No. 130716

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellant, -vs- DAVID A. HIETSCHOLD, Defendant-Appellee.	))))))))))	Appeal from the Appellate Court of Illinois, No. 2-23-0047. There on appeal from the Circuit Court of the Sixteenth Judicial Circuit, Kane County, Illinois, No. 21 CF 608. Honorable David P. Kliment, Judge Presiding.

BRIEF AND ARGUMENT FOR DEFENDANT-APPELLEE

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ISSUE PRESENTED FOR REVIEW

Whether the trial court erred in allowing trial to proceed *in absentia* when it advised David Hietschold that trial could proceed in his absence, but not that his failure to appear at trial would operate as a waiver of his right to confront witnesses.

STATUTES INVOLVED

725 ILCS 5/113-4(e) (2022)

§ 113-4. Plea.

> (e) If a defendant pleads not guilty, the court shall advise him at that time or at any later court date on which he is present that if he escapes from custody or is released on bond and fails to appear in court when required by the court that his failure to appear would constitute a waiver of his right to confront the witnesses against him and trial could proceed in his absence.

725 ILCS 5/115-4.1(a) (2022)

§ 115-4.1. Absence of defendant.

> (a) When a defendant after arrest and an initial court appearance for a non-capital felony or a misdemeanor, fails to appear for trial, at the request of the State and after the State has affirmatively proven through substantial evidence that the defendant is willfully avoiding trial, the court may commence trial in the absence of the defendant. . . .

STATEMENT OF FACTS

On February 10, 2021, the State charged David Hietschold with misdemeanor battery (bodily harm) in Kane County case number 2021 CM 261. *See* Docket, *People v. Hietschold*, 2021 CM 261 (Kane Cnty. Cir. Ct.), https://kanecoportal.co.kane.il.us/Portal/ (click "Smart Search," type "2021CM261" into the search bar, complete captcha challenge, click the blue "2021-CM-000261" link).[1] During Hietschold's only appearance in the misdemeanor case, the trial court did not provide a trial *in absentia* admonishment. *Compare id.* (documenting the events and hearings in the public-facing docket for the misdemeanor case, with no notation that a trial *in absentia* admonishment was given to Hietschold), *with* Docket, *People v. Hietschold*, 2021 CF 608 (Kane Cnty. Cir. Ct.), https://kanecoportal.co.kane.il.us/Portal/ (same instructions as before, but instead searching "2021CF608") (documenting the events and hearings in the public-facing docket for this case and including an accurate notation that trial *in absentia* admonishments were given on October 20, 2021, and July 22, 2022). On April 5, 2021, the misdemeanor charge was enhanced, and the State charged Hietschold with one count of aggravated battery (bodily harm) in a public place and one count of aggravated battery (physical contact) in a public place. (C. 5-6). The misdemeanor charge was dismissed on April 28, 2021, as a result of the enhancement, and the trial court required that Hietschold be booked again. (C. 11).

When the parties appeared on October 20, 2021, they set the case for a conference pursuant to Rule 402 for December 15, 2021, and for jury trial on

[1] The State is correct that this Court can take judicial notice of the trial court's online docket of events. (St. Br. 3); *see also Kramer v. Ruiz*, 2021 IL App (5th) 200026, ¶ 32, n.3.

February 24, 2024. (C. 24). The trial court, via the Honorable D.J. Tegeler, admonished Hietschold, "Mr. Hietschold, February 24th at 1:30 in the afternoon in courtroom 311. You must be present on that day. If you are not, a warrant could issue for your arrest and you could be tried in your absence, and if found guilty, sentenced in your absence." (R. 27). Hietschold, present via the Zoom videoconference platform, gave the court a thumbs up, indicating that he understood the admonishment. (C. 24; R. 27). The court order from October 20, 2021, reflects, "In absentia explained." (C. 24).

The February 24, 2022, trial date was ultimately stricken. (C. 39). On July 22, 2022, the case was set for jury trial for September 29, 2022, with jury selection beginning on October 3, 2022. (C. 52; R. 67). The parties also scheduled an interim status date of August 26, 2022. (C. 52). Upon setting the trial date, the trial court, via the Honorable Elizabeth Flood, admonished Hietschold as follows:

> Okay. So this case will be continued for jury trial to September 29th at 1:30, with the jury being summoned October 3rd at 9:00.
>
> Mr. Hietschold, you do have a right to be present at all of your court dates.
>
> You do need to be present on both of those dates.
>
> If you fail to come to court, that would constitute a waiver of your right to be present, and the trial could continue without you.
>
> You could be found guilty, you could be sentenced if you don't come back to court.

(R. 67). Hietschold told the court that he understood. (R. 68). The court order from July 22, 2022, again reflects, "In absentia explained." (C. 52).

July 22, 2022, was the last court date at which Hietschold appeared. (C. 52-54, 62, 64, 69, 73, 124-26). Through that date, Hietschold appeared at all court

dates for which his appearance was not waived, a total of nine times. (C. 10, 19, 21, 24, 39-40, 49-50, 52-53). The trial court never arraigned Hietschold, nor did Hietschold plead not guilty. (C. 10, 19, 21, 24-25, 28-29, 39-40, 49-54).

When Hietschold did not appear for trial on September 29, 2022, the State asked to proceed to trial *in absentia*. (C. 62; R. 77). The State told the court that it had spoken to a sergeant from the Geneva Police Department, who called seven area hospitals, including in Morris, where Hietschold lived. (R. 78). The prosecutor also checked Vinelink, which did not show that Hietschold was in custody. (R. 78). The State accordingly argued that Hietschold was willfully not appearing. (R. 78). Defense counsel argued Hietschold was never arraigned, and the State agreed. (R. 79-80, 83). The trial court continued the matter to the following day so the parties could obtain the transcript from the day Hietschold was admonished regarding trial *in absentia*. (R. 88-89).

The following day, defense counsel argued that the trial court did not admonish Hietschold that, if he failed to appear, he would waive his right to confront and cross-examine witnesses as 725 ILCS 5/113-4(e) (2022) required. (R. 94). The State responded that the trial court substantially complied with the statute. (R. 95-96). The trial court found substantial compliance with the statute and allowed the case to proceed to trial *in absentia* over defense counsel's objection, though it agreed that "it does not appear that the Court specifically noted the fact that [Hietschold] would be forfeiting his right to confront witnesses." (R. 96-97).

The case proceeded to jury trial as scheduled, over which the Honorable David Kliment presided. (C. 69; R. 116). The evidence at trial established that Kristen Tunney was at Third Street Station, a bar in Geneva, with her co-workers.

(R. 309). There, Tunney observed an argument between Hietschold and another female, and Tunney attempted to intervene in the argument for the female's safety. (R. 310). The female rebuffed Tunney's attempt, and Tunny went back to her co-workers on the other side of the bar. (R. 310-11, 314). Hietschold walked up to Tunney and struck her in the head from behind with his forearm or fist, knocking Tunney unconscious and to the ground. (R. 330-31, 337-38, 351-52; People's Ex. No. 3 2:54-3:06). Tunney fell into another woman or hit her head on a brick wall in the process. (R. 331, 338; People's Ex. No. 3 3:06-3:08).

The jury found Hietschold guilty of both counts of aggravated battery. (C. 110-11). Counsel filed a post-trial motion, arguing, *inter alia*, that the trial court erred in proceeding to trial *in absentia* after failing to arraign Hietschold and when Hietschold had not entered a formal plea. (C. 114). The motion also asserted that trial *in absentia* was in error because the trial court failed to advise Hietschold that his failure to appear at trial would result in the waiver of his right to confront witnesses pursuant to section 113-4(e). (C. 114). The trial court denied the motion. (C. 126). For purposes of sentencing, the trial court merged the physical contact count into the bodily harm count, and it sentenced Hietschold *in absentia* to 42 months in prison. (C. 126, 129, 132).

On behalf of Hietschold, counsel filed a notice of appeal. (C. 145-46; R. 559). On appeal, Hietschold argued that the trial court erred in proceeding to trial *in absentia* because (1) Hietschold had neither been arraigned nor pled not guilty by the time he received the trial court's *in absentia* trial admonishments as section 113-4(e) required, and (2) the trial court's trial *in absentia* admonishments failed to comply with section 113-4 in that the trial court did not inform Hietschold that

his failure to appear at trial would result in the waiver of his right to confront witnesses. *People v. Hietschold*, 2024 IL App (2d) 230047, ¶ 18.

In a split decision, the Appellate Court, Second Judicial District, reversed Hietschold's conviction and remanded for a new trial, finding that the trial court did not substantially comply with section 113-4(e) when it did not admonish Hietschold that he would waive his right to confront witnesses if he failed to appear at trial. *Id.* at ¶¶ 23, 29-43. Although finding it related, the Second District did not address Hietschold's first argument. *Id.* at ¶¶ 23, 29.

In reaching its decision, the majority noted that its "assessment of whether compliance was substantial is informed by considering the essence of the rule," and this case did not feature a situation in which a defendant "received both admonishments but at different times" or the trial court merely used different words than what the legislature outlined in section 113-4(e). *Id.* at ¶ 35 (internal quotation marks omitted). The majority continued, "Rather, in this case, prior to being tried *in absentia*, [Hietschold] never received one of the two components of the statutorily required admonishment." *Id.*

The majority discussed *People v. Dominguez*, 2012 IL 111336, a case in which, although the admonishments at issue were "imperfect, they addressed *each* required element, either orally or in writing." *Hietschold*, 2024 IL App (2d) 230047, ¶ 39 (emphasis in original) (citing *Dominguez*, 2012 IL 111336, ¶¶ 40-54). The majority noted that, in contrast to the case at bar, "none of the specific admonishments that the defendant challenged were *completely* absent from the record." *Id.* (emphasis in original).

Additionally, the majority rejected the decision in *People v. Broyld*, 146

Ill.App.3d 693 (4th Dist. 1986), in which the Fourth District held substantial compliance with section 113-4(e) occurred even though the trial court did not admonish the defendant that her failure to appear would result in the waiver of her right to confront witnesses. *Broyld*, 146 Ill.App.3d at 697-98; *Hietschold*, 2024 IL App (2d) 230047, ¶¶ 29-34. First, the Second District noted that the cases upon which *Broyld* relied, including *People v. Clark*, 96 Ill.App.3d 491 (3d Dist. 1981), were problematic in that they did not support *Broyld*'s holding. *Hietschold*, 2024 IL App (2d) 230047, ¶¶ 30-32. The majority also recognized that *Broyld* is inconsistent with this Court's decision in *People v. Garner*, 147 Ill.2d 467 (1992), which required the trial *in absentia* admonishment notwithstanding the fact that the defendant may have received the admonishment in another case. *Id.* at 479; *Hietschold*, 2024 IL App (2d) 230047, ¶ 33. Finally, the majority believed that *Broyld* rendered the right-to-confrontation component of the admonishment superfluous. *Hietschold*, 2024 IL App (2d) 230047, ¶ 34.

The majority also addressed the Second District's own precedent, *People v. Liss*, 2012 IL App (2d) 101191. *Hietschold*, 2024 IL App (2d) 230047, ¶ 29. In *Liss*, the defendant was informed about his right to confront witnesses at arraignment and subsequently told that the trial could proceed in his absence if he did not appear. *Liss*, 2012 IL App (2d) 101191, ¶ 18. The Second District found this procedure substantially complied with section 113-4(e), as it put the defendant on notice with regard to the right to confront witnesses and the waiver of that right for failing to appear at trial. *Id.* at ¶ 18. The *Liss* court also asserted, citing to *Broyld*, that, "even if the defendant were not admonished about his confrontation rights, as he contends, our result would not change." *Id.* at ¶ 19.

The majority here found this claim in *Liss* to be *dictum* and that, in this case, it was "squarely forced to decide whether to follow *Broyld*." *Hietschold*, 2024 IL App (2d) 230047, ¶ 29.

The majority next indicated that its decision is consistent with this Court's decision in *People v. Smith*, 188 Ill.2d 335 (1999), and *Smith* is in "complete harmony" with this Court's decision *Garner*. *Hietschold*, 2024 IL App (2d) 230047, ¶ 40. In *Smith*, this Court noted that, for trial to proceed *in absentia*, the State had to prove the defendant was willfully not appearing. *Smith*, 188 Ill.2d at 341 (quoting 725 ILCS 5/115-4.1(a) (1996)). It added that, to prove that the defendant was willfully absenting himself from trial, the State had to prove the defendant "(1) was advised of the trial date; (2) was advised that failure to appear could result in trial *in absentia*; and (3) did not appear for trial when the case was called." *Id.* at 342-43, 347-48. The majority here believed that *Smith* aligned with *Garner*'s "interpretation of section 113-4(e) as requiring that a trial in the defendant's absence not be held unless the defendant has made a valid waiver of both the right to be present at trial *and* the right to confront witnesses," as part of the reasoning in *Smith* in finding the defendant's absence willful was that the defendant "had already been advised in full compliance with section 113-4(e), including the right to confrontation." *Hietschold*, 2024 IL App (2d) 230047, ¶ 40 (emphasis in original) (citing *Smith*, 188 Ill.2d at 347-48).

Finally, the majority rejected a comparison to the analysis concerning whether the trial court substantially complied with Supreme Court Rule 402 when a defendant pleads guilty. *Id.* at ¶ 42. It further rejected an assertion that what suffices when admonishing a defendant pursuant to Rule 402 "necessarily and

always suffice[s] for [trial *in*] *absentia* purposes." *Id.* The majority reached this conclusion because it "disagree[d] with the implication that the rights a defendant waives by pleading guilty are more impactful than those waived by simply not appearing at trial," and it also believed that "the situations are different in a meaningful way," as trials *in absentia* are abhorred. *Id.*

The dissenting justice believed that the admonishments here substantially complied with section 113-4(e) and would have thus affirmed Hietschold's conviction. *Id.* at ¶¶ 50, 124 (Birkett, J., dissenting). Relying on *Broyld*, *Liss*, *Clark*, and *People v. Coppage*, 187 Ill.App.3d 436 (1st Dist. 1989), Justice Birkett believed that "[e]very district of the appellate court that has addressed the precise issue in this case (concerning the failure to include the right-to-confront admonishment) has ruled that the omission does not render the admonishment deficient where the defendant has been admonished regarding trial *in absentia*." *Hietschold*, 2024 IL App (2d) 230047, ¶ 84 (Birkett, J., dissenting). The dissent did not believe *Garner* stood for the proposition that, in order for substantial compliance to occur, the defendant must be advised both that the trial could proceed in the defendant's absence and that the defendant's failure to appear would act as a waiver of his right to confront witnesses. *Id.* at ¶ 97. Justice Birkett also thought that *Smith* held that the defendant did not need to be advised that he would waive his right to confront witnesses in order to be tried *in absentia*. *Id.* at ¶¶ 87-88. Justice Birkett asserted that *Smith* conflicts with *Garner* because the willfulness test in *Smith* did not contain a requirement that the defendant be informed that he would be waiving his right to confront witnesses if he failed to appear. *Id.* at ¶ 106. The dissent believed courts were required to adhere to *Smith* as a result of the conflict. *Id.*

Justice Birkett also noted that, in *Smith*, this Court cited to *Broyld* and *Coppage* as appellate court cases that employed the three-part willfulness test, and the dissent in turn asserted that this Court "would not have cited *Coppage* as support for the three-part willfulness test if [it] did not approve of *Coppage*'s express holding that there was substantial compliance." *Id.* at ¶ 107.

Also, the dissent did not think that the majority explained how the admonishments here did not "specify the essence of the rule" as outlined in section 113-4(e). *Id.* at ¶ 89. Further, the dissent analogized to rules concerning substantial compliance for guilty pleas under Rule 402, including a case in which it was found that the trial court substantially complied with Rule 402 after it failed to tell a defendant that he was waiving his right to confront witnesses upon pleading guilty. *Id.* at ¶¶ 114-16, 120 (citing *People v. Unger*, 23 Ill.App.3d 525 (2d Dist. 1974)). Finally, the dissent posited that "[t]he admonishments required by Rule 402 for a guilty plea are equally, if not more, important than the admonishment required by section 113-4(e)." *Id.* at ¶ 120.

Following the Second District's decision, this Court allowed the State's petition for leave to appeal.

ARGUMENT

Because the trial court did not advise David Hietschold that his failure to appear at trial would result in a waiver of his right to confront witnesses, proceeding to trial *in absentia* was in error.

After July 22, 2022, David Hietschold stopped appearing for court. Trial subsequently proceed *in absentia* at the State's request after the trial court ruled that it substantially complied in giving the section 113-4(e) admonition. Although a trial court indeed need only substantially comply with section 113-4(e), and a trial court need not read section 113-4(e) to a defendant verbatim, the plain language of section 113-4(e) demonstrates that the legislature intended that a section 113-4(e) admonition distinctly advise a defendant *both* that a trial can proceed in his absence *and* that he waives his right to confront witnesses by failing to appear for trial. 725 ILCS 5/113-4(e) (2022). As a result, in order to substantially comply with section 113-4(e), a trial court must do just that. This Court's precedent further confirms that substantial compliance occurs only when a defendant is provided with both components of the admonition. *See People v. Garner*, 147 Ill.2d 467, 483 (1992) (emphasis added) ("[I]t is clear that the legislative scheme is designed to insure that trial in the defendant's absence is not held unless defendant has made a valid waiver of his right to be present at trial *and* to confront witnesses against him.").

Although the trial court here twice advised Hietschold that trial could proceed in his absence if he did not appear for trial, because it never admonished him that his failure to appear would operate as a waiver of his right to confront witnesses, it did not substantially comply with section 113-4(e) and erred in conducting Hietschold's trial *in absentia*. Additionally, the cases the State relies upon to argue that the defendant need only be advised that trial can proceed in his absence:

(1) conflict with the plain language of section 113-4(e), (2) predate this Court's precedent and were thus implicitly overruled, (3) are problematic and based on *obiter dictum*, or (4) do not support the State's claim.

Even if a trial court only has to advise a defendant that trial could proceed in his absence to substantially comply with section 113-4(e), one must still waive the right to confront witnesses before trial *in absentia* can lawfully occur. This requires the defendant to know about the right. Therefore, the failure to admonish Hietschold that his failure to appear waives his right to confront witnesses is fatal given Hietschold was never arraigned, as there was no valid waiver of the right to confront witnesses because he did not know about the right.

In the end, this Court should affirm the judgment of the appellate court reversing Hietschold's conviction and remanding this case for a new trial.

Whether a trial court erred in allowing a trial to proceed *in absentia* is generally reviewed for an abuse of discretion. *People v. Smith*, 188 Ill.2d 335, 341 (1999). The more specific question of whether trial *in absentia* admonishments were sufficient for a trial to subsequently proceed *in absentia*, and thus whether a defendant's right to be present at trial was violated, is reviewed *de novo*. *People v. Montes*, 2013 IL App (2d) 111132, ¶¶ 51-58. Additionally, the issue here ultimately presents a question necessitating statutory interpretation, for which *de novo* review is appropriate. *People v. Castillo*, 2022 IL 127894, ¶ 24.

Under both the United States Constitution and the Illinois Constitution, a criminal defendant enjoys the right to be present at trial. U.S. Const. amend. XIV; Ill. Const. 1970, art. I, § 8; *People v. Lindsey*, 201 Ill.2d 45, 55 (2002). A criminal defendant also possesses the right, pursuant to both constitutions, to confront

the witnesses brought to testify against him. U.S. Const. amends. VI, XIV; Ill. Const. 1970, art. I, § 8; *see also Pointer v. Texas*, 380 U.S. 400, 403 (1965) (incorporating the Sixth Amendment right to confront witnesses to the States through the Fourteenth Amendment).

If a defendant voluntarily fails to appear at trial, it can be construed as a waiver of his constitutional right to be present, and trial can proceed *in absentia*, even if the defendant was not given advance notice that such would be a consequence of his failure to appear. *People v. Phillips*, 242 Ill.2d 189, 195 (2011) (citing *Taylor v. United States*, 414 U.S. 17, 18-20 (1973)). "This rule is grounded in the rationale that to allow a defendant to stop trial proceedings by his or her voluntary absence would allow a defendant to profit from his or her own misconduct." *Smith*, 188 Ill.2d at 341. However, if the defendant is not aware of the rights he is giving up, there can be no valid waiver of those rights. *People v. Lester*, 165 Ill.App.3d 1056, 1058 (4th Dist. 1988); *see also People v. Lesley*, 2018 IL 122100, ¶ 36 ("[A] waiver is an intentional relinquishment or abandonment of a known right or privilege."). Accordingly, for a trial to occur *in absentia*, "the defendant must first be informed of his right to be present and have knowingly and intelligently waived that right." *Garner*, 147 Ill.2d 483. Section 113-4(e) is "the procedural mechanism to effect a formal waiver of the right to be present." *Id*. In turn, a criminal defendant in Illinois "has a statutory right under section 113-4(e) of the Code to be admonished as to the possible consequences of failing to appear in court when required." *Phillips*, 242 Ill.2d at 195.

Under section 113-4(e), if a defendant pleads not guilty at arraignment, the trial court must:

> advise him at that time or at any later court date on which he is present that if he escapes from custody or is released on bond and fails to appear in court when required by the court that his failure to appear would constitute a waiver of his right to confront the witnesses against him and trial could proceed in his absence.

725 ILCS 5/113-4(e) (2022); *see also Phillips*, 242 Ill.2d at 196-97 (noting that this Court has suggested that the section 113-4(e) admonishment is mandatory). If a defendant is not admonished pursuant to section 113-4(e), the defendant's "statutory right to be notified he could be tried *in absentia* is violated." *Garner*, 147 Ill.2d at 483. A court must substantially comply with section 113-4(e) for a trial to proceed *in absentia*. *See Phillips*, 242 Ill.2d at 199 (noting a circumstance in which there is no "substantial compliance" with section 113-4(e)); *Montes*, 2013 IL App (2d) 111132, ¶ 55 ("[O]nly 'substantial compliance' with [section 113-4(e)] is necessary to permit the trial of an absent defendant.").

Additionally, the General Assembly enacted 725 ILCS 5/115-4.1 to govern when a trial *in absentia* can occur. *Smith*, 188 Ill.2d at 341. "In enacting section 115-4.1(a), the 'legislature's intention was to provide for a trial *in absentia*, within constitutional limits, if a defendant willfully and without justification absented himself from trial.'" *Id.* (quoting *People v. Maya*, 105 Ill.2d 281, 285 (1985)). Under section 115-4.1(a):

> When a defendant after arrest and an initial court appearance for a non-capital felony or a misdemeanor, fails to appear for trial, at the request of the State and after the State has affirmatively proven through substantial evidence that the defendant is willfully avoiding trial, the court may commence trial in the absence of the defendant.

725 ILCS 5/115-4.1(a) (2022).

When evaluating the legislative history of sections 113-4(e) and 115-4.1, this Court noted that it "suggests that the 113-4(e) admonishment was part of

a complex series of tradeoffs designed to balance the defendant's right to be present at trial, the State's interest in the expeditious administration of justice, and our traditional distrust of trials *in absentia*." *People v. Partee*, 125 Ill.2d 24, 40 (1988). However, trials *in absentia* are not merely disfavored; they are "abhorred because of their inherent unfairness to a defendant." *Montes*, 2013 IL App (2d) 111132, ¶ 52.

In light of sections 113-4(e) and 115-4.1(a), the appellate court "developed a three-part test to determine whether the State has established a *prima facie* case of a defendant's willful absence within the meaning" of section 115-4.1(a). *Smith*, 188 Ill.2d at 342-43. In *Smith*, this Court adopted the test. *Id.* at 345-48. Under this test, to make a *prima facie* case that the defendant's absence is willful, the State must prove "that the defendant: (1) was advised of the trial date; (2) was advised that failure to appear could result in trial *in absentia*; and (3) did not appear for trial when the case was called." *Id.* at 343.

Here, only the second element of the willfulness test is at issue. The State is correct in asserting that sections 115-4.1(a) and 113-4(e) work together to "ensure that a defendant is not tried in absentia unless he is willfully absent," with the latter "ensuring that defendants receive the admonishment necessary to protect their right to be present at trial," and the former "ensuring that a defendant who fails to appear is not tried in absentia unless he has received [the 113-4(a)] admonishment, such that his absence is willful." (St. Br. 12-13). Indeed, contrary to the dissent's belief, *People v. Hietschold*, 2024 IL App (2d) 230047, ¶ 106 (Birkett, J., dissenting), *Smith* and *Garner* are in "complete harmony." *Id.* at ¶ 40 (majority opinion). As the majority implicitly recognized, *id.*, *Smith* outlines a test that must

be satisfied to establish a willful absence so as to allow for trial *in absentia* in compliance with section 115-4.1(a), and both *Garner* and *Smith* illustrate what must be shown to satisfy the second element of that test. *Smith* held that proof of a willful absence requires showing that the defendant "was advised that failure to appear could result in trial *in absentia*," and it found the requirement satisfied when the trial court told the defendant, "in accordance with section 113-4(e)," that she "must be here or they could proceed to trial without you * * * which means you wouldn't be here to confront witnesses." *Smith*, 188 Ill.2d at 342-43, 347 (alteration in original). Meanwhile, *Garner* emphasized that the legislative scheme for section 113-4(e) "is designed to insure that trial in the defendant's absence is not held unless [the] defendant has made a valid waiver of his right to be present at trial *and* to confront witnesses against him." *Garner*, 147 Ill.2d at 483 (emphasis added).

To satisfy this second element, the trial court must thus substantially comply with section 113-4(e) before the trial can proceed *in absentia*. *See id.*; *Smith*, 188 Ill.2d at 347-48. Substantial compliance means distinctly admonishing the defendant *both* that the trial could proceed in his absence if he fails to appear *and* that his failure to appear at trial will result in a waiver of his right to confront witnesses. However, even if a trial court need only admonish a defendant that the trial could proceed in his absence in order to substantially comply with the statute, because a defendant must still give a valid waiver of the right to confront witnesses before a trial can proceed *in absentia*, the failure to give the admonishment concerning the right to confront witnesses proves fatal here considering Hietschold was never arraigned. Accordingly, when the trial court here only admonished Hietschold

that trial could proceed in his absence, it erred in proceeding to trial *in absentia*.

A. Consistent with the plain language of section 113-4(e), substantial compliance with the section means distinctly admonishing a defendant *both* that a trial could proceed in his absence *and* that his failure to appear would serve as a waiver of his right to confront witnesses.

Substantial compliance means "impart[ing] to a defendant largely that which is specified in the [statute], or the [statute's] 'essence.'" *People v. Dominguez*, 2012 IL 111336, ¶ 19. In other words, a court must impart the substance of the statute. *Id.* at ¶ 22; *see also People v. Mehmedoski*, 207 Ill.App.3d 275, 280 (2d Dist. 1990) ("Substantial compliance means such compliance as will assure that the beneficial effect of the rule will be achieved."). Substantial compliance does not require the statute to be read to the defendant verbatim. *Dominguez*, 2012 IL 111336, ¶¶ 11, 19, 22. In *Dominguez*, which involved Rule 605(c) admonishments about preserving issues for appeal following a negotiated guilty plea, *id.* at ¶¶ 24, 43, 51; *see also* Ill. S. Ct. R. 605(c), this Court noted that substantial compliance occurs when the defendant is advised "in such a way that the defendant is properly informed, or put on notice, of what he must do in order to preserve his right to appeal his guilty plea or sentence." *Dominguez*, 2012 IL 111336, ¶ 22.

Because substantial compliance requires a court to impart the substance of the statute, properly inform the defendant, and achieve the beneficial effect of the statute, the intent of the legislature can provide guidance as to what constitutes the substance, a proper informing, and the beneficial effect. Therefore, interpreting a statute is appropriate to determine the essence of the statute and thus whether substantial compliance has occurred. *See People v. Shunick*, 2024 IL 129244, ¶¶ 41-42, 60 (looking to the plain text of section 1-109 of the Code of

Civil Procedure to determine "the essence of the section" and thus whether the defendant substantially complied with its dictates, and also holding that, where the defendant did not adhere to the plain language of Rule 12(b)(6), substantial compliance with the Rule did not occur). Indeed, interpreting a statute uncovers the legislature's intent. *See Castillo*, 2022 IL 127894, ¶ 24 ("A court's fundamental objective in addressing issues of statutory construction is to ascertain and to give effect to the legislature's intent.").

There is no better evidence of the legislature's intent than the plain, ordinary language of the statute. *Id.* If the legislature employed plain and unambiguous language in the statute, it must be applied "as written, without resort to extrinsic aids to statutory construction." *Id.* To determine the plain language of a statute, "it is entirely appropriate to look to the dictionary for a definition of the term." *Id.* When interpreting a statute, "no part should be rendered meaningless or superfluous." *Skaperdas v. Country Casualty Insurance Co.*, 2015 IL 117021, ¶ 15.

Again, section 113-4(e) provides that, when a defendant pleads not guilty at arraignment, the trial court must:

> advise him at that time or at any later court date on which he is present that if he escapes from custody or is released on bond and fails to appear in court when required by the court that his failure to appear would constitute a waiver of his right to confront the witnesses against him and trial could proceed in his absence.

725 ILCS 5/113-4(e) (2022). The language of section 113-4(e) is plain and unambiguous: It says that, when a defendant pleads not guilty at arraignment, at that time or at a subsequent court date at which the defendant appears, the trial court must advise him *both* that (1) if he does not appear for trial, such failure

to appear serves as a waiver of the right to confront witnesses, *and* (2) the trial could proceed in his absence. Accordingly, the legislature intended that defendants be admonished as to *both* consequences of failing to appear for trial. *See Castillo*, 2022 IL 127894, ¶ 24. After all, "It is well settled that, generally, the use of a conjunctive such as 'and' indicates that the legislature intended that *all* of the listed requirements be met." *In re M.M.*, 2016 IL 119932, ¶ 21 (emphasis in original); *see also* Dictionary.com, https://www.dictionary.com/browse/and (last visited February 27, 2025) (defining "and" to mean "along or together with; as well as; in addition to").

The only time "and" should not be given its conjunctive meaning is when "there is an apparent repugnance or inconsistency in a statute that would defeat its main intent and purpose." *In re M.M.*, 2016 IL 119932, ¶ 21. Here, there is no repugnance or inconsistency in reading "and" in section 113-4(e) conjunctively. Only if "and" was interpreted in a non-conjunctive manner would such occur; section 113-4(e) was designed as "part of a complex series of tradeoffs designed to balance the defendant's right to be present at trial, the State's interest in the expeditious administration of justice, and our traditional distrust of trials *in absentia*." *Partee*, 125 Ill.2d at 40. Accordingly, to read "and" in a manner that is not conjunctive would be to upset the careful balance the General Assembly struck with sections 113-4(e) and 115-4.1(a).

Additionally, both pieces of the admonishment must be addressed with a defendant distinctly. If advising a defendant that a trial can proceed in his absence necessarily satisfies the requirement to inform a defendant that he waives the right to confront witnesses if he does not appear, (St. Br. 16), the language in section

113-4(e) requiring the defendant to be informed as to the latter would be rendered superfluous, which is improper. *Skaperdas*, 2015 IL 117021, ¶ 15.

As the plain and unambiguous language in section 113-4(e) discloses that the legislature's intent was that the defendant be admonished *both* that trial could proceed in his absence *and* his failure to appear would result in the waiver of his right to confront witnesses, and that they should be addressed distinctly, it must be applied as written. *Castillo*, 2022 IL 127894, ¶ 24. This means that the essence of section 113-4(e) is that the defendant is distinctly advised as to both. *See Shunick*, 2024 IL 129244, ¶¶ 41-42, 60 (looking to the plain language of a statute to determine what constitutes the essence of it, and thus substantial compliance with it, and additionally finding no substantial compliance with Rule 12(b)(6) when the defendant did not adhere to the plain language of it). However, this does not mean that section 113-4(e) must be read verbatim to the defendant. *Dominguez*, 2012 IL 111336, ¶¶ 11, 19, 22. Rather, the court must merely ensure that it puts the defendant "on notice" of both parts of section 113-4(e). *Id.* at ¶ 22.

The defendant in *Dominguez* argued that the trial court failed to substantially comply in giving numerous of Rule 605(c)'s admonishments. *Id.* at ¶ 38. First, he asserted that the trial court erred when it told him that he had a "right to return to the courtroom within 30 days to file motions to vacate your plea of guilty and/or reconsider your sentence" and that the motions had to be "in writing and contain all the reasons to support them." *Id.* at ¶¶ 41-42. Rule 605(c)(2) actually dictated that the defendant be admonished that, before appealing, he must file with the trial court "within 30 days of the date on which sentence is imposed, a written motion asking to have the judgment vacated and for leave to withdraw the plea

of guilty, setting forth the grounds for the motion." *Id.* at ¶ 40 (quoting Ill. S. Ct. R. 605(c)(2)). Although this Court found it "unfortunate" that the trial court gave an "imperfect" admonishment, it ultimately found substantial compliance because the defendant was "put on notice of what he must do within 30 days to withdraw his guilty plea." *Id.* at ¶ 43.

The defendant also complained about the trial court's admonishment when, after it had admonished him that he would be re-sentenced if his motion to reconsider sentence was granted and that he had 30 days from the day of a denial of the motion to file a notice of appeal, it admonished him, "If you wish to do so and could not afford an attorney, we will give you an attorney free of charge, along with the transcripts necessary for those purposes." *Id.* at ¶¶ 46-47. The defendant argued that this admonishment did not substantially comply with Rule 605(c)(5)'s mandate that the defendant be told that if he is indigent, he will receive "a copy of the transcript of the proceedings at the time of [his] plea of guilty and sentence" at no cost and that "counsel will be appointed to assist [him] with the preparation of the motions." *Id.* at ¶¶ 45, 47 (quoting Ill. S. Ct. R. 605(c)(5)). Although this Court recognized that the "trial court arguably did not explicitly inform [the] defendant that he was entitled to have an attorney appointed to help him prepare the postplea motions," the admonitions "reflect that a court-appointed attorney would be available for [the] defendant," thus substantially complying with Rule 605(c)(5). *Id.* at ¶ 51.

As the majority below recognized, these holdings from *Dominguez* instruct that substantial compliance occurs when the defendant is properly provided with the *main points* of a statute or rule, *i.e.*, is "put on notice" of its *elements*. *Id.* at

¶ 22; *Hietschold*, 2024 IL App (2d) 230047, ¶ 39. Here, given the plain and unambiguous language of section 113-4(e), the main points and elements of the admonition are: (1) if the defendant fails to appear for trial, he waives his right to confront witnesses, and (2) the trial can proceed in his absence. Therefore, when an admonishment is given to a defendant pursuant to section 113-4(e) that covers both elements, substantial compliance occurs. *Hietschold*, 2024 IL App (2d) 230047, ¶¶ 35, 39; *see also Dominguez*, 2012 IL 111336, ¶¶ 43, 51. On the other hand, despite the State's insistence otherwise, (St. Br. 9, 15, 17-21), substantial compliance does *not* occur if one of the elements of the admonition is "*completely* absent from the record." *Hietschold*, 2024 IL App (2d) 230047, ¶ 39 (emphasis in original). Indeed, it belies all common sense that compliance can be "substantial" under the term's ordinary and plan meaning when the legislature intends for the admonition to cover both components and only one part—or 50% of the admonition—is given. *See Dominguez*, 2012 IL 111336, ¶¶ 18-19 (emphasis added) (exploring the dictionary definition of "substantial" and holding that, to substantially comply with a statute or rule, the court must "impart to a defendant *largely* that which is specified in the" statute or rule).

The State argues that, "when interpreting [a] statute or rule, courts may look to similar provisions in other statutes or rules." (St. Br. 19) (citing *People ex rel. Department of Corrections v. Hawkins*, 2011 IL 110792, ¶ 24). Accordingly, the State looks to this Court's jurisprudence concerning Supreme Court Rule 402 to argue that a trial court need not admonish a defendant, pursuant to section 113-4(e), that his failure to appear would result in a waiver of his right to confront witnesses. (St. Br. 19-21). Under Rule 402, a trial court cannot accept a guilty

plea without advising the defendant, and ensuring that he understands, *inter alia*, that if he pleads guilty, there will be no trial, and by pleading guilty, he waives the right to confront the witnesses against him. Ill. S. Ct. R. 402(a)(4).

But *Hawkins* directs that any comparison to Rule 402 here is inappropriate. There, this Court noted that, if the plain language of a statute is ambiguous, courts can "look to tools of interpretation to ascertain the intended meaning of a provision." *Hawkins*, 2011 IL 110792, ¶ 24; *see also Castillo*, 2022 IL 127894, ¶ 24 ("Where the language of the statute is plain and unambiguous, a court will apply it as written, without resort to extrinsic aids to statutory construction."). So when a reviewing court is interpreting an ambiguous statute, it can "consider the purpose of the law, the evils it was intended to remedy, and the legislative history of the statute." *Hawkins*, 2011 IL 110792, ¶ 24. "In so doing, [a reviewing court] presume[s] that several statutes relating to the same subject are governed by one spirit and a single policy, and that the legislature intended the several statutes to be consistent and harmonious," meaning courts can therefore consider "similar and related enactments, though not strictly *in pari materia*." *Id.* (quoting *DeLuna v. Burciaga*, 223 Ill.2d 49, 60 (2006)). Here, as discussed above, the plain language of section 113-4(e) is unambiguous. 725 ILCS 5/113-4(e) (2022). Therefore, referring to other statutes or rules to determine the meaning of substantial compliance with section 113-4(e) is improper.[2] *Hawkins*, 2011 IL 110792, ¶ 24; *Castillo*, 2022 IL 127894,

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[2] Above, Hietschold relies on *Dominguez*—which determined substantial compliance with Rule 605(c) occurred, *Dominguez*, 2012 IL 111336, ¶¶ 43, 51—to determine what constitutes substantial compliance with section 113-4(e). However, it should be noted that Hietschold argues what constitutes substantial compliance with section 113-4(e) based on what *substantial compliance means generally* per *Dominguez*. On the other hand, the State argues what constitutes substantial compliance with section 113-4(e) by directly considering what

¶ 24. Even so, Rule 402(a) covers a completely different subject in guilty pleas compared to section 113-4(e), and it is thus not a "similar and related enactment," let alone one even remotely *in pari materia*. *Hawkins*, 2011 IL 110792, ¶ 24 (quoting *DeLuna*, 223 Ill.2d at 60). Indeed, trials *in absentia* are abhorred because they are inherently unfair to a defendant. *Partee*, 125 Ill.2d at 40; *Montes*, 2013 IL App (2d) 111132, ¶ 52. On the other hand, guilty pleas are a daily occurrence in every county in this State, and not only are they encouraged, they are a necessary part of the criminal justice system. *Santobello v. New York*, 404 U.S. 257, 260 (1971).

Garner and *Smith* also demonstrate that substantial compliance with section 113-4(e) occurs only if a defendant receives an admonition that covers both components of the section. This Court in *Garner* recognized that the section 113-4(e) admonition concerns knowingly waiving the right to be present so that trial *in absentia* can proceed. *Garner*, 147 Ill.2d at 483. But when discussing section 113-4(e) and the legislative tradeoff leading to its enactment, this Court noted, "[I]t is clear that the legislative scheme is designed to insure that trial in the defendant's absence is not held unless [the] defendant has made a valid waiver of his right to be present at trial *and* to confront witnesses against him." *Id.* (emphasis added). Of course, one can only waive rights he knows about, which this Court in *Garner* recognized. *Id.* at 477, 481-83 (citing *Lester*, 165 Ill.App.3d at 1058-59). Thus, *Garner* stands

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constitutes substantial compliance for a different rule, Rule 402, as "when interpreting [a] statute or rule, courts may look to similar provisions in other statutes or rules" to determine what the statute or rule at issue means. (St. Br. 19). It is the latter that *Hawkins* and *Castillo* prohibit when a statute or rule is unambiguous, as section 113-4(e) is. *See Hawkins*, 2011 IL 110792, ¶ 24; *Castillo*, 2022 IL 127894, ¶ 24.

for the proposition that, to knowingly waive the right to be present so that trial *in absentia* can occur, the defendant must also waive his right to confront witnesses. To do so, the defendant must be advised—pursuant to section 113-4(e)—as to the effects on his right to confront witnesses should he fail to appear at trial such that he can knowingly waive the right to confront witnesses. Indeed, "a defendant in Illinois has a statutory right under section 113-4(e) of the Code to be admonished as to the possible consequences of failing to appear in court when required," *Phillips,* 242 Ill.2d at 195, and section 113-4(e) explicitly states that the waiver of the right to confront witnesses is one such consequence. 725 ILCS 5/113-4(e) (2022). Consistent with this proposition, in *Smith*, this Court found the second element of the willfulness test satisfied when the trial court, pursuant to section 113-4(e), advised the defendant, "You must be here or they could proceed to trial without you * * * *which means you wouldn't be here to confront witnesses*." *Smith*, 188 Ill.2d at 347 (alteration in original) (emphasis added).

The State relies on *People v. Broyld*, 146 Ill.App.3d 693 (4th Dist. 1986), to argue that, to substantially comply with section 113-4(e), a trial court need not specifically advise a defendant that his failure to appear for trial waives his right to confront witnesses. (St. Br. 17-18). In *Broyld*, the Fourth District held that, where a defendant is admonished that the trial could proceed in his absence but not that his failure to appear would result in the waiver of his right to confront witnesses, no error occurs. *Broyld*, 146 Ill.App.3d at 697-98. In reaching this holding, the Fourth District reasoned, "[A]nyone who would be able to understand what the court meant when it stated that the right of confrontation would be lost, would understand that if he or she were not present at trial, that right could not be

exercised." *Id.* at 698. The *Broyld* court also asserted that precedent required its holding. *Id.* However, there are numerous problems with *Broyld*, some of which the majority below recognized. *Hietschold*, 2024 IL App (2d) 230047, ¶¶ 30-34.

First, *Broyld*'s reasoning is faulty, as it assumes that a defendant knows about his right to confront witnesses. But defendants are often laypersons, and "we cannot assume that they know all of their rights and how their rights might change over the course of a case or be affected by certain decisions that they might make." *In re D.W.*, 2023 IL App (1st) 211006, ¶ 28. This is exactly why courts spend a great deal of time admonishing defendants of their rights and the consequences certain acts have on their rights. *Id.* Indeed, in *Garner*, this Court found that, even if a defendant is a "veteran offender" or "had knowledge of the law in some very complicated matters," the section 113-4(e) admonishment is required; "[t]he dangers in [finding otherwise] are obvious." *Garner*, 147 Ill.2d at 479. Also, this Court explicitly rejected *Broyld*'s line of reasoning in holding that it "decline[s] to equate knowledge of the law with waiver of a right." *Id.*

Second, *Broyld* is inconsistent with *Garner*, which, as just discussed, requires that a defendant receive both components of the admonishment. Simply put, this Court in *Garner* implicitly overruled *Broyld*. Additionally, *Garner*, which was decided nearly six years after *Broyld*, is controlling, as it is precedent from this Court. *See Yakich v. Aulds*, 2019 IL 123667, ¶ 13 ("Our circuit and appellate courts are bound to apply this court's precedent to the facts of the case before them under the fundamental principle of *stare decisis*.").

Third, *Broyld* is inconsistent with the plain language of section 113-4(e), which unambiguously requires both components of the admonition to be given,

discussed previously. 725 ILCS 5/113-4(e) (2022).

Fourth, as the majority below astutely noted:

> [I]f *Broyld* is correct that the capacity to understand a waiver of the right to confrontation necessarily means a defendant understands that, by not appearing, he or she is waiving that right, it raises the question why both admonishments appear as required components of section 113-4(e). Indeed, if the admonishment regarding confrontation of witnesses may be implicitly "covered" or subsumed by the broader admonishment that trial may proceed in the defendant's absence, we question why the legislature specifically chose to separate and include *both* in section 113-4(e).

Hietschold, 2024 IL App (2d) 230047, ¶ 34 (emphasis in original). In other words, a holding like *Broyld*'s improperly renders section 113-4(e) as improperly superfluous with regard to admonishing a defendant concerning the right to confront witnesses. *Id.*; *Skaperdas*, 2015 IL 117021, ¶ 15.

Similarly, the majority's correct observations demonstrate that, in the eyes of the General Assembly, the right to confrontation is not an "ancillary right" of the right to be present, nor is the waiver of the right to confront witnesses an "ancillary consequence" of failing to appear for trial. (St. Br. 9-10, 16, 19-20). Consistent with *Garner*, it is instead something that itself must be waived in order for trial to proceed *in absentia*, which the giving of the admonishment concerning confrontation rights allows to occur. *See Garner*, 147 Ill.2d at 483.

Finally, the *Broyld* court's assertion that precedent required its outcome is problematic. *See Broyld*, 146 Ill.App.3d at 698. The *Broyld* court relied upon *People v. Watson*, 109 Ill.App.3d 880 (4th Dist. 1982), and *People v. Clark*, 96 Ill.App.3d 491 (3d Dist. 1981), the latter of which the State also relies on here. *Broyld*, 146 Ill.App.3d at 697-98; (St. Br. 17). In *Watson*, when the defendant failed to appear at a pre-trial conference, the trial court mailed an order to him that

stated that his failure to appear at trial "will result in the trial proceeding in his absence, and his case being tried *in absentia*." *Watson*, 109 Ill.App.3d at 881-82. The mailed order made no mention of the right to confront witnesses. *Id.* at 882. The defendant did not appear at trial. *Id.* The *Watson* court found error holding the trial *in absentia* because: (1) the trial court never orally admonished the defendant pursuant to section 113-4(e), (2) the notice was not sent to the defendant via certified mail as section 115-4.1(a) required, and (3) the State did not prove the defendant was willfully absent. *Id.* at 882-83.

The *Broyld* court seemingly believed that the *Watson* court implicitly held it to be permissible for the defendant to not have been informed about the right to confront witnesses, as "[t]he [*Watson*] court said nothing about the failure to mention loss of confrontation rights in the written notice." *Broyld*, 146 Ill.App.3d at 698. But as the majority below observed, "there was no need to mention the absence of confrontation rights in the written notice [in *Watson*], as the court was not specifically faced with that issue." *Hietschold*, 2024 IL App (2d) 230047, ¶ 31. In other words, "[N]ot mentioning the absence of confrontation rights in the written notice was *not* equivalent to an affirmative holding that substantial compliance is satisfied, even if . . . the confrontation admonishment is completely absent from the record." *Id.* (emphasis in original); *cf. In re Jovan A.*, 2014 IL App (1st) 103835, ¶ 44 ("We should not . . . without input from them, decide the case on a basis that was not addressed by the parties."). Indeed, *Watson* was consistent with *Garner*, specifically holding that "the legislative scheme providing for trial *in absentia* is designed to insure that such a trial is not held unless [the] defendant has made a valid waiver of his right to be present at trial *and* to confront witnesses

against him." *Watson*, 109 Ill.App.3d at 882 (emphasis added).

As for *Clark*, there, when the defendant was arraigned, she was advised that "she could be tried in her absence if she failed to appear." *Clark*, 96 Ill.App.3d at 495. The trial proceeded *in absentia*. *Id.* The defendant alleged that the trial *in absentia* statute was unconstitutional as applied to her, as the trial court never advised her that her failure to appear would constitute a waiver of her right to confront witnesses. *Id.* at 494. Noting that the admonishment the defendant received "referred only to a trial in absentia," the *Clark* court held that it did "not find this admonishment fatal, however, as it satisfies statutory requirements." *Id.* at 496. As the majority below stated, this is not a persuasive holding, let alone "affirmative authority" that no error occurred, as the court "provided no explanation or rationale for [the] holding." *Hietschold*, 2024 IL App (2d) 230047, ¶ 32. It is also noteworthy that *Clark* was decided before *Garner*, meaning *Garner* implicitly overruled *Clark*, too. Further, like *Broyld*, *Clark* is inconsistent with section 113-4(e)'s plain language and improperly renders superfluous the statutory language concerning the right to confront witnesses. *Skaperdas*, 2015 IL 117021, ¶ 15; 725 ILCS 5/113-4(e) (2022).

The State's reliance on *People v. Coppage*, 187 Ill.App.3d 436 (1st Dist. 1989), is also misplaced. (St. Br. 18). There, the First District held that the trial court substantially complied with section 113-4(e) when it only told the defendant that he could be tried *in absentia* if he failed to appear for trial. *Coppage*, 187 Ill.App.3d at 439, 442-43. However, like the other cases the State relies on, *Coppage* pre-dates *Garner*, meaning *Garner* implicitly overruled it; it is inconsistent with the statute's plain language; and it improperly renders half the statute superfluous.

It is also incorrect to say that this Court has "acquiesced in" *Broyld*'s and

Coppage's "interpretation of section 113-4(e)" as a result of this Court relying upon them "in adopting its three-part test for willful absence" in *Smith*. (St. Br. 18). When this Court cited *Broyld* in *Smith*, it did so only for the following propositions: (1) satisfying the three-part willfulness test creates a "very strong inference . . . that the defendant has elected not to appear," (2) burden-shifting for the issue of willfulness is constitutionally permissible, and (3) appellate courts have held that the State must establish more than a *prima facie* case of willful absence only if the defense presents evidence that the absence is not willful. *Smith*, 188 Ill.2d at 343, 345-47. This Court only cited *Coppage* in recognizing that the "appellate court developed a three-part test to determine whether the State has established a *prima facie* case of a defendant's willful absence within the meaning of" section 115-4.1(a). *Id.* at 342-43. At no point did this Court adopt the holdings of *Broyld* and *Coppage* that a trial court, to substantially comply with section 113-4(e), need not advise a defendant that his failure to appear results in the waiver of his right to confront witnesses. To the contrary, this Court in *Smith* found that the trial court complied with section 113-4(e), and thus the defendant was advised that trial could proceed *in absentia* if he did not appear consistent with the second element of the willfulness test, when the trial court informed her, "You must be here or they could proceed to trial without you * * * *which means you wouldn't be here to confront witnesses*." *Id.* at 347 (emphasis added) (alteration in original).

Citing to *People v. Liss*, 2012 IL App (2d) 101191, ¶ 19, the State argues that, after *Smith*, "the appellate court continued to interpret section 113-4(e) to provide that an admonishment about the possibility of trial in absentia alone demonstrates substantial compliance." (St. Br. 18). In *Liss*, during arraignment,

the defendant was advised that, at trial, he had the right to confront and cross-examine the State's witnesses. *Liss*, 2012 IL App (2d) 101191, ¶ 4. After arraigning the defendant, and after the defendant pled not guilty, the trial court told him that, if he did not appear for trial, "you would run the risk that the trial could go forward without you, which means that you could be tried in your absence, a jury could find you guilty, and a judge could sentence you, even though you are not here." *Id.* at ¶ 5. Trial proceeded *in absentia*, and the defendant was found guilty. *Id.* at ¶ 8. The defendant argued on appeal, *inter alia*, that error occurred when the trial proceeded *in absentia* because the trial court did not admonish him, consistent with section 113-4(e), that his failure to appear would serve as a waiver to confront witnesses. *Id.* at ¶ 17. The *Liss* court found substantial compliance with section 113-4(e) because the trial court advised the defendant about his right to confront witnesses during arraignment, and it later advised him that the trial could proceed in his absence, which put him "on notice that if he failed to appear for trial he would lose the ability to confront the witnesses against him."[3] *Id.* at ¶ 18.

Relying on *Broyld*, the *Liss* court continued, "[E]ven if the defendant were not admonished about his confrontation rights . . . our result would not change." *Id.* at ¶ 19. Hietschold already discussed the flaws with *Broyld* above. Regardless, as the majority here correctly noted, *Hietschold*, 2024 IL App (2d) 230047, ¶ 29,

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[3] This holding of *Liss* is problematic, as it assumes that a defendant can, under the facts of *Liss*, deduce that his failure to appear means that he waives his right to confront witnesses. But "we cannot assume [layperson defendants] know all of their rights and how their rights might change over the course of a case or be affected by certain decisions that they might make." *In re D.W.*, 2023 IL App (1st) 211006, ¶ 28.

this portion of *Liss* is *obiter dictum*—the defendant, according to the *Liss* court, was admonished about his confrontation rights at arraignment, which the court in part relied on to find substantial compliance—and it accordingly need not be adhered to. *Liss*, 2012 IL App (2d) 101191, ¶ 18; *see also Lebron v. Gottlieb Memorial Hospital,* 237 Ill.2d 217, 236 (2010) (holding that *obiter dictum* "is a remark or opinion that a court uttered as an aside" and "is not essential to the outcome of the case," meaning it "is generally not binding authority or precedent"). Instead, this Court is "squarely forced to decide whether to follow *Broyld*." *Hietschold*, 2024 IL App (2d) 230047, ¶ 29.

Citing to *People v. Caballero*, 228 Ill.2d 79 (2008), and its comment that the legislature's "acquiescence in the judicial construction of [a statute] over the past 14 years dissuades us from overruling the appellate court decisions," *id.* at 91, the State argues that the General Assembly has acquiesced to an interpretation of section 113-4(e) that does not require an admonishment regarding confrontation rights, as it "has declined to amend section 114-3(e) in the face of multiple appellate court decisions construing it across decades." (St. Br. 18-19). But again, the cases the State relies on have either been implicitly overruled by *Garner* and are inconsistent with the plain language of section 113-4(e) (*Broyld*, *Clark*, and *Coppage*), are problematic and based on *obiter dictum* (*Liss*), or do not stand for the proposition the State claims they stand for, (*Smith*). Instead, the General Assembly's failure to amended section 113-4(e) in the 33 years since this Court decided *Garner* suggests that this Court's holding there that both components of the section 113-4(e) admonishment must be given is correct and what the legislature intended. *See Caballero*, 228 Ill.2d at 91.

Both the majority and dissent below believed that the best practice is to give a defendant the full section 113-4(e) admonishment. *Hietschold*, 2024 IL App (2d) 230047, ¶ 34; *id.* at ¶ 124 (Birkett, J., dissenting). Even the *Broyld* court subscribed to this view. *Broyld*, 146 Illl.App.3d at 698. Indeed, it takes no more than ten seconds to advise a defendant *both* that, if he fails to appear, the trial could proceed in his absence, *and* if he fails to appear, he waives the right to confront witnesses. Through the plain language the General Assembly employed, the essence of section 113-4(e) requires the trial court to advise the defendant as to both components distinctly, though it need not use exact language in the statute. As a result, and as this Court in *Garner* and *Smith* recognized, if the trial court fails to admonish a defendant *both* that trial could proceed in his absence *and* his failure to appear at trial results in the waiver of his right to confront witnesses, substantial compliance with section 113-4(e) does not occur, and a trial cannot proceed *in absentia*, as the second element of the willfulness test is not satisfied.

B. The trial court did not substantially comply with section 113-4(e) because it did not admonish Hietschold that he would waive his right to confront witnesses upon failing to appear at trial.

As discussed, to substantially comply with section 113-4(e), the trial court must distinctly advise the defendant *both* that the trial could proceed in his absence *and* that he waives his right to confront witnesses upon failing to appear for trial. Here, on October 20, 2021, Judge Tegeler admonished Hietschold that, "[i]f you are not [present for trial], a warrant could issue for your arrest and you could be tried in your absence, and if found guilty, sentenced in your absence." (R. 27). On July 22, 2022, upon resetting the case for trial, Judge Flood told Hietschold:

> Okay. So this case will be continued for jury trial to September

> 29th at 1:30, with the jury being summoned October 3rd at 9:00.
>
> Mr. Hietschold, you do have a right to be present at all of your court dates.
>
> You do need to be present on both of those dates.
>
> If you fail to come to court, that would constitute a waiver of your right to be present, and the trial could continue without you.
>
> You could be found guilty, you could be sentenced if you don't come back to court.

(R. 67).

Although the trial court twice advised Hietschold that, if he failed to appear, trial could proceed in his absence, it never advised him that his failure to appear would constitute a waiver of his right to confront witnesses. (R. 27, 67). Accordingly, the trial court failed to substantially comply with section 113-4(e). *See* 725 ILCS 5/113-4(e) (2022) (requiring, through its plain language, that both components of the admonishment be distinctly given); *Garner*, 147 Ill.2d at 483 ("[I]t is clear that the legislative scheme is designed to insure that trial in the defendant's absence is not held unless [the] defendant has made a valid waiver of his right to be present at trial *and* to confront witnesses against him."). Thus, the second element of the willfulness test was not satisfied, and the trial court erred in holding trial in Hietschold's absence. *See Smith*, 188 Ill.2d at 342-43, 347; *Garner*, 147 Ill.2d at 483. Indeed, by not substantially complying with section 113-4(e), the trial court violated Hietschold's "statutory right . . . to be admonished as to the possible consequences of failing to appear in court when required." *Phillips*, 242 Ill.2d at 195.

The State notes that "an imperfect admonishment is not reversible error unless real justice has been denied." (St. Br. 11) (quoting *People v. Whitfield*, 217

Ill.2d 177, 195 (2005)). But it must also be noted that this Court made the aforementioned statement in *Whitfield* in the context of analyzing substantial compliance with Rule 402. *Whitfield*, 217 Ill.2d at 195. As discussed above, analogizing to Rule 402 in this case is inappropriate. Indeed, proceeding to trial *in absentia* is inherently prejudicial and is abhorred. *Partee*, 125 Ill.2d at 40; *Montes*, 2013 IL App (2d) 111132, ¶ 52. As a result, this Court has remanded for new proceedings upon finding section 113-(e) was not complied with. *See Garner*, 147 Ill.2d at 483; *Phillips*, 242 Ill.2d at 201-02.

The State adds that Hietschold "clearly understood that he could be tried in absentia if he failed to appear and simply did not want to face trial after not receiving the plea offer he wanted." (St. Br. 15). However, Hietschold's dissatisfaction with plea negotiations did not relieve the trial court of its responsibility to ensure a knowing waiver of the right to be present, which required that both components of the section 113-4(e) admonishment be given distinctly, before proceeding to trial *in absentia*. *See* 725 ILCS 5/113-4(e) (2022); *Garner*, 147 Ill.2d at 483.

Because the trial court did not admonish Hietschold that his failure to appear operates as a waiver of his right to confront witnesses, it did not substantially comply with section 113-4(e), and proceeding to trial *in absentia* was in error.

C. At the very least, because Hietschold was never arraigned, both components of the admonition were required here.

According to the State, to substantially comply with section 113-4(e), the trial court need only advise a defendant that trial may proceed in his absence upon his failure to appear. (St. Br. 9, 15, 17-21). Even if the State is correct, trial *in absentia* still cannot occur "unless [the] defendant has made a valid waiver of his right . . . to confront witnesses against him." *Garner*, 147 Ill.2d at 483. Again,

one can only waive rights that he knows about. *Lester*, 165 Ill.App.3d at 1058; *Lesley*, 2018 IL 122100, ¶ 36. Thus, in order to waive the right to confront witnesses—and, in turn, to allow trial to proceed *in absentia*, *Garner*, 147 Ill.2d at 483—the defendant must first know that he enjoys the right to confront witnesses. *See Lester*, 165 Ill.App.3d at 1058; *Lesley*, 2018 IL 122100, ¶ 36.

Here, Hietschold was not arraigned even though the trial court had nine chances to arraign him. (C. 10, 19, 21, 24, 39-40, 49-50, 52-53). At arraignment, Hietschold would have been informed of his right to confront witnesses. *Garner*, 147 Ill.2d at 481 (noting that a defendant is informed of his "significant protections" at arraignment). Accordingly, Hietschold could not give a valid waiver of his right to confront witnesses, and trial could not proceed *in absentia*, unless he received *both* components of the section 113-4(e) admonition. Indeed, putting Hietschold on notice as to both distinct components of the admonishment would have necessarily put him on notice that he enjoys the right to confront witnesses such that he could waive it with his non-appearance at trial. *See* 725 ILCS 5/113-4(e) (2022) ("[T]he court shall advise [the defendant] . . . that his failure to appear would constitute a waiver of his right to confront the witnesses against him."). Therefore, because Hietschold was never arraigned and both components of the admonition were not given here, Hietschold never gave a valid waiver of his right to confront witnesses even if the State's position is correct, as he never knew about it. *Lester*, 165 Ill.App.3d at 1058; *Lesley*, 2018 IL 122100, ¶ 36. Thus, a new trial is still in order. *See Garner*, 147 Ill.2d at 483.

D. Conclusion.

As a "part of a complex series of tradeoffs designed" to ensure the interests

of the parties and the court are protected upon a defendant's failure to appear for trial, the General Assembly promised Hietschold that no trial in his absence would occur unless he was distinctly advised that his trial could proceed in his absence *and* that his failure to appear would serve as a waiver of his right to confront witnesses. *Partee*, 125 Ill.2d at 40. Instead, the State—through requesting trial *in absentia*—and the trial court—through only providing 50% of the admonishment and allowing trial *in absentia* to occur—maintained their interests while depriving Hietschold of his. To maintain his interests, too, the trial court had to distinctly advise Hietschold in some form that his failure to appear operates as a waiver of his right to confront witnesses. Even if the trial court did not have to in order to substantially comply with section 113-4(e), the admonition was still required to give a valid waiver of the right to confront witnesses here, as Hietschold was never arraigned. As the trial court failed to give the admonition, it erred in allowing trial *in absentia* to occur. Therefore, this Court should affirm the judgment of the appellate court reversing Hietschold's conviction and remanding this case to the trial court for a new trial.

However, should this Court find that the appellate court erred, this Court should remand to the appellate court for consideration of Hietschold's other and unaddressed argument as to why the trial court did not substantially comply with section 113-4(e). *See Hietschold*, 2024 IL App (2d) 230047, ¶¶ 18, 29 (recognizing Hietschold's first argument but declining to address it upon finding the second argument dispositive).

CONCLUSION

For the foregoing reasons, David Hietschold, Defendant-Appellee, respectfully requests that this Court affirm the judgment of the appellate court reversing his conviction and remanding this case for a new trial. In the alternative, should this Court find that the appellate court erred, it should remand this case to the appellate court for consideration of Hietschold's other, unaddressed argument as to why the trial court did not substantially comply with section 113-4(e).

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages contained in the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342, is 38 pages.

/s/Elliott A. Borchardt
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No. 130716

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellant, -vs- DAVID A. HIETSCHOLD, Defendant-Appellee.	))))))))))	Appeal from the Appellate Court of Illinois, No. 2-23-0047. There on appeal from the Circuit Court of the Sixteenth Judicial Circuit, Kane County, Illinois, No. 21 CF 608. Honorable David P. Kliment, 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 March 11, 2025, the Brief and Argument was filed with the Clerk of the Supreme Court of Illinois using the court's electronic filing system in the above-entitled cause. Upon acceptance of the filing from this Court, persons named above with identified email addresses will be served using the court's electronic filing system and one copy is being mailed to the Defendant-Appellee in an envelope deposited in a U.S. mail box in Elgin, Illinois, with proper postage prepaid. Additionally, upon its acceptance by the court's electronic filing system, the undersigned will send 13 copies of the Brief and Argument to the Clerk of the above Court.

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