviction"); *People v. Jordan*, 247 Ill. App.3d 75, 84-85 (1st Dist. 1993) ("Due to the relationship of the [accomplice] witness and the State, there may be a strong motivation to testify falsely for the accomplice who seeks, hopes or expects lenient treatment by the State in return for favorable testimony"); *People v. Lewis*, 240 Ill. App.3d 463, 466 (1st Dist. 1992) ("The accomplice witness instruction is to apprise the jury that the testimony of an accomplice is fraught with serious weakness such as the promise of leniency or immunity and malice toward the accused."); *People v. Pierce*, 223 Ill. App.3d

423, 435 (2d Dist. 1991) ("The purpose of the instruction is to warn the jury that there may be a strong motivation for a witness to provide false testimony for the State in return for immunity or some form of lenient treatment by the State."). Citing *Hunt*, the appellate court below correctly found that "the accomplice-witness instruction (IPI Criminal No. 3.17) exists to warn the jury that the witness might have a strong motivation to provide false testimony for the State in exchange for immunity or some other lenient treatment." *People v. Fane*, 2020 IL App (2d) 180151, ¶39. (Citing and quoting *Hunt*, 2016 IL App (2d) 140786, ¶ 52, internal quotation omitted).

Indeed, this Court has recognized that accomplice testimony should "be accepted only with utmost caution and suspicion" because such testimony possesses "serious infirmities" and "inherent weaknesses" being "motives such as malice towards the accused, fear, threats, promises or hopes of leniency, or benefits from the prosecution." *People v. Williams*, 147 Ill.2d 173, 232–33 (1991). Thus, the very purpose of IPI 3.17 is to warn a jury to accept accomplice testimony with suspicion and caution because of malice towards the defendant and possible threats and promises by the prosecution.

Despite the purpose of the accomplice instruction, under certain circumstances IPI 3.17 can apply to a defense witness. *Rivera*, 166 Ill. 2d 279, 292 (1995); IPI No. 3.17 (4th ed.)(Committee Note). However, IPI 3.17 "should not be given where the witness's testimony completely fails to implicate the defendant, because the instruction may tend to unduly derogate the defendant's ability to use favorable testimony by an accomplice." *People v. Dodd*, 173 Ill. App.3d 460, 466-67 (2nd

Dist. 1988) *citing People v. Krush*, 120 Ill. App.3d 614, 618 (2nd Dist. 1983).

IPI 3.17 accurately states the law. By its language, IPI 3.17 is only to be tendered "[w]hen a witness says he was involved in the commission of a crime with the defendant." In other words, the instruction is applicable if the purported accomplice implicates the defendant, and it should not be tendered if the accomplice testimony exonerates the defendant. This makes sense, as an accomplice could not possibly expect leniency from the State if his testimony exonerates the defendant. On the other hand, if the accomplice "says he was involved in the commission of a crime with the defendant," he may reasonably expect some form of leniency by implicating the defendant.

Here, the State presented evidence that Drean McGee and another man broke into the home of Ms. Modlinger, wherein the two tried to steal items and the man with McGee injured Modlinger by throwing a laundry basket at her and by lifting her up and down. The police interrupted the home invasion, and McGee and the other man fled. A short time later, officers arrested McGee and Fane outside a nearby building (Provena). The defense called McGee as a witness. McGee had already pleaded guilty to the home invasion. He testified that James Beales was the other man involved in the home invasion and that Fane had nothing to do with that crime. According to McGee, he came across Fane by happenstance in the Provena parking lot while running from the police. When the police saw them and told them to stop, he and Fane fled. Fane presumably fled because he was selling cannabis in that location at that time. (R. 666-681)

The appellate court correctly found that McGee's testimony failed to implicate

Fane. *People v. Fane*, 2020 IL App (2d) 180151, ¶¶36, 39. Pursuant to *Dodd* and *Krush*, it was improper to instruct the jury to consider his testimony with caution and suspicion. IPI 3.17, which accurately states the law, is inapplicable because McGee did not say that he was involved in the commission of the offenses with Fane. Even the trial court recognized that it was improper to issue IPI 3.17 under the facts of this case, wherein McGee did not implicate Fane. But rather than simply refuse to give an accomplice instruction, the trial court, over objection, tendered a non-IPI modified version of IPI 3.17 worded so that it fit the facts of this case. This was error because IPI 3.17 accurately stated the law whereas the non-IPI accomplice instruction did not.

The court instructed the jury, "*When a witness says he participated in the commission of a crime with which the defendant is charged*, the testimony of that witness is subject to suspicion and should be considered by you with caution. It should be carefully examined in light of the other evidence in the case." (emphasis added) (C. 195) This instruction is significantly different than IPI 3.17. Rather than requiring McGee to implicate Fane (which did not occur), the non-IPI instruction tendered to the jury merely required the jury to find that McGee participated in the charged crimes. As McGee testified that he and another man committed the charged offenses, the tendered instruction essentially told the jury to accept McGee's testimony with suspicion and caution.

According to the State, the non-IPI accomplice instruction was properly given because, pursuant to *Rivera*, 166 Ill. 2d 279 (1995) and *Touhy*, 361 Ill. 332 (1935), an accomplice instruction is appropriate merely due to McGee's "status

as an accomplice." (St. Br. at 6) The State makes this argument without discussing IPI 3.17 or why IPI 3.17 did not accurately state the law, such that it needed to be modified. The State affirmatively argues that the appellate court in this and other cases misconstrued *Rivera*. (St. Br. at 7) In the State's eyes, only it properly construes the holding in *Rivera* and the IPI and appellate courts have misstated the law for decades. The State cites not a single Illinois appellate court case that agrees with its interpretation of *Rivera* that the accomplice instruction is appropriate even if the purported accomplice fails to implicate the defendant. Further, the State's brief does not cite *People v. Ticey*, 2021 IL App (1st) 181002, ¶¶ 70-75, a case wherein the First District appellate court recently followed the appellate court opinion at issue here and held that an accomplice instruction is not appropriate where, as here, the accomplice testimony exonerates the defendant. It is the State, not the appellate courts or the IPI instructions (which were "painstakingly drafted with the use of simple, brief and unslanted language so as to clearly and concisely state the law," *Pollock*, 202 Ill.2d at 211–12 (2002)), which has misconstrued the law.

The appellate court properly held that *Rivera* is readily distinguishable from this case. *People v. Fane*, 2020 IL App (2d) 180151, ¶35. In *Rivera*, the accomplice implicated the defendant at the accomplice's prior trial, and that evidence was used as substantive evidence at the defendant's trial. *Rivera*, 166 Ill. 2d at 289. Moreover, the IPI accomplice instruction (IPI 3.17) was tendered to the jury in *Rivera*. As the appellate court for the instant case correctly observed, "the *Rivera* court must have deemed that earlier testimony sufficient to trigger giving the

instruction; otherwise, it would have been necessary to modify the instruction in a manner similar to what the trial court did here." *People v. Fane*, 2020 IL App (2d) 180151, ¶37.

Additionally, both the State and the defense called accomplices as witnesses in *Rivera*. In such a case, had the trial court given the accomplice instruction for the State's witnesses and not for the defense accomplice witness, it would have essentially bolstered the credibility of the defense witness by telling the jury to consider the accomplice testimony for the State with caution and suspicion while not putting such a limitation on the accomplice testimony for the defense.

Other cases have similarly distinguished facts similar to those in the present case from *Rivera*. *People v. Szydloski*, 283 Ill. App. 3d 274 (3rd Dist. 1996) is a case on point. In *Szydloski*, Glen Staley drove the defendant and his wife Catherine to Eagle and Giant Foods. The defendant had a tote bag when Staley picked him up. When Catherine entered the car, she and the defendant placed a cardboard box in the vehicle. Staley drove the two to Eagle and stayed in the car. The defendant gave Catherine the tote bag prior to entering the store, and, when they returned, Catherine sat in the back seat removing meat from the tote bag and placing it in the box. Staley then drove them to Giant Foods. All three entered Giant. Staley saw the defendant and Catherine place merchandise into the tote. Meat, cigarettes and other merchandise from Eagle and Giant were recovered from Staley's car. *Szydloski*, 283 Ill. App. 3d at 275.

Catherine testified that she stole the merchandise while the defendant was not looking. *Szydloski*, 283 Ill. App. 3d at 275. She insisted that her husband had

no knowledge of her plans to steal merchandise and that he only learned of the thefts after returning to Staley's car. When he discovered the crimes, the defendant exited the vehicle and began walking. In rebuttal, a police officer testified that Catherine had told her that she and the defendant had entered the store with the intent to steal meat. *Szydloski*, 283 Ill. App. 3d at 275.

The circuit court gave the jury IPI No. 3.17. *Szydloski*, 283 Ill. App. 3d at 275-76. On appeal, the defendant argued that the instruction should not have been given because Catherine testified for the defense and because Catherine's testimony exonerated the defendant. *Szydloski*, 283 Ill. App. 3d at 276. The appellate court rejected defendant's first argument citing *Rivera*, 166 Ill. 2d at 292. *Szydloski*, 283 Ill. App. 3d at 277-78.

However, the Court found that IPI No. 3.17 must properly apply to a witness before it can be given. *Szydloski*, 283 Ill. App. 3d at 276. The Court noted that Catherine's testimony placed the defendant at the scene, and he had admitted he was there. *Szydloski*, 283 Ill. App. 3d at 277. Nevertheless, Catherine consistently testified that the defendant did not know of the scheme to steal the merchandise. The Court held that "while the jury was free to reject these claims, it was error to give the accomplice instruction since the defendant's wife did not say that she was involved in the commission of a crime with the defendant." *Szydloski*, 283 Ill. App. 3d at 277. The defendant's conviction was therefore reversed, and the cause was remanded for a new trial. *Szydloski*, 283 Ill. App. 3d at 278.

In *People v. Dodd*, 173 Ill. App. 3d 460, 466 (2d Dist. 1988), a case decided pre-*Rivera*, the appellate court noted that there was a split in Illinois regarding

if and under what circumstances IPI 3.17 may be given pertaining to a defense witness. *Dodd*, 173 Ill. App.3d at 466. Other districts of the appellate court had held that the accomplice instruction should be given only when the witness testifies for the State. *Id*. However, the Second District appellate court took the position "that whether an accomplice testifies for the defendant or the State, his credibility may be suspect, and a trial court should have discretion to decide whether to advise the jury to accept the accomplice's testimony with caution *unless the testimony completely fails to implicate the defendant*." *Id*. (Emphasis added). Thus, pre-*Rivera*, courts either did not allow the accomplice instruction when an accomplice testified for the defense, or allowed the accomplice instruction so long as the accomplice implicated the defendant. The third option urged by the State, that an accomplice instruction is proper even when the testimony of the purported accomplice completely exonerates the defendant, had not been adopted by any appellate court.

Rivera did not overrule *Dodd* or the line of cases which held that IPI 3.17 may be given for a defense witness, but not if the defense witness completely fails to implicate the defendant. At the time *Rivera* was decided, the Committee Note for IPI 3.17 asserted that the accomplice instruction only applied to State witnesses. *Rivera*, 166 Ill.2d at 292. Accordingly, citing to the Committee Note for IPI 3.17 and appellate court cases with the same holding, the defense argued in *Rivera* that the instruction only applied to State witnesses. *Id*. Under the facts of that case, *Rivera* held that it could not think of a reason why 3.17 should be given regarding the State's witness (Meger) but not given regarding the defense witness (Norman). *Id*. Thus, although *Rivera* seemingly overruled the line of cases which

held that IPI 3.17 can never be given regarding a defense witness, it did not overrule *Dodd* or the cases asserting that IPI 3.17 should not be given regarding a defense witness who completely exonerates the defendant.

The circuit court here did not deem it appropriate to give IPI 3.17 without modification. Here, contrary to *Rivera*, the jury was improperly tendered a modified version of IPI 3.17. Instead of tracking the language of IPI 3.17 that the testimony of a witness should be considered with caution and suspicion "[w]hen a witness *says he was involved* in the commission of a crime *with the defendant*," the jury here was instructed to so scrutinize McGee's exonerating testimony "[w]hen a witness [McGee] *says he participated in the commission of a crime in which the defendant is charged*." (Emphasis added). (C. 195) The non-IPI instruction was given because McGee did not testify that he was involved with Fane in the commission of the crimes he committed. Rather than taking the correct action and denying the State's request for the jury to be instructed in accord with IPI 3.17, the court gave a non-IPI instruction unsupported by the law.

The State claims that *Rivera* merely reaffirmed a "core principle" set by this Court long ago in *Touhy*, 361 Ill. 332, that there is no reason why "one who is in fact an accomplice should not have his testimony scrutinized carefully before it is relied on, no matter on which side of the case he testified." (St. Br. at 8-9) The State would have this Court read *Touhy* and *Rivera* in isolation. As is noted above, courts of review repeatedly held before and after *Rivera* that the accomplice instruction is inapplicable when the purported accomplice does not implicate the defendant.

Like *Rivera*, *Touhy* was a case where accomplices testified for both the State and the defense. *Touhy*, 361 Ill. at 352-353. Accomplice witnesses Walter Henrichsen and Isaac Costner testified for the State, whereas accomplice witness Basil Banghart testified for the defense. *Id*. The only argument advanced by the defense was that Banghart was not an accomplice because he testified for the defense and, accordingly, the court erred by telling the jury to consider his testimony with grave suspicion and great caution. *Id*. The *Touhy* Court held that although the term accomplice is usually applied to those testifying against their fellow criminals, Banghart was nevertheless an accomplice. *Id*. The Court observed that "[n]o reason is advanced, and none is apparent, why one who is in fact an accomplice should not have his testimony scrutinized carefully before it is relied on, no matter on which side of the case he testified." *Id*.

Notably, the *Touhy* Court did not discuss or consider the now well-established reasons noted above why an accomplice is subject to questionable veracity. In short, it is because such a witness may implicate a defendant in the hopes of obtaining immunity or leniency from the prosecution. Further, there was apparently no controlling IPI instruction in 1935, or if there was, it was not addressed in *Touhy*. But the most likely rationale utilized in *Touhy* is that, like in *Rivera*, accomplices testified both for the prosecution and the defense, and applying the accomplice instruction only to prosecution witnesses would not be fair and would essentially bolster the credibility of the accomplice testifying for the defense.

It should be noted that even before *Touhy* this Court recognized that the veracity issue with accomplice testimony is due to the hopes the witness may get

leniency from the prosecution. "If an accomplice gives testimony which tends in any degree to exonerate himself or to lay the blame of the transaction upon another or it appears that he will be the gainer in any way by his testimony, such facts should have great weight with the jury and trial court." *People v. Grove*, 284 Ill. 429, 435 (1918). See also *People v. Rees*, 268 Ill. 585, 593 (1915) ("It scarcely need be said that the fact of a witness having been promised immunity from prosecution for crime on condition that he will testify for the people must be considered in weighing his testimony."). At least as far back as 1892, this Court has recognized the veracity issues with accomplice testimony:

> 'Accomplices, upon their own confession, stand contaminated with guilt. They admit a participation in the very crime which they endeavor by their evidence to fix upon other persons. *They are sometimes entitled to earn a reward upon obtaining a conviction, and always expect to earn a pardon. Accomplices are therefore of a tainted character, giving their testimony under the strongest motives to deceive.* * * *' And it is said in Best, Ev. *596 p. 266, § 170, in speaking of approvers and accomplices: 'No doubt, if it was not absolutely necessary for the execution of the law against notorious offenders that accomplices should be received as witnesses, the practice is liable to many objections; and though, under this practice, they are clearly competent witnesses, their single testimony alone is seldom of sufficient weight with the jury to convict the offenders; *it being so strong a temptation to a man to commit perjury if by accusing another he can escape himself*.

Hoyt v. People, 140 Ill. 588, 595 (1892) (emphasis added).

Since *Touhy*, cases have clarified that the purpose of the IPI 3.17 accomplice instruction is to warn the jury that an accomplice may have a strong motive to provide false testimony for the State in exchange for immunity or some other lenient treatment. *Hunt*, 2016 IL App (2d) 140786, ¶ 52. See also *Pierce*, 223 Ill. App.3d at 435 ("The purpose of the instruction is to warn the jury that there may be a

strong motivation for a witness to provide false testimony for the State in return for immunity or some form of lenient treatment by the State."); *People v. Young*, 128 Ill.2d 1, 47–48 (1989) (testimony of an accomplice witness has inherent weaknesses of having possible motives such as malice towards the accused, fear, threats, promises or hopes of leniency, or benefits from the prosecution); *People v. Holmes*, 141 Ill.2d 204, 242 (1990) (same).

Thus, both before and after *Touhy*, it has been recognized by this Court and Illinois appellate courts that the hopes and expectation of obtaining leniency are what render the testimony of an accomplish suspect. Where, as in the instant case, an accomplice testifies for the defense and his testimony is exculpatory, there is no reasonable expectation of leniency. In fact, the opposite is true. An alleged accomplice offering exculpatory testimony could reasonably be fearful of retaliation by the State against him or his family.

In short, the State cites to no Illinois case applying *Touhy* and *Rivera* in the manner it urges this Court to do. The prosecution hopes that this Court will read these cases overly-broadly and apply an over-broad interpretation to the present case, despite this case not involving accomplice witnesses testifying for both sides, as was the case in *Touhy* and *Rivera*. Moreover, even if there theoretically could be a case in which it would be appropriate to give the non-IPI instruction at issue here, such an instruction is inappropriate where, as here, the entire defense depends on the exonerating testimony of that witness. *People v. Fane*, 2020 IL App (2d) 180151, ¶ 40. Much for the same reason it was not fair to the State in *Rivera* and *Touhy* to treat its accomplice witnesses with greater scrutiny than

the defendants' accomplice witnesses, the witness setting forth the entire defense with exonerating testimony should not be more strictly scrutinized than the State's witnesses, particularly where that witness lacks the motive to falsely testify of expected leniency.

3. This Court should not follow the minority view of foreign authority.

The State cites cases from two states and three federal circuit courts for the proposition that it is "proper to give an accomplice witness instruction even when the witness gave exculpatory testimony on the defendant's behalf." (St. Br. at 9-10) But as is argued above, this is not the view of Illinois courts. Obviously, "cases from foreign jurisdictions are not binding" upon this Court. *Condo. Ass'n of Commonwealth Plaza v. City of Chicago*, 399 Ill. App. 3d 32, 50 (1st Dist. 2010). Not only are the foreign cases cited by the State not binding, they are not persuasive. One of the cases cited by the State specifically states that it adopted the minority view. See *State v. Anthony*, 242 Kan. 493, 501–03, 749 P.2d 37, 43–45 (1988) ("We adopt the minority view that a cautionary instruction on accomplice testimony is proper in all circumstances where an accomplice testifies.") Moreover, the State cites no good reason for adopting the minority view.

According to the State, when an "accomplice testifies for another, there is always the chance that each will try to 'swear the other out of the charge." (St. Br. at 10) However, one's spouse, friend, business partner, or relative usually brings bias to court when testifying. Yet, it is only the potential bias of seeking leniency from the prosecution that warrants a special instruction telling the jury to consider the testimony with suspicion and caution. The general credibility instruction set

forth in IPI 1.02 adequately instructs the jury regarding common biases, and non-IPI instructions should be given only if the pertinent IPI fails to accurately state the law. See *People v. Foster*, 199 Ill. App. 3d 372, 386 (4th Dist. 1990) (refusing non-IPI proposed instruction relative to the credibility of a witness who was granted immunity, because the IPI instructions accurately stated the law and the general credibility instruction set forth in IPI 1.02 was given).

As was noted in *People v. Howard*, 130 Ill. App. 2d 496, 497–99 (3d Dist. 1970):

> In jurisdictions which have considered this question it has been deemed erroneous to instruct that the testimony of an accomplice should be discredited when such testimony exonerates a defendant. *Joseph v. State*, 34 Tex.Cr.R. 446, 30 S.W. 1067; *Hazzard v. State*, 111 Tex.Cr.R. 539, 15 S.W.2d 638; *Burns v. State*, 123 Tex.Cr.R. 213, 57 S.W.2d 836; *People v. O'Brien*, 96 Cal. 171, 31 P. 45; *People v. Melone*, 71 Cal.App.2d 291, 162 P.2d 505; *People v. Hartung*, 101 Cal.App.2d 292, 225 P.2d 614 and *State of Missouri v. Reeder, Mo.*, 395 S.W.2d 209 and *State of N.J. v. Anderson*, 104 N.J.Super. 18, 248 A.2d 438. See also 23A C.J.S. Criminal Law s 1227, p. 564. *The general rule appears to be that the accomplice instruction is properly given only in those cases where an accomplice implicates the defendant in the commission of the offense.* For example in *Hazzard v. State*, supra, the Court held that an instruction ought not to have been given even though the witness testified on behalf of the State. In *People v. Diaz*, 19 N.Y.2d 547, 281 N.Y.S.2d 53, 227 N.E.2d 860, the Court held that the accomplice instruction should have been given when so requested by a defendant where the accomplice, a co-defendant, confessed the offense and implicated defendant.
> The only case relied upon by the State is *People v. Touhy*, 361 Ill. 332. (Emphasis added).

Howard went on to hold that the State's reliance on *Touhy* was misplaced:

> We do not believe that the *Touhy* case is of general application where the testimony of an accomplice exonerates a defendant. The policy underlying the accomplice instruction is not discussed in *Touhy* and there was accomplice testimony introduced both by the State and the defendant. The accomplice testifying on behalf of defendant had not confessed his guilt and consequently the reasons for discrediting

> his testimony were not so apparent. However the principal limitation of the opinion in *Touhy* is the Court's initial premise that it would consider only the very narrow objections to the instruction made by the defendant at the time the instruction was tendered. A complete examination of the subject was not considered by the Court.
>
> *In our view there is no reason for giving any accomplice instruction where the testimony of the accomplice fails to implicate the defendant.* The inappropriateness of giving such an instruction is further demonstrated by the definition of accomplice included in the pattern instruction quoted above. The instruction defines an accomplice witness as '* * * one who testifies that he was involved in the commission of a crime with the defendant * * *.' The so called accomplices did not so testify and the effect of the instruction could only have been confusing and prejudicial.

Howard, 130 Ill. App. 2d at 497–99 (emphasis added).

Howard set forth the status of the law in Illinois and foreign jurisdictions, as well as its rejection of the argument that *Touhy* stands for the proposition that the accomplice instruction may be given even if the accomplice did not implicate the defendant.

After *Howard*, numerous other foreign cases have found it is improper to give accomplice instructions when the accomplice testifies for the defense or exonerates the defendant. *Com. v. Jones*, 490 Pa. 599, 603–04, 417 A.2d 201, 203–04 (1980) (error to instruct the jury that the exculpatory testimony of a defense witness who admits participation in the crime should be considered with caution); *People v. Guiuan*, 18 Cal. 4th 558, 569, 957 P.2d 928, 935 (1998) (only accomplice testimony unfavorable to the defendant should be viewed with care and caution); *State v. Nelson*, 309 Or. App. 1, 8, 481 P.3d 314, 318 (2021) ("the 'proper occasion' for instructing the jury that an accomplice's testimony should be viewed with distrust is when the thrust of the testimony implicates the defendant in a way that allows

for an inference of blame-shifting, and when the instruction is requested for the purpose of addressing that blame-shifting inference."); *Wheelis v. State*, 340 So. 2d 950, 952 (Fla. Dist. Ct. App. 1976); *United States v. Rosa*, 560 F.2d 149, 156 (3d Cir. 1977) ("In general, an accomplice charge need be given only when the alleged accomplice incriminates the defendant.").

In sum, there is no need to look to foreign jurisdictions to resolve the State's claim that the appellate court misconstrued the purportedly clear holdings of *Rivera* and *Touhy* that an accomplice instruction is appropriate whenever an accomplice testifies for either the State or the defense, even if the testimony exonerates the defendant. If *Rivera* and *Touhy* are clear as the State maintains, there is no need to look to foreign authority. However, even *Anthony*, the Kansas case cited by the State, indicates that the State's view is the minority position. Moreover, there is no good reason to find that accomplice testimony that exonerates the defendant should be viewed with suspicion and caution. What differentiates the bias of an accomplice from other forms of bias is that accomplices hope or expect leniency from the prosecution in that they help the State. When accomplice testimony exonerates a defendant, the unique bias related to aiding the prosecution does not exist. Moreover, IPI 3.17 correctly stated the law, and in such a case it is improper to give a non-IPI instruction in its stead, as occurred here.

II.

The State forfeited its harmless error argument because it did not raise the issue in its PLA and because its brief does not cite to facts pertinent to a harmless error analysis and does not argue the law regarding its burden. Alternatively, the appellate court correctly held that the error is not harmless.

Alternatively, the State argues that even if the Court holds that the appellate court correctly found the non-IPI accomplice instruction was improperly tendered, the error was harmless. (St. Br. at 11-13)

Noting that the State failed to meet its burden of proving the error harmless, the appellate court held that the error is not harmless. *People v. Fane*, 2020 IL App (2d) 180151, ¶ 40. The appellate court observed that the case turned on the credibility of McGee and that McGee's testimony represented Fane's entire defense. *Id*. In support of its decision, the appellate court cited *People v. Fultz*, 2012 IL App (2d) 101101, ¶ 74 (finding instructing jury with IPI 3.13 over the defendant's objection, directing the jury as to the use it could make of the defendant's prior conviction, was not harmless error because the evidence exclusively concerned a credibility contest between a state witness and defendant).

1. The State's harmless error argument should be deemed forfeited

First, the State forfeited this argument by not raising harmless error in its PLA. "[T]he failure to raise an issue in a petition for leave to appeal results in the forfeiture of that issue before this court." *People v. McCarty*, 223 Ill.2d 109, 122–23 (2006). An issue not raised in a PLA is forfeited even if raised in the party's brief. *People v. Fitzpatrick*, 2013 IL 113449, ¶ 26. The basis for the State's PLA was that the holding of the appellate court is "directly at odds with this Court's

pronouncement in *Rivera* and *Touhy*." (St. PLA at 2) As this brief makes clear, this assertion is incorrect. Presumably, this Court granted the State leave to appeal in order to clarify *Rivera* and *Touhy* and whether it is error to give an accomplice instruction when the accomplice offers exculpatory testimony for the defendant. This Court did not grant leave to appeal in order to determine whether the error in this particular case was harmless in the event it concluded that the State incorrectly claimed the appellate court ruling clearly violated *Rivera* and *Touhy*. The State urged this Court to grant its request for leave to appeal by insisting there was a clear violation of *Touhy* and *Rivera*, and raising harmless error in the PLA would have weakened this argument.

This Court should not reward the State by allowing it to argue harmless error to this Court after forfeiting that issue by failing to raise it in his PLA. Moreover, the State does not fully develop its harmless error argument. Specifically, the State does not set forth what burden it has in order to prove that the error is harmless. The failure to cite to the appropriate standard of review is a basis for this Court to find that a party has forfeited the issue. This Court should not reverse when the appellant does not cite to the standard of review. See *Bartlow v. Costigan*, 2014 IL 115152, ¶ 52 (Court deemed issue forfeited because the claims did not state the applicable standard of review and were raised in a cursory fashion, finding that this Court will "consider only fully briefed and argued issues").

Further, a significant fact argued by Fane in the appellate court regarding prejudice involved DNA evidence found on a t-shirt, and the State's brief not only did not raise this in its argument, but also neglected to include this evidence in

its statement of facts. The State's brief does not summarize the testimony of Heather May, a forensic scientist with the Illinois Crime Lab, who extracted and tested DNA from the shirt collar. (R. 619-628) Nor does the State's statement of facts assert the findings regarding the DNA comparisons, which concluded that both Fane's and McGee's DNA was on the t-shirt. (R. 628) For the reasons detailed below, the DNA evidence was favorable to Fane's defense. An appellant has a duty to include fairly state facts necessary to an understanding of the case. Sup. Ct. Rule 341(h)(6). See *People v. Johnson*, 192 Ill.2d 202, 204 (2000) (recognizing a duty to fairly state the facts and ordering a corrected brief to be filed because brief did not fairly state facts and contained inadequate citations).

Thus, the harmless error argument was not raised in the State's PLA and fails to assert the appropriate standard of review, and the State's statement of facts and argument does not raise or discuss DNA evidence significant to a proper harmless error analysis (detailed further below). Under these circumstances, the State's harmless error argument should be found by this Court to be forfeited. Accordingly, Fane asks this Court to find that the issue has been forfeited and not consider its harmless error argument.

2. The State failed to establish that the error was harmless.

Assuming, *arguendo*, this Court deems the State's harmless error argument has not been forfeited, this Court should find that the error was not harmless. Because Fane preserved the accomplice instruction issue for review, the State bears the burden of showing that this error was harmless. See *People v. Thurow*, 203 Ill.2d 352, 363 (2003) (observing that the State that bears the burden of

persuasion with respect to prejudice for a harmless-error analysis). "Error arising from the tendering of jury instructions is deemed harmless only if the submission of proper instructions to the jury would not have yielded a different result." *People v. Shaw*, 186 Ill.2d 301, 323 (1998), *opinion modified on denial of reh'g* (June 1, 1999). In order to demonstrate that a jury instruction error is harmless, the State must show that the result of the trial would not have been different if the proper instruction had been given. *People v. Ward*, 187 Ill.2d 249, 265 (1999). It cannot meet its burden of establishing that the error is harmless. When a case comes down to a credibility contest, Illinois courts have held that an instructional error that weakens key witness testimony favorable to the defendant is not harmless error. See *Fultz*, 2012 IL App (2d) 101101, ¶ 74 (erroneous giving of IPI 3.13 was not harmless where the instruction concerned the defendant's credibility in a case that was a "credibility contest"); *People v. Wheeler*, 401 Ill. App.3d 304, 314 (3rd Dist. 2010) (defense counsel's failure to ask for IPI 3.17 was not harmless where the instruction concerned the credibility of a key State witness).

Here, McGee's credibility was crucial to the defense. If believed, McGee's testimony would have exonerated Fane. McGee's testimony explained why Fane was in the area and why Fane may have run. McGee told the jury that Beales was the other intruder. McGee also explained that he tossed the t-shirt McGee planned to use as a mask to Fane, hoping that Fane would throw it on the roof of Provena. Forensic scientist May concluded that Fane and McGee could not be excluded as being contributors of the male DNA. (R. 627-628) The fact that the DNA for *both* Fane and McGee was found makes sense under McGee's version

that he and Beales obtained the shirts from Fane's dirty laundry in the back of Fane's girlfriend's car. Under the State's version that Fane had the shirt all along because he was the masked intruder, there is no explanation for how or why McGee's DNA would also be on the t-shirt. Additionally, a rational juror could have questioned why the State failed to call Beales as a witness to rebut McGee's testimony if McGee falsely exonerated Fane. Under the facts of this case, the State cannot demonstrate that the instructional error is harmless, so this Court should reverse his convictions and remand for a new trial. See *People v. Dodd*, 173 Ill. App. 3d 460, 467 (2d Dist. 1988) (finding that tendering the accomplice instruction regarding a defense witness who exonerated the defendant was prejudicial because it tended to "unfairly discredit the principal evidence favoring defendant.").

CONCLUSION

For the foregoing reasons, Twiqwon Fane, the defendant-appellee, respectfully requests that this Court affirm the order of the appellate court reversing and remanding for a new trial. Should this Court hold that it was proper for the circuit court to instruct the jury with the accomplice instruction, this Court should remand this matter to the appellate court for further proceedings, as the appellate court did not address the Rule 431(b) issue raised by Fane on appeal.

Respectfully submitted,

THOMAS A. LILIEN
Deputy Defender

DARREN E. MILLER
Assistant Appellate Defender
Office of the State Appellate Defender
Second Judicial District
One Douglas Avenue, Second Floor
Elgin, IL 60120
(847) 695-8822
2nddistrict.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 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 38 pages.

/s/Darren E. Miller
DARREN E. MILLER
Assistant Appellate Defender

No. 126715

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellant, -vs- TWIQWON R. FANE, Defendant-Appellee.	))))))))))	Appeal from the Appellate Court of Illinois, No. 2-18-0151. There on appeal from the Circuit Court of the Fifteenth Judicial Circuit, Stephenson County, Illinois, No. 16 CF 283, 16 CM 1034. Honorable Val Gunnarsson, 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. Edward Randall Psenicka, Deputy Director, State's Attorney Appellate Prosecutor, 2032 Larkin Avenue, Elgin, IL 60123, 2nddistrict.eserve@ilsaap.org;

Mr. John H. Vogt, Stephenson County State's Attorney, 15 N. Galena Ave., Freeport, IL 61032, clarson@co.stephenson.il.us;

Mr. Twiqwon Fane, Register No. M21481, Pinckneyville Correctional Center, 5835 State Route 154, Pinckneyville, IL 62274

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 April 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-appellant in an envelope deposited in a U.S. mail box in Elgin, 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/Vinette Mistretta
LEGAL SECRETARY
Office of the State Appellate Defender
One Douglas Avenue, Second Floor
Elgin, IL 60120
(847) 695-8822
Service via email will be accepted at
2nddistrict.eserve@osad.state.il.us