APPENDIX A

2023 IL App (5th) 220050-U

NO. 5-22-0050

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Madison County.
	)	
v.	)	No. 20-CF-2969
	)	
GEORGE E. LACEY,	)	Honorable
	)	Kyle A. Napp,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE CATES delivered the judgment of the court.
Justices Welch and Vaughan concurred in the judgment.

ORDER

¶ 1 *Held*: The defendant's counsel did not provide ineffective assistance by failing to request severance of the charges.

¶ 2 The defendant, George E. Lacey, was convicted of first degree murder and unlawful possession of weapons by a felon after a jury trial. The defendant appeals the convictions based on an ineffective assistance of counsel claim where trial counsel failed to sever the charge of unlawful possession of weapons by a felon from the remaining counts. For the following reasons, we affirm the judgment of the circuit court.

¶ 3 I. BACKGROUND

¶ 4 On the evening of November 19, 2020, Lauren Swearingen was in her apartment, washing dishes, when two men forced their way inside by kicking in the back door. One man approached Lauren and held her down against the floor. The other man confronted Lauren's boyfriend, Darian

Woods, who was coming down the staircase from upstairs. Darian was fatally shot in the chest as he descended, and fell on the stairs, sliding to the floor. The men then took thousands of dollars and cannabis from the apartment and fled.

¶ 5 On November 24, 2020, the defendant was charged by information with four counts of first degree murder (720 ILCS 5/9-1(a) (West 2020)), one count of home invasion (720 ILCS 5/19-6(a)(5) (West 2020)), one count of armed robbery (720 ILCS 5/18-2(a)(4) (West 2020)), and one count of unlawful possession of weapons by a felon (720 ILCS 5/24-1.1(a) (West 2020)). The defendant's arrest warrant was issued on November 30, 2020.

¶ 6 The State filed a notice of intent to introduce certified copies of the defendant's prior armed robbery conviction. The defendant had been convicted of armed robbery on September 1, 2015. See People v. Lacey, No. 13-CF-295 (Cir. Ct. St. Clair County). The defense filed a motion *in limine* to preclude the use of the prior conviction for impeachment of credibility of the defendant and argued that the defendant's prior conviction was prejudicial and had no bearing on credibility.

¶ 7 The circuit court held a pretrial conference and addressed the defendant's motion *in limine* to preclude the use of the defendant's prior conviction. The defense argued that the defendant was on trial for armed robbery and that the prior conviction for armed robbery would be used as propensity evidence. The State argued that the use of the defendant's prior conviction for armed robbery would be used for impeachment purposes if the defendant testified. Additionally, the State argued that it was obligated to present evidence of the prior charge because it was an element of the State's case where the defendant was charged as a felon in possession of a weapon. During the motion hearing, the circuit court questioned defense counsel about whether he was going to include the unlawful possession of a weapon by a felon charge in the trial. Defense counsel indicated that

he would defend the charge at trial and stipulated to the fact that the defendant was a convicted felon, without mentioning the underlying armed robbery offense.

¶ 8 The circuit court denied the defendant's motion *in limine*, allowing the State to introduce the defendant's armed robbery conviction for impeachment purposes if the defendant testified. If the defendant did not testify, the circuit court allowed the defendant to stipulate that he was a convicted felon, and the jury would not have knowledge of his prior armed robbery conviction.

¶ 9 On October 12, 2021, the trial began with jury selection. During jury selection, the circuit court addressed the parties outside of the presence of the jury panel regarding the unlawful possession of weapons by a felon count. The circuit court again inquired whether defense counsel wanted to proceed with the inclusion of that count at trial and defense counsel confirmed his position with the circuit court. The circuit court reiterated that the defendant was stipulating that he was a felon, and the jurors would not be informed of the nature of the prior conviction. The circuit court also reiterated that the defendant's prior armed robbery conviction would be allowed only for impeachment purposes.

¶ 10 The following day, after the jury was selected, the State presented its opening statement. The defense declined to present an opening statement prior to the presentation of the State's case. The State then called Officer Ben Koertge as its first witness. Officer Koertge was dispatched to the victim's residence on the evening of November 19, 2020, and secured the crime scene. Several photographs were taken of the outside of the apartment building, the deceased, and the interior of the apartment. The photographs were identified by the officer and admitted as evidence.

¶ 11 Lauren Swearingen testified that she lived with her boyfriend, Darian Woods, in Collinsville, Illinois. Darian sold cannabis out of their home. Lauren and Darian used Percocet and fentanyl. Their apartment had a "Ring door camera" that was activated by motion.

¶ 12 On the evening of November 19, 2020, Lauren and Darian were at home in their apartment, located on the ground floor of a residence. Lauren testified that she was washing dishes when she heard a loud noise. She turned around to see that her back door had been kicked in and two men entered her home. A man wearing a "covid mask" and dark clothing came towards her. Lauren threw her hands up and cowered down. The man put his hands around her neck and his knee into her back, holding her onto the kitchen floor, as she faced her refrigerator. The second man was wearing a white shirt and had "something red around his face." Lauren was able to determine that the men were Black, but she never saw their facial features, which were covered.

¶ 13 Lauren testified that the man in the white shirt "bolt[ed] up the stairs." She heard Darian running downstairs at the same time. Lauren testified that there was a "half of a second of just scuffling and then a pop." A gunshot. Lauren saw Darian slide down the stairs headfirst, struggling to breathe. The man in the white and red was searching the second floor of the apartment and yelled "where's the money." The man that had pinned Lauren to the ground grabbed Lauren by the neck and directed her upstairs. Lauren had to step over Darian's body to walk up the stairs. Once she reached the second floor, the man released his hold while Lauren walked towards where Darian kept the money in a laundry basket.

¶ 14 After Lauren located the money, the man in the white shirt grabbed what Lauren estimated was seven to ten thousand dollars from the laundry basket. This man also took a duffle bag containing cannabis and a blue bag of cannabis. Both bags were located in the upstairs bedroom closet. Lauren testified that she kept her eyes focused to the side, told the men that she had not seen them, and begged them not to hurt her. The man that had pinned her to the ground in the kitchen directed Lauren into a bedroom closet, told her not to move or say anything, and he closed

the closet door. Lauren heard their footsteps as they went downstairs. She called 911 from the closet.

¶ 15 When emergency medical services arrived, Darian no longer had a pulse. Lauren testified that she provided the police with videos from her security camera system. Two video clips from the security footage were published to the jury. Lauren identified the men on the videos as the same men that were in her apartment. Their faces were covered in the videos. The second video clip depicted the man in the white and red grabbing the outside security camera. Lauren identified that he had a gun in his pocket while he dismantled the camera.

¶ 16 During cross-examination, Lauren testified that Darian sold marijuana out of their apartment. Lauren was not familiar with everyone that came to the apartment. Darian also used fentanyl and sometimes his drug dealers would come to their apartment. Lauren knew of four additional times that Darian had been robbed. Lauren additionally testified that she did not recognize the defendant. Lauren clarified that the man in the white and red could have been the defendant, as he had the same build. Lauren admitted, however, that she was unable to identify the intruders because their facial features were covered.

¶ 17 Detective Kyle Graham testified to obtaining security footage from a business in Collinsville, Illinois, near the victims' apartment. Between 7:20 p.m. and 7:25 p.m. on November 19, 2020, a truck with a "fast blinking blinker" paused near where the incident occurred. The same truck was shown leaving the area when the 911 call was made by Lauren. Graham additionally obtained video footage from a gas station that had a side view of the color, make, and model of the truck. The information on the truck was sent to local law enforcement agencies as a vehicle of interest.

¶ 18 Michelle Werner testified to a Facebook Live video dated July 22, 2020. The defendant was on the video wearing shoes that appeared to be similar to the shoes shown in the video from the crime scene. A clip of the video was published to the jury and introduced into evidence.

¶ 19 Adisa Smith, the owner of the blue truck identified by law enforcement, also testified. Smith was 28 years old, and he attended the same high school as the defendant. Smith viewed the Facebook video and confirmed that the defendant was in the video.

¶ 20 Smith testified to the events that occurred on November 19, 2020. Earlier in the day, Smith had contacted Matthew Drake, his friend and mechanic. Drake was drinking with the defendant and Demandrell Davis. Smith joined and they drank together for several hours. During that time, they did not discuss or plan any crimes. Smith testified that he noticed the defendant was carrying a gun.

¶ 21 Smith indicated that the defendant had offered Smith $50 for a ride. Smith agreed and drove the defendant and Davis to Collinsville, Illinois. The defendant directed Smith to drop the defendant and Davis off at an apartment building and to back in his truck to park. Smith testified the defendant's instruction seemed "a little weird." After the defendant and Davis exited the truck, Smith drove to the next intersection to turn around and then returned to the apartment complex to pick up the defendant and Davis. Smith waited approximately three to five minutes for the defendant and Davis. When the two men returned to the truck, they appeared "very nervous" and had a reusable shopping bag that "smelled like all weed."

¶ 22 Smith testified that the defendant directed Smith to a gas station in St. Louis, Missouri. When they crossed the I-70 bridge, the defendant "wrapped something up and threw it in the river." The defendant additionally told Smith and Davis that "if word got back that I [Smith] brought him to this apartment, he was gonna kill both of us."

¶ 23 Smith was shown a video taken from the gas station and he confirmed that the video depicted his truck pulling into the gas station. Smith testified that he went inside the gas station while the defendant and Davis remained in the truck. The defendant sat in the passenger seat and wore a long-sleeved white shirt. The video did not clearly depict the passengers that remained in the truck. The gas station videos were published and admitted into evidence. Smith testified that after he left the gas station, he drove the defendant and Davis back to Davis's house. The defendant gave Smith $50 and cannabis for the ride.

¶ 24 Four days after the incident, Smith was pulled over by the St. Clair County Sheriff's Department. Smith was arrested and his truck was towed. Smith testified that he was interviewed by the police on November 23, 2020. During the interview, Smith provided the police with a physical description of the defendant.

¶ 25 Smith admitted that he had lied to the police during his first interview. Smith told the police that he had rented his truck to the defendant for the night and Smith was not involved with what had happened. Smith additionally told the police that the defendant's cousin was involved, and not Davis, but that was not true. Smith was charged with accessory to murder, home invasion, and robbery. Smith pleaded guilty to armed robbery and the State agreed to recommend a sentence of 10 years in the Illinois Department of Corrections. Smith testified that he had lied to the police because he did not want to get in trouble. Smith additionally testified that he was telling the truth in court and that he had received a deal to serve 10 years in prison for the armed robbery conviction.

¶ 26 An expert in forensic pathology performed Darian Woods's autopsy and testified that the cause of death was a gunshot wound of the chest. The manner of death was homicide. Darian had abrasions on his head consistent with being struck with a firearm or fist. Darian had no injuries to his hands, or signs of Darian striking anyone. The soot found around the bullet wound

demonstrated that Darian was shot at close range, within a foot. The gun could have loosely touched Darian's body when fired. The gunshot wound tracked through the upper part of the sternum, through the left upper lobe of the lung, through the aorta, and through the spine. Darian experienced instantaneous paralysis and because the bullet transected the aorta, Darian would have died within minutes of the injury. A bullet was recovered from Darian's body.

¶ 27 Detective Michael Hentze was a crime scene investigator with the Illinois State Police. Detective Hentze testified that he found a "Ring doorbell camera" in a recycling bin outside of the apartment complex. He photographed the camera, and the camera was collected and taken to the crime lab. Detective Hentze took additional photographs of the crime scene and collected a fired cartridge case as evidence. Drug paraphernalia was found in the apartment, but no firearms or ammunition were recovered. Detective Hentze additionally collected the bullet obtained during the autopsy. He was also involved with the search of Smith's blue truck. During the search of the truck, an Illinois Link card with the name Demandrell Davis was recovered. Detective Hentze did not recover any items belonging to the defendant from the apartment or from the truck.

¶ 28 Officer Nicole Dwyer with the Collinsville Police Department testified that she booked and fingerprinted the defendant. The defendant's fingerprint samples were sent to the crime lab for a comparison.

¶ 29 Melissa Gamboe, with the Illinois State Police forensic science lab, testified to examining the "Ring doorbell camera." A latent fingerprint was found on the camera. She compared the collected fingerprint to the sample received from the defendant and concluded that the latent print on the "Ring doorbell camera" was made by the defendant. Gamboe testified that she was not able to determine when the fingerprint was made, "but the likelihood of them staying on a doorbell that is outside decreases each day because of the environmental conditions."

¶ 30 Angela Horn with the Metro East Forensic Science Laboratory in Belleville, Illinois, testified that she analyzed the recovered bullet from Darian's body and the bullet casing from the crime scene. Horn was unable to determine what type of firearm fired the bullet as the firearm was not recovered. The recovered cartridge case was a .40-caliber, possibly 10-millimeter, and was marked Smith and Wesson. The State rested after Horn testified.

¶ 31 The defense presented a motion for a directed verdict. The circuit court denied the motion for a directed verdict. The defendant did not testify on his own behalf and the defense did not present any additional evidence.

¶ 32 During closing argument, the State argued that the defendant committed first degree murder, where he put a gun to Darian Woods's chest and pulled the trigger at close range. Additionally, the defendant knowingly possessed a firearm and he had admitted to having been convicted of a previous felony. The State played the video from the security camera and argued that the video was of the defendant with a gun in his front right pocket. The State's closing argument also included that the defendant left his fingerprint on the security camera.

¶ 33 The defense argued that the evidence presented did not place the defendant at the crime scene. He argued that Adisa Smith was the only witness that testified that the defendant was present at Darian Woods's apartment, and his testimony was not believable. The forensic scientist was unable to determine how long the fingerprint was on the camera. Darian Woods sold cannabis out of his apartment and purchased fentanyl. Lauren Swearingen did not know everyone that had been to the apartment to meet with Darian. The defense insinuated that the defendant could have been at the apartment to purchase cannabis or sell fentanyl prior to the night of the incident and left his fingerprint on the "Ring doorbell camera" on a different occasion.

¶ 34 While the jury was deliberating, they sent a note to the circuit court which stated, "the jurors are currently 10-2 that [the defendant] 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." The circuit court then sent the jurors home for the evening at approximately 8:30 p.m.

¶ 35 The jurors continued deliberation the following morning. The jurors sent a note to the circuit court that stated, "1) What was the felony charge in 2015?" and "2) Transcript of Adisa Smith's testimony." For the first question, the circuit court responded that the jurors had received all of the evidence in this case. For the second question, the circuit court instructed the jury that they should rely on their recollection of the testimony.

¶ 36 The jurors subsequently submitted a third note which stated, "what happens if we agree on 2 counts, but are hung on the remainder?" The circuit court noted that the jurors had deliberated longer than the presentation of evidence in the case. The jurors were provided lunch and continued to deliberate. The jurors subsequently submitted a final note to the circuit court which stated, "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." When the circuit court read the note, the court clarified with counsel that there were four felony charges and a question posed to the jury on whether the defendant had discharged the firearm. There were five issues that the jury had to decide. They had evidently reached an agreement on two of the issues. The circuit court did not believe further deliberations would be productive, and the jurors returned to the courtroom. The jurors found the defendant guilty of first degree murder and unlawful possession of weapons by a felon. The court declared a mistrial as to the charges of home invasion and armed robbery.

¶ 37 The defense filed a posttrial motion for a new trial which was denied by the circuit court. On January 27, 2022, the defendant was sentenced to consecutive sentences of 45 years for the

charge of first degree murder and 7 years for the charge of unlawful possession of weapons by a felon. This appeal followed.

¶ 38 II. ANALYSIS

¶ 39 On appeal, the defendant argues that defense counsel rendered ineffective assistance of counsel for failing to sever the unlawful possession of weapons charge from the remaining felony counts. The defendant claims that the evidence of a prior conviction improperly influenced the jury in finding the defendant guilty of murder.

¶ 40 Criminal defendants have a constitutional right to effective assistance of counsel. *People v. Hale*, 2013 IL 113140, ¶ 15. Claims of ineffective assistance of counsel are governed by a two-pronged test established in *Strickland v. Washington*, 466 U.S. 668 (1984). Under *Strickland*, to establish a claim of ineffective assistance of counsel, the defendant must show that (1) counsel's performance was deficient, and (2) the deficient performance resulted in prejudice. *People v. Hughes*, 2012 IL 112817, ¶ 44. Where an ineffective assistance of counsel claim has not been raised before the circuit court, our review is *de novo*. *People v. Lofton*, 2015 IL App (2d) 130135, ¶ 24.

¶ 41 To establish deficient performance of counsel, the defendant must overcome the strong presumption that defense counsel's actions were the product of sound trial strategy and not incompetence. *People v. Tucker*, 2017 IL App (5th) 130576, ¶ 26. Representation will not be considered ineffective based on mistakes in trial strategy or judgment alone as a defendant is entitled to "competent, not perfect, representation." *Tucker*, 2017 IL App (5th) 130576, ¶ 26. "In establishing the prejudice prong, the defendant must show that there is a reasonable probability that, but for his attorney's deficient performance, the result of the proceedings would have been different." *Tucker*, 2017 IL App (5th) 130576, ¶ 26. If we find that the defendant failed to satisfy

the first prong of *Strickland*, we need not consider the second prong of whether the deficient performance resulted in prejudice. *People v. Torres*, 228 Ill. 2d 382, 395 (2008).

¶ 42 Generally, charges arising out of the same incident may be tried together (725 ILCS 5/114-7 (West 2022)), unless it appears that the defendant will be prejudiced thereby (725 ILCS 5/114-8(a) (West 2022)). The circuit court has broad discretion in its decision to grant or deny a motion to sever. *People v. Fleming*, 2014 IL App (1st) 113004, ¶ 38.

¶ 43 The defendant relies on *People v. Edwards*, 63 Ill. 2d 134 (1976), in support of his claim that the circuit court would have granted a motion to sever had defense counsel filed the motion. In *Edwards*, the Illinois Supreme Court found that "the joinder of the armed robbery and the felonious unlawful use of a weapon 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. The *Edwards* case was specific to whether the circuit court erred in denying a severance; ineffective assistance of counsel was not at issue. *Edwards*, 63 Ill. 2d at 138.

¶ 44 The defendant recognizes that an attorney's performance will not be found deficient if it was based upon sound trial strategy. *Strickland*, 466 U.S. at 689. "Generally, a defense decision not to seek a severance, although it may prove unwise in hindsight, is regarded as a matter of trial strategy." *People v. Poole*, 2012 IL App (4th) 101017, ¶ 10. The defendant argues that where the trial strategy is unsound the defense counsel's performance will be found deficient. See *People v. McMillin*, 352 Ill. App. 3d 336, 346-47 (2004). The trial strategy presumption is overcome "where no reasonably effective criminal defense attorney, confronting trial's circumstances, would engage in similar conduct." *McMillin*, 352 Ill. App. 3d at 344.

¶ 45 Illinois law recognizes that when deciding whether to seek a severance, trial counsel may choose an "all or nothing" trial strategy, where the defendant is acquitted or convicted of all charges in a single proceeding. *People v. Fields*, 2017 IL App (1st) 110311-B, ¶ 28. "The mere fact that an 'all-or-nothing' strategy proved unsuccessful does not mean counsel performed unreasonably and rendered ineffective assistance." *Fields*, 2017 IL App (1st) 110311-B, ¶ 28. A defendant may be disadvantaged by severing a case where an evidentiary deficiency in the first case could potentially be cured in the second case. *Poole*, 2012 IL App (4th) 101017, ¶ 10. We also consider that " '[p]erhaps trial counsel felt that it made sense to try for an acquittal of both counts in one proceeding, thinking that the impact of the additional conviction would not be significant.' " *Poole*, 2012 IL App (4th) 101017, ¶ 10 (quoting *People v. Gapski*, 283 Ill. App. 3d 937, 943 (1996)).

¶ 46 Defense counsel addressed the defendant's prior armed robbery conviction during the hearing on his motion *in limine* to prohibit the use of the conviction if the defendant testified. The circuit court denied the motion and the defendant's conviction of armed robbery would have been admissible only if the defendant testified. During the motion hearing, the circuit court additionally addressed whether the unlawful possession of a weapon by a felon charge would be included at trial. The defense did not seek to sever the charge and sought to minimize the prejudice of the prior conviction by stipulating that the defendant was a convicted felon without informing the jury that the defendant had a prior armed robbery conviction. The circuit court addressed this issue again during jury selection. Defense counsel confirmed that he wished to proceed by stipulating that the defendant had a prior conviction. The defense counsel's decision to stipulate to the prior felony indicates that the decision not seek a severance of the felony claims was a matter of trial strategy.

¶ 47 The defense employed an "all-or-nothing" trial strategy while presenting a theory that there was insufficient evidence to place the defendant at the crime scene during the time of the murder. Evidence demonstrated that the victim sold drugs to numerous people at his apartment and abused fentanyl. Defense counsel argued that the expert witness could not determine a date for the defendant's fingerprint; the defendant may have left his fingerprint at the apartment at an earlier time; and, insinuated that the defendant may have purchased drugs from the victim in the past. Perhaps defense counsel considered that it made sense to try for an acquittal of all counts in one proceeding where the impact of an unknown prior conviction may not be significant considering that the defendant's fingerprint was found at a location associated with illegal drug activity.

¶ 48 Accordingly, the defendant has failed to overcome the strong presumption that defense counsel's decision to not pursue a motion to sever was a matter of sound trial strategy. Thus, we conclude that the defendant did not receive ineffective assistance of counsel where counsel's performance was not deficient, and we need not consider whether defendant was prejudiced.

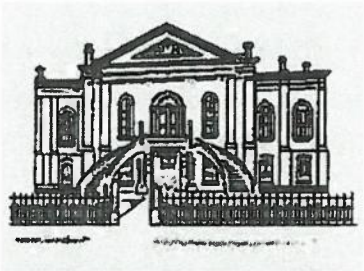
¶ 49 III. CONCLUSION

¶ 50 For the reasons stated above, we conclude that the defendant did not receive ineffective assistance of counsel and affirm his conviction and sentence.

¶ 51 Affirmed.

APPENDIX B

JOHN J. FLOOD
CLERK
(618) 242-3120



APPELLATE COURT, FIFTH DISTRICT
14TH & MAIN ST., P.O. BOX 867
MT. VERNON, IL 62864-0018

September 18, 2023

Office of the State Appellate Defender, Fifth District
909 Water Tower Circle
Mt. Vernon, IL 62864

RE: People v. Lacey, George E.
General No.: 5-22-0050
County/Agency: Madison County
Trial Court/Agency No: 20CF2969

Pursuant to the attached order, the court today denied the petition for rehearing filed in the above entitled cause. The mandate of this Court will issue 35 days from today unless a petition for leave to appeal is filed in the Illinois Supreme Court.

Clerk of the Appellate Court

c: George Lacey
Madison County Circuit Court
State's Attorney Madison County
State's Attorney's Appellate Prosecutor, Fifth District

FILED
September 18, 2023
APPELLATE
COURT CLERK

5-22-0050

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. GEORGE E. LACEY, Defendant-Appellant.	Madison County Trial Court/Agency No.: 20CF2969

ORDER

This cause coming on to be heard on defendant-appellant's petition for rehearing and the court being advised in the premises:

IT IS THEREFORE ORDERED that the petition for rehearing is denied.

APPENDIX C

SUPREME COURT OF ILLINOIS
SUPREME COURT BUILDING
200 East Capitol Avenue
SPRINGFIELD, ILLINOIS 62701-1721
(217) 782-2035

FIRST DISTRICT OFFICE
160 North LaSalle Street, 20th Floor
Chicago, IL 60601-3103
(312) 793-1332
TDD: (312) 793-6185

January 24, 2024

In re: People State of Illinois, respondent, v. George E. Lacey, petitioner. Leave to appeal, Appellate Court, Fifth District. 130123

The Supreme Court today DENIED the Petition for Leave to Appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on 02/28/2024.

Very truly yours,

Cynthia A. Grant

Clerk of the Supreme Court

APPENDIX D

E-FILED
Transaction ID: 5-22-0050
File Date: 6/21/2022 9:22 AM
John J. Flood, Clerk of the Court
APPELLATE COURT 5TH DISTRICT

No. 5-22-0050

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH JUDICIAL DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the Third Judicial Circuit, Madison County, Illinois
Plaintiff-Appellee,	)	
	)	20-CF-2969
-vs-	)	
	)	
GEORGE E. LACEY,	)	Honorable Kyle Knapp,
Defendant-Appellant.	)	Judge Presiding.

BRIEF AND ARGUMENT FOR DEFENDANT-APPELLANT

JAMES E. CHADD
State Appellate Defender

ELLEN J. CURRY
Deputy Defender

CHRISTOPHER SIELAFF
Assistant Appellate Defender
Office of the State Appellate Defender
Fifth Judicial District
909 Water Tower Circle
Mt. Vernon, IL 62864
(618) 244-3466
5thdistrict.eserve@osad.state.il.us

COUNSEL FOR DEFENDANT-APPELLANT

ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS AND POINTS AND AUTHORITIES

NATURE OF THE CASE

George E. Lacey was convicted of first degree murder and unlawful possession of a weapon by a felon after a jury trial and was sentenced to 52 years in the Department of Corrections and 3 years of mandatory supervised release.

This is a direct appeal from the judgment of the court below. No issue is raised challenging the charging instrument.

ISSUE PRESENTED FOR REVIEW

Whether trial counsel was ineffective for failing to sever the unlawful possession of a weapon charge, because the evidence necessary to prove that charge prejudiced the jury against Mr. Lacey on the remaining counts?

JURISDICTION

George E. Lacey appeals from a final judgment of conviction in a criminal case. He was sentenced on January 27, 2022. (C.16) Notice of appeal was timely filed on January 31, 2022. (C.17) Jurisdiction therefore lies in this Court pursuant to Article VI, Section 6, of the Illinois Constitution, and Supreme Court Rules 603 and 606.

STATEMENT OF FACTS

Mr. George Lacey was charged by information with four counts of first degree murder, and one count each of home invasion, armed robbery, and unlawful possession of a weapon by a felon ("UPWF") on November 24, 2020, for the alleged robbery, home invasion, and murder of Darian Woods on November 19, 2020. (C.18-19) Mr. Lacey was convicted of one count of first degree murder and one count of UPWF on October 15, 2021. (C.13-14)

Jury Trial

Lauren Swearingen's Testimony

Swearingen testified that she knew the decedent, Darian Woods, for about three years, they started dating about a month after they met, and they moved in together about a month after that. (R.280-281) She also testified that she and Woods would use drugs together. (R.285) Swearingen explained that people would regularly come to the apartment to buy marijuana from Woods, that she knew most of their names but did not know them personally, and would recognize them if she saw them. (R.285-286)

Swearingen installed security cameras on the front door and back doors. (R.288) Swearingen testified that she did not know Mr. Lacey before the robbery, he never had permission or reason to touch the camera, she never saw video of him touching the camera before the incident, and that he never had permission to come into the apartment. (R.291-292)

Swearingen had used some sort of unidentified drugs approximately five hours prior to the incident, but the drugs didn't affect her ability to remember.

(R.292-293) While Swearingen was cleaning some dishes, the back door of the apartment was kicked in and two men came into the apartment. (R.293-294) The first man she saw wore dark clothing and a Covid mask. (R.294) She testified that "immediately I knew what was happening" and she put her hands in the air. (R.294) The first man she saw put his hands around her neck and his knees on her back, did not say anything to her, and put his weight on her. (R.294) She only saw that the second person was wearing a white shirt and had something red on his face, and was moving up the stairs of the apartment. (R.294-295) She could not see any of their faces, but could tell from seeing their hands that the two men were black. (R.295)

She heard the second man move up the stairs, heard Woods coming down the stairs, and then heard a gunshot. (R.295-296) When she turned her head toward the stairs, Swearingen saw Woods sliding down headfirst and heard him struggling to breathe. (R.296) The man upstairs yelled down asking where the money was, and the man holding her walked her up the stairs. (R.297-298) She showed the two men the laundry basket where Woods saved money from his marijuana sales. (R.298-299) While she was showing the two men where the money was, Swearingen felt what she believed to be a gun press into her back. (R.298-299) Swearingen testified that she kept her vision to the sides of the room and repeatedly told the men that she never saw them. (R.299-300) After the man in the white shirt grabbed the money, he said the two men had to get to the car and he ran downstairs. (R.300) After the man in the white shirt left, the man in the dark shirt told her to get in the upstairs closet, not to move or speak, and he shut the closet door. (R.302)

Swearingen waited a few seconds before calling 911. (R.303)

Swearingen let police in and pulled up the camera footage on her phone within two minutes of their arrival. (R.306) Swearingen did not remember anything about the shoes or facial hair of the man in the white shirt. (R.312) Swearingen also testified that the video shows that the man in the white shirt has a gun in his right pocket. (R.312)

Swearingen testified that Woods would usually go meet someone to purchase Fentanyl, "but on rare occasions, it was a select two people that would come to us." (R.315) Swearingen also confirmed that Woods had been robbed at least four times, at least one of which was at the same apartment. (R.315-316) Swearingen testified that she did not get a good look at either of the men who entered the apartment other than their clothing, that it was fair to say she could not identify those people, and that she had never seen George Lacey except during court appearances. (R.318-319)

Adisa Smith's Testimony

Smith testified that he knew Mr. Lacey from high school and through mutual friends. (R.362-363) Smith and Lacey bumped into each other occasionally at Smith's job. (R.363) Smith testified that he knows Demandrell Davis, Mr. Lacey's uncle, through his mechanic. (R.364)

Smith testified that he went to see his mechanic on November 19, 2020, about issues he was having with his truck. (R.366) The mechanic gave Smith directions to Davis' house in Belleville, because he was there drinking and hanging out. (R.366) Smith said that his mechanic was too drunk to help him when he

arrived, so he went to the liquor store down the street, grabbed a bottle, and came back to drink with everyone there. (R.367-368) Smith was there for approximately four hours, and said there was no conversation about any crimes happening later on. (R.368)

Smith testified that his mechanic left with his nephew, and that Mr. Lacey asked Smith for a ride as he was leaving. (R.369-370) According to Smith, Mr. Lacey offered $50 for the ride, and said he was going to Collinsville to pick up marijuana. (R.370) Smith said that Davis rode with them, and there was not much conversation except for Mr. Lacey's directions that eventually led to the Catsup Bottle in Collinsville. (R.370-371)

Smith said they pulled into a neighborhood around 7 or 8 pm. (R.372) Smith testified that he pulled up to a set of apartment buildings that Mr. Lacey pointed at, but Mr. Lacey told him to go past the buildings and make a u-turn to come to a specific spot. (R.372-373) Smith testified that Mr. Lacey gave him specific instructions to back into a spot, and that the instructions "seem[ed] a little weird" to him. (R.374)

Smith said he only waited between three and five minutes before Mr. Lacey and Davis returned. (R.375-376) Smith testified that Mr. Lacey was holding a reusable shopping bag that smelled like marijuana. (R.376) Mr. Lacey told Smith to go St. Louis, which he did by way of the I-70 bridge. (R.377) Smith testified that Mr. Lacey wrapped something and threw it in the river as they passed over the bridge, but Smith never saw what it was. (R.377) Smith testified that Mr. Lacey told him that if word got back that Smith drove Mr. Lacey to that apartment,

he would kill both Davis and Smith. (R.378)

When the three arrived in St. Louis, Smith went to a gas station. (R.378) Smith confirmed that video from the gas station surveillance cameras show his truck pulling up to the gas station, and him walking into and out of the gas station. (R.378-379) Smith testified that he drove Mr. Lacey and Davis back to Belleville after they left the gas station, and that Mr. Lacey gave Davis some marijuana and they parted ways. (R.381-382)

Smith testified that he was stopped by police four days later, was told his truck was involved in a serious crime, and helped the police identify Mr. Lacey. (R.382-383) Smith also admitted that he lied to police during interviews with them. (R.383) Smith walked through a few of the lies he told police, and explained that he was trying to avoid implicating Davis because he knows him. (R.383-385) "After they told me what went down, I knew he wouldn't do nothing like that." (R.385) Smith further admitted that he was originally charged as an accessory to murder, home invasion, and armed robbery; but that the State agreed to dismiss all but the armed robbery charge and recommend a 10-year sentence if he agreed to testify against Mr. Lacey. (R.385-387)

On cross-examination, Smith agreed that he "lied a lot" to police at the beginning, and that he could not be certain how many times he lied. (R.388) Defense counsel walked Smith through a number of statements he made to the police during his interrogation, confirming that each statement was either a lie or contradictory to what he was currently stating during his testimony. (R.388-423) Smith agreed that it was his truck that appeared on camera, and that he was the only one who

could be positively identified on the night of the incident. (R.423) At the end of cross-examination, Smith admitted that he is "getting one heck of a deal." (R.423) On redirect, Smith testified that he agreed to the plea deal because he drove Davis and Mr. Lacey to commit the crimes, and that it was Davis and Mr. Lacey who appeared on the video. (R.424-425)

The State admitted People's Exhibit 101 - a stipulation that Mr. Lacey had previously been convicted of a felony in 2015 - without objection. (R.451-452)

The parties rested, and after the jury was instructed, it began deliberations on October 14, 2021, at approximately 3:20 pm. (R.640)

Jury Question #1

At approximately 8:10 pm on October 14, 2021, the jury sent a question to the court, 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; CI.97) All parties agreed to send the jury home for the night and to resume deliberations in the morning. (R.652-654) The jurors were brought into the courtroom, read IPI 26.09 regarding breaking during deliberations, and sent home for the night. (R.654-657; CI. 98) The jury continued their deliberations on October 15, 2021, at approximately 9:30 am. (R.660)

Jury Question #2

The jury sent a two-part question to the court at approximately 10:05 am. (R.661-662; CI.99) The first question read, "What was the felony charge in 2015?" and the second question read, "Transcript of Adisa Smith's testimony." (R.661-662;

CI.99) As to the first question, the court instructed the jury that they have received all of the evidence in the case. (R.663; CI.100) As to the second question, the court instructed the jury to go off of their recollections. (R.664-665; CI.100)

Jury Question #3

The jury sent a third question to the court at approximately 12:25 pm. (R.665; CI.101) The question read, "What happens if we agree on two counts but are hung on the remainder?" (R.665; CI.101) The court said it would not do any good to read the *Primm* instruction at this point due to the time the jury had already spent deliberating. (R.665-666) The State proposed having the jury sign the agreed-upon verdict forms and leaving the remaining forms blank, and the defense asked for more time for the jury to deliberate. (R.666-667) The court said it would allow the jury to have lunch before deciding what to do, in the hopes that the problem might resolve itself. (R.668-671)

Jury Question #4

The jury sent a fourth question to the court at approximately 1:20 pm. (R.671-672; CI.102) The question 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; CI.102) The court said it would bring the jurors in and ask if they were adamant that they would not reach a verdict on the three hung charges, and would decide whether to read the *Primm* instruction based on their answer. (R.672-673) The jurors were brought into the court room and confirmed that they had reached a verdict on two counts and were deadlocked on the other three counts. (R.673-676)

Verdict

Mr. Lacey was found guilty of first degree murder and UPWF, and the jury was hung on the other counts. (C.13-14) The court declared a mistrial as to the charges of home invasion and armed robbery. (R.679)

This appeal followed.

ARGUMENT

Trial counsel was ineffective for failing to sever the unlawful possession of a weapon charge, because the evidence necessary to prove that charge prejudiced the jury against Mr. Lacey on the remaining counts.

This case involved four distinct charges: murder, home invasion, armed robbery, and unlawful possession of a weapon by a felon (UPWF). (C.18-19) To prove the latter charge, the State had the burden to prove that Mr. Lacey had a prior felony conviction, making him a convicted felon in possession of a weapon. 720 ILCS 5/24-1.1(a). The proof of this prior conviction would have been inadmissible to prove that Mr. Lacey murdered Darian Woods or committed any of the other charged conduct, because it presented inadmissible other crimes evidence. Based on existing case law, a motion for severance would have been granted had one been filed by trial counsel. Moreover, a motion for severance, once granted, would have prevented the jury from hearing evidence that Mr. Lacey had a prior felony conviction at his trial for murder. The evidence of this prior conviction improperly influenced the jury to find Mr. Lacey guilty of murder, which it likely would not have done had the evidence not been presented. Accordingly, this Court should vacate Mr. Lacey's convictions and remand his cause to the circuit court for new and separate trials.

Standard of Review

A reviewing court assesses *de novo* the legal issue of whether counsel was ineffective. *People v. Manoharan*, 394 Ill. App. 3d 762, 769 (4th Dist. 2009). In

order to prove ineffective assistance of counsel, a defendant must show that: (1) their attorney's performance fell below an objective standard of reasonableness; and (2) but for counsel's deficient performance, the outcome of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 686, 694 (1984); *People v. Albanese*, 104 Ill. 2d 504, 525 (1984). A circuit court's decision to grant a motion to sever is reviewed for an abuse of discretion. *People v. Fleming*, 2014 IL App (1st) 113004, ¶ 38. "A trial court abuses its discretion when its decision is arbitrary, fanciful, or unreasonable, or where no reasonable person would take the court's view." *Id.* (citing *People v. Illgen*, 145 Ill. 2d 353, 364 (1991)).

Analysis

Defense counsel was ineffective for failing to move to sever the UPWF charge from the remaining three charges. Had counsel moved to sever this charge, the circuit court would have almost certainly granted the motion, because severance would have been appropriate both as a matter of law and under the facts of this case. The failure to sever this charge from the remaining three charges resulted in the jury hearing evidence that was unduly prejudicial as other-crimes evidence. Defense counsel's failure to sever this charge was unsound, and cannot be excused as a matter of trial strategy.

"Two or more offenses may be charged in the same indictment, information or complaint in a separate count for each offense if the offenses charged ... are based on the same act or on 2 or more acts which are part of the same comprehensive transaction," unless it appears that the defendant will be prejudiced by joinder of the separate charges 725 ILCS 5/111-4(a)(2016); 725 ILCS 5/114-8. Although

a defendant can be made to defend against multiple charges in a single prosecution, a defendant can request that those charges be separated into multiple trials in one of two ways. First, he can argue that the joined charges are not part of the same comprehensive transaction, and the different charges therefore require separate trials. 725 ILCS 5/111-4 (2016); *People v. Walston*, 386 Ill. App. 3d 598, 601 (2d Dist. 2008). Second, he can argue that he would be prejudiced by having to defend against the multiple charges in a single trial. 725 ILCS 5/114- 8 (2016); *People v. Patterson,* 245 Ill. App. 3d 586, 590 (5th Dist. 1993). A defendant is prejudiced and charges should be severed where an element of one of the charges against the defendant is that he had a prior felony conviction because of the "significant risk that the trier of fact will use evidence of a prior conviction in determining the defendant's guilt or innocence of an unrelated offense." *People v. Edwards*, 63 Ill. 2d 134, 140 (1976).

At issue here is the second approach, in which prejudice is determined by analyzing what evidence would be admissible at separate trials had a defendant's charges been severed. If evidence from a severed charge would be properly admissible in the separate trial, the defendant suffered no prejudice from the joined charges. *Patterson,* 245 Ill. App. 3d at 590-91. If, however, evidence from the severed charge would be inadmissible in a separate trial, the defendant suffered prejudice by having to defend against multiple charges in a single trial. See *Id.*

In *Edwards*, the defendant was charged with armed robbery and unlawful use of a weapon by a felon. *Edwards*, 63 Ill. 2d at 138. The latter 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 request was denied. *Id.* On appeal, the appellate court found that the trial court's refusal to sever the charges was an abuse of discretion. The supreme court agreed 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 it had an overriding interest in prosecuting all the related charges in one trial:

> "The State does have an interest in its 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 felonious unlawful use of a weapon 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.*

Thus, it is inevitable that the charges would have been severed had counsel filed a motion. Unfortunately, counsel did not do so here, and as a result, committed error.

The "Sixth Amendment demands more than placing a warm body with a legal pedigree next to an indigent defendant." *People v. Lee*, 185 Ill. App. 3d 420, 425 (5th Dist. 1989). A defendant has the constitutional right to the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686 (1984); U.S. Const., Amends. VI, XIV. Under the first prong of *Strickland*, a defendant claiming ineffective assistance of counsel must prove that trial counsel's actions were so deficient that they were unreasonable. *People v. Wilson*, 164 Ill. 2d 436, 453 (1994). The second prong of the *Strickland* analysis requires a demonstration that, but for counsel's unprofessional errors, the result of the proceedings would

have been different. *Strickland*, 466 U.S. at 694; *People v. Albanese*, 104 Ill. 2d 504, 525 (1984). An attorney's performance will not be found deficient if it was based upon a sound trial strategy. *Strickland*, 466 U.S. at 689. However, an attorney's performance will be found deficient if it is based upon an unsound strategy that no reasonably effective attorney would pursue under the circumstances. *People v. McMillin*, 352 Ill. App. 3d 336, 344, 346-47 (5th Dist. 2004).

For example, in *McMillin*, counsel introduced evidence at trial that the defendant had pleaded guilty to several prior offenses in order to make the argument that the defendant possessed the integrity to plead guilty if he had committed the offenses with which he was charged. Although this was counsel's trial strategy, the appellate court found it to be unsound. The court reasoned:

> Reasonably effective advocates would worry about the downside from such a strategy, based upon the true impact that such evidence would have upon law-abiding people who sit as jurors. This kind of evidence bears a high degree of prejudice. It carries an overwhelming ability to domina[te] decision making, swaying people to convict, regardless of what the actual evidence to support the charged conduct can establish. This is precisely why the State, despite its strong desire to present the kind of evidence elicited by defense counsel in this case, is generally barred from introducing it. *Id.* at 346.

For similar reasons, counsel's performance may be found deficient where counsel fails to request severance of charges. *People v. Johnson*, 2013 IL App (2d) 110535, ¶ 55. In *Johnson*, the defendant was charged with domestic battery and UPWF. On appeal, he argued counsel was ineffective for failing to move to sever the charges. The State argued counsel's decision was sound strategy because a single trial on both offenses presented the best opportunity for the defendant to challenge the credibility of the complaining witness and obtain acquittal on both

charges. The appellate court disagreed with the State, noting that such a strategy was unsound as to the domestic battery charge because "[i]n the domestic battery case, the jury was improperly informed of the defendant's status as a felon." *Id.*

Likewise, the court in *People v. Williams*, 164 Ill. App. 3d 99 (4th Dist. 1987), indicated that counsel performed deficiently in failing to request severance. The defendant in that case was charged with UPWF and other offenses, including murder. On appeal, he argued that his counsel was ineffective for failing to request severance of the charges. Although the appellate court denied relief on the ground that there was no prejudice in light of the overwhelming evidence supporting the defendant's convictions, citing *Edwards* and *Bracey*, the court stated: "the [UPWF charge] should have been severed from the other charges, and defense counsel's failure to secure a severance was a mistake." *Id.* at 115-16 (internal citations omitted).

Under the circumstances of this case, counsel's decision not to seek severance was unsound. Informing a jury that a defendant is a convicted felon engenders such severe prejudice that it will lead a jury to convict, regardless of the evidence. Several appellate courts have found as much and, as a result, it is widely recognized that not only are motions to sever UPWF charges from other criminal charges sound trial strategy, circuit courts are almost uniformly required to grant such motions. Failure to sever an UPWF charge is not strategy effective counsel would pursue because it unnecessarily informs a jury that the defendant is a convicted felon. Thus, counsel's performance was deficient, and not merely the result of trial strategy.

Furthermore, Mr. Lacey was prejudiced by having to defend himself against both charges in the same trial. The UPWF charge required the State to introduce evidence that he had a prior felony conviction. 720 ILCS 5/24-1.1(a). (CI.84) The State introduced this evidence through a stipulation from defense counsel that Mr. Lacey was previously convicted of a felony. (E.170) The mere mention of a previous felony conviction was prejudicial to Mr. Lacey, because it was other crimes evidence - which is generally prohibited by Illinois Rule of Evidence 404(b) - and might lead the jury to believe that Mr. Lacey was "a bad person deserving punishment." *People v. Lindgren*, 79 Ill. 2d 129, 137 (1980); *People v. Robinson*, 167 Ill. 2d 53, 62 (1995). None of the exceptions to Rule 404(b) apply to this case, because the State did not make any argument or present any evidence that this previous conviction was being used to demonstrate proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. Ill. R. Evid. 404(b).

Additionally, the record provides compelling evidence that Mr. Lacey's argument is not just speculative, but that evidence of his prior convictions prejudiced him to the jury. The jury's questions indicate its focus on Mr. Lacey's prior convictions during their deliberations. After several hours of deliberation on the first day, the jury sent a note to the court stating that it was hung on all counts, because two of the jurors did not believe that Mr. Lacey was even present at the scene. (R.652; CI.97) The jury was then sent home for the night and instructed to return in the morning for further deliberations. (R.652-657; CI.98) Upon returning the next morning, the jury continued deliberating for approximately 30 minutes

before sending another note, this time asking for details regarding Mr. Lacey's prior conviction. (R.661-662; CI.99) Once the jury was told that they had received all the evidence in the case, they reached a verdict on two of the charges and remained hung on the rest. (R.665) Thus, as the record demonstrates, the jury was hung as to all counts for over five hours, and once they asked their question about Mr. Lacey's previous felony conviction, they started making decisions as to the verdict.

Where the jury hangs on some charges and remains deadlocked for hours, the evidence is certainly closely balanced, and any mistake - like the admission of the prior felony - was prejudicial. Given the specific questions and actions of the jurors in this case, it is reasonable to infer that the other crimes evidence influenced the verdict. *See People v. Lee*, 2019 IL App (1st) 162563, ¶ 67 (citing *People v. Wilmington*, 2013 IL 112938, ¶ 35) (jury's several-hour deliberations and multiple notes stating they were deadlocked indicate that the evidence was closely balanced). But for defense counsel's failure to sever the UPWF charge before trial, Mr. Lacey likely would not have been convicted of first degree murder based on the presumptively inadmissible other-crimes evidence of his previous felony conviction.

Conclusion

Trial counsel's failure to move to sever the UPWF charge from the remaining criminal charges in Mr. Lacey's case constituted deficient performance under prevailing case law. The circuit court would have granted the motion under well-established case law, there is no evidence to suggest that trial counsel's failure

to sever was part of a trial strategy, and any argument to the contrary would run counter to prevailing case law that trial strategy generally does not apply to this type of failure. Mr. Lacey was prejudiced by this failure because he was forced to defend against charges which required the introduction by the State of unduly prejudicial evidence against him, and the jury likely would not have convicted him of murder had the charges been severed. Accordingly, Mr. Lacey respectfully requests that this Court vacate his convictions and remand his cause for new and separate trials.

CONCLUSION

For the foregoing reasons, George E. Lacey, defendant-appellant, respectfully requests that this Court vacate his convictions and remand his cause for new and separate trials.

Respectfully submitted,

ELLEN J. CURRY
Deputy Defender

CHRISTOPHER SIELAFF
Assistant Appellate Defender
Office of the State Appellate Defender
Fifth Judicial District
909 Water Tower Circle
Mt. Vernon, IL 62864
(618) 244-3466
5thdistrict.eserve@osad.state.il.us

COUNSEL FOR DEFENDANT-APPELLANT

CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342, is 19 pages.

/s/ Christopher Sielaff
CHRISTOPHER SIELAFF
ARDC No. 6333356
Assistant Appellate Defender

No. 5-22-0050

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH JUDICIAL DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the Third Judicial Circuit, Madison County, Illinois
Plaintiff-Appellee,	)	
	)	20-CF-2969
-vs-	)	
	)	
GEORGE E. LACEY,	)	Honorable Kyle Knapp,
Defendant-Appellant.	)	Judge Presiding.

NOTICE AND PROOF OF SERVICE

TO: Mr. Patrick D. Daly, Deputy Director, State's Attorneys Appellate Prosecutor, 4114 North Water Tower Place, Suite C, Mt. Vernon, IL 62864, 05dispos@ilsaap.org

Mr. George E. Lacey, Register No. B90013, Menard Correctional Center, P.O. Box 1000, Menard, IL 62259

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. On June 21, 2022, the Brief and Argument was filed with the Clerk of the Appellate Court using the court's electronic filing system in the above-entitled cause. Upon acceptance of the filing from this Court, persons named above with identified email addresses will be served using the court's electronic filing system and one copy is being mailed to the appellant in an envelope deposited in a U.S. mail box in Mt. Vernon, Illinois, with proper postage prepaid.

/s/ Heather Thomas
LEGAL SECRETARY
Office of the State Appellate Defender
Fifth Judicial District
909 Water Tower Circle
Mt. Vernon, IL 62864
(618) 244-3466
5thdistrict.eserve@osad.state.il.us

APPENDIX E

No. 5-22-0050

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John J. Flood, Clerk of the Court
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IN THE

APPELLATE COURT OF ILLINOIS

FIFTH JUDICIAL DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the Third Judicial Circuit, Madison County, Illinois
Plaintiff-Appellee,	)	
	)	20-CF-2969
-vs-	)	
	)	
GEORGE E. LACEY,	)	Honorable Kyle Knapp,
Defendant-Appellant.	)	Judge Presiding.

REPLY BRIEF FOR DEFENDANT-APPELLANT

JAMES E. CHADD
State Appellate Defender

ELLEN J. CURRY
Deputy Defender

CHRISTOPHER SIELAFF
Assistant Appellate Defender
Office of the State Appellate Defender
Fifth Judicial District
909 Water Tower Circle
Mt. Vernon, IL 62864
(618) 244-3466
5thdistrict.eserve@osad.state.il.us

COUNSEL FOR DEFENDANT-APPELLANT

ORAL ARGUMENT REQUESTED

POINT AND ADDITIONAL AUTHORITIES

ARGUMENT

Defense counsel's failure to sever Mr. Lacey's Unlawful Possession of a Weapon by a Felon charge constituted ineffective assistance, and this Court should vacate his convictions and remand his cause for new and separate trials.

Defense counsel's failure to sever Mr. Lacey's Unlawful Possession of a Weapon by a Felon ("UPWF") charge from his remaining charges constituted ineffective assistance, because no reasonable attorney would have made the same mistake, and it is more likely than not that severance of the charges would have resulted in acquittal on the murder charge. The State argues that defense counsel engaged in an "all or nothing" strategy, attempting to get acquittals on all charges in one trial and preventing the State from having "two bites at the apple." (St. Res. 4) However, the State's reliance on these points is in error because: (1) well-settled case law demonstrates that a motion for severance would have been appropriate based on undue prejudice; (2) such a motion would almost certainly have been granted by the circuit court; and (3) severance would more likely than not have resulted in an acquittal on the murder charge. (Op. Br. 11-18)

Additionally, the State's argument that there was no prejudice in this case relies on an incomplete description of the evidence at issue, as well as total avoidance of the jury's notes to the trial court during deliberations. Because counsel's performance was deficient in failing to sever the UPWF charge from the remaining charges, and this failure resulted in the jury being improperly influenced by the

unduly prejudicial information of Mr. Lacey's unrelated prior felony conviction, this Court should vacate Mr. Lacey's convictions and remand for new and separate trials.

As noted in Mr. Lacey's Opening Brief, *People v. Edwards*, 63 Ill. 2d 134 (1976), demonstrates that a motion to sever UPWF charges will almost always be granted. (Op. Br. 12-13 (citing *Id.* at 140)). This is true, because the joinder of UPWF charges with other felonies, "create[s] such a strong possibility that the defendant [will] be prejudiced in his defense of the [other] charge[s] that [is] an abuse of the trial court's discretion to deny a severance." *Edwards*, 63 Ill. 2d at 140. Put another way, a defendant is prejudiced in his defense and charges should be severed where an element of one of the charges against the defendant is that he had a prior felony conviction, because of, "the significant risk that the trier of fact will use evidence of a prior conviction in determining the defendant's guilt or innocence of an unrelated offense." (Op. Br. 12 (citing *Id.*)) Such reasoning is further explained by this Court's decision in *People v. Patterson*, 245 Ill. App. 3d 586 (5th Dist. 1993). In *Patterson*, this Court held that charges are properly severed when evidence from one charge would be inadmissible in another. *Id.* at 590-91.

The State does not contest that unduly prejudicial charges should be severed, and that a motion to sever will usually be granted. Rather, the State argues that defense counsel's failure to sever the UPWF charge was indicative of an "all or nothing" trial strategy. (St. Res. 4-9) The State points to *People v. Gapski*, 283 Ill. App. 3d 937 (2nd Dist. 1996), *People v. Poole*, 2012 IL App (4th) 101017, and

People v. Fields, 2017 IL App (1st) 110311-B, in support of its "all or nothing" argument. (St. Res. 4-6) The State argues that the "all or nothing" strategy allows defense counsel to get an acquittal on all charges in a single proceeding, and prevents the State from curing an evidentiary deficiency from the first trial in a second trial. (St. Res. 4-5) Here, the State begins the first of many instances where it turns Mr. Lacey's case into an abstraction instead of analyzing the evidence available at trial. To that end, the State never once mentions what possible "evidentiary deficiency" from Mr. Lacey's single trial would have been cured by the State in a separate trial or how the jury hearing that Mr. Lacey was a felon benefitted him on the other charges. The State also points to the language in *Gapski* and *Poole* that defense counsel may think it makes sense to try for an acquittal on all counts in one trial, "thinking that the impact of the additional conviction would not be significant." (St. Res. 5 (quoting *Poole*, 2012 IL App (4th) 101017, ¶ 10)). Again, there is no indication from the State what that could possibly mean in the context of Mr. Lacey's case. However, given that Mr. Lacey was convicted of both murder and UPWF, it would appear that "the impact of the additional conviction" in this case is a 45-year sentence to the Department of Corrections ("DOC"). Thus, the State's policy arguments in favor of an "all or nothing" strategy do not speak to any of the facts of Mr. Lacey's case, and in no way require this Court to find that defense counsel's performance was adequate. The larger stake here is the murder conviction, and nothing can reduce the prejudice from the jury hearing that Mr. Lacey was already a felon.

The State, relying on *Fields* and *Gapski*, argues that defense counsel's failed

pretrial motion *in limine* to prohibit the State from using Mr. Lacey's prior felony convictions as impeachment evidence demonstrates not only an "all or nothing" strategy, but also that severance would be irrelevant where the State could have brought in Mr. Lacey's prior felony convictions pursuant *People v. Montgomery*, 47 Ill. 2d 510. (St. Res. 5-6) However, *Fields* and *Gapski* are distinguishable from Mr. Lacey's case, and in no way demonstrate that an "all or nothing" approach was sound trial strategy in Mr. Lacey's case.

In *Fields*, defense counsel filed a pretrial motion *in limine* to prevent the State from admitting the defendant's prior convictions for armed robbery and unlawful use of a weapon by a felon as unduly prejudicial, given the similarity between the prior convictions and the current charges. *Fields*, 2017 IL App (1st) 110311-B, ¶ 4. The trial court granted the motion, "stating that while Fields's testimony could reopen the issue, *the judge could not envision a fair trial if the prior convictions were ruled admissible.*" *Id.* (emphasis added) On appeal, the First District went on to note that, "The case law suggests the motion to sever would have been granted if counsel had made one." *Id.* (citing *Edwards*, 63 Ill. 2d at 140). Thus, *Fields* indicates an awareness that a motion to sever improperly prejudicial charges is not only appropriate, but is likely to be granted as a matter of well-settled case law.

Additionally, defense counsel's pretrial motion *in limine* in this case was, at best, an inadequate means of severing the UPWF charge without following through. Had defense counsel's motion been granted, the fact of Mr. Lacey's prior felony convictions would not have been able to come in at all, meaning the State

would not be able to prove the UPWF charge at all. *See* 720 ILCS 5/24-1.1(a) (requiring the State to prove a prior felony). Had defense counsel simply moved to sever the charges, such a motion would have almost certainly been granted and achieved the same end – prohibiting any mention of Mr. Lacey's unrelated prior felony history in his trial on the other charges. There was no sound trial strategy in opening the door to this kind of evidence through a motion *in limine* with no guarantee of success, especially where a motion to sever would have achieved the same goals and been nearly certain to have succeeded.

The State's reliance on *Gapski* is also misplaced. The State cites to *Gapski* in support of its argument that, "defense counsel may be aware that prior convictions could be used regardless of a severance, making a motion *in limine* irrelevant." (St. Res. 5-6) The *Gapski* court denied an ineffective assistance claim based on failure to sever, relying in large part on the State's ability to bring in the defendant's prior conviction regardless of a motion *in limine*. *Gapski*, 283 Ill. App. 3d at 942. Specifically, the court stated, "Defense counsel *no doubt* anticipated that the defendant intended to testify at trial and that his credibility could be impeached with his prior felony [conviction]...pursuant to *People v. Montgomery*, 47 Ill. 2d 510 (1971)." *Gapski*, 283 Ill. App. 3d at 942. Unlike the defendant in *Gapski*, there is no indication that Mr. Lacey ever intended to testify. Furthermore, the State does not point to any evidence that would support such a claim. Thus, it is disingenuous for the State to claim that *Gapski* contemplates, "the jury [becoming] aware of a [defendant's] prior felony regardless of whether or not the two counts were severed." (St. Res. 6) (citing *Id.*) Rather, Mr. Lacey's convictions would have

only come in had he testified at trial, and there is simply nothing in the record to suggest that he intended to testify.

The State's arguments that defense counsel's performance was adequate rely on speculation regarding an "all or nothing" trial strategy, "evidentiary deficiencies", and testimony from Mr. Lacey – all without any citation to evidence in the record that would support such speculation. Mr. Lacey's opening brief, as well as the cases relied on by the State, make it clear that a motion to sever would have been granted had defense counsel simply asked for one. Furthermore, there is no evidence to support the conclusion that an "all or nothing" approach would have limited the impact of an additional conviction, as Mr. Lacey was sentenced to 45 years in prison for murder. The State's arguments that counsel's performance does not rise to the level of deficient performance are purely speculative, and this Court should instead rely on the well-settled case law provided in Mr. Lacey's opening brief.

To that end, the State's attempts to distinguish the cases relied on by Mr. Lacey in his opening brief are unpersuasive. The State takes issue with Mr. Lacey's reliance on *Edwards*; *People v. McMillin,* 352 Ill. App. 3d 336 (5th Dist. 2004); *People v. Johnson,* 2013 IL App (2d) 110535; and *People v. Williams,* 164 Ill. App. 3d 99 (4th Dist. 1987). The State argues that *Edwards* does not apply because defense counsel's motion to sever in that case was denied, while here, "defense counsel clearly had a strategy and made no such motion to sever." (St. Res. 8) However, as discussed above, there is no indication in the record that defense counsel's failure to sever was a matter of trial strategy. Furthermore, the entire

point of this argument is that counsel *failed* to file a motion to sever, and that *Edwards* specifically held that such a motion will almost always be granted in order to avoid undue prejudice to the defendant. *Edwards*, 63 Ill. 2d at 140. Thus, the State's argument on this point fails to provide any reason why this Court should not rely on *Edwards* in determining whether defense counsel was ineffective for failing to seek a severance that not only would have benefitted his client, but almost certainly would have been granted.

The State argues that *McMillin* does not match the facts of this case, because Mr. Lacey's defense counsel stipulated to a prior unrelated felony conviction with no further details. (St. Res. 8) In *McMillin*, defense counsel told the jury about several of the defendants prior felonies in an attempt to argue that the defendant would plead guilty when he knew he had done something wrong. *McMillin*, 352 Ill. App. 3d at 345. This Court found that defense counsel's decision to allow evidence of the defendant's prior criminal history was not a sound trial strategy, because such information necessarily has a tendency to "domina[te] decision making, swaying people to convict, regardless of what the actual evidence to support the charged conduct can establish." *Id.* at 346. Thus, the State argues a distinction without a difference, because the jury in Mr. Lacey's case still heard information that unduly influenced their verdict, just as in *McMillin*.

The State claims that *Johnson* directly supports its argument, relying on what appears to be a "comprehensive transaction" theory of severance. However, as noted in Mr. Lacey's opening brief, he is specifically *not* relying on a "comprehensive transaction" theory. (Op. Br. 12) Rather, Mr. Lacey's argument

rests on the undue prejudice he suffered by having to defend against an UPWF charge that required the State to present evidence that would otherwise be inadmissible in a trial for the other charges. (Op. Br. 12-15) Mr. Lacey's reliance on *Johnson* is for the purposes of showing, yet again, that Illinois case law demonstrates that a severance is appropriate if it would prevent the jury from being improperly informed of a defendant's unrelated prior felony convictions. *Johnson*, 2013 IL App (2d) 110535, ¶ 55. The State also argues that *Johnson* is distinguishable because Mr. Lacey's prior felony convictions would have been admissible if Mr. Lacey had testified at trial, and "there is clear indication in the record that defense counsel was making a strategic choice to not sever the charges." (St. Res. 8) At the risk of beating the proverbial dead horse, the State once again does not present any evidence in the record to support its argument that Mr. Lacey intended to testify at trial or that defense counsel's failure to sever was a matter of trial strategy. Thus, because the State's distinction of *Johnson* is irrelevant to Mr. Lacey's argument, and because it does not cite any record evidence in support of its arguments regarding Mr. Lacey's testimony or defense counsel's alleged trial strategy, this Court should ignore its discussion of *Johnson*.

Finally, the State argues that *Williams* has been abrogated, but is still a case where the court found no ineffective assistance for defense counsel's failure to sever charges. (St. Br. 8) To the extent that *Williams* has been abrogated, it was on other grounds that are irrelevant to this appeal. *See People v. Morgan*, 197 Ill. 2d 404, 449-52. *Williams* is still good law with regards to counsel's failure to sever unduly prejudicial charges, as it relies on our supreme court's decisions

in *Edwards* and *People v. Bracey*, 52 Ill. App. 3d 266. Specifically, the *Williams* court stated that the UPWF charge should have been severed, "and defense counsel's failure to secure a severance was a mistake." *Williams*, 164 Ill. App. 3d at 116. While it is true that the *Williams* court found no prejudice, Mr. Lacey cited to this case specifically to point out that Illinois case law finds defense counsel's performance to be deficient for failing to sever unduly prejudicial charges. Thus, the State's distinction here is irrelevant.

The State's arguments that defense counsel's performance were not deficient rely on distinguishable case law and a complete lack of record evidence in support. While an "all or nothing" approach may be sound trial strategy in *some* cases, there is nothing in Mr. Lacey's case to suggest that such a strategy was prudent. The State attempts to argue that Mr. Lacey's prior felony convictions would have come in at trial regardless of severance, but this is only true if Mr. Lacey intended to testify. Again, the record is devoid of any evidence that Mr. Lacey intended to testify, and the State makes no effort to show that he would have. Accordingly, this Court should find that defense counsel's performance was deficient for not following well-settled case law regarding severance of Mr. Lacey's UPWF charge.

In arguing that there was no prejudice for defense counsel's deficient performance, the State claims that there is no evidence to suggest that the jury was improperly influenced by knowledge of Mr. Lacey's unrelated prior felony, and that there was "strong evidence" to support the jury's guilty verdict on the murder charge. (St. Res. 9) Both of these claims are demonstrably false. There is a glut of evidence demonstrating that the jury was improperly influenced by

Mr. Lacey's unrelated prior felony history, and the evidence supporting the murder conviction was murky at best.

The only way it is possible to argue that there is no evidence to suggest that the jury was improperly influenced by Mr. Lacey's prior criminal history is to ignore everything that happened between the jury being sent to deliberate and returning a final verdict in this case. That is the exact strategy employed by the State here. Nowhere in the State's discussion of prejudice does it analyze, or even *recognize*, that unrelated prior felony convictions are presumptively inadmissible due to their tendency to be unduly prejudicial. (St. Res. 9-11) As was argued in the opening brief, "The mere mention of a previous felony conviction was prejudicial to Mr. Lacey, because it was other crimes evidence – which is generally prohibited by Illinois Rule of Evidence 404(b) – and might lead the jury to believe that Mr. Lacey was 'a bad person deserving punishment.' " (Op. Br. 16) (citing *People v. Lindgren*, 79 Ill. 2d 129, 137 (1980); *People v. Robinson*, 167 Ill. 2d 53, 62 (1995)) The State does not mention – let alone discuss – this section of the opening brief, suggesting that it does not contest this point.

Similarly, the State does not mention or discuss Mr. Lacey's argument that the jury's questions during deliberations provide direct evidence that not only was the jury considering Mr. Lacey's unrelated prior felony history, but that such evidence was what convinced the jury to convict when they otherwise would not have. (Op. Br. 16-17; *contra* St. Res. 9-11) As noted in the opening brief, the jury's first day of deliberations lasted for several hours. Late in the evening, the jury sent a note to the court 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; CI.97) Already, this note suggests that the jury did not believe the evidence was strong enough to support a claim that Mr. Lacey was even *present* at the scene of the crime, let alone responsible for anything that took place there. After being sent home for the night and returning for deliberations in the morning, the jury sent two more notes approximately 30 minutes into their second day of deliberations. (R.661-62; CI.99) These notes read, "What was the felony charge in 2015?" and "Transcript of Adisa Smith's testimony." (R.661-62; CI.99) After being told that they had received all the evidence in this case, the jury continued deliberating for approximately three more hours, before returning guilty verdicts on the murder and UPWF charges and hung verdicts on the remaining three charges. (R.672-76; C.13-14)

As Mr. Lacey argued in the opening brief, this evidence demonstrates that the jury was hung on all counts for over five hours of their deliberations, and only resolved the deadlock after being informed that they would not receive any *further* information about Mr. Lacey's unrelated prior felony history. (Op. Br. 16-17) Where a jury hangs on some charges and remains deadlocked for hours, the evidence is necessarily closely balanced, and any mistake – such as the admission of unrelated prior felony history – improperly influences the jury's verdict. (Op. Br. 17 (citing *People v. Lee*, 2019 IL App (1st) 162563, ¶ 67 (citing *People v. Wilmington*, 2013 IL 112938, ¶ 35 (jury's several-hour deliberations and multiple notes stating they were deadlocked indicate that the evidence was closely balanced))

This is exactly the harm that resulted from defense counsel's failure to sever the UPWF charge, because it resulted in the jury unnecessarily hearing about Mr. Lacey's unrelated prior felony history. The jury's request for specific information about Mr. Lacey's unrelated prior felony conviction is compelling evidence that the jury was using that prior conviction as improper propensity evidence during its deliberations. Again, the State does not contest or even mention this argument, and this Court should follow the obvious conclusion that the deadlocked jury was improperly influenced in reaching a guilty verdict on the murder conviction by being given information about Mr. Lacey's unrelated prior felony history. Had defense counsel simply moved to sever the UPWF charge, the jury would not have had this information available, and it is likely that Mr. Lacey would not have been found guilty of murder.

Turning to the State's only counter to Mr. Lacey's prejudice argument, it claims that, "There was strong evidence in this case to support the jury's conviction of murder." (St. Res. 9-11) The State never acknowledges that most of the evidence in this case was circumstantial, at best. Not a single person, outside of Adisa Smith, could place Mr. Lacey at the scene of the crime. Lauren Swearingen, one of the other victims in this case, testified that she never saw the faces of the men who entered her home. (R.318-19) Indeed, the faces of the two men who broke into the apartment were never seen on the video evidence presented at trial. (R.318-19) Swearingen also testified that she ingested some unidentified drug about five hours before the incident, which could have easily effected her memory of the event. (R.292-93) When asked about the intruders first kicking down her door, Swearingen

said, "Immediately I knew what was happening." (R.294) This is likely a reference to her later testimony that not only had Woods been robbed before on four separate occasions, but at least one of those robberies had happened at the same apartment at issue in this case. (R.315-16) It is certainly possible that Swearingen knew what was happening because the people who broke into her apartment were the same people who had broken in at least once before. Indeed, Swearingen testified that Woods would often go out to purchase Fentanyl, "but on rare occasions, it was a select two people that would come to us." (R.315) This is yet more evidence that two other people not only knew of the apartment, but had motive and opportunity to go back for a subsequent robbery.

Additionally, Adisa Smith's testimony is suspect; he testified to many things, including his alleged involvement in this crime. (R.361-427) In cases involving accomplice witnesses, this Court must cautiously scrutinize their testimony on appeal. *People v. Ash*, 102 Ill. 2d 485, 493 (1984) This is particularly the case when a witness "has hopes of reward from the prosecution," – like Mr. Smith's plea deal that reduced his criminal liability from four potential felony convictions down to a 10-year prison sentence – as such hopes require that this Court determine that the witness's testimony carries an "absolute conviction of its truth" before his testimony can be accepted. *Id.* (internal quotation omitted). The State notes that Smith testified to driving Mr. Lacey and an alleged accomplice to the scene of the crime, drove them to St. Louis, saw Mr. Lacey throw something into the river as they crossed the I-70 bridge, and was allegedly told by Mr. Lacey that he would kill Smith if he told anyone about what happened. (St. Res. 10-11; R.361-

427) Notably absent from the State's brief is any denial or distinguishing of the fact – as mentioned in Mr. Lacey's opening brief – that Smith openly admitted on the stand that he "lied a lot" to police, and could not be certain how many times he lied. (Op. Br. 6) (R.388)

Defense counsel walked Smith through his lies, omissions, and half-truths during cross-examination. Smith admitted that he had been drinking for several hours before he and two other men began driving around (R.367-68), suggesting that his memory of the events might not be as clear as the State would have this Court believe. Smith testified that he did not hear anything strange while waiting for Mr. Lacey and Davis to finish up whatever they were doing in the apartment (R.376), despite later testifying that he was only parked a few feet from the building. (R.405-06) Smith testified that he saw Mr. Lacey wrap something up in a shirt and throw it into the river as they crossed the bridge into St. Louis (R.377), but later waffled on when, where, or even *if* Mr. Lacey threw something out of the car. (R.402-05,411-12)

As for lying to the police, Smith admitted on cross-examination that he: (1) lied about telling police that he let Mr. Lacey and Davis borrow his truck, when he knew that he drove them around; (2) lied about telling police that he thought Davis was Mr. Lacey's cousin, when he knew that Davis is Mr. Lacey's uncle; (3) lied about telling police that he picked up "the second guy" (Davis) in East St. Louis, stating that he did not want to tell police about Davis' involvement because "I knew he wouldn't do nothing like that[;]" (4) lied about telling police that Mr. Lacey rented the truck from him; (5) misled police during a traffic stop that

he did not know of anyone who used his truck within the last few days, clearly trying to avoid discussing his involvement in the crime; (6) lied to the police by telling them that, on the day of the robbery, he took a shower and played video games the whole night because he did not want to get in trouble "for something I didn't do[;]" (7) lied to the police when he said that he gave Mr. Lacey the keys to his truck on the night of the murder; (8) lied to police when he told them that Mr. Lacey brought the truck to his home around 9 or 10 pm; (9) lied to police when he told them he was sleeping when the truck was returned, and his brother woke him to give him the keys; and (10) lied to police when he told them he had no idea who Mr. Lacey's "cousin" was, where he knew that the additional passenger was not Mr. Lacey's cousin, but, in fact, his uncle. (R.361-427)

In addition to the outright lies that Smith told police, there was a legitimate question at trial as to how much he remembered of the night in question. Smith testified that he told police during a ride along that he dropped Mr. Lacey and Davis off in the apartment complex (R.372-74), but the surveillance video shows that the passengers exited the vehicle near a house *well outside* of the apartment. (People's Exhibit 45A) Smith initially testified that Mr. Lacey never instructed him to drive to the Ameristar casino. (R.409) When Smith was confronted with his statement to police that Mr. Lacey asked Smith to drive to the casino, Smith said, "Oh, yeah, I did say that. You right." (R.409) Smith initially testified that he could not remember the location of the gas station he drove to on the night of the murder, because Mr. Lacey was the one giving him directions. (R.409) When defense counsel reminded Smith that he had led detectives to the gas station during

their ride along, Smith suddenly remembered where the gas station was. (R.409-10) Smith later testified that he and Mr. Lacey had known each other since high school (approximately 10 years) and they were hanging out together all day, but that he could not remember Mr. Lacey's last name. (R.418-19)

Smith even agreed that his testimony was not credible, based on the story he had come up with to explain his involvement in the murder. On cross-examination, the following exchange occurred between Smith and defense counsel:

> Defense counsel: So when somebody says, I'll kill ya, but I'll give you some weed, you know, it'll be alright, that's fine with you?
>
> Smith: I'm not saying that
>
> Defense counsel: Is that what happened, or is that not what happened.
>
> Smith: That's what happened. (R.414)

Smith also admitted that his testimony was less than credible, because he was receiving a substantial deal in exchange for his testimony. In fact, after acknowledging that his initial charges – four counts of murder, one count of armed robbery, and one count of home invasion – were all dismissed in exchange for a guilty plea to the armed robbery charge and 10-year DOC sentence, Smith agreed with defense counsel that he was, "getting one heck of a deal." (R.423)

Despite the many inconsistencies, lies, and omissions from Smith, as well as the questions raised by Swearingen's testimony, the State still asserts that, "There was strong evidence in this case to support the jury's conviction of murder." (St. Res. 9) However, the State's evidence was not strong enough to prevent the jury from being deadlocked 10-2 on all counts for over six hours, with the two holdouts not believing that Mr. Lacey was even *present* at the scene. The State's

evidence was not strong enough to prevent the jury from requesting to hear specific information about Mr. Lacey's unrelated prior felony history in order to resolve the deadlock. The State's evidence was not strong enough to overcome Mr. Lacey's argument that, but-for counsel's failure to sever the UPWF charge, the jury likely would not have convicted him of the murder charge.

The State's arguments regarding a potential "all-or-nothing" trial strategy are little more than speculation. There is no evidence in the record to suggest that defense counsel believed he had a better chance of an acquittal on all charges in one trial than multiple trials, nor does the State provide any. It is a near certainty that a motion to sever – had counsel filed one – would have been granted, which would have ultimately prohibited any mention of Mr. Lacey's prior felonies at trial. The only way that this information would have come in is if Mr. Lacey had made the decision to testify, and there is simply no indication in the record – nor any evidence provided by the State – that he was ever going to testify. The jury's notes to the court during its deliberations demonstrate deadlock as to whether Mr. Lacey was even at the scene of the crime, let alone culpable for any actions therein. However, once the jurors started asking questions about Mr. Lacey's prior felony conviction, the matter was quickly resolved. The State never contests that the jury's knowledge of Mr. Lacey's prior felony history improperly effected their judgment during deliberations, except to generally argue that there is no evidence in the record to support such a claim. However, the evidence in the record clearly demonstrates not only that the evidence was closely balanced, but that defense counsel's failure to sever the UPWF charge allowed the jury to hear evidence of

a prior felony that they otherwise would not have. Once that factor was taken into consideration by the jury, they quickly reached a verdict. Had defense counsel simply moved to sever this charge, the motion almost certainly would have been granted and the jury would not have heard this unduly prejudicial information that ultimately led to Mr. Lacey being convicted of murder. Thus, because defense counsel's failed to file a motion with an near certainty of success, Mr. Lacey was ultimately convicted of murder, when he otherwise likely would not have been. Accordingly, Mr. Lacey asks that this Court vacate his convictions and remand his cause for new and separate trials.

CONCLUSION

For the foregoing reasons, George E. Lacey, defendant-appellant, respectfully requests that this Court vacate his convictions and remand his cause for new and separate trials.

Respectfully submitted,

ELLEN J. CURRY
Deputy Defender

CHRISTOPHER SIELAFF
Assistant Appellate Defender
Office of the State Appellate Defender
Fifth Judicial District
909 Water Tower Circle
Mt. Vernon, IL 62864
(618) 244-3466
5thdistrict.eserve@osad.state.il.us

COUNSEL FOR DEFENDANT-APPELLANT

CERTIFICATE OF COMPLIANCE

I certify that this reply brief conforms to the requirements of Rules 341(a) and (b). The length of this reply brief, excluding pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, and the certificate of service, is 19 pages.

/s/ Christopher Sielaff
CHRISTOPHER SIELAFF
ARDC No. 6333356
Assistant Appellate Defender

No. 5-22-0050

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH JUDICIAL DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the Third Judicial Circuit, Madison County, Illinois
Plaintiff-Appellee,	)	
	)	20-CF-2969
-vs-	)	
	)	
GEORGE E. LACEY,	)	Honorable Kyle Knapp,
Defendant-Appellant.	)	Judge Presiding.

NOTICE AND PROOF OF SERVICE

TO: Mr. Patrick D. Daly, Deputy Director, State's Attorneys Appellate Prosecutor, 4114 North Water Tower Place, Suite C, Mt. Vernon, IL 62864, 05dispos@ilsaap.org

Mr. George E. Lacey, Register No. B90013, Menard Correctional Center, P.O. Box 1000, Menard, IL 62259

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. On February 23, 2023, the Reply Brief was filed with the Clerk of the Appellate Court using the court's electronic filing system in the above-entitled cause. Upon acceptance of the filing from this Court, persons named above with identified email addresses will be served using the court's electronic filing system and one copy is being mailed to the appellant in an envelope deposited in a U.S. mail box in Mt. Vernon, Illinois, with proper postage prepaid.

/s/ Debra Zurliene
LEGAL SECRETARY
Office of the State Appellate Defender
Fifth Judicial District
909 Water Tower Circle
Mt. Vernon, IL 62864
(618) 244-3466
5thdistrict.eserve@osad.state.il.us

APPENDIX F

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APPELLATE COURT 5TH DISTRICT

No. 5-22-0050

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH JUDICIAL DISTRICT

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, -vs- GEORGE E. LACEY, Defendant-Appellant.	)))))))))	Appeal from the Circuit Court of the Third Judicial Circuit, Madison County, Illinois 20-CF-2969 Honorable Kyle Knapp, Judge Presiding.

PETITION FOR REHEARING FOR DEFENDANT-APPELLANT

JAMES E. CHADD
State Appellate Defender

ELLEN J. CURRY
Deputy Defender

CHRISTOPHER SIELAFF
Assistant Appellate Defender
Office of the State Appellate Defender
Fifth Judicial District
909 Water Tower Circle
Mt. Vernon, IL 62864
(618) 244-3466
5thdistrict.eserve@osad.state.il.us

COUNSEL FOR DEFENDANT-APPELLANT

ARGUMENT

I. This Court did not give proper consideration to several points of fact in its Rule 23 order.

In its Rule 23 order, this Court did not give proper consideration to several facts that were material to its determination. Pursuant to Illinois Supreme Court Rule 367(b), petitioner-appellant George Lacey calls these facts to this Court's attention, in the order in which they appear, as follows:

Paragraph 6: This Court's order states that, "defense counsel filed a motion *in limine* to preclude the use of the prior conviction for impeachment of credibility of the defendant and argued that the defendant's prior conviction was prejudicial and had no bearing on credibility." This portion of the order neglects to mention that the motion additionally argued that the State would use Mr. Lacey's prior conviction for the improper purpose of demonstrating his propensity to commit other crimes. (C.97) This propensity argument immediately follows defense counsel's arguments regarding prejudice and credibility. (C.97) In fact, the propensity argument is in the same sentence as the prejudice and credibility arguments, demonstrating that any discussion of propensity can not be separated from the prejudice and credibility arguments. This additional argument is critical to any discussion of this case, as Mr. Lacey argued in briefing and oral argument that the failure of defense counsel to sever the charges allowed the jury to improperly consider his prior conviction as propensity evidence. (Op. Br. 10-18; Rep. Br. 2-13, 16-18)

Paragraph 7: This Court's order states that defense counsel argued at the hearing on the motion *in limine* to preclude Mr. Lacey's prior felony conviction that the prior conviction could be used as propensity evidence. However, defense counsel not only argued that the prior convictions could be used as propensity evidence, but that it would *not* be used for credibility purposes. (R.50) This Court's order makes it appear that defense counsel was only arguing that the introduction of Mr. Lacey's prior conviction at trial would be improper because it would *also* demonstrate propensity, when defense counsel was actually arguing that the prior conviction would *exclusively* demonstrate propensity and not be used for credibility purposes. This is critical to Mr. Lacey's case, as he argued in briefing and oral argument that defense counsel knew or should have known that the joinder of the unlawful possession of a weapon by a felon ("UPWF") charge would have an unduly prejudicial effect on the jury at trial, but failed to do the one thing that would have cured this error: severing the charge from the remaining counts. (Op. Br. 12-15; Rep. Br. 4-5, 8-9)

Additionally, this Court's order also states that, after being questioned by the circuit court about whether he would include the UPWF charge at trial, "[d]efense counsel indicated that he would defend the charge at trial and stipulated to the fact that the defendant was a convicted felon, without mentioning the underlying armed robbery offense." Defense counsel did not state at the hearing that he would include the UPWF charge at trial. (R.50-51) This fact is crucial, as there is no evidence in the record - and none was provided in the State's brief or this Court in its order - that the failure to sever the UPWF

charge was part of defense counsel's trial strategy. Indeed, Mr. Lacey argued in briefing and at oral argument that Illinois case law demonstrates that the failure to sever the UPWF charge could not be part of any competent trial strategy in his case. (Op. Br. 11-15; Rep. Br. 1-9)

Paragraph 9: This Court's order states that the circuit court confirmed with defense counsel that he was proceeding with the inclusion of the UPWF charge, and reiterated the limitations on the State's use of Mr. Lacey's prior conviction at trial. However, on the page before this discussion in the record, the circuit court stated that it had, "asked the fourth *Zehr* question ... at [defense counsel]'s request." (R.111) The fourth *Zehr* question asks the jury if they both understand and accept that a defendant's decision not to testify can not be held against them. Ill. S. Ct. Rule 431(b). This fact is critical, because the case law that the State cited in support of its "all or nothing" trial strategy relied on the defendants in those cases testifying at trial; while Mr. Lacey noted extensively in his reply brief that there was no indication he was going to testify at trial, and, in fact, he did not testify. (Rep. Br. 4-9) The fact that defense counsel specifically requested that the jury receive the fourth *Zehr* shows not only the lack of any evidence that Mr. Lacey would testify at trial, but in fact affirmatively shows that it was part of the trial strategy to *not* have Mr. Lacey testify at trial.

II. This Court overlooked or misapprehended several points of law in its Rule 23 order.

Paragraph 41: This Court's order describes the trial strategy exception to ineffective assistance of counsel, and the presumption that defense counsel's actions are generally considered, "the product of sound trial strategy and not incompetence." In so stating, this Court relies on its decision in *People v. Tucker*, 2017 IL App (5th) 130576, ¶ 26. This citation accurately reflects the legal standard stated by the Court. However, this Court's decision in *Tucker* actually supports Mr. Lacey's argument on appeal. This Court ultimately held in *Tucker* that defense counsel's performance was deficient, because his decisions were not based on any competent trial strategy. *Id.* at ¶¶ 33-37. In *Tucker*, the defendant testified, and defense counsel asked him to explain his prior felony conviction to the jury. *Id.* at ¶ 34. This Court held that there was no reasonably competent strategy in defense counsel allowing the jury to be informed of a prior felony conviction, because, "Our courts have voiced concerns that providing proof of an accused's 'penchant for criminal behavior would control the decision-making process, resulting in convictions based upon past guilt instead of current evidence.'" *Id.* at ¶ 35 (citing *People v. Fletcher*, 335 Ill. App. 3d 447, 449 (5th Dist. 2002)). *Tucker* ultimately resulted in reversal and remand for an evidentiary hearing on the defendant's ineffective assistance claims. *Id.* at ¶¶ 60-61. Thus, while *Tucker* does adequately lay out the legal standards for the trial strategy exception, it also clearly aligns with Mr. Lacey's argument that his attorney was ineffective for allowing the jury to hear evidence

of his prior felony conviction.

Paragraph 43: This Court's order states that *People v. Edwards*, 63 Ill. 2d 134 (1976) is distinguishable from Mr. Lacey's case, because *Edwards* did not involve any issue of ineffective assistance of counsel. While it is true that the procedural posture of *Edwards* is different than Mr. Lacey's argument on appeal, this is a distinction without a difference. As Mr. Lacey argued in detail, both in briefing and at oral argument, defense counsel's failure to sever the UPWF charge from the remaining charges represented deficient performance specifically because *Edwards* holds that it would have been an abuse of the court's discretion to deny the severance. (Op. Br. 11-15; Rep. Br. 1-9)

As this Court noted in the sentence immediately preceding its distinction of the procedural postures in Mr. Lacey's case and *Edwards*, the supreme court found that the denial of a severance was an abuse of discretion because, "the joinder of the armed robbery and the felonious unlawful use of a weapon charges *created such a strong probability 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." *Lacey*, 2023 IL App (5th) 220050-U, ¶ 43 (quoting *Edwards*, 63 Ill. 2d at 140) (emphasis added). While ineffective assistance may not have been the issue *du jour* in *Edwards*, the inherent prejudice to a defendant defending against UPWF and armed robbery charges in the same trial most certainly was. Defense counsel knew or should have known that a nearly 50-year-old precedent would have been on his side in a motion to sever, but failed to do so for no conceivable reason. Thus, the

distinction this Court makes between the reasoning in *Edwards* and the facts of Mr. Lacey's case is, while technically accurate, functionally irrelevant.

Paragraphs 44 and 45: This Court's order states that, while trial strategy may serve as an exception to deficient performance, any trial strategy is unsound, "where no reasonably effective criminal defense attorney, confronting trial's circumstances, would engage in similar conduct." *People v. McMillin*, 352 Ill. App. 3d 336, 344 (5th Dist. 2004). This Court additionally noted that an "all or nothing" strategy being ultimately unsuccessful does not necessarily indicate that it was the result of deficient performance, as the strategy has been endorsed to avoid "an evidentiary deficiency" between severed cases, or in the hopes that "the impact of the additional conviction would not be significant." *People v. Fields*, 2017 IL App (1st) 110311-B; *People v. Poole*, 2012 IL App (4th) 101017; *People v. Gapski*, 283 Ill. App. 3d 937 (2d Dist. 1996).

As Mr. Lacey argued in his reply brief and at oral argument, none of the stated benefits of the "all or nothing" trial strategy applied to his case. (Rep. Br. 2-9) The State offered no explanation or evidence in the record to demonstrate what, if any, evidentiary deficiency would have been corrected between severed trials. This is likely because there was *no* evidentiary issue that would have been corrected between severed trials. Additionally, the State never explained how the impact of Mr. Lacey's unrelated prior felony charge was somehow not a significant factor in this case. This is likely because there is no good-faith position from which to argue that the unnecessary joinder of these charges is not what ultimately resulted in Mr. Lacey being convicted of first-degree murder,

when he otherwise likely would have been acquitted.

Additionally, this Court did not address Mr. Lacey's arguments regarding his decision not to testify in this case. Such a consideration is crucial, because the reasoning in *Gapski* - that the defendant's prior felony conviction would have been admissible at trial despite a severance - was central to the disposition of that case. As Mr. Lacey noted in his briefing and at oral argument, the Court in *Gapski* found that severance could be viewed as a matter of trial strategy, because it was clear from the record that the defendant was going to testify, and therefore could be impeached with a prior conviction pursuant to *People v. Montgomery*, 47 Ill. 2d 510 (1971). (Rep. Br. 5-6 (citing *Gapski*, 283 Ill. App. 3d at 943-944)) In this case, there is no evidence to support the contention that Mr. Lacey ever planned to testify. Indeed, as noted when discussing Paragraph 9 of this Court's decision, the circuit court stated that it asked potential jurors the fourth *Zehr* question at defense counsel's request, indicating that not only was there doubt that Mr. Lacey would testify, but there is reason to believe that part of defense counsel's strategy was for Mr. Lacey to remain silent at trial. With this in mind, had defense counsel filed a motion to sever the UPWF charge from the remaining charges - a motion that *Edwards* says would have been an abuse of the circuit court's discretion to deny - the only way Mr. Lacey's prior felony conviction could come in at trial is if he testified, which the record strongly suggests was never going to happen. Thus, defense counsel's failure to sever not only provided no benefit, but allowed the jury to hear evidence of a prior conviction that otherwise would not have been admissible at trial. While

there may be some cases where not severing these types of charges could be considered trial strategy, in Mr. Lacey's case, "no reasonably effective criminal defense attorney, confronting trial's circumstances, would engage in similar conduct." *McMillin*, 352 Ill. App. 3d at 344.

Paragraph 46: This Court's order states that, prior to trial, defense counsel twice confirmed that he was proceeding with the UPWF charge; and attempted to minimize the impact of Mr. Lacey's prior felony conviction by agreeing to a stipulation that the conviction existed, without informing the jury of any details. The Court then goes on to state, "The defense counsel's decision to stipulate to the prior felony indicates that the decision not [to] seek a severance of the felony claims was a matter of trial strategy." This conclusion misreads the record in this case, as there is nothing in the record to indicate that defense counsel's decision to defend against all the charges in a single trial was the result of any sort of strategy.

This Court's order points to defense counsel's statements at the motion *in limine* hearing and jury selection as evidence that he made a conscious decision to try the cases together based on an "all or nothing" trial strategy. However, defense counsel's statements were merely responsive to the circuit court's questions, and do not demonstrate or affirmatively state any sort of trial strategy. At the motion *in limine* hearing, defense counsel argued that Mr. Lacey's prior conviction for armed robbery could be used as propensity evidence by the State. (R.50) The State responded that it would only use the prior conviction for credibility and not propensity, and that the introduction of

the prior conviction was necessary as an element of the UPWF charge. (R.50-51) The court asked defense counsel if he would include the UPWF charge, and defense counsel responded that he would be willing to stipulate to the fact of the conviction without mentioning the underlying offense. (R.51) The court then went on to discuss its reasoning for allowing the prior conviction to come in at trial, including the fact that defense counsel was willing to stipulate to the fact of the conviction. However, notably absent from this section is any statement by counsel that this was the result of a strategic decision, and there is certainly no discussion of limiting evidentiary deficiencies between severed trials or a statement that the impact of Mr. Lacey's unrelated prior conviction would not be significant at the single trial.

Similarly, at the sidebar during jury selection, the circuit court noted that defense counsel had stated that he would continue with the UPWF charge at trial by stipulating to Mr. Lacey's prior conviction without addressing any factual details. (R.112-13) Here, defense counsel did not state this on the record, but rather, he simply agreed with the court's discussion of the issue. (R.112-13) As with the statements made during the motion *in limine* hearing, defense counsel never stated that this was a part of any trial strategy, nor did he discuss any of the stated reasons for employing the "all or nothing" trial strategy. Instead, defense counsel was simply agreeing that the charges would be tried in a single trial. There is simply no affirmative evidence that defense counsel's decision to try the charges together was part of any conscious trial strategy, let alone the so-called "all or nothing" trial strategy.

Paragraph 47: This Court's order states that defense counsel employed the "all or nothing" trial strategy to argue that there was insufficient evidence to place Mr. Lacey at the crime scene during the time of the murder. This Court discusses some of the defense's theory of the case, then states, "Perhaps defense counsel considered that it made sense to try for an acquittal on all counts in one proceeding where the impact of an unknown prior conviction may not be significant considering that the defendant's fingerprint was found at a location associated with illegal drug activity."

First, this Court ignores Mr. Lacey's theory that not only was there insufficient evidence to place him at the scene of the murder, but that the testimony of State's eye-witness - Adisa Smith - was anything other than credible. This is significant, because he was the only person outside of Lauren Swearingen who allegedly saw anyone at the murder scene. As Mr. Lacey noted in detail in his briefing and at oral argument, Smith lied to the police nearly as many times as he told the truth, if not more. (Rep. Br. 13-16) Additionally, Smith admitted that he was getting "one heck of deal", receiving a plea deal for ten years and dismissal of several charges in exchange for his incredible testimony. (R.423) Thus, not only did Mr. Lacey attempt to show that any evidence placing him at the scene was insufficient, but that Smith's alleged eye-witness testimony should be disregarded as untrustworthy and likely based on "one heck of a deal."

Second, no part of this paragraph analyzes why this strategy would have been sound, when defense counsel could have just as easily moved to sever the

charges and eliminated any possibility of prejudice from his unrelated prior felony conviction. The fact that defense counsel had a theory of the case that suggested Mr. Lacey was not at the home at the time of the murder does not, in any way, suggest that the jury hearing about his unrelated prior felony conviction would somehow not be prejudicial. As Mr. Lacey noted in briefing, the reason to sever an UPWF charge from other charges is to prevent the jury from being improperly lead to believe that a defendant is, "a bad person deserving punishment." (Op. Br. 16; Rep. Br. 10 (quoting *People v. Lindgren*, 79 Ill. 2d 129, 137 (1980)) Indeed, as Mr. Lacey pointed out in his reply brief, the First District in *Fields* quoted the circuit court's decision to grant the defense's motion barring admission of the defendant's prior convictions, stating it "could not envision a fair trial if the prior convictions were ruled admissible." (Rep. Br. 4 (quoting *Fields*, 2017 IL App (1st) 110311-B, ¶ 4)) The Court in *Fields* went on to cite *Edwards*, noting that, "The case law suggests the motion to sever would have been granted if counsel had made one." (Rep. Br. 4 (quoting *Id.*))

Additionally, to reiterate the points regarding Paragraphs 44 and 45 of this Court's order, the lack of testimony by Mr. Lacey is crucial to determining whether the "all or nothing" trial strategy was unsound in this case. The State argued that, had defense counsel successfully moved to sever the UPWF from the remaining charges, Mr. Lacey's unrelated prior felony conviction could have come in if he testified. (St. Br. 5-6) However, there is no indication that Mr. Lacey was going to testify, and there is evidence to suggest that it was a part of defense counsel's trial strategy to have Mr. Lacey not testify. As

discussed above, the circuit court read the potential jurors the fourth *Zehr* question at defense counsel's request. (R.50) This suggests that defense counsel was aware that Mr. Lacey would not testify, meaning his prior conviction would not have come in for credibility purposes. Under this reading, the only way the prior conviction would come in was if the UPWF was not severed from the remaining charges. So the question necessarily becomes, "if defense counsel knew that Mr. Lacey would not testify and his prior conviction would only come in as a stipulation, why not simply sever the charges and prevent the jury from hearing about the prior conviction at all?" In fact, the State's proffered reasoning and this Court's ultimate basis for affirming Mr. Lacey's conviction - the so-called "all or nothing" trial strategy - naturally begs this question. The simplest and most logical answer to this question is that there was no benefit to a single trial, especially where well-settled case law would have almost certainly required the circuit court to grant a motion to sever.

Finally, this Court's order suggests that defense counsel may have thought that the impact of Mr. Lacey's prior conviction would have had little impact, given that his fingerprint was found at the scene. However, the fact that Mr. Lacey's fingerprint was found at the scene should have had no impact on whether his unrelated prior felony conviction would have been prejudicial to the jury during its deliberation on the other charges. In fact, the opposite is true. It would have been sound trial strategy to sever the UPWF charge in this case specifically to prevent the jury from being unduly prejudiced by the idea that Mr. Lacey was "a bad person deserving punishment." (Op. Br. 16; Rep. Br. 10

(quoting *People v. Lindgren*, 79 Ill. 2d 129, 137 (1980)) Where there was fingerprint evidence tending to put Mr. Lacey at the murder scene, then there was *certainly* no reason to also inform the jury that he had an unrelated prior felony conviction; *especially* where a motion to sever the UPWF and prevent any mention of the prior conviction would have almost certainly been granted as a matter of well-settled case law.

Additionally, while this Court's order did not determine whether Mr. Lacey was prejudiced by defense counsel's obviously deficient performance, the fingerprint issue demonstrates that the outcome at trial would likely have been different had defense counsel simply severed the UPWF charge before trial. The jury's first question to the court during deliberations stated, "The jurors are currently 10-2 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*." (CI 97) (emphasis added) After the jurors returned the next day for further deliberations, they specifically asked for details of the felony charge and a transcript of Adisa Smith's testimony. (CI 99) The record clearly shows that the jury was hung on all charges *specifically because* they did not believe that a fingerprint was enough to connect Mr. Lacey to the murder. The record further shows that, while trying to break this tie, the jury believed that *more* information about Mr. Lacey's unrelated prior felony conviction would help them reach a verdict. This is compelling evidence that not only was the jury focused on Mr. Lacey's unrelated prior felony conviction, but that it's unduly prejudicial influence is what resulted in his ultimate conviction. Had defense counsel

simply moved to sever the UPWF charge before trial, the conviction would not have come in at trial, and the jury would not have been allowed to rely on the old adage of "once a criminal, always a criminal." Instead, defense counsel made the unsound decision of failing to file a severance motion that almost certainly would have been granted, and this decision directly led to Mr. Lacey's convictions in this case.

Summary

There was no trial strategy in failing to sever Mr. Lacey's UPWF charge from his remaining charges. Well-settled case law was on the side of a severance motion by defense counsel, as it would have been an abuse of the trial court's discretion to deny such a motion. There was no benefit to Mr. Lacey in joining the UPWF charge with the remaining charges; as there is no indication of any evidentiary deficiency that would have been cured at a separate trial, and the impact of Mr. Lacey's unrelated prior felony conviction was obviously going to unduly prejudice the jury during deliberations. The State provided no evidence to support its "all or nothing" trial strategy argument, and the evidence clearly shows that it does not apply to this case. Additionally, although this Court did not analyze whether Mr. Lacey was prejudiced by defense counsel's failure to sever the UPWF charge, the record clearly indicates that Mr. Lacey's unrelated prior felony conviction was a primary basis for the jury's verdict in this case, and he would more likely than not have been acquitted had defense counsel severed the UPWF charge.

Accordingly, rehearing is necessary to acknowledge that defense counsel's

performance was deficient in failing to sever the UPWF charge, and to determine whether Mr. Lacey was prejudiced by that failure.

CONCLUSION

For the foregoing reasons, George E. Lacey, defendant-appellant, respectfully requests that this Court reconsider its order, and either set this cause for additional proceedings, or modify its order so as to grant the relief requested in his opening and reply briefs.

Respectfully submitted,

ELLEN J. CURRY
Deputy Defender

CHRISTOPHER SIELAFF
Assistant Appellate Defender
Office of the State Appellate Defender
Fifth Judicial District
909 Water Tower Circle
Mt. Vernon, IL 62864
(618) 244-3466
5thdistrict.eserve@osad.state.il.us

COUNSEL FOR DEFENDANT-APPELLANT

CERTIFICATE OF COMPLIANCE

I certify that this petition conforms to the requirements of Supreme Court Rule 341(a) and 367(a) and (c). The length of this petition, excluding the pages or words contained in the Rule 341(d) cover, the Rule 367(a) certificate of compliance, and the certificate of service, is 16 pages.

/s/ Christopher Sielaff
CHRISTOPHER SIELAFF
ARDC No. 6333356
Assistant Appellate Defender

No. 5-22-0050

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH JUDICIAL DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the Third Judicial Circuit, Madison County, Illinois
Plaintiff-Appellee,	)	
	)	20-CF-2969
-vs-	)	
	)	
GEORGE E. LACEY,	)	Honorable Kyle Knapp,
Defendant-Appellant.	)	Judge Presiding.

NOTICE AND PROOF OF SERVICE

TO: Mr. Patrick D. Daly, Deputy Director, State's Attorneys Appellate Prosecutor, 4114 North Water Tower Place, Suite C, Mt. Vernon, IL 62864, 05dispos@ilsaap.org

Mr. George E. Lacey, Register No. B90013, Menard Correctional Center, P.O. Box 1000, Menard, IL 62259

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. On September 12, 2023, the Petition for Rehearing was filed with the Clerk of the Appellate Court using the court's electronic filing system in the above-entitled cause. Upon acceptance of the filing from this Court, persons named above with identified email addresses will be served using the court's electronic filing system and one copy is being mailed to the appellant in an envelope deposited in a U.S. mail box in Mt. Vernon, Illinois, with proper postage prepaid.

/s/ Debra Geggus
LEGAL SECRETARY
Office of the State Appellate Defender
Fifth Judicial District
909 Water Tower Circle
Mt. Vernon, IL 62864
(618) 244-3466
5thdistrict.eserve@osad.state.il.us

APPENDIX G

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Respondent-Appellee, -vs- GEORGE E. LACEY, Petitioner-Appellant.	)	Petition for Leave to Appeal from the Appellate Court of Illinois, Fifth Judicial District, No. 5-22-0050 There heard on Appeal from the Circuit Court of Madison County, Illinois, No. 20-CF-2969. Honorable Kyle Knapp, Judge Presiding.

PETITION FOR LEAVE TO APPEAL

JAMES E. CHADD
State Appellate Defender

ELLEN J. CURRY
Deputy Defender

CHRISTOPHER SIELAFF
Assistant Appellate Defender
Office of the State Appellate Defender
Fifth Judicial District
909 Water Tower Circle
Mt. Vernon, IL 62864
(618) 244-3466
5thdistrict.eserve@osad.state.il.us

COUNSEL FOR PETITIONER-APPELLANT

E-FILED
10/27/2023 1:03 PM
CYNTHIA A. GRANT
SUPREME COURT CLERK

PETITION FOR LEAVE TO APPEAL

PRAYER FOR LEAVE TO APPEAL

George E. Lacey, petitioner-appellant, hereby petitions this Court for leave to appeal, pursuant to Supreme Court Rules 315 and 612, from the judgment of the Appellate Court, Fifth Judicial District, affirming his conviction for first-degree murder and possession of a weapon by a felon and his sentence of 52 years in the Department of Corrections and 3 years of mandatory supervised release imprisonment.

PROCEEDINGS BELOW

The appellate Court affirmed George E. Lacey's conviction on August 22, 2023. The appellate court denied Mr. Lacey's petition for rehearing on September 18, 2023. A copy of the appellate court's judgment is appended to this petition.

COMPELLING REASONS FOR GRANTING REVIEW

Is it ever reasonable for counsel to reveal a criminal defendant's otherwise unrelated criminal history to the jury as a matter of strategy? This question needs to be resolved in order to correct a split in the appellate court. *See People v. Lewis*, 240 Ill. App. 3d 463, 469 (1st Dist. 1992); *People v. Karraker*, 261 Ill. App. 3d 942, 953 (3d Dist. 1994); *But see People v. Gapski*, 283 Ill. App. 3d 937 (2d Dist. 1996); *People v. Poole*, 2012 IL App (4th) 101017; *People v. Fields*, 2017 IL App (1st) 110311-B.

Certainly, this Court has made clear in *Edwards*, that a trial court would be required to sever unlawful possession of a weapon by a felon (UPWF) charges in order to avoid handing the jury such highly prejudicial evidence out of a fear that it would be persuasive for all the wrong reasons. Now, the appellate court has held that counsel's failure to sever the UPWF charge from the other counts is sound trial strategy, even though the jury would have otherwise been shielded from the defendant's prior criminal history. How is it possible for counsel's actions to be reasonable, when this Court has already held that it would be reversible error for the trial court to prohibit such a strong possibility of undue prejudice?

While this Court has previously endorsed the "all-or-nothing" trial strategy - where defense counsel attempts to get an acquittal on all charges at a single trial, *People v. Barnard*, 104 Ill. 2d 218, 231-32 (1984) – the strategy occurred in the context of lesser-included offenses. *Id.* In other words, the jury in *Barnard* was always going to hear that the defendant had a criminal

conviction, and the appellate court's adoption of *Barnard* in Mr. Lacey's context stands in opposition to the reasoning and holding of this Court in *Edwards*. The appellate courts that have found deficient performance have applied the "all-or-nothing" strategy's justifications – preventing the State from curing evidentiary deficiencies from one trial to another, hoping the impact of an additional conviction will be minimal, and minimizing the impact of unrelated prior felonies by stipulating to their existence without providing details – to the facts of the case and found that the defendant was still prejudiced at trial by the failure to sever. *See People v. Lewis*, 240 Ill. App. 3d 463, 469 (1st Dist. 1992) ("We can conceive of no legitimate trial strategy in defense of counsel's failure to move for a severance. Instead, we are struck by the distinct disadvantage defendant suffered from the joint trial."); *People v. Karraker*, 261 Ill. App. 3d 942, 953 (3d Dist. 1994). By contrast, the appellate courts that have found no deficient performance relied on the reasoning that this Court's decision in *Edwards* did not address ineffective assistance of counsel, and therefore did not require a finding of deficient performance for failure to sever. *People v. Gapski*, 283 Ill. App. 3d 937 (2d Dist. 1996); *People v. Poole*, 2012 IL App (4th) 101017; *People v. Fields*, 2017 IL App (1st) 110311-B.

Accordingly, guidance is needed from this Court to resolve the split as well as guidance as to how *Edwards* and *Barnard* can be applied in harmony. Mr. Lacey respectfully requests that this Court grant leave to appeal to determine whether it is ever sound strategy to fail to file a motion to sever, and if so, whether it was sound strategy in his case.

Alternatively, Mr. Lacey requests that this Court grant a supervisory order finding that defense counsel's failure to sever his UPWF charge was clearly deficient performance based on the facts of his case, and remand his cause to the appellate court for consideration of whether defense counsel's failure to file said motion resulted in prejudice at trial.

STATEMENT OF FACTS

Mr. George Lacey was charged by information with four counts of first degree murder, and one count each of home invasion, armed robbery, and unlawful possession of a weapon by a felon ("UPWF") on November 24, 2020. (C.18-19) Mr. Lacey was convicted of one count of first-degree murder and UPWF on October 15, 2021. (C.13-14)

Darien Woods was killed after a break in to the apartment that he and Lauren Swearingen shared. (R.295-96) The two men who entered the apartment wore Covid masks, and Swearingen could only tell that the men were black by looking at their exposed hands. (R.294-95) No one ever saw the faces of the men that entered the home. A video camera installed outside of the apartment captured video of the men, but their faces are not clearly visible. (R.306) Swearingen testified that she did not get a good look at either man who entered the apartment other than their clothing, that it was fair to say she could not identify the two men, and that she had never seen Mr. Lacey except during court appearances. (R.318-19)

Adisa Smith testified that he spent the earlier part of that day drinking with Mr. Lacey, Mr. Lacey's uncle (Demandrell Davis), Smith's mechanic, and the mechanic's nephew. (R.366) Smith testified that Mr. Lacey offered him $50 for a ride to Collinsville to pick up marijuana. (R.370) Smith testified that he drove Mr. Lacey and Davis to Collinsville, with Mr. Lacey providing directions along the way. (R.370-71) Smith testified that he dropped Mr. Lacey and Davis off at a set of apartment buildings per Mr. Lacey's instructions, and waited for

approximately five minutes before Mr. Lacey and Davis returned. (R.375-76) Smith testified that Mr. Lacey was a holding a bag that smelled like marijuana, and he told Smith to drive to St. Louis. (R.376-77) Along the way, Mr. Lacey allegedly threw something off of the bridge as they traveled into St. Louis, but Smith never saw what it was. (R.377) Smith admitted to several lies - both direct and by omission - that he told to police during their investigation of the shooting. (R.383-423) Smith also agreed that he had accepted a plea deal to dismiss four charges, including accessory to murder, and a 10-year sentence for armed robbery. (R.385-87) Smith further admitted that he was "getting one heck of a deal" as a result of his plea. (R.423)

Prior to trial, defense counsel had agreed to stipulate to Mr. Lacey's 2015 prior felony conviction without mentioning any details of the underlying offense. (R.50-51) The parties again confirmed during jury selection that the defense would stipulate to the prior felony conviction. (R.112-13) At the close of evidence, the State admitted the stipulation without objection. (R.451-52) The stipulation was accompanied by a certificate from the Circuit Clerk of St. Clair County (E. 170-71)

Jury Question #1

At approximately 8:10 p.m., the jury sent a question to the court 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; CI.97) All parties agreed to send the jury home for the night and to resume deliberations in the morning. (R.652-

54) The jurors were brought into the courtroom, read IPI 26.09 regarding breaking during deliberations, and sent home for the night. (R.654-57; CI.98) The jury continued their deliberations on October 15, 2021, at approximately 9:30 am. (R.660)

Jury Question #2

The jury sent a two-part question to the court at approximately 10:05 a.m. (R.661-62; CI.99) The first question read, "What was the felony charge in 2015?" and the second question read, "Transcript of Adisa Smith's testimony." (R.661-62; CI.99) As to the first question, the court instructed the jury that they have received all of the evidence in the case. (R.663; CI.100) As to the second question, the court instructed the jury to go off of their recollections. (R.664-65; CI.100)

Jury Question #3

The jury sent a third question to the court at approximately 12:25 p.m. (R.665; CI.101) The question read, "What happens if we agree on two counts but are hung on the remainder?" (R.665; CI.101) The court said it would not do any good to read the *Primm* instruction at this point due to the time the jury had already spent deliberating. (R.665-66) The State proposed having the jury sign the agreed-upon verdict forms and leaving the remaining forms blank, and the defense asked for more time for the jury to deliberate. (R.666-67) The court said it would allow the jury to have lunch before deciding what to do, in the hopes that the problem might resolve itself. (R.668-71)

Jury Question #4

The jury sent a fourth question to the court at approximately 1:20 pm. (R.671-72; CI.102) The question 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; CI.102) The court said it would bring the jurors in and ask if they were adamant that they would not reach a verdict on the three hung charges, and would decide whether to read the *Primm* instruction based on their answer. (R.672-73) The jurors were brought into the court room and confirmed that they had reached a verdict on two counts and were deadlocked on the other three counts. (R.673-76) Mr. Lacey was convicted of first-degree murder and UPWF, and the jury was hung on the other counts. (C.13-14) The court declared a mistrial on the home invasion and armed robbery charges. (R.679)

Direct Appeal

Mr. Lacey argued on appeal that his trial counsel was ineffective for failing to sever his UPWF charge from his remaining charges. *People v. Lacey*, 2023 IL App (5th) 220050-U, ¶ 39. Relying on this Court's decision in *People v. Edwards*, 63 Ill. 2d 134 (1976), Mr. Lacey argued that defense counsel was ineffective for failing to move to sever his UPWF charge because it would have been an abuse of the circuit court's discretion to deny such a motion, and there was no conceivable trial strategy in trying the charges together. *Id.* Mr. Lacey further argued that he was prejudiced by defense counsel's failure to sever, because the evidence at trial was relatively weak, and the jury's notes during deliberation demonstrated that their consideration of his unrelated prior felony

conviction was a significant, if not the exclusive, factor in his ultimate murder conviction.

The Fifth District found that defense counsel's failure to sever was a strategic decision. *Id.* at ¶¶ 45-50. The Fifth District reasoned that by employing the so-called "all-or-nothing" approach, defense counsel could have been trying for an acquittal on all charges at one trial, "thinking that the impact of the additional conviction would not be significant[,]" or in an effort to prevent the State from curing an evidentiary deficiency from the first trial in a subsequent trial. *Id.* at ¶ 45 (quoting *People v. Poole*, 2012 IL App (4th) 101017, ¶ 10). The Fifth District found that counsel's decision to stipulate to the unrelated prior felony without providing any details of the conviction not only demonstrated the employment of the "all-or-nothing" approach, but also eliminated any prejudice from the jury hearing about this unrelated prior felony conviction. *Id.* at ¶ 46.

ARGUMENT

I. This Court should grant review to determine whether it is ever sound trial strategy to fail to sever UPWF charges from the remaining charges, and if so, whether such a strategy was sound in Mr. Lacey's case.

This Court's guidance is needed to resolve an appellate court split regarding deficient performance in the context of the "all-or-nothing" approach - an attempt by counsel to achieve a conviction on all counts at a single trial instead of severing potentially prejudicial charges. In *People v. Edwards*, 63 Ill. 2d 134 (1976), this Court held that the trial court's failure to sever the defendant's trial for armed robbery and unlawful use of a weapon – which included as an element the defendant's commission of a prior felony – "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.* at 140. Since this Court's decision in *Edwards*, the appellate courts have split on whether counsel's performance is deficient for failing to sever charges that include a prior felony conviction as an element. Some lower courts have found counsel ineffective for choosing an "all-or-nothing" approach instead of severing unduly prejudicial charges. *See People v. Lewis*, 240 Ill. App. 3d 463, 469 (1st Dist. 1992) ("We can conceive of no legitimate trial strategy in defense of counsel's failure to move for a severance. Instead, we are struck by the distinct disadvantage defendant suffered from the joint trial.");

People v. Karraker, 261 Ill. App. 3d 942, 953 (3d Dist. 1994). Other courts have found no deficient performance, relying on the reasoning that this Court's decision in *Edwards* did not address ineffective assistance of counsel, and therefore did not require a finding of deficient performance for failure to sever. *People v. Gapski*, 283 Ill. App. 3d 937 (2d Dist. 1996); *People v. Poole*, 2012 IL App (4th) 101017; *People v. Fields*, 2017 IL App (1st) 110311-B.

When Mr. Lacey asked the appellate court to find his attorney ineffective for failing to put forward a motion to sever his UPWF charge that this Court's decision in *Edwards* said would be an abuse of the circuit court's discretion to deny, the Fifth District found that such a failure was actually a matter of trial strategy. *People v. Lacey*, 2023 IL (5th) 220050-U, ¶¶ 46-50. But can counsel ever call a decision reasonable strategy where the a denial of that same action by the trial court would be reversible error? The Fifth District relied on the "all-or-nothing" approach endorsed by this Court in the lesser-included-offense-instruction context in *People v. Barnard*, 104 Ill. 2d 218 (1984). But *Barnard* is different than Mr. Lacey's case, or Edwards' case for that matter. In Barnard, the jury would have always heard about the prior criminal history; but here, severing the UPWF charge from the other charges would have effectively shielded Mr. Lacey from having to reveal to the jury his prior criminal history. Mr. Lacey now asks this Court to grant leave to appeal to clarify whether the "all-or-nothing" approach from *Barnard* can be adopted and applied in cases like Mr. Lacey's, or whether the holding in Edwards must apply not just to the trial court, but to counsel as well.

When it appears that a defendant is prejudiced by the joinder of related charges, a court may order that the charges be severed for trial. 725 ILCS 5/114-8 (2009). While the issue of whether charges should be severed is one ordinarily within the discretion of the trial court, *see People v. Willer*, 281 Ill. App. 3d 939, 950 (2d Dist. 1996), "a defendant suffers severe prejudice where a jury learns of the defendant's prior convictions through an indictment on an enhanced weapons count while adjudicating his guilt on other unrelated charges." *People v. Bracey*, 52 Ill. App. 3d 266, 273 (1st Dist. 1977), *citing People v. Edwards*, 63 Ill. 2d 134 (1976).

Where *Edwards* holds that it is reversible error to deny the severance of UPWF charges, how could letting the jury hear about a prior conviction ever be considered beneficial to the defendant? Here, the State charged Mr. Lacey with first-degree murder, home invasion, armed robbery, and UPWF. (C.18-19) The UPWF charge was based on Mr. Lacey's prior felony conviction from 2015. (R.451-52) Pretrial, defense counsel moved to prohibit the use of Mr. Lacey's prior felony conviction for impeachment, arguing that its prejudicial effect outweighed its probative value. *Lacey*, 2023 IL App (5th) 220050-U, ¶ 46. When defense counsel explained that he would stipulate to the prior conviction without providing further details and planned to try all the charges in a single trial, the circuit court granted the motion. *Id.* By failing to move to sever, counsel allowed the jury to hear that Mr. Lacey had a prior felony conviction, highly prejudicial evidence with no probative value to the remaining charges.

While the Fifth District found counsel acted strategically in choosing an

"all or nothing" approach, *Lacey*, 2023 IL App (5th) 220050-U, ¶¶ 45-50, this Court has not endorsed this strategy as sound if it results in exposing a jury to the defendant's criminal history. *See Fields*, 2014 IL App (1st) 110311, ¶ 28, *vacated and remanded for reconsideration*, No. 117475 (September 28, 2016), *citing People v. Walton*, 378 Ill. App. 3d 580 (2007). Although *Walton* cites *People v. Barnard*, 104 Ill. 2d 218, 231-32 (1984), in support of the soundness of the "all-or-nothing" strategy, both *Walton* and *Barnard* dealt with lesser-included-offense instructions. These cases are distinguishable where the choice to forego a lesser-included instruction does not necessarily give rise to prejudice, as is the case with prior convictions. Thus, by extending the "all-or-nothing" approach once again to the severance of prejudicial charges, the opinion below has exacerbated the appellate court split by endorsing an all-or-nothing approach as sound trial strategy, even though such a decision means unnecessarily exposing the jury to the defendant's unrelated prior felony convictions.

Furthermore, none of the lower court's stated justifications for the "all-or-nothing" approach apply to the facts of Mr. Lacey's case. The Fifth District's decision posits that defense counsel may have tried all charges in a single trial in an attempt to prevent the State from curing an evidentiary deficiency from the first trial in a subsequent trial. *Lacey*, 2023 IL App (5th) 220050-U, ¶ 45 (citing *People v. Poole*, 2012 IL App (4th) 101017, ¶ 10). However, neither the State nor the Fifth District ever suggested what evidentiary deficiency the State might have cured in a subsequent trial, and none is apparent in the record. The Fifth District also suggested that counsel may have believed that a single trial

would have lessened the impact of any additional conviction. *Id.* Again, however, neither the State nor the Fifth District ever explained how such a consideration would have played out in Mr. Lacey's trial, and the ultimate impact of defense counsel's failure to sever was a 52-year prison sentence.

Instead, the Fifth District's stated justifications for the "all-or-nothing" approach only make sense in the context that the strategy was first discussed: lesser-included offenses. When considering whether to defend against all charges in a single trial, the impact of an additional conviction or curing evidentiary deficiencies between separate trials makes much more sense when considering the impact of a potential lesser-included offense. If the only way to potentially mitigate a much more serious offense is to present evidence of a different crime, then the "all-or-nothing" strategy may yet prove effective; or, at least, the employment of the strategy would not necessarily be ineffective.

However, in the context of a motion to sever, the stated benefits of the "all-or-nothing" approach do not stand up to scrutiny. As discussed above, this Court's decision in *Edwards* makes it an abuse of circuit court discretion to deny the severance of UPWF charges specifically because of the undue prejudice that would result to a defendant if those charges are joined. This is especially true where, as here, the prior felony the State must necessarily prove in order to convict on the UPWF charge is unrelated to any alleged course of action the defendant undertook in the remaining charges. The statute allowing for severance of charges, 725 ILCS 5/114-8(a), allows for severance specifically because of the prejudice that will result from joinder. Furthermore, as this Court

noted in *Edwards*, a defendant is prejudiced and the circuit court must grant a defense motion to sever charges where an element of the charges against him is that he had a prior felony conviction because of the, "significant risk that the trier of fact will use evidence of a prior conviction in determining the defendant's guilt or innocence of an unrelated offense." *Edwards*, 63 Ill. 2d at 140. *See also People v. Montgomery*, 47 Ill. 2d 510, 514 (" 'The defendant is a dead duck once he is on trial before a jury and you present a record that he was [previously] convicted....If it's any way close, the jury is going to [convict] him on that record, not on the evidence' ")

This Court's reasoning in *Edwards* solidifies why the "all-or-nothing" approach, as well as the appellate courts' reliance upon it in the severance context, creates an enhanced danger of unfair trials. Defense attorneys know or should know that a motion to sever will be granted because of the undue prejudice that defendants suffer when having to admit to an unrelated prior felony conviction. *Edwards* holds that a motion to sever UPWF charges must be granted, because it would be an abuse of discretion to deny such a motion. The fact that a defense attorney may lessen some of the prejudice of this unrelated prior felony conviction by stipulating to it existence without providing details does not eliminate the prejudice altogether. To that end, when the options are either reducing the kind of prejudice that this Court in *Edwards* found to be necessarily unfair, or simply eliminating it altogether, there is really no choice: defense attorneys must be required to sever UPWF charges, or else defendants will not be guaranteed to receive the benefit of the protection that *Edwards*

provides.

Because there is a split in appellate court authority regarding ineffective assistance in the severance context, the stated benefits of the "all-or-nothing" approach do not apply to severance of UPWF charges, and this Court's decision in *Edwards* requires reexamination of the "all-or-nothing" approach in the context of severance, Mr. Lacey respectfully requests that this Court grant leave to appeal to resolve these issues.

II. Alternatively, this Court should issue a supervisory order finding that counsel's performance was deficient for failing to sever the UPWF charge, and instructing the Fifth District to determine whether he was prejudiced by counsel's failure to sever.

Should this Court find that leave to appeal is not necessary, it should remand to the appellate court for further consideration of Mr. Lacey's prejudice argument. This Court's decision in *Edwards* makes it clear that Mr. Lacey's trial attorney's performance was necessarily deficient for not moving to sever his UPWF charge from his remaining charges. Any motion to sever would have been granted as a matter of law, and none of the stated benefits of the "all-or-nothing" trial strategy applied to the facts of Mr. Lacey's case. Where the Fifth District erroneously disposed of Mr. Lacey's case on the grounds of trial strategy, this Court should remand his case to the appellate court to find that defense counsel's performance was deficient, and to consider whether Mr. Lacey suffered prejudice at trial as a result.

CONCLUSION

George E. Lacey, petitioner-appellant, respectfully requests that this Court grant leave to appeal.

Alternatively, George E. Lacey, petitioner-appellant, respectfully requests that this Court grant a supervisory order remanding his case to the appellate court to determine whether he was prejudiced by defense counsel's failure to sever his UPWF charge from his remaining charges.

Respectfully submitted,

ELLEN J. CURRY
Deputy Defender

CHRISTOPHER SIELAFF
Assistant Appellate Defender
Office of the State Appellate Defender
Fifth Judicial District
909 Water Tower Circle
Mt. Vernon, IL 62864
(618) 244-3466
5thdistrict.eserve@osad.state.il.us

COUNSEL FOR PETITIONER-APPELLANT

CERTIFICATE OF COMPLIANCE

I certify that this petition conforms to the requirements of Supreme Court Rule 341(a) and 315(d). The length of this petition, excluding any items identified as excluded from the length limitation in Rule 341(b)(1), is 19 pages.

/s/Christopher Sielaff
CHRISTOPHER SIELAFF
Assistant Appellate Defender

APPENDIX

George E. Lacey, Petitioner

Appellate Court Decision

Order Denying Petition for Rehearing

2023 IL App (5th) 220050-U

NO. 5-22-0050

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. GEORGE E. LACEY, Defendant-Appellant.	)))))))))	Appeal from the Circuit Court of Madison County. No. 20-CF-2969 Honorable Kyle A. Napp, Judge, presiding.

JUSTICE CATES delivered the judgment of the court.
Justices Welch and Vaughan concurred in the judgment.

ORDER

¶ 1 *Held*: The defendant's counsel did not provide ineffective assistance by failing to request severance of the charges.

¶ 2 The defendant, George E. Lacey, was convicted of first degree murder and unlawful possession of weapons by a felon after a jury trial. The defendant appeals the convictions based on an ineffective assistance of counsel claim where trial counsel failed to sever the charge of unlawful possession of weapons by a felon from the remaining counts. For the following reasons, we affirm the judgment of the circuit court.

¶ 3 I. BACKGROUND

¶ 4 On the evening of November 19, 2020, Lauren Swearingen was in her apartment, washing dishes, when two men forced their way inside by kicking in the back door. One man approached Lauren and held her down against the floor. The other man confronted Lauren's boyfriend, Darian

Woods, who was coming down the staircase from upstairs. Darian was fatally shot in the chest as he descended, and fell on the stairs, sliding to the floor. The men then took thousands of dollars and cannabis from the apartment and fled.

¶ 5 On November 24, 2020, the defendant was charged by information with four counts of first degree murder (720 ILCS 5/9-1(a) (West 2020)), one count of home invasion (720 ILCS 5/19-6(a)(5) (West 2020)), one count of armed robbery (720 ILCS 5/18-2(a)(4) (West 2020)), and one count of unlawful possession of weapons by a felon (720 ILCS 5/24-1.1(a) (West 2020)). The defendant's arrest warrant was issued on November 30, 2020.

¶ 6 The State filed a notice of intent to introduce certified copies of the defendant's prior armed robbery conviction. The defendant had been convicted of armed robbery on September 1, 2015. See People v. Lacey, No. 13-CF-295 (Cir. Ct. St. Clair County). The defense filed a motion *in limine* to preclude the use of the prior conviction for impeachment of credibility of the defendant and argued that the defendant's prior conviction was prejudicial and had no bearing on credibility.

¶ 7 The circuit court held a pretrial conference and addressed the defendant's motion *in limine* to preclude the use of the defendant's prior conviction. The defense argued that the defendant was on trial for armed robbery and that the prior conviction for armed robbery would be used as propensity evidence. The State argued that the use of the defendant's prior conviction for armed robbery would be used for impeachment purposes if the defendant testified. Additionally, the State argued that it was obligated to present evidence of the prior charge because it was an element of the State's case where the defendant was charged as a felon in possession of a weapon. During the motion hearing, the circuit court questioned defense counsel about whether he was going to include the unlawful possession of a weapon by a felon charge in the trial. Defense counsel indicated that

he would defend the charge at trial and stipulated to the fact that the defendant was a convicted felon, without mentioning the underlying armed robbery offense.

¶ 8 The circuit court denied the defendant's motion *in limine*, allowing the State to introduce the defendant's armed robbery conviction for impeachment purposes if the defendant testified. If the defendant did not testify, the circuit court allowed the defendant to stipulate that he was a convicted felon, and the jury would not have knowledge of his prior armed robbery conviction.

¶ 9 On October 12, 2021, the trial began with jury selection. During jury selection, the circuit court addressed the parties outside of the presence of the jury panel regarding the unlawful possession of weapons by a felon count. The circuit court again inquired whether defense counsel wanted to proceed with the inclusion of that count at trial and defense counsel confirmed his position with the circuit court. The circuit court reiterated that the defendant was stipulating that he was a felon, and the jurors would not be informed of the nature of the prior conviction. The circuit court also reiterated that the defendant's prior armed robbery conviction would be allowed only for impeachment purposes.

¶ 10 The following day, after the jury was selected, the State presented its opening statement. The defense declined to present an opening statement prior to the presentation of the State's case. The State then called Officer Ben Koertge as its first witness. Officer Koertge was dispatched to the victim's residence on the evening of November 19, 2020, and secured the crime scene. Several photographs were taken of the outside of the apartment building, the deceased, and the interior of the apartment. The photographs were identified by the officer and admitted as evidence.

¶ 11 Lauren Swearingen testified that she lived with her boyfriend, Darian Woods, in Collinsville, Illinois. Darian sold cannabis out of their home. Lauren and Darian used Percocet and fentanyl. Their apartment had a "Ring door camera" that was activated by motion.

¶ 12 On the evening of November 19, 2020, Lauren and Darian were at home in their apartment, located on the ground floor of a residence. Lauren testified that she was washing dishes when she heard a loud noise. She turned around to see that her back door had been kicked in and two men entered her home. A man wearing a "covid mask" and dark clothing came towards her. Lauren threw her hands up and cowered down. The man put his hands around her neck and his knee into her back, holding her onto the kitchen floor, as she faced her refrigerator. The second man was wearing a white shirt and had "something red around his face." Lauren was able to determine that the men were Black, but she never saw their facial features, which were covered.

¶ 13 Lauren testified that the man in the white shirt "bolt[ed] up the stairs." She heard Darian running downstairs at the same time. Lauren testified that there was a "half of a second of just scuffling and then a pop." A gunshot. Lauren saw Darian slide down the stairs headfirst, struggling to breathe. The man in the white and red was searching the second floor of the apartment and yelled "where's the money." The man that had pinned Lauren to the ground grabbed Lauren by the neck and directed her upstairs. Lauren had to step over Darian's body to walk up the stairs. Once she reached the second floor, the man released his hold while Lauren walked towards where Darian kept the money in a laundry basket.

¶ 14 After Lauren located the money, the man in the white shirt grabbed what Lauren estimated was seven to ten thousand dollars from the laundry basket. This man also took a duffle bag containing cannabis and a blue bag of cannabis. Both bags were located in the upstairs bedroom closet. Lauren testified that she kept her eyes focused to the side, told the men that she had not seen them, and begged them not to hurt her. The man that had pinned her to the ground in the kitchen directed Lauren into a bedroom closet, told her not to move or say anything, and he closed

the closet door. Lauren heard their footsteps as they went downstairs. She called 911 from the closet.

¶ 15 When emergency medical services arrived, Darian no longer had a pulse. Lauren testified that she provided the police with videos from her security camera system. Two video clips from the security footage were published to the jury. Lauren identified the men on the videos as the same men that were in her apartment. Their faces were covered in the videos. The second video clip depicted the man in the white and red grabbing the outside security camera. Lauren identified that he had a gun in his pocket while he dismantled the camera.

¶ 16 During cross-examination, Lauren testified that Darian sold marijuana out of their apartment. Lauren was not familiar with everyone that came to the apartment. Darian also used fentanyl and sometimes his drug dealers would come to their apartment. Lauren knew of four additional times that Darian had been robbed. Lauren additionally testified that she did not recognize the defendant. Lauren clarified that the man in the white and red could have been the defendant, as he had the same build. Lauren admitted, however, that she was unable to identify the intruders because their facial features were covered.

¶ 17 Detective Kyle Graham testified to obtaining security footage from a business in Collinsville, Illinois, near the victims' apartment. Between 7:20 p.m. and 7:25 p.m. on November 19, 2020, a truck with a "fast blinking blinker" paused near where the incident occurred. The same truck was shown leaving the area when the 911 call was made by Lauren. Graham additionally obtained video footage from a gas station that had a side view of the color, make, and model of the truck. The information on the truck was sent to local law enforcement agencies as a vehicle of interest.

¶ 18 Michelle Werner testified to a Facebook Live video dated July 22, 2020. The defendant was on the video wearing shoes that appeared to be similar to the shoes shown in the video from the crime scene. A clip of the video was published to the jury and introduced into evidence.

¶ 19 Adisa Smith, the owner of the blue truck identified by law enforcement, also testified. Smith was 28 years old, and he attended the same high school as the defendant. Smith viewed the Facebook video and confirmed that the defendant was in the video.

¶ 20 Smith testified to the events that occurred on November 19, 2020. Earlier in the day, Smith had contacted Matthew Drake, his friend and mechanic. Drake was drinking with the defendant and Demandrell Davis. Smith joined and they drank together for several hours. During that time, they did not discuss or plan any crimes. Smith testified that he noticed the defendant was carrying a gun.

¶ 21 Smith indicated that the defendant had offered Smith $50 for a ride. Smith agreed and drove the defendant and Davis to Collinsville, Illinois. The defendant directed Smith to drop the defendant and Davis off at an apartment building and to back in his truck to park. Smith testified the defendant's instruction seemed "a little weird." After the defendant and Davis exited the truck, Smith drove to the next intersection to turn around and then returned to the apartment complex to pick up the defendant and Davis. Smith waited approximately three to five minutes for the defendant and Davis. When the two men returned to the truck, they appeared "very nervous" and had a reusable shopping bag that "smelled like all weed."

¶ 22 Smith testified that the defendant directed Smith to a gas station in St. Louis, Missouri. When they crossed the I-70 bridge, the defendant "wrapped something up and threw it in the river." The defendant additionally told Smith and Davis that "if word got back that I [Smith] brought him to this apartment, he was gonna kill both of us."

¶ 23 Smith was shown a video taken from the gas station and he confirmed that the video depicted his truck pulling into the gas station. Smith testified that he went inside the gas station while the defendant and Davis remained in the truck. The defendant sat in the passenger seat and wore a long-sleeved white shirt. The video did not clearly depict the passengers that remained in the truck. The gas station videos were published and admitted into evidence. Smith testified that after he left the gas station, he drove the defendant and Davis back to Davis's house. The defendant gave Smith $50 and cannabis for the ride.

¶ 24 Four days after the incident, Smith was pulled over by the St. Clair County Sheriff's Department. Smith was arrested and his truck was towed. Smith testified that he was interviewed by the police on November 23, 2020. During the interview, Smith provided the police with a physical description of the defendant.

¶ 25 Smith admitted that he had lied to the police during his first interview. Smith told the police that he had rented his truck to the defendant for the night and Smith was not involved with what had happened. Smith additionally told the police that the defendant's cousin was involved, and not Davis, but that was not true. Smith was charged with accessory to murder, home invasion, and robbery. Smith pleaded guilty to armed robbery and the State agreed to recommend a sentence of 10 years in the Illinois Department of Corrections. Smith testified that he had lied to the police because he did not want to get in trouble. Smith additionally testified that he was telling the truth in court and that he had received a deal to serve 10 years in prison for the armed robbery conviction.

¶ 26 An expert in forensic pathology performed Darian Woods's autopsy and testified that the cause of death was a gunshot wound of the chest. The manner of death was homicide. Darian had abrasions on his head consistent with being struck with a firearm or fist. Darian had no injuries to his hands, or signs of Darian striking anyone. The soot found around the bullet wound

demonstrated that Darian was shot at close range, within a foot. The gun could have loosely touched Darian's body when fired. The gunshot wound tracked through the upper part of the sternum, through the left upper lobe of the lung, through the aorta, and through the spine. Darian experienced instantaneous paralysis and because the bullet transected the aorta, Darian would have died within minutes of the injury. A bullet was recovered from Darian's body.

¶ 27 Detective Michael Hentze was a crime scene investigator with the Illinois State Police. Detective Hentze testified that he found a "Ring doorbell camera" in a recycling bin outside of the apartment complex. He photographed the camera, and the camera was collected and taken to the crime lab. Detective Hentze took additional photographs of the crime scene and collected a fired cartridge case as evidence. Drug paraphernalia was found in the apartment, but no firearms or ammunition were recovered. Detective Hentze additionally collected the bullet obtained during the autopsy. He was also involved with the search of Smith's blue truck. During the search of the truck, an Illinois Link card with the name Demandrell Davis was recovered. Detective Hentze did not recover any items belonging to the defendant from the apartment or from the truck.

¶ 28 Officer Nicole Dwyer with the Collinsville Police Department testified that she booked and fingerprinted the defendant. The defendant's fingerprint samples were sent to the crime lab for a comparison.

¶ 29 Melissa Gamboe, with the Illinois State Police forensic science lab, testified to examining the "Ring doorbell camera." A latent fingerprint was found on the camera. She compared the collected fingerprint to the sample received from the defendant and concluded that the latent print on the "Ring doorbell camera" was made by the defendant. Gamboe testified that she was not able to determine when the fingerprint was made, "but the likelihood of them staying on a doorbell that is outside decreases each day because of the environmental conditions."

¶ 30 Angela Horn with the Metro East Forensic Science Laboratory in Belleville, Illinois, testified that she analyzed the recovered bullet from Darian's body and the bullet casing from the crime scene. Horn was unable to determine what type of firearm fired the bullet as the firearm was not recovered. The recovered cartridge case was a .40-caliber, possibly 10-millimeter, and was marked Smith and Wesson. The State rested after Horn testified.

¶ 31 The defense presented a motion for a directed verdict. The circuit court denied the motion for a directed verdict. The defendant did not testify on his own behalf and the defense did not present any additional evidence.

¶ 32 During closing argument, the State argued that the defendant committed first degree murder, where he put a gun to Darian Woods's chest and pulled the trigger at close range. Additionally, the defendant knowingly possessed a firearm and he had admitted to having been convicted of a previous felony. The State played the video from the security camera and argued that the video was of the defendant with a gun in his front right pocket. The State's closing argument also included that the defendant left his fingerprint on the security camera.

¶ 33 The defense argued that the evidence presented did not place the defendant at the crime scene. He argued that Adisa Smith was the only witness that testified that the defendant was present at Darian Woods's apartment, and his testimony was not believable. The forensic scientist was unable to determine how long the fingerprint was on the camera. Darian Woods sold cannabis out of his apartment and purchased fentanyl. Lauren Swearingen did not know everyone that had been to the apartment to meet with Darian. The defense insinuated that the defendant could have been at the apartment to purchase cannabis or sell fentanyl prior to the night of the incident and left his fingerprint on the "Ring doorbell camera" on a different occasion.

¶ 34 While the jury was deliberating, they sent a note to the circuit court which stated, "the jurors are currently 10-2 that [the defendant] 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." The circuit court then sent the jurors home for the evening at approximately 8:30 p.m.

¶ 35 The jurors continued deliberation the following morning. The jurors sent a note to the circuit court that stated, "1) What was the felony charge in 2015?" and "2) Transcript of Adisa Smith's testimony." For the first question, the circuit court responded that the jurors had received all of the evidence in this case. For the second question, the circuit court instructed the jury that they should rely on their recollection of the testimony.

¶ 36 The jurors subsequently submitted a third note which stated, "what happens if we agree on 2 counts, but are hung on the remainder?" The circuit court noted that the jurors had deliberated longer than the presentation of evidence in the case. The jurors were provided lunch and continued to deliberate. The jurors subsequently submitted a final note to the circuit court which stated, "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." When the circuit court read the note, the court clarified with counsel that there were four felony charges and a question posed to the jury on whether the defendant had discharged the firearm. There were five issues that the jury had to decide. They had evidently reached an agreement on two of the issues. The circuit court did not believe further deliberations would be productive, and the jurors returned to the courtroom. The jurors found the defendant guilty of first degree murder and unlawful possession of weapons by a felon. The court declared a mistrial as to the charges of home invasion and armed robbery.

¶ 37 The defense filed a posttrial motion for a new trial which was denied by the circuit court. On January 27, 2022, the defendant was sentenced to consecutive sentences of 45 years for the

charge of first degree murder and 7 years for the charge of unlawful possession of weapons by a felon. This appeal followed.

¶ 38 II. ANALYSIS

¶ 39 On appeal, the defendant argues that defense counsel rendered ineffective assistance of counsel for failing to sever the unlawful possession of weapons charge from the remaining felony counts. The defendant claims that the evidence of a prior conviction improperly influenced the jury in finding the defendant guilty of murder.

¶ 40 Criminal defendants have a constitutional right to effective assistance of counsel. *People v. Hale*, 2013 IL 113140, ¶ 15. Claims of ineffective assistance of counsel are governed by a two-pronged test established in *Strickland v. Washington*, 466 U.S. 668 (1984). Under *Strickland*, to establish a claim of ineffective assistance of counsel, the defendant must show that (1) counsel's performance was deficient, and (2) the deficient performance resulted in prejudice. *People v. Hughes*, 2012 IL 112817, ¶ 44. Where an ineffective assistance of counsel claim has not been raised before the circuit court, our review is *de novo*. *People v. Lofton*, 2015 IL App (2d) 130135, ¶ 24.

¶ 41 To establish deficient performance of counsel, the defendant must overcome the strong presumption that defense counsel's actions were the product of sound trial strategy and not incompetence. *People v. Tucker*, 2017 IL App (5th) 130576, ¶ 26. Representation will not be considered ineffective based on mistakes in trial strategy or judgment alone as a defendant is entitled to "competent, not perfect, representation." *Tucker*, 2017 IL App (5th) 130576, ¶ 26. "In establishing the prejudice prong, the defendant must show that there is a reasonable probability that, but for his attorney's deficient performance, the result of the proceedings would have been different." *Tucker*, 2017 IL App (5th) 130576, ¶ 26. If we find that the defendant failed to satisfy

the first prong of *Strickland*, we need not consider the second prong of whether the deficient performance resulted in prejudice. *People v. Torres*, 228 Ill. 2d 382, 395 (2008).

¶ 42 Generally, charges arising out of the same incident may be tried together (725 ILCS 5/114-7 (West 2022)), unless it appears that the defendant will be prejudiced thereby (725 ILCS 5/114-8(a) (West 2022)). The circuit court has broad discretion in its decision to grant or deny a motion to sever. *People v. Fleming*, 2014 IL App (1st) 113004, ¶ 38.

¶ 43 The defendant relies on *People v. Edwards*, 63 Ill. 2d 134 (1976), in support of his claim that the circuit court would have granted a motion to sever had defense counsel filed the motion. In *Edwards*, the Illinois Supreme Court found that "the joinder of the armed robbery and the felonious unlawful use of a weapon 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. The *Edwards* case was specific to whether the circuit court erred in denying a severance; ineffective assistance of counsel was not at issue. *Edwards*, 63 Ill. 2d at 138.

¶ 44 The defendant recognizes that an attorney's performance will not be found deficient if it was based upon sound trial strategy. *Strickland*, 466 U.S. at 689. "Generally, a defense decision not to seek a severance, although it may prove unwise in hindsight, is regarded as a matter of trial strategy." *People v. Poole*, 2012 IL App (4th) 101017, ¶ 10. The defendant argues that where the trial strategy is unsound the defense counsel's performance will be found deficient. See *People v. McMillin*, 352 Ill. App. 3d 336, 346-47 (2004). The trial strategy presumption is overcome "where no reasonably effective criminal defense attorney, confronting trial's circumstances, would engage in similar conduct." *McMillin*, 352 Ill. App. 3d at 344.

¶ 45 Illinois law recognizes that when deciding whether to seek a severance, trial counsel may choose an "all or nothing" trial strategy, where the defendant is acquitted or convicted of all charges in a single proceeding. *People v. Fields*, 2017 IL App (1st) 110311-B, ¶ 28. "The mere fact that an 'all-or-nothing' strategy proved unsuccessful does not mean counsel performed unreasonably and rendered ineffective assistance." *Fields*, 2017 IL App (1st) 110311-B, ¶ 28. A defendant may be disadvantaged by severing a case where an evidentiary deficiency in the first case could potentially be cured in the second case. *Poole*, 2012 IL App (4th) 101017, ¶ 10. We also consider that " '[p]erhaps trial counsel felt that it made sense to try for an acquittal of both counts in one proceeding, thinking that the impact of the additional conviction would not be significant.' " *Poole*, 2012 IL App (4th) 101017, ¶ 10 (quoting *People v. Gapski*, 283 Ill. App. 3d 937, 943 (1996)).

¶ 46 Defense counsel addressed the defendant's prior armed robbery conviction during the hearing on his motion *in limine* to prohibit the use of the conviction if the defendant testified. The circuit court denied the motion and the defendant's conviction of armed robbery would have been admissible only if the defendant testified. During the motion hearing, the circuit court additionally addressed whether the unlawful possession of a weapon by a felon charge would be included at trial. The defense did not seek to sever the charge and sought to minimize the prejudice of the prior conviction by stipulating that the defendant was a convicted felon without informing the jury that the defendant had a prior armed robbery conviction. The circuit court addressed this issue again during jury selection. Defense counsel confirmed that he wished to proceed by stipulating that the defendant had a prior conviction. The defense counsel's decision to stipulate to the prior felony indicates that the decision not seek a severance of the felony claims was a matter of trial strategy.

¶ 47 The defense employed an "all-or-nothing" trial strategy while presenting a theory that there was insufficient evidence to place the defendant at the crime scene during the time of the murder. Evidence demonstrated that the victim sold drugs to numerous people at his apartment and abused fentanyl. Defense counsel argued that the expert witness could not determine a date for the defendant's fingerprint; the defendant may have left his fingerprint at the apartment at an earlier time; and, insinuated that the defendant may have purchased drugs from the victim in the past. Perhaps defense counsel considered that it made sense to try for an acquittal of all counts in one proceeding where the impact of an unknown prior conviction may not be significant considering that the defendant's fingerprint was found at a location associated with illegal drug activity.

¶ 48 Accordingly, the defendant has failed to overcome the strong presumption that defense counsel's decision to not pursue a motion to sever was a matter of sound trial strategy. Thus, we conclude that the defendant did not receive ineffective assistance of counsel where counsel's performance was not deficient, and we need not consider whether defendant was prejudiced.

¶ 49 III. CONCLUSION

¶ 50 For the reasons stated above, we conclude that the defendant did not receive ineffective assistance of counsel and affirm his conviction and sentence.

¶ 51 Affirmed.

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Respondent-Appellee, -vs- GEORGE E. LACEY, Petitioner-Appellant.	)	Petition for Leave to Appeal from the Appellate Court of Illinois, Fifth Judicial District, No. 5-22-0050 There heard on Appeal from the Circuit Court of Madison County, Illinois, No. 20-CF-2969. Honorable Kyle Knapp, Judge Presiding.

NOTICE AND PROOF OF SERVICE

Mr. Kwame Raoul, Attorney General, 100 W. Randolph St., 12th Floor, Chicago, IL 60601, eserve.criminalappeals@ilag.gov;

Mr. Patrick D. Daly, Deputy Director, State's Attorneys Appellate Prosecutor, 4114 North Water Tower Place, Suite C, Mt. Vernon, IL 62864, 05dispos@ilsaap.org;

Mr. Thomas Haine, Madison County State's Attorney, 157 N. Main St., Suite 402, Edwardsville, IL 62025, sainfo@co.madison.il.us;

Mr. George E. Lacey, Register No. B90013, Menard Correctional Center, P.O. Box 1000, Menard, IL 62259

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. On October 26, 2023, the Petition for Leave to Appeal was filed with the Clerk of the Supreme Court of Illinois using the court's electronic filing system in the above-entitled cause. Upon acceptance of the filing from this Court, persons named above with identified email addresses will be served using the court's electronic filing system. One copy is being mailed to the petitioner in an envelope deposited in a U.S. mail box in Mt. Vernon, Illinois, with proper postage prepaid. Additionally, upon its acceptance by the court's electronic filing system, the undersigned will send 13 copies of the Petition for Leave to Appeal to the Clerk of the above Court.

/s/Debra Geggus
LEGAL SECRETARY
Office of the State Appellate Defender
909 Water Tower Circle
Mt. Vernon, IL 62864
(618) 244-3466
Service via email will be accepted at
5thdistrict.eserve@osad.state.il.us

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September 18, 2023
APPELLATE
COURT CLERK

5-22-0050

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. GEORGE E. LACEY, Defendant-Appellant.	Madison County Trial Court/Agency No.: 20CF2969

ORDER

This cause coming on to be heard on defendant-appellant's petition for rehearing and the court being advised in the premises:

IT IS THEREFORE ORDERED that the petition for rehearing is denied.