No. 127907

IN THE
SUPREME COURT OF ILLINOIS

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| PEOPLE OF THE STATE OF ILLINOIS, | Appeal from the Appellate Court of Illinois, Fourth District, |
| Plaintiff-Appellee, | No. 4-19-0114 |
| v. | There on Appeal from the Circuit Court of Vermilion County, No. 17 CF 476 |
| LATRON Y. CROSS, | The Honorable Nancy S. Fahey, |
| Defendant-Appellant. | Judge Presiding. |

**BRIEF OF PLAINTIFF-APPELLEE**
**PEOPLE OF THE STATE OF ILLINOIS**

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## TABLE OF CONTENTS

Page(s)



## POINTS AND AUTHORITIES

## NATURE OF THE CASE

Defendant was charged with murder for fatally shooting a man in Danville, Illinois. The parties told the trial court that defendant's trial needed to begin by November 29, 2018 to comply with the speedy trial statute. The court set trial for November 6, 2018, and a jury found defendant guilty of murder. Defendant appealed, claiming that his conviction should be overturned because the trial court abused its discretion when it attributed 34 days to defendant due to his untimely disclosure of his alibi evidence. The appellate court disagreed and affirmed his conviction, which he now appeals to this Court. No issue is raised on the pleadings.

## ISSUES PRESENTED

1. Whether defendant is barred from raising a speedy trial claim because he agreed to his November 6 trial date when it was proposed and did not argue that the date violated the speedy trial statute.

2. Alternatively, whether (1) the trial court clearly and obviously abused its discretion by attributing 34 days of delay to defendant due to his untimely disclosure of key evidence, which required prosecutors to conduct further investigation, and (2) if so, whether the court's decision was second prong plain error.

## JURISDICTION

Jurisdiction lies under Supreme Court Rules 315(a) and 604(a). This Court allowed defendant's petition for leave to appeal on January 26, 2022.

## STATEMENT OF FACTS

### A. Defendant's Crime and Arrest

On July 7, 2017, Ollie Williams was shot multiple times while riding his bicycle in Danville, Illinois. R237-38, 253.[1] As he lay dying in a ditch beside the road, Williams told a police officer and a bystander that defendant was the shooter. R246-48, 253. Police arrested defendant two days later and charged him with first degree murder. R299-300; C11-13.

### B. Pretrial Proceedings

Defendant's Continuances and the Tentative Trial Date

Following his arrest, defendant's case was continued for the next 18 days, with the delay attributed to the People. R8-18. On defendant's motions, the case was then continued multiple times until July 16, 2018. *See* R17, 27, 35, 39, 42, 45, 51. On July 16, 2018, defense counsel made a speedy trial demand. R54.

The trial court tentatively scheduled defendant's trial for September 24, 2018. R55. The court noted that it had another trial scheduled for that date but agreed to schedule defendant's trial as a "backup" in the event that the other trial was postponed. *Id.* The court and the parties agreed that they would revisit whether it would be possible to hold defendant's trial on that date "as it gets closer." *Id.* Because the defense announced that it was ready

[1] The common law record and report of proceedings are cited as "C_" and "R_"; the second and fourth volumes of the supplemental record are cited as SC.II._ and SC.IV._." Defendant's opening brief is cited as "Def. Br. _."

for trial on July 16, the court stated that the delay from that date to the tentative trial date would be attributed to the People. *Id.*

Defendant's Untimely Disclosure of His Alibi Defense

On August 15, 2018, more than a year after his arrest, defendant told defense counsel that he had an alibi for the day of the shooting. R60-61. The defense waited a week and then, on August 21, 2018 — a month before the tentative trial date — defense counsel informed prosecutors for the first time that he intended to raise an alibi defense, and that defendant's grandmother would testify in support of that alibi. *Id.* The People filed a motion stating that the late disclosures required prosecutors to conduct further investigation and noted that the defense had advised prosecutors that, in addition to the new alibi evidence, there would be even more "witnesses and statements forthcoming in disclosure." SC.IV.4. Accordingly, the People asked that the delay previously attributed to them (when setting the tentative trial date) be attributed to defendant instead. *Id.*

At the hearing on the People's motion, the court asked defense counsel whether he would have been able to proceed to trial without the newly disclosed evidence. R61. Defense counsel said that he had been ready to proceed with trial but "[i]t would have been a different trial. I certainly would think this [alibi] information is valuable to me . . . we were ready to proceed and we weren't going to be proceeding with an alibi." R61.

The court granted the People's motion in part and held that (1) the delay from July 16 to August 21, 2018 was attributed to the People (*i.e.*, from the time defendant demanded trial to just before he disclosed his alibi evidence, a total of 36 days); and (2) the delay from August 21 to September 24, 2018 was attributed to defendant (*i.e.*, from the date of the disclosure to the tentative trial date, a total of 34 days, during which time prosecutors would investigate the new evidence). R61-62. Defendant did not move to reconsider.

Defendant's Agreement that the Speedy Trial Term Ended November 29

On September 24, 2018 (the tentative trial date), defense counsel stated that he was ready for trial. R65. The prosecutor noted that defendant had provided additional discovery since the last hearing, and stated that the prosecution was not yet ready for trial. *Id.* The prosecutor stated that the parties "agree that the speedy [trial deadline] would run November 29th." *Id.*[2] The court scheduled the trial for November 6 and attributed the delay from September 24 to that date to the People. R66. Defendant did not object.

### C. Defendant's Trial and Conviction

Defendant's trial began on November 6, 2018, as scheduled. R111. Eyewitness testimony and a videotape of the shooting showed that Williams was riding his bicycle along a road, when a black male in a Chevrolet Impala

[2] As of September 24, 2018, the court had attributed 54 days to the People (18 days at the start of the case, plus 36 days following the People's motion to re-allocate delay). That meant that 66 days remained in the speedy trial period (120 – 54 = 66); 66 days from September 24 is November 29.

drove alongside him, slowed down, and shot Williams multiple times. R225-33, 237-38. Williams told a responding police officer that Latron Cross (*i.e.*, defendant, a black male like the person in the Impala) had shot him. R253. In a 911 recording played for the jury, a bystander also said that Williams had identified defendant as the shooter. R246-48. Williams died hours later from his gunshot wounds. R389, 398-400.

Defendant's girlfriend testified that, on the day of the shooting, defendant took her car (an Impala) and left her house. R289-90. Hours after the shooting, she found her car parked on a dead-end street, after someone told her where it was located. R293. Defendant called her that night and told her to pick him up in Chicago. R296.

Defendant testified that he knew Williams and that Williams had murdered defendant's sister years earlier. R428. However, defendant denied shooting Williams and claimed to have been at his grandmother's home in Danville at the time of the shooting. R430. His grandmother testified for the defense that defendant was at her home at that time. R416-20. In rebuttal, the lead detective on the case testified that defendant's grandmother had declined to speak with police. R443.

The jury found defendant guilty of first degree murder. R512. The defense filed two motions for a new trial, neither of which raised a speedy trial claim. SC.II.23-25; C147-48. The trial court denied defendant's motions. R525, 532. The court sentenced defendant to 59 years in prison,

noting that he had a lengthy criminal history and had shown no remorse for killing Williams, but instead had smirked throughout the trial, including when the video of the shooting was played, as if it were "funny." R557-58.

### D. Defendant's Appeal

On appeal, defendant argued in relevant part that his statutory speedy trial rights were violated because 131 days of delay attributable to the People elapsed between his arrest and trial. *People v. Cross*, 2021 IL App (4th) 190114, ¶ 70. Specifically, he argued that the trial court abused its discretion when it attributed 34 days to defendant due to his untimely disclosure of his alibi evidence. *Id.* The appellate court affirmed defendant's conviction. *Id.* ¶ 99. The dissent agreed with defendant that the trial court abused its discretion by attributing the 34 days to defendant because his late disclosure of evidence "caused no postponement" of the tentative trial date. *Id.* ¶ 158 (Cavanagh, J., dissenting).

## STANDARD OF REVIEW

A trial court's ruling that delay is attributable to a defendant "is entitled to much deference and should be sustained absent a clear showing that the trial court abused its discretion." *People v. Mayo*, 198 Ill. 2d 530, 535 (2002). Under the plain error doctrine, a defendant must prove that a "clear or obvious" error occurred, and (1) the evidence of guilt was closely balanced or (b) the error was so serious that it undermined the fairness of the proceedings. *People v. McLaurin*, 235 Ill. 2d 478, 489 (2009).

## ARGUMENT

Defendant's claim that his trial violated the speedy trial statute is barred and meritless.

### I. Defendant Is Barred from Arguing That His Trial Violated the Speedy Trial Statute.

The speedy trial statute provides that defendants shall be tried "within 120 days" of being taken into custody unless the delay is attributable to the defendant or caused by certain events such as a fitness hearing or interlocutory appeal. 725 ILCS 5/103-5(a).[3] In this appeal, defendant argues that his November 6, 2018 trial violated his statutory speedy trial rights because 131 days of delay from his arrest to the trial were attributable to the People. Def. Br. 14-22. According to defendant, to comply with the speedy trial statute, his trial needed to begin no later than October 26, 2018. *Id.* But even if defendant were correct — and he is not — his speedy trial claim must be rejected because he agreed to begin trial on November 6.

It is settled that a defendant's failure to object to a trial date outside the speedy trial deadline bars him from arguing on appeal that his trial violated the speedy trial statute. *People v. Cordell*, 223 Ill. 2d 380 (2006). The defendant in *Cordell* made a speedy trial demand on several occasions, but prosecutors were not ready for trial and thus trial was not held; at a later

[3] Defendant claims that his trial violated the speedy trial statute, not his constitutional right to a speedy trial. The statutory and constitutional rights to a speedy trial are not coextensive, and where, as here, a defendant asserts only a violation of his statutory right, a reviewing court will not consider his constitutional right. *E.g., People v. Mayo*, 198 Ill. 2d 530, 535 (2002).

status hearing, the court scheduled trial for June 11, 2002, and the defense did not object. *Id.* at 382-84. On appeal, the defendant argued that his trial violated the speedy trial statute because 128 days of delay between his arrest and trial were attributable to the prosecution. *Id.* at 384-86.

This Court held that the defendant was barred from raising a statutory speedy trial claim because he had agreed to the trial date without voicing a specific objection when that date was proposed. As this Court explained,

> Should a defendant wish to employ [the speedy trial statute] as a shield against any attempt to place his trial date outside the 120-day period, he is free to do so. To allow [the statute] to be used as a sword after the fact, to defeat a conviction, however, would be contrary to our [precedent] and allow defendants to use a procedural loophole to obstruct justice.

*Id.* at 390. To that end, this Court held that if a trial court suggests a trial date that would violate the speedy trial statute, (1) the defendant is "obligated to object" so that the court is alerted to the issue and can schedule the trial for an earlier date; and (2) a defendant who fails to object when the trial date is proposed is barred from raising a speedy trial claim on appeal. *Id.* at 390-91. Accordingly, the *Cordell* Court held that the defendant's prior requests for a speedy trial were insufficient to preserve his claim; rather, he was obligated to take "affirmative action" by objecting *when the trial court proposed a specific trial date* that violated the speedy trial statute. *Id.* at 390-92. And because the defendant failed to do so, he could not argue on appeal that his speedy trial rights had been violated. *Id.*

This case presents a quintessential example of a defendant using the speedy trial statute as a sword to attack his conviction, rather than a shield against an untimely trial. Here, as in *Cordell*, defendant failed to object to the trial date when it was set. On September 24, 2018, the parties told the court that they "agree that the speedy [trial deadline] would run November 29th of 2018," and, in reliance on that information, the court scheduled trial for November 6, 2018. R65-66. Defendant did not object. Indeed, given defendant's agreement in open court that the speedy trial period ended on November 29 (rather than October 26 as he now contends), it could be argued that he induced any violation of the speedy trial statute. And, at the very least, defendant's failure to object to the November 6 trial date robbed the trial court of the opportunity to address any potential speedy trial concerns by scheduling trial 11 days earlier. Thus, defendant is barred from raising a speedy trial claim. *Cordell*, 223 Ill. 2d at 390-92; *cf. In re Det. of Swope*, 213 Ill. 2d 210, 217 (2004) (a party may not complain about trial court decisions that they "induced the court to make or to which that party consented").[4]

## II. Defendant's Speedy Trial Claim Is Also Meritless.

Even if defendant's speedy trial claim were not barred, his conviction should be affirmed because his claim is meritless.

[4] The People acknowledge that they did not raise this argument in the appellate court, but because the People were appellee in the appellate court and here, they may raise any argument supported by the record to affirm defendant's conviction. *People v. Artis*, 232 Ill. 2d 156, 164 (2009).

### A. Defendant Cannot Establish Clear or Obvious Error.

Defendant admits that because he failed to raise a speedy trial claim in his post-trial motion, his claim can be reviewed only for plain error, which requires him first to prove that a "clear or obvious error occurred." Def. Br. 26; *People v. Jackson*, 2020 IL 124112, ¶ 81. He cannot carry that burden.

#### 1. The trial court did not clearly or obviously abuse its discretion.

Each delay in the proceedings must be reviewed individually and attributed to the party who causes it. *Mayo*, 198 Ill. 2d at 536. A delay is attributable to the defendant if his actions caused or contributed to the delay. *Id*. (citing *People v. Hall*, 194 Ill. 2d 305, 327 (2000)). Any period of delay found to be occasioned by the defendant tolls the statutory period. *Id.* It is settled that "'a trial court's determination as to whether a delay is attributable to the defendant is entitled to much deference and should be sustained absent a clear showing that the trial court abused its discretion.'" *E.g., id.* at 535 (quoting *Hall*, 194 Ill. 2d at 327). An abuse of discretion occurs if the trial court's decision "is arbitrary, fanciful, or unreasonable." *People v. Brand*, 2021 IL 125945, ¶ 36.

Consistent with the significant discretion given to trial courts, this Court has affirmed decisions to attribute delay in a variety of circumstances, including where the defendant slows, extends, or complicates the litigation, or otherwise makes it impossible to immediately hold a trial that day, even if the conduct did not require postponement of a set trial date. *E.g.*, *Cordell*,

223 Ill. 2d at 390 ("There is nothing in the [speedy trial statute] to indicate that the 'delay' must be of a set trial date."); *Mayo*, 198 Ill. 2d at 537-39 (counsel's request for continuance was delay attributed to defendant even though defendant wished to begin trial); *Hall*, 194 Ill. 2d at 328 (defendants are typically "charged with delay caused by defense motions"); *People v. Donalson*, 64 Ill. 2d 536, 542 (1976) (filing motion to suppress was delay attributed to defendant because it created work for prosecutors); *see also People v. Murphy*, 47 Ill. App. 3d 278, 283 (2d Dist. 1977) (defendant's "failure to comply with the trial court's discovery order constituted delay attributable to defendant"), *aff'd*, 72 Ill. 2d 421 (1978).

Here, defendant's claim focuses on a single period: the 34 days that the trial court attributed to him due to his eleventh-hour disclosure of alibi evidence (*i.e.*, the time between his disclosure and the initial trial date, during which time prosecutors investigated the new evidence). Def. Br. 17-18. The court's decision to attribute that time to defendant was not clearly and obviously an abuse of discretion.

It is undisputed that defendant knew of his alibi evidence more than a year before he disclosed it to prosecutors and, thus, he could have disclosed it much earlier than he did. It is also undisputed that the evidence defendant withheld was important and significantly altered the course of the trial preparations — in fact, defense counsel admitted that it completely changed the defense they intended to present at trial. R61-62. Moreover, the defense

told prosecutors that it would be disclosing additional alibi witnesses in the coming weeks. SC.IV.4. Plainly, the late disclosure of alibi evidence created more work for prosecutors who had to prepare to meet a new defense by interviewing new witnesses and otherwise investigating defendant's alibi. And, of course, this additional work took time. Accordingly, the court's decision to attribute 34 days to defendant (during which time prosecutors were investigating the new alibi evidence and defense) was not clearly and obviously arbitrary, fanciful, or unreasonable.

**2. Defendant's argument is contrary to the plain language of the speedy trial statute and this Court's precedent.**

Indeed, defendant does not attempt to argue that the trial court abused its discretion, nor could he credibly do so. Instead, he argues that the court had *no discretion* to begin with. According to defendant, the delay must automatically be attributed to prosecutors — and the trial court had no discretion to decide otherwise — because his untimely disclosure of alibi evidence did not require the postponement of "his previously scheduled trial date." Def. Br. 18-19. In defendant's view, whether delay is attributable to a defendant involves a rigid, multi-step process that depends on whether there is a "set trial date":

- First, the court must determine whether a trial date has been set. If a trial date has *not* been set, then the trial court may attribute a delay to the defendant.
- Second, if a trial date has been set, then the court must determine whether the defendant's delay requires the postponement of the set trial date.

- If the defendant's delay requires the postponement of the set trial date, then the delay may be attributed to the defendant.
- However, if it is still possible to keep the set trial date despite the defendant's delay, then the trial court has *no discretion* to attribute the delay to the defendant no matter what conduct he engaged in.

Def. Br. 18-21.

Defendant's argument is contrary to the plain language of the speedy trial statute, which states that defendants shall be tried within 120 days of being taken into custody,

> unless delay is occasioned by the defendant, by an examination for fitness ordered pursuant to Section 104-13 of this Act, by a fitness hearing, by an adjudication of unfitness to stand trial, by a continuance allowed pursuant to Section 114-4 of this Act after a court's determination of the defendant's physical incapacity for trial, or by an interlocutory appeal.

725 ILCS 5/103-5(a). The plain language of the speedy trial statute simply refers to "delay" that is "occasioned by the defendant" or events such as fitness hearings or appeals. *Id.* The statute does not use the phrase "set trial date" or otherwise refer to whether a trial date has been previously scheduled or must be postponed. *Id.*

Indeed, this Court has already rejected an argument indistinguishable from defendant's when it held: "There is nothing in the [speedy trial statute] to indicate that the 'delay' must be of a set trial date." *Cordell*, 223 Ill. 2d at 390. True, *Cordell* involved a case where trial had not yet been scheduled when the delay occurred, but defendant's argument suffers from the same fatal flaw as the argument this Court rejected in *Cordell*: just as nothing in the statute refers to a "set trial date," nothing in the statute refers to the

"*postponement* of a set trial date," let alone creates the rigid, multi-step framework that defendant argues this Court should adopt.

Tellingly, defendant fails to even acknowledge the plain language of the speedy trial statute, much less argue that the plain language supports his proposed framework. Because the plain language of the statute is contrary to defendant's proposed approach, his claim necessarily fails. *See, e.g., People v. Carlson*, 2016 IL 120544, ¶ 17 (reviewing courts "must enforce clear and unambiguous statutory provisions as written" and "should not read into the statute exceptions, conditions, or limitations not expressed by the legislature"); *see also* Ill. S. Ct. R. 341(h)(7) (any point not raised in appellant's opening brief is forfeited and may not be raised in the reply brief or at oral argument).

Moreover, defendant is incorrect that this Court has "implied" that whether a delay is attributable to a defendant turns on whether a trial date has been set. *See* Def. Br. 13, 18-20. Although this Court has interpreted the speedy trial statute in many cases over several decades, it has never suggested that defendant's rigid framework is correct, or that courts may not attribute delay to a defendant unless a set trial date is postponed.

Instead, as noted, this Court has consistently emphasized that a trial court's decision to attribute delay is entitled to "much deference" and may be reversed only if the decision is an abuse of discretion — meaning it was fanciful, arbitrary, or unreasonable — without any reference to whether a set

trial date has been postponed. *See, e.g., Mayo*, 198 Ill. 2d at 535 (collecting cases); *Hall*, 194 Ill. 2d at 327 (same). And, accordingly, this Court has affirmed decisions to attribute delays to defendants in a variety of circumstances without considering whether a trial was scheduled or was required to be postponed. *Supra* pp. 10-11 (collecting cases).

Defendant quotes — without discussion — dicta in *People v. Kliner,* 185 Ill. 2d 81 (1998), that delay is attributable to a defendant if his "acts caused or contributed to a delay resulting in the postponement of trial." Def. Br. 15. But, as the appellate court pointed out below, that merely means that a defendant's acts that postpone a set trial date "are *sufficient* for finding that a delay in the speedy-trial term is occasioned by defendant"; neither *Kliner* nor any other case "stand[s] for the proposition that a postponement of trial is *necessary* before a defendant can be deemed to have caused a delay under the statute." *Cross*, 2021 IL App (4th) 190114, ¶ 106 (emphasis in original). Indeed, the Court in *Kliner* attributed various delays to the defendant (such as when he filed evidentiary motions) without considering whether the trial date was postponed, which is presumably why defendant's brief merely quotes the dicta without discussing the facts of the case or otherwise relying on its reasoning. *See Kliner,* 185 Ill. 2d at 115-17. Other cases that defendant quotes without discussion — such as *People v. McDonald*, 168 Ill. 2d 420 (1995) — fail to support his argument for similar reasons.

Defendant does discuss three cases in at least some detail (one from this Court and two from the appellate court), but none supports his argument either. Def. Br. 19-20 (citing *People v. Ladd*, 185 Ill. 2d 602 (1999); *People v. Lendabarker*, 215 Ill. App. 3d 540 (2d Dist. 1991); *People v. Boyd*, 363 Ill. App. 3d 1027 (2d Dist. 2006)). The defendant in *Ladd* filed motions at the end of June, and a hearing was scheduled for July 12. This Court attributed the delay between the filing of the motions and the hearing date to defendant; however, the prosecutor failed to appear at the scheduled July 12 hearing, and so the Court attributed the delay between July 12 and the date when the motions were finally argued to the prosecution. 185 Ill. 2d at 608-10. Instead of discussing whether a trial date needed to be postponed, the Court's analysis depended on the conduct of the parties, *i.e.*, the defense delayed the case by filing motions and waiting to schedule the hearing, but the prosecutor caused further delay by failing to appear and slowing resolution of the motions. Thus, *Ladd* does not support defendant's argument.

*Lendabarker*, an appellate decision from more than 30 years ago, does not support defendant's argument either. In that case, trial was scheduled for April 10, but on April 6, defense counsel notified the trial court that he could not try the case on the scheduled date because he had another trial set for that time. 215 Ill. App. 3d at 554. The appellate court held that it would not attribute the four days between April 6 and 10 to the defendant because

"[t]o do so would punish the defendant for coming into court ahead of time to inform the court of the conflict." *Id.* The rationale behind that decision is understandable: a contrary ruling would provide incentive for defendants to wait to alert courts of scheduling conflicts, which would make the judicial system less efficient. Moreover, the delay in *Lendabarker* did not create additional work for the prosecution or change the substance of trial. Thus, *Lendabarker* is inapposite because here (1) defendant waited months to disclose key evidence, and (2) his untimely disclosure required prosecutors to conduct further investigation and completely changed the defense theory they needed to be prepared to address at trial. If this delay were not attributed to defendant, it would provide an incentive to defendants to withhold key evidence and fail to disclose an alibi defense until late in the litigation.

Defendant's final case, the appellate decision in *Boyd*, is simply wrongly decided. *Boyd* states that "unless the trial date is postponed, there is no delay to attribute to defendant." 363 Ill. App. 3d at 1037. But *Boyd* failed to consider the language of the speedy trial statute or this Court's consistent holding that trial courts have wide discretion to attribute delay to parties; instead, the opinion relied primarily on *Lendabarker*, which, as just explained, does not actually hold that delay is attributable to a defendant only if it requires postponement of a set trial date. *Id.* at 1037-38. Further, *Boyd* cannot be harmonized with this Court's holding in *Cordell* that "[t]here is nothing in the [speedy trial statute] to indicate that the 'delay' must be of a

set trial date." 223 Ill. 2d at 390. As the appellate court below stated, *Boyd* was an opinion issued in "error" because it "is predicated on a misreading" of the relevant speedy trial precedent and "is contrary to longstanding Illinois Supreme Court case law." *Cross*, 2021 IL App (4th) 190114, ¶¶ 104-09.

In sum, defendant's proposed rule is contrary to the plain language of the speedy trial statute and this Court's precedent.

### 3. Defendant's interpretation creates procedural loopholes and obstructs the ends of justice.

This Court has consistently held that "the purpose" of the speedy trial statute is "to guarantee a speedy trial and not to open a new procedural loophole" that would allow defendants to "obstruct the ends of justice." *Cordell*, 223 Ill. 2d at 390 (citations omitted). But defendant's interpretation is not only contrary to the plain language of the statute, it creates just such loopholes. For example, the following hypothetical shows how, under defendant's interpretation, a trial can go from not violating the speedy trial statute to violating the statute, based solely on whether a tentative trial date was previously set, even though the length of time between arrest and trial remained the same in both scenarios:

- Suppose that hypothetical defendant Smith is arrested on January 1, he requests continuances until March 1, then his counsel announces he is ready for trial.
- Prosecutors state that they are not yet ready for trial and ultimately request two continuances to April 30 over Smith's objections. The trial court attributes those 60 days to the People but does not yet set a trial date.

- On April 30, Smith files a motion to suppress, which is not resolved until May 30. The court attributes this 30-day delay to Smith.
- On May 30, prosecutors request a 30-day continuance over Smith's objection, so now a total of 90 days are attributed to the People.
- On June 29, Smith again announces he is ready for trial, but the People ask that trial be set for July 9 because the lead prosecutor is unavailable or not yet fully prepared. The court attributes this 10-day delay to the People, who now are responsible for 100 days of delay.
- Trial is held on July 9 as scheduled.

Because only 100 days are attributed to the People, the trial did not violate the speedy trial statute, even under defendant's interpretation of the statute.

Now imagine that the same events occur, with a small change: now a tentative trial date is set at an earlier status hearing. That is, suppose in this second scenario that during the status hearing on March 1 (*i.e.*, before Smith engaged in his delay on April 30), Smith announces he is ready for trial, the prosecutor requests that trial be set trial for June 29, and the court grants the prosecutor's request; then, similar to the first scenario, the People appear in court on June 29 and ask to postpone trial to July 9, and the trial court agrees.

Under defendant's interpretation of the speedy trial statute, in this second scenario, the trial court erred by attributing to Smith the 30-day delay caused by his motion to suppress because it did not require the initial trial date to be postponed. Therefore, under defendant's interpretation, in this second scenario, Smith's trial violated the speedy trial statute, and the appellate court should overturn his conviction, because 130 days of delay

should be attributed to the People (*i.e.*, the 100 days of continuances requested by the People, plus the 30 days of delay caused by Smith). This is true even though, in both scenarios, Smith was tried on the exact same date, the exact same number of days passed between his arrest and his trial, and the parties' pre-trial conduct was the same in all relevant respects, including when Smith announced he was ready for trial. Thus, defendant's interpretation creates loopholes that are inconsistent with the purposes of the speedy trial statute.

One reason defendant's interpretation creates loopholes is that he fails to fully acknowledge what he is actually asking this Court to do: attribute delay to the People, even though it was the defendant who caused the delay. Throughout his brief, defendant argues that a delay caused by a defendant should not be attributed to the defendant unless it postpones the trial date, even if, for example, the defendant violates his discovery obligations or otherwise slows the litigation. But time must be attributed to either a defendant or the prosecution. So, when defendant says that courts should not attribute delay to a defendant, he really means that courts should be required to attribute delay to the prosecution even though the prosecution did nothing to cause the delay, and indeed, even when it is defendant who slows the case.

This rhetorical sleight of hand also obscures another potential problem created by defendant's argument. To the prosecutors' credit, when defendant

made his untimely disclosure of alibi evidence a few weeks before the initial trial date, the People did not immediately ask to postpone the trial but instead made a good faith effort to be ready for trial even though (1) prosecutors stated that defendant's disclosure created more work for the People and required additional investigation, (2) the defense said more witnesses would be disclosed in the coming weeks, and (3) defense counsel admitted that the new evidence completely changed the defense prosecutors would need to address at trial. SC.IV.4; R61. Now on appeal, defendant uses the prosecutors' good faith effort against the People — arguing that no delay should be attributed to defendant (and thus the delay should be attributed to the People and his conviction should be overturned), because prosecutors did not immediately ask to postpone trial. *See* Def. Br. 20-21.

This is a classic example of using the speedy trial statute as a sword rather than shield. Simply put, defendant's interpretation allows him to punish the prosecutors for attempting to keep the trial date as initially scheduled. As a result, if defendant's interpretation were adopted, it would create a clear incentive for prosecutors: if a defendant engages in a delay that causes prosecutors to doubt their ability to be ready for trial, they should immediately ask to postpone the trial due to the defendant's actions, rather than first attempting to keep the trial date. In practice then, defendant's interpretation would extend the litigation process for some defendants (contrary to the purpose of the statute) and disrupt trial courts' schedules.

Lastly, defendant's interpretation would sow confusion in the lower courts because it is unclear when his interpretation would apply (or even if it would apply in *this* case). In defendant's view, whether delay is attributable to a defendant turns on whether there is a "set trial date," but it is unclear what constitutes a "set trial date." Here, for example, as is true of many cases, the initial trial date was only a *tentative* trial date — the trial court told the parties that he had another trial scheduled for that date, so he could not be certain that he could hold defendant's trial at that time. R55. Similarly, in other cases, trial dates are often expressly conditioned on various factors, such as the completion of discovery, expert witness availability, or the return of forensic testing results. If a trial date is tentative — *i.e.*, if the parties acknowledge it is subject to change due to certain factors — defendant has failed to explain why, and in what circumstances, his "set trial date" rule would apply. It is also unclear whether, or in what circumstances, delays could be retroactively attributed to a different party depending on whether the tentative trial date became definite. Resolving these issues would result in substantial additional litigation about the application of the speedy trial statute.

In sum, defendant's interpretation is not only contrary to the plain language of the speedy trial statute and this Court's precedent, it would create unjust loopholes, impair the efficient operation of the judicial system, multiply litigation, and sow confusion in the lower courts.

### B. Defendant Cannot Establish Second Prong Plain Error.

Even if defendant could prove that the trial court clearly and obviously abused its discretion by attributing 34 days of delay to him, his claim still should be denied because he cannot establish that the error rose to the level of second prong plain error. Under the plain error doctrine, a defendant must not only prove that a "clear or obvious" error occurred, he must also prove that either (1) the evidence of guilt was closely balanced or (b) the error was so serious that it undermined the fairness of the proceedings. *McLaurin*, 235 Ill. 2d at 489. Defendant does not contend that the evidence was closely balanced, and thus he does not argue that first prong plain error occurred. *See* Def. Br. 26. So, the only remaining question before this Court is whether defendant can satisfy the second prong of the plain error test. He cannot.

This Court has explained that second prong plain error applies only "where an error is deemed 'structural,' *i.e.*, a systemic error which serves to erode the integrity of the judicial process and undermine the fairness of the defendant's trial." *People v. Glasper*, 234 Ill. 2d 173, 197-98 (2007); *see also People v. Thompson*, 238 Ill. 2d 598, 613-14 (2010). Second prong plain error applies "only in a very limited class of cases," such as a trial with a biased judge. *Glasper*, 234 Ill. 2d at 198. Statutory speedy trial claims should not be added to that limited list.

Defendant asserts that statutory speedy trial errors should be considered second prong plain errors because the speedy trial statute has its "underpinnings" in the United States and Illinois constitutions and is "a

fundamental right." Def. Br. 26.[5] He cites three cases for that contention: *People v. Cane*, 195 Ill. 2d 42 (2001), *People v. McKinney*, 2011 IL App (1st) 100317, and *People v. Gay*, 376 Ill. App. 3d 796 (4th Dist. 2007). But *Cane* does not involve plain error or a statutory speedy trial claim. *Cane*, 195 Ill. 2d at 46-49. And while *McKinney* and *Gray* suggest, in passing, that violations of the speedy trial statute can be second prong plain error, those comments are dicta, because the courts found no violation of the defendant's statutory speedy trial rights at all. *McKinney*, 2011 IL App (1st) 100317, ¶ 32; *Gay*, 376 Ill. App. 3d at 803.

More importantly, the dictum in *McKinney* and *Gray* is incorrect. That dictum is based on the idea that the *constitutional* right to a speedy trial is fundamental, but it is settled that the statutory and constitutional speedy trial rights "are not coextensive," and a violation of the statute does not mean that the defendant's constitutional right was violated. *People v. Hunter*, 2013 IL 114100, ¶ 9 (collecting cases); *see also People v. Gooden*, 189 Ill. 2d 209, 216 (2000) (distinguishing between the constitutional right to speedy trial, which this Court deemed "fundamental," and the "additional statutory right" set forth in the speedy trial statute).

Indeed, this Court has already effectively rejected defendant's argument because it cannot be squared with the Court's decision in *Cordell*.

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[5] The speedy trial provisions of the federal and Illinois constitutions are co-extensive. *E.g., People v. Mitchell*, 365 Ill. App. 3d 158, 161 (2d Dist. 2005) (noting that "no Illinois cases suggest" any differences between the two).

As noted, *Cordell* held that a defendant is barred from arguing on appeal that his trial violated the speedy trial statute if he did not object to his trial date in the trial court. *Cordell*, 223 Ill. 2d at 388-91; *see also supra* Section I. Adopting defendant's view that a statutory speedy trial claim is second prong plain error — and thus can be raised on appeal even though defendant voiced no objection in the trial court — would eviscerate this Court's holding that the speedy trial statute cannot be "used as a sword after the fact, to defeat a conviction," because that "would be contrary to our [precedent] and allow defendants to use a procedural loophole to obstruct justice." *Cordell*, 223 Ill. 2d at 390.

In addition, the legislature has also made clear that a statutory speedy trial claim is not second prong plain error. Where the legislature confers a right, it may limit the scope of that right and impose conditions on its exercise. *E.g.*, *People v. Staten*, 159 Ill. 2d 419, 429-30 (1994) (recognizing "legislative prerogative to set reasonable conditions" on exercise of statutory speedy trial right). This Court has applied that principle to the speedy trial statute, enforcing its provisions that dictate the form of an effective speedy trial demand. *Id.; see also People v. Sandoval*, 236 Ill. 2d 57, 65-69 (2010).

This Court should likewise enforce the legislature's requirement that a defendant file a pretrial motion to dismiss to invoke his statutory speedy trial right. The legislature provided defendants with a right to a trial within a defined period, but it conditioned that right on filing a pretrial motion to

dismiss. 725 ILCS 5/114-1(a)(1), (b) (statutory speedy trial claims "shall not be considered" unless the defendant filed a motion to dismiss). That condition would be rendered meaningless if this Court held that a violation of the speedy trial statute is second prong plain error.

And the General Assembly's approach makes sense given that the speedy trial statute is a prophylactic to "prevent the constitutional speedy-trial issue from arising in a case." *Gooden*, 189 Ill. 2d at 220. Absent a violation of a defendant's constitutional right to a speedy trial (which defendant does not allege here), no purpose would be served by retroactive application of the prophylaxis. At that point, vacating the defendant's conviction would simply afford him a "procedural loophole" and "obstruct the ends of justice." *Id.* at 221; *see also Thompson*, 238 Ill. 2d at 609-11, 614-15 (holding that while a biased jury is structural error, violation of a particular rule designed to ensure an unbiased jury was not).

Indeed, while defendant contends that the speedy trial statute confers a fundamental right, its role is actually as a prophylactic to ensure that the fundamental constitutional right is not violated, as is evident from the varied approaches taken in States across the country. Research shows that (1) ten States have no speedy trial statute, and (2) the statutes in some other States do not provide a specific deadline but merely provide that a defendant must be tried within a "reasonable" time.[6] Moreover, of the States that prescribe

[6] *See* https://www.ncsl.org/research/civil-and-criminal-justice/speedy-trial-rights.aspx.

specific time limits, some provide longer deadlines than Illinois. *E.g.,* Ohio Rev. Code Ann. 2945.71(c) & 2945.72 (Ohio deadline is 270 days, excluding delays by defendant); 234 Pa. Code R. 600 (Pennsylvania deadline is 365 days, excluding delays by defendant). All of which is to say, Illinois's speedy trial statute cannot confer a "fundamental right" because the legislature could abolish the statute, or significantly extend its deadline, without running afoul of the constitution or being out of step with other States.

In sum, defendant's claim fails for the additional reason that a violation of the speedy trial statute is not second prong plain error.

## III. Defendant's Arguments Regarding Supreme Court Rule 415 Are Irrelevant and Incorrect.

As explained, the appellate court correctly held that the trial court did not abuse its discretion by attributing to defendant 34 days of delay resulting from defendant's untimely disclosure of his alibi defense and supporting evidence. *Cross*, 2021 IL App (4th) 190114, ¶¶ 72-99. After reaching that conclusion, the appellate court briefly noted, in the alternative, that the decision to attribute the delay to defendant was also justified under Supreme Court Rule 415(g), which permits trial courts to sanction a party for failing to comply with their discovery obligations. *Id.* ¶ 100. Defendant argues that he did not violate any discovery rule and that, even if he did, courts may not attribute delay to a party as a discovery sanction. Def. Br. 22-25.

This Court need not reach this issue because the trial court's ruling did not rely on discovery rules when attributing the 34-day delay to defendant,

and its ruling was justified under the speedy trial statute regardless of whether defendant violated a discovery rule. *Supra* Section II.A. Still, the People note that the appellate court is correct that the discovery rules provide an alternative basis to affirm the trial court's decision.

Defendant primarily contends that he cannot be sanctioned under Rule 415 (which allows courts to sanction a party for discovery violations), because he did not violate Rule 413(d)(iii). Def. Br. 22-23. According to defendant, Rule 413 only obligates "defense counsel" to disclose evidence to the prosecution, so *defendants* themselves may withhold evidence from the prosecution as long they wish. *Id.* A fatal problem with defendant's argument is that it ignores the language of Rule 415, which allows courts to sanction a defendant for failing to comply with a discovery rule or "order." Ill. Sup. Ct. R. 415(g). After defendant's arraignment, prosecutors filed a motion asking the trial court to order "Defendant and his attorney" to provide notice of the defenses they intended to raise, identify defense witnesses, and provide information related to Rule 413(d) (*i.e.*, alibi information). C34-35. The court granted the motion, ordered defendant to respond to the request within 30 days, and reminded defendant of his duty to supplement his discovery if new evidence were discovered. C172; R17-18. By waiting more than a year to disclose the alibi defense and evidence, defendant violated that order and could be sanctioned under Rule 415, even if he did not violate Rule 413.

Even setting that aside, defendant's argument that he did not violate Rule 413 is incorrect. While it is true that Rule 413 states that "defense counsel" shall "furnish the State" with evidence, defendant fails to cite any authority interpreting that rule to allow a *defendant* to withhold evidence as long as he wishes. Def. Br. 22-23. That is unsurprising because defendant's interpretation leads to absurd results that are contrary to the purpose of discovery. *See, e.g., People v. Hanna*, 207 Ill. 2d 486, 498 (2003) (applying the settled rule that, "if a literal reading of a statute produces absurd results," it must be "so construed to avoid the absurdity"). The purpose of Rule 413 is to "eliminate[] unfair surprise" and allow the prosecution the chance "to establish the truth or falsity of the defense." Ill. S. Ct. R. 413 Comm. Cmt. Because Rule 413 is expressly intended to be a tool to ascertain the truth, it would be absurd to interpret the rule to allow a defendant to withhold evidence that would be discoverable if possessed by his attorney. The more reasonable interpretation is that when Rule 413 states that "defense counsel" must "furnish to the State" alibi evidence, it means that counsel is the person who transmits the evidence to prosecutors, not that defendant has no discovery obligations, much less that he can game the system by withholding information from his attorney (and the prosecution) until the eve of trial.

Defendant's argument that he had no duty to disclose alibi information to either his counsel or the People is also contrary to Rule 415(b), which provides that if a "party" learns of additional material subject to disclosure,

"he or she shall promptly notify the other party or his or her counsel of the existence of such additional material." Ill. S. Ct. R. 415(b). Because alibi evidence is subject to disclosure, defendant was obligated supplement the discovery by providing the evidence to his counsel or the People.

Defendant also misstates the record when he argues that he could not be sanctioned because prosecutors "never claimed" to be negatively affected. Def. Br. 24. The People's motion stated that defendant's actions created more work for prosecutors (such as interviewing newly disclosed witnesses) and defense counsel admitted that the new evidence completely changed the defense that prosecutors would need to address at trial. SC.IV.4; R61. Thus, the entire basis for the People's motion was that defendant's conduct negatively affected the prosecutors.

Moreover, defendant is incorrect that the discovery rules do not allow courts to attribute delay to a defendant as a form of sanction under Rule 415. Def. Br. 24. Rule 415 expressly gives trial courts wide discretion to fashion sanctions: it provides that when a defendant fails to comply with a discovery rule or order, a court may "grant a continuance, exclude such evidence, *or enter such other order as it deems just under the circumstances*." Ill. S. Ct. R. 415(g) (emphasis added); *see also* Comm. Cmt. ("The sanctions listed are not exclusive."). Accordingly, the trial court would have been well within its authority to issue an order attributing delay to defendant as a sanction for delays caused by his discovery violation.

Defendant's argument that the proper remedy in these circumstances is to order a continuance, Def. Br. 25, presents a distinction without a difference. The days of delay caused by a continuance must be attributed to someone — either defendant or the People — and delay resulting from a continuance predicated on defendant's discovery violation would plainly be attributable to defendant. Indeed, defendant's own authority recognizes that courts may order a continuance with delay attributed to the defendant as a sanction for withholding evidence. *See People v. Tally*, 2014 IL App (5th) 120349, ¶ 30 (cited in Def. Br. 24-25).

Defendant is also incorrect that attributing delay does not compel compliance with the rules but rather "encroach[es] on a party's right to a fair trial." Def. Br. 24. As noted, Rule 415 expressly gives trial courts wide discretion to fashion appropriate sanctions, including the power to "exclude such evidence." Ill. S. Ct. R. 415(g); *see also People v. Ramsey*, 239 Ill. 2d 342, 431-32 (2010) (affirming exclusion of defendant's evidence). If courts may exclude defendant's evidence as a sanction, defendant cannot credibly argue that merely attributing delay encroaches on his right to a fair trial.

In this respect, it is also important to note that, had the trial court denied the People's motion in its entirety and declined to attribute any delay to defendant (as defendant now argues the court should have done), defendant would not have been entitled to an immediate dismissal of his case. Rather, at the time the People's motion was argued, two months still

remained on the speedy trial clock. R54, 58-59. Given that an alternative sanction would have been to exclude the evidence, it is clear that attributing delay to a defendant is a relatively mild remedy that would not prevent a fair trial, but rather advances the interests of justice by promoting accurate and complete fact finding based on the best available evidence. Indeed, it is reasonable to assume that in almost all cases a defendant would prefer to be charged with a period of delay rather than have his alibi evidence excluded. Thus, defendant's argument is not only contrary to the plain language of Rule 415, it is contrary to the interests of other defendants.

## IV. Defendant's Ineffective Assistance Claim is Meritless.

Defendant's derivative claim that his counsel was ineffective for failing to move to dismiss on speedy trial grounds is meritless for three independent reasons. *See* Def. Br. 27-30. First, this Court has held that where, as here, the record shows that the defendant did not object to his trial date, his claim that his counsel was ineffective for not filing a motion to dismiss is meritless. *Cordell*, 223 Ill. 2d at 388-93; *supra* Section I. Second, as noted, defendant's speedy trial claim is meritless because the trial court did not abuse its discretion in attributing the delay to defendant, *supra* Section II, and counsel cannot be faulted for failing to raise a losing argument, *see, e.g., People v. Phipps*, 238 Ill. 2d 54, 70 (2010). Third, to the extent defendant contends that counsel should have objected when the final trial date was proposed, he cannot establish prejudice for the additional reason that had counsel done so, the trial court would not have dismissed the case because the speedy trial

deadline had not yet expired, even under defendant's current interpretation of the statute; rather, the parties could have simply scheduled the trial a few days earlier and defendant provides no reason to believe he would have been acquitted at an earlier trial.

## CONCLUSION

This Court should affirm the appellate court's judgment and defendant's conviction.

July 5, 2022

Respectfully submitted,

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## RULE 341(c) CERTIFICATE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, and the certificate of service, is 33 pages.

/s/ Michael L. Cebula
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## PROOF OF SERVICE

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 July 5, 2022, the foregoing **Brief of Plaintiff-Appellee People of the State of Illinois** was (1) filed with the Clerk of the Supreme Court of Illinois, using the court's electronic filing system, and (2) served by transmitting a copy from my email address to the email address below:

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Additionally, upon its acceptance by the court's electronic filing system, the undersigned will mail thirteen copies of the brief to the Clerk of the Supreme Court of Illinois, 200 East Capitol Avenue, Springfield, Illinois, 62701.

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