No. 121371

IN THE

SUPREME COURT OF ILLINOIS

| | | |
|---|---|---|
| PEOPLE OF THE STATE OF ILLINOIS,<br><br>Plaintiff-Appellant<br>Cross-Appellee,<br><br>-vs-<br><br>ROBERT CAREY<br><br>Defendant-Appellee<br>Cross-Appellant. | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | Appeal from the Appellate Court of Illinois, No. 1-13-1944.<br><br>There on appeal from the Circuit Court of Cook County, Illinois , No. 11 CR 3485.<br><br>Honorable<br>Matthew E. Coghlan,<br>Judge Presiding. |

**BRIEF AND ARGUMENT FOR DEFENDANT-APPELLEE**
**CROSS-RELIEF REQUESTED**

MICHAEL J. PELLETIER
State Appellate Defender

PATRICIA MYSZA
Deputy Defender

MANUEL S. SERRITOS
Assistant Appellate Defender
Office of the State Appellate Defender
First Judicial District
203 N. LaSalle St., 24th Floor
Chicago, IL 60601
(312) 814-5472
1stdistrict.eserve@osad.state.il.us

COUNSEL FOR DEFENDANT-APPELLEE

**ORAL ARGUMENT REQUESTED**

E-FILED
7/26/2017 1:04 PM
Carolyn Taft Grosboll
SUPREME COURT CLERK

**POINTS AND AUTHORITIES** Page

## NATURE OF THE CASE

Robert Carey was convicted of first degree murder after a jury trial in which the State proceeded on only one count of felony murder. He was sentenced to 40 years in prison, consisting of 25 years for the murder and 15 years for a firearm enhancement. On direct appeal, Carey raised three issues, including a challenge to the 15-year firearm enhancement because notice was not given concerning this enhancement.

In a Rule 23 Order, the appellate court rejected two of Carey's claims, but overturned the imposed firearm enhancement. The parties filed petitions for rehearings. Carey's petition for rehearing, relying on the appellate court's rationale striking down the enhancement and on *People v. Pujuoe*, 61 Ill.2d 335 (1975), argued that the State failed to spell out that firearm was an essential element of the charged predicate offense and, therefore, the felony murder conviction must be vacated. The appellate court took both petitions under advisement, but ordered the State to address Carey's *Pujuoe* claim.

In a published decision, the appellate court reversed Carey's felony murder conviction because he did not receive adequate notice for the predicate offense. Without addressing Carey's other issues, including his sufficiency challenge to the non-functioning firearm, the case was remanded "to the circuit court for further proceedings consistent with [its] opinion." *People v. Carey*, 2016 IL App (1st) 131944, ¶37.

This Court allowed the State's petition for leave to appeal.

## ISSUES PRESENTED FOR REVIEW

1. Illinois has two mutually exclusive armed robbery offenses, involving either "dangerous weapon" or "firearm." Here, only one armed robbery was alleged in the charge as the predicate offense without statute citation or any descriptive language for the prosecution's felony murder theory. At trial, the State argued *both* robbery offenses and had the jury instructed on *both* robbery offenses after it had *nolle prossed* the other counts of the indictment. Thus, the question presented:

Whether the Appellate Court was correct in vacating Robert Carey's murder conviction where he received insufficient notice of the charge and was unable to plead the case as a double jeopardy bar, which are the two twin concerns of the *Pujuoe* rule. Therefore, Carey's conviction should be reversed.

### Cross-Appeal Issue

2. In Illinois, the question of "what is a firearm," is an issue to be determined by the fact-finder. In this jury trial, per the request of the State, the trial court precluded the defense from challenging whether the .22 Derringer found on Robert Carey's person at the scene was "a firearm." Therefore, the issue presented is:

Whether the State proved the essential element of "firearm" for its attempted armed robbery/firearm charge where the trial court's ruling removed the question of "firearm" from the jury's consideration (finding the matter a question of law) and where the prosecution's evidence demonstrated that .22 Derringer had lost the characteristics of a firearm.

## STATUTES INVOLVED

**720 ILCS 5/8-4 (West 2011)**
§8-4. Attempt.
(a) Elements of the offense.
A person commits the offense of attempt when, with intent to commit a specific offense, he or she does any act that constitutes a substantial step toward the commission of that offense.

**720 ILCS 5/18-1 (West 2011)**
§18-1. Robbery. . . .
(a) Robbery. A person commits robbery when he or she knowingly takes property . . . from the person or presence of another by the use of force or by threatening the imminent use of force.

**720 ILCS 5/18-2 (West 2011)**
§18-2. Armed robbery.
(a) A person commits armed robbery when he or she violates Section 18-1; and

> (1) he or she carries on or about his or her person or is otherwise armed with a dangerous weapon other than a firearm; or
>
> (2) he or she carries on or about his or her person or is otherwise armed with a firearm; or
>
> * * * * * *

**720 ILCS 5/9-1 (West 2011)**
§9-1. First degree Murder . . . .
(a) A person who kills an individual without lawful justification commits first degree murder if, in performing the acts which cause the death:

> (1) he either intends to kill or do great bodily harm to that individual or another, or knows that such acts will cause death to that individual or another; or
>
> (2) he knows that such acts create a strong probability of death or great bodily harm to that individual or another; or
>
> (3) he is attempting or committing a forcible felony other than second degree murder.
>
> * * * * * *

## STATEMENT OF FACTS

Robert Carey was charged with first degree murder (felony murder/ attempt armed robbery), among other charges. (C. 31-34). Prior to trial, the State *nolle prossed* all the counts save for felony murder. (R. BB19). The surviving charge alleged that, on January 28, 2011, Carey committed first degree murder –

> in that he, without lawful justification, committed the offense of attempt armed robbery, and during the commission of the offense, he set in motion a chain of events that caused the death of Jimmy Townsend in violation [of the Criminal Code], Section 9-1(a)(3). . . .
>
> (C. 31) (*See* Appendix, A-1).

The decedent, Townsend, was Carey's confederate and stepbrother.

***Pre-Trial***

Prior to trial, the State filed a motion *in limine* to prohibit the defense from arguing that the item recovered from Carey must be operable in order to qualify as a firearm to support the predicate felony for the instant felony murder charge. (C. 92; R. BB2-11). The trial court granted the State's motion. (R. BB15-17).

In August 2012, nearly six months before trial, a fitness hearing was held. Both parties presented expert testimony on Carey's fitness and his amnesia from being shot in the head during the offense. Carey fell into a coma, "developed some seizures," and lost his right eye. (R. V19). For the State, Dr. Nishad Nadkarni testified that Carey "recall[ed] being shot" because someone told him. (R. V20). Nadkarni considered Carey fit because he could "form new memories . . . and [can] logically discuss information

that's being presented to him." (R. V25). It was his opinion that Carey was "fit to stand trial" (R. V32, 43), despite "being amnesiac of the actual crime." (R. V46).

Defense expert, Dr. Robert Heilbronner, stated that it was his opinion "that the gunshot wound to the head and brain caused a significant memory impairment." (R. V63). This "persistent memory impairment" affected Carey's overall "ability to learn and remember things." (R. V64-65). Carey had no memories of incident, "[n]o recollection, none." (R. V65). The doctor stated that Carey had "profound impairment in his ability to recollect and relate occurrences" and he was "not fit to stand trial." (R. V70, 84). Eventually, the trial court ruled that Carey was fit to stand trial. (R. V107).

Prior to *vire dire*, the State *nolle prossed* all the counts, save for the felony murder count. (R. BB19).

**Trial Evidence**

Robert Carey was the only defense witness. Carey's testimony drew upon memories of events months prior to the January 28, 2011 incident. At the time of trial, Carey was 52 years old and his stepbrother, Townsend, who was older by three years. (R. EE37-42). Around Thanksgiving and Christmas, Townsend said that he was depressed and suicidal. (R. EE48-49). Townsend said he "wanted to go out in a hail of bullets." (R. EE57-58).

Carey averred that he had no memory of any events on the day that his brother was shot to death. (R. EE59). He did not remember getting shot; but, he recalled that his niece told him that he had been shot when he awoke

following his coma, which lasted about two months. (R. EE60, 65). The only memories of the shooting was what he was later told. (R. EE64).

At trial the State presented the two security guards and three other occurrence witnesses. Julio Rodriguez, an armed armored truck messenger, testified that on January 28, 2011, he was working with his partner, Derrick Beckwith, who was driving the truck that day. (R. CC24-26). Rodriguez's job was to pick up cash receipts, while Beckwith stayed inside the truck. At 9:40 a.m., Rodriguez exited the truck to go to the Family Dollar Store at Chicago Avenue and Homan. Rodriguez wore a uniform and a bulletproof vest, a scanner, and a .357 revolver on his right hip. Rodriguez also carried a bag for the money. (R. CC27-29). Inside, the store manager gave him deposits and he scanned the items and gave the manager a receipt. (R. CC30-31).

Rodriguez left the store and walked to the truck, when he saw a man (Townsend) wearing a camouflage jacket running towards him. The man yelled at Rodriguez, "Don't move, motherfucker." (R. CC33). Townsend pointed what looked like a shotgun, but was actually two pipes taped together, at him and saw Carey approach from a different direction. (R. CC34-35). While Carey ran towards him, Rodriguez unholstered his revolver and shot four times at Townsend. (R. CC35). Townsend threw the taped pipes to Carey and Carey swung the pipes at his head, but Rodriguez ducked. Rodriguez tried to point his firearm at Carey, but Carey got Rodriguez in a choke hold. (R. CC35-36). They wrestled for a time, but Rodriguez managed to hit Carey in the face with his revolver and Carey released him. (R. CC39-

40). Rodriguez ran back to the armored truck and threw himself inside. (R. CC40). He heard Beckwith fire four shots at Carey and that Carey had been struck, falling to the ground. (R. CC41-43).

Rodriguez acknowledged that he never saw Carey touch his money bag and he never saw a firearm in Carey's hands. (R. CC66) (Q: "And you never saw Robert Carey with a weapon, correct? A: No, I never saw").

Beckwith corroborated his partner's account of the cash pick-up at the Family Dollar Store. (R. CC79-83). Beckwith, who was armed with a semi-automatic .40 Glock, parked the truck near the front entrance of the store. He was waiting for his partner's return, when Beckwith heard "someone say, 'don't move, motherfucker.'" (R. CC83-86). As he moved inside the truck to the door, Beckwith heard four gunshots. (R. CC87).

Beckwith looked through the window of the van door and saw a man (Townsend) lying on the ground and another man (Carey) with a choke hold around Rodriguez. (R. CC88-89). He opened the messenger door, drew his weapon and, when Rodriguez got free, he fired four shots at Carey. (R. CC89-90). Beckwith thought he saw Carey holding a small handgun and pointing it in his direction. (R. CC90). Beckwith identified State's Ex. No. 9, as the "weapon" held by Carey. (R. CC97, 125-126). Carey was struck by Beckwith's gunfire and he fell to the ground. (R. CC91). Carey tried to get up twice from the ground, but he could not. (R. CC92-93).

The three other eyewitnesses, Michael Burton, who was standing across the street at a bus stop (R. CC131-140); Carl Robinson, who was

working in a nearby beauty salon (R. CC159-165); and Victor Cabrera, the assistant store manager at the Family Dollar Store (R. CC180-188) – all saw portions of the incident. Burton and Robinson saw Rodriguez's struggle with Carey and then Carey was on the ground, holding his eye in his hand (R. CC140; CC165); Carey's eye "dangled" from his hand. (R. CC190-191). Burton and Cabrera thought they saw Carey holding a small gun (R. CC139-140; CC 188), but Robinson averred that he did not see Carey point anything at Rodriguez. (R. CC172). Cabrera identified the item in the State's photo exhibit, No. 9, as the "firearm" held by Carey. (R. CC196-197, 205).

Chicago Police Officer Kaczorowski testified that he responded to the "man shot" call at Chicago Avenue and Homan at about 9:45 a.m., and found paramedics already at the scene. (R. DD4-7). He saw the paramedics examine Carey for wounds and observed as "they removed a gun out of his pocket or his waist area." (R. DD8, 10). Kaczorowski identified the object in State's Ex. No. 9 as the "gun" removed from Carey's waistband. (R. DD9). He saw the paramedic place the item on the ground. (R. DD10-11). A forensic investigator recovered items from the scene, including the two taped pipes (St. Ex. No. 48) and the Derringer (St. Ex. No. 9) found near Carey. (R. DD13-52).

Forensic scientist Elizabeth Haley, specialist in firearm identification, examined Carey's Derringer that was recovered at the scene. She found both barrels of the Derringer to be inoperable. She was unable to load a cartridge into the top barrel because "there was some type of obstruction," which

prevented it from chambering the cartridge. (R. DD113-114). Haley was able to place a cartridge in the lower barrel, but it would not fire because "the firing pin" did not hit the cartridge "with enough force" to engage the priming material. (R. DD114-115). She tried the lower barrel again, but "nothing happened" and determined that the Derringer "was inoperable." (R. DD116-117, 128-129). The Derringer came to her without ammunition. (R. DD129).

**The Instructions Conference**

At the close of the State's case, the parties discussed jury instructions. Defense counsel argued against each instruction containing the allegation, "firearm." In part, the defense contention rested (1) on the trial court granting the State's motion *in limine*, which prohibited the defense from arguing that a weapon that is inoperable was not a firearm and (2) the State's failure to provide notice to the defendant on which attempt armed robbery served as the predicate offense for its felony murder charge. (R. EE5, 17). Defense counsel contended --

> [M]y objection would be that . . . the actual count of first degree murder does not allege that he was armed with a firearm. It says he was attempting to commit the offense of attempt armed robbery. And we don't have a notice as to the first degree murder that they were seeking the felony enhancement.
>
> (R. EE5).
>
> The State responded:
>
> With regard to the issue of notice, the predicate felony alleged in the felony murder count is attempt armed robbery. Case law indicates that the indictment is to be read as a whole. The defendant is no longer standing trial for the offense of attempt armed robbery, however, the attempt armed robbery [count] indicates that the defendant was armed with a firearm. So he is on notice that the

> State's theory of the case is that he's armed with a firearm. He is on notice that we are specifically alleging that a firearm was used.
>
> (R. EE6-7).

The trial court ruled on behalf of the State that the defense had "notice," remarking that, "Up until the first day of trial he stood charged with the attempt armed robbery with firearm. [The instruction] will be given over defense objection." (R. EE8-9).

Defense counsel also objected to the State's Instruction No. 18 (C. 117), which instructed the jury on armed robbery "with a dangerous weapon" and Instruction No. 19 (C. 118), which instructed on armed robbery "with a firearm." (R. EE14). Counsel objected to both instructions because Illinois had two armed robbery offenses, and the State chose the one "with firearm." (R. EE14-15). Counsel argued: "[The State was] going to prove firearm. So I think this jury has to find beyond a reasonable doubt[,] firearm. Not just any dangerous weapon. Not a bludgeon or a baseball bat." (R. EE15).

The prosecutor stated that the predicate offense was not relevant:

> I would argue that I certainly know of case law indicating there's only one offense of first degree murder where a judge's decision to instruct a jury on an alternate theory of murder other than that which was charged by the State has been upheld when the evidence supported it. . . . . But on appeal the [reviewing court] held that the defendant was on notice for what he was being charged with. There's only one offense of murder. As there is only one offense of armed robbery and that therefore he's on notice that the State may proceed. In addition to that, the discovery makes it clear that . . . the firearm is non-functioning. It's metal. . . . the defense was aware of the fact that the co-offender who was shot was [in] possession of two pipes taped together, which could certainly be used as a bludgeon. So I fail to see how this could come as a surprise.
>
> (R. EE15-16).

Defense counsel responded that the case law relied on by the prosecutor was distinguishable because the prosecutor had argued twice that the State "was not going to proceed on the theory that Mr. Carey was armed with a dangerous weapon other than a firearm. . . . They are proceeding on a theory that they're trying to prove that he's in possession of a firearm, not any other type of dangerous weapon." (R. EE17).

The trial court ruled on behalf of the State, finding that the evidence could support that Carey wielded a bludgeon, *i.e.*, a dangerous weapon:

> I think this instruction applies to both the Derringer . . . and with the fake sawed-off shotgun, which Mr. Rodriguez testified the defendant used to swing at him thus using it as a bludgeon[ ]and certainly that qualifies as a dangerous weapon other than a firearm. I believe that the Defense is on notice. . . . [T]he Court may instruct the jury that there is only one offense of murder and that the State may or that the Court may instruct the jury as to whatever theory even if it's not specifically alleged. . . . [T]here's only [one] offense of murder. And the precise statutory theory is not a matter that must be specifically alleged. Thus a general verdict convicting of murder is proper even though it might have been based on felony murder theory. Unless the variance between the charge and proof prejudiced the defendant in the preparation of his defense or exposes him to a risk of double jeopardy. And certainly the defendant is not exposed to the risk of double jeopardy. And I do not believe the Defense is prejudiced in the preparation of his defense. It cannot be a surprise that this fake shotgun could be considered as a dangerous weapon other than a firearm and that it could have been used as a bludgeon[ ]. So this [instruction] will be given over Defense objection.
>
> (R. EE17-18).

Thus, the jury was given instructions on both dangerous weapon and firearm.

**Closing Argument, Verdict, Sentencing and Direct Appeal**

In its initial closing argument, the prosecutor argued that to sustain the murder charge, the jury could consider the Derringer that Carey was

carrying at the time, as well as "what that look-alike gun looked like that day . . . the two metal pipes that were put together. You can feel it's substantial. . . . It could be used to hit somebody." (R. FF4). The prosecutor stated that Townsend had swung the pipes at security guard Rodriguez. (R. FF4). Later, the prosecutor informed the jury that to find Carey guilty of attempt armed robbery, that it could rely on Carey's possession of the Derringer, or "an alternative similar definition, but instead of firearm, it says dangerous weapon." (R. FF15-16). The prosecutor referenced the two metal pipes that had been swung at Rodriguez "as a bludgeon." (R. FF16). The prosecutor continued: "And the firearm, if it's heavy enough, can also be used as a bludgeon to hit somebody over the head or injure them. And this is a metal gun with some substantial weight that can [be] used that way as well." (R. FF16). The prosecutor repeated the idea of the Derringer as "a dangerous weapon" later in her argument. (R. FF17).

After deliberations, the jury returned with a guilty verdict, finding that the State had proven "that during the commission of the offense of first degree murder the defendant was armed with a firearm." (R. EE125).

At the sentencing hearing, the trial court imposed 25 years on the first degree murder conviction and 15 years for the firearm enhancement, for a total of 40 years. (R. HH13; C. 167). On appeal, Carey raised three issues: one, a two-part sufficiency issue, disputing the proof for the predicate attempt armed robbery, to wit: (a) no proof of intent to rob and (b) no proof that Carey's inoperable Derringer qualified as "a firearm"; two, Carey was unfit

for trial because his total amnesia precluded him from assisting counsel; and, three, the 15-year firearm enhancement should be vacated for lack of notice.

In an unpublished Rule 23 Order, the Appellate Court affirmed Carey's conviction, rejecting his first two issues, but vacated the 15-year firearm sentencing enhancement. *People v. Carey*, 2015 IL App (1st) 131944-U. Both parties filed petitions for rehearings. In his petition, Carey argued to reverse the substantive felony murder charge based on the same logic used to vacate the sentencing enhancement since the charging count failed to specify which of Illinois' two armed robbery offenses was contemplated as the predicate offense. Carey posited that the court's sentencing rationale tracked *People v. Pujoue*, 61 Ill.2d 335 (1975), to overturn the imposed firearm enhancement and that due process required vacating his felony murder conviction for the same reason: the State's failure to spell out the underlying predicate offense.

The Appellate Court withdrew its earlier decision and entered an opinion that agreed with Carey's position that the felony murder count failed to sufficiently apprise him of the offense charged. The Court declined to address the fitness and sufficiency issues, along with the sentencing issue, but reversed judgment because Carey was prejudiced "by the State leaving open its ability to convict him using either of the attempted armed robbery offenses as the predicate offense for felony murder." *People v. Carey*, 2016 IL App (1st) 131944, ¶34.

## ARGUMENT

**Due To The State's Failure To Identify The Underlying Armed Robbery Offense As The Predicate For The Felony Murder Charge – Where Illinois Has Two Types Of Armed Robbery And The State Argued *Both* Types, And Had The Jury Instructed On *Both* Offenses – The Appellate Court Was Correct In Vacating Robert Carey's Murder Conviction Since He Received Insufficient Notice Of The Charge And Was Unable To Present The Case As A Double Jeopardy Bar. Because The State's Actions Violated This Court's *Pujuoe* Rule, Carey's Conviction Should Be Vacated.**

It is a fundamental tenet of due process that a criminal defendant has the "right to notice of the charges brought against him" and "may not be convicted of an offense he has not been charged with committing." *People v. Kolton*, 219 Ill.2d 353, 359 (2006). In its strategy to overturn the Appellate Court's decision, the State misstates the record, misinforms relevant law and deprecates the constitutional interests that are protected by this Court's rule in *People v. Pujoue*, 61 Ill. 2d 335 (1975). For the reasons discussed below, Robert Carey asks that this Court affirm the ruling of the reviewing court, reversing his felony murder conviction *People v. DiLorenzo*, 169 Ill.2d 318, 321 (1996), *citing* U.S. Const., amend. VI; Ill. Const. 1970, art. I, § 8.

***Standard of Review***

The sufficiency of the charging instrument is a question of law and it is

to be examined *de novo*. *See People v. Maxwell*, 148 Ill. 2d 116, 136 (1992); *People v. Swartwout*, 311 Ill. App. 3d 250, 256 (2d Dist. 2000). When the sufficiency of a charging instrument is challenged on appeal, the instrument will be upheld "if it apprised the accused of the precise offense charged with sufficient specificity to prepare his defense and allow pleading a resulting conviction as a bar to future prosecution arising out of the same conduct." *Maxwell*, 148 Ill. 2d at 136, *quoting Pujoue*, 61 Ill. 2d at 339. The Appellate Court appropriately applied the rule of *Pujuoe* in finding that the State's actions violated Carey's due process rights. *Carey*, 2016 IL App (1st) 131944, ¶¶21-34.

***Pujuoe* Jurisprudence**

Due process requires that every criminal defendant has a fundamental constitutional right to be informed of the nature and cause of the charges brought against him. *People v. Heard*, 47 Ill.2d 501, 505 (1970); *People v. DiLorenzo*, 169 Ill. 2d at 321. The "'nature and cause' of a criminal accusation refers to the crime committed, not the manner in which it was committed." *DiLorenzo*, 169 Ill.2d at 321. When the sufficiency of the charging instrument is attacked before trial, "the standard of review is to determine whether the instrument strictly complies with the requirements of section 111-3." *DiLorenzo*, 169 Ill.2d at 321 *citing* 725 ILCS 5/111-3(a)(3).

*Pujuoe* states plainly:

> [The charging instrument] is sufficient if it apprised the defendant of the precise offense charged with sufficient specificity to prepare his defense and allow pleading a resulting conviction as a bar to a future prosecution arising out of the

same conduct.

*Pujoue*, 61 Ill.2d at 339.

*Pujoue*'s core concern is examination of the charge for a determination of *sufficient facts* in the charging instrument – facts necessary to apprise the accused of the charge. *Pujoue*, 61 Ill.2d at 339-340. The charge must "give notice of the elements of the charge *and particularize it with allegations of the essential facts* to enable the accused to prepare a defense which, if successful, would bar further prosecution for the same offense." *People v. Alvarado*, 301 Ill. App. 3d 1017, 1023 (2d Dist. 1998) (emphasis added), *citing People v. Smith*, 99 Ill.2d 467, 471 (1984) (*Smith* cited in *People v. Thingvold*, 145 Ill. 2d 441, 448 (1991)). Whether a charging count meets the interests spelled out in *Pujuoe* may be asserted at any time. *DiLorenzo*, 169 Ill. 2d at 321; *Alvarado*, 301 Ill. App. 3d at 1022.

To reinstate Carey's murder conviction, the State argues that felony murder's predicate offense does not matter. In the State's view, the predicate offense is window-dressing, unimportant to the greater murder offense. In this approach, the State deprecates the *Pujuoe* rubric and devalues due process standards that this Court has embraced as black letter law.

**Felony Murder's Predicate Offense Matters**

Charging felony murder is without question the most potent arrow in the State's prosecutorial quiver. In Illinois felony murder provides that:

- no mental state need be shown for felony murder, merely that mental state required to show that the accused "is attempting or committing a forcible felony" (720 ILCS 5/9-1(a)(3));

- liability is not restricted to the intended victim or, for that matter, an innocent bystander; a co-felon or confederate may be the basis for the felony murder charge. *People v. Dekens*, 182 Ill.2d 247, 252-253 (1998)

- the consequences of committing the predicate offense need not be foreseeable (*People v. Smith*, 56 Ill. 2d 328 (1974) (as a result of a burglary, the deceased jumped from the window causing fatal injuries));

- the predicate offense may be completed, but the accused is responsible if the death occurred during the escape (*People v. Klebanowski*, 221 Ill.2d 538, 551-552 (2006) (distinguishing culpability in felony murder from accountability), *citing People v. Dennis*, 181 Ill.2d 87 (1992)); and

- the defendant need not be actually present at the killing to be guilty (*People v. Johnson*, 55 Ill. 2d 62 (1973)).

In short, Illinois' felony murder mechanism provides strict liability coverage to a criminal code that generally requires *mens rea* and *actus reus;* here, an accused may be found guilty of felony murder, regardless of his mental state and where he has not performed the actual acts constituting the murder *or* the predicate offense. Thus, on balance, it can hardly be an onerous task (as the State suggests) *to sufficiently spell out the predicate offense.* St. Brf. 12 ("[r]ather than risk deficiently pleading felony murder, prosecutors instead might opt to charge only intentional and knowing murder"). The State argues that "the appellate court's holding [is] contrary to longstanding authority" as it "introduces *needless formalism* into criminal law with no attendant benefit to defendants or the criminal justice system." St. Brf. 14 (emphasis added). Carey's analysis challenges the State's misguided "formalism" characterization by examining the due process requirement of "notice."

***Due Process Interests Found In Proper Notice***

To charge an offense, due process requires adequate "notice." U.S. Const., amend. VI; Ill. Const. 1970, art. I, §8. A criminal defendant has the "right to notice of the charges brought against him" and "may not be convicted of an offense he has not been charged with committing." *Kolton*, 219 Ill.2d at 359. Indeed, the charging instrument is controlling in determining the State's theory of prosecution. *See People v. Crespo*, 203 Ill. 2d 335, 345 (2001). The charging instrument provides notice to the defendant and prevents the prosecution from calling "an audible" at trial, in which it changes its prosecution theory.

The charging instrument is examined for "notice," *i.e.*, to see how the State intended to treat the conduct of defendant. *See Crespo*, 203 Ill. 2d at 343-344 (generally, to comply with the one-act/one-crime rule). *Crespo* reasoned that it would be "profoundly unfair" to apportion the crimes in that case among the various stab wounds "for the first time on appeal." *Crespo*, 203 Ill. 2d at 343. Similarly, it would be equally unfair to reveal "the authentic" prosecution theory of guilt on appeal, where at trial the State plied two contradictory theories of guilt and, on appeal, offering a third.

To convict, due process requires that the accused in a criminal prosecution is proved guilty beyond a reasonable doubt of all elements of the offense. U.S. Const., amend. XIV; Ill. Const. 1970, art. I, §2; *In Re Winship*, 397 U.S. 358, 364 (1970); *People v. Brown*, 2013 IL 114196, ¶48. To sustain a felony murder conviction, it is fundamental that each element of the

predicate offense be proved beyond a reasonable doubt. *People v. Pecina*, 132 Ill. App. 3d 948, 955 (3rd Dist.1985); *People v. Falkner*, 61 Ill. App. 3d 84, 86 (2d Dist. 1978). The element that was insufficiently spelled out in Carey's case was the predicate offense for felony murder, "attempt armed robbery."

***Two Armed Robbery Offenses in Illinois***

Likely the most conspicuous flaw in the State's position is its failure to recognize anywhere in its argument – although prominently discussed by the Appellate Court in its opinion (*Carey*, 2016 IL App (1st) 131944, ¶24) – that Illinois currently has two types of armed robbery. Since the passage of Public Act 91-404 (effective January 1, 2000), there are two types of armed robbery offenses in Illinois: (a) those involving a dangerous weapon and (b) those committed with a firearm (of which there are three types of penalties imposed depending on possession or use of that firearm). 720 ILCS 5/18-2(a), (b) (West 2011); *People v. Toy*, 407 Ill. App. 3d 272, 291 (1st Dist. 2011). These offenses are mutually exclusive of each other. *People v. Washington*, 2012 IL 107993, ¶6 (recognizing that these provisions of the statute are now substantively distinct). *See People v. Clark*, 2016 IL 118845, ¶23 ("a weapon cannot at once be a 'firearm' and something 'other than a firearm'").

Notwithstanding that the *Pujuoe* rule represents "a more liberal" review of the charging instrument (*DiLorenzo*, 169 Ill. 2d at 322), which favors the prosecution, the State's suggestion that adherence to *Pujuoe* is "needless formalism" is a misinterpretation of the law. The State treats the instant predicate offense as if there was still one armed robbery offense in

Illinois. Not spelling out the "nature and cause" of the offense denies the accused information necessary to protect the interests envisioned by *Pujuoe*.

***At trial, the State did not specify the type of attempt armed robbery charge advanced against Carey***

Nowhere in its argument does the State acknowledge that by the conclusion of Carey's trial, it offered two mutually exclusive theories of guilt to his jury, arising from one charge. Indeed, not only was there argument, but the State had *Carey's jury instructed on both armed robbery theories*, that is, attempt armed robbery with a firearm and attempt armed robbery with a dangerous weapon - even though those theories are mutually exclusive and substantively distinct. *See Washington*, 2012 IL 107993, ¶6; *People v. Barnett*, 2011 IL App (3d) 090721, ¶38. The error at bar originated with the charging instrument, and it was only exacerbated at trial.

Notably, the State's charging instrument failed to reflect its predicate offense for the felony murder charge which alleged that, on January 28, 2011, Carey committed first degree murder –

> in that he, without lawful justification, committed the offense of attempt armed robbery, and during the commission of the offense, he set in motion a chain of events that caused the death of Jimmy Townsend in violation [of the Criminal Code], Section 9-1(a)(3). . . .
>
> (C. 31) (*See* Appendix, A-1).

It should be readily recognizable that this count utterly failed to spell out which of Illinois' two armed robbery offenses was to serve as its inchoate predicate offense.

At the close of trial, when the issue of instructions arose, the

ambiguity of the charge gave license to the State *to add* a second theory of guilt to its prosecution. The State sought instructions on both attempt armed robbery with firearm and attempt armed robbery with a dangerous weapon. (C. 117-118). Defense counsel objected to both instructions because Illinois had two armed robbery offenses, and the State chose the one "with firearm." (R. EE14-15). Defense counsel reasoned that the State was seeking *a firearm enhancement* indicating that it had chosen the inchoate version of armed robbery with a firearm and that at the beginning of trial the prosecutor had represented that: "[The State was] going to prove firearm. So I think this jury has to find beyond a reasonable doubt[,] firearm. Not just any dangerous weapon. Not a bludgeon or a baseball bat." (R. EE15).

Parenthetically, it should be noted that prior to trial the State had won a pivotal point for its trial strategy. Before trial, the State filed a motion *in limine* to prohibit the defense from arguing that the Derringer recovered from Carey must be operable in order to qualify as a firearm to support the predicate felony for the instant felony murder charge. (C. 92; R. BB2-11). The trial court granted the State's motion. (R. BB15-17). In its successful ruling on this motion, the State signaled that it was prosecuting attempt armed robbery *with a firearm*, since the defense was precluded from challenging its non-functionality of this article. Together with seeking the firearm sentencing enhancement, the ruling on this matter ostensibly indicated that the State had chosen its theory of guilt.

However, the deficient charge permitted the State to be untethered

with just one theory of guilt as it wrongly argued that Illinois had only one offense of armed robbery. The prosecutor stated that it is –

> a judge's decision to instruct a jury on an alternate theory of murder other than that which was charged by the State has been upheld when the evidence supported it. . . . There's only one offense of murder. As *there is only one offense of armed robbery* and that therefore he's on notice that the State may proceed.
>
> (R. EE15-16) (emphasis added).

Worse yet, emboldened by his misstatement of the law, the prosecutor, in support for a new theory of guilt, added that Carey could be convicted of attempt armed robbery with a dangerous weapon because (a) Townsend wielded the two taped pipes as a bludgeon and (b) Carey's firearm could also be a bludgeon. (R. EE15-16). In response, defense counsel noted again that the prosecutor had twice represented that he "was not going to proceed on the theory that Mr. Carey was armed with a dangerous weapon other than a firearm. . . . They are proceeding on a theory that they're trying to prove that he's in possession of a firearm, not any other type of dangerous weapon." (R. EE17). Although the court agreed that the State had not specifically alleged the type of attempted armed robbery, the trial court sided with the State, rejecting the defense claim of lack of notice and surprise. (R. EE17-18). ("[T]here is only one offense of murder and . . . the Court may instruct the jury as to whatever theory even if it's not specifically alleged").

Consequently, given the freedom to misdirect the jury, the prosecutor argued for the jury's consideration of the taped pipes as a dangerous weapon to support its attempt armed robbery theory (R. FF4) ("You can feel it's

substantial when you get back there in the jury room. It could be used to hit somebody"), as well as Carey's Derringer as a bludgeon. (R. FF16) ("this is a metal gun with some substantial weight that can [be] used that way as well").

After deliberations, Carey's dangerous weapon transmuted back to a firearm with the jury's guilty verdict, finding that the State had proven "that during the commission of the offense of first degree murder the defendant was armed with a firearm." (R. EE125).

The State explains the differing guilt theories as inconsequential. Among other things, the State argues that citation to the underlying felony need not be set out and that sufficient notice is present in this case because "'there is only one crime of murder,' not a variety of distinct offenses." St Br 10. The State relies on *People v. Simmons*, 92 Ill. 2d 94, 100 (1982), for the proposition that the charging instrument need not "set out the citation to the underlying felony charged," and the omission of a material element does not render a charge void. St. Brf. 10. The State's reliance on *Simmons* is misplaced.

In *Simmons*, the defendant was charged with first degree murder under two theories, intentional and strong probability, as well as armed violence. The defendant complained that his conviction for involuntary manslaughter was inappropriate because he was not charged with armed violence based on involuntary manslaughter. 92 Ill. 2d at 96, 99-100.

*Simmons* examined the language of the charges and found that the

defendant was sufficiently apprised that the predicate offense for armed violence was the murder count based on strong probability and that a statutory citation was not necessary. 92 Ill. 2d at 100-101. *Simmons* also found the offense of involuntary manslaughter appropriate because the accused had received notice that he was facing charges of a greater offense, *i.e.*, first degree murder, which had the same elements of involuntary manslaughter, together with the additional element of knowledge of the probability of death or great bodily harm to another. 92 Ill. 2d at 101.

In the case at bar, adequate notice cannot be found, where the State *nolle prossed* the stand-alone attempt armed robbery charge (Count II (referencing "firearm," C. 32) prior to trial. (R. BB19). This action by the State has consequences. As this Court has explained "a *nolle prosequi* is the formal entry of record by the State which denotes its unwillingness to prosecute a charge." *People v. Hughes*, 2012 IL 112817, ¶22, *citing People v. Artis*, 232 Ill.2d 156, 169 (2009). In light of the dispositive nature of this *nolle prosequi*, the defense was entitled to rely on this action by the State. The State's stance on appeal that "the no-longer-present-or-relevant" Count II, as well as Counts III and IV (advancing unlawful use of a weapon by a felon charges) (St. Brf. 16-17) – which were also *nolle prossed* – informed the accused on its flawed felony murder count is baseless.

The State's reliance on *People v. Morris*, 135 Ill. 2d 540, 545-546 (1990) (St. Brf. 17), is likewise misplaced since that case speaks to a charging instrument that has been quashed or set aside on appeal, *not* when a count is

*nolle prossed* by the State. In the latter situation, the count is dismissed by the State on its own volition. As noted above, this is a consequential action by the State and the accused is entitled to rely on *the State's affirmative, volitional act*. Thus, the State's position to look at the "entirety" of the charging instrument, including the *nolled* counts, fails where it affirmatively took attempt armed robbery with a firearm "off the table."

On a similar front, the State places great reliance on *People v. Hall*, 96 Ill. 2d 315, 317-319 (1982) (St. Brf. 12-15), for the proposition that an ambiguity in one count may be clarified by looking at another count in the indictment. For the reasons advanced below, *Hall* is inapposite to the cause at bar. In *Hall*, this Court found that the count charging defendant with possession of cannabis with intent to deliver was cured by looking at the count charging armed violence, as to what defendant was doing with a gun. 96 Ill. 2d at 320-322. In its reliance on *Hall*, the State omits *that here, in Carey's case, no other counts were on the table* – in Carey's case, the State had plainly *nolle prossed* all the other counts. With the other counts dismissed by the State's own hands, there were no other counts to clear up the ambiguity of the felony murder count since Carey was entitled to rely on the State's dismissal of those other counts. *Carey*, 2016 IL App (1st) 1311944, ¶30 ("the State cannot rely on [the contents of the other counts] to supplement a defective Count I"; "the State's action of dropping [Count II] . . . effectively informed defendant that it was not willing to prosecute . . . for the charges therein contained").

It is disingenuous for the State to posit the original state of the charging instrument, *i.e.*, prior to its *nolle prosequied* of the other counts, to clarify the ambiguity of the felony murder count, when as depicted earlier, during trial the State was all over the map, arguing both forms of attempt armed robbery – dangerous weapon and firearm – and providing the jury with instructions on both types of attempt armed robbery. Therefore, there is no question that the State played up the ambiguity of its theory of prosecution to the hilt, unanchored by a specifically-spelled out charging instrument.

The State offers the axiom that, "there is only one crime of murder" and *People v. Maxwell*, 148 Ill. 2d 116 (1992), for prime support of its position that the instant predicate offense is irrelevant. St. Brf. 11-12. This axiom is taken out of context as it presupposes sufficient due process notice, which lies at the heart of Carey's challenge to the charging instrument. This axiom is also derivative of "the one-good-count rule," which is inapposite to the cause at bar, where there was only one murder count prosecuted. Additionally, *Maxwell* is distinguishable for the following reasons.

The State advances *Maxwell* for the proposition that "felony murder need not be expressly charged in the indictment in order" to convict "for felony murder, *as long as the defendant was charged with murder in some form."* St. Brf. 11. In *Maxwell*, with murder charges based on 9-1(a)(1) and section 9-1(a)(2) in play, a felony murder charge under 9-1(a)(3) was not only understood as a part of the prosecutorial formation, but *it had been*

*announced* prior to jury selection as a part of the State's case. *Maxwell*, 148 Ill. 2d at 137-138. The State's actions unquestionably served as "notice."

Such notice is wholly absent here, where the State *nolle prossed* all of the other counts. (R. BB19). Here, in contradistinction, there were no other murder charges *ever* in play against Carey; the State can only look to a felony murder charge that is deficiently articulated. (C. 31). Without a properly spelled out predicate offense, the murder charge failed to allege a sufficient charge against Carey. The threshold test is whether the charging instrument is sufficient to "appris[e] the accused of the precise offense charged with sufficient specificity to prepare his defense and allow pleading a resulting conviction as a bar to future prosecution arising out of the same conduct." *People v. Thingvold*, 145 Ill.2d 441, 448 (1991), *quoting People v. Gilmore*, 63 Ill.2d 23, 29 (1976). Here, the criminal accusation was an empty vessel – "a murder charge" without positing "the nature and cause of the criminal accusation." *See DiLorenzo*, 169 Ill.2d at 321

Moreover, it is also a critical distinguishing point that the defendant in *Maxwell*, unlike here, did not allege that he was denied the opportunity to adequately prepare for and defend against this additional theory of guilt, and the record did not suggest that he was denied such an opportunity. *Maxwell*, 148 Ill. 2d at 137. The issue in *Maxwell* challenged giving the jury felony murder instructions, where this theory was not one of the advanced theories of guilt. *Maxwell*, 148 Ill. 2d at 133. At the instructions conference, the defense expressed no surprise and the basis of his objection was only that the

indictment did not cite the additional theory of guilt; he did not allege that his defense would be in any way impaired. 148 Ill. 2d at 138. *See also People v. Allen*, 56 Ill. 2d 536, 542-543 (1974) (felony murder conviction affirmed where accused was charged with two alternative theories of first degree murder and there was no claim that defendant was misled – factors missing in the case at bar). Here, too, unlike *Maxwell* and *Allen*, there was *only one murder count* on the table – and it failed to fully inform the accused on its theory of guilt.

*Maxwell* found no error in instructing the jury on felony murder even where felony murder was not advanced in the indictment, but there existed *other* actionable murder counts in the charging instrument. This is particularly true where there was no claim of surprise or impairment in preparation of the defense. *Maxwell*, 148 Ill. 2d at 137. The situation is totally different in the instant case because defendant was not adequately prepared for trial where he simply did not know what predicate felony, whether firearm or dangerous weapon, he had to defend against. Here, defense counsel repeatedly expressed surprise at the State's change in theories. *See* (R. BB8, BB12-13, EE5 (defense counsel observed that the murder count had no "firearm" allegation), EE16-17 (counsel argued that she was misled by the prosecutor pre-trial, the prosecutor "told us twice . . . that he was *not* going to proceed on the theory that Mr. Carey was armed with a dangerous weapon") (emphasis added).

Before trial began, the trial court, pursuant to the State's request,

prohibited the defendant from arguing that the non-operational status disqualified his Derringer as a firearm. (C. 92; R. BB2-11, BB15-17).[1] While this successful proscription suggested that the State *had* chosen its theory of prosecution (*i.e.,* predicate offense - armed robbery/firearm), its closing argument also included that Townsend's swinging the *faux* shotgun at the security guard and Carey's possible use of the Derringer as a bludgeon indicated that the State had left the door open for the predicate offense of armed robbery/dangerous weapon.[2] Having the jury instructed on both types of predicate offenses of armed robbery demonstrates unequivocally that the State had wrongfully advanced two alternate and exclusive theories of guilt. The defendant here was clearly prejudiced by the State's use of both types of attempt armed robbery at trial.

The Appellate Court accurately assessed the prejudice sustained by Carey where "the State [left] open its ability to convict him using either of the attempted armed robbery offenses as the predicate offense for felony murder." *Carey*, 2016 IL App (1st) 131944, ¶34. As demonstrated from the foregoing discussion, with the jury instructed on both armed robbery theories

---

[1]Notably, in its ruling prohibiting discussion of the condition of this item, the trial court removed "a question for the trier of fact to assess." *People v. Williams*, 394 Ill. App. 3d 286, 291 (1st Dist. 2009). This ruling will be a part of the discussion in Carey's cross-appeal issue. *See* Cross-Appeal Argument.

[2]Prior to trial, based on the representations of the prosecutor, the trial court informed the defense that the jury would *not* be instructed on attempt armed robbery with . . . [the fake shotgun] being a bludgeon, even if its not charged." (R. BB15).

(C. 116-117), and with an argument in support of both theories, *i.e.*, firearm/dangerous weapon (R. FF16-17), Carey was required to blindly defend against two exclusive theories of guilt for the predicate offense.

Further, Carey cannot use the instant conviction as a double jeopardy bar, as also found by the Appellate Court (2016 IL App (1st) 131944, ¶35), where the offense upon which the conviction is based is not described and has no statutory reference. As observed earlier, without *some* descriptive information for its predicate offense, the instant felony murder charge is a felony murder charge in name only – an inchoate vessel of possible theories, not an actionable criminal charge.

Additionally, the State's notion that insertion of the predicate offense into the felony murder count is a needless formality is at odds with an entire line of cases from this Court that have examined the predicate offense to determine if the felony murder conviction could properly lie. *See e.g., People v. Morgan*, 197 Ill. 2d 404 (2001) (requiring that the predicate allege an independent felonious purpose); *see People v. Davison*, 236 Ill. 2d 232, 244 (2010) (finding continued adherence to *Morgan*'s principles). Given this scrupulous examination, adequate drafting of the predicate offense hardly appears to be a needless formality.

Finally, on appeal to this Court, and unraised in the appellate court, the State raises a tertiary theory to salvage its murder conviction, not previously advanced, not even where the Appellate Court ordered the prosecution to respond to Carey's *Pujuoe* argument. The State offers the

oversimplified request that its felony murder conviction here may be sustained if this Court considers attempted robbery to be the lesser-included offense of attempted armed robbery. This State floats this theory on general lesser-included offense principles. St. Brf. 23-24. The State's *per se* approach that all attempted robbery charges are forcible felonies is undermined by case law, including from this Court, that have rejected the mechanical approach suggested by the State.

The flaw in the State's position lies in the legislature's decision to not include any inchoate offenses in its enumerated list of forcible felonies. *See* 720 ILCS 5/2-8 (West 2011). Consequently, the question of what is a forcible felony defaults into whether a potential felony may be found to satisfy this statute's catch-all phrase: "and any other felony which involves the use or threat of physical force or violence against any individual." 720 ILCS 5/2-8. This is a factual question that must be determined by the trier of fact. *People v. Ross*, 229 Ill. 2d 255, 274 (2008). Here, the jury was never asked to decide the specific question of whether the Derringer was "a firearm." *See* Cross-Appeal issue. Thus, the State's attempt in this appeal to use the inchoate offense of attempt robbery as a substitute for the flawed attempt armed robbery predicate fails.

Moreover, the State's analysis would also fail under this Court's test in in *People v. Belk*, 203 Ill. 2d 187 (2003), in assessing the inclusion for non-enumerated felonies. *Belk* framed its issue as "whether aggravated possession of a stolen vehicle can be considered to be a forcible felony for

purposes of the felony murder rule." *Belk*, 203 Ill. 2d at 189. This Court, consistent with the appellate court, rejected the automatic approach suggested by the State in this appeal. On appeal to this Court, the State argued that the appellate court erred in its reliance on intent because the felony murder rule does not require an intent to kill and that an intent to kill is irrelevant to the determination of whether a felony qualifies as a forcible felony. *Belk*, 203 Ill. 2d at 191; *see* 720 ILCS 5/2-8. Not finding the offense of aggravated possession of a stolen motor vehicle as one of the enumerated statutory forcible felonies, this Court concluded that the issue required examination of the facts of the case to determine whether Belk's charge "involved the use or threat of physical force or violence against any individual." 203 Ill. 2d at 193.

Rejecting the State's position, *Belk* reasoned that although the defendant was reckless and injury to pedestrians and other motorists was certainly foreseeable, nothing supported the inference that he believed "the use of force or violence against an individual might be *necessary* in order for him to accomplish his escape." *Belk*, 203 Ill. 2d at 195 (emphasis in original).

Consistent with this Court's decision in *Belk*, in *People v. Sanderson*, 2016 IL App (1st) 141381, the appellate court rejected the State's lesser-included theory that an inchoate offense is an automatic forcible felony of an enumerated felony. This analysis is applicable to the inchoate offense found in the instant case. In *Sanderson*, the defendant was convicted of the offense of armed habitual criminal predicated on an unlawful possession of a weapon

prior conviction and an attempted residential burglary conviction. The defendant argued that the latter inchoate conviction did not qualify as a predicate for the offense of armed habitual criminal because it was not an enumerated forcible felony under the criminal code. *Sanderson*, 2016 IL App (1st) 141381, ¶1.

*Sanderson* reviewed the enumerated offenses in the forcible felony statute and found residential burglary among the listed offenses, observing the State's position "that an attempt to commit any of the enumerated offenses necessarily qualifies as a forcible felony." 2016 IL App (1st) 141381, ¶4. *Sanderson* rejected this facile approach and turned to the residual clause of the forcible felony definition, to wit: "any other felony which involves the use or threat of physical force or violence against any individual." 2016 IL App (1st) 141381, ¶5.

*Sanderson* found, quoting *Belk*, that an "unenumerated felony falls within the residual clause if the defendant contemplated that the use of force or violence against the individual might be involved and [was] willing to use such force or violence." *Sanderson*, 2016 IL App (1st) 141381, ¶5 (internal quotes omitted). *Sanderson* stated that crimes fall under the residual clause in one of two ways. The first is where one of a crime's elements is "a specific intent" to carry out a violent act, every instance of that crime "necessarily qualifies" as a forcible felony – such as in attempted murder. 2016 IL App (1st) 141381, ¶6. The second way a felony can qualify as a forcible felony, even if a crime does not have a violent intent as an element "if the State

proves that, under the particular facts of [the] case, the defendant contemplated use of force and was willing to use it." *Id.,* ¶7.

Here, attempted robbery does not qualify as a forcible felony under either prong and thus cannot be a predicate for felony murder. While force is contemplated, attempt robbery is not inherently a violent act. As *Sanderson* found attempted residential burglary not an inherent violent act, as in attempt murder, the offense at bar does not require a specific intent to carry out a violent act. *Sanderson*, 2016 IL App (1st) 141381, ¶9. *See also People v. Terrell*, 99 Ill. 2d 427, 433-435 (1984) (where this Court recognized the "troublesome problems" in the area of inchoate offenses, such as in determining when force is actually used or threatened). In *Sanderson*, the reviewing court examined the facts of the case and found that there were no facts underlying Sanderson's conviction that could be found that he "contemplated the use of force." *Id.*, ¶11. *See* Cross-Appeal Argument (regarding the defendant's intent in possessing a non-functioning firearm).

Here, in fact, the non-operational Derringer, which likely was never removed by Carey during the charged incident, was also without ammunition. (R. DD129). Complainant Jose Rodriguez, the security guard carrying the money bag, testified that he did not see Carey with a firearm. (R. CC66-67). Further, no case of contemplated violence with the Derringer could possibly be made where Police Officer Kaczorowski testified that he saw the paramedics remove this weapon from Carey's waistband after they arrived at the scene. (R. DD9-11). Alternatively, the State needed to

demonstrate a substantial step for attempted robbery, *i.e.*, the attempted taking, *and* that such step contemplated physical force or violence. However, this specific factual question was never presented to the jury. Thus, under the *Belk* analysis, it cannot be found that the non-enumerated inchoate offense of attempted robbery has been established in the instant circumstances.

***Summary***

It has been observed that a straight line is the shortest distance between two points. For a murder prosecution in Illinois, there is no shorter distance between charging instrument and conviction than felony murder, since this device provides strict liability coverage in a criminal code that generally requires *mens rea* and *actus reus*.

The State's arguments in this appeal repudiate the constitutional interests represented by sufficient "notice." The State contends that the Appellate Court's relief fosters needless formalism that would diminish charging instruments. This notion is belied by the reality that it can hardly be an onerous task to have the State *sufficiently spell out the predicate offense.* St. Brf. 12 ("[r]ather than risk deficiently pleading felony murder, prosecutors instead might opt to charge only intentional and knowing murder"). The State belittles the predicate offense as an element of felony murder by arguing that, because the charge is murder and, since all murders are really one, the predicate offense has no real importance. This contention omits that its position relies on the presence of *other murder charges* in a case

where there are *no* other charges on the table. In this case, not only were there no other murder charges in the instant prosecution, but the underlying attempt armed robbery theory was *nolle prossed* - a formal act denoting the State's unwillingness to prosecute the charge. *Hughes*, 2012 IL 112817, ¶22.

Carey's objection to the instant charge is not that he was uninformed of the State's evidentiary minutiae, but rather that the State failed to disclose its theory of prosecution – *the crime alleged*. *DiLorenzo* found the due process threshold: the accused must be informed of the "'nature and cause of a criminal accusation," which "refers to the crime committed, not the manner in which it was committed." *DiLorenzo*, 169 Ill.2d at 321. Where there are two distinct and exclusive armed robbery offenses, the State's failure to choose one deprived Carey of due process notice.

In sum, in Carey's case the constitutional violation is not that multiple theories were pled, but that ***none*** were pled. Carey was compelled to guess the State's theory of guilt. Like Russian Nesting Dolls, decreasing smaller dolls placed inside another, *i.e.*, a charge in a greater charge, with the appearance of alleging *something*, but actually alleging nothing because the inside is empty. The State's position eviscerates due process notice because its failure to spell out the criminal offense is feracious with possibilities and has the unconstitutional result that the accused does not know what is he defending against – here, attempted armed robbery/dangerous weapon, attempted armed robbery/firearm or, as the State now suggests in appeal to this Court, attempted robbery.

For the reasons advanced, Robert Carey asks that this Court affirm the decision of the reviewing court finding the due process violation to his right to sufficient notice in the charging instrument and vacate his felony murder conviction.

## II. Assuming *Arguendo* That This Court Finds That The State Advanced A Proper Felony Murder Charge Based On Attempted Armed Robbery/Firearm, The State's Proof Was Insufficient Because No Evidence Was Adduced That .22 Derringer Possessed By Robert Carey Was A Firearm Where The State's Proof Indicated That It Was Long Not Functional.

Assuming *arguendo* that the State's felony murder charge comported with the due process requirement of notice (*see* Argument I), for this conviction to stand, the prosecution was required to prove the predicate offense of attempted armed robbery with a firearm. Due process requires that a criminal conviction occurs when every essential element of the charged offense is proved beyond a reasonable doubt. U.S. Const., amend. XIV; Ill. Const. 1970, art. I, §2; *In Re Winship*, 397 U.S. 358, 364 (1970). Therefore, under its theory of prosecution (*i.e.*, C. 31), the State was required to prove Robert Carey guilty of every essential element of the predicate offense of attempted armed robbery with a firearm – including, that the item in his possession was "a firearm."

The firearm at issue is the .22 caliber Derringer found on Carey's person at the scene. St. Ex. No. 9. Where both sides agreed that the Derringer was not operational, *i.e.*, that it could not fire, it cannot be found that Carey was proven guilty of this essential element. Since this item lacked the primary characteristic of "a firearm," it was not a firearm within the meaning of the statute and failed to satisfy the State's burden of proof of

establishing every essential element of the charge. Consequently, where the State failed to prove the predicate offense of attempt armed robbery/firearm for the felony murder, Robert Carey asks this Court to reverse his conviction outright.

***Standard of Review***

When an accused challenges the sufficiency of the evidence on appeal, the relevant question is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found all the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *People v. Filippo*, 235 Ill.2d 377, 384-385 (2009). Because this claim requires no assessment of the credibility of witnesses, but presents only the question of whether settled facts met the reasonable doubt standard, the standard of review is *de novo*, for the question is purely a legal one. *People v. Smith*, 191 Ill.2d 408, 411 (2000).

**A. Failure in the Trial Proof: The State's Complete Reliance On The Presumption That A Weapon Designed As A Firearm IS A Firearm, Without Consideration Of Its Non-operational Quality And Its Lack of Ammunition. This Approach Is Antithetical To The Guidance Provided By This Court in *People v. Ross* (2008).**

Prior to trial, the State filed a motion *in limine* to prohibit the defense from arguing that the item recovered from Carey must be operable in order to qualify as a firearm to support the predicate felony for the instant felony murder charge. (C. 92; R. BB2-11). The prosecution argued that requiring functionality for the Derringer would be a misstatement of law under the controlling definition of "firearm" found in the FOID Act. *See* 430 ILCS

65/1.1 (West 2011); 720 ILCS 5/2-7.5 (West 2011). Relying on *People v. Hill*, 346 Ill. App. 3d 545 (4th Dist. 2004), and *People v. McBride*, 2012 IL App (1st) 100375, the prosecutor argued that as long as the article has the design of a firearm, it should be regarded as a firearm for purposes of the armed robbery statute. (R. BB9). The trial court agreed with the State's position and later rejected the defense challenge to this ruling in its post-trial motion. (C. 163; R. GG15-27).

Whether the recovered Derringer was "a firearm" was not a matter determined by statute; rather, it was a question of fact that the jury was compelled to decide. *People v. Williams*, 394 Ill. App.3d 286, 289-291 (1st Dist. 2009). The condition of an item in order to qualify as a firearm presents a factual question for the jury. *Williams*, 394 Ill. App.3d at 291. *See People v. Robinson*, 73 Ill. 2d 192, 202 (1978) ("when the character of the weapon is doubtful . . . *it is a question for the jury* to determine from a description of the weapon, from the manner of its use, and the circumstances of the case") (emphasis added, internal quotes omitted). *People v. Ross*, 229 Ill. 2d 255 (2008), provides controlling guidance to this matter.

Although Carey was convicted under the successor armed robbery statute serving as the predicate for felony murder, the analysis found in *Ross* is analogous to the cause at bar. In *Ross*, this Court was faced with the question of whether a pellet gun qualified as a dangerous weapon under the previous armed robbery statute. *Ross*, 229 Ill. 2d at 257, 272. In beginning its analysis, *Ross* examined previous approaches to the issue of dangerous

weapons. *Ross* observed that the *per se* approach found in *People v. Dwyer*, 324 Ill. 363 (1927), was "less than clear" and carried with it a "constitutionally suspect" view because it used a presumption that "shifts to the defendant the burden of proving that the weapon was dangerous." *Ross*, 229 Ill. 2d at 273.

Next, *Ross* turned to the analysis found in *People v. Skelton*, 83 Ill. 2d 58 (1980). In *Skelton*, the issue was whether a toy gun, made of hard plastic and "tinny metal" could be considered a dangerous weapon. *Ross*, 229 Ill. 2d at 274. *Ross* observed that *Skelton* examined the two approaches to the question: one, "a subjective approach" that assays "the victim's perception of the gun" and, two, "an objective approach" that "[looks] to the nature of the gun." *Ross*, 229 Ill. 2d at 274. *Skelton* was quoted as concluding that both approaches suffer from "logical and practical difficulties." 229 Ill. 2d at 274-275 (citation, internal quotes omitted). *Skelton* considered the objective approach that holds unloaded guns to be dangerous weapons to be "problematic" and found the question of dangerous weapon to be a question of fact. 229 Ill. 2d at 274-275.

*Ross* held that Illinois did not create a mandatory presumption that any gun is a dangerous weapon, concluding that "the trier of fact may make an inference of dangerousness based upon the evidence." 229 Ill. 2d at 276. *Ross* continued:

> The State may prove that a gun is a dangerous weapon by presenting evidence that the gun was loaded and operable, or by presenting evidence that it was used or capable of being used as a club or bludgeon. Here, the State did neither.

*Ross*, 229 Ill. 2d at 276.

(Ultimately, *Ross* held that "the State proved only that the defendant had a small BB gun and that it was a hard object." *Ross*, 229 Ill. 2d at 276.)

As indicated above, *Ross* rejected the presumption that all guns are dangerous. Implicit in that finding is any sufferance that an article *designed as a firearm*, is a firearm. The issue presented is a question of fact. In Carey's case, the State's reliance on, and the trial court's acceptance of, the definition of "firearm" in the FOID Act constituted a presumption in place of evidence. In other words, the State considered this presumption as overcoming *its own evidence* that the Derringer that Carey possessed, inoperable and unloaded (R. DD113-117, 128-129), ceased to exhibit the characteristics of a firearm. As in *Ross*' analysis, the State failed to prove that this object was a firearm, because it failed in "answering the bell" to the factual question raised by its prosecution.

### B. The State Failed To Prove That The Inoperable Derringer In Carey's Possession Was A Firearm, So As To Satisfy Its Burden Of Proving An Essential Element Of Its Case.

The essential element of firearm is a question of fact. *Robinson*, 73 Ill. 2d at 202; *Williams*, 394 Ill. App. 3d at 291. The instant record does not establish that the prosecution proved that Carey's inoperable Derringer possessed the essential characteristics of a firearm. Therefore, the State did not satisfy the essential element of "firearm," so as to sustain its burden for the instant predicate offense. *See People v. Worlds*, 80 Ill. App.3d 628, 630 (1st Dist. 1980) (holding that a gun that was so decrepit because of rust and

missing pieces could hardly be classified as a gun); *see also People v. Coburn*, 25 Ill. App.3d 542, 545 (1st Dist. 1975) (holding that without a barrel the item in question lacked the essential characteristics of a firearm).

*Williams* recognized that a firearm, originally designed as a firearm, may lose that designation due to disrepair. Specifically:

> . . . we agree that a device could indeed be in such a state of disrepair or its design so completely altered that it no longer could be said to be "designed" for that purpose and, therefore, no longer a threat to public health, safety, and decency. . . .
>
> *Williams*, 394 Ill. App.3d at 291.

The *Williams* Court concluded that the condition of the item was a factual question. *Williams*, 394 Ill. App.3d at 291.

The core facts underlying the instant issue are not in controversy. After Carey's partner, Jimmy Townsend, was fatally shot by one of the security guards and after Carey was shot in the head by the other security guard, one of the first police officers to arrive at the scene was Officer Kaczorowski. He arrived at the scene at approximately 9:45 a.m., finding the paramedics already present. (R. DD4-7). Kaczorowski saw the paramedics examine Carey, observing that "they removed a gun out of his pocket or his waist area." (R. DD8, 10). He identified the object from a photo (St. Ex. No. 9) as the .22 Derringer removed from Carey's waistband. (R. DD9-11).

A forensic investigator processed the crime scene and recovered the Derringer found near Carey. (R. DD13-52). Illinois State Police forensic scientist Elizabeth Haley examined the Derringer and found both barrels of the Derringer to be inoperable. Haley was unable to load a cartridge into the

top barrel because "there was some type of obstruction," which prevented it from chambering the cartridge properly. (R. DD113-114). Haley was able to place a cartridge in the lower barrel, but it would not fire because "the firing pin" did not hit the cartridge "with enough force . . . to set out the priming material." (R. DD114-115). She tried the lower barrel again, but again "nothing happened" and determined that the Derringer "was inoperable." (R. DD116-117, 128-129). Haley confirmed that the Derringer lacked ammunition. (R. DD129).

In light of the State's own proof, the recovered inoperable, unloaded Derringer could *not* be considered a firearm. The State's expert testified that the Derringer had lost the essential characteristics of a firearm. The facts in the instant case compare favorably with case law. In *Worlds*, the defendant's conviction was reversed where the gun was "so decrepit" that it could not longer be classified as a gun. 80 Ill. App.3d at 630. The defendant in *Worlds* possessed a .32 caliber pistol with no handle that was rusty and incapable of being cocked. The reviewing court found that he could not be guilty of UUW because "the so-called gun was in so decrepit a state because of rust and the absence of a handle that it could hardly be classified as a gun or a dangerous weapon." 80 Ill. App.3d at 631. In other words, *Worlds* found the item lost the basic characteristics of a firearm and that it could no longer be classified as a gun. 80 Ill. App.3d at 631. *See also Com. v. Sampson*, 422 N.E.2d 450, 455 (Mass., 1981) (finding that the only potential danger of a firearm is its capability of "firing shots or bullets"); *Com. v. Bartholomew*, 93 N.E.2d 551,

552 (Mass. 1950) (finding that a weapon designed for firing projectiles may be so defective or damaged that it has lost its initial character as a firearm).

In *Coburn*, 25 Ill. App. 3d at 545, the reviewing court reversed the defendant's UUW conviction where the barrel of the shotgun was found separate from the rest of the weapon. The defendant was found in his basement sleeping on a couch with the stock of a sawed-off shotgun, and the barrel of a shotgun was discovered in another location of the basement. In reversing defendant's conviction, the court recognized that "the barrel is an integral part of the weapon; without it, the item found lying next to the defendant lacks the essential characteristics of a shotgun and is merely the stock of a shotgun which is not prohibited." *Coburn*, 25 Ill. App. 3d at 545.

The fundamental character that a firearm is a firearm only when it can expel a bullet is resoundingly logical. A device that is designed to expel a projectile, and is thus a firearm, would need to do two basic things: (1) have the firing pin strike the hammer to cause the explosion that expels the projectile; and (2) expel the projectile out of the barrel towards its target. Vincent J. Di Maio, *Gunshot Wounds: The Practical Aspects of Firearms, Ballistics and Forensic Techniques* (2d ed., CRC Press 1999). The State's expert concluded that Carey's Derringer did not have these two basic characteristics of a firearm. Thus, there is no question that the item Carey possessed had reached the point where it was no longer a firearm.

At trial the State relied on two cases in support of the proposition that functionality of the weapon does not matter, only original design so as to

qualify as "firearm" under the armed robbery statute. (R. BB3-9). However, both cases are readily distinguishable. In *Hill* that defendant was charged with armed robbery *under the dangerous weapon sub-section* of the statute. *Hill*, 346 Ill. App. 3d at 547-548. Therefore, in *Hill*, the State did not have to prove firearm or the object's operational ability. *Hill*'s dismissive language – concerning "the current status of [the article's] ability to be used as intended" (346 Ill. App. 3d at 549) – is inapposite to this case. In fact, the inquiry was offered as a hypothetical since in *Hill* there was "[n]o evidence . . . positively indicat[ing] that the gun was in fact inoperable or what made it inoperable." 346 Ill. App. 3d at 548. In the instant case, it was the State's expert who declared Carey's Derringer as inoperable *and* she fully explained "what made it inoperable." (R. DD113-117, 128-129). The State's other authority was *McBride*, which cited *Hill*. *McBride* was an appeal following an aggravated vehicular hijacking conviction, where the accused was charged under the former, pre-amended armed robbery statute, with "dangerous weapon, to wit a firearm." *McBride*, 2012 IL App (1st) 100375, ¶¶4, 12. The Court found that because the object was actually used as a bludgeon, the State thus proved "dangerous weapon." Consequently, *McBride* is inapposite to the case at bar.

In short, the question of firearm, like that of dangerous weapon, presents a question of fact. The State's proof on this matter was more than not proven as found in *Ross*; here, the State's own evidence demonstrated that Carey's Derringer, which no longer possessed the essential

characteristics of a firearm.

**C. Summary**

In Carey's case, the State championed the original design of the .22 Derringer over its non-operational character. Relying on the presumption that character of a firearm was determined by its original design, the State failed to prove the essential element of its charged predicate for felony murder. Specifically, the State did not adduce sufficient proof on the essential element of "firearm" in its attempted armed robbery with a firearm charge. A criminal conviction cannot be sustained where the State fails in carrying its "burden of proving beyond a reasonable doubt each element of an offense. *People v. Siguenza-Brito*, 235 Ill. 213, 224 (2009) (*citing* the *Jackson* standard).

Accordingly, for the foregoing reasons, Robert Carey asks that his felony murder conviction be reversed outright, where the State failed to prove the underlying predicate offense. *People v. Jenkins*, 190 Ill. App. 3d 115, 137 (1st Dist.1989); *People v. Pecina*, 132 Ill. App. 3d 948, 955 (3rd Dist.1985).

## CONCLUSION

For the foregoing reasons, Robert Carey, defendant-appellee, respectfully requests that this Court affirm the reversal of his conviction for the reasons advanced herein.

Respectfully submitted,

PATRICIA MYSZA
Deputy Defender

MANUEL S. SERRITOS
Assistant Appellate Defender
Office of the State Appellate Defender
First Judicial District
203 N. LaSalle St., 24th Floor
Chicago, IL 60601
(312) 814-5472
1stdistrict.eserve@osad.state.il.us

COUNSEL FOR DEFENDANT-APPELLEE

## CERTIFICATE OF COMPLIANCE

I, Manuel S. Serritos, certify that this brief conforms to the requirements of Supreme Court Rule 341(a) and (b). The length of this brief, excluding pages containing the Rule 341(d) cover, the Rule 341(h)(1) 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(a) is 48 pages.

/s/Manuel S. Serritos
MANUEL S. SERRITOS
Assistant Appellate Defender

No. 121371

IN THE

SUPREME COURT OF ILLINOIS

| | | |
|---|---|---|
| PEOPLE OF THE STATE OF ILLINOIS,<br><br>Plaintiff-Appellant,<br>Cross-Appellee,<br>-vs-<br><br>ROBERT CAREY<br><br>Defendant-Appellee,<br>Cross-Appellant. | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | Appeal from the Appellate Court of Illinois, No. 1-13-1944.<br><br>There on appeal from the Circuit Court of Cook County, Illinois , No. 11 CR 3485.<br><br>Honorable Matthew E. Coghlan, Judge Presiding. |

**NOTICE AND PROOF OF SERVICE**

Lisa Madigan, Attorney General, 100 W. Randolph St., Chicago, IL 60601;mglick@atg.state.il.us, cc: twhatley-conner@atg.state.il.us, jescobar@atg.state.il.us, lbendik@atg.state.il.us;

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

Mr. Robert Carey, Register No. B01665, Menard Correctional Center, P.O. Box 1000, Menard, IL 62259

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 25, 2017, 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 Chicago, Illinois, with proper postage prepaid. Additionally, upon its acceptance by the court's electronic filing system, the undersigned will send 13 copies of the Brief and Argument to the Clerk of the above Court.

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

# APPENDIX TO THE BRIEF

**Charging Instrument (C. 31-34)**

STATE OF ILLINOIS )
) SS.
COUNTY OF COOK )

121371

The FEBRUARY 2011 Grand Jury of the
Circuit Court of Cook County,

The Grand Jurors chosen, selected and sworn, in and for the County of Cook, in the State of Illinois, in the name and by the authority of the People of the State of Illinois, upon their oaths present that on or about January 28, 2011 at and within the County of Cook

Robert Carey

committed the offense of FIRST DEGREE MURDER

in that HE, WITHOUT LAWFUL JUSTIFICATION, COMMITTED THE OFFENSE OF ATTEMPT ARMED ROBBERY, AND DURING THE COMMISSION OF THE OFFENSE, HE SET IN MOTION A CHAIN OF EVENTS THAT CAUSED THE DEATH OF JIMMY TOWNSEND

IN VIOLATION OF CHAPTER 720 ACT 5 SECTION 9-1(a)(3) OF THE ILLINOIS COMPILED STATUTES 1992 AS AMENDED AND

contrary to the Statute and against the peace and dignity of the same People of the State of Illinois.

COUNT NUMBER 1
CASE NUMBER 11CR-3485
CHARGE ID CODE: 0735200

People of the State of Illinois, [illegible] about January 28, 2011 at and within the County of [illegible]

Robert Carey

committed the offense of ATTEMPT ARMED ROBBERY

in that HE, WITH THE INTENT TO COMMIT THE OFFENSE OF ARMED ROBBERY, DID ANY ACT, TO WIT: APPROACHED JULIO RODRIGUEZ, POINTED A FIREARM AT JULIO RODRIGUEZ, AND PULLED ON A BAG CARRIED BY JULIO RODRIGUEZ, BY THE USE OF FORCE OR BY THREATENING THE IMMINENT USE OF FORCE WHILE ARMED WITH A DANGEROUS WEAPON, TO WIT: A FIREARM, WHICH CONSTITUTED A SUBSTANTIAL STEP TOWARD THE COMMISSION OF THE OFFENSE OF ARMED ROBBERY,

IN VIOLATION OF CHAPTER 720 ACT 5 SECTION 8-4(18-2(a)(2)) OF THE ILLINOIS COMPILED STATUTES 1992 AS AMENDED AND

contrary to the Statute and against the peace and dignity of the same People of the State of Illinois.

COUNT NUMBER 2
CASE NUMBER 11CR-3485
CHARGE ID CODE: A0012366

...and Jurors chosen, ... Cook, in the State of Illinois, ... People of the State of Illinois, upon their oath ... about January 28, 2011 at and within the County of Cook

Robert Carey

committed the offense of UNLAWFUL USE OR POSSESSION OF A WEAPON BY A FELON

in that HE, KNOWINGLY POSSESSED ON OR ABOUT HIS PERSON A FIREARM, AFTER HAVING BEEN PREVIOUSLY CONVICTED OF THE FELONY OFFENSE OF ARMED ROBBERY, UNDER CASE NUMBER 89CR-18975, UNDER THE LAWS OF THE STATE OF ILLINOIS,

IN VIOLATION OF CHAPTER 720 ACT 5 SECTION 24-1.1(a) OF THE ILLINOIS COMPILED STATUTES 1992 AS AMENDED AND

contrary to the Statute and against the peace and dignity of the same People of the State of Illinois.

COUNT NUMBER 3
CASE NUMBER 11CR-3485
CHARGE ID CODE: 0012309

The Grand Jurors chosen, sworn [illegible] Cook, in the State of Illinois, in the name and by the authority of the People of the State of Illinois, upon their oath [illegible] about January 28, 2011 at and within the County of [illegible]

Robert Carey

committed the offense of UNLAWFUL USE OR POSSESSION OF A WEAPON BY A FELON

in that HE, KNOWINGLY POSSESSED ON OR ABOUT HIS PERSON A FIREARM, AFTER HAVING BEEN PREVIOUSLY CONVICTED OF THE FELONY OFFENSE OF ARMED ROBBERY, UNDER CASE NUMBER 89CR-18976, UNDER THE LAWS OF THE STATE OF ILLINOIS,

IN VIOLATION OF CHAPTER 720 ACT 5 SECTION 24-1.1(a) OF THE ILLINOIS COMPILED STATUTES 1992 AS AMENDED AND

contrary to the Statute and against the peace and dignity of the same People of the State of Illinois.

COUNT NUMBER 4
CASE NUMBER 11CR-3485
CHARGE ID CODE: 0012309

Anita Alvarez