No. 126852

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, -vs- SERVETUS BROWN, Defendant-Appellant.	)	Appeal from the Appellate Court of Illinois, No. 1-18-0826. There on appeal from the Circuit Court of Cook County, Illinois , No. 17 CR 10469. Honorable Neera Lall Walsh, Judge Presiding.

BRIEF AND ARGUMENT FOR DEFENDANT-APPELLANT

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ORAL ARGUMENT REQUESTED

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NATURE OF THE CASE

Servetus Brown was convicted of being an armed habitual criminal after a jury trial and was sentenced to 10 years in prison.

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

ISSUES PRESENTED FOR REVIEW

Whether Servetus Brown was denied his right to be present for his own trial and to the effective assistance of counsel when the circuit court had the parties select jurors at off-the-record sidebar conferences for which Mr. Brown was not present and his attorney failed to object to this improper practice.

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STATEMENT OF FACTS

Servetus Brown was convicted after a jury trial of being an armed habitual criminal (AHC). (C. 144) He was acquitted of possession of a controlled substance (PCS). (C. 129; R. 332) He was sentenced to 10 years in prison. (C. 144)

Prior to beginning jury selection in this case, the circuit court did not give any instructions regarding the manner in which that selection would be carried out. (R. 24-55) After questioning the entire venire regarding the Rule 431(b) principles and giving some general admonishments, the court began questioning individual jurors. (R. 55-67) The court questioned four jurors and then asked to see the attorneys at a sidebar. (R. 67-84) The sidebar was held off the record. (R. 84) The judge then repeated this process several more times, questioning several jurors and then asking the attorneys to approach the bench for an off-the-record sidebar. (R. 84-160) After questioning one final juror and holding one final sidebar, the circuit court announced that a jury had been selected. (R. 160-61) At no time during this procedure were any jurors excused nor did the judge say anything about what was occurring at the sidebars. (R. 67-161)

After announcing that jury selection was complete, and after sending the jury out, the judge stated that the jurors were selected and stricken during these off-the-record sidebars "in the interest of saving a little bit of time[.]" (R. 163) The judge then listed seven jurors who were excluded with peremptory challenges and noted that two jurors had been excused "by agreement" including one for an "undisclosed murder case." (R. 163) The

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judge did not mention the tenth juror that was excluded. (R. 163) The judge then asked if either attorney had anything else to put on the record and they declined. (R. 163-64)

At trial, two police officers, Officers DiCera and Cherry, testified that they responded to a call of shots fired at 123rd Street and Yale Avenue in Chicago between 8:00 and 8:30 p.m. on June 18, 2017. (R. 171-74, 205-07) When they arrived a witness pointed toward a black sedan. (R. 173-74, 207) They pulled their police car up, front bumper to front bumper, with that car. (R. 174-75, 208) They did not activate their emergency lights, so their dash camera never came on. (R. 185-86, 223-26) They approached and saw Mr. Brown in the driver's seat of the car. (R. 175-76, 209) They told him to get out of the car several times, but he seemed disoriented and, every time they told him to get out, he either did not respond or refused. (R. 177-79, 209-10) Finally, DiCera opened the door, reached in and put the car in park, and then they pulled Mr. Brown out. (R. 210) Mr. Brown could not stand on his own. (R. 178-79, 211) While DiCera held Mr. Brown up, Cherry searched Mr. Brown's pockets and pulled a gun out of his left pant pocket. (R. 180-81) DiCera recovered two small packets of "suspect narcotics" from the seat where Mr. Brown had been sitting. (R. 212-13) When they got back to the station, Cherry read Mr. Brown his *Miranda* rights and Mr. Brown said that he had "plenty more guns." (R. 187)

The State called forensic chemist Fella Johnson from the Illinois State Police, who identified the substance in the packets as PCP. (R. 266-67) The parties then stipulated that Mr. Brown had two qualifying prior convictions

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for purposes of the AHC statute. (R. 271) The jury found Mr. Brown guilty of AHC but not guilty of PCS. (R. 332) The defense filed a motion for new trial, which was denied. (C. 145-50; R. 358) Mr. Brown was sentenced to 10 years in prison. (C. 144)

Mr. Brown argued on appeal that he was denied his right to be present for all critical portions of his trial when he was excluded from the off-the-record conferences at which the jury strikes were held. He argued that his trial counsel was ineffective for acquiescing in this process and failing to object and protect Mr. Brown's rights. Finally, he argued that the court and counsel's further error in holding these jury strikes off the record rendered it impossible for Mr. Brown to make a showing of prejudice, because he did not, and could not, know what occurred during the jury strike conferences. Mr. Brown argued that requiring him to show prejudice, where making such a showing was impossible, due to no fault of his own, would deny him his right to a direct appeal from his conviction. Therefore, he asked the appellate court to presume prejudice from counsel's errors.

The appellate court disagreed in a published opinion. *People v. Brown*, 2020 IL App (1st) 180826, ¶¶1-16. In a discussion that lasted all of three paragraphs, the court questioned whether Mr. Brown even had a right to be present for the strikes in the first place. *Brown*, 2020 IL App (1st) 180826, ¶14. It then rejected his ineffective assistance of counsel claim based on his failure to show prejudice. *Id*. at ¶16. The court did not address Mr. Brown's argument that such a result denied him his right to a direct appeal. *Id*. at ¶¶14-16. This Court granted leave to appeal on March 24, 2021.

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ARGUMENT

Servetus Brown was denied his rights to be present and to the effective assistance of counsel where the circuit court had the parties select jurors during off-the-record sidebar conferences for which Mr. Brown was not present and where his attorney failed to object to this improper procedure.

Servetus Brown was allowed to be present for the questioning of the potential jurors who would try his case. However, when the time came to actually decide which jurors would be seated for the trial, that process was held during off-the-record sidebars at which only the attorneys were allowed to be present. The circuit court never informed the parties ahead of time that it would be using this procedure and defense counsel offered no objection. As far as the record shows, Mr. Brown would not have had any idea that the jury selection was actually taking place during these sidebars until after the fact. When the circuit court eventually disclosed that the jury had been selected during the sidebars, it stated that this had been done "in the interest of saving a little bit of time." (R. 163)

When the circuit court excluded Mr. Brown from the selection of the jury it violated his right to be present for all critical portions of his own trial. When it held these juror strikes off the record, the court violated Illinois Supreme Court Rule 608(a)(7), which requires jury selection to be recorded by the court reporter. When counsel acquiesced to this improper procedure, he deprived Mr. Brown of his right to the effective assistance of counsel. When the appellate court declined to presume prejudice, despite the fact that the errors below made a showing of prejudice impossible, it denied Mr. Brown his right to a full appellate review of his trial.

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The appellate court affirmed Mr. Brown's conviction and sentence. *People v. Brown*, 2020 IL App (1st) 180826, ¶14-16. In the course of its three-paragraph discussion of this issue, the court first questioned whether Mr. Brown's right to be present had been impacted at all where he was present for the *voir dire*, but absent for the actual selection of the jurors. *Brown*, 2020 IL App (1st) 180826, ¶14. Second, it held that Mr. Brown could not show that he was prejudiced by his exclusion from the jury selection because he could not show that the jury that convicted him was biased. *Id*.

The appellate court's holdings were erroneous, as was its affirmance of Mr. Brown's conviction. As discussed in section A below, Mr. Brown's right to be present was in fact violated by his exclusion from the selection of jurors in his trial, and counsel performed unreasonably by failing to object and protect Mr. Brown's constitutional right. As discussed in section B below, Mr. Brown acknowledges that he cannot show prejudice in order to meet the second prong of the *Strickland* test. However, the court and counsel's second error, holding the strikes off the record, renders it practically impossible for him to do so. Therefore, prejudice should be presumed in this circumstance because holding otherwise would deny Mr. Brown his constitutional right to a direct appeal of his trial.

A criminal defendant has a general right to be present at every stage of his trial. *People v. Bean*, 137 Ill. 2d 65, 80-81 (1990). The right to be present is not an express right under the United States Constitution, but is implied, arising from the due process clause of the fourteenth amendment. U.S. Const., amend. XIV, § 1. *Kentucky v. Stincer*, 482 U.S. 730, 745 (1987).

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Article I, section 8 of the Illinois Constitution grants criminal defendants the express right "to appear and defend in person and by counsel." Ill. Const. 1970, art. I, § 8. Accordingly, both the federal constitution and our state constitution afford criminal defendants the general right to be present, not only at trial, but at all critical stages of the proceedings, from arraignment to sentencing. *People v. Lindsey*, 201 Ill. 2d 45, 55 (2002).

Although they are very similar, the State and federal rights to be present have different sources and this makes some difference in the way that courts approach them. It is true that, under either the federal or the State Constitution, what must be shown is that: 1) a defendant was prohibited from being present during a critical portion of the proceedings against him; and 2) that this resulted in a violation of a substantive constitutional right. *People v. McLaurin*, 235 Ill. 2d 478, 490-92 (2009). However, in light of the Illinois Constitution's explicit reference to a right to "appear and defend in person," Illinois courts recognize the existence of a "broad right to be present," although they will not reverse a defendant's conviction for a violation of that broad right unless that violation results in a denial of a greater, substantive right. *Bean*, 137 Ill. 2d at 80-81. By contrast, it appears that the federal right, or "privilege," to be present exists solely as an implicit subsidiary of other substantive rights. *Stincer*, 482 U.S. at 745.

The law in Illinois is clear that a criminal defendant has an absolute right to be personally present at his trial and this right can only be waived by the defendant, not by defense counsel. *People v. Mallett*, 30 Ill. 2d 136, 141-42 (1964). The issue of whether Mr. Brown was denied his constitutional right to

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be present at a critical stage of proceedings is reviewed *de novo*. *People v. O'Quinn*, 339 Ill. App. 3d 347, 358 (5th Dist. 2003).

Because his appointed counsel acquiesced in this process, Mr. Brown's right to the effective assistance of counsel is also at issue in this case. A defendant has the right to the effective assistance of counsel under both the United States and Illinois Constitutions. U.S. Const. amends. VI, XIV; Ill. Const. 1970, art. I, §8; *Strickland v. Washington*, 466 U.S. 668, 690-91 (1984); *People v. Albanese*, 104 Ill. 2d 504, 525 (1984). Defense counsel renders ineffective assistance where his performance is unreasonable, and there is a reasonable probability that, but for counsel's deficient performance, the result of the trial would have been different. *Strickland*, 466 U.S. at 688, 694. A claim of ineffective assistance of counsel is also reviewed *de novo*. *People v. Williams*, 391 Ill. App. 3d 257, 269 (1st Dist. 2009).

A. The right to be present for all critical stages includes the right to be present for the actual selection of the jury and counsel performed unreasonably by acquiescing in the circuit court's improper procedure.

This Court has previously held that a defendant generally has a right to be present "throughout the jury selection process." *Bean*, 137 Ill. 2d at 84. *Bean* itself considered a defendant's absence from both the questioning and exclusion of several jurors. *Bean*, 137 Ill. 2d at 78-79. However, a defendant's right to be present may be equally violated by his absence from either questioning or the actual striking and accepting of jurors.

The core of a defendant's right to be present during jury selection is his right to participate in the selection of a fair and impartial jury. *Id.* at 84. A defendant who is not present for any portion of jury selection clearly cannot

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participate. However, a defendant who is not present for either the questioning or the selection portions of the procedure will often be equally unable to participate. A defendant who is not present for the questioning of jurors but is present for the actual strikes and acceptances cannot contribute meaningfully to those decisions because they lack the information necessary to do so. Similarly, as in this case, a defendant who has heard the venire members' answers to questions, but has no means by which to participate in the decision as to who will be stricken and who will be accepted, cannot meaningfully contribute to the selection of an impartial jury. Hearing the answers to questions is simply useless if the defendant will have no opportunity to put the knowledge gained thereby to use.

Notably, even those appellate court cases that have held that there is no right to be present for the striking and accepting of jurors have implicitly recognized this rationale. See *People v. Spears*, 169 Ill. App. 3d 470, 482-83 (1st Dist. 1988); *People v. Beachem*, 189 Ill. App. 3d 483, 491-92 (1st Dist. 1989); *People v. Gentry*, 351 Ill. App. 3d 872, 882-84 (4th Dist. 2004). Those cases all relied on the fact that the defendant, who was present for *voir dire*, had the opportunity to consult with counsel prior to the conferences at which the strikes were made. For example, in *Spears*, the court noted that the defendant was present and able to contribute "during the discussions among defense counsel, the prosecutor, and defendant regarding specific objections to prospective jurors." 169 Ill. App. 3d at 483. Similarly the court in *Beachem* noted that the defendant admitted that he was able to consult with his attorney prior to the exercise of challenges in chambers and that, at one

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point, he was "allowed to reverse his counsel's acceptance of a panel of jurors." 189 Ill. App. 3d at 491-92; see also *Gentry*, 351 Ill. App. 3d at 882-84 (counsel stated on the record that defendant was aware that juror strikes were taking place and had chosen not to attend). Thus, each of these cases indicated that the defendant had an opportunity to participate in the selection process by communication with counsel.

Indeed, the problem with the *Spears* line of cases lies not in the results reached, but in the specific holding the courts made to reach those results. As this Court explained in *McLaurin*, prejudice is always a component of a claimed violation of the right to be present. 235 Ill. 2d at 495-96. Where an error is properly preserved, the burden is on the State to prove harmlessness. *Id*. at 495. Where the error has not been properly preserved, the burden is on the defendant to prove prejudice (either via the plain error rule or as part of a claim of ineffective assistance of counsel). *Id*. at 495-96.

It is plain that in *Spears* and its progeny, the core of the appellate court's analysis focused on a lack of prejudice. *Spears*, 169 Ill. App. 3d at 483; *Beachem*, 189 Ill. App. 3d at 491-92; *Gentry*, 351 Ill. App. 3d at 882-84. Put simply, the defendant's "broad right of presence" was violated in each of those cases. *Bean*, 137 Ill. 2d at 81 ("although defendant's broad right of presence was improperly denied and could have affected the impartiality of the jury," the record demonstrated a lack of prejudice). However, the record demonstrated that no prejudice resulted from that violation because the defendant was still able to meaningfully participate in the jury selection process. Where the appellate court erred was in holding that the defendant

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had no right to be present for the strikes in the first place, just because, in those particular cases, no prejudice resulted from the defendant's absence. *Spears*, 169 Ill. App. 3d at 482-83; *Beachem*, 189 Ill. App. 3d at 492; *Gentry*, 351 Ill. App. 3d at 882-84.

In this case, there is no question that Mr. Brown's broad right to be present was violated. *Bean*, 137 Ill. 2d at 81. The record is clear that the judge summoned the attorneys, and only the attorneys, to the off-the-record sidebar conferences at which the jury strikes took place. (R. 84, 98, 131, 150, 151, 157, 160) (each time asking to "see the attorneys") Counsel raised no objection to this process and participated without comment in all of these off-the-record sidebars.

Counsel's actions in this case were unreasonable. The appellate court has held that defense counsel may be found ineffective for failing to protect a defendant's right to be present during jury selection. *People v. Oliver*, 2012 IL App (1st) 102531, ¶¶5, 22. Moreover, it is well established that the right to be present is one that is personal to the defendant, and that counsel has no authority to waive that right. *Mallett*, 30 Ill. 2d at 141-42. By acquiescing in the circuit court's improper procedure, defense counsel improperly waived the defendant's right to be present, which was something counsel had no right to do. This was unreasonable. See *Oliver*, 2012 IL App (1st) 102531, ¶¶5, 22 (defendant adequately stated a claim that counsel performed unreasonably where counsel waived defendant's presence at jury strikes without authorization).

The remaining question to be answered is whether counsel's actions

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prejudiced Mr. Brown. However, as discussed below, the second error by court and counsel render it impossible to answer that question.

B. Because the court's decision to hold the jury selection conferences off the record, and counsel's acquiescence in that decision, make it impossible for Mr. Brown to show prejudice, prejudice should be presumed in this case in order to preserve Mr. Brown's right to an appeal.

The appellate court premised its affirmation of Mr. Brown's conviction in this case on the fact that Mr. Brown was unable to prove that he had been tried by a biased jury. *Brown*, 2020 IL App (1st) 180826, ¶16. As a general rule, the court was correct that a defendant must make such a showing in order to establish prejudice from counsel's failure to protect his right to be present for a portion of jury selection. See *McLaurin*, 235 Ill. 2d at 495-96. However, as Mr. Brown argued extensively in his appellate briefs, he was prevented from making any showing that he was prejudiced because, aside from the jury strikes being held outside of his presence, they were also held off the record. Because Mr. Brown has no means of knowing, much less proving, what took place during these strikes, he has no means by which he could *ever* show prejudice. Thus, the errors by the court and counsel below have, if allowed to stand, rendered this portion of Mr. Brown's trial completely unreviewable. This warrants a presumption of prejudice.

Mr. Brown's inability to show prejudice is itself a feature of the pair of errors in this case. Because the very nature of the errors at issue render it impossible to assess prejudice, Mr. Brown contends that this case presents one of the rare circumstances in which presuming prejudice is appropriate. See *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1908 (2017) ("an error has been

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deemed structural if the effects of the error are simply too hard to measure."); *Vasquez v. Hillery*, 474 U.S. 254, 263-64 (1986) (no showing of prejudice required where grand jury was selected in part based on race because "we simply cannot know that the need to indict would have been assessed in the same way by a grand jury properly constituted"); *People v. Spreitzer*, 123 Ill. 2d 1, 15-17 (1988) (*per se* conflicts of interest "might 'subliminally' affect counsel's performance in ways difficult to detect and demonstrate[,]" and require no showing of prejudice).

Because the juror strikes in this case were conducted off the record and outside of Mr. Brown's presence, he has no means by which to assess or argue prejudice. This places him in an impossible bind due to no fault of his own. It was the court and counsel who held the juror strikes off the record and without Mr. Brown present. However, according to the appellate court, the second error (holding the strikes off the record) renders the first error (holding the strikes without Mr. Brown present) unreviewable. *Brown*, 2020 IL App (1st) 180826, ¶16. Put simply, according to the appellate court's decision, two wrongs do make a right here.

Mr. Brown has a constitutional right to a full and fair review of the trial that led to his conviction and imprisonment. Ill. Const. 1970, art. VI, §6; *People v. McCaslin*, 2014 IL App (2d) 130571, ¶13. He has not received that review, because the appellate court chose to excuse one error the by court and counsel because of a second error by the court and counsel. *People v. Ramos*, 295 Ill. App. 3d 522, 525-27 (1st Dist. 1998) (defendant's right to appeal is denied where incomplete record frustrates review, and the incomplete state of

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the record is not defendant's fault). Such a result is incompatible with the right to an appeal.

Furthermore, this is not a circumstance where the record made of the *voir dire* questioning can suffice to establish that a fair and impartial jury was empaneled and that none of Mr. Brown's other substantive constitutional rights were denied. Although the actual questioning of the venire may not have given rise to the appearance of juror bias, that alone cannot answer the question of whether or not the selection process in this case violated Mr. Brown's constitutional rights to a fair and impartial jury.

Often, constitutional error in jury selection arises, not out of the particular opinions and beliefs of the jurors, but out of the process that selects them. For example, as far as the record shows, the State could have excluded every black venire member they were presented with, and they may have done so without any race-neutral reason. See *Batson v. Kentucky*, 476 U.S. 79, 90 (1986); *Snyder v. Louisiana*, 552 U.S. 472, 476-77 (2008). However, there is no record whatsoever of whether this happened, whether defense counsel ever sought to challenge those strikes, or what, if any, explanation the prosecution gave. Because there is no record, and because he was not present for any of the selection conferences, Mr. Brown himself can have no idea whether any of this occurred. See contra *Oliver*, 2012 IL App (1st) 102531, ¶6 (record showed that counsel raised a *Batson* challenge during selection, which was addressed by the court).

Similarly, as far as the record shows, the judge could have arbitrarily denied defense counsel's attempts to exercise a peremptory challenge on one

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or more jurors while allowing the State's. This would be a plain violation of procedural law and would be strongly indicative of judicial bias that could, on its own, give rise to a constitutional violation and reversible error. See 725 ILCS 5/115-4(e) (2018) (defense and prosecution each allowed equal number of peremptory strikes); *Bracy v. Gramley*, 520 U.S. 899, 904-05 (1997) (trial before a biased judge violates due process). However, once again, there is no record of any of this and Mr. Brown has no means of even knowing if it occurred.

Also, as the record in this case demonstrates, there is often important information disclosed during the actual selection conferences that is not revealed during the *voir dire*. For example, the court in this case explained that one venire member, Michael Gonzalez, was removed "by agreement" due to a failure to reveal a murder "case" from his past. (R. 163) Notably, Mr. Gonzalez's questioning was entirely unremarkable and he indicated that he had recently retired from a job with the City of Chicago reviewing red-light camera footage. (R. 103-06) Gonzalez is also a very common name and it is hardly unheard of for the State to incorrectly match a prior arrest or conviction to a potential juror based on similar or identical names.

Just as Mr. Gonzalez's alleged murder "case" was never revealed during the on-the-record questioning, any number of other venire members could have had prior convictions or charges that were only discussed at the off-the-record selection conference. Some such convictions or charges could give rise to an inference of bias, and therefore could make a showing of prejudice resulting from Mr. Brown's absence, but Mr. Brown will never

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know and will never be able to show that. Similarly, no court of review will ever be able to conduct a meaningful prejudice analysis, because the jury selection was conducted off-the-record and in secret.

In the appellate court, the State advanced several different arguments intended to convince the court that it actually is possible to measure the prejudice in this case, and that Mr. Brown should therefore be held to account for failing to prove the second prong of *Strickland*. (Appellate Response Brief. at 14-17) However, careful scrutiny reveals serious flaws in the State's contentions.

The State argued below that nothing in the record shows that Mr. Brown was unable to consult with his attorney regarding the jury strikes. (App. R. Br. at 14-15) As Mr. Brown discussed in his opening brief in the appellate court, there was nothing whatsoever said before or during the *voir dire* about strikes being conducted during off-the-record sidebars. (Appellate Opening Brief at 9) Therefore, there is no way that Mr. Brown could have communicated with his attorney about at least the first group of jurors, because he had no way to know that juror strikes were about to take place.

Furthermore, no jurors were actually asked to leave after any of the sidebars took place. (R. 84, 98, 131, 150, 151, 157, 160) It was not until jury selection was complete that it became apparent that prospective jurors had been struck and accepted during the numerous off-the-record sidebars that the court held. (R. 162-63) The State's argument would have this Court speculate that Mr. Brown obtained information that was never provided anywhere on the record in order to justify the trial court's decision to hold a

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significant portion of his trial proceedings off the record and without his presence. This places an impossible burden on Mr. Brown, as there is no way to disprove the State's speculation about things that occurred off the record. This situation stands in stark contrast to the facts in the *Spears* line of decisions, where the record affirmatively demonstrated that the defendant was aware of, and had an opportunity to participate through counsel in, the jury selection process. *Spears*, 169 Ill. App. 3d at 483; *Beachem*, 189 Ill. App. 3d at 491-92; *Gentry*, 351 Ill. App. 3d at 882-84.

The State also claimed that all of the information from the off-the-record sidebars was communicated to Mr. Brown after the fact and that he expressed no concern about the procedure employed. (App. R. Br. at 15) First, it is a matter of record that the judge did *not* provide a complete account of what occurred during the sidebars, because at least one juror who was stricken from the venire was never mentioned. (R. 150-51, 160-61, 163-64) Second, no one ever told Mr. Brown that he had a right to be present for the jury strikes. As the appellate court has previously held, a defendant cannot be expected to object to being denied a right that he does not know he has. See *People v. Lucas*, 2019 IL App (1st) 160501, ¶14 (no waiver of right to be present where defendant was never informed that she had that right).

The State also argued that Mr. Brown should have obtained a bystander's report, or other alternative report of proceedings, of the off-the-record proceedings and that he should not be rewarded for "failing to provide a complete record." (App. R. Br. at 15-16) However, providing a complete record is impossible in this case. Mr. Brown cannot, as Rule 323(c) prescribes,

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offer a proposed bystander's report, because he has no idea what happened during these off-the-record proceedings. Ill. S. Ct. R. 323(c). Similarly, were the State to proffer an alternative proposed report of proceedings, Mr. Brown would have no means by which to assess its validity or accuracy. Ill. S. Ct. R. 323(c). In short, the errors in this case deprive Mr. Brown of the ability to meaningfully participate in the process required in order to generate an alternative report of proceedings.

It is well established that, where an incomplete record prevents a defendant from receiving a full and fair appeal from his conviction, and the incomplete nature of the record is not due to any fault of the defendant's, reversal and remand for a new trial is required. *People v. Stark*, 33 Ill. 2d 616, 620-23 (1966); *see also People v. Ramos*, 295 Ill. App. 3d 522, 526-27 (1st Dist. 1998); *People v. Seals*, 14 Ill. App. 3d 413, 413-14 (1st Dist. 1973). Here, the errors by the court and counsel have not only deprived Mr. Brown of a complete record, they have rendered it impossible for him to even know what occurred during the off-the-record proceedings. Mr. Brown had no control over any of this and was never even informed that he had a right to be present for the off-the-record conferences at which his jury was chosen.

At times, post-conviction proceedings may provide an opportunity for a defendant to raise an issue that the direct appeal record is insufficient to support. However, for all of the reasons discussed above, not even a post-conviction petition could aid Mr. Brown in this case. He cannot file an affidavit attesting to what happened during jury selection because he has no knowledge of what happened. Nor could Mr. Brown realistically expect to

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obtain a supporting affidavit from his attorney, who would have to allege his own ineffectiveness in such an affidavit. See *People v. Williams*, 47 Ill. 2d 1, 4 (1970) (defendant cannot be expected to obtain an affidavit from his former counsel alleging their own ineffectiveness); *People v. Hall*, 217 Ill. 2d 324, 333-34 (2005) (same). Mr. Brown's remaining options would be to seek an affidavit from the judge, who would be required to allege that she violated Mr. Brown's constitutional rights, or from the opposing party. None of these are realistic options.

The record in this case (or, in some respects, the lack thereof) establishes beyond question that error occurred where Mr. Brown's jury was selected outside of his presence and off the record. He cannot possibly prove prejudice from those errors, and from counsel's acquiescence to them, because no record exists and he has no knowledge of what happened. In this unique circumstance, prejudice should be presumed, as it is in other limited circumstances where the nature of an error itself makes it difficult or impossible to determine prejudice. See *Weaver*, 137 S. Ct. at 1908; *Vasquez*, 474 U.S. at 263-64; *Spreitzer*, 123 Ill. 2d at 16-17. Holding otherwise would deprive Mr. Brown of his constitutional right to a full and fair appeal. Therefore, Mr. Brown respectfully requests that this Court reverse his conviction and remand this case for a new trial, with all critical proceedings to be held on the record and in his presence.

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CONCLUSION

For the foregoing reasons, Servetus Brown, defendant-appellant, respectfully requests that this Court reverse his conviction and remand this case for a new trial.

Respectfully submitted,

DOUGLAS R. HOFF
Deputy Defender

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COUNSEL FOR DEFENDANT-APPELLANT

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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 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 20 pages.

/s/Kieran M. Wiberg
KIERAN M. WIBERG
Assistant Appellate Defender

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APPENDIX TO THE BRIEF

Servetus Brown No. 126852

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INDEX TO THE RECORD

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Report of Proceedings ("R")

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IN THE CIRCUIT COURT OF COOK COUNTY

PEOPLE OF THE STATE OF ILLINOIS)
V.)
SERVETUS BROWN)
Defendant

CASE NUMBER 17CR1046901
DATE OF BIRTH 09/21/74
DATE OF ARREST 06/18/17
IR NUMBER 1000694 SID NUMBER 031263820

ORDER OF COMMITMENT AND SENTENCE TO ILLINOIS DEPARTMENT OF CORRECTIONS

The above named defendant having been adjudged guilty of the offense(s) enumerated below is hereby sentenced to the Illinois Department of Corrections as follows:

Count	Statutory Citation	Offense	Sentence	Class
001	720-5/24-1.7(A)	ARMED HABITUAL CRIMINAL	YRS. 010 MOS.00	X
	and said sentence shall run concurrent with count(s) ___ ___ ___ ___			
____	_____	_____	YRS. ____ MOS. ____	____
	and said sentence shall run (concurrent with)(consecutive to) the sentence imposed on:			
____	_____	_____	YRS. ____ MOS. ____	____
	and said sentence shall run (concurrent with)(consecutive to) the sentence imposed on:			
____	_____	_____	YRS. ____ MOS. ____	____
	and said sentence shall run (concurrent with)(consecutive to) the sentence imposed on:			
____	_____	_____	YRS. ____ MOS. ____	____
	and said sentence shall run (concurrent with)(consecutive to) the sentence imposed on:			

On Count ___ defendant having been convicted of a class _ offense is sentenced as a class x offender pursuant TO 730 ILCS 5/5-5-3(C)(8).

On Count ___ defendant is sentenced to an extended term pursuant to 730 ILCS 5/5-8-2.

The Court finds that the defendant is entitled to receive credit for time actually served in custody for a total credit of 0248 days as of the date of this order Defendant is ordered to serve 0003 years Mandatory Supervised Release.

IT IS FURTHER ORDERED that the above sentence(s) be concurrent with the sentence imposed in case number(s) _____ _____ _____ _____
AND: consecutive to the sentence imposed under case number(s)
_____ _____ _____ _____ _____

IT IS FURTHER ORDERED THAT _____

IT IS FURTHER ORDERED that the Clerk provide the Sheriff of Cook County with a copy of this Order and that the Sheriff take the defendant into custody and deliver him/her to the Illinois Department of Corrections and that the Department take him/her into custody and confine him/her in a manner provided by law until the above sentence is fulfilled.

DATED FEBRUARY 20, 2018 ENTER: 02/20/18
CERTIFIED BY P COLLINS
DEPUTY CLERK
VERIFIED BY _____

ENTERED
JUDGE NEERA WALSH-1969
FEB 20 2018
DOROTHY BROWN
CLERK OF THE CIRCUIT COURT
OF COOK COUNTY, IL
DEPUTY CLERK

JUDGE: WALSH NEERA LALL 1969

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2020 IL App (1st) 180826

FIFTH DIVISION
DECEMBER 18, 2020

No. 1-18-0826

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County, Illinois.
	)	
v.	)	No. 17 CR 10469
	)	
SERVETUS BROWN,	)	Honorable
	)	Neera Lall Walsh,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE CUNNINGHAM delivered the judgment of the court, with opinion.
Justices Hoffman and Rochford concurred in the judgment and opinion.

OPINION

¶ 1 The defendant-appellant Servetus Brown appeals his conviction of being an armed habitual criminal, for which he was sentenced to 10 years' imprisonment. On appeal, the defendant argues that he was denied his right to be present at a critical stage of trial where all the juror strikes were made at sidebar conferences held off the record and outside his presence, and that his counsel was ineffective for failing to object to this procedure which did not allow him to be present at this critical stage. He further argues that his conviction for unlawful possession of a firearm in case number 96 CR 3273 (01) should be vacated as void *ab initio*. For the reasons that follow, we affirm the judgment of the circuit court of Cook County in the instant case but vacate the defendant's conviction in case number 96 CR 3273 (01).

¶ 2 BACKGROUND

¶ 3 On June 18, 2017, two Chicago police officers, responding to a call of shots fired, were directed to a black sedan where the defendant was sitting in the driver's seat. When the defendant

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did not respond to the officers' repeated requests to exit the vehicle, an officer pulled him out of the car. The officers then searched the defendant and recovered a gun from his pants pocket. The officers also recovered two packets of what was later determined to be PCP from the driver's seat.

¶ 4 The defendant was indicted on 21 counts, but the State proceeded to trial on only 2 counts: armed habitual criminal and possession of a controlled substance.

¶ 5 A jury trial commenced on January 9, 2018. The court questioned the venire in panels of four. After questioning the first panel in open court, the court asked to see the attorneys. The record reflects that a sidebar was held off the record. The court repeated this process for the second, third, fourth, and fifth panels, holding a sidebar off the record after questioning each panel.

¶ 6 In the sixth panel, the court first questioned Dennis Eakright. In response to a question regarding whether anything would keep him from participating in jury duty, Eakright responded that he was on medication for injuries he suffered a year ago that left him "not always focused." The court then questioned the next panel member, Barbara Hayler, before asking to see the attorneys and holding another sidebar off the record. Finally, the court questioned the third panel member, Tyler M. Le Pretre, and held a sidebar off the record.

¶ 7 Following this last sidebar, the court announced that it had a jury. Among those not selected for the jury were Dennis Eakright and Barbara Hayler from the sixth panel. After the court dismissed those who were not selected for the jury, it took a short recess before coming back on the record and noting that the State, the defendant, and defense counsel were present. The court then stated: "[W]e just completed jury selection and in the interest of saving a little bit of time, we had sidebars regarding the challenges for cause and for peremptory challenges and now we're going to put them all on the record."

¶ 8 The court then named the jurors that the defendant and the State struck for peremptory

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challenges. The court further noted that two jurors were dismissed for cause, by agreement. Dennis Eakright, who was not on the jury, was not mentioned as either a peremptory challenge or a dismissal for cause. The court finally asked if there was "anything else anyone wants to put on the record," to which the State and the defendant responded "no."

¶ 9 At trial, the two arresting officers testified, along with the forensic examiner who tested the substance recovered from the driver's seat of the defendant's car. The State then entered into evidence a stipulation that the defendant had two prior qualifying convictions. (Those convictions did not include his 1996 conviction for possession of a firearm.)

¶ 10 The defendant, whose motion for a directed verdict was denied, then rested his case without putting on any evidence. The jury found the defendant guilty of being an armed habitual criminal but not guilty of possession of a controlled substance.

¶ 11 In February 2018, the defendant's motion for a new trial was denied, and the defendant was sentenced to 10 years' imprisonment. His motion to reconsider sentence was denied on March 19, 2018. The defendant filed a notice of appeal the same day.

¶ 12 ANALYSIS

¶ 13 We note that we have jurisdiction to review this matter, as the defendant timely appealed. Ill. S. Ct. R. 301 (eff. Feb. 1, 1994); Ill. S. Ct. R. 303 (eff. July 1, 2017).

¶ 14 The defendant challenges his conviction on the basis that he was deprived of his constitutional right to be present at a critical stage of proceedings—namely, jury selection. Both the federal and State constitutions afford defendants the "'general right to be present, not only at trial, but at all critical stages of the proceedings, from arraignment to sentencing.'" *People v. Aguilar*, 2020 IL App (1st) 161643, ¶ 38 (quoting *People v. Lindsey*, 201 Ill. 2d 45, 55 (2002)); see also U.S. Const. Amend. 14; Ill. Const. art. 1, sec. 8. While it is well settled that jury selection

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is a critical stage of trial (*People v. Bean*, 137 Ill. 2d 65, 80, 84 (1990)), it is far less clear whether the exercise of juror challenges is a critical stage of proceedings (see *People v. Spears*, 169 Ill. App. 3d 470, 483 (1988); *People v. Gentry*, 351 Ill. App. 3d 872, 883-84 (2004)). Here, while the defendant was present for *voir dire*, he was absent from the conferences where the State and defense counsel made peremptory challenges and challenges for cause.

¶ 15 At the outset, we note that the defendant did not object to the court's decision to address juror challenges in a sidebar off the record at the time of trial or in a posttrial motion, as required to preserve the issue for review. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988) (in order to preserve error for review, party must object at trial and file written posttrial motion). Defendant also does not argue plain error, which permits us to review otherwise forfeited issues if the evidence was closely balanced or if the error was so serious that the defendant was denied a fair trial. *In re C.B.*, 386 Ill. App. 3d 735, 745 (2008). Instead, he argues that his trial counsel was ineffective for failing to object to the process which allowed the exercise of challenges to jurors without the defendant being present. A claim of ineffective assistance of counsel requires a defendant to show that (1) his counsel's representation fell below an objective standard of reasonableness; and (2) he suffered prejudice in that there is a reasonable probability that but for counsel's errors the outcome of the proceeding would have been different. *People v. Rouse*, 2020 IL App (1st) 170491, ¶ 46 (quoting *Strickland v. Washington*, 466 U.S. 668, 687-88, 694 (1984)).

¶ 16 Here, we need not evaluate counsel's performance, because the defendant has not shown prejudice. *People v. Campos*, 2019 IL App (1st) 152613, ¶ 46. Importantly, the right to presence at trial is not a freestanding constitutional right; it is a "lesser right" that serves as a means by which to secure other constitutional rights, such as the right to an impartial jury. *Bean*, 137 Ill. 2d at 80-81. It follows that to show prejudice, the defendant must establish that he was not tried by

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an impartial jury. *Id.* at 81 (holding that defendant was not prejudiced by absence from *in camera voir dire* because he did not claim that the jurors selected were not impartial). This he has not done. The defendant claims that it is impossible for him to make this showing because the juror strikes were conducted off the record and therefore, prejudice should be presumed. But this misses the point. It is of no moment if the stricken jurors would have been impartial where the defendant has not shown that the chosen jurors were *not* impartial. "The United States Constitution, as does the Illinois Constitution, guarantees a defendant an impartial jury, *not a jury of his choice.*" *Id.* at 85 (Emphasis added.). Because the defendant has not shown prejudice, we reject his claim of ineffective assistance of counsel arising out of counsel's decision not to object to the defendant's absence during the juror challenge process.

¶ 17 The defendant next challenges his 1996 conviction for unlawful possession of a weapon. In that case, the defendant was convicted under subsection 24-1(A)(4) of the Criminal Code of 2012. 720 ILCS 5/24-1(A)(4) (West 1994). That subsection was held unconstitutional in *Moore v. Madigan*, 702 F.3d 933, 942 (7th Cir. 2012). Therefore, the defendant now seeks to vacate that conviction as void *ab initio*. See *People v. Dunmore*, 2013 IL App (1st) 121170, ¶ 9 (conviction under facially unconstitutional statute is void).

¶ 18 The State does not dispute that a conviction based on an unconstitutional statute is void, nor does it dispute the unconstitutionality of subsection 24-1(A)(4) of the Code. Instead, the State argues that the defendant may only challenge his 1996 conviction on direct review of that conviction, or in a collateral proceeding, such as a postconviction petition pursuant to the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2018)), or a petition filed pursuant to section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2018)). Not so. Our supreme court in *In re N.G.*, 2018 IL 121939, ¶ 53 held that a postconviction petition or a section

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2-1401 petition are not "the sole means for collaterally attacking the validity of a conviction premised on a facially invalid, and indisputably unenforceable, statute." Instead, the court explained,

> "[W]here a person has been convicted under an unconstitutional statute, he or she may obtain relief from any court that otherwise has jurisdiction. *** Simply put, under Illinois law, there is no fixed procedural mechanism or forum, nor is there any temporal limitation governing when a void *ab initio* challenge may be asserted. [Citation.] Under our precedent, it is sufficient if a person subject to a conviction premised on a facially invalid statute raises his or her challenge through an appropriate pleading in a court possessing jurisdiction over the parties and the case." *Id.* ¶¶ 56-57.

¶ 19 It is undisputed that this court has jurisdiction over the parties and the case, and the defendant also put forth his challenge through an appropriate pleading—an appellate brief. Therefore, we vacate as void the defendant's 1996 conviction in case number 96 CR 3273 (01).

¶ 20 CONCLUSION

¶ 21 For the reasons stated, we affirm the judgment of the circuit court of Cook County convicting the defendant of being an armed habitual criminal but vacate the defendant's conviction in case number 96 CR 3273 (01) due to the unconstitutionality of the statute upon which that conviction was premised.

¶ 22 Affirmed in part and vacated in part.

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No. 1-18-0826

Cite as:	*People v. Brown*, 2020 IL App (1st) 180826
Decision Under Review:	Appeal from the Circuit Court of Cook County, No. 17-CR-10469; the Hon. Neera Lall Walsh, Judge, presiding.
Attorneys for Appellant:	James E. Chadd, Douglas R. Hoff and Kieran M. Wiberg, of State Appellate Defender's Office, of Chicago, for appellant.
Attorneys for Appellee:	Kimberly M. Foxx, State's Attorney, of Chicago (Alan J. Spellberg, Aline B. Dias and Conor McNulty, Assistant State's Attorneys, of counsel), for the People.

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TO THE APPELLATE COURT OF ILLINOIS
IN THE CIRCUIT COURT OF COOK COUNTY
CRIMINAL DIVISION

PEOPLE OF THE STATE OF ILLINOIS	)	
	)	
	)	**Case No: 17 CR 10469**
vs.	)	**Judge: WALSH**
SERVETUS BROWN	)	**Attorney: Crystal Brown APD**
	)	

FILED
JUDGE NEERA WALSH-1969
MAR 19 2018
DOROTHY BROWN
CLERK OF THE CIRCUIT COURT
OF COOK COUNTY, IL
DEPUTY CLERK

NOTICE OF APPEAL

An Appeal is taken from the order of judgment described below:

APPELLANT'S NAME: **SERVETUS BROWN**
APPELLANT'S ADDRESS: IDOC
APPELLANT'S ATTORNEY: **Office of the State Appellate Defender**
ATTORNEY'S ADDRESS: **203 North LaSalle Street, 24th Floor, Chicago, IL 60601**
ATTORNEY'S EMAIL: **1stDistrict@osad.state.il.us**
OFFENSE: ARMED HABITUAL CRIMINAL
JUDGMENT: GUILTY
DATE OF JUDGMENT: 1/10/18
SENTENCE: 10 YEARS IDOC with credit for 248 days TCS/TAS
IF NOT A CONVICTION, NATURE OF ORDER APPEALED FROM:

APPELLANT/APPELLANT'S ATTORNEY

VERIFIED PETITION FOR REPORT OF PROCEEDINGS COMMON LAW RECORD AND FOR APPOINTMENT OF COUNSEL ON APPEAL

Under Supreme Court Rules 605-608, appellant asks the Court to order the Official Court Reporter to transcribe an original and copy of the proceedings, file the original with the Clerk and deliver a copy to the Appellant; order the Clerk to prepare the Record on appeal, and to appoint the State Appellate Defender as counsel on appeal. Appellant, being duly sworn, says that at the time of his conviction he was and is now unable to pay for the Record or to retain counsel on appeal.

APPELLANT/APPELLANT'S ATTORNEY

ORDER

IT IS ORDERED that the State Appellate Defender be appointed as counsel on appeal and the Record and Report of Proceedings be furnished to appellant without cost, within 45 days of receipt of this Order.
Dates to be Transcribed: 1/9/18, 1/10/18 and 1/20/18 3/19/18

ENTERED
JUDGE NEERA WALSH-1969
MAR 19 2018
DOROTHY BROWN
CLERK OF THE CIRCUIT COURT
OF COOK COUNTY, IL
DEPUTY CLERK

DATE: 3/19/18 ENTER: _____
JUDGE

C 156

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No. 126852

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Appellate Court of Illinois, No. 1-18-0826.
Plaintiff-Appellee,	)	There on appeal from the Circuit Court of Cook County, Illinois , No.
-vs-	)	17 CR 10469.
SERVETUS BROWN,	)	Honorable Neera Lall Walsh, Judge Presiding.
Defendant-Appellant.	)	

NOTICE AND PROOF OF SERVICE

Mr. Kwame Raoul, Attorney General, 100 W. Randolph St., 12th Floor, Chicago, IL 60601, aagKatherineDoersch@gmail.com;

Ms. Kimberly M. Foxx, State's Attorney, Cook County State's Attorney Office, 300 Daley Center, Chicago, IL 60602, eserve.criminalappeals@cookcountyil.gov;

Mr. Servetus Brown, Register No. K99176, Dixon Correctional Center, 2600 North Brinton Avenue, Dixon, IL 61021

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 4, 2021, the Brief and Argument 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 and one copy is being mailed to the defendant-appellant in an envelope deposited in a U.S. mail box in Chicago, Illinois, with proper postage prepaid. Additionally, upon its acceptance by the court's electronic filing system, the undersigned will send 13 copies of the Brief and Argument to the Clerk of the above Court.

/s/Carol M. Chatman
LEGAL SECRETARY
Office of the State Appellate Defender
203 N. LaSalle St., 24th Floor
Chicago, IL 60601
(312) 814-5472
Service via email is accepted at
1stdistrict.eserve@osad.state.il.us

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