No. 126729

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellant, -vs- KELVIN T. HARTFIELD, Defendant-Appellee.	)	Appeal from the Appellate Court of Illinois, Fourth Judicial District, No. 4-17-0787. There on appeal from the Circuit Court of the Sixth Judicial Circuit, Champaign County, Illinois, No. 16-CF-1055. Honorable Thomas J. Difanis, Judge Presiding.

APPELLEE'S REPLY IN SUPPORT OF REQUEST FOR CROSS-RELIEF

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CROSS-REPLY BRIEF FOR DEFENDANT-APPELLEE

I.

Mr. Hartfield's constitutional rights to due process of law and to a jury trial were violated because the trial court responded to the jury's mid-deliberation question with an instruction that excused the state from proving beyond a reasonable doubt two elements of the crime of aggravated discharge of a firearm (peace officer).

The state begins its response to instructional errors of constitutional magnitude with a forfeiture argument. (Cross-resp. at 32-34.) Although Mr. Hartfield raised a contemporaneous objection to trial court's mid-deliberation instruction (R. 631-33) and repeated his objection in a post-trial motion (C. 257-58), the state claims that the objection was insufficiently specific to preserve the errors for appeal, citing *People v. Nelson*, 235 Ill. 2d 386 (2009), and *People v. Miller*, 173 Ill. 2d 167 (1996), *abrogated on other grounds by In re Commitment of Simons*, 213 Ill. 2d 523, 530-33 (2004). (Cross-resp. at 34.) But neither *Nelson* nor *Miller* involved instructional error at all, much less forfeiture of instructional error by way of an insufficiently specific objection. See *Nelson*, 235 Ill. 2d at 436 (observing that the defendant made no contemporaneous objection to the prosecutor's opening statement and concluding that any error in the statement was not preserved for appeal); *Miller*, 173 Ill. 2d at 191 (concluding that the defendant's objection to certain testimony "on the basis of lack of foundation *** and hearsay" did not preserve the distinct issue of any erroneous use of that testimony as "evidence of other crimes").

The cases of *People v. Mohr*, 228 Ill. 2d 53 (2008), and *People v. Herron*, 215 Ill. 2d 167 (2005), are of far greater applicability here. In *Mohr*, the state argued that the defendant forfeited instructional error "by failing to object to [a pattern provocation] instruction during trial on the same grounds that he presented after trial and in his appeal." *Mohr*, 228 Ill. 2d at 64. This Court rejected the state's argument, reasoning that the forfeiture rule requires "only that the defendant must object [to the instruction] during and after trial" and holding that

"[t]he fact that the defendant objected to [the pattern provocation instruction] at trial and again in his posttrial motion is enough to preserve the issue on appeal." *Id.* at 64-65. And in *Herron*, this Court indicated that *either* a contemporaneous "object[ion] to the [erroneous] instruction *or* [the] offer [of] an alternative instruction at trial" is sufficient to preserve the instructional error for appeal, together with a post-trial motion. (Emphasis added.) *Herron*, 215 Ill. 2d at 175. In other words, when the defendant is faced with the prospect of an erroneous instruction, he must take some immediate action to present the trial court with an opportunity to avoid the error. See *id.* (explaining that the forfeiture rule is meant to "allow[] the [trial] court to correct its own errors before the instructions are given" and "disallow[] the defendant to obtain a reversal through inaction").

In this case, as soon as it became clear that the trial court was drafting an erroneous response to the jury's mid-deliberation question (see R. 630-32), Mr. Vargas explicitly objected and implicitly endorsed the legal accuracy of the initial jury instructions on aggravated discharge (R. 632), which completely and correctly stated the law as applied to the state's theory of the case (see R. 620-23). The trial court noted the objection and overruled it by finalizing the erroneous response, putting the response in writing, and giving it to the jury as a grievously flawed mid-deliberation instruction. (R. 633; see Sup. C. 3-4.) Thus, Mr. Hartfield did not stand by idly and deprive the trial court of an opportunity to avoid the instructional errors it was about to make. (See R. 630-33.) And in his post-trial motion, Mr. Hartfield again objected to the mid-deliberation instruction and endorsed the legal accuracy of the initial jury instructions on aggravated discharge. (C. 257-58.) No more was required to preserve the instructional errors now before this Court. See *Mohr*, 228 Ill. 2d at 64-65; *Herron*, 215 Ill. 2d at 175. And because the state makes no alternative argument that the instructional errors were harmless beyond a reasonable doubt (see Cross-resp. at 32-40), Mr. Hartfield respectfully refers this Court to the unanswered harmless-error analysis in his request for cross-relief (Appellee's brf. at 23-28).

Arguing only against plain error, the state next claims that "there was no clear or obvious error" in the trial court's mid-deliberation instruction. (Cross-resp. at 34-37.) According to the state, that instruction "could not have misled the jury about the trajectory element" of aggravated discharge because, in the midst of its deliberations, the jury "asked about" the knowledge element of aggravated discharge but not the trajectory element. (Cross-resp. at 35-36.) For two reasons, the state mistaken. One, the jury's mid-deliberation question showed its confusion about the trajectory element, insofar as the question equated proof that a peace officer was "on the scene in the area where [the] gun was fired" (Sup. C. 3) with proof that the gun was fired "in the direction of" that officer, 720 ILCS 5/24-1.2(a)(3) (2015).

And two, even if the jury's question was about the knowledge element only, the trial court's answer injected erroneous instruction on the trajectory element as well, by indicating that the trajectory element is proved by evidence that an officer "may have been in the line of fire when the firearm was discharged." (See Sup. C. 4.) A hypothetical may be of some use here. Consider a student who asks his professor, "Will the rule against perpetuities be on the exam?" The professor answers: "No, neither the rule against perpetuities nor the doctrine of worthier title will be on the exam." If the exam actually does cover both the rule against perpetuities and the doctrine of worthier title, then the professor has misled her student about both the need to study the rule against perpetuities and the need to study the doctrine of worthier title, even though the student did not ask about the doctrine of worthier title.

The state goes on to suggest that an instruction to determine "which officer or officers, if any, may have been in the line of fire" of a discharge of a firearm (Sup. C. 4) is somehow equivalent to instructions to determine whether a firearm was discharged "in the direction of" each of four named officers, 720 ILCS 5/24-1.2(a)(3), arguing that "the words 'if any' clearly contemplated that the jury could conclude that no officer was in the line of fire." (Cross-resp. at 36.) This argument rewrites the mid-deliberation instruction by silently replacing

"may have been" with "was." (Compare Sup. C. 4, with Cross-resp. at 36.) But "may have been" means "perhaps was," not "was." (Emphasis and internal quotation marks omitted.) IX The Oxford English Dictionary 501 (2nd ed. 1989); see also American Heritage Dictionary of the English Language 1086 (5th ed. 2011) (providing that "may" is "[u]sed to express possibility or probability"). That being so, the mid-deliberation instruction—"if any" and all—expressed that the jury must determine whether zero, one, two, three, or four officers were possibly in the line of fire, impermissibly reducing the state's burden on the trajectory element as to each of the four counts of aggravated discharge. (See Sup. C. 4.)

The state similarly skews the jury's mid-deliberation question in service of an argument that the trial court's mid-deliberation instruction was "an accurate statement of law" on the knowledge element of aggravated discharge, twice implying that the trial court answered " 'no' " when the jury asked whether it "need[ed] to find" or "ha[d] to find" that the defendant had knowledge of the total number of peace officers who were on the scene when the defendant discharged a firearm, *i.e.*, four officers. (See Cross-resp. at 36-37.) But that is not what the jury asked. The jury asked, "Does suspect need to know there were four cops on the scene in the area where gun was fired *to be guilty of all four counts of aggravated discharge of a firearm*[?]" (Emphasis added.) (Sup. C. 3.) Unless the emphasized language is ignored entirely, as in the state's analysis (see Cross-resp. at 36-37), it must be concluded that the jury was asking whether a guilty verdict on any one count of aggravated discharge required proof beyond a reasonable doubt of Mr. Hartfield's knowledge of the facts of existence and identity of the officer named in that count. (See Sup. C. 3.) As the state charged, tried, and sent this case to the jury, the only legally accurate answer to that question was yes. (See C. 64-67; R. 620-30.) By answering no and then telling the jury that it could find Mr. Hartfield guilty of as many counts of aggravated discharge as there were peace officers who "may have been in the line of fire," the instruction struck the knowledge element from all four counts.

To whatever extent the state argues that the jury could not have been misled by the selective and erroneous mid-deliberation instruction because the jury also received complete and correct initial instructions on the elements of aggravated discharge (see Cross-resp. at 35-36), the argument suffers from both a temporal illogic and an absence of authority. The initial instructions, of course, preceded in time the mid-deliberation instruction. (R. 620-23, 630-33.) And the jury's mid-deliberation question showed that it did not understand the knowledge and trajectory elements of aggravated discharge despite already having received the initial instructions on those elements. (See R. 620-33; Sup. C. 3.) It follows that the jury certainly could have been misled by the mid-deliberation instruction notwithstanding the initial instructions, a risk recognized in the unanswered authority requiring resolution of a jury's "explicit" mid-deliberation "difficulties" with "specificity and accuracy" regardless of whether "the jury was properly instructed originally," *People v. Childs*, 159 Ill. 2d 217, 229 (1994). (Appellee's brf. at 11; see Cross-resp. at 34-40.)

The state alternatively argues against first-prong plain error by denying that the evidence was closely balanced on the knowledge and trajectory elements, asserting that inconsistencies in the four deputies' testimony were minor. (Cross-resp. at 37-38.) In support, the state selectively quotes the testimony of Deputies DeRouchie and Demko, without addressing or even acknowledging the following. (See Cross-resp. at 37-38.) Deputy DeRouchie testified that he and Deputy Demko were about *thirty* feet away from the second suspect when the suspect began firing (R. 226), while Deputy Demko testified that he was about *four* feet away from the second suspect when the suspect began firing (R. 282). Is the difference between the length of a bicycle and the length of a full-size school bus really so insignificant that it could not have raised credibility questions? And what of the discrepancy between Deputy Donovan's testimony that the suspect "was firing at everyone" (R. 310-11) and the testimony of

Deputy Ferriman—who alone testified that he had been able to see all the other deputies at the time the suspect began firing (compare R. 297, with R. 226, 284, 310-11)—that the suspect was firing only in Deputy Demko's direction and in Deputy DeRouchie's "[g]eneral[]" direction (R. 297-98)? The state has nothing to say about that discrepancy. (See Cross-resp. at 37-38.)

Finally as to second-prong plain error, the state argues that "there is no serious risk the jury did not understand the law" on the knowledge and/or trajectory elements and "convicted defendant" as a result because the initial jury instructions were complete and correct. (Cross-resp. at 38-40.) Once again, the state seems to suppose that the confounding effect of an improper mid-deliberation instruction is cured, preemptively, by proper initial instructions. (See Cross. resp. at 39.) Another professor-student hypothetical may be called for here. Just before the exam, the professor accurately describes her grading policy by telling the class: "Giving a wrong answer to an exam question will harm your grade more than just skipping the question will." In the middle of the exam, a panicked student approaches the professor's desk and asks, "What if I don't know the answer?" The professor responds by writing on the chalkboard: "If you don't know the answer, just give it your best guess." There is a serious risk that at least one of the students in the class will get a worse grade on the exam because, owing to the chalkboard instruction, he did not understand the professor's grading policy.

What is more, the state's supposition of preemptive cure is almost the inverse of Illinois authority holding that "if conflicting instructions are given, one being a correct statement of law and the other an incorrect statement of law," the jury is necessarily deprived of "proper guidance" on the law and thus "cannot perform its constitutional function." *People v. Pollock*, 202 Ill. 2d 189, 212 (2002); see also *People v. Bush*, 157 Ill. 2d 248, 254 (1993) (substantively same); *People v. Haywood*, 82 Ill. 2d 540, 545 (1980) (substantively same); *People v. Jenkins*, 69 Ill. 2d 61, 66 (1977) (substantively same). The state attempts to dismiss this long line of cases on the grounds that "they involved explicit misstatements of law." (Cross-resp. at 39-40.)

According to the state, the mid-deliberation instruction—which the state remarkably refers to as "the clarifying note"—did not " 'conflict' " with the initial instructions or "explicitly misstate the law." (Cross-resp. at 38-40.) The state is mistaken. As more fully demonstrated in Mr. Hartfield's request for cross-relief (Appellee's brf. at 11-23), the errors in the mid-deliberation instruction are immediately evident upon comparison of that instruction (Sup. C. 4; see Sup. C. 3) with the statutory elements of the offense it regards, see 720 ILCS 5/24-1.2(a)(3). The mid-deliberation instruction reduced the state's burden on the trajectory element and eliminated the knowledge element entirely, explicitly misstating the law on two essential elements of aggravated discharge and thereby conflicting with the initial instructions. It was anything but "clarifying." (See Cross-resp. at 40.)

II.

Three of Mr. Hartfield's four convictions for aggravated discharge of a firearm (peace officer) are unlawful as surplus convictions because the state did not charge or attempt to prove one discharge per count.

(No reply permitted.)

III.

Mr. Hartfield's statutory right to a speedy trial was violated because the trial court granted the state's first and third motions for continuance to obtain the results of fingerprint and DNA analyses despite the state's failure to show due diligence to obtain the results within the speedy-trial period.

With regard to a speedy trial, the state initially argues that delay occasioned by its six continuances to obtain the results of fingerprint and DNA analyses should be attributed to Mr. Hartfield because, in objecting to each of the six continuances, Mr. Vargas failed to use the words "speedy" or "120 days." (Cross-resp. at 22-23.) But this Court has made clear that " 'magic words' " are not required "[t]o prevent the speedy-trial clock from tolling." *People v. Phipps*, 238 Ill. 2d 54, 66 (2010). All that is required is a record objection to the proposed delay along with "some affirmative statement" to indicate that a speedy trial is

being requested. *Phipps*, 238 Ill. 2d at 66. Here, each of six times the state asked for a continuance, Mr. Hartfield objected, reminded the trial court that he was in custody, and declared his readiness for trial. (R. 36, 40, 44, 47, 50, 53.) The close coupling of a declaration of readiness for trial and a reference to the defendant's custodial status is an affirmative statement that is most naturally interpreted as a request for a speedy trial, compare 725 ILCS 5/103-5(a) (2016), with 725 ILCS 5/103-5(b) (2016), and the state cites no authority to the contrary. (See Cross-resp. at 22-23.)

The state alternatively argues that it met its burden to show due diligence to obtain the results of fingerprint and DNA analyses within the speedy-trial period by representing that it promptly collected and transported physical evidence to the crime lab "within 22 days of the crime and 20 days of defendant's arrest." (Cross-resp. at 24-27.) The state ignores Mr. Hartfield's reliance on a well-reasoned Fifth District case that held, "Standing alone, rapid retrieval of testing materials and delivery of those materials to a crime lab for testing is not enough to show" due diligence, *People v. Battles*, 311 Ill. App. 3d 991, 1000 (5th Dist. 2000). (Appellee's brf. at 54; see Cross-resp. at 24-27.) So too does the state withhold any response to Mr. Hartfield's discussion of the record possibility that at least one item of physical evidence that underwent fingerprint and DNA analyses—that is, a revolver that may have been used and abandoned by the first perpetrator/second suspect—was not transported to the lab until later, perhaps much later. (Appellee's brf. at 58-59; see Cross-resp. at 24-27.)

Neither does the state attempt to answer Mr. Hartfield's point that it sought and received a 120-day extension of the speedy-trial period without explaining why analyses that were reportedly "pending" as of August 29, 2016, could not be completed by the speedy-trial date of November 25, 2016, almost three months later. (Appellee's brf. at 56; see Cross-resp. at 24-27.) Instead, the state responds to an argument that Mr. Hartfield has not made, insisting that it was "not required from the first day" of the crime lab's receipt of items of physical evidence

"to request that the laboratory complete testing on only those items critical to the case." (Cross-resp. at 26; see Appellee's brf. at 53-60.) Mr. Hartfield agrees. It remains that the state was statutorily obliged to identify *some* action it took "in an attempt to promote, or expedite" the pending fingerprint and DNA analyses in order to show due diligence to obtain the results of those analyses within the speedy-trial period. *Battles*, 311 Ill. App. 3d at 1000-01. And at least as to its first, second, third, and fourth continuance motions, the state failed to do so. (See C. 56-57, 70-71, 74-77; R. 36-37, 40, 44, 47.)

The state next argues, for the first time, that an unpreserved violation of the statutory right to a speedy trial may not be corrected on appeal as second-prong plain error. (Cross-resp. at 27-30.) This argument is forfeited, having not been made in the appellate court below (see State's brf. at 6-7), and this Court should decline to consider it. See *People v. Holman*, 2017 IL 120655, ¶¶ 28-29 (agreeing that the state "forfeited its forfeiture argument because that argument was raised for the first time in the State's response brief" in this Court); *People v. Ringland*, 2017 IL 119484, ¶¶ 2, 36-37 (declining to consider the state's alternative argument against the suppression of evidence because the state did not make any such argument in the trial and appellate courts below); see also *People v. Dorsey*, 2021 IL 123010, ¶ 113 (Neville, J., dissenting) ("The doctrine of forfeiture applies equally to the State as well as to the defendant."), *reh'g denied* (Nov. 22, 2021).

In any event, the state acknowledges that five cases cited by Mr. Hartfield—one from each district of the appellate court—support his position on plain error. (Appellee's brf. at 63; Cross-resp. at 27, 30.) But the state dismisses "the plain error language" in four of the five cases as "dicta." (Cross-resp. at 27-28.) The state is mistaken. In at least three of those four cases, the proposition that a statutory speedy-trial violation constitutes second-prong plain error was the foundation for analysis of a procedurally forfeited claim of a violation of the

speedy-trial statute. See *People v. Mosley*, 2016 IL App (5th) 130223, ¶ 9 ("Despite defendant's failure to raise the issue below, we will address the issue under the plain-error doctrine because a speedy trial is a substantial fundamental right."); *People v. McKinney*, 2011 IL App (1st) 100317, ¶ 29 ("[D]espite the defendant's failure to include this issue in the motion for a new trial, it is subject to plain error review because a speedy trial implicates fundamental constitutional concerns. [Citation.] Therefore, we proceed to the merits of this issue."); *People v. Gay*, 376 Ill. App. 3d 796, 799 (4th Dist. 2007) ("We first note that a speedy trial is a substantial, fundamental right [citation]; thus, we will review defendant's claim under the plain-error doctrine despite defendant's failure to file a motion to dismiss the charges or file a posttrial motion."). This is Illinois authority, not dicta. See also *People v. Smith*, 2016 IL App (3d) 140235, ¶¶ 1, 9-10, 21 (concluding that an unpreserved violation of the defendant's statutory speedy-trial right was second-prong plain error requiring outright reversal of his conviction for aggravated criminal sexual abuse), *appeal denied*, 60 N.E.3d 881 (Ill. 2016).

According to the state, all of that authority is "incorrect." (Cross-resp. at 28.) Yet the state does not cite any contrary authority. (See Cross-resp. at 27-30.) Instead, the state points out that "constitutional and statutory speedy trial rights are not coextensive," then goes on to assert that "the latter is merely a prophylactic rule designed to protect the former." (Cross-resp. at 28-30.) But this Court has never described the speedy-trial statute as no more than prophylaxis. Over and again, this Court has said that the statute "implements" the right to a speedy trial guaranteed by the federal and state constitutions. See, *e.g.*, *People v. Lacy*, 2013 IL 113216, ¶ 20 ("Illinois' speedy-trial statute implements the constitutional right to a speedy trial by setting forth a definite time limit within which a defendant must be brought to trial."); *People v. Crane*, 195 Ill. 2d 42, 48 (2001) ("Because of the imprecise nature of the constitutional guarantee to a speedy trial, our legislature enacted section 103-5 of the Code of Criminal Procedure of 1963," which "implements the constitutional guarantee" by "specif[ying] certain time periods within which

a defendant must be brought to trial."); see also American Heritage Dictionary, *supra*, at 882 (defining "implement" as "[t]o put into practical effect" or "carry out"). And because the speedy-trial statute effectuates the constitutional right, it must be "liberally construed." *People v. Staten*, 159 Ill. 2d 419, 427 (1994) (collecting cases). The appellate court caselaw is correct that violation of the statutory speedy-trial right is second-prong plain error.

The state lastly argues that Mr. Vargas was not ineffective for failing to file a motion to dismiss the charges on speedy-trial grounds and failing to raise a speedy-trial issue in Mr. Hartfield's post-trial motion, relying on little more than its earlier argument that it met its burden to show due diligence to obtain the results of fingerprint and DNA analyses within the speedy-trial period. (Cross-resp. at 30-32.) Mr. Hartfield has already answered the state's due-diligence argument above, and he will not retread that ground here. The state also seems to suggest that Mr. Hartfield was not prejudiced by any deficiency in Mr. Vargas's failure to file a motion to dismiss because the trial court's finding of due diligence indicates that it would not have granted any such motion. (See Cross-resp. at 32.) But the question is not whether the trial court would have granted a motion to dismiss the charges on speedy-trial grounds; the question is whether a motion to dismiss the charges on speedy-trial grounds "would properly have been granted." *People v. Callahan*, 334 Ill. App. 3d 636, 644-45 (4th Dist. 2002). And as more fully demonstrated in Mr. Hartfield's request for cross-relief (Appellee's brf. at 52-60), that question must be answered in the affirmative.

IV.

Mr. Hartfield's constitutional right to a public trial was violated because the trial court excluded spectators from the courtroom during jury selection without making findings adequate to support the exclusion and considering reasonable alternatives to the exclusion.

As to the public-trial issue, the state first argues that plain-error review is foreclosed because Mr. Vargas acquiesced to the courtroom closure on Mr. Hartfield's behalf by "merely inquiring into the trial court's preference and voicing no complaint." (Cross-resp. at 14-16.)

This argument is defeated by an examination of the three cases the state cites in supposed support. (See Cross-resp. at 15.) In *People v. Averett*, 237 Ill. 2d 1, 6, 24 (2010), defense counsel both "assisted the trial court in drafting its response to the jury's question" and "agreed to the trial court's answer." Similarly in *In re Detention of Swope*, 213 Ill. 2d 210, 216-17 (2004), the petitioner's attorney helped craft the very discovery procedure that the petitioner later attacked on appeal. So too in *People v. Harvey*, 211 Ill. 2d 368, 376, 381, 386 (2004), where one defendant's counsel actually requested mere-fact impeachment, and another defendant's counsel expressly agreed to it by saying "[a]ll right" and "[o]kay" and that mere-fact impeachment "[wa]s fine." Each of the three cited cases, then, involved acquiescence that was explicit and active—not, as the state suggests, "tacit[]" or "passive[]." (See Cross-resp. at 15.)

Here, by contrast, Mr. Vargas stayed silent when the trial court confirmed that it was excluding even the few defense-supportive spectators from portions of the jury-selection process. (See R. 67-68.) The state has identified no case in which defense counsel's mere silence in the face of error operated as waiver, as opposed to forfeiture, of the error on appeal. (See Cross-resp. at 14-16.) That may be because the caselaw indicates that acquiescence to error may result in waiver only where the acquiescence is "affirmative." See, *e.g.*, *People v. Lawrence*, 2018 IL App (1st) 161267, ¶ 54 ("Where a defendant affirmatively acquiesced to the error by agreeing to the trial court's proposed answer to the jury, the plain error doctrine does not apply." (Internal quotation marks omitted.)); *People v. Bates*, 2018 IL App (4th) 160255, ¶ 74 ("[W]hen defense counsel affirmatively acquiesces to actions taken by the trial court, any potential claim of error on appeal is waived[.]"), *aff'd as modified*, 2019 IL 124143; see also Black's Law Dictionary 73 (11th ed. 2019) (defining "affirmative" as"[i]nvolving or requiring effort," as in "an affirmative duty"). The state cannot show and, indeed, does not assert that Mr. Vargas *affirmatively* acquiesced to the courtroom closure. (See Cross-resp. at 14-16; R. 67-68.) The public-trial issue is not waived.

The state next claims that the record on appeal does not show that any spectators were excluded from the courtroom at any point, asking this Court to infer that, after the trial court expressly and unequivocally directed all spectators to leave the courtroom, (1) each of those spectators defied the court by staying in the courtroom, and (2) the trial court accepted their defiance without record comment or action. (Cross-resp. at 17; see R. 67-68.) This Court should do no such thing, for the only reasonable inference from record silence in the face of a judicial command is obedience to—not defiance of—that command. *Cf. People v. Cunningham*, 212 Ill. 2d 274, 280 (2004) (stating in the context of review for sufficiency of the evidence that "if only one conclusion may reasonably be drawn from the record, a reviewing court must draw it even if it favors the defendant"). The state similarly argues for a presumption that "any members of the media who wanted to be present were permitted in the courtroom," although the trial court said nothing to impose or even imply some sort of media exception to its blanket courtroom closure. (Cross-resp. at 18-19; see R. 67-68.) Because any such presumption would require this Court to read into the record that which is not there, the state's argument must fail. *Cf. People v. Carter*, 2015 IL 117709, ¶ 23 (declining to assume that the defendant did not accomplish service by certified mail based on no more than the absence of a certified-mail return receipt in the record); *People v. Hunt*, 234 Ill. 2d 49, 57-58 (2009) (rejecting the state's interpretation of the trial court's arguably ambiguous oral order where the record contained no support for that interpretation).

On the record, the trial court told "the People in the courtroom," without exception, to "step out" so the jury-selection process could begin. (R. 67.) The only qualification, which the trial court made after Mr. Vargas questioned the courtroom closure, was that Mr. Hartfield's mother and grandmother and a public defender intern would be allowed back into the courtroom after the first 12 veniremembers were seated in the jury box. (R. 67-68.) Between the time that

all spectators were directed to leave the courtroom (R. 67-68) and the time that the first 12 veniremembers were seated in the jury box (R. 74), portions of the jury-selection process occurred, including: the trial court's reading of the charges (R. 69-71), the list of potential witnesses (R. 71-72), and the initial jury instructions (R. 72-73); and the swearing-in of the veniremembers (R. 74). The record before this Court is more than adequate to show that all spectators, including any members of the media that may have been present, were excluded from the courtroom during identifiable and significant portions of the jury-selection process.

The state alternatively argues that the trial court's total closure of the courtroom during at least portions of the jury-selection process was "consistent with the Sixth Amendment" because the veniremembers themselves were able to observe those portions of the process, citing *People v. Radford*, 2020 IL 123975, *reh'g denied* (Sept. 28, 2020), *cert. denied sub nom. Radford v. Illinois*, 141 S. Ct. 1438 (2021). (Cross-resp. at 18.) But the trial court in *Radford*, unlike the trial court in this case, permitted two of the defendant's family members, two of the victim's family members, and at least one camera-bearing member of the media to remain in the courtroom alongside the veniremembers. *Radford*, 2020 IL 123975, ¶ 40. The presence of the veniremembers alone is not enough. See *Presley v. Georgia*, 558 U.S. 209, 210-11, 215-16 (2010) (*per curiam*) (concluding that the defendant's right to a public trial was violated where the trial court excluded "a lone courtroom observer" from jury-selection proceedings that some 42 veniremembers observed).

The state also relies on *Radford* to argue that the exclusion of the public from jury selection did not impact Mr. Hartfield's right to a public trial because courtroom closures are sometimes " 'justified.' " (Cross-resp. at 18.) The cited paragraph of *Radford* discusses a passage from *Weaver v. Massachusetts*, 137 S. Ct. 1899 (2017), in which the United States Supreme Court indeed made clear that there may be legitimate reasons to impinge on the public-trial right. *Radford*, 2020 IL 123975, ¶ 33 (citing *Weaver*, 137 S. Ct. at 1909).

But in the very same passage, the Supreme Court emphasized that "courtroom closure is to be avoided" and reiterated that before "a judge may deprive a defendant of his right to an open courtroom" in the "rare" case, the judge must "mak[e] proper factual findings in support of the decision to do so." *Weaver*, 137 S. Ct. at 1909 (citing *Waller v. Georgia*, 467 U.S. 39, 45 (1984)). Thus, the question is not whether the trial court was " 'justified' " in excluding the public from jury selection in this case (see Cross-resp. at 18); the question is whether the trial court met each of the four criteria to constitutionally exclude the public from jury selection. See *Presley*, 558 U.S. at 213-14 (listing the four criteria that must be met to constitutionally exclude the public from any stage of a criminal trial, specifically including jury selection (citing *Waller*, 467 U.S. at 48)). The state does not even try to establish that the answer to that question is yes. (See Cross-resp. at 14-21; R. 67-68.)

Rather, the state goes on to adopt the appellate court's holding that only certain portions of the jury-selection process are constitutionally required to be open to the public, namely, those portions of the process during which the veniremembers are being literally examined or selected as jurors, *People v. Hartfield*, 2020 IL App (4th) 170787, ¶ 51, *as modified on denial of reh'g* (Nov. 4, 2020). (Cross-resp. at 19-20.) The state correctly notes that Mr. Hartfield has not cited any case with facts like the facts in his case, where all members of the public were excluded from the courtroom during the reading of the charges, the reading of the list of potential witnesses, the reading of the initial jury instructions, and the swearing-in of the veniremembers, and at most three members of the public were permitted to observe the rest of the jury-selection process. (Cross-resp. at 19; see Appellee's brf. at 70-71; R. 67-74.) Mr. Hartfield's research has uncovered no such case. But neither has the state—or the appellate court, see *Hartfield*, 2020 IL App (4th) 170787, ¶ 51—cited Illinois or federal authority for the proposition that the public-trial right does not apply to the reading of the charges, or to the reading of the list of potential witnesses, or to the reading of the initial jury instructions, or to the swearing-in of the veniremembers, or even for the lesser proposition that those proceedings are not really part of *voir dire*. (See Cross-resp. at 19-20.)

As often occurs, dictionary definitions cut both ways. See Black's Law Dictionary, *supra*, at 1886 (defining "voir dire" as "[a] preliminary examination of a prospective juror by a judge or lawyer to decide whether the prospect is qualified and suitable to serve on a jury" but further indicating that "voir dire" may be used "[l]oosely" to "refer[] to the jury-selection phase of a trial"); Webster's New World College Dictionary 1619 (5th ed. 2018) (defining "voir dire" as "the phase of a trial in which prospective jurors are examined and jurors are selected"); see also Random House Unabridged Dictionary 2130 (2d ed. 1993) (defining "voir dire" as "an oath administered to a proposed witness or juror by which he or she is sworn to speak the truth in an examination to ascertain his or her competence"). The state leaves unanswered Mr. Hartfield's pin-cited observation that "*voir dire*" and "jury selection" have often been used in the public-trial caselaw to mean "the jury-selection phase of a trial," Black's Law Dictionary, *supra*, at 1886. (Appellee's brf. at 70-71; see Cross-resp. at 19-20.) And the state's only response to the Supreme Court's expansive description of *voir dire* as the "jurors' first introduction to the substantive factual and legal issues in a case," *Gomez v. United States*, 490 U.S. 858, 874 (1989), is to distinguish *Gomez* on its facts. (Cross-resp. at 19.)

But obviously Mr. Hartfield does not rely on *Gomez* for its specific holding that "presiding at the selection of a jury in a felony trial without the defendant's consent" is not among the " 'additional duties' " that may be assigned to a federal magistrate within the meaning of the Federal Magistrates Act, *Gomez*, 490 U.S. at 860, 875-76; he relies on *Gomez* for its general discussion of the nature and purpose of *voir dire*, *id.* at 874-75, a discussion that would seem to apply in any jury-trial case. (Appellee's brf. at 70.) The state makes no attempt to deny that the reading of the charges and the initial instructions, to an even greater degree than the subsequent examination of the veniremembers and selection of jurors, represent the veniremembers' "first introduction to the substantive factual and legal issues in a case," *id.* at 874. (See Cross-resp. at 19-20.) Neither does the state respond to Mr. Hartfield's examples of the kinds of unspoken

"gestures and attitudes of all participants," *id.* at 875, that the public may observe during the important introductory moments of jury selection—but only if it is not prevented from doing so. (Appellee's brf. at 71; see Cross-resp. at 19-20.) This Court should reject the lone out-of-state case cited by the state (Cross-resp. at 19) and the appellate court, *Hartfield*, 2020 IL App (4th) 170787, ¶ 1, in which one division of the Court of Appeals of Washington minimized those moments as an "administrative component" of the jury-selection process, *State v. Parks*, 190 Wash. App. 859, 866-67 (2015), and instead hold that the entire process is constitutionally required to be open to the public.

The state lastly argues that any violation of Mr. Hartfield's public-trial right does not warrant reversal of his convictions because he did not expressly object to the courtroom closure, urging this Court to decline to excuse procedural forfeiture as it did in *Radford*, 2020 IL 123975, ¶ 42. (Cross-resp. at 20-21.) But there, the defendant apparently did not question the partial courtroom closure in any way; instead, he actively cooperated in the closure by choosing his two supporters to remain in the courtroom. *Radford*, 2020 IL 123975, ¶¶ 5, 36-38, 40. Here, as soon as the trial court told "the People in the courtroom" to "step out," Mr. Vargas specifically identified three defense-supportive spectators who wanted to remain in the courtroom and asked whether they could remain in the courtroom. (R. 67-68.) Although Mr. Vargas did not use the word "object," his interjection was functionally equivalent to an objection because it gave the trial court an opportunity to rethink or make findings adequate to support the courtroom closure it was about to effect. See *Weaver*, 137 S. Ct. at 1912 ("[W]hen a defendant objects to a courtroom closure, the trial court can either order the courtroom opened or explain the reasons for keeping it closed."); *Radford*, 2020 IL 123975, ¶ 37 ("[I]f there is no objection at trial, there is no opportunity for the judge to develop an alternative plan to a partial closure or to explain in greater detail the justification for it.").

As Mr. Hartfield has already demonstrated at some length (see Appellee's brf. at 72-75), his case is thus much more like *People v. Schoonover*, 2019 IL App (4th) 160882, *appeal allowed*, 154 N.E.3d 748 (Ill. 2020), in which the defendant timely questioned a courtroom closure but neither expressly objected to the closure nor raised the violation of his public-trial right in a post-trial motion. *Schoonover*, 2019 IL App (4th) 160882, ¶¶ 5, 13. Yet the state does not so much as mention *Schoonover* in arguing against reversal here. (See Cross-resp. at 20-21.) Because the state has not responded to Mr. Hartfield's reliance on *Schoonover*, he respectfully refers this Court to the unanswered analysis in his request for cross-relief rather than repeating that analysis here. (Appellee's brf. at 72-75.)

CONCLUSION

For the foregoing reasons, Kelvin T. Hartfield, defendant-appellee, respectfully requests that this Court reverse each of his convictions outright (Issue III). In the alternative, Mr. Hartfield respectfully requests that this Court reverse each of his convictions and remand for a new trial (Issue IV). As a further alternative, Mr. Hartfield respectfully requests that this Court reverse all four of his aggravated-discharge convictions and remand for a new trial (Issue I). And as a final alternative, Mr. Hartfield respectfully requests that this Court affirm the appellate court's judgment and remand to the trial court for vacatur of three of his four aggravated-discharge convictions and for resentencing (Issue II).

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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

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IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellant, -vs- KELVIN T. HARTFIELD, Defendant-Appellee.	)	Appeal from the Appellate Court of Illinois, Fourth Judicial District, No. 4-17-0787. There on appeal from the Circuit Court of the Sixth Judicial Circuit, Champaign County, Illinois, No. 16-CF-1055. Honorable Thomas J. Difanis, Judge Presiding.

NOTICE AND PROOF OF SERVICE

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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 December 8, 2021, the Cross-Reply Brief 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-appellee in an envelope deposited in a U.S. mail box in Springfield, Illinois, with proper postage prepaid. Additionally, upon its acceptance by the court's electronic filing system, the undersigned will send 13 copies of the Cross-Reply Brief to the Clerk of the above Court.

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