

No. 105437

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Appellate Court of
)	Illinois, First District, No. 06-1761
Plaintiff-Appellee,)	
)	
-vs-)	There heard on Appeal from the Circuit
)	Court of Cook County, Illinois,
)	No. 92 CR 14706.
)	
TERRANCE WALKER,)	Honorable
)	John Morrissey,
Defendant-Appellant.)	Judge Presiding.

PROOF OF SERVICE

TO: Lisa M. Madigan, Attorney General, 100 W. Randolph St., 12th Floor, Chicago, Illinois 60601;
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Mr. Terrance Walker, Register No. B-53452, Big Muddy River Correctional Center,
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You are hereby notified that on July 8, 2008, we sent via State of Illinois messenger service the required number of copies of the Reply Brief in the above-entitled cause to the Clerk of the above Court and to the Attorney General of Illinois. We have also personally delivered required number of copies to the State's Attorney of Cook County.

ROBERT M. STEPHENSON
Pro-Bono Counsel

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

The undersigned, being first duly sworn on oath, deposes and says that he personally sent via messenger service the required number of copies of the attached Reply Brief to the Clerk of the above Court and to the Attorney General of Illinois and personally delivered copies to the State's Attorney of Cook County on July 8, 2008.

CLERK

SUBSCRIBED AND SWORN TO BEFORE ME
on July 8, 2008.

NOTARY PUBLIC

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REPLY BRIEF AND ARGUMENT FOR DEFENDANT-APPELLANT

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REPLY BRIEF AND ARGUMENT FOR DEFENDANT-APPELLANT

I. The trial court denied Terrance Walker his right to counsel and a fair trial by forcing the 16-year-old to trial on two counts of first degree murder with an appointed attorney that was admittedly and demonstrably unprepared to represent him.

The State begins its argument by asserting that Terrance Walker has forfeited this issue for review because he failed to include it in a post trial motion. (St. Br. 12) The purpose of a post-trial motion is “to inform the court of a possible mistake so as to give it the opportunity to correct the mistake,” and to prevent a defendant from raising an “object[ion] on appeal to a matter to which he acquiesced at trial.” *People v. Hammond*, 48 Ill. App. 3d 707, 708-09 (5th Dist. 1977) In this case, Judge Morrissey was aware of the issue and given an opportunity to correct it. Defense counsel informed the judge on multiple occasions that she had not prepared for trial, and could not proceed with the trial. (R. 8-9) As counsel continued to argue in favor of a continuance, Judge Morrissey informed counsel that her lack of preparedness was “irrelevant,” and a “dirty shame,” and that the case would proceed to trial as scheduled. (R. 9) Given that the entire trial consumed only 42 pages of transcript, the brief temporal disparity between the argument concerning the request for a continuance and the conclusion of trial, as well the trial judge’s previous rejection of the request as “irrelevant” and a “dirty shame,” any attempt to bring the issue before the trial judge a second time would have been futile. (R. 9) Additionally, it cannot reasonably be argued that Terrance acquiesced in the judge’s ruling given counsel’s numerous protestations that she could not proceed to trial due to her lack of preparedness. (R. 9) Terrance maintains that this is sufficient, under these unique circumstances, to preserve the issue for review.

Moreover, this case involved a bench trial, and it has been held that 725 ILCS 5/116-1 “does not require that a defendant file a post-trial motion where he is tried

before the court and has raised the issues at the trial level.” *People v. Ocasio*, 148 Ill. App. 3d 418, 422 (1st Dist. 1986). In *Ocasio*, the defendant filed pre-trial motions to quash arrest, suppress a statement, and suppress evidence. *Id.* at 421. The trial judge denied the motions. *Id.* at 421. On appeal the State argued that defendant waived the issue concerning these motions because defendant failed to file a post trial motion for a new trial as required by 725 ILCS 5/116-1. *Id.* at 422. The court acknowledged the general rule for preservation of issues, but held that 725 ILCS 5/116-1 “does not require that a defendant file a post-trial motion where he is tried before the court and has raised the issues at the trial level.” *Id.* Like the defendant in *Ocasio*, Terrance had a bench trial. Similarly, the issue in this case involved a pre-trial ruling on a motion for a continuance, not a motion arising during the course of the trial. Consequently, this Court should hold that the issue is not forfeited.

Even if this Court finds the issue forfeited, this Court should excuse the forfeiture under the first prong of the plain error doctrine. 134 Ill.2d R. 615. Claims which were not preserved in the trial court will be reviewed for plain error where a clear or obvious error occurs and the evidence is closely balanced. *People v. Herron*, 215 Ill.2d 167, 187 (2005). The only physical evidence connecting Terrance to the crime in this case consisted of a single fingerprint recovered from the outside of the rear door of the automobile. (R. 25-8) No weapon, gun shot residue, or other physical evidence linked Terrance to this crime. While Terrance gave a statement, the statement indicates that the two deceased men threatened to kill Terrance and his family. (Supp. R. 4) Despite the State’s repeated claims concerning the overwhelming nature of the evidence, the trial judge found Terrance guilty of second degree murder concerning one of the counts. (R. 51-2) The State’s evidence suggests that the decedents were killed at approximately the

same time. (Supp. R. 4) If the trial judge, as trier of fact, found Terrance Walker guilty of the lesser included offense of second degree murder on one of the counts, then the State's case, according to the trier of fact, was not overwhelming. In light of this, it is difficult to avoid the conclusion had counsel been afforded a continuance to prepare to represent her client, the result of the proceedings might have been different.

Similarly, this Court should excuse the forfeiture under the second prong of the plain error doctrine. Claims which were not preserved in the trial court will be reviewed for plain error where a clear or obvious error occurs and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process. *Herron*, 215 Ill.2d at 187; *People v. Williams*, 193 Ill.2d 306, 347-48 (2000). For the reasons set forth in Terrance's opening brief, the error in this case impugned the integrity of the judicial system, denying Terrance due process, a fair trial, and his right to counsel. (Def. Br. 10-19); *See also, People v. Blue*, 189 Ill.2d 99 (2000)(reversing, despite forfeiture, because the court could not "confidently state that defendant's trial was fundamentally fair," and because reversal was necessary to "preserve the integrity of the judicial process.") Lastly, when the error at issue concerns the conduct of the trial judge, as it does in this case, forfeiture is relaxed because the defendant cannot be expected to accuse the trial court of improper conduct in order to preserve an error for appeal. *People v. Ellis*, 309 Ill. App. 3d 443 (4th Dist. 1999)(reversing under plain error on the basis that the trial judge abused his discretion in refusing to appoint the public defender despite the fact that the issue was not preserved in a post trial motion); *People v. Rowjee*, 308 Ill. App. 3d 179, 185 (1st Dist. 1999); *People v. Nevitt*, 135 Ill.2d 423, 455 (1990). In this case, it was the trial judge's ruling that counsel's lack of preparedness was irrelevant and his subsequent refusal to continue the case that forms

the basis of the issue. For the reasons stated above, this Court should review the issue under the plain error doctrine.

In an anticipatory response to Terrance Walker's plain error argument, the State presents the novel, albeit legally inaccurate, argument that defendant "cannot and indeed does not argue that this Court should review the claim under the plain error rule." (St. Br. 12-3) According to the State, the judgment must be affirmed because Terrance did not raise plain error in his opening brief. (St. Br. 13) It is well settled that plain error can be raised for the first time in a reply brief. *People v. Williams*, 193 Ill.2d 306, 347-48 (2000); *People v. Thomas*, 178 Ill.2d 215, 235 (1997). Despite this, the State relies on a dissenting opinion from a factually distinguishable case to support its contention. (St. Br. 12-13; citing, *People v. Heider*, __ Ill.2d __ (No. 103859, May 22, 2008)(Thomas, C.J., dissenting) In *Heider*, the defendant failed to raise plain error in his reply brief as a response to the State's forfeiture argument. *People v. Heider*, 2008 Westlaw 2131584 *13. In this case, unlike *Heider*, Terrance has raised a plain error argument in his reply brief. The State's argument that Terrance Walker "cannot" raise a plain error argument is without merit.

The State's argument that defense counsel exhibited "apparent readiness" to proceed to trial after the recess is an unconvincing argument. (St. Br. 15) Defense counsel informed the court, on two separate occasions and in no uncertain terms, that she "would not be able to proceed to trial." (R. 8-9) The trial commenced after a short recess. There is nothing in the record to suggest that defense counsel adequately prepared to represent Terrance during the short recess. Counsel did not exhibit "apparent readiness" – the trial judge made it clear that defense counsel did not have an alternative by refusing to order a continuance, so counsel proceeded, unprepared.

Next, the State contends that the trial judge did not abuse his discretion because the motion for a continuance was not in writing. (St. Br. 15-6) In support of its argument the State cites to *People v. Petrovic*, 102 Ill. App. 3d 282 (1st Dist. 1981). (St. Br. 15) In *Petrovic*, defense counsel informed the trial court that an important defense witness had been hospitalized, and the defense would be unduly prejudiced. *Id.* at 288. The State responded that it had four witnesses ready to proceed, and that the case had previously been set with subpoenas on prior occasions. *Id.* The circuit court noted that the parties set the matter for a bench trial, and concluded that there would be no harm with the State proceeding with its witnesses and then continuing the case to a future date to allow the hospitalized defense witness to testify. *Id.* The defense objected. *Id.* On appeal, the appellate court ruled that the trial court did not abuse its discretion in denying the continuance because there was no showing that the failure to grant the continuance prejudiced the defendant's rights, and the failure to make an offer of proof concerning the witness's testimony prevented the State from stipulating to the testimony. *Id.*

In *Petrovic*, the trial judge did not abuse his discretion because the case had been set with subpoenas on previous occasions, and the trial judge fashioned a remedy that would have allowed the defense to present its unavailable witness at a future date. Here, unlike *Petrovic*, the State did not object to the continuance, the matter had not previously been set for trial, and the trial judge, rather than fashioning a remedy, simply concluded that defense counsel's lack of preparedness was irrelevant. (R. 9) Judge Morrissey reflexively denied the motion despite counsel's assertion that she had been held to other trials all week – an enumerated reason in the statute as a basis to grant a continuance. 725 ILCS 5/114-4(b)(3). In so doing, Judge Morrissey denied the motion without considering the rights of Terrance Walker to a fair and impartial trial, as he was required

to consider pursuant to 725 ILCS 5/114-4(h). Consequently, in this case, unlike *Petrovic*, the refusal to order a continuance constituted an abuse of discretion as it denied Terrance his right to a "fair and impartial trial." 725 ILCS 5/114-4(h).

Lastly, *Petrovic* does not stand for the proposition that anytime a request for a continuance is not in writing the trial judge's denial of that continuance will not constitute an abuse of discretion. It is well settled that "an abuse of discretion may be found even in the absence of a written motion and supporting affidavit." *People v. Harris*, 222 Ill. App. 3d 1089, 1095 (3rd Dist. 1991), citing *People v. Peruscini*, 188 Ill. App. 3d 803 (2nd Dist. 1989). Indeed, the State concedes this very point in its brief by acknowledging that there is no set formula concerning when the denial of a continuance will constitute an abuse of discretion. (St. Br. 13) The State does not site a single case to support its proposition that the failure to present the motion in writing obviates the requirement that the trial judge exercise discretion. Consequently, the State's argument does not dispose of the issue presented.

Next, the State contends that the "overwhelming" evidence renders the denial of the continuance neither error nor prejudicial. As argued above, based on the State's own evidence, the trial judge found Terrance guilty of a lesser included offense on one of the charged counts, no physical evidence, save a solitary fingerprint, connected Terrance to the crime, and the uncontradicted statement indicates that the two deceased individuals, at least one of whom had a weapon, threatened to kill Terrance and his family. (Def. Rp. Br. 3-4) In light of this, the evidence cannot properly be construed as overwhelming. Moreover, it is precisely counsel's failure to prepare to represent her client that created the 42-page transcript, and the basis for the State's argument. Under these facts, this Court cannot be certain of the fundamental fairness of the proceedings resulting in

Terrance's conviction; thus, it must preserve the integrity of the judicial system by reversing the case for a new trial.

The two cases relied on by the State to support its position that the trial judge did not abuse his discretion in denying the continuance because the continuance was sought for the purpose of delay, actually support the opposite conclusion. (St. Br. 17-20, citing, *People v. Friedman*, 79 Ill.2d 341 (1980); *People v. Trimble*, 345 Ill. 82 (1931)). In *Friedman*, the circuit court informed defendant 2 ½ months prior to trial, when defendant first complained about appointed counsel, that he was free to substitute retained counsel as long as the substitution would not delay the trial. *Friedman*, 79 Ill.2d at 348. On the day of trial, defendant requested a continuance to substitute retained counsel whom he had contacted three days earlier. *Id.* The circuit court denied the request for a continuance. *Id.* On appeal, this Court concluded that the defendant acted without diligence and employed his right to counsel of his choice as a “weapon to indefinitely thwart the administration of justice or to otherwise embarrass the effective prosecution of crime.” *Id.* Under such circumstances, the circuit court “could reasonably conclude that the request was made solely for the purpose of delay.” *Id.*

In this case, unlike *Friedman*, Terrance Walker never requested a change of attorney, change of judge, or otherwise sought to delay the proceedings. The half-sheet indicates that every prior continuance had been by agreement, and the case had not previously been set for trial. (C. 2-4) Consequently, counsel's request to continue the trial date was the first such request made solely by the defense. Terrance simply appeared in court to learn that his attorney failed to prepare his defense, and his trial judge found her lack of preparation “irrelevant.” (R. 9) Thus, not only does the same inference concerning diligence not apply in this case, but the opposite conclusion arises

– Terrance Walker, unlike the defendant in *Friedman*, acted with diligence.

In *Trimble*, defendant was arraigned and trial set four days later. *Trimble*, 345 Ill. at 85. Defendant’s counsel was unavailable due to other trial commitments, so the Court appointed counsel’s associate to try the case. *Id.* at 85-86. A motion for a continuance was filed based on the associate’s lack of preparation, but the Court found the “only purpose for which a continuance” was sought was to “secure the attendance of character witnesses.” *Id.* This Court held that the four day interval was sufficient for associate counsel to procure the attendance of character witnesses, and, under these facts, a continuance was not warranted. *Id.* In this case, unlike *Trimble*, Terrance Walker did not need the continuance to secure witnesses necessary for the defense, defense counsel needed the continuance because she admittedly abdicated her duty to prepare to represent Terrance. Based on counsel’s representation, it appears defense counsel would have only required a six-day continuance – counsel indicated that she had mis-calendared the trial date for January 26. In light of the foregoing, it was an abuse of discretion to deny counsel a brief continuance so that she could prepare to represent her client.

The State next contends that the trial judge’s comments that counsel’s lack of preparedness was irrelevant, were taken out of context by Terrance, and, in proper context, do not support Terrance’s argument. (St. Br. 22) According to the State, the reason defense counsel needed a continuance was “unconvincing” because it was made on the day of trial. (St. Br. 22) This fact actually supports defense counsel’s argument that she thought the trial had been scheduled for the following week due to a calendaring error. (R. 8-9) Having mis-calendared the trial date, counsel had no choice but to make the motion on the day of trial – the morning after counsel learned of her error. The exchange between defense counsel and the trial judge is clear – counsel had failed to

prepare for trial because she had been held to other trials all week, and had miscalendared the trial date. Pursuant to 725 ILCS 5/114-4(b)(3), this is a relevant factor for the trial judge to consider when confronted with a request for a continuance. The trial judge deemed it irrelevant.

In a similar argument, the State contends that the trial judge based his decision on the complexity of the case and the seriousness of the charges. (St. Br. 22) However, the State's entire argument is predicated on the fact that the trial judge "certainly knew" about these issues. (St. Br. 22) The State does not respond to the trial judge's statement that the matter would proceed to trial, solely because it had been set for trial, which, as argued in Terrance's opening brief, indicates not simply an abuse of discretion, but the rote application of courtroom policy.

Next, the State argues that *People v. Sullivan*, 52 Ill. App. 3d 666 (4th Dist. 1977), and *People v. Lyons*, 26 Ill. App. 3d 358 (3rd Dist. 1971), relied on by Terrance in his opening brief, (Def. Br. 11, 13) do not support Terrance's argument. (St. Br. 22-25) Terrance only cited to *Lyons* to support the proposition that a court should look to diligence on the part of a defendant when confronted with a request for a continuance. (Def. Br. 11,13) The State has not contested that theory. (St. Br. 22-25) Furthermore, it is undisputed that Terrance never sought a change of counsel, a change of judge, or otherwise sought to delay the proceedings. (Def. Br. 14) In *Sullivan* the defendant demanded trial, and, at the trial date nine days later, the court received a phone call from defendant's attorney who had just been retained requesting a continuance. The trial judge granted the continuance. Four days later, when the State appeared with its witnesses, defendant again changed attorneys to the public defender after private counsel appeared and filed motions. The trial court denied the public defender's request for a

continuance. The appellate court affirmed on the basis that the public defender did a competent job. Unlike *Sullivan*, there is no basis upon which to conclude that Terrance Walker's defense attorney performed competently as argued in Terrance Walker's opening brief. Moreover, Terrance Walker, unlike Sullivan, never once changed counsel of his own volition, or otherwise sought to delay the proceedings.

Next the State contends that Terrance Walker's argument that the trial judge failed to consider judicial economy, docket management, or inconvenience to the parties or witnesses is "disingenuous at best," apparently because the trial court learned at the previous court date that the State had an out-of-state witness they would be presenting at trial, but the State did not mention this witness at the time when defense counsel sought a continuance. (St. Br. 14-15, 26) On December 16, 1993, the prosecutor stated that "I have an out of state witness. So I couldn't do it (the trial) until January." (R. 3) The State's Answer to Discovery lists 42 witnesses, 41 of which had in-state addresses. (C. 22-23) The remaining witness, Jearott Linzy, is listed as address unknown. (C. 23) The State never filed a supplemental answer indicating an address for Mr. Linzy, and, the record does not include any evidence that the State ever placed Mr. Linzy under subpoena. Consequently, it is unclear if the State would have even been allowed to present testimony from the mysterious out-of-state witness. On the date of trial, the State never objected to defense counsel's request for a continuance, and never indicated that a continuance would inconvenience its alleged out-of-state witness. Similarly, the trial judge, in denying the motion for a continuance, never mentioned an out-of-state witness, and no out-of-state witness testified at trial. This record does not demonstrate that the trial judge based his denial of a continuance on inconvenience to the parties or witnesses.

The State argues that the trial judge thought the continuance request was made solely for the purpose of delay because “the only reasonable inference” from the judge’s statement that “[t]here isn’t a private attorney in the business who hasn’t tried to pull something like this,” is that Judge Morrissey believes that private counsels have a “penchant for asking for continuances for convenience sake.” (St. Br. 26-27) Thus, the State is asking this Court to sanction, as a valid exercise of discretion, Judge Morrissey’s belief that since private counsels have a “penchant” for seeking unnecessary continuances, the public defender in this case did as well. The State’s creative argument notwithstanding, there is nothing in the record to support the conclusion that defense counsel here acted with dilatory intent.

The State also argues that Terrance Walker’s reliance on *People v. Childress*, 276 Ill. App. 3d 402 (1st Dist. 1995), is misplaced. (St. Br. 27) Terrance Walker cited *Childress* for the proposition that Judge Morrissey did not even inquire of defense counsel how long of a continuance would be required. (Def. Br. 15) Given that defense counsel thought the case had been set for the following week, it is reasonable to conclude that counsel would have needed less than a week to prepare. (Def. Br. 15) The State contends that the “inference” that counsel simply sought to delay the proceedings is “buttressed by [this] assertion.” (St. Br. 28) According to the State’s logic, if counsel only needed an additional week, she could have advised the prosecution prior to the date of trial. (St. Br. 28) However, counsel’s uncontradicted statement to the trial judge was that she did not find out that she had made a scheduling error until the evening of January 19, 1994. (R. 8-9) Counsel informed the State and the court the following morning. (R. 8-9) The State does not explain how counsel could have informed the parties of her error before she knew of its existence.

The State misstates the appellate court’s order by stating that “the appellate court’s analysis of the continuance issue did not turn on whether [Terrance Walker] could demonstrate that his statement would have been suppressed but for counsel’s alleged incompetence.” (St. Br. 31) The appellate court stated that counsel “makes no showing that the trial court would have granted his suppression motion had counsel been better prepared.” Order at 12. The State follows up this argument by raising a *Strickland* argument in the middle of its continuance discussion. *Strickland* has no place in the analysis of this issue – when the record demonstrates that an attorney was not prepared, and demonstrated neither diligence nor skill in representing the accused, courts are inclined to find prejudice resulting from the denial of a continuance. *People v. Tyler*, 128 Ill. App. 3d 1080, 1097 (2nd Dist. 1984); (Def. Br. 11).

The State ridiculed defendant numerous times in its brief, calling him – sardonic, flippant, overly dramatic, naive, and disingenuous (St. Br. 22, 26, 32-33) – but what it has not done is to provide any viable argument to counter the fact that Judge Morrissey abused his discretion by refusing to grant a continuance. The abuse of discretion prejudiced Terrance by denying him his right to counsel and a fair trial. This Court should reverse Terrance’s convictions and remand the case for a new, fair trial.

II. Terrance Walker received ineffective assistance of counsel when his court appointed attorney informed the court prior to the start of the juvenile’s double-murder trial that she was unprepared, that she could not proceed, and, during the ensuing trial, failed to provide any meaningful adversarial testing of the State’s case as evidenced by her failure to develop a theory of the case, submitting a legally deficient defense, failing to request a ruling on a motion to suppress, and failing to file any post-trial motion or notice of appeal after a trial that consumed less than 43 pages of transcripts.

In his opening brief, Terrance Walker argued that this Court should presume prejudice based on defense counsel’s failure to subject the State’s case to meaningful adversarial testing, and because conditions unique to this trial render it unlikely that any

counsel, even competent counsel, could have provided effective assistance of counsel. (Def. Br. 22-23) In response, the State raises three issues, only one of which is relevant to the case. Specifically, the State contends that *United States v. Cronin*, 466 U.S. 648 (1985), does not apply to the instant case. However, nothing in the State's *Cronin* analysis refutes Terrance Walker's argument that prejudice should be presumed.

The State takes issue with Terrance Walker's argument that defense counsel, who appeared at trial admittedly unprepared to represent her client, had only a short recess to prepare. (St. Br. 35) According to the State this argument is "disingenuous" and "flatly contradicted by the record." (St. Br. 25) The State rests its argument on the position, which Terrance acknowledged in his opening brief – that counsel had been appointed to the case previously. (St. Br. 36) However, nothing in the record detracts from the fact that counsel admitted prior to the start of trial that she had failed to prepare to defend Terrance Walker. (R. 8-9) Similarly, nothing in the record detracts from the fact that counsel, having arrived for trial unprepared, had only a short recess to prepare. (R. 8-9) It is a reasonable conclusion from such facts, that under these unique circumstances, that counsel could not provide effective assistance. Counsel's subsequent performance at trial confirms this conclusion where counsel failed to develop a theory of defense, failed to reasonably attack the State's two key pieces of evidence, and presented a legally deficient self-defense theory. (See, Def. Br. 20-26)

The State argues that defense counsel must completely fail to subject the State's case to meaningful adversarial testing in order to invoke the presumption of prejudice. (St. Br. 35) Terrance has not disputed this point, and does not now. However, the State attempts to bolster its argument that the breakdown of representation in this case was not complete by misconstruing the facts and holding of *United States v. Nixon*, 543 U.S. 175

(2004). According to the State, the United States Supreme Court held in *Nixon* that the presumption of prejudice did not apply in *Nixon* even though defense counsel “conceded defendant’s guilt before the jury, and then failed to put on a defense, cross-examined only a few witnesses, and did not object to any of the crime scene evidence.” (St. Br. 36) The implication of the State’s argument is that if the facts of *Nixon* did not warrant a presumption of prejudice, then the facts of this case do not. (St. Br. 36-7)

Contrary to the State’s argument, *Nixon* is not on point, nor does it stand for the proposition recited in the State’s brief. In *Nixon*, the defendant, charged with kidnaping and murder, faced the death penalty. In preparing for trial, defense counsel “deposed all of the State’s potential witnesses,” and, based on that investigation, concluded that the defendant’s guilt was not “subject to any reasonable dispute.” *Nixon*, 543 U.S. at 180-81. In a footnote, the Supreme Court indicated that every court which considered this case agreed with defense counsel’s analysis. *Id.* Based on this, counsel “believe[d] that the only way to save Nixon’s life would be to present extensive mitigation centering on Nixon’s mental instability.” *Id.* Defense counsel, an “experienced [] capital defense” attorney, “feared that denying Nixon’s commission of the kidnaping and murder during the guilt phase would compromise [defense counsel’s] ability to persuade the jury, during the penalty phase, that Nixon’s conduct was the product of his mental illness.” *Id.* Counsel attempted to explain this strategy to the defendant on numerous occasions, but Nixon remained unresponsive – never approving or protesting the strategy. *Id.* Nixon did not give counsel any assistance, and “refused to attend pretrial dispositions of various motions.” *Id.* At trial, Nixon “pulled off his clothing, demanded a black judge and lawyer, refused to be escorted into the courtroom, and threatened to force the guards to shoot him.” *Id.* Counsel proceeded with his strategy of conceding Nixon’s guilt, and

focusing on mitigation evidence during the penalty phase. *Id.* On appeal, the Supreme Court ruled that counsel made a strategic decision concerning Nixon's defense, and, given the circumstances, including Nixon's refusal to cooperate, counsel's decision did not fall within the realm of *Cronic*. *Id.* at 192-93.

The fundamental difference between this case, and *Nixon*, is that defense counsel in *Nixon* had fully prepared for trial and made strategic decisions following a full investigation. Conversely, in this case, defense counsel entirely failed to prepare for trial. This is evident, by among other things, the fact that counsel for Nixon "deposed all of the State's witnesses," and came to the conclusion, which every reviewing court concurred with, that Nixon did not have a viable defense. *Nixon*, 543 U.S. at 180-81. There is no evidence that defense counsel in this case interviewed any witnesses, let alone all of them. Similarly, there is no evidence that defense counsel's lack of preparedness in this case was a part of a trial strategy, that she discussed this strategy with Terrance, or that any court would ever approve such an absurd proposition. Most obviously, Terrance Walker's defense counsel did not have to make a Hobson's Choice between presenting an untenable defense and risk losing credibility with the jury during a death penalty hearing, or conceding Terrance's guilt. Terrance, unlike Nixon, did not face the death penalty. Lastly, there is nothing in the record to suggest that Terrance Walker ever conducted himself in a disruptive or uncooperative manner. Consequently, none of the factual circumstances that compelled the Supreme Court's conclusion concerning the presumption of prejudice in *Nixon* are applicable in this case.

The State does not dispute that counsel failed to make an opening statement, but contends that in a bench trial it is reasonable to assume that an opening statement would not have an effect on the outcome. (St. Br. 35-6) The State's argument fails to account

for the argument that Terrance Walker actually advanced in his opening brief. Terrance did not argue, as the State's suggests, that counsel's failure to give an opening statement warrants a presumption of prejudice. Terrance maintains that defense counsel failed to develop a theory of the case as evidenced by, *inter alia*, her failure to give an opening statement. (Def. Br. 20-26) Consequently, while it is possible for counsel to make a strategic decision to forgo an opening statement, it does not follow that admittedly unprepared counsel made such a strategic decision in this case. Indeed, when counsel is unprepared, counsel is not in a position to make strategic decisions.

Next, the State relies on a quote from *Cronic* indicating that not every failure to grant a continuance will compel a presumption of prejudice. (St. Br. 37-8) Terrance does not dispute this fact, just the State's application of it. The quote from *Cronic* cites to two cases where a tardy appointment of counsel did not compel a presumption of prejudice. *Cronic*, 466 U.S. at 661-62, citing *Avery v. Alabama*, 308 U.S. 444 (1940); and, *Chambers v. Maroney*, 399 U.S. 42 (1970). In *Avery*, the court appointed defense counsel three days before trial, and denied counsel's request for additional time to prepare. *Id.* at 450-53. At a hearing during a post-trial motion, the two attorneys who had represented Avery at trial testified that they conferred with Avery, but he did not provide any information relevant to his defense. The attorneys made inquiries of people who lived in the community, but none of those questioned, including a brother of petitioner, could offer information or assistance helpful to the defense. In short, the record established that defense counsels had prepared in the time allotted. Lastly, the Supreme Court noted that the offense occurred in a largely rural county where court is in session only during fixed terms. The Court concluded that "under these circumstances," the denial of the continuance did not require reversal. *Id.* In *Chambers*,

the Supreme Court deferred to the state court's finding that counsel's failure to successfully exclude certain evidence at trial did not compel the conclusion that counsel had failed to prepare for trial. *Chambers* 399 U.S. 53-54. In this case, unlike either *Avery* or *Chambers*, defense counsel repeatedly informed the trial judge that she failed to prepare for trial, and her subsequent performance at trial confirmed her admission.

Next, the State contends that Terrance Walker did not explain how defense counsel's cross examination of James Brewer, the State latent fingerprint examiner, was "faulty or wanting." (St. Br. 38) Contrary to the State's argument, Terrance Walker explained, in his opening brief, exactly why the cross-examination was faulty or wanting. (Def. Br. 23) In his opening brief, Terrance Walker criticized the appellate court's conclusion that defense counsel subjected the State's case to meaningful adversarial testing because she "called into question defendant's guilt where she elicited, through cross-examination, that only 1 of 16 fingerprints lifted from the Chevy was a match to defendant." Order at 8. Terrance Walker pointed out that this is the exact same evidence the State elicited on direct. (Def. Br. 23) Consequently, defense counsel did nothing on cross, save repeat the most damning aspect of the witness' testimony. (Def. Br. 23) The appellate court's order did not explain how "eliciting" that the State recovered her client's fingerprint from an automobile in which two people were discovered killed, constitutes calling "into question defendant's guilt." Order at 8. The State, in its brief, has also elected to forgo an explanation as it makes no argument that defense counsel's examination of Brewer constituted meaningful adversarial testing.

The State argues that defense counsel properly litigated the suppression motion. (St. Br. 38-40) However, the State does not dispute that the suppression motion had been entered and continued to be heard in conjunction with the trial, that defense counsel

failed to raise any questions concerning the voluntariness allegation in paragraph four of that motion, counsel failed to call the officers who were present during the initial interrogation concerning the presence of a youth officer during that interrogation, failed to ask for a ruling on the motion, and failed to correct the trial judge when he stated that the statement was not disputed. Moreover, the State concedes that the presence of a youth officer during the initial interrogation would have been a relevant factor bearing on the issue of admissibility. (St. Br. 39) The State's assertion that the youth officer was the "central issue" in the motion is based only on counsel's failure to raise the voluntariness issue in her motion to suppress. Counsel's failure in these respects are raised to demonstrate the fact that counsel failed to prepare to represent her client, and, thus, prejudice should be presumed. As a consequence, Terrance need not show that the motion would have been granted, because counsel's entire lack of advocacy is sufficient to prevent this Court from concluding that his trial was fundamentally fair, and reversal is necessary to preserve the integrity of the judicial process.

Next, the State argues that defense counsel's self-defense theory was not legally deficient, and faults Terrance Walker for not mentioning the fact that the trial judge found Terrance guilty on one count of second degree murder "precisely because counsel argued the self-defense theory." (St. Br. 40; citing to (R. 50-51) The reason Terrance Walker did not reference this fact is because it is not true. The Court based its findings of second degree murder solely on Terrance Walker's statement which was admitted by the State. (R. 48-52) Specifically, the trial judge stated that he "[l]ook[ed] not beyond the four corners of this seven-page document," Walker's statement, and concluded that "Walker was fearful ..." (R. 48-52) Subsequently, the trial judge, based on the statement, found Terrance guilty on one count of second degree murder. (R. 51-2)

Consequently, it was the State's own evidence, not defense counsel's legally deficient self-defense argument, that compelled the second degree murder finding.

CONCLUSION

For the foregoing reasons, Terrance Walker, Defendant-Appellant, respectfully requests that this Court reverse his convictions, and remand the case for a new, fair trial.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I, Robert M. Stephenson, certify that this brief conforms to the requirements of Supreme Court Rule 341(a) and (b). The length of this brief, excluding the appendix is 20 pages.

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