No. _____

_____

IN THE

SUPREME COURT OF THE UNITED STATES

_____

Antonio Bryant — PETITIONER
(Your Name)

vs.

State of Illinois — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

The Illinois Supreme Court
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Antonio Bryant # R51295
(Your Name)

2500 Rt. 99 South
(Address)

Mt. Sterling IL 62353-1462
(City, State, Zip Code)

N/A
(Phone Number)

Questions Presented

1). Whether the Illinois Appellate Court's decision in People v. Bryant, 2018 IL App (1st) 143578-U, is contradictory to this Court's decision in In re Winship, 397 U.S. 358 (1970), pertaining to sufficiency of the evidence.

2). Whether the Illinois Appellate Court's decision in People v. Bryant, 2018 IL App (1st) 143578-U, is contradictory to this Court's opinions in Jackson v. Denno, 378 U.S. 368 (1964) and Mincey v. Arizona, 437 U.S. 385 (1978), pertaining to inadmissable, involuntary custodial statements.

3). Whether the Illinois Appellate Court's decision in People v. Bryant, 2018 IL App (1st) 143578-U, is contradictory to this Court's holding in Strickland v. Washington, 466 U.S. 668 (1984), pertaining to ineffective assistance of counsel.

LIST OF PARTIES

[V] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[ ] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

[✓] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix D to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[✓] is unpublished.

The opinion of the Illinois Appellate court appears at Appendix A to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[✓] is unpublished.

JURISDICTION

[ ] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was _____.

[ ] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[✓] For cases from **state courts**:

The date on which the highest state court decided my case was 9/26/18. A copy of that decision appears at Appendix D.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

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STATEMENT OF FACTS

Procedural history.

The State charged Antonio Bryant with, among other things, attempt murder and aggravated assault, alleging that he was accountable for codefendant Tyshawn Reese's actions. (C30, 50; RQ. 14-15). In a bench trial, he was convicted and sentenced to 32 and six years, respectively. (C199). The appellate court affirmed; Bryant, however, argues on pages 15-18 below that its decision rests on facts outside the record.

At about 8:15 p.m., a guard hears shots and sees men running.

On April 28, 2013, Francisco Samoya testified, he was working as a security guard. (RQ40, 42). He was patrolling an apartment complex at 2333 West Jackson Boulevard in Chicago. (RQ41-42). Having worked there for years, he knew the residents and their visitors. (RQ41).

Samoya testified that at about 8:15 p.m., he was in a security booth on Western Avenue between Jackson and Van Buren Street. (RQ40, 42). From that location, he heard six or seven shots from the Jackson side. (RQ42-43). Three men then approached from that direction. (RQ43). They were Bryant (who often visited), Reese (who had been barred from the property), and Gates (a tenant). (RQ43). Samoya identified Bryant and Gates in court. (RQ43-45). Per standard procedure after a shooting, the complex's gates were locked, so Bryant and Gates could not get in. (RQ45). Later, at "around 10:00 or 10:30," Samoya heard more shots, this time from the Oakley side. (RQ45). He did not thereafter see Bryant, Gates, or Reese, and he saw nothing in

Bryant's hands at any time. (RQ46-47).

Events at about 10:00 p.m.: an off-duty officer sees a shooting, he chases and shoots at a car, and Bryant is gravely wounded.

Officer Coleman sees a shooting and chases the shooters.

At 10:00 p.m. on the night in question, narcotics officer Ronald Coleman testified, he was off duty. (RQ52-53). He was sitting in a police car, one designed to resemble a civilian vehicle, in the 300 block of South Leavitt. (RQ52). The area was well lit. (RQ59). He was wearing civilian clothes. (RQ52-53). He carried his off-duty gun. (RQ53). He was planning to move his car from the street's east side to its west side. (RQ54-55).

Coleman testified that a maroon Buick drove east on Jackson and then south on Levitt, toward him. (RQ54-55). It stopped directly across from his car. (RQ54-55). Looking to his left, he could see that its windows were up and it had four people inside. (RQ55, 79-80). He did not get a good look at the front-seat passengers, who were young and probably male. (RQ64-65).

Coleman testified that Antonio Bryant exited the rear-passenger door, firing a gun. (RQ56-57). He could not describe this weapon. (RQ85). He could not see if these shots were aimed at anyone, but they were aimed "towards Jackson westbound facing north." (RQ56-57).

Coleman testified that when Bryant got back in the car, another person exited the rear driver's-side door. (RQ57, 58). This shooter had a semiautomatic pistol. (RQ57, 85). He could not see if these shots were aimed ay anyone, but they were aimed "southeast." (RQ57-58).

Coleman testified that the Buick then drove south. (RQ59). Lacking a

radio, he called 911, identified himself, and described shots fired in the 300 block of Leavitt. (RQ59). Then, turning his vehicle around, he followed the car. (RQ59, 84). As he gave chase, he saw a man lying on the ground, saying that he had been shot. He did not specify where this man was. (RQ59).

Coleman testified that he followed the Buick, turning west on Van Buren Street. (RQ59-60). The car stopped at Oakley Boulevard in the left lane. (RQ60). Coleman stopped in the center lane, behind the Buick and to its right. (RQ61). In the far right lane, a state trooper was conducting a traffic stop of a different car, and the Buick's rear passengers slid beneath its windows. (RQ60).

Coleman testified that he then got out. Holding his star and his weapon, he "announced [his] office, and informed the trooper to get his attention that the individuals inside the Buick, the burgundy Buick had just fired shots at someone on Leavitt Street." (RQ61). Then, while standing beside his own car, about 12 feet behind the Buick, he "announced my office telling the individuals to stop the car yelling, 'Police. Police. Stop the car." (RQ62). Then, about eight feet from the Buick, he "continued to step toward the vehicle announcing my office, telling them to stop the car." (RQ62-63).

Coleman testified that, at that point, a "subject in the rear driver's side turned to me and pointed a weapon at me." (RQ63). The gunman, he said, was 5 feet 10 inches to six feet tall, weighing 160-180 pounds, with a light-to-medium complection and dread locks. (RQ. 64). The man's gun was silver; Coleman did not know its type. He acknowledged telling a detective that it

was a semiautomatic weapon. (RQ88). Asked if he had told an investigator that it was a revolver, he first said, "I corrected her on a couple occasions that it was a semiautomatic weapon, but she left it as a revolver." (RQ89). Then, he said, he recalled being asked about what happened and answering that he saw a "silver revolver being pointed at me." (RQ90).

Coleman testified that he then shot at the passenger. After his first few shots, the car sped west on Van Buren. Coleman then fired more shots, 10 in all. (RQ63). The trooper then asked him, "Are you a cop?" Coleman said he was and "continued to display" his star. The trooper then left to chase the Buick. (RQ64).

Coleman testified that the trooper's squad-car video accurately portrayed events at Oakley and Van Buren, including the sound of his gunshots and of him saying "Stop. Police. Police. Stop." (RQ71-73; St. Exh. 1). He testified that he uttered these words after the gun had been pointed at him. (RQ73).

Trooper Mayerbock conducts a traffic stop, sees Coleman fire shots into a car, and chases after that car.

At about 10:00 p.m. on the night in question, Illinois trooper Timothy Mayerbock testified, he pulled over a Chevrolet on the corner of Van Buren and Oakley (RQ22). He was on Van Buren, facing west. (RQ22). The car stopped in the right-hand lane; the light was red. (RQ22-23). There were two other cars in the intersection, including a red vehicle, but he paid them no attention. (RQ23, 30).

Mayerbock approached the Chevrolet's passenger side. (RQ22-23).

While speaking with its occupants, he saw "an unknown individual approach from the east, from my left, yelling 'police.'" This individual "beg[a]n to fire into a vehicle." (RQ23-24). After about 10 shots, the red car drove west on Van Buren. (RQ24).

Mayerbock testified that he then pulled his own gun and "verified" that the gunman was an officer. (RQ24, 30). Asked to elaborate, Mayerbock testified that the man "displayed what I believed to be a badge initially" and said he was an officer. (RQ26). Mayerbock drove west on the Eisenhower, seeking to chase the red car, after "confirm[ing] that it was a badge and that he was, in fact, yelling 'police.'" (RQ25-26).

Mayerbock testified that his squad-car camera accurately recorded video and audio of these events. (RQ26-27; State's Exh. 1)[1]. It reflects:

0:54 Mayerbock follows a silver Chevrolet onto the Oakley Boulevard ramp.

1:01 Mayerbock activates his Mars lights and his audio recording.

1:10 Mayerbock stops the Chevrolet stops on Van Buren, facing Oakley.

1:23 A dark red car pulls aside the Chevrolet, to its left, in the center lane. The light at the corner of Oakley and Van Buren is red.

1:30 Mayerbock exits and goes to the Chevrolet's front-passenger window.

1:41 Mayerbock leans into its window, saying, "'[h]ow y'all doing?"

1:42 A voice, presumably Coleman's, is heard. Mayerbock does not react. Mayerbock requests a driver's license and insurance papers.

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[1]As discussed below, this video was admitted as evidence, but the appellate court refused to consider it or accept a copy from counsel.

Coleman's voice is heard again.

1:43 Mayerbock looks up, to his left.

1:44 A single gunshot is heard.

1:45 The red car in the center lane turns right.

Three more shots are heard.

A second red car, in the left lane, drives west, through the intersection.

1:47 Five more shots ring out. The second red car proceeds on Van Buren.

A voice, presumably Coleman's yells, "Police! Police! Stop that car!"

1:53 Mayerbock radios out a report of shots fired.

A man, presumably Coleman, appears, saying, "Police! Stop that car!"

1:56 Mayerbock says, "What happened? Coleman says, "They just shot..."

Mayerbock says, "Are you a cop?" Coleman says, "Yes, sir. Yes, sir."

Officer Boyle finds Bryant gravely wounded.

At about 10:00 p.m. on the night in question, Officer Maureen Boyle testified, she and a partner answered a call. (RQ97-98). It involved a person shot in the 300 block of South[2] Maplewood Avenue. (RQ99). In an alley, she saw a man whom she identified as Bryant. (RQ99-100). He was leaning against a black garbage can, having suffered gunshot wounds to the head and neck. (RQ100). He was incoherent and was bleeding profusely. (RQ101).

Boyle radioed out a dispatch, and an ambulance arrived. (RQ101-02). After Bryant was in the ambulance, but before it left, another man

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[2]She actually said the 300 block of Maplewood, but from context it is apparently South Maplewood.

approached, whom Boyle identified as the codefendant Gates. (RQ102-04). Boyle followed a blood trail from the garbage can to an old Buick Regal. (RQ105). It was in the middle of the street, its rear windshield was shot out, it was full of bullet holes, and it had blood in its interior. (RQ105). An old-style revolver was in the back seat. (RQ105). Mayerbock testified that after trying to chase the Buick, he arrived at the Maplewood scene, and saw the Buick, which was the same as the one that he saw being shot at. (RQ25-26).

Events at 10:30 p.m.: Dorsey hears shooting, runs home, and then learns he has been shot.

At about 10:30 p.m. on the night in question, Nicklaus Dorsey testified, he was in front of his home at 315 South Leavitt. (RQ32-33). He noticed a man exiting a maroon car, on its driver's side, and crossing the street. He paid the man no attention. (RQ33-35). Dorsey then crossed the street. As he approached his own car, the maroon car was behind him. He heard gunshots also from behind. (RQ33-34, 37). He ran around his car and ducked. He did not turn around, and he did not see the shooter. (RQ34-35). He then ran home, had an ambulance called, and was later treated at Stronger Hospital. (RQ35-37). He did not testify that he fell to the ground, that he ever was lying on the ground, or that, while on the ground, he said that someone had shot him. He only realized that he had been shot when he entered his home. (RQ35-36).

Investigation and forensic testimony.

Coleman testified that the following day, April 29, after signing an advisory form, he viewed a photo array, identifying Bryant as the rear

passenger-side passenger and Reese as the rear driver's-side passenger. (RQ66-67).

Detective James Decicco testified that on April 30, 2013, he went to Stroger Hospital. (RQ115-16). He did not know when Bryant had left surgery; he assumed that Bryant had received anesthesia. (RQ120). Bryant, he said, could speak and was in "stable condition." (RQ110).

Decicco testified that after *Miranda* warnings, he interrogated Bryant. According to Decicco, Bryant said that in the hours before the night in question, he was walking with Dejuan Gates. When they reached Jackson near Western Avenue, he saw 10 people emerge from an alley. One started shooting. (RQ112). Bryant and Gates then ran into a restaurant. When it seemed safe, they left. (RQ112). Bryant then walked, by himself, towards his home, at the Saint Stephens complex. (RQ111-113). After trying to get a ride from his girlfriend, he waved down a car driven by Deandre Fields. (RQ113). He saw a revolver on the rear-passenger seat. He picked it up and inspected it. (RQ113).

Decicco then testified that according to Bryant, Fields drove east on Jackson. When they reached Leavitt, Bryant said to turn left, towards his aunt's house. (RQ113). But Fields turned right, going south on Leavitt. Bryant then saw "a subject" at the corner of Jackson and Leavitt. Reese then got out and began "shooting at those subjects." (RQ114). Then, seeing other people exiting an alley, Bryant got out and fired a large revolver into the air. He and Gates then got back in, and the car drove south on Leavitt. (RQ114).

He next remembered hearing shots and feeling pain in the back of his head. (RQ114).

The State also presented forensic stipulations and evidence; because this evidence was not disputed, it is presented summarily. Bryant and his codefendants submitted DNA samples, fingerprints, and palm prints. (C92-96, 105-06).

Investigator Paul Prenell testified, among other things, that, at the 315 South Leavitt Street scene, near Crane High School, he collected nine .45-caliber cartridge casings, a fired bullet, and a pair of pants. (RR40). He did not describe blood on the ground or a blood trail.

At the 325 South Maplewood scene, Prenell saw a red Buick. From its back seat, he collected an unloaded revolver on the passenger floor, with five spent cartridges and an empty cylinder casing, and cell phones. (RR41-42, 63).

At the 2251 West Van Buren scene, near the Eisenhower Expressway, he collected 10 .45-caliber cartridge casings. (RR38-39). Prenell testified that he had the car towed from the Maplewood scene. (RR42). He also collected Coleman's semiautomatic .45-caliber gun. (RR43). He swabbed the revolver for DNA. (RR44). He also identified numerous photographs from all three scenes. (RR45-62).

Investigator Nancy DeCook testified that she processed the Skylark at the pound. (RR72-73). Among other things, she collected fingerprints, found bullets in the trunk, and took three swatches from the back seat: one on the

rear-passenger headrest, one in the center rear-seat area, and a third from the driver's-side rear seat. (RR74-77).

The State presented stipulated evidence that the rear-seat swatches and the cell phones both had Bryant's DNA. (C99-103). Bryant's fingerprint was found on the exterior window of the rear passenger door, while the codefendant Fields' fingerprint was found on the driver's-side visor-vanity mirror. (C109-10).

Verdict and post-trial proceedings.

The judge convicted Bryant on all counts. (RR131-32). Bryant unsuccessfully sought *Krankel* relief. (RT6-14). A post-trial motion was denied. (RW2).The judge then sentenced Bryant to 32 years in prison for attempt murder and six years for aggravated assault. (RW7-8).

REASONS FOR GRANTING THE PETITION

In the case at bar, it is clear and apparent that the holdings of the Illinois Appellate Court in People v. Bryant, 2018 IL App (1st) 143578-U, are against the well established caselaw of this Honorable Court. Thus, the Illinois Courts have need of the instructive findings from this Court in order to follow federal constitutional standards.

Furthermore, the opinion of the Illinois Appellate Court failed to deliver justice to the petitioner of the instant cause, being a person convicted under the theory of accountability. As such, Mr. Bryant asks this Honorable Court to review his case, apply the standards of the Federal Constitution, and give relief where this Court deems just and fair.

ARGUMENT

I. The appellate court so misread the record that it denied Bryant's right to appeal.

This Court should grant review or issue supervisory relief because the appellate court denied Antonio Bryant his Illinois and federal constitutional rights to appeal. In his appeal, Bryant argued that the State failed to prove aggravated assault. Video evidence anchored this argument. This video was attached to a codefendant's record. The appellate court allowed Bryant's motion to consider the codefendant's record. Without notice to Bryant, however, it declined to engage his argument, because it could not find the video in the codefendant's record. Had Bryant received notice, he could have provided a copy. By failing to consider evidence introduced below, the appellate court violated Bryant's right to appeal. It further violated this right when considering one of Bryant's other issues, insufficiency of the evidence for attempt murder. As to this issue, it considered incompetent evidence, misconstrued all-purpose evidence as limited-purpose evidence, misread other evidence, and imagined evidence never offered. This Court should grant review or issue a supervisory order directing the appellate court to address the actual record.

Although this Court usually takes cases of broad impact, it also has used its supervisory power to protect judicial integrity, especially where the appellate court has failed to address issues. *See, e.g.*, *People v. Maxfield*, 2018 WL 1419073, No. 123036 (2018) (directing appellate court to consider direct-appeal *Strickland* claim on merits); *In re Jacari J.*, 89 N.E.3d 755, No.

122508 (2017) (directing appellate court to consider forfeited sentencing issue, where State did not argue forfeiture); *People v. Sharp*, 45 N.E.3d 673, No. 118333 (2015) (remanding for appellate court to consider un-notarized post-conviction affidavits).

On appeal, Bryant argued that the State had failed to prove the mental-state element of aggravated battery. (De.br21-26). A dash-cam video anchored his argument. (De.br21-26). This video was entered into evidence and published. (R.Q; 71-73; RR108; St. Exh. 1). However, this video was previously attached to codefendant DeAndre Fields' record on appeal, and after Bryant's trial it remained with the codefendant's record. (*See* Bryant's motion to consider exhibits, included in appendix; *People v. Fields*, 2017 IL App (1st) 143575-U, ¶ 7 (noting video, in unpublished order)). The appellate court granted Bryant's motion to consider those exhibits in his case (see *People v. Bryant*, 2018 IL App (1st) 143578-U, ¶ 8, n.3; also order of October 16, 2017, in appendix).

Until its decision, the appellate court denied Bryant notice that this exhibit was not of record. Its decision, however, failed to engage his claim, stating that it could not find this video in the record. *Bryant*, ¶ 8 fn.3. In his rehearing petition, Bryant offered the court a copy. (Rehearing Petition at 5, included in appendix). The appellate court denied the petition without comment. (Order of March 28, 2018, in appendix).

This notice failure denied Bryant his Illinois right to appeal. Ill. Const. art. I, § 8; art. VI, § 6. The appellant has a duty to provide a complete record.

People v. Appelgren, 377 Ill. App. 3d 137, 140 fn.1 (2d Dist. 2007). But where a defendant diligently seeks a key trial exhibit, one lost by another entity, this loss violates the right to appeal. *Appelgren*, 377 Ill. App. 3d at 145. In *Appelgren*, this loss required a new trial. *Id.* Here, such a drastic remedy is unnecessary, as Bryant still stands willing to provide a copy of the tape.

In sum, the appellate court ordered the codefendant's exhibits included in Bryant's record, but then failed to consider them, without notice to Bryant. This failure denied Bryant his right to appeal under the Illinois constitution. Ill. Const. art. I, § 8; art. VI, § 6. It also denied him his due-process right to appeal the sufficiency of the evidence. *See People v. Wheeler*, 226 Ill. 2d 92, 117 (2007), *citing Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (requiring reviewing court, when evaluating sufficiency argument, to consider "*all of the evidence*") (emphasis in original). Court should grant review or order the appellate court to consider this issue with the video.

This Court further denied Bryant his right to appeal with regard to a different issue: sufficiency of evidence concerning the attempt murder charge. As to this charge, the State argued that Bryant was accountable for co-defendant Fields' shooting of Nicklaus Dorsey. Conceding that Fields (and himself) had fired shots that evening, Bryant argued that Dorsey's shooting was separate, contending that the two shootings had occurred at different times (10:00 p.m. vs. 10:30 p.m.), in different directions, and with different results. (De.br16-19). In rejecting this argument, the appellate court considered incompetent evidence against Bryant, it mistook exculpatory

police testimony as limited-purpose evidence, it misread Dorsey's exculpatory testimony, and it invented inculpatory testimony Dorsey never offered. By repeatedly misconstruing the record, the appellate court further denied Bryant his right to appeal.

The appellate court, for example, considered evidence was which inadmissible against Bryant. Bryant was tried with a different codefendant. *People v. Bryant*, 2018 IL App (1st) 143578-U, ¶ 3 fn.2. At trial, the State introduced this codefendant's custodial statement. (R. R. 11-16). The trial judge properly did not use this statement against Bryant **(cite)**, as it was inadmissible against Bryant. *See Bruton v. United States*, 391 U.S. 123, 136 (1968) (explaining why co-defendant's words cannot incriminate defendant); *Crawford v. Washington*, 541 U.S. 36, 53 (2004) (barring testimonial, out-of-court statements by unavailable witness). But the appellate court did use it against Bryant. *Bryant*, ¶¶ 35, 39. This was improper. *See People v. Quiroga*, 2015 IL App (1st) 122585, ¶ 22 (refusing to consider limited-purpose hearsay as general evidence of guilt). In short, the appellate court violated *Bruton*. Together with the errors below, it denied Bryant's right to appeal.

The appellate court, as another example, ignored competent evidence favoring Bryant, specifically time-frame evidence. On appeal, Bryant conceded that codefendant Fields had fired shots, but he argued that this shooting was separate from the charged incident. Dorsey, he noted, testified that he was shot after leaving his home at about 10:30 p.m. (RQ32-33). In contrast, Officer Ronald Coleman placed Fields's shooting at 10:00 p.m.

(RQ52). Then Officer Maureen Boyle testified to finding Bryant on the ground, badly wounded, at around 10:00 p.m. (RQ97-98). From the officers' testimony, Bryant argued that he could not have been accountable for the Dorsey shooting. (De.br17).

In denying Bryant's argument, the appellate court improperly ignored this unrebutted testimony. *See People v. Carpenter*, 228 Ill. 2d 250, 266 (2008) (reversing conviction for having false or secret compartment, where defendant testified that air bag had been removed when he brought car, which the State failed to rebut). The officers' time-frame evidence, it held, was "simply" a "a means to initiate their testimony." *Bryant*, ¶ 39. The State, however, never asked to admit this testimony for a limited purpose. (RQ21-23, 32, 52, 98). Therefore, it came in for all purposes. *See People v. Kneller*, 219 Ill. App. 3d 834, 840 (2d Dist. 1991) (finding no prosecutorial misconduct in arguing hearsay for its truth because defendant neither objected nor sought limiting instruction). In short, the appellate court ignored competent evidence. Together with the errors below, it denied Bryant's right to appeal.

The appellate court, as another example, misread Dorsey's competent testimony. In his brief, Bryant contrasted Dorsey's testimony (that, before the shooting, an occupant of an approaching car got out and crossed the street) with Coleman's testimony (under which the shooters did not cross the street). *Bryant*, ¶ 44. The appellate court, however, found no contrast, asserting that Dorsey was "not paying attention." *Id.* But the appellate court misread the record. Dorsey only denied "paying attention" when asked if he

knew "at what point did that person get out of the car." He crisply described that same person crossing the street. (RQ33-35). In short, the appellate court misread Dorsey's testimony. Together with its other errors, it denied Bryant's right to appeal.

The appellate court, as another example, invented testimony. Under the State's trial theory, the codefendant shot Dorsey then fled in a Buick. (RR112-13). According to the appellate court, Dorsey corroborated this theory, testifying that after he was shot, "the Buick drove away," and he "thought the shots came from that car." *Bryant*, ¶ 42. Dorsey, however, knew only that shots came from behind him. (RQ34-35). And he neither described seeing a Buick nor seeing any car drive away; rather, he heard shots from behind, ducked, took cover, heard more shots, and ran home. (RQ34-36). In short, the appellate court relied on nonexistent evidence. Together with the errors below, it denied Bryant's right to appeal.

In sum, Bryant diligently pursued a complete record, including video. Without notice to Bryant, the appellate court disregarded this video evidence because it could not find a copy. Because Bryant's aggravated-assault argument rested on this video, this was not appellate review. As to Bryant's attempt-murder argument, the appellate court violated *Bruton*, ignored the time-frame clash, disregarded Dorsey's testimony, and misperceived that Dorsey corroborated Coleman. This Court should therefore either grant review or issue supervisory relief, directing the appellate court to consider the video and to accurately address the remaining record.

II. This Court should grant review because Bryant stands convicted for a shooting which did not involve him.

This Court should grant review because the evidence shows that Bryant's codefendant's shots were not those that hit the complainant, Nicklaus Dorsey. Under the State's theory of the case, Bryant was accountable for Tyshawn Reese's shots at Dorsey. (RQ13-14; RR113). Neither Dorsey nor the State's other witness at the scene, Ronald Coleman, claimed to see Reese aiming at Dorsey. And although Coleman claimed to see Reese fire shots, and although Dorsey was shot on the same night and on the same street, the circumstantial evidence showed that the two shootings were separate: they occurred at different times (10:00 p.m. vs. 10:30 p.m.), in different manners (Coleman described southeast-aimed shots which would have missed Dorsey), and with different results (Coleman's victim was lying on the ground; Dorsey ran home). Because the evidence shows that someone else shot Dorsey, yet the appellate court affirmed, this Court should grant review.

A. Applicable law.

Due process requires the State to prove each element of an offense beyond a reasonable doubt, including the offender's identity. U.S. Const. amend. XIV; Ill. Const. 1970, art. I, § 2; *In re Winship*, 397 U.S. 358, 364 (1970). A doubtful identification will not support a conviction. *People v. Slim*, 127 Ill. 2d 302, 307 (1989). Under the usual standard of review, a conviction must be overturned when the evidence, viewed most favorably to the prosecution, does not let a rational trier of fact find the offense elements

beyond a reasonable doubt. *People v. Hopkins*, 201 Ill. 2d 26, 40 (2002). However, the "simple fact that a judge or jury accepted the veracity of certain testimony does not guarantee reasonableness," as reasonable people "may on occasion act unreasonably." *People v. Wheeler*, 226 Ill. 2d 92, 115 (2007).

B. The State failed to prove that Tyshawn Reese shot at Nicklaus Dorsey.

The shooting Officer Coleman described mismatches the Dorsey shooting in several ways. First, Coleman's timeline failed to match events. Dorsey said that he had been shot at about 10:30 p.m. (RQ32-33). But Coleman testified that the shooting he saw, at 315 South Leavitt Street, was at 10:00 p.m. (RQ52). Soon after, Coleman shot Bryant at Van Buren and Oakley, less than half a mile away[3], an event that Trooper Mayerbock also placed at 10:00 p.m. (RQ21-23, 55-57). Soon after that, also at about 10:00 p.m., patrol officer Maureen Boyle found Bryant propped against a garbage bin, gravely shot. (RQ98-101). Thus, under the timeline provided by the State's witnesses, Coleman was wounded long before Dorsey was shot – and Reese fired his gun on Leavitt long before Dorsey was shot.

Second, Coleman's story failed to match Dorsey's. Coleman testified that just after the shooting, a "gentlemen," whom he did not then know, but whom he now knew by the name Dorsey, was lying on the ground, saying

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[3]As depicted by Google Maps, of which this Court can take judicial notice. *See Dawdy v. Union Pacific Railroad Co.*, 207 Ill. 2d 167, 177-78 (2003) (letting reviewing courts judicially notice distances between locations); *People v. Stiff*, 391 Ill. App. 3d 494, 503-04 (2009) (taking judicial notice of distance victim traveled per Google Maps). The map can be seen at http://tinyurl.com/jonsfga.

that he had been shot. (RQ59, 96). But Dorsey never described lying on the ground. Rather, he described hearing shots, ducking, and "proceed[ing] to run back to my house." (RQ35). And because Dorsey only realized that he was shot when he got home (RQ36), he would not have said, while lying on the ground, that he had been shot. Coleman could not have seen Dorsey do and say what Dorsey neither said nor did.

Third, Coleman's story failed to match the direction in which Dorsey was shot. Coleman testified that Reese shot in a south*east* direction. But under the evidence, Dorsey was shot by someone shooting south or perhaps slightly southwest. Bryant will first show that Dorsey was shot from the north while facing south. He will then show that under the evidence, the shooter was right behind him, or, if the shooter was at a slight angle, it was one that would have the shooter shooting southwest.

The evidence shows that Dorsey was shot from behind while facing south. Dorsey testified that just before the shooting, he had crossed the street in front of his home at 315 South Leavitt. (RQ32). His home was on the east side of Leavitt Street. (See St. Exh. 69). Because his east-side home was behind him, he was, while crossing the street, facing west. Then, seeing a maroon car to his right, he turned away from this car. (RQ33-34, 37). In other words, after facing west, he turned to his left – which would be south.

The evidence also shows that Dorsey was shot from behind while approaching a car parked on Leavitt Street's west side. As noted above, he crossed the street with his east-side home behind him; at that point, he

turned left towards his car. (RQ32-34, 37). Therefore, he would have been on the west side of the street when shot.

Under Coleman's testimony, however, the shooter was not shooting towards the west side of Leavitt. He was not even shooting straight down Leavitt. Rather, he was, while standing on Leavitt Street, shooting "southeastbound." (RQ57, 90, 97). Under these circumstances, the shooter would not have hit Dorsey, who had crossed to Leavitt Street's west side. This discrepancy suggests that Coleman never saw the Dorsey shooting.

Fourth, Coleman's story failed to match what Dorsey saw. Dorsey testified that just before the shooting, he saw one person get out of the driver's side of the maroon car – and cross the street. (RQ33-34). Coleman, however, never testified that either Bryant or Reese crossed the street. Rather, he testified that Bryant got out on the passenger side, started shooting, and went back to get in. Then Reese also gout on the driver's side and started shooting. (RQ56-59, 80-82). This mismatch also suggests that Coleman never saw the Dorsey shooting.

Neither does Bryant's alleged custodial statement match the Dorsey shooting. Although it does describe a shooting on Leavitt Street, it depicts Reese shooting at people on a corner. (RQ114). Dorsey described being in the middle of the street mid-block, at about 315 South Leavitt. (RQ32-33). Further, Bryant's alleged oral statement was unreliable for the same reasons that, as discussed in Issue III, it was involuntary (see pages 27-32 below).

In summary, the State presented direct evidence that Reese fired shots

and that Dorsey was shot. But the State presented no direct evidence that these events were the same. Rather, it shows that Reese's shots and those that hit Dorsey were different. As noted in Issue I, the appellate court, in affirming, misread the record. This Court should grant review.

III. A statement extracted from one unable to resist interrogation is involuntary. The investigating detective interrogated Bryant less than 48 hours after Bryant's surgery for seven gunshot wounds, including three to the head. Counsel was ineffective for failing to move to suppress Bryant's custodial statement.

Trial counsel should have moved to suppress Bryant's custodial statement. Such a motion would have fit like a glove into counsel's strategy, which was to get the trial court to disregard the statement. There is a reasonable probability that such a statement would have succeeded, as Bryant was unable to resist interrogation: the detective already knew many facts about the case, and Bryant, who had been gravely wounded, and who had undergone surgery, was in no condition to resist his questions. There is also a reasonable probability that Bryant would have been acquitted without the statement: a confession is powerful evidence, and it helped the State prove its case. This Court should remand so that Bryant can file a motion to suppress his statement.

A. Applicable law.

1. Due process requires that confessions be voluntary.

Involuntary custodial statements are inadmissable. *Jackson v. Denno*, 378 U.S. 368, 376-377 (1964). The accused must make the statement "freely, voluntarily, and without compulsion or inducement of any sort" so as to overcome his or her will. *People v. Gilliam*, 172 Ill.2d 484, 500 (1996). To evaluate voluntariness, courts consider the totality of the circumstances, including the accused's age, intelligence, background, experience, education, mental capacity, and physical condition at the time of questioning. *People v. Richardson*, 234 Ill. 2d 233, 253 (2009). The State must prove a statement voluntary by a preponderance of the evidence. *Lego v. Twomey*, 404 U.S. 477, 489 (1972); 725 ILCS 5/114-11(d) (2012); *People v. Manning*,

182 Ill. 2d 193, 208 (1998).

A statement extracted from one unable to resist interrogation is involuntary. *See Mincey v. Arizona*, 437 U.S. 385, 398 (1978). In *Mincey*, a "seriously wounded" suspect arrived at the hospital, among other things, "depressed almost to the point of coma." While being questioned, the defendant was "lying on his back in a hospital bed, encumbered by tubes, needles, and breathing apparatus. He was, in short, 'at the complete mercy' of [the police detective], unable to escape or resist the thrust of [the detective's] interrogation." *Mincey*, 437 U.S. at 399. The Supreme Court found it "hard to imagine a situation less conducive to the exercise of a 'a rational intellect and a free will.'" 437 U.S. at 398.

2. Trial counsel must provide effective assistance.

Criminal defendants have a constitutional 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, sec. 8. A defendant is denied effective assistance if counsel's representation "fell below an objective standard of reasonableness," and absent counsel's deficient performance, there is a reasonable probability that the outcome of trial would have been different. *Strickland*, 466 U.S. at 687-689. "[P]rejudice may be found even when the chance [of acquittal] is significantly less than 50 percent." *People v. McCarter*, 385 Ill. App. 3d 919, 935 (1st Dist. 2008).

The failure to file a viable suppression motion can constitute ineffective assistance of counsel. *People v. Brinson*, 80 Ill. App. 3d 388, 394 (2nd Dist. 1980). *See also People v. Hill*, 2012 IL App (1st) 102028, ¶35 (finding no sound trial strategy for failing to move to suppress most damaging State evidence); *People v. Little*,

322 Ill. App. 3d 607, 613 (1st Dist. 2001) (finding no sound trial strategy for failing to file suppression motion that would not have harmed defendant).

An exception to the reasonable-probability standard exists, but it does not apply here. In *Kimmelman v. Morrison*, the Supreme Court found that to establish prejudice in the Fourth Amendment context, the accused must show that the motion would have been meritorious. 477 U.S. 365, 375 (1986). *See People v. Henderson*, 2013 IL 114040, ¶ 15 (applying *Kimmelman* to motion to quash arrest). In several cases outside the Fourth Amendment context, however, the Illinois Supreme Court and this Court have not applied this exception. *See People v. Patterson*, 2014 IL 115102, ¶ 81 (applying reasonable-probability test to motion addressing involuntariness and *Miranda*); *People v. Bowen*, 2015 IL App (1st) 132046, ¶ 28 (same, in Fifth Amendment *Miranda* context); *People v. Sims*, 2014 IL App (4th) 1305689, ¶ 93 (same); *People v. Brannon*, 2013 IL App (2d) 1110849, ¶ 35 (same); *but see People v. Tayborn*, 2016 IL App (3d) 130594, ¶ 17 (applying *Henderson's* outcome-determinative test to *Miranda*). *See also People v. Campbell*, 2014 IL App (1st) 1129268, ¶ 38 (applying reasonable-probability test to motion addressing Sixth Amendment right to counsel).

3. Standard of review.

Strickland claims present mixed questions of fact and law, with the ultimate question of whether counsel was ineffective receiving *de novo* review. *People v. Max*, 2012 IL App (3d) 110385, ¶ 64.

B. Counsel should have moved to suppress Bryant's statement.

Counsel should have moved to suppress Bryant's statement. Her failure was unsound because such a motion would have complemented her strategy and

stood a good chance of success. Counsel's strategy was to get the judge to disregard the statement. At trial, counsel elicited that the interrogating detective, Decicco, already knew many facts about the case. She elicited that Decicco had questioned Bryant in a question-and-answer format. (R.Q. 114-18, 121-22). She elicited that Decicco knew of Bryant's multiple gunshot wounds and his medical condition. Further, she pressed Decicco as to whether Bryant was in intensive care or a recovery room. (R.Q. 118-19, 120, 122-24). Finally, she elicited that Decicco never tried to memorialize the statement. (R.Q. 121). From these facts, she argued that the statement was unreliable. (R.R. 118-21).

Pursuing a motion would have had the same upside – that is, to get the trial judge to disregard the statement – with no downside. Failing to pursue a meritorious suppression motion is not sound trial strategy. *See, e.g., People v. Spann*, 332 Ill. App. 3d 425, 436 (1st Dist. 2002); *People v. Little*, 322 Ill. App. 3d 607, 613 (1st Dist. 2001); *People v. Moore*, 307 Ill. App. 3d 107, 110-13 (5th Dist. 1999); *People v. Steels*, 277 Ill. App. 3d 123, 127 (1st Dist. 1995); *People v. McPhee*, 256 Ill. App. 3d 102, 106-07 (1st Dist. 1993). *See also Moore*, 279 Ill. App. 3d at 158-59 (finding that sound trial strategy "is made of sterner stuff. It embraces the use of established rules of evidence and procedure to avoid, when possible, the admission of incriminating statements, harmful opinions, and prejudicial facts.")

Further, it is not trial strategy to fail to take an action which can only be consistent with that strategy. *See People v. Robinson*, 375 Ill. App. 3d 320, 332 (2d Dist. 2007) (finding counsel ineffective for failing to request hearing on accused's shackling, where counsel argued that shackling could harm accused).

Further, counsel's failure was also nonstrategic for the same reason it was

prejudicial: a suppression motion would have had a reasonable probability of success. The responding officer testified that she found Bryant leaning against a garbage can, having suffered gunshot wounds to the head and neck. (R.Q. 100). He was incoherent, bleeding profusely from a large wound. (R.Q. 101). Less than 48 hours later, after undergoing surgery, he was lying on a hospital bed with intravenous tubes coming out of him. Although the detective denied knowing what type of hospital room Bryant was in, he testified that it was next to the emergency room, suggesting that it was not a standard hospital room. (R.Q. 118-19, 120, 122-24). Further, the post-sentence investigation reflected that Bryant suffered three shots to the head, three shots to the arm and hand, and one shot to the face. (C. 124). Although Bryant's condition may not have been as bad as the defendant in *Mincey*, the State, on these facts, could not possibly have disproved that Bryant was "at the complete mercy" of the detective, "unable to escape or resist the thrust of [the detective's] interrogation." *Mincey*, 437 U.S. at 399. Because it is reasonably probable that Bryant was unable to resist interrogation, *id.*, Bryant's motion would have had a reasonable probability of success.

It is also reasonably probable that had Bryant's statement been suppressed, he would have been acquitted at least of attempt murder. It is reasonably probable because an inculpatory statement is inherently powerful. *See People v. Simpson*, 2013 IL App (1st) 111914, ¶ 22 (finding prejudice because improper confession evidence can carry extreme probative weight, especially because rational trier of fact could have disbelieved State's other witnesses). ¶ 22, *aff'd*, 2015 IL 116512. November 29, 2016. It is reasonably probable because the statement gave the State direct motive and accountability evidence, specifically, evidence that he had been shot at. And it is reasonably probable because, in convicting Bryant, the judge

mentioned few facts but did address the statement. (R. 131). And it is reasonably probable because, as discussed in Issue I above, Officer Coleman's testimony was weak at best. But for the statement, the judge could well have acquitted Bryant.

C. Summary.

Trial counsel should have moved to suppress Bryant's custodial statement. Such a motion fit into counsel's theory, there is a reasonable probability that it would have won, and there is a reasonable probability that, without it, Bryant would have been acquitted. This Court should remand for a motion hearing.

IV. A judge must appoint new counsel when the accused's complaints reveal trial counsel's possible neglect. Bryant complained that counsel failed to discuss pretrial motions, and counsel failed to move to suppress Bryant's statement as involuntary. Especially where the trial judge used the wrong standard, this Court should find possible neglect.

The trial judge failed to appoint *Krankel* counsel and used an incorrect standard for deciding whether to appoint counsel. A judge must appoint *Krankel* counsel if a hearing shows trial counsel's possible neglect. Bryant protested that counsel had failed to discuss possible pretrial motions. In response, counsel denied that any pretrial motions would have been meritorious or fit her theory of the case. But a pretrial motion to suppress Bryant's custodial statement would at least possibly have fit counsel's theory of the case. And for the reasons discussed in Issue III above, such a motion would at least possibly have won. Further, the judge erred by deciding whether counsel was in fact ineffective instead of applying the lower *Krankel* possible-ineffectiveness standard. This Court should remand for appointment of counsel and *Krankel* proceedings.

A. Applicable law.

Criminal defendants enjoy the right to effective assistance of counsel. U.S. Const., amends. VI, XIV; Ill. Const. (1970), art. I, § 8; *Strickland v. Washington*, 466 U.S. 668, 687-89 (1984); *People v. Albanese*, 104 Ill. 2d 504, 526 (1984). In *People v. Krankel*, 102 Ill. 2d 181 (1984), and its progeny, the Illinois Supreme Court defined a trial judge's duties when a defendant alleges ineffective assistance of counsel. First, the judge must hear the defendant out. *People v. Taylor*, 237 Ill. 2d 68, 75 (2010). Then the trial court must appoint new counsel if the hearing "show[s] possible neglect of the case." *Taylor*, 237 Ill. 2d at 75.

"Possible neglect" is a low threshold; the accused need not prove up a complete *Strickland* claim. *People v. Moore*, 207 Ill. 2d 68, 77-78 (2003); see also *People v.*

Nitz, 143 Ill. 2d 82, 134, 135 (1991) (requiring new counsel unless *pro se* claim is "spurious" or if defendant "might have a valid claim"); *People v. Pence*, 387 Ill. App. 3d 989, 994 (2nd Dist. 2009) (new counsel due when "allegations suggest possible neglect").

When a trial court holds a proper *Krankel* hearing, the standard of review is deferential. *People v. Tolefree*, 2011 Ill. App (1st) 100689, ¶ 25. But this was not a proper *Krankel* hearing, because the judge never decided whether there was "possible neglect." Rather, he jumped ahead to the ultimate question under *Strickland*, finding "no ineffective assistance." (R.T. 14). Rulings that normally receive discretion are reviewed *de novo* where "a trial court's exercise of discretion has been frustrated by an erroneous rule of law." *People v. Caffey*, 205 Ill.2d 52, 89 (2001)). *See also People v. Jolly*, 2014 IL 117142, ¶ 28 (reviewing *de novo* whether judge properly conducted Krankel inquiry).

B. Bryant showed possible neglect.

In his *Krankel* complaint, Bryant contended, among other things, that counsel refused to discuss pre-trial motions. (R.T. 6). In response, counsel said that no pre-trial motions fit into her trial theory or had merit. (R.T. 9). As to Bryant's custodial statement, counsel said that she cross-examined the interrogating detective, hoping to show that he fed Bryant facts. (R.T. 12). The judge then found "no ineffective assistance of counsel." (R.T. 14).

As to counsel's trial theory, it is at least possible that a suppression motion would have complemented it. (R. T. 9.) Counsel said that her strategy was to bring out that the detective already knew the facts of the case (and, presumably, inferring that the statement was fabricated or suggested), but counsel went beyond the detective's knowledge, pressing him on Bryant's condition. At the very least a motion

to suppress would not have undermined counsel's trial efforts and they likely would have been complementary.

As to merit, it is at least possible that counsel could have successfully moved to suppress Bryant's statement, for all the reasons outlined in Issue III. Specifically, Bryant had suffered gunshot wounds, including three to the head, he had undergone surgery, and he was apparently not yet placed in a standard hospital room. (R.Q. 118-19, 120, 122-24). Further, as argued above, it is at least possible that the result would have been different without the custodial statement: the statement was inherently powerful, the statement provided the State with motive evidence, the judge specifically mentioned the statement, and Officer Coleman's testimony was weak.

Counsel's possible neglect is underscored by evidence that she was unprepared to execute the strategy she did offer. At trial, counsel tried to establish that Bryant, while under interrogation, was in intensive care or a recovery room. She tried to establish this by cross-examining the interrogating detective. When the detective claimed not to know what kind of room Bryant was in, counsel had no other way to prove it up. (R.Q. 118-124). If counsel could have shown that Bryant was in intensive care or a recovery room, that would have been strong circumstantial evidence that his condition was serious, and his statement unreliable (for trial purposes) and involuntary (for motion purposes). If counsel sought to establish the intensity of Bryant's condition or his treatment, she should have subpoenaed medical records, not hoped to establish these facts from a hostile witness.

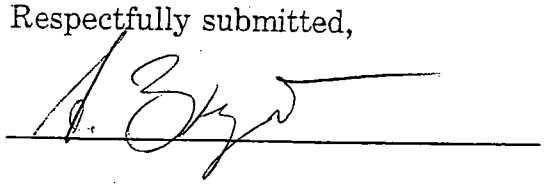
This Court should also remand not only because the record shows possible neglect but also because the judge used the wrong standard for appointment of counsel. The judge never addressed whether counsel was possibly ineffective; rather,

he jumped to the next stage and found counsel in fact effective. (T.15). Because the trial court misapprehended the governing law, its ruling does not qualify as a "determination on the merits," and so it must not receive deferential review. See *Moore*, 207 Ill. 2d at 75; *People v. Walker*, 2011 IL App (1st) 072889, ¶ 33. This Court should review the facts, find reason to believe that counsel was at least possibly ineffective, and remand for appointment of *Krankel* counsel.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Date: December 17, 2018