No.

IN THE

SUPREME COURT OF THE UNITED STATES

GEORGE E. LACEY, Petitioner,

-vs-

PEOPLE OF THE STATE OF ILLINOIS, Respondent.

On Petition For Writ Of Certiorari

To The Appellate Court Of Illinois

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether, and to what extent, the joinder of status charges with non-status charges in a single trial denies criminal defendants the right to a fair trial?

2. Whether, and to what extent, defense counsel in a criminal case renders ineffective assistance by failing to put forward a motion that the trial court is required to grant in order to protect the defendant's right to a fair trial?

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The petitioner, George E. Lacey, respectfully prays that a writ of certiorari issue to review the judgment below.

OPINION BELOW

The decision of the Illinois Appellate Court (Appendix A) is reported at *People v. Lacey* 2023 IL App (5th) 220050-U, appeal denied, 130123, 2023 WL 5383210 (Ill. January 24, 2024) and is not published. A copy of order denying rehearing (Appendix B) is not reported. The order of the Illinois Supreme Court denying leave to appeal (Appendix C) is reported at *People v. Lacey*, 130123, 2023 WL 5383210 (Ill. January 24, 2024).

JURISDICTION

On August 22, 2023, the Appellate Court of Illinois issued its decision. A petition for rehearing was timely filed and denied on September 18, 2023. The Illinois Supreme Court denied a timely filed petition for leave to appeal on January 24, 2024. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Sixth Amendment to the United States Constitution

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury...,and to...have the assistance of counsel for his defense.

Fourteenth Amendment to the United States Constitution

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On the evening of November of 2020, Darian Woods and Lauren Swearingen were at their shared apartment in Collinsville, Illinois. (R.280-81) Woods occasionally worked at a car wash, and sold marijuana out of the apartment. (R.285-87) Swearingen was not comfortable with Woods selling marijuana out of the apartment, but said that Woods did what he wanted to do; he was worried that "an actual job" would make him less money. (R.286-87) Woods would usually go out to meet someone when he wanted to purchase Fentanyl, "but on rare occasions, it was a select two people that would come to [the apartment]." (R.315) Woods had been robbed at least four times, at least one of which took place at the shared apartment. (R.315-16)

On the evening of November 19, 2020, two men broke into the apartment through the back door. (R.293-94) The men wore dark clothing and Covid face masks. (R.294) The first man held Swearingen down and put his weight on her to keep her from moving. (R.294-95) When the second man moved up the stairs, she heard Woods coming down the stairs, followed by a gunshot. (R.295-96) When she looked to the stairs, she saw Woods sliding down headfirst and heard him struggling to breathe. (R.296) Swearingen was brought upstairs, showed the two men where Woods kept money from his drug sales, and felt what she believed to be a gun pressed into her back. (R.297-99) Swearingen purposefully kept her vision to the sides of the room, repeatedly telling the men she did not see their faces. (R.299-300) The two men left, and Swearingen waited for a few seconds before calling the police. (R.303) When police arrived, Swearingen let them in through the front door and pulled up the footage from a security camera she had placed on the back door. (R.306) Police downloaded this

video, which was later used at trial. (R.306; People's Exhibit 43) Woods was pronounced dead upon the arrival of EMS. (R.261-63)

Police found video from a house a few streets over that shows two men exiting a truck and heading in the direction of the apartment, but neither person could be positively identified. (R.324-31; People's Exhibit 44) Additional video from a liquor store showed the truck approaching and leaving the area, and video from a gas station in St. Louis, Missouri, allowed police to identify the make, model, and color of the truck. (R.333-40; People's Exhibit 45A) These videos led police to investigate Adisa Smith, who was stopped in the truck on November 23, 2020, after a crime alert was put out. (R.355-59) Smith was arrested, and told police that Mr. Lacey had offered to pay Smith $50 for a ride from Belleville to Collinsville to pick up marijuana. (R.366-70) Smith, however, agreed that he "lied a lot" to police during their investigation, and could not be certain how many lies he had told. (R.388)

Mr. Lacey was ultimately charged with first-degree murder, home invasion, armed robbery, and unlawful possession of a weapon by a felon ("UPWF"). (C.18-19) Defense counsel filed a motion *in limine* on October 1, 2021, seeking to preclude the State from using Mr. Lacey's prior felony conviction for impeachment purposes. (C.97-98) The trial court denied the motion, allowing the State to use Mr. Lacey's prior conviction for impeachment if he testified at trial. (R.52-53) The trial court specifically asked defense counsel if he would move to sever the UPWF charge from the trial on the remaining charges, and defense counsel responded, "I think we would be willing to stipulate to the fact that he is a convicted felon without mentioning the underlying offense." (R.51) The trial court found that, because of defense counsel's decision not to

sever the charges, it would be appropriate to allow a stipulation that Mr. Lacey was a convicted felon to demonstrate that element of the UPWF charge. (R.53) "So the jury would know that he has a prior conviction that is a felony, but they would not know what it is for." (R.53) At a sidebar during jury selection, defense counsel reiterated his choice to stipulate to the felony instead of severing the UPWF charge from the remaining charges. (R.112-13)

The case proceeded to trial. Swearingen testified that she never saw the faces of the men who entered the apartment. (R.295) She further testified that Woods would sell marijuana out of the apartment, that Woods had been robbed several times before, and that she and Woods had been robbed at the apartment at least once. (R.285-86, 315-16) A fingerprint found at the scene was matched to Mr. Lacey; but the fingerprint expert admitted that she never compared her results to other possible suspects, and that it was impossible to determine how long the fingerprint had been present. (R.529-34,535-36)

Adisa Smith testified that Mr. Lacey offered him $50 to drive he and his uncle from Belleville to Collinsville. (R.370) Smith claimed that Mr. Lacey directed him to an apartment complex, where Lacey and his uncle left the car for approximately five minutes before returning and urging Smith to leave quickly. (R.375-76) Smith testified that he drove to St. Louis, and on the way, Mr. Lacey wrapped something in a white shirt and threw it into the river as they crossed the I-70 bridge from Illinois to Missouri. (R.377) The three stopped at a gas station, Smith got out of the truck to buy some items, and the three returned to Belleville. (R.378-82) Mr. Lacey allegedly gave Smith some marijuana and the three parted ways. On cross-examination, Smith

admitted that he lied several times to police, that he could not be sure how many times he lied, and that his plea agreement in exchange for his testimony was, "one heck of a deal." (R.423)

The jury deliberated for several hours over the course of two days. (R.640-76) After approximately 5 hours on the first day, the jury sent a note stating, "The Jurors are currently ten to two that Mr. Lacey was at the scene. We have come to a standstill. The two against say there isn't enough evidence to say he was there, fingerprint is not enough." (R.652) The jury was sent home for the night and instructed to continue deliberations in the morning. (R.652-57) After approximately 30 minutes on the second day, the jury sent two notes to the court. The first note read, "What was the felony charge in 2015?" (R.661-62) The second note read, "Transcript of Adisa Smith's testimony." (R.661-62) The court instructed the jury that they had received all the evidence in the case, and to use their memory of the evidence when deliberating. (R.664-65) Approximately two and a half hours later, the jury sent a third note that read, "What happens if we agree on two counts but are hung on the remainder?" (R.665) The trial court decided to let the jury have lunch before deciding what to do with the third note, in the hopes that the matter would resolve itself. (R.665-71) After lunch the jury sent their fourth and final note that read, "We have come to an agreement on two of the charges and we are hung on the last three and do not feel anything will change." (R.672) Mr. Lacey was found guilty of first-degree murder and UPWF, and the jury was hung on the remaining charges. (C.13-14) The court declared a mistrial as to the remaining charges. (R.679)

On appeal, Mr. Lacey argued that his attorney was ineffective for not filing a

motion to sever the UPWF charge from the remaining charges, pursuant to the Illinois Supreme Court's decision in *People v. Edwards*, 63 Ill. 2d 134 (1976). *People v. Lacey*, 2023 IL App (5th) 220050-U, ¶ 43. *Edwards* held that it is an abuse of the trial court's discretion to deny a motion to sever a UPWF charge from an armed robbery charge, because, "the joinder of the armed robbery and the [UPWF] charges created such a strong possibility that the defendant would be prejudiced in his defense of the armed robbery charge that it was an abuse of the trial court's discretion to deny a severance." *Edwards*, 63 Ill. 2d at 140. Mr. Lacey argued that it could not be considered sound trial strategy to rely on mitigation of prior felon status by motion *in limine* instead of severing the charge entirely, where binding case law holds that the trial court abuses its discretion in denying a motion to sever. Brief and Argument for Defendant-Appellant at 10-15 (No. 5-22-0050); Reply Brief for Defendant-Appellant at 1-9 (No. 5-22-0050); Petition for Rehearing at 1-15 (No. 5-22-0050). The appellate court held that, because *Edwards* relied on a circuit court's discretion in granting a motion to sever, it did not speak to ineffective assistance of counsel. *Lacey*, 2023 IL App (5th) 220050-U, ¶ 43 (citing *Edwards*, 63 Ill. 2d at 138). The appellate court further held that Mr. Lacey's attorney may have been employing a so-called "all or nothing" strategy: trying all the charges in one trial in an effort to acquit Mr. Lacey of all the charges at once, or to prevent the State from curing an evidentiary deficiency from one trial to the next. *Id.* at ¶ 45.

Mr. Lacey filed a petition for leave to appeal ("PLA") in the Illinois Supreme Court on October 27, 2023. Petition for Leave to Appeal, (No. 130123). The PLA asked the supreme court to determine whether counsel renders deficient performance by

failing to file a motion to sever status charges from non-status charges pursuant to its decision in *Edwards*. Petition for Leave to Appeal at 3-4, (No. 130123). The PLA further argued that there is a split in the Illinois Appellate Court. Petition for Leave to Appeal at 3, (No. 130123). Mr. Lacey argued that the so-called "all or nothing" trial strategy only applied in the context of jury instructions regarding lesser-included offenses, in which case the jury was always going to learn of the defendant's prior, unrelated felony convictions, and that the stated rationales for the "all or nothing" trial strategy do not apply to defense counsel's alleged strategy in not severing status charges from non-status charges. Petition for Leave to Appeal at 3-4, (No. 130123). The Illinois Supreme Court denied Mr. Lacey's PLA on January 24, 2024. Petition for Leave to Appeal Denied, (No. 130123).

REASONS FOR GRANTING CERTIORARI

I. The joinder of status charges with non-status charges in one trial denies defendants their right to a fair trial by requiring them to present unduly prejudicial evidence of a prior felony conviction to the jury.

The right of the government to try related charges in one trial has been upheld by this Court on numerous occasions, primarily to promote judicial efficiency and prevent inconsistent verdicts. *Zafario v. United States*, 506 U.S. 534, 537-38 (1993) (compiling cases). This Court has also held that evidence of a criminal defendant's unrelated, prior felony convictions is generally prohibited at trial, unless the defendant opens the door to its use. *See, e.g., Michelson v. United States*, 335 U.S. 469, 475-76 (1948) (other crimes evidence proves too much and has a tendency to over-persuade a jury to find guilt where it otherwise might not). Evidence of a prior conviction may come in when the defendant exercises the right to testify, in which case the evidence may be used to impeach credibility; if the defendant puts forward evidence of good character, in which case the evidence may be used to rebut the defendant's assertion; or for a purpose other than to demonstrate the defendant's propensity to commit crimes generally. *Spencer v. State of Tex*, 385 U.S. 554, 560-61 (1967) (compiling cases) (other crimes evidence may be used to demonstrate intent, identity, malice, motive, or modus operandi).

There is no consensus across the country regarding what to do when "status offenses" (charges requiring proof of the defendant's prior, unrelated felony conviction) are charged along with non-status offenses. When status offenses, such as UPWF, are

brought with other non-status offenses, there is the distinct threat that the prosecution will present evidence of the defendant's prior, unrelated felony conviction to the jury. The question that jurisdictions across the country have not agreed upon is how best to protect the defendant from being unduly prejudiced by the prosecution using prior, unrelated felony convictions for propensity purposes, while still protecting the government's interest in trying all related crimes together.

Severance and bifurcation are two ways to guarantee that other crimes evidence is not improperly used for propensity purposes. The mere fact of a defendant's prior, unrelated felony conviction could be enough to taint a jury's perception of the case. As Chief Justice Warren noted in *Spencer*, "A jury might punish an accused for being guilty of a previous offense, or feel that incarceration is justified because the accused is a 'bad man,' without regard to his guilt of the crime currently charged." *Spencer*, 385 U.S. at 575 (1967) (Warren, C.J., concurring in part, dissenting in part). Additionally, it has long been argued that limiting instructions to the jury to only consider other crimes evidence for the limited purpose of proving an element of a separate crime does not cure the inherent prejudice of informing the jury of the prior, unrelated felony conviction. As Chief Justice Warren continued in *Spencer*:

> Of course it flouts human nature to suppose that a jury would not consider a defendant's previous trouble with the law in deciding whether he has committed the crime currently charged against him. As Mr. Justice Jackson put in a famous phrase, "(t)he naive assumption that prejudicial effects can be overcome by instructions to the jury...all practicing lawyers know to be unmitigated fiction." *Id.* (citing *Krulewitch v. United States*, 336 U.S. 440, 453 (1949) (Jackson, J., concurring)).

As discussed below, in the decades since both *Krulewitch* and *Spencer*, several courts have agreed with Justice Jackson and Chief Justice Warren on this point.

Several courts across the country have instituted a mechanism by which a defendant may seek severance or bifurcation of their charges when one or more of those charges require proof at trial of the defendant's prior, unrelated convictions. In Alabama, Florida, Illinois, Missouri, Pennsylvania, and Virginia, severance of status offenses is generally required after a timely motion by the defense. *See Anderson v. State*, 886 So. 2d 895, 896-98 (Ala. Crim. App. 2003); *State v. Vasquez*, 419 So. 2d 1088, 1090-91 (Fla. 1982); *People v. Edwards*, 63 Ill. 2d 134, 140 (1976); *State v. Cook*, 673 S.W. 2d 469, 472-73 (Mo. Ct. App. 1984); *Commonwealth v. Jones*, 585 A. 2d 1198, 1206-08 (Pa. Super Ct. 2004); *Hackney v. Commonwealth*, 504 S.E. 2d 385, 388-89 (Va. Ct. App. 1998) (en banc). Alaska, Arizona, Colorado, Kentucky, Nevada, New Jersey, New Mexico, and Utah also require severance upon the defense's motion, unless the parties agree to not mention the defendant's prior, unrelated crimes while the jury considers the non-status charges. *See Elerson v. State*, 732 P. 2d 192, 195 (Alaska Ct. App. 1987); *State v. Burns*, 344 P. 3d 303, 316 (Ariz. 2015); *People v. Peterson*, 656 P. 2d 1301, 1305 (Colo. 1983); *Wallace v. Commonwealth*, 478 S.W. 3d 291, 301 (Ky. 2015); *Brown v. State*, 967 P. 2d 1126, 1131 (Nev. 1998); *State v. Ragland*, 519 A. 2d 1361, 1363-64 (N.J. 1986); *State v. Garcia*, 246 P. 3d 1057, 1065 (N.M. 2011); *State v. Long*, 721 P. 2d 483, 495 (Utah 1986) Arkansas has a presumption that status offenses should be severed, but no *per se* rule requiring severance. *Sutton v. State*, 844 S.W. 2d 350, 352-54 (Ark. 1993).

Federally, the Third Circuit *requires* severance of status offenses if evidence of those charges would be inadmissible with respect to the non-status offenses. *See United States v. Joshua*, 976 F. 2d 844, 847-48 (3d Cir. 1992), *abrogated on other grounds by*

Stinson v. United States, 508 U.S. 36 (1993); *United States v. Busic*, 587 F. 2d 57, 585 (3d Cir. 1978), *rev'd on other grounds*, 446 U.S. 398 (1980) The First, Second, Fourth through Eleventh, and D.C. Circuit Courts of Appeal all make severance a matter of trial court discretion. *See, e.g., United States v. Ouimette*, 753 F. 2d 188, 193 (1st Cir. 1985); *United States v. Page*, 657 F. 3d 126, 129-32 (2d Cir. 2011); *United States v. Silva*, 745 F. 2d 840, 843-44 (4th Cir. 1984); *United States v. Rice*, 607 F. 3d 133, 141-42 (5th Cir. 2010); *United States v. Aleman*, 609 F. 2d 298, 310 (7th Cir. 1979), *superseded by statute on other grounds as stated in Jake v. Herschberger*, 173 F. 3d 1059, 1065 n. 6 (7th Cir. 1999); *United States v. Rock*, 282 F. 3d 548, 552 (8th Cir. 2002); *United States v. Burgess*, 791 F. 2d 676, 678-79 (9th Cir. 1986); *United States v. Valentine*, 706 F. 2d 282, 289-90 (10th Cir. 1983); *United States v. Jiminez*, 983 F. 2d 1020, 1022-23 (11th Cir. 1993); *United States v. Daniels*, 770 F. 2d 1111, 1115-18 (D.C. Cir. 1985).

The question that this court must resolve is whether the government's interest in prosecuting all charges in a single trial necessarily overcomes the defendant's right to a fair trial free from the unduly prejudicial evidence that they have previously been convicted of a prior, unrelated felony. There does not appear to be any evidence that a mandatory severance process would impermissibly slow down the criminal trial courts to the extent that a criminal defendant's right to a fair trial free from undue prejudice must give way. However, even if such evidence exists, severance is not the only method to protect against undue prejudice. Many courts have adopted an approach that provides for a single trial while preventing the jury from being unduly prejudiced by a defendant's unrelated prior felony conviction.

Alaska, Arizona, Colorado, Georgia, Indiana, Kentucky, Nevada, New Jersey, New Mexico, Oklahoma, and Utah have approved of a process known as bifurcation. *See Elerson*, 732 P. 2d at 195; *Burns*, 344 P. 3d at 317, *Peterson*, 656 P. 2d at 1305; *Wallace*, 478 S.W. 3d at 305; *Morales v. State*, 143 P. 3d 463, 465-66 (Nev. 2006); *Ragland*, 519 A. 3d at 1363-64; *Garcia*, 246 P. 3d at 1065; *State v. Reece*, 349 P. 3d 712, 735-36 (Utah 2015). In a bifurcated trial, multiple charges are tried together, but in different phases. Thus, despite there technically being one trial, the defendant's right to a fair trial is still maintained because the status charges are heard *after* the jury determines the defendant's guilt or innocence on the remaining charges. *See, e.g., Hines v. State*, 794 N.E. 2d 469, 472-73 (Ind. Ct. App. 2003), *adopted and incorporated*, 801 N.E. 2d 634 (Ind. 2004); *Head v. State*, 322 S.E. 2d 228, 232 (Ga. 1984), *overruled in part on other grounds by Ross v. State*, 614 S.E. 2d 31, 34 n. 17 (Ga. 2005). In lieu of allowing severance, Georgia, Indiana, and Oklahoma *require* bifurcation when an UPWF charge is joined with other charges. *Head*, 322 S.E. 2d at 232; *Pickett v. State*, 83 N.E. 3d 717, 719-20 (Ind. Ct. App. 2017); *Chapple v. State*, 866 P. 2d 1213, 1217 (Okla. Crim. App. 1993). In federal court, the Third Circuit has approved of bifurcation as an alternative to severance. *Joshua*, 976 F. 2d at 847-88. While the Second and Ninth circuits do not require severance or bifurcation in every case, they have held that either is permissible. *See United States v. Jones*, 16 F. 3d 487, 492-93 (2d Cir. 1994); *United States v. Nguyen*, 88 F. 3d 812, 815-18 (9th Cir. 1996). Bifurcation thus allows for a single trial, while prohibiting any mention of the defendant's unrelated prior felony conviction until it is relevant to the charge then being heard.

Mr. Lacey's case lays bare the exact type of harm that severance and bifurcation

are meant to protect against. The jury's first question specifically stated that there was not enough evidence to place Mr. Lacey at the scene, let alone to say that he was guilty of the charged offenses. (R.652; CI.97) After returning for deliberations the next morning, the jury asked for specific information relating to Mr. Lacey's prior, unrelated felony conviction. (R.661-62; CI.99) This second note clearly shows that Mr. Lacey's prior, unrelated felony conviction was a source of focus for the jurors, despite it having nothing to do with his guilt or innocence on the non-status offenses. Mandatory severance or bifurcation would have prevented the jury from hearing this unduly prejudicial evidence when considering the murder, home invasion, and armed robbery charges, which in turn likely would have led to an acquittal on those charges.

A defendant's Sixth Amendment right to a fair trial can not be made a simple matter of geography. Instead of letting this vital issue of fairness in a criminal prosecution be left to a patchwork set of inconsistent rules across the country, this Court should grant review to determine whether, and to what extent, a defendant's right to a fair trial is restricted by the joinder of status charges with non-status charges given the prevalence of severance and bifurcation procedures within the state and federal courts, and the inherently unduly prejudicial nature of the jury being informed of an unrelated prior felony conviction when considering guilt or innocence on non-status charges.

II. This Court's review is necessary to determine whether defense counsel is ineffective for failing to pursue a motion that binding case law requires the trial court to grant to protect the defendant's right to a fair trial.

The right to the assistance of counsel for indigent criminal defendants is guaranteed by the Sixth Amendment to the Constitution, and is applicable to the states via the Fourteenth Amendment. *Gideon v. Wainwright*, 372 U.S. 335 (1963). After *Gideon*, this Court determined that the right to the assistance of counsel includes the right to the *effective* assistance of counsel, and that ineffective assistance of counsel requires remand for a new trial. *Strickland v. Washington*, 466 U.S. 668 (1984). This Court so held, because, "access to counsel's skill and knowledge is necessary to accord defendants the 'ample opportunity to meet the case of the prosecution' to which they are entitled." *Id.* at 685 (quoting *Adams v. United States ex rel. McCann*, 317 U.S. 269, 275 (1942)).

In *Strickland*, this Court outlined the minimum standards that defense counsel must rise to in order to render the effective assistance of counsel. In emphasizing that the purpose of the effective assistance of counsel is to uphold a criminal defendant's right to a fair trial, *Strickland*, 466 U.S. at 686, this Court created a two-factor test for determining whether counsel was ineffective. In order to demonstrate ineffective assistance of counsel, a defendant must first show that counsel's performance was deficient, that is, "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment." *Id.* at 687. Second, the defendant must show that counsel's deficient performance resulted in prejudice, that is, "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result

is reliable." *Id.* *Strickland* also held that trial strategy may serve as an exception to the deficient performance prong of the ineffective assistance test. *Id.* at 689. However, an attorney's particular trial strategy must be considered sound in order to serve as an exception to deficient performance. *Id.* While the soundness of a particular trial strategy is to be considered at the time the strategy was made and not in hindsight, if a strategy proves unsound at the time it was made, then it can not serve as an exception deficient performance. *Id.* at 689-90. Put another way, the "Sixth Amendment demands more than placing a warm body with a legal pedigree next to an indigent defendant." Bazelon, *The Realities of Gideon and Argersinger*, 64 Geo. L.J. 811, 819 (1976).

To that end, the issue in this case was whether defense counsel was ineffective for failing to file a motion to sever Mr. Lacey's UPWF charge from his remaining charges. The argument Mr. Lacey raised in the Illinois courts was that, because it would be an abuse of the trial court's discretion to deny such a motion based on the risk of an unfair trial when these charges are heard together, defense counsel's failure to file the motion could not have been a matter of trial strategy. Brief and Argument for Defendant-Appellant at 11-15 (No. 5-22-0050); Reply Brief for Defendant-Appellant 1-9 (No. 5-22-0050); Petition for Rehearing at 1-13 (No. 5-22-0050). Put another way, defense counsel could not have possibly been relying on any sort of strategy in not putting forward a motion that was certain to be granted as a matter of law *specifically because* that motion would have guaranteed his right to a fair trial.

Illinois law makes it clear that it is an abuse of the trial court's discretion to deny a defense motion to sever UPWF charges from other charges. *People v. Edwards*,

63 Ill. 2d 134 (1976). In *Edwards*, the defendant was charged with armed robbery and UPWF. *Id.* at 138. The UPWF charge required the State to prove that the defendant had a prior felony conviction. *Id.* Consequently, the defendant sought to sever the charges, but his motion was denied. *Id.* On appeal, the appellate court found that the trial court's refusal to sever the charges was an abuse of discretion. *Id.* The Illinois Supreme Court found that severance was required by the rules of evidence, which bar the introduction of unnecessary and unduly prejudicial evidence. *Id.* at 140. Further, the supreme court rejected the State's argument that its interest in prosecuting all the related charges in one trial overrode the defendant's right to severance:

> The State does have an interest in the pursuit of judicial economy in prosecuting all charges against one defendant in one trial, but that interest is not so strong as to justify the denial of a severance in the instant case. We find that the joinder of the armed robbery and the [UPWF] charges created such a strong possibility that the defendant would be prejudiced in his defense of the armed robbery charge that it was an abuse of the trial court's discretion to deny a severance. *Id.*

In other words, the Illinois Supreme Court held that the failure to sever these types of charges resulted in an unfair trial to a defendant, who must then defend against evidence that would be inadmissible at a separate trial and, if admitted, would likely prejudice the jury against him on the remaining charges.

Despite this clear admonishment, the appellate court in Mr. Lacey's case found that *Edwards* was not directly on point, because *Edwards* was about whether the trial court abused its discretion and did not mention ineffective assistance. *Lacey*, 2023 IL App (5th) 220050, ¶ 43. The appellate court went on to hold that defense counsel may have been employing a so-called "all or nothing" trial strategy, thereby hoping to get an acquittal on all charges in one trial and preventing the State from curing any

"evidentiary deficiencies" in a second trial. *Id.* at ¶ 45-48. However, the so-called "all or nothing" trial strategy only applies in Illinois in the context of jury instructions for lesser included offenses. *People v. Barnard*, 104 Ill. 2d 218, 231-32 (1984). Furthermore, the appellate court did not address Mr. Lacey's argument that there was no evidence that counsel was relying on the so-called "all or nothing" trial strategy in Mr. Lacey's case. Petition for Rehearing at 6-9, (No. 5-22-0050); Petition for Rehearing denied, 5-22-0050. The appellate court failed to address these issues squarely, and the Illinois Supreme Court declined to clarify how its clear prohibition on the denial of motions to sever in cases like Mr. Lacey's applies to a claim that counsel was ineffective for failing to seek severance.

This Court's review is necessary to determine whether defense counsel may rely on trial strategy in failing to file a motion to sever, even where binding precedent requires the trial court to grant such a motion. As discussed above in Reason I, *supra*, it is clear from a review of jurisdictions that courts across the country are concerned with the prejudice that defendants suffer when they are made to simultaneously defend against status charges and other charges not involving their previous felony conviction. Where several of these jurisdictions - including the one that Mr. Lacey's case took place in - require either severance or bifurcation upon a timely request by defense counsel, there is a legitimate question whether defense counsel provides effective assistance in failing to provide that protection to their clients. Allowing Mr. Lacey's conviction to stand would place too heavy a hand on the scale of the Sixth Amendment's right to counsel in favor of attorneys, unfairly disadvantaging the accused that the right is meant to protect. Thus, this Court should grant review to

determine whether, and to what extent, defense counsel renders ineffective assistance in failing to file a beneficial motion that is certain to be granted in the interests of justice.

CONCLUSION

For the foregoing reasons, petitioner, George E. Lacey, respectfully prays that a writ of certiorari issue to review the judgment of the Illinois Appellate Court.

Respectfully submitted,

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