No. 19-5254

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

TERM,

Jose Arroyo — PETITIONER
(Your Name)

VS.

People of the State of Illinois — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Appellate Court of Illinois, First Judicial District.
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Jose Arroyo
(Your Name)
6665 State Rt. 146 E.
(Address)
Vienna IL. 62995
(City, State, Zip Code)

(Phone Number)

ISSUES PRESENTED FOR REVIEW

I. Did the State fail to prove the *corpus delicti* of charges alleging penetration and sexual conduct with Jose Arroyo's mouth where the only proof of those acts was Arroyo's own statement?

II. After reviewing discovery, Arroyo's appointed counsel moved for an independent expert analysis of the State's DNA evidence. The State, citing the high costs of an independent DNA analysis, moved to remove outside counsel, and the court appointed a public defender. Where the public defender then refused to obtain an independent DNA analysis, did he prejudice Arroyo, justifying the re-appointment of outside counsel?

III. Did the circuit court fail to conduct a proper *Krankel* hearing when Arroyo raised several allegations of ineffective assistance of counsel in his *pro se* post-trial motion?

TABLE OF AUTHORITIES CITED

TABLE OF CONTENTS

INDEX TO APPENDICES

IN THE

SUPREME COURT OF THE UNITED STATES

TERM,

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 N/A; 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[ ] is unpublished.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 N/A; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

[X] For cases from **state courts**:

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

[ ] reported at 119 NE 3d 1020; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

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

[ ] reported at 2018 Ill. App. (1st) 152602-U; 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[ ] is unpublished.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 N/A.

[ ] 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: N/A, 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 N/A (date) on N/A (date) in Application No. A-_____.

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

[X] For cases from **state courts:**

The date on which the highest state court decided my case was March 20, 2019. A copy of that decision appears at Appendix C.

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

[X] An extension of time to file the petition for a writ of certiorari was granted to and including 60 days (date) on June 7, 2019 (date) in Application No. A-N/A.

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

Effective Assistance of Counsel.

U.S. Const. Amends. VI and XIV.

Ill. Const. of 1970, art. 1 section 8.

Due Process Clause.

U.S. Const. Amend. XIV.

Ill. Const. of 1970, art. 1 section 2.

Criminal Sexual Assault

720 ILCS 5/12-13 (2011) renumbered as 720 ILCS 5/11-1.20

Criminal Sexual Abuse

720 ILCS 5/12-16 (2011) renumbered as 720 ILCS 5/11-1.50

Expert Witness, Appointment.

725 ILCS 5/113-3 (2014).

STATEMENT OF FACTS

The State charged Jose Arroyo with criminal sexual assault and aggravated criminal sexual abuse for alleged acts with his 15-year-old daughter D.A.H. (C. 130-177) Though the jury acquitted Arroyo of one count of criminal sexual assault by force, it convicted him on counts of criminal sexual assault based upon penis-to-vagina, mouth-to-vagina, and finger-to-vagina penetration with a family member who was under 18, and on counts of aggravated criminal sexual abuse based upon hand-to-breast and mouth-to-breast contact. (C. 72, 77, 130, 139-42, 144; R. AAA6-7) The State alleged that those acts occurred in April 2011 and ended when D.A.H.'s mother, A.H., found Arroyo and D.A.H. having vaginal sex in the family's apartment on April 28, 2011. (C. 122, 139-32, 144)

Arroyo's Counsel Prior to Trial

Prior to trial, Arroyo repeatedly sought to fire his public defender. (R. X2, Y3-5, Z2, AA4-8, BB4, CC2, DD2, FF3-4) On October 25, 2013, the circuit court allowed Arroyo to proceed *pro se*. (R. FF6) Though Arroyo immediately requested standby counsel, the court refused to appoint one. (R. FF6-8)

On December 11, 2013, the court told Arroyo it was "extremely concerned about your ability to protect yourself in this courtroom representing yourself" and asked to appoint the public defender. (R. HH9) The court gave Arroyo a two-week continuance and promised to "discuss this representation again." (R. HH12) When Arroyo again requested standby counsel, the court again refused to provide it. (R. HH13) On December 23, 2013, the court offered the public defender, but Arroyo again refused. (R. II7)

On January 16, 2014, the court ordered a behavioral clinical examination (BCX) of Arroyo. (R. JJ13)

On January 22, 2014, the circuit court appointed Daniel Coyne of the Chicago-Kent College of Law as Arroyo's counsel. (C. 283) Coyne filed an appearance that day. (C. 282)

At a hearing on February 19, 2014, Coyne appeared for Arroyo and said he had received discovery from the State, though he still needed DNA results. (R. KK2) Coyne also said he had met with Arroyo and discussed the discovery and his options. (R. KK3) Arroyo continued to insist upon representing himself. (R. KK3) The State reported that the prior BCX found Arroyo fit to stand trial, but Arroyo refused to participate in the sanity portion. (R. KK5) The court said it would reorder the BCX. (R. KK5)

At the next court hearing on March 31, 2014, Coyne again appeared on Arroyo's behalf. (R. MM2) Coyne summarized the results of a BCX finding Arroyo fit to stand trial, then asked for the appointment of a psychologist to determine whether or not Arroyo could represent himself. (R. MM2-3)

At the next hearing on April 9, 2014, the State said "I was just informed today of what occurred on the last court date, that apparently the defendant is now going to be represented by Mr. Coyne and he has agreed to do so." (R. NN2)

Also on April 9, 2014, Coyne moved to appoint an independent DNA expert. (C. 309) In that motion, Coyne noted that the State would have the advice and direction of the Illinois State Police Crime Laboratory at trial, but that the defense had no such expert available. (C. 309) It proposed

"appointing Independent Forensics of Illinois as DNA experts in this cause." (C. 309-310) Coyne attached the curricula vitae of two experts at Independent Forensics. (C. 311-332) Coyne's motion did not indicate the cost of appointing Independent Forensics.

The State asked for a continuance to respond to Coyne's motion, which it remarked "[o]bviously would mean that we would pay for this expert." (R. NN2) Coyne asked what the basis of the State's objection was, but the State said simply "I don't think an expert should be appointed in this case." (R. NN3) Later, the State added that it would "like to look over this motion and see the credentials of these people." (R. NN3) The court continued the case by agreement for the State's response to Coyne's motion. (R. NN4)

At the next hearing on April 18, 2014, the State filed a motion to vacate Coyne's appointment. (R. OO2; C. 334) In that motion, the State noted that Coyne "wanted an independent DNA expert, one who charges at least $30,000.00 (consultation/report/testimony charges) to be appointed." (C. 336) The State did not include any citations supporting its cost estimate.

In its motion, the State also argued that independent counsel should be appointed only when there is no public defender in the county or the defendant's rights would be prejudiced by the public defender. (C. 336) The State argued that Arroyo's previous public defender was effective and diligent. (C. 338) Arguing that Arroyo "does not get to hand pick court-appointed counsels," the State argued that Arroyo had to choose between proceeding *pro se* or accepting the public defender. (C. 338) The court continued the case by agreement for Coyne to respond. (R. OO6)

On May 19, 2014, the circuit court held that the State "has pointed out the error of my ways. [Arroyo] represents himself. The appointment [of Coyne] was improper." (R. PP3) Coyne, who was still in the courtroom, then asked if Arroyo could adopt his motion for independent DNA analysis. (R. PP6) The court said that Arroyo could chose to do so, but only after the court ruled on a motion to dismiss Arroyo also filed. (R. PP6-7)

On June 24, 2014, Arroyo filed a motion to have Coyne reappointed to his case, claiming that the public defender would not represent him diligently. (C. 344-49; S.R. A2-4) According to Arroyo, the State "maliciously and frivolously" sought to remove Coyne to avoid paying for the independent DNA analysis Coyne sought. (C. 349; S.R. A8)

The court held that Arroyo needed an attorney, but it was not appropriate to appoint someone outside the public defender's office. (S.R. A10) The court thus appointed the new public defender in his courtroom, David Roleck, as Arroyo's prior public defender had been reassigned. (S.R. A11)

Public defender Roleck then appeared for Arroyo and repeatedly continued the case so that the "forensic unit" could review the DNA evidence. (R. TT2, UU2, WW2) However, Rolceck did not refile Coyne's motion to have an independent expert review that DNA evidence.

On February 20, 2015, Arroyo filed a motion asking the court to remove Roleck and appoint an attorney who was not a public defender. (C. 359; R. YY2-3) In part, Arroyo claimed that Roleck had consulted with a DNA expert from the public defender's office who did not want to conduct

independent testing, which Arroyo believed was necessary. (R. YY5) Arroyo said that he maintained from the start of the prosecution that he needed an independent DNA test, and although Roleck initially agreed, he now refused to obtain one. (R. YY5)

The court held that an attorney outside the public defender's office would not be appropriate because Arroyo had not shown that Roleck had prejudiced him. (R. YY3-4) It added that Roleck was very experienced. (R. YY6) The court thus denied Arroyo's motion. (R. YY7) Roleck represented Arroyo for the remainder of the proceedings below.

Trial Testimony Regarding the Incidents

At trial, D.A.H. testified that in April 2011, she lived in a two-bedroom apartment with Arroyo, her mother, and her two sisters. (R. AAA26) At that time, D.A.H. shared a room with her mom and her sisters, while Arroyo, who was not getting along with her mom, had his own room. (R. AAA27, AAA44)

In early April, D.A.H. was home alone with Arroyo when he told her to go to his room because they needed to talk. (R. AAA28-29) Arroyo grabbed her arms, forced her to the bed, and started taking her pants and underwear off. (R. AAA29) Arroyo removed his pants and underwear, pushed himself onto her, and penetrated her vagina with his penis. (R. AAA30) Arroyo also squeezed D.A.H.'s breasts and placed a finger in her vagina. (R. AAA31-32) D.A.H. testified that throughout April 2011, there were five to six similar incidents in the house. (R. AAA32-33, AAA40)

The last incident occurred on April 28, 2011. (R. AAA35) D.A.H. was home with Arroyo while her mother was picking her sisters up from school.

(R. AAA35) D.A.H. left the front door to the apartment unlocked because she "wanted him to get caught." (R. AAA36) While D.A.H. was in the bathroom brushing her teeth, Arroyo pulled her into his bedroom and put her on the bed. (R. AAA36-37) Arroyo forced D.A.H. to take off her pants and underwear and then penetrated her vagina with his penis. (R. AAA37) A.H. arrived home with D.A.H.'s sisters, saw what was happening, and immediately took D.A.H. and her sisters out of the apartment and to the hospital, where nurses performed a sex assault kit. (R. AAA38-39, AAA42)

A.H. testified at trial that on April 28, 2011, she returned home around 3:00 p.m. (R. AAA53-54) She noticed that the front door was unlocked and open. (R. AAA54) When she walked inside, she saw Arroyo "on top of" D.A.H. (R. AAA54) A.H. testified that D.A.H.'s blouse was up, her pants were down, and her legs were open; Arroyo's pants were also down, with his zipper open. (R. AAA55) Arroyo stood up and sat in the chair in front of his computer, and A.H. took her daughters out of the apartment. (R. AAA55) She took D.A.H. to the hospital and called the police. (R. AAA56)

In his defense, Arroyo testified, with the help of a Spanish interpreter, that in April of 2011, his relationship with A.H. had deteriorated and he was dating another woman. (R. BBB116) He then specifically denied having any sexual encounters with D.A.H.. (R. BBB117, BBB137-38) According to Arroyo, on April 28, 2011 he "was getting ready for a haircut, and since my daughter is playful, at that time she stumbled on me and we fell, which is why she thought ill about what she saw at that moment. Because prior to my

getting a haircut, I used to wear only underwear." (R. BBB118) He denied ever engaging in sexual activity with D.A.H. (R. BBB117)

Arroyo's Statement to Police

Arroyo also denied making an inculpatory statement to the police on April 29, 2011, saying that he simply said "uh huh" to the officer's questions in English describing his involvement in the crime. (R. BBB124) He only did so after the officers kept him in a cell for 24 hours without food and threatened his family if he did not cooperate. (R. BBB119-122) He also claimed that he did not understand the Assistant State's Attorney who typed his statement because she also spoke in English. (R. BBB125) Arroyo denied that he signed each page of the statement, claiming his signature only appeared on two pages of that four-page document. (R. BB126-27)

The State published Arroyo's statement to the jury. (St. Ex. 1; R. AAA152-158) In the Statement, Arroyo said that D.A.H. was having trouble at school in April of 2011, and that while he was comforting her they began touching each other's bodies, then taking each other's clothes off and having sex. (R. AAA154) In his statement, Arroyo said that during one incident he kissed D.A.H.'s breasts, and that during another he put his tongue inside D.A.H.'s vagina. (R. AAA154-55)

DNA Evidence

Forensic scientist Casey Karaffa testified that he performed an Acid Phosphataze test, a P30 test, and a microscope examination for the presence of semen on a small cutting of D.A.H.'s underwear and on her vaginal swabs. (R. BBB19-21) While the first two tests were positive for semen, he did not

find sperm heads under the microscope. (R. BBB19-21) Because he could not confirm semen under the microscope, his report stated "semen indicated" rather than "semen identified." (R. BBB30) Given the small amounts of semen indicated, Karaffa asked the circuit court for permission to consume both samples in DNA testing prior to trial, and the court granted that request. (R. BBB31)

Forensic scientist Ruben Ramos testified regarding the initial DNA testing he conducted in this case. (R. BBB44) According to Ramos, he did a differential extraction from D.A.H.'s vaginal swabs, but was not able to generate a male profile, though he could confirm there was male DNA. (R. BBB48-49) He added that there was only 0.01 to 0.02 nanograms per microliter of DNA, meaning only a few cells were present. (R. BBB61-62) He thus suggested that the lab perform YSTR testing on the samples, which would look specifically for male DNA on the Y chromosomes and preclude the female DNA in the sample from interfering. (R. BBB49-50) Ramos then did the same differential extraction on the underwear samples, and found a mixture of 2 DNA profiles, one major female and one minor male, in the sperm fraction. (R. BBB51) The minor profile was too partial for comparison. (R. BBB53) Additionally, the mixed portion of the sample did not generate any DNA profiles. (R. BBB53) Ramos thus recommended YSTR testing of the underwear sample as well. (R. BBB54)

Ramos acknowledged that YSTR testing is extremely sensitive, and that it is utilized specifically to obtain results with very little DNA. (R. BBB68) Ramos also acknowledged that DNA can very easily transfer, and

that contamination is especially problematic in YSTR testing given the sensitive systems at work. (R. BBB67-68)

Forensic scientist Lisa Fallara testified that she performed the YSTR testing on the samples that Ramos prepared. (R. BBB80) Fallara found a mixture of Y profiles in the sperm fraction of D.A.H.'s vaginal swab, which included a minor Y profile at 2 loci. (R. BBB88) She also found a mixture of Y profiles in the underwear sample. (R. BBB88) In both, the major Y profiles matched Arroyo in a partial profile that would occur in 1 in 1000 unrelated Hispanic males. (R. BBB82-84, BBB89) Fallara did not find a full profile for Arroyo in the major portion of the samples. (R. BBB94) Fallara clarified that she could not tell whether those profiles were generated by semen or not. (R. BBB90) Fallara also agreed that studies have shown that sperm cells can transfer between items of clothing in the laundry. (R. BBB96-97)

Jury Verdict

The jury found Arroyo not guilty on one count of criminal sexual assault based upon penis-to-vagina penetration by force. (C. 391) It found Arroyo guilty of criminal sexual assault based upon penis-to-vagina, mouth-to-vagina, and finger-to-vagina penetration with a family member who was under 18, and of aggravated criminal sexual abuse based upon hand-to-breast and mouth-to-breast contact. (C. 392, 394-97)

Post-Trial Motions

Following trial, the court accepted post-trial motions from both defense counsel Roleck and from Arroyo himself. (R. FFF3) In arguing his post-trial motion, Roleck argued that D.A.H.'s testimony did not include complaints of

mouth-to-vagina or mouth-to-breast contact, and thus was insufficient to maintain a conviction on those counts. (R. FFF4) Arroyo's post-trial motion also included a reference to the *corpus delicti* rule. (C. 470)

In his post-trial motion, Arroyo also made several allegations that his counsel was ineffective. In arguing that the circuit court abused its discretion when it allowed the State to consume the DNA samples, Arroyo added that he was denied "the effective assistance of counsel" when his original public defender failed to object to that consumption testing or to inform Arroyo of his right to independent DNA analysis. (C. 461) Next, Arroyo argued that he asked his attorneys to subpoena documents from the State that would show that the detective and assistant state's attorney who interviewed him were lying on the stand, which "violat[ed] the effective assistance of counsel clause." (C. 462-63) Lastly, Arroyo argued that his attorney refused to request a hearing to determine whether the State's "search of [his] private genetic code (DNA) was warrantless," and thus the State's DNA evidence was inadmissible. (C. 477) Arroyo again cited to his rights "to due process and effective assistance of counsel." (C. 477)

After hearing argument from both Roleck and the State, the circuit court denied Roleck's motion for a new trial. (R. FFF9-10) The court then noted that Arroyo had filed his own 31-page motion for a new trial, which the court had "occasion to review," and that it raised "substantial issues." (R. FFF10) The court asked if Arroyo wished to present any additional argument. (R. FFF10) Arroyo responded that he had friends at the legal library help him prepare the motion and that he "just copied what they gave

me." (R. FFF10) The court incorporated Arroyo's motion into the file for purposes of appeal. (R. FFF10) It then stated "as concerns the issues raised in that document, it is denied." (R. FFF10-11)

Sentencing

The court announced sentences of nine years for penis-to-vagina criminal sexual assault; eight years for mouth-to-vagina criminal sexual assault; and seven years for finger-to-vagina criminal sexual assault, all to be served consecutively. (R. FFF24) It announced four-year sentences for aggravated criminal sexual abuse based upon hand-to-breast and mouth-to-breast contact, which would be concurrent to each other but consecutive to the remaining counts. (R. FFF24) The total sentence was 28 years. (R. FFF24; C. 485)

I. The State failed to prove the *corpus delicti* of charges alleging penetration and sexual conduct with Jose Arroyo's mouth where the only proof of those acts was Arroyo's own statement.

The *corpus delicti* requirement ensures that convictions do not rest upon a simple conjecture: because the defendant made an inculpatory statement and committed other bad acts, he must be guilty of the charged crime. That was precisely the basis for Jose Arroyo's conviction on criminal sexual assault and aggravated criminal sexual assault involving penetration or sexual conduct with his mouth. The only evidence of such conduct was Arroyo's own statement. Neither physical evidence nor testimony supported those portions of his statement. This Court should reverse those convictions.

The Illinois Supreme Court's decisions in *People v. Sargent*, 239 Ill. 2d 166, 183 (2010) and *People v. Lambert*, 104 Ill. 2d 375, 378-79 (1984) require reversal here. In *Lambert*, the Illinois Supreme Court reversed a conviction

for the defendant allegedly placing his mouth on a young boy's penis where the evidence, aside from the defendant's inculpatory statement, only showed that the boy had a swollen rectum. *Lambert*, 104 Ill. 2d at 377-78. The evidence of a swollen rectum was insufficient to prove a criminal act involving the defendant's mouth and the boy's penis. *Id.* at 380. In *Sargent*, the Supreme Court reversed on two of the seven charges against the defendant premised upon fondling a young boy's penis where only the defendant's confession suggested he had ever touched the boy's penis. *Sargent*, 239 Ill. 2d at 169, 184. Independent proof of other sexual conduct to support other convictions did not sufficiently support a conviction on the charges related to that fondling. *Id.* at 185, 194.

Contrary to the State's claims, *Sargent* and *Lambert* control here. (St. Br. 32) Just as the only evidence of specifically charged conduct in *Lambert* and *Sargent* were the defendants' statements, the only evidence of the specific conduct involving Arroyo's mouth was his own statement. Neither testimony nor physical evidence proved the *corpus delicti* of those two charges. This Court should reverse those convictions. *Lambert*, 104 Ill. 2d at 381; *Sargent*, 239 Ill. 2d at 194.

This Court should not adopt the State's overbroad reading of *People v. Lara*, 2012 IL 112370. St. Br. 29-32. The *Lara* court did hold that a confession alone is sufficient to convict so long as independent evidence "corroborates some of the circumstances related in the confession." (St. Br. 32) That broad standard, which no Illinois court has adopted, would eviscerate the *corpus delicti* rule and expand criminal liability for any

conduct in a confession so long as the State corroborated a few ancillary details.

The *Lara* Court carefully avoided that conclusion. It noted that corroborating evidence must " 'relate to the specific events on which the prosecution is predicated,' " rather than to distinct charges "alleging distinctly different types of acts." *Id.* at 24 (quoting *Sargent*, 239 Ill. 2d at 185) In other words, evidence of one assault cannot sufficiently corroborate the portions of a defendant's statement regarding "an entirely different type of assault affecting a different part of the victim's body." *Id.* The *Lara* court only upheld the *Lara* defendant's convictions because they both concerned the same conduct–digital penetration–and the victim testified that the defendant touched her vagina without clarifying whether he touched the inside or outside. *Id.* at 25 (noting that, "unlike in *Sargent*, exactly the same type and point of contact was alleged in both . . . counts" against the defendant).

While corroborating evidence in *Lara* showed that the defendant's hand touched the victim's vagina similar to the conduct described in his confession, absolutely no corroborating evidence below showed that Arroyo's mouth made contact with D.A.H.'s breasts or vagina. D.A.H.'s testimony described digital and penile penetration and hand-to-breast contact, but never described any mouth-to-breast or mouth-to-vagina touching. (R. AAA30-35) Without independent evidence of that "entirely different type of assault affecting a different part" of D.A.H.'s body, the State could not convict Arroyo on those distinct charges. *Id.* at 24.

The State's footnoted suggestion that the charge specifying "sexual penetration by a specific body part (mouth) is considered surplusage" flies in the face of the Illinois Supreme Court's careful delineation of the *corpus delicti* rule. (St. Br. 33, n. 8) The State cannot conjure counts from thin air. It must specify when and where specific criminal conduct occurred in the charging documents, then provide corroborating proof of that conduct, beyond the defendant's statement, to obtain a conviction. This Court should ignore the State's claim to the contrary.

The State also claims that it would be "unreasonable to require a young teen to delineate. . . . defendant's every touch and intrusion of her body." St. Br. 35) The *corpus delicti* rule does not require such delineation. It merely requires that some evidence aside from the defendant's confession corroborate the charged offenses. No such corroborating evidence of contact between D.A.H. and Arroyo's mouth was introduced below, requiring reversal of his convictions for criminal sexual assault and aggravated criminal sexual abuse premised upon mouth-to-vagina penetration and mouth-to-breast contact.

II. The public defender prejudiced Arroyo by refusing to obtain an independent expert analysis of the DNA evidence–an analysis Arroyo's prior counsel recommended and the State was determined to prevent.

Jose Arroyo was entitled to representation by counsel other than the public defender where that public defender prejudiced his right to independent expert analysis of the State's DNA evidence. 725 ILCS 5/113-3 (2014); *People v. Woods*, 84 Ill. App. 3d 938, 946 (1st Dist. 1980); *see also People v. Tucker*, 99 Ill. App. 606, 611 (2nd Dist. 1981). Public defender David Roleck failed to obtain independent expert analysis of the State's DNA evidence, even after the State acknowledged the importance of such analysis and successfully sought removal of Arroyo's prior counsel Daniel Coyne to avoid it. (Op. Br. 22-23) Roleck's failure was prejudicial; the State's DNA experts relied upon sensitive YSTR testing procedures to analyze extremely small samples, those samples contained mixtures of incomplete male profiles that may not have been derived from semen, and the results were only marginally conclusive. This Court should reverse and remand for the appointment of counsel who will pursue independent expert analysis of the State's DNA evidence at a new trial.

The State misleadingly asserts that Arroyo seeks impossible DNA testing of consumed evidence. (St. Br. 36-37, 41) Arroyo seeks expert analysis and testimony, not additional testing. In April of 2014, Arroyo and his prior counsel Daniel Coyne sought the appointment of an independent DNA expert, one who could "assist in preparation for trial" and testify as "DNA experts in this cause." (C. 309-10) That motion requested independent analysis of the State's testing results, not additional tests. (C. 309-10; R.

NN2-4) The State was determined to preclude such independent analysis; it sought Coyne's removal two weeks later, based upon its unsupported assertion that an independent expert would cost "at least $30,000.00." (R. OO2; C. 334, 336) Despite that apparent ploy to avert independent DNA analysis, the circuit court granted the State's motion to remove Coyne and refused Arroyo's subsequent motions for counsel who would seek such testing in June of 2014 and February of 2015. (C. 344-50, 359; S.R. A2-4, A8; R. YY2-3, YY5)

Such independent expert analysis was vital to Arroyo's defense that he did not engage in sexual conduct with D.A.H. It could further undermine the questionable DNA proof. The State found only a few cells of male DNA in the samples from D.A.H.'s vaginal swab and underwear (R. BBB61-62); it relied upon extremely sensitive YSTR testing that is more prone to contamination (R. BBB67-68); and it found a mixture of profiles in both the underwear and vaginal swabs without generating any full profiles matching Arroyo. (R. BBB88, BBB94) Further expert analysis of that DNA evidence could have uncovered more support for Arroyo's defense. Depriving him of that analysis was highly prejudicial.

The State suggests that no independent expert analysis was necessary simply because an attorney with forensic experience, public defender Christa Petty, cross-examined the State's DNA experts. (St. Br. 36, 40) No amount of cross-examination equates to independent, countervailing DNA expert testimony. Arroyo's right to such independent expertise and evaluation could not be vindicated by any quantum of confrontation. The State's efforts to

recast Arroyo's claim as one of ineffective assistance of Petty is a red herring. (St. Br. 41) His claim is that the circuit court wrongly denied appointment of outside counsel who, unlike his public defender, would be willing to seek such necessary, independent expert analysis and testimony. He never claims that trial counsel's cross-examination was ineffective.

Much as it asserted below, the State claims that public defender Roleck's failure to obtain independent expert analysis of the DNA evidence avoided "wast[ing] resources and time." (St. Br. 42) That argument puts the cart before the horse. The State cannot assert that independent expert analysis is wasteful without knowing that expert's conclusions, or what weaknesses in the State's DNA evidence that expert could highlight beyond those discussed above and in Arroyo's opening brief. (Op. Br. 23) And despite the State's insinuation, unverified estimates of the costs of such expert analysis cannot justify the denial of Arroyo's constitutional rights. (St. Br. 39)

Independent expert analysis of the DNA evidence was crucial where Arroyo maintained that he did not engage in sexual conduct with D.A.H. Public defender Roleck prejudiced Arroyo by refusing to obtain such independent expert analysis, and the circuit court should have appointed new counsel from outside the public defender's office to do so. This Court should reverse and remand for the appointment of such counsel and a new trial. 725 ILCS 5/113-3 (2014); *Woods*, 84 Ill. App. 3d at 946.

III. The circuit court failed to conduct a proper *Krankel* hearing when Arroyo raised several allegations of ineffective assistance of counsel in his *pro se* post-trial motion.

When presented with Jose Arroyo's specific allegations that his trial counsel was ineffective, the circuit court was obligated to inquire into the factual basis of those claims. *People v. Patrick*, 2011 IL 111666; *Peopl.e v. Krankel*, 102 Ill. 2d 181, 189 (1984); *Strickland v. Washington*, 466 U.S. 688, 687-92 (1984). The court's failure to do so warrants reversal for a proper preliminary *Krankel* inquiry.

This Court should ignore the State's misrepresentations of the substance of a preliminary *Krankel* inquiry. (St. Br. 43-44) The State claims that the circuit court may decide that a defendant's post-trial claims of ineffective assistance can be rejected based solely on the court's personal knowledge of counsel's performance, citing *People v. Moore*, 207 Ill. 2d 68, 79 (2003). (St. Br. 44) But before saying that circuit courts may "[a]lso . . . base" its evaluation on that knowledge, the *Moore* court held that "some interchange between the trial court and trial counsel regarding the facts and circumstances surrounding the allegedly ineffective representation is permissible and usually necessary in assessing what further action, if any, is warranted on a defendant's claim." *Id.* at 78-79. *People v. Radford*, 359 Ill. App. 3d 411, 418 (1st Dist. 2005) merely recites the same language from *Moore* indicating that both the circuit court's personal knowledge *and* a discussion with trial counsel are usually necessary in a preliminary *Krankel* inquiry. (St. Br. 44)

The circuit court below conducted no *Krankel* inquiry. Instead, it incorporated Arroyo's motion into the file and stated "as concerns the issues raised in that document, it is denied," without any further discussion of the factual basis of Arroyo's *pro se* claims of ineffective assistance. (R. FFF10-11) Those claims are far from the "bald allegations" present in cases the State cites. (St. Br. 44) Arroyo specifically argued that his counsel ineffectively failed to object to consumption DNA testing, to inform Arroyo of his right to independent DNA analysis, to subpoena documents that would show two State witnesses lied on the stand, and to request a hearing on the State's efforts to collect a buccal swab from him. (C. 461-63, 477) The circuit court's insufficient inquiry regarding the factual basis of those detailed claims requires reversal.

This Court should not entertain the State's dual attempts to misdirect away from the question this issue presents. (St. Br. 45-46) First, the State's detailed discussion of the circuit court's approach to other *pro se* motions is irrelevant. (St. Br. 45-46) *Krankel* evaluates only how the circuit court responded to the defendant's post-trial allegations of ineffective assistance, and here the court rejected them without any inquiry. Second, the State's review of the merits of Arroyo's allegations is premature. (St. Br. 46) As the State itself acknowledges later (St. Br. 46-47), the Illinois Supreme Court's decision in *People v. Ayers*, 2017 IL 120071, ¶ 19 clarified that a *Krankel* claim need not be supported by facts or specific examples. (Op. Br. 30) The details of the defendant's allegations should be uncovered in the preliminary *Krankel* inquiry, not act as a prerequisite to one.

The State suggests in passing that Arroyo did not add anything to his written post-trial motion when offered the chance. (St. Br. 47) Again, that is irrelevant. The Court was offering Arroyo the chance to add to his 30-page post-trial motion; it was not specifically inquiring into his ineffective assistance allegations as *Krankel* requires. (R. FFF10) The circuit court never fulfilled that requirement by asking either Arroyo or his counsel about the facts and circumstances underlying Arroyo's ineffective assistance claims. It failed to conduct a proper preliminary *Krankel* inquiry, requiring reversal and remand.

REASONS FOR GRANTING THE PETITION

The Appellate Court's decision affirming Jose Arroyo's conviction rests upon a novel interpretation of the *corpus delicti* rule that will lead to confusion amongst the lower courts. The Appellate Court reasoned that a defendant's confession is independently corroborated so long as the victim testifies to contact between a specific part of the victim's body and *any* part of the defendant's body–even if the charge and confession concerned that specific part of the victim's body and *an entirely different* part of the defendant's body. *See People v. Arroyo*, 2018 IL App (1st) 152602-U, ¶ 39. That reasoning subverts this Court's *corpus delicti* jurisprudence, which requires independent corroboration of the specific allegations made against the defendant beyond his own confession. *See People v. Sargent*, 239 Ill. 2d 166, 183 (2010); *People v. Lara*, 2012 IL 112370. That reasoning may sow confusion amongst the lower courts regarding the proper evidentiary standard for proof of the *corpus delicti* of sex crimes. This Court should grant leave to appeal to clarify that, in order to satisfy Due Process, the State must corroborate a defendant's confession with proof of contact between the specific body parts of the victim *and* the defendant named in the charges.

CONCLUSION

For the foregoing reasons, Jose Arroyo, Defendant-Appellant, respectfully requests that this Court reverse two of his convictions, vacate the associated sentences, and order the issuance of a corrected mittimus under Issue I; reverse and remand for a new trial on the remaining counts with counsel outside the public defender's office appointed under Issue II; and remand for a preliminary *Krankel* inquiry under issue III.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Jose Arroyo

Date: 6-27-19