No. 121371

IN THE
SUPREME COURT OF ILLINOIS

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

**REPLY AND CROSS-APPELLEE'S BRIEF OF PETITIONER-APPELLANT PEOPLE OF THE STATE OF ILLINOIS**

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**ORAL ARGUMENT REQUESTED**

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## POINTS AND AUTHORITIES

## ARGUMENT

### I. Defendant's Conviction Should Be Affirmed Because He Has Not Shown that the Indictment Was Deficient or that Any Alleged Deficiency Prejudiced Him.

Defendant's conviction should be affirmed because defendant failed to carry his burden to demonstrate that (1) the indictment insufficiently charged felony murder and (2) any alleged deficiency prejudiced him.

#### A. The Indictment Fully Informed Defendant of the Felony Murder Charge.

##### 1. Count I fully informed defendant of the felony murder charge.

The People's opening brief demonstrated that Count I fully informed defendant of the felony murder charge against him. Peo. Br. 9-16.[1] Count I provided in pertinent part 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)[.]

C31. Count I thus expressly specified (i) the offense defendant committed ("first degree murder"); (ii) the statutory provision violated (§ 9-1(a)(3), felony murder); (iii) the nature and elements of the offense (felony murder while committing attempted armed robbery); (iv) the date and location of the offense; (v) the victim's name; and (vi) the accused's name. *Id*. Defendant's argument — that Count I is deficient because it fails to include the "statutory citation" to the *underlying predicate felony* of attempted armed robbery or

[1] The common law record and report of proceedings are cited as "C" and "R," respectively. Citations to the People's and Defendant's briefs in this Court appear as "Peo. Br. _" and "Def. Br. _," respectively.

provide "specific detail" as to the weapon used in the offense — suffers from two fundamental flaws.

To begin, defendant's argument ignores the significance of his failure to challenge the indictment until he filed a petition for rehearing in the appellate court. As this Court has repeatedly emphasized, the timing of the challenge to an indictment is "significant in determining whether a defendant is entitled to reversal of his conviction on that ground." *See, e.g., People v. Cuadrado*, 214 Ill. 2d 79, 86 (2005). Where, as here, the indictment is challenged for the first time on appeal, the pleading requirements of Section 111-3 of the Code of Criminal Procedure that usually govern indictments do *not* apply and "the standard of review is more liberal." *People v. DiLorenzo*, 169 Ill. 2d 318, 322 (1996). As relevant here, defendant must show, among other things, that the indictment lacked enough information to "allow preparation of his defense." *Id*.

Importantly, as defendant's own cases hold, under this liberal standard of review, an indictment challenged for the first time on appeal is sufficient to sustain a conviction even if the indictment omits a material element of the charged crime and fails to allege "the manner in which [the crime] was committed," as long as the indictment informed the defendant of the "nature" of his offense such that he was able to prepare a defense. *Id*. at 321-25 (cited in Def. Br. 14, 27, 36); *Gilmore*, 63 Ill. 2d at 28-30 (cited in Def. Br. 27).

All of that information — and far more — was provided in Count I, and defendant tellingly fails to articulate any specific way that the preparation of his defense was impeded. Instead, he asks this Court to affirm the appellate court's formalistic rule that a felony murder charge is required to (1) "provide a statutory citation" to the *underlying predicate felony*; and (2) include "specific detail" as to the weapon used. *Carey II*, 2016

IL App (1st) 131944, ¶ 22. As explained in the People's opening brief, such specific details about a predicate felony are not required even when the indictment is challenged prior to trial. Peo. Br. 10.[2] But even if they are (a question that this Court need not reach), to hold that such detail is required when the indictment is challenged for the first time in a petition for rehearing — even absent a showing that defendant's trial preparation was impeded — would nullify the "significant" differences in the "more liberal" standard of review that this Court has long applied to indictments first challenged on appeal.

The other fatal flaw in defendant's argument is the impossibility of harmonizing his proposed new rule — that felony murder charges must include the "statutory citation" to the underlying predicate felony and "specific detail" about the weapon used — with this Court's longstanding rule that a defendant charged with intentional murder (and *not* felony murder) may nonetheless be convicted of felony murder. *See, e.g., People v. Maxwell*, 148 Ill. 2d 116, 134, 137 (1992). As this Court has repeatedly held, "there is but one crime of murder" and "the precise statutory theory of the offense of murder is not a matter that must be specifically alleged." *Id.*; *see also People v. Griffin*, 178 Ill. 2d 65, 83 (1997) (same); *People v. Allen*, 56 Ill. 2d 536, 542-43 (1974) (same); *People v. Rosochacki*, 41 Ill. 2d 483, 491-92 (1969) (same). For example, in *Maxwell* this Court rejected a defendant's argument that he was denied due process notice, and his right to be

[2] *See, e.g., People v. Simmons*, 93 Ill. 2d 94, 100 (1982) ("Section 111-3, however, does not require that [an indictment] set out the citation to the underlying felony charged"); *People v. Evans*, 125 Ill. 2d 50, 97-98 (1988) ("in an indictment for attempt the crime intended need not be set out as fully or specifically as would be required for the completed offense"); *see also People v. Williams*, 52 Ill. 2d 455, 460-61 (1972) ("[A]n indictment for conspiracy need not allege all the elements of the substantive offense which is the object of the conspiracy.").

informed of the charges against him, when he was indicted for knowing murder (but not felony murder) and convicted of felony murder. *Maxwell*, 148 Ill. 2d at 133-37.

Plainly, if an indictment is sufficient to support a felony murder conviction where the indictment alleges intentional murder but not felony murder, then it would be illogical to find that an indictment alleging felony murder is deficient and requires vacatur of a defendant's conviction if it does not provide the statutory citation to the *underlying predicate* felony, specify the weapon used, or otherwise specify the type of attempted armed robbery that forms the predicate felony.

Notably, defendant neither contests this logic nor attempts to reconcile his proposed new requirement with the Court's "one crime of murder" rule. Defendant also fails to cite a single case supporting his proposed new requirement and the People have been unable to find one either. Instead, defendant's response unsuccessfully attempts to distinguish this Court's "one crime of murder" precedent.

Defendant first flatly states, without explanation or citation to any authority, that this Court's "one crime of murder" rule "presupposes sufficient due process notice" and is "derivative of 'the one-good-count rule' which is inapposite to the cause at bar," where only one count remained at the time of trial. Def. Br. 26. Because defendant fails to develop this argument or cite any authority, it is waived. Ill. Sup. Ct. R. 341(h)(7). Defendant's argument is also meritless because this Court has relied on the "one crime of murder" rule to reject a defendant's claim that he was denied due process notice when he was charged with intentional murder but convicted of felony murder, *Maxwell*, 148 Ill. 2d at 133-34, and in cases where only one count was charged in the indictment, *Rosochacki*, 41 Ill. 2d at 491-92.

Defendant also misunderstands the relevance of the "one crime of murder" rule when he argues that the rule should not apply here because "the State can only look to a felony murder charge that is deficiently articulated." Def. Br. 27. Defendant's argument assumes his conclusion, *i.e.*, that a felony murder charge is deficient if it does not include the statutory citation of the predicate felony and "specific detail" about the weapon used. But, as noted above, the "one crime of murder" rule and other pleading rules demonstrate that such information is unnecessary.

Defendant next argues that *Maxwell* is inapposite because there the prosecutor announced prior to trial that the State would proceed under a felony murder theory (even though felony murder was not mentioned in the indictment). Def. Br. 26-27. But, as discussed at length in the People's opening brief, the record confirms that defense counsel knew defendant was charged with felony murder based on a predicate felony of attempted armed robbery with a firearm. Peo. Br. 19-21. Indeed, prior to jury selection the prosecutor stated "[t]he attempt armed robbery section that is the predicate for the felony murder is 18-2(a)(2), which requires proof of a firearm, not a dangerous weapon. It requires us to prove [a] firearm." R.II.BB7. And, as she had in prior hearings, defense counsel confirmed her understanding that the prosecution "is going to ask that the jury find that this crime was committed with a firearm." R.II.BB13. Defendant's other attempt to distinguish *Maxwell* and *Allen* — that those defendants made no claim that they were unprepared for trial — fails because, among other reasons, defendant's vague, unsupported, and self-serving claim that he could not prepare for trial because (despite what the record shows) he supposedly did not know which type of attempted armed robbery was alleged is insufficient as a matter of law to show prejudice. *See infra* 8-10;

*see also* Peo. Br. 18-21. Lastly, it bears noting that defendant failed to distinguish the remaining "one crime of murder" cases cited by the People.

In sum, a defendant is entitled to notice of "the crime committed, not the manner in which it was committed," *DiLorenzo*, 169 Ill. 2d at 321, and Count I provided all that information and more. Accordingly, this Court should reverse the appellate court's judgment holding that an indictment challenged for the first time on appeal must include the statutory citation to the underlying predicate felony and provide "specific detail" as to the weapon used.

**2. Even if Count I were deficient, read as a whole the indictment sufficiently informed defendant of the felony murder charge.**

The People's opening brief also demonstrated that, even if Count I failed to sufficiently notify defendant of the felony murder charge, the appellate court's judgment should be reversed because, read as a whole, the indictment provided all the information that the court found lacking in Count I. Peo. Br. 16-18; *see also People v. Hall*, 96 Ill. 2d 315, 320 (1982) (indictment must be read as a whole and "elements missing from one count of a multiple-count indictment or information may be supplied by another count").

In response, defendant does not dispute that Counts II (attempted armed robbery with a firearm) and III-IV (unlawful use or possession of a weapon by a felon) provided all the information about the underlying predicate felony that defendant contends is missing in Count I. Defendant also concedes, as he must, that charges dismissed before trial can provide necessary elements missing in the remaining charges. Def. Br. 24-25; *see also People v. Morris*, 135 Ill. 2d 540, 544-45 (1990).

Defendant nevertheless argues that Counts II-IV cannot supply the missing elements of the felony murder charge because those counts were nolle prossed on the first

day of trial (as opposed to being dismissed by the trial court, as in *Morris*). Def. Br. 24-25. Defendant cites no case holding that a nolle prossed charge cannot supply the elements missing from a remaining charge, and the People are aware of none.

Notably, *Morris* holds that a charge that was dismissed by the trial court because it was based on a repealed criminal statute (and thus a crime for which a defendant may never be convicted) may supply necessary elements that are missing from the remaining charges in the indictment. *Morris*, 135 Ill. 2d 540, 544-45. Given that holding, there is no logical reason to conclude that a charge that is nolle prossed (and which the prosecutor remains free to pursue in a variety of circumstances) cannot. Prosecutors nolle pros charges for a number of reasons, many of which have nothing to do with a change in the prosecution's theory of the case or intent to seek a conviction. Indeed, defendant's own authority holds that (1) nolle prosequi "is not an acquittal of the underlying conduct"; (2) the People may prosecute the defendant for a nolle prossed charge, including later in the same proceeding; and (3) the trial court is permitted to accept a guilty plea on a nolle prossed charge even where the People did not re-file the charge, file a new indictment, or file a motion to vacate the nolle prosequi. *People v. Hughes*, 2012 IL 112817, ¶¶ 22-30 (Def. Br. 24). Thus, defendant's unsupported assertion that nolle prossed charges may not supply elements missing from an indictment's remaining charges should be rejected.

Furthermore, defendant's contention that the People's voluntary dismissal of Counts II-IV "affirmatively took attempt armed robbery with a firearm off the table" is contradicted by the record. Def. Br. 25. The remaining Count I expressly alleged that the felony murder charge was based on "attempt armed robbery." C31. And, as noted in the People's opening brief, at the same hearing in which Counts II-IV were nolle prossed, the

prosecutor stated that "[t]he attempt armed robbery section that is the predicate for the felony murder is 18-2(a)(2), which requires proof of a firearm, not a dangerous weapon. It requires us to prove [a] firearm." R.II.BB7. Defense counsel then confirmed that she understood that the prosecution "is going to ask that the jury find that this crime was committed with a firearm." R.II.BB13. Thus, despite the dismissal of Counts II-IV, the record demonstrates defense counsel's continued understanding that the underlying predicate for felony murder was attempted armed robbery with a firearm, which is precisely the crime of which defendant concedes he was convicted. Def. Br. 12, 38-47.

In sum, even if Count I were deficient, all the missing elements were supplied by the remainder of the indictment. And defendant plainly was on notice, as his own counsel stated in open court on the first day of trial, that the underlying predicate for the felony murder charge was attempted armed robbery with a firearm.

**B. Defendant's Conviction Should Be Affirmed For the Independent Reason that He Cannot Establish Prejudice.**

The People's opening brief further demonstrated that, even if the indictment failed to sufficiently allege felony murder (it did not), defendant's conviction must be affirmed because he cannot show that he was prejudiced, for three independent reasons:

(1) The pre-trial record, including defense counsel's own statements, shows that defense counsel knew defendant was charged with felony murder based on a predicate of attempted armed robbery with a "firearm," which is the precise crime for which he was convicted, Peo. Br. 19-20;

(2) The record demonstrates that defense counsel mounted thorough and specific defenses to the allegations that defendant (a) was attempting to rob the armored truck and (b) used a firearm in the attack, Peo. Br. 20-21; and

(3) The details omitted from Count I (the statutory citation to the predicate felony and the type of weapon used) were irrelevant to defendant's theory of the case — *i.e.*, that rather than attempting to rob the armored truck, defendant was trying to prevent his brother from committing suicide, Peo. Br. 21-22.

Defendant's response does not dispute *any* of these three independent bases for finding he cannot show prejudice. Def. Br. 15-35. Therefore, this Court should hold that defendant has failed to show he was prejudiced, and affirm his conviction. Peo. Br. 18-22; *see also, e.g., Cuadrado,* 214 Ill. 2d at 88 (no prejudice where record showed defense counsel understood charge despite faulty indictment); *DiLorenzo*, 169 Ill. 2d at 324-25 (no prejudice where defense raised at trial demonstrated understanding of charge); *People v. Pujoue*, 61 Ill. 2d 335, 339 (1975) (same); *People v. Maggette*, 195 Ill. 2d 336, 350-51 (2001) (no prejudice from deficient sexual assault indictment where defendant claimed he never touched victim improperly); *People v. Bohm*, 95 Ill. 2d 435, 440-41 (1983) (failure to sufficiently allege theft not prejudicial where defendant claimed he paid for item); *People v. Davis*, 82 Ill. 2d 534, 539 (1980) (no prejudice in charging defendant with threatening wrong person where defendant claimed he did not threaten anyone at all).

The few prejudice arguments raised by defendant are all meritless. Throughout his response brief defendant repeats the conclusory assertion that he was unable to prepare for trial. *See, e.g.*, Def. Br. 28, 30. But, as the People's opening brief demonstrated, the record contradicts that claim because defense counsel mounted a thorough, albeit unsuccessful, defense that (1) attempted to undermine the People's allegations in various ways and (2) affirmatively presented an alternative explanation for defendant's behavior during the attack. Peo. Br. 18-22.

Furthermore, defendant has never articulated what, if anything, he would have done differently had Count I included the statutory citation to the predicate felony or specified the weapon used. As the People's opening brief noted, this Court has long held that "broad assertions" that due to a defective indictment a defendant was "unable to

prepare a meaningful defense" and "was 'left to guess' as to some of the details of the charge" are insufficient to establish prejudice. *DiLorenzo*, 169 Ill. 2d at 323. The defendant must specifically "identify what, in fact, he could have done differently" had the indictment contained more information. *People v. Davis*, 217 Ill. 2d 472, 479 (2005). An unexplained assertion that defendant "could have adjusted his trial strategy" is insufficient to establish prejudice. *Id*. Because defendant has never explained what he would have done differently had the indictment included the statutory citation to the predicate felony or specified the weapon used, he has not established prejudice.

Equally meritless is defendant's new argument that he was prejudiced because (1) the jury was instructed on both attempted armed robbery with a "firearm" and attempted armed robbery with a "dangerous weapon other than a firearm"; and (2) the prosecutor raised both theories of culpability in closing argument. *See* Def. Br. 20-22, 28-29. It is settled that charging and prosecuting a defendant "under alternative theories of criminal culpability" is permissible and provides "no occasion to challenge the indictment." *See, e.g., People v. Bishop*, 218 Ill. 2d 232, 247-48 (2006). Indeed, there is nothing unusual about a defendant being required to defend against, and a jury being instructed on, multiple theories of culpability, even theories that are inconsistent. *See, e.g., id*.; *see also Maxwell*, 148 Ill. 2d at 133 (affirming conviction and death sentence where jury was instructed on intentional murder, creation of a strong possibility of death, and felony murder). Furthermore, where, as here, the defendant does not contend that any of the instructions misstated the law, "no error occurs in instructing the jury. *This is true even when the instruction complained of is, alone, superfluous or misleading*." *People v.*

*Shaw*, 186 Ill. 2d 301, 328-29 (1998) (collecting cases; emphasis added). Defendant cites no cases to the contrary.

At the heart of defendant's new complaint is his contention that by requesting an instruction on attempted armed robbery with a dangerous weapon other than a firearm (in addition to the instruction on attempt with a firearm) and by arguing in closing that the taped-together pipes defendant swung at the security guard were a dangerous weapon (in addition to arguing that defendant's Derringer was a firearm), the People unfairly broadened their theory of the case near the end of trial. According to defendant, before trial the prosecution both "signaled" and "indicated" that it would proceed under the firearm theory but then, in the jury instructions and at closing argument, the prosecution added the additional theory that a dangerous weapon other than a firearm was also used. Def. Br. 21-23. This new argument differs significantly from the reasoning employed by the appellate court.[3] Defendant has abandoned the claim (flatly contradicted by the record yet accepted by the appellate court) that he did not know the prosecution believed the attempted robbery was committed with a firearm, and instead now complains that he was prejudiced by the addition of the alternative dangerous weapon other than a firearm theory near the end of trial. *Id*.

Defendant's new argument is a red herring because in finding defendant guilty of felony murder, the jury also specifically found that "during the commission of the offense of first degree murder the defendant was armed with a firearm." R.V.EE125. Indeed,

[3] In vacating defendant's conviction, the appellate court expressly rejected the People's argument that the People's motion in limine indicated that prosecutors intended to proceed under the theory that the Derringer qualified as a "firearm." *Carey II*, 2016 IL App (1st) 131944, ¶ 31. But before this Court, defendant now admits that the motion in limine "signaled" the People's intent to raise the "firearm" theory. Def. Br. 21, 29.

defendant himself concedes that he was convicted of felony murder based on a predicate of attempted armed robbery with a firearm. Def. Br. 12, 38-47. Thus, the alternative instruction and argument regarding attempted robbery with a dangerous weapon other than a firearm was, at most, superfluous, and did not prejudice defendant, because he was not convicted based on a dangerous weapon other than a firearm theory. That is, it cannot reasonably be said that, but for the instruction and argument on the dangerous weapon other than a firearm theory, defendant would have been found not guilty of felony murder based on attempted armed robbery with a firearm.

While the jury's verdict that defendant used a firearm in the attack defeats defendant's claim that he was prejudiced by the inclusion of the "dangerous weapon" instruction and argument, it is worth noting that defendant does not identify any specific way in which the alternative "dangerous weapon" theory prevented him from preparing his defense, nor does he identify how his defense would have changed had he known of this additional theory of culpability earlier in the proceedings. Indeed, the record shows that defendant's counsel thoroughly cross-examined the prosecution's witnesses in an attempt to show that the security guard's testimony that defendant swung the large pipes at him was neither credible nor corroborated, and she argued those same points in closing argument by claiming that defendant never attempted to hit anyone with anything. R.III.CC62-63; R.IV.DD154, R.V.EE86-92. Thus, defendant's new argument fails for these additional reasons. *See, e.g.*, *Davis*, 217 Ill. 2d at 479 (no prejudice where defendant did not specifically "identify what, in fact, he could have done differently"); *DiLorenzo*, 169 Ill. 2d at 324-25 (no prejudice where defense raised at trial demonstrated understanding of charge).

Furthermore, defendant's own cases directly support the conclusion that he was not prejudiced. Def. Br. 19-20 (citing *Toy* and *Washington*). In *Toy*, the defendant was charged with armed robbery but the indictment "did not specify" the type of armed robbery committed. *People v. Toy*, 407 Ill. App. 3d 272, 292 (1st Dist. 2011) (Def. Br. 19). The appellate court acknowledged that armed robbery with a "firearm" and with a "dangerous weapon" were "different offenses" under the statute and that the prosecution "did not specifically charge defendant" based on the firearm theory. *Id*. at 291-93. The court nevertheless affirmed Toy's conviction under the firearm theory because the prosecution presented two eyewitnesses who testified that they saw the defendant carrying what appeared to be a "gun," despite Toy's claim that the object he carried was not an operable firearm. *Id*.; *see also People v. Hill*, 346 Ill. App. 3d 545, 549 (4th Dist. 2004) (same).

Another case defendant relies upon, *People v. Washington*, 2012 IL 107993 (cited in Def. Br. 19-20), likewise supports the conclusion that defendant's conviction should be affirmed. In *Washington*, the indictment incorrectly included the statutory citation to the old version of the armed robbery statute (which treated "firearm" and "dangerous weapon" armed robbery as a single offense) and alleged that Washington committed robbery "while armed with a dangerous weapon, to wit: a firearm." *Id*. ¶¶ 5-7. On appeal, Washington argued that he was prejudiced because "the indictment specifically alleged the use of a 'firearm,'" and his defense was built around proving that his weapon did not qualify as a firearm, but "at trial, the State was allowed to prove that [Washington] was armed with a 'dangerous weapon' as opposed to a firearm." *Id*. ¶ 39. This Court rejected that argument because the indictment, despite its deficiencies, "fully

apprised [Washington] of the charges against him" and the prosecution presented eyewitness testimony that Washington used a gun in the robbery. *Id*. ¶ 41.

Defendant's remaining authorities are inapposite and irrelevant. *Crespo* is inapposite because there the Court held that where the prosecution charged the defendant's multiple stabbings of the victim as a single act and prosecuted the case at trial as a single act, the prosecution could not "change its theory of the case *on appeal*" by arguing that the stab wounds were separate acts that justified multiple convictions. *Crespo*, 203 Ill. 2d 335 at 343-44 (emphasis added; cited in Def. Br. 18). Here, by contrast, defendant admits the People "signaled" their intent to proceed under the "firearm" theory prior to trial and that the jury found him guilty under the "firearm" theory, and the People maintain that defendant's felony murder conviction should be upheld under the "firearm" theory.

Similarly, the cases defendant relies on for the proposition that "a weapon cannot at once be a 'firearm' and something 'other than a firearm'" have no relevance to the present case because the evidence shows that *multiple* weapons (pipes and a handgun) were used in the attack, and defendant was convicted of a single count expressly based on the jury's determination that the Derringer was a "firearm." Def. Br. 19, 20 (citing *Clark*, *Barnett*). Likewise, cases holding that the prosecution must prove at trial that the predicate felony had an "independent felonious purpose" apart from killing the victim are irrelevant here, where the attempted armed robbery plainly had an independent felonious purpose: to steal money from the armored truck, regardless of the weapon used. *Id*. at 30 (citing *Morgan* and *Davison*).

In sum, defendant's conviction should be affirmed because, as his own cases show, he cannot demonstrate that he was prejudiced by any deficiency in the indictment.

**C. Defendant's Other New Arguments Are Meritless.**

Defendant's remaining arguments are meritless.

Without citation to any authority, defendant argues that because the indictment supposedly does not "describe[]" the offense and "has no statutory reference," he "cannot use the instant conviction as a double jeopardy bar." Def. Br. 30. As the People have demonstrated, the indictment fully informed defendant of the charges against him. Peo. Br. 9-18. Furthermore, defendant's own authority holds that "the time when an indictment defined the limits of jeopardy has passed." *See, e.g., Gilmore*, 63 Ill. 2d at 30 (cited in Def. Br. 27). Rather, res judicata analysis requires an examination of the entire record to determine the theories of culpability the prosecution pursued. *See, e.g., id.*; *see also DiLorenzo*, 169 Ill. 2d at 325 (cited in Def. Br. 14, 19, 27, 36); *Maxwell*, 148 Ill. 2d at 138-39 (cited in Def. Br. 26-28). Thus, defendant's argument is meritless.

Defendant also faults the prosecutor for saying during the jury instructions conference that there is only one offense of armed robbery. Def. Br. 22. However, read in context, it is plain that the prosecutor was discussing the "one crime of murder" rule, which allows the prosecution to pursue different theories of murder at trial even if only one type of murder is charged in the indictment. *See* R.IV.EE15-16 (prosecution arguing that a judge may "instruct a jury on an alternative theory of murder" even if it is not charged because "[t]here's only one offense of murder"). The prosecutor's fleeting comment that there was one offense of armed robbery was at most inadvertent or inartful, and had no effect on the trial. At the prosecutor's request, the jury was separately instructed on the two types of attempted armed robbery (firearm and dangerous weapon),

there is no allegation that those instructions misstated the law, and the prosecution treated each theory as distinct in closing argument.

Without citation, defendant also claims that "the State argues that felony murder's predicate offense does not matter." Def. Br. 16. Not so. The People contend that (1) under the "one crime of murder" rule, and other well-settled pleading rules, Count I sufficiently notified defendant of the charges against him where it alleged that he committed felony murder based on "attempt armed robbery" in causing the death of Townsend at a specifically identified date and location; (2) in the alternative, the indictment, read as a whole, notified defendant of the underlying predicate because Counts II-IV alleged that he used a "firearm" in the attack and provided the statutory citation to attempted armed robbery with a firearm; and (3) even if the indictment were deficient, the record establishes that defendant was fully informed that the People were prosecuting the "firearm" theory. Peo. Br. 8-23.

Defendant also incorrectly claims that the People's opening brief "fail[ed] to recognize" that there are two types of armed robbery. Def. Br. 19. The People's brief expressly noted that Illinois law recognizes two types of armed robbery, provided the statutory citations, and argued that the indictment notified defendant of the precise type of attempted armed robbery underlying the felony murder charge. Peo. Br. 7, 16-21.

Defendant argues that felony murder is the "most potent arrow" the prosecution has because an accused may be found guilty "regardless of his mental state." Def. Br. 16-17. But defendant cites no case holding that a special, stricter pleading standard should apply to felony murder cases, nor has the People's research found any. *See id*. Rather, as noted above, the "one crime of murder" rule and defendant's own authorities

demonstrate that the failure to provide the statutory citation to the predicate felony or specify the weapon used in the indictment does not render a felony murder indictment deficient or defendant's conviction invalid. Furthermore, to the extent a felony murder defendant believes that the indictment does not sufficiently notify him of the predicate offense, he may move to dismiss prior to trial and/or seek a bill of particulars to obtain additional information. *See, e.g.*, *DiLorenzo*, 169 Ill. 2d at 324 (collecting cases: "to the extent that defendant may have been required to know 'some of the details' of the charge he could have filed a request for a bill of particulars"). Defendant did neither, and his claim that the Court should create new, special, and formalistic pleading rules that are directly contrary to this Court's longstanding precedent should be rejected.

* * *

In sum, the appellate court's ruling should be reversed, and defendant's conviction affirmed, because (1) the indictment fully informed defendant of the crime for which he was convicted; and (2) even if the indictment were deficient, the record demonstrates that defendant was not prejudiced.

## II. Even If the Indictment Were Deficient and Defendant Were Prejudiced, the Appellate Court Applied the Wrong Remedy.

The People's opening brief demonstrated that, even if the indictment were deficient and defendant were prejudiced, the appellate court should have treated the predicate felony as the lesser included offense of attempted robbery (rather than attempted armed robbery) and affirmed defendant's felony murder conviction.

Defendant does not dispute that (1) reviewing courts have the power to convict a defendant of a lesser-included offense that was not charged or considered by the jury; (2) attempted robbery is a lesser-included offense of attempted armed robbery; and (3) the

evidence was sufficient to support a conviction for attempted robbery. Def. Br. 30-31. The only two arguments defendant raises in response are meritless.

Without citation to authority, defendant first faults the People for not previously arguing that the appellate court imposed the wrong remedy. Def. Br. 30. But the trial court denied defendant's motion for a new trial, the initial appellate court decision affirmed defendant's conviction, and the appellate court did not vacate his conviction and impose the improper remedy until after defendant's petition for rehearing claimed (for the first time) that the indictment failed to sufficiently allege felony murder. Thus, the People's remedy argument has been timely raised in this Court. *See, e.g., People v. Ramirez*, 214 Ill. 2d 176, 185 n.2 (2005) ("The State, however, was the appellee in the appellate court. As the appellant now in this court, the State may raise any argument properly presented by the record to sustain the judgment of the trial court, whether or not that argument was raised below or included in the petition for leave to appeal.").

Defendant's remaining argument is that, while this Court may reduce his conviction to attempted robbery, attempted robbery is not the type of crime that may serve as the predicate offense for felony murder. Def. Br. 31-35. To the contrary, attempted robbery is specifically identified by statute as a predicate offense for felony murder. A defendant is guilty of felony murder if, in performing the acts that led to the victim's death, he was "attempting or committing a forcible felony" other than second degree murder. 720 ILCS 5/9-1(a)(3) (2015). And the statutory definition of "forcible felony" expressly includes "robbery." 720 ILCS 5/2-8 (2012). Thus, attempted robbery is a predicate offense that supports a felony murder conviction.

Defendant claims that the People's position is "facile" and "flaw[ed]" because the legislature supposedly decided "to not include any inchoate offenses in its enumerated list of forcible felonies." Def. Br. 31, 33. But defendant's argument ignores that the felony murder statute expressly applies to a defendant who is "*attempting* or committing a forcible felony." 720 ILCS 5/9-1(a)(3) (emphasis added). Because robbery is a forcible felony by definition, a defendant who attempts to commit robbery is "attempting" a "forcible felony" and, as such, may be convicted of felony murder.

None of defendant's cases supports his position. *See* Def. Br. 31-34. *Ross*, which holds that whether an object is a dangerous weapon is a question of fact, is irrelevant to the question of whether attempted robbery (which does not require a weapon) may support a felony murder conviction. *Ross*, 229 Ill. 2d at 275. *Terrell*, which held that a man seen outside a gas station holding a mask and a gun could be convicted of attempted armed robbery even though he never entered the store, provides no support to defendant. *Terrell*, 99 Ill. 2d at 432-36. *Belk*, which observes that "possession of a stolen vehicle" is not listed as a forcible felony, likewise has no application here, given that the legislature decided that attempted robbery can support a felony murder conviction. *Belk*, 203 Ill. 2d at 193. Lastly, *Sanderson*, 2016 IL App (1st) 141381, holds that attempted burglary could not serve as the predicate offense for Armed Habitual Criminal (AHC); that holding is irrelevant here because AHC (unlike felony murder) does not expressly state that "attempting" to commit a forcible felony may serve as the underlying predicate offense. *Compare* 720 ILCS 5/24-1.7(a) (AHC requires proof of prior conviction for "a forcible felony") *with* 720 ILCS 5/9-1(a)(3) (felony murder requires proof defendant was "*attempting* or committing a forcible felony") (emphasis added).

Furthermore, even if defendant were correct that attempted robbery is not expressly identified by statute as a predicate offense for felony murder (he is not), his argument would still fail because attempted robbery would plainly fall into the statute's catch-all provision. In addition to certain specifically enumerated felonies, the definition of "forcible felony" also includes "any other felony which involves the use or threat of physical force or violence against any individual." 720 ILCS 5/2-8. As defendant notes, such offenses include any crime where *either* (1) one of the elements of the predicate offense is the use or threat of force; *or* (2) the prosecution shows that the defendant contemplated the use of force and was willing to use it. Def. Br. 33-34.

Attempted robbery meets both prongs. An element of attempted robbery is that the defendant intends to take someone's property "by the use of force or by threatening the imminent use of force." 720 ILCS 5/18-1(a). Thus, even under defendant's own analysis and authorities, attempted robbery is a forcible felony. Furthermore, as to the second prong, the People presented overwhelming evidence that defendant "contemplated" (and indeed used) force because multiple eyewitnesses testified that (1) defendant was carrying a handgun and Townsend was carrying two large pipes when they approached the first security guard; (2) Townsend yelled "Don't move, motherfucker!" and then told defendant to "kill" the guard; (3) during the attack, defendant picked up the pipes and swung them at the guard; (4) defendant then put the guard in a chokehold; and (5) after the guard broke free, defendant gave chase and pointed his gun at a second security guard who had opened the armored truck's doors to give his partner refuge. *See, e.g.*, R.III.CC33-40, 86-91, 135-38, 161-63, 181-83, 188. Defendant's assertion that he "likely" never removed the gun from his waistband is both incorrect and irrelevant given

that he attempted to hit the first security guard with the pipes and then put him in a chokehold. *See* Def. Br. 34. Thus, even under defendant's analysis, the attack qualifies as a predicate offense for felony murder for this additional reason.

Defendant's related claim that "the jury was never asked to decide" whether defendant used a firearm in the attack, Def. Br. 31, is irrelevant to whether defendant's predicate offense may be reduced to attempted robbery, a crime that does not require use of a weapon, 720 ILCS 5/18-1(a). Defendant's claim is also factually incorrect because the trial court instructed the jury on the definition of a "firearm," the jury was issued a special interrogatory asking it to decide whether defendant used a firearm, and the jury returned a verdict that "during the commission of the offense of first degree murder the defendant was armed with a firearm." R.V.EE115-16, 125; C130. Defendant likewise is incorrect when he claims that the jury was not asked to determine whether defendant contemplated the use of force during the attack. Def. Br. 35. The jury was instructed that armed robbery, as the predicate to felony murder, requires proof that defendant took property "by the use of force or by threatening the imminent use of force," R.X.114, and the jury returned a guilty verdict, R.X.125. Furthermore, it is black letter law that a reviewing court has the power to convict a defendant of a lesser-included offense that was not charged or considered by the trier of fact. Ill. Sup. Ct. R. 615(b)(3); *People v. Kennebrew*, 2013 IL 113998, ¶¶ 25, 53.

In sum, even if the indictment failed to sufficiently allege attempted armed robbery, the appellate court should have treated the predicate felony as attempted robbery, and affirmed defendant's felony murder conviction.

## III. Defendant's Cross-Appeal Should Be Denied.

Defendant's cross-appeal resurrects an argument that defendant lost and then abandoned in the appellate court: the People supposedly failed to prove that the Derringer is a "firearm" to support the predicate offense of attempted armed robbery underlying defendant's felony murder conviction.

Importantly, on two occasions at trial, defense counsel agreed that the People were not required to prove that defendant's Derringer was operable to qualify as a "firearm" and support the predicate offense of attempted armed robbery with a firearm. R.II.BB16, R.V.EE24. Then, following his conviction, defendant filed a motion for new trial, arguing that the prosecution failed to prove him guilty beyond a reasonable doubt. C162. The trial court denied the motion, finding that the evidence against defendant was "overwhelming." R.V.GG27.

On appeal, defendant argued that the People failed to prove that his Derringer was a "firearm" and that he had the intent to commit robbery. The appellate court affirmed defendant's conviction and held that (1) given the evidence, a trier of fact would have "easily concluded" that defendant intended to rob the armored truck; and (2) the Derringer qualified as a firearm under the "plain language" of the Illinois criminal code. *Carey I*, 2015 IL App (1st) 131944-U, ¶¶ 63-65, 74.

Notably, defendant's petition for rehearing abandoned his argument that the Derringer was not a firearm and instead asked the appellate court to reconsider only its holding that there was sufficient evidence to prove that he intended to rob the armored truck. *See* Def. Pet. Reh'g at 6. The appellate court declined to reconsider its ruling on that issue but held, based on an argument defendant raised for the first time in his petition

for rehearing, that the indictment failed to sufficiently charge felony murder. *Carey II*, 2016 IL App (1st) 131944, ¶ 37.

For the reasons discussed below, the firearm argument that defendant resurrects in his cross-appeal is meritless and his felony murder conviction should be affirmed.

### A. The Evidence at Trial Proved that Defendant Was Armed with a Firearm.

In assessing the sufficiency of the evidence, this Court asks "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *People v. Beauchamp*, 241 Ill. 2d 1, 8 (2011) (emphasis in original; collecting cases). Under this deferential standard of review, the Court "allow[s] all reasonable inferences from the record in favor of the prosecution," and will reverse a conviction only if "the evidence is so improbable, unsatisfactory, or inconclusive that it creates a reasonable doubt of defendant's guilt." *Id*. (internal quotations omitted).

Defendant's cross-appeal rests on two contentions: (1) that the jury was not asked to determine whether the Derringer was a firearm; and (2) that the evidence did not support a finding that the Derringer was a firearm. Both are incorrect.

#### 1. The jury was asked to determine whether defendant was armed with a "firearm" during the offense.

Defendant's contention that the trial court "removed" from the jury's consideration whether defendant was armed with a "firearm" in the attack is contradicted by the record. *See* Def. Br. 29 n.1, 39-42.

Before trial, the prosecution filed a motion in limine that argued, in pertinent part, that defendant should be prohibited from telling the jury that the prosecution had to prove that the Derringer was "operable" at the time of the attack, because the statutory

definition of "firearm" includes no such element. C92; *see also* 430 ILCS 65/1.1 (defining firearm). Importantly, during argument on that motion, defense counsel *agreed* that the definition of firearm does not require proof that the weapon is "operable":

> Trial Court: What kind of argument do you want to make as far as your defense that it's not a firearm? That it doesn't qualify as a firearm? Under the definition [in the criminal code] it qualifies as a firearm. It doesn't matter whether or not it's operable, correct?
>
> Defense counsel: *According to the definition, but there are some exceptions*. For example an antique firearm . . . is not covered by the definition under the Illinois law. . . I think we are entitled to explore and contest whether this item meets any of those exemptions.

R.II.BB16 (emphasis added); *see also* 430 ILCS 65/1.1 (listing statutory exceptions and stating that a gun does not qualify as a "firearm" if it is "an antique" that the Department of State Police has concluded "is primarily a collector's item and is not likely to be used as a weapon").

Based on defense counsel's agreement that the definition of "firearm" did *not* require proof that the gun was operable and her explanation of the defendant's theory that instead the Derringer fell into one of the statutory exceptions to the definition of firearm, the trial court granted the prosecution's motion in part. The court held that at trial, defendant "can't say it's not a firearm, but if you have evidence which suggests it comes within one of the exceptions, I will allow you to do that." R.II.BB17.

The trial date was postponed multiple times to permit testing of the Derringer and to give defendant time to retain and consult with a firearm expert. R.I.X2-3, Y2-3, Z1-2. Yet defendant never presented an expert at trial, presumably because he was unable to find one who would support his firearm theories.

At trial defendant was given free rein to contend that the Derringer was not a "firearm." Among other things, defense counsel thoroughly cross-examined the People's forensic expert to establish that (1) the Derringer was "inoperable" at the time it was examined because the firing pin did not strike with sufficient force to fire a bullet; (2) although it did not affect the gun's functionality, the Derringer was "old," had some "rust," and the hammer seemed loose; and (3) although the Derringer could be loaded, there was an obstruction in one barrel at the time of examination. R.IV.DD128-32. Furthermore, defendant was permitted to offer his opinion that the Derringer was an "insignificant" "little thing" that was incapable of killing anyone. R.V.EE63-64. And, in closing argument, defense counsel repeatedly argued that the Derringer was a "fake" weapon, an "inoperable" weapon, it was "unloaded," and it did not "work." R.V.EE83, 86, 90.

In turn, the jury was instructed that armed robbery with a firearm required the People to prove that defendant was armed with a "firearm." R.V.EE114. The jury was also instructed that the term "firearm" "means any device by whatever name known which is designed to expel a projectile or projectiles by the action of an explosion, expansion of gas or escape of gas." R.V.EE115 (quoting 430 ILCS 65/1.1).

Defense counsel did not object to that definition, nor did she request that the jury be instructed that the prosecution was required to prove that the Derringer was "operable" or loaded. R.V.EE20-21. Indeed, during the jury instruction conference, the prosecutor indicated that he intended to tell the jury that the Derringer did not need to be operable to qualify as a firearm and defense counsel agreed that "that is an accurate statement of the law." R.V.EE24.

Lastly, because the People sought a sentencing enhancement based on the use of a firearm, the jury was given a special interrogatory that asked it to determine whether defendant was armed with a "firearm." C130; *see also* R.V.EE117. The jury answered that question in the affirmative, expressly concluding that "during the commission of the offense of first degree murder the defendant was armed with a firearm." R.V.EE125.

Thus, contrary to defendant's new claim, the jury was asked to determine whether the Derringer defendant used in the attack was a "firearm" as defined by Illinois law and the defendant was given ample opportunity to present evidence and argument that it was not. Moreover, both before trial and during the jury instruction conference, defense counsel agreed that the definition of "firearm" does not require the People to prove that the gun was operable at the time of the offense. Thus, any claim that defendant was somehow prevented from pursuing his inoperability theory at trial (despite defense counsel emphasizing the Derringer's inoperability during cross-examination and closing argument) would be barred by the doctrine of invited error. *See, e.g., In re Det. of Swope*, 213 Ill. 2d 210, 217 (2004) ("a party cannot complain of error which that party induced the court to make or to which that party consented").

**2. Defendant's new argument that the People are required to prove that the Derringer was functional during the attack is barred and meritless.**

The other basis for defendant's cross-appeal — his contention that the People were required to prove that the Derringer was operable and/or loaded at the time of the attack, and the prosecution failed to do so — is both barred and meritless.

As discussed, on two occasions at trial (in response to a pre-trial motion and in the jury instructions conference), defendant agreed that the People were not required to prove that the Derringer was operable to qualify as a "firearm" and defendant never claimed

that the People were required to prove that it was loaded. R.II.BB16, R.V.EE24. It is settled that on appeal defendants may not change their theory of defense or adopt a view of the law contrary to the position the defendant asserted in the trial court. *See, e.g., In re Marriage of Schneider*, 214 Ill. 2d 152, 172 (2005) ("[t]o allow a party to change his or her trial theory on review would weaken the adversarial process and the system of appellate jurisdiction" and prejudice the opposing party); *In re Det. of Swope*, 213 Ill. 2d at 217 ("it would be manifestly unfair" to grant defendant relief based on an issue that defendant "induced" or to which he "consented"); *People v. Brown*, 11 Ill. App. 3d 67, 72 (2d Dist. 1973) (sufficiency of the evidence claim barred because "[w]e have repeatedly held that a new theory of defense not raised at the trial level may not be raised on appeal"). Thus, defendant's sufficiency claim is barred. Having taken the position at trial that the People were not required to prove that the Derringer was operable or loaded, defendant cannot take the opposite position on appeal.

Furthermore, defendant's new theory is meritless. The predicate offense of attempted armed robbery with a firearm requires the People to prove that during the attack defendant "carrie[d] on or about" his person or "was otherwise armed" with a "firearm." 720 ILCS 5/18-2(a)(2). In turn, the Illinois criminal code defines "firearm" as

> any device, by whatever name known, which is designed to expel a projectile or projectiles by the action of an explosion, expansion of gas or escape of gas[.]

430 ILCS 65/1.1; *see also* 720 ILCS 5/2-7.5.[4] Thus, defendant's unsupported claim that whether a gun is a firearm is not determined by statute is incorrect. Def. Br. 40, 42.

[4] The definition of "firearm" includes a list of several exceptions, including an "antique" gun that the State Police has concluded "is primarily a collector's item and is not likely to be used as a weapon." 430 ILCS 65/1.1. Defendant does not contend that any of those statutory exceptions applies, nor could he credibly do so.

Moreover, the People proved that the Derringer met the statutory definition of firearm because a forensic scientist testified without rebuttal that the Derringer was a "firearm"; it still could be loaded with bullets; it still had all the "essential parts" of a firearm; it was "designed" to expel a "projectile"; and, in particular, it was "designed" to fire "ammunition." R.IV. 114-117, 121-22. Defendant's assertion that "[t]he State's expert testified that the Derringer had lost the essential characteristics of a firearm" is, therefore, plainly incorrect. Def. Br. 44.

More importantly, by raising his new argument that only an "operable" and/or loaded gun can be a firearm — that is, by arguing that the People must prove that a gun was operable and loaded at the time of the attack to qualify as a firearm — defendant is asking this Court to add new elements to the definition of "firearm" that are contrary to the plain language of the statute and the legislature's clear intent.

Neither the armed robbery statute nor the statutory definition of firearm includes the word "operable," "loaded," or anything similar. The plain language of the armed robbery statute provides that the People must prove that the defendant carried a "firearm," and the plain language of the statutory definition of "firearm" focuses exclusively on whether the weapon was "designed" to fire a projectile, with no mention of the weapon's current capacity to do so. *See* 720 ILCS 5/18-2(a)(2); 430 ILCS 65/1.1. By failing to include the word "operable," "loaded," or any similar language in either statute, the legislature made clear that the People do not need to prove that a gun is operable or loaded to sustain a conviction for armed robbery with a firearm. *See, e.g., People v. Carlson,* 2016 WL 120544, ¶ 17 ("A reviewing court must enforce clear and unambiguous statutory provisions as written, and it should not read into the statute

exceptions, conditions, or limitations not expressed by the legislature"); *People v. Kinzer*, 232 Ill. 2d 179, 186 (2009) (rejecting the defendant's argument because it "requires adding a condition to the plain language of the statute"); *People v. Lewis*, 223 Ill. 2d 393, 402 (2006) (rejecting the defendant's attempt to add requirements because "a court may not add provisions that are not found in a statute").

Indeed, when the legislature intends to limit crimes regarding firearms to only loaded or operable firearms, it does so expressly. For example, for the crime of unlawful use of weapons, the criminal code expressly exempts firearms that "(i) are broken down in a non-functioning state; or . . . (iii) are unloaded and enclosed in a case . . ." 720 ILCS 5/24-1(a)(4)(i). Similarly, with regard to restrictions on the sale or transfer of "firearms," the legislature expressly exempted "firearms that have been rendered permanently inoperable[.]" 430 ILCS 65/3(a-15)(8). No such language is present in the statutes relevant to this case. *See* 720 ILCS 5/18-2(a)(2); 430 ILCS 65/1.1.

The legislature's clear intent not to require the People to prove that a firearm was operable or loaded to sustain an attempted armed robbery conviction reflects sound policy. As this case shows, carrying a firearm during a robbery — even a firearm that may have been inoperable and/or unloaded — drastically increases the potential danger and the risk of loss of human life. Security guards, police officers, and anyone else who lawfully possesses a firearm have no way of knowing whether a robber's firearm actually works. And so, during a robbery a security guard, police officer, or other lawful gun owner may draw his or her own gun and shoot, which raises the possibility that someone, including an innocent bystander, will be shot, injured, or even killed. This case presents tragic proof supporting the legislature's policy choice: defendant contends that he did not

carry a functioning gun during the attack; nevertheless, as a result of defendant's offense, one person died, another was maimed, and numerous others were put at risk of being hit by stray bullets. The legislature's policy judgment also is sensible because in many armed robbery cases the gun might not be recovered, which would make it impossible for the People to prove at trial that the gun was operable and/or loaded. Defendant's proposed new rule thus would unduly benefit defendants who damage or unload their firearms before they are recovered by police.

Notably, even defendant's own cases recognize that "firearm" is defined broadly and that "there is nothing in the plain language" of the statute "that requires the firearm to be currently operational or functional." *See, e.g., People v. Williams*, 394 Ill. App. 3d 286, 289 (1st Dist. 2009) (Def. Br. 40-43). As defendant's own authority notes, "Illinois courts have followed this statutory construction" to hold that it is "immaterial" whether a firearm is inoperable or unloaded. *Id*. at 289-90 (collecting cases); *see also, e.g., People v. Hill*, 346 Ill. App. 3d 545, 549 (4th Dist. 2004) ("According to the [statutory] definitions, the focus is on the intended purpose of the firearm based upon its *design*, not the current status of its ability to be used as intended"). Defendant does not cite a single case holding that to sustain an attempted armed robbery conviction the prosecution must prove that the gun was operable and loaded, nor have the People found one.

For similar reasons, defendant's assertion that due to "disrepair" the Derringer lost its "designation" as a firearm (because the People's expert testified that the firing pin struck too softly to fire) is also meritless. Def. Br. 43, 45. To begin, even the authorities that defendant cites that entertain the possibility that a defendant might hypothetically be able to prove that a gun is so decrepit that it can no longer be considered a firearm (one of

which is a nearly seventy-year-old case from Massachusetts) hold that a broken firing pin or a damaged barrel are not the kind of drastic damage that would cause a firearm to cease being a firearm. *Williams*, 394 Ill. App. 3d at 289 (cited in Def. Br. 40-43; inoperable gun with faulty firing pin and barrel that came off was a "firearm"); *Comm. v. Bartholomew*, 93 N.E.2d 551, 552 (Mass. 1950) (cited in Def. Br. 44-45; inoperable gun was a "firearm" despite missing firing pin).

More importantly, the plain language of the definition of "firearm" focuses solely on the weapon's original design. The only exception related in any way to age or disrepair is for an "antique" gun that the Department of State Police has concluded "is primarily a collector's item and is not likely to be used as a weapon," and defendant does not contend that this exception applies here. 430 ILCS 65/1.1. Indeed, because the focus is on the weapon's original design, Illinois courts and federal courts of appeals repeatedly have held that a gun is a "firearm" even if the gun was rusty, missing a firing pin, or was otherwise inoperable due to disrepair. *See e.g.*, *Hill*, 346 Ill. App. 3d at 549 (immaterial that gun currently inoperable because statute focuses on original design); *People v. Halley*, 131 Ill. App. 2d 1070, 1072-73 (5th Dist. 1971) (immaterial that gun had no firing pin or open barrels and was unloaded); *People v. Martinez*, 285 Ill. App. 3d 881, 884 (1st Dist. 1996) (collecting cases holding that inoperable guns that are rusty, unloaded, and/or missing firing pins qualify as "firearms"); *United States v. Rivera*, 415 F.3d 284, 286 (2d Cir. 2005) (rejecting broken firing pin argument because "every other circuit to consider it has concluded that an inoperable weapon falls within [the statutory] definition of 'firearm'"); *see also id.* (collecting cases and holding that it is immaterial

that gun is inoperable because "although it is temporarily incapable of effecting its purpose, it continues to be designed to fire a projectile").

Furthermore, defendant's own cases uphold the long-standing rule that eyewitness testimony that the defendant carried what appeared to be a gun is sufficient to prove that the defendant possessed a "firearm" even if the gun was never recovered and the eyewitness does not know whether the gun was operable or loaded. *See, e.g., Toy*, 407 Ill. App. 3d 272 (cited in Def. Br. 19). Toy argued that the prosecution failed to prove that he was armed with a "firearm" during a robbery because that depended on technical specifications that were not proven at trial given that Toy's weapon was never recovered. *Id*. at 287. The appellate court rejected that argument, noted that "firearm" is defined "broadly" by statute and held that, based on a long line of authority, testimony from two eyewitnesses that Toy held what appeared to be a "gun" was sufficient to meet the State's burden even though there was no evidence that what he carried was capable of firing bullets. *Id*. at 288-89, 292-93 (collecting cases); *see also, e.g., People v. Fields*, 2017 IL App (1st) 110311-B, ¶ 36 (firearm is "defined broadly" and eyewitness testimony "that the defendant held a gun is circumstantial evidence sufficient to establish that a defendant is armed with a firearm during a robbery"); *People v. Lee*, 376 Ill. App. 3d 951, 955 (1st Dist. 2007) (same); *Hill*, 346 Ill. App. 3d at 548-49 (same)[5]; *People v. Clark*, 2015 IL

[5] Defendant's attempt to distinguish *Hill* by suggesting that it concerns only the "dangerous weapon" theory of armed robbery and not firearm operability misstates the facts of that case. Def. Br. 46. Like defendant here, Hill claimed that the gun he carried during the robbery (which was not recovered) was "inoperable" and thus he could not be convicted of attempted armed robbery. The appellate court rejected that argument; expressly found that the evidence was "sufficient to find defendant guilty of attempt (armed robbery) for carrying a firearm" because eyewitnesses saw what appeared to be a gun; and held that "the focus is on the intended purpose of the firearm based upon its *design*, not the current status of its ability to be used as intended." *Hill*, 346 Ill. App. 3d at 547-49 (emphasis in original).

App (3d) 140036, ¶ 20 (same); *see also Washington*, 2012 WL 107993, ¶¶ 35-37 (cited in Def. Br. 19-20; under pre-amended statute, eyewitness testimony that defendant had gun was sufficient to affirm armed robbery conviction despite defense theory that unrecovered object was actually toy gun). Defendant's proposed new rule — that the People must prove that a gun was loaded and/or operable during the offense — cannot be squared with this longstanding, well-reasoned authority. Instead, defendant's proposed new rule would benefit defendants who are able to hide or damage their guns following their crimes, with no attendant benefit to the public or the criminal justice system.

The two other cases defendant primarily relies on in his cross-appeal also support the People's position. *See* Def. Br. 42-45 (citing *Worlds* and *Coburn*). In *Worlds*, the appellate court held that the defendant could not be convicted for possession of a "decrepit" gun he found in a dump, and which could not be cocked and "had no handle," but only because the defendant was charged with unlawful use of weapons, a crime that expressly exempts by statute possession of a gun that is "broken down in a non-functioning state." *Worlds*, 80 Ill. App. 3d at 630, 632 (quoting 720 ILCS 5/24-2(b)(4)). Similarly, in *Coburn*, the appellate court held that the defendant could not be convicted of illegal possession of a sawed-off shotgun because the sawed-off shotgun statute expressly required proof that the shotgun had "a barrel less than 18 inches in length" and the shotgun discovered by police was completely missing a barrel and there was no evidence that any particular barrel fit the stock. *Coburn*, 25 Ill. App. 3d at 545 (quoting 720 ILCS 5/24-1(a)(7)). Thus, defendant's own cases make clear that when the legislature intends to require a weapon to be operable or to have certain physical characteristics, it expressly identifies those requirements in the statute.

The remainder of defendant's cases are inapposite. *Skelton, Ross,* and *Robinson* all deal with statutes that have since been repealed; they do not examine the statutory definition of "firearm"; and they instead concern the evidence necessary to prove that fingernail clippers or toys are a "dangerous weapon," *i.e.*, that they could be used to bludgeon, stab, or otherwise harm someone. *Skelton*, 83 Ill. 2d at 66-67 (plastic toy gun was too small to be bludgeon); *Ross*, 229 Ill. 2d at 258, 277 (no evidence that tiny BB gun was dangerous weapon); *Robinson*, 73 Ill. 2d at 202 (fingernail clippers were dangerous weapon). *Sampson*, a nearly forty-year-old case from Massachusetts, merely holds that the defendant did not need a license to possess a "flare device" that was used for "signaling," and was not designed as a weapon. *Sampson*, 422 N.E. 2d at 452.

Accordingly, as the plain language of the Illinois criminal code makes clear, and as defendant's own cases expressly hold, the People were not required to prove that the Derringer was operable and/or loaded in order to prove the underlying predicate felony of attempted armed robbery with a firearm.

**3. Even if the prosecution were required to prove that the Derringer was functional during the attack, it did so.**

Lastly, even if defendant's new argument that the People were required to prove that the gun was functional at the time of the attack were not barred (it is) and even if it had merit (it does not), defendant's conviction should be affirmed because there was sufficient evidence for the jury to conclude that the Derringer was functional during the attack on the armored truck. As noted above, when a defendant challenges the sufficiency of the evidence, the Court must examine the evidence "in the light most favorable to the prosecution" and determine whether "*any* rational trier of fact" could have found the defendant guilty. *Beauchamp*, 241 Ill. 2d at 8. In the course of this

deferential review, the Court must "allow all reasonable inferences from the record in favor of the prosecution." *Id*.

There is sufficient evidence from which a factfinder could determine that the Derringer was functional during the offense. The defense itself admitted that defendant carried the Derringer to protect himself when he was in "dangerous neighborhoods" and that it could be loaded with .22 caliber bullets. R.V.EE67-68, 86.

Testimony from the People's witnesses, which defendant expressly does not challenge, also supports the conclusion that the Derringer was functional during the attack. Def. Br. 39. The People's forensic expert testified that the Derringer had all the essential elements of a firearm; she was able to load one barrel; and the issue that prevented it from firing at the time of examination was relatively minor — the firing pin struck too softly. R.IV.DD115-17. Furthermore, eyewitnesses testified that at the beginning of the attack, defendant and his partner verbally threatened to "shoot" and "kill" the first security guard. R.III.CC34, 183. And eyewitnesses testified that, after the first security guard ran toward the armored truck in an attempt to get away, defendant ran after him while carrying the Derringer; defendant then pointed the Derringer at the second security guard who had stepped out of the truck and was aiming his own gun at defendant. RIII.CC90-91, 137-40.

All of these admissions and actions by defendant are consistent with a person who was carrying a functional firearm. Accordingly, viewing the evidence in the light most favorable to the prosecution, and accepting all inferences in favor of the prosecution as this Court must do, it was reasonable for the jury to have rejected defense counsel's claim in closing argument that the gun did not work and presented no threat. Instead, a

factfinder could have reasonably determined that the Derringer was functional during the attack, and that the very slight damage to the gun occurred either during defendant's violent physical struggle with the first security guard (in which defendant put the security guard in a chokehold and attempted to strangle him), when defendant collapsed to the ground after being shot by the second security guard, or sometime thereafter.

* * *

In sum, defendant's claim that the People are required to prove that the Derringer was operable and loaded during the attack is barred because defendant took precisely the opposite position at trial. Moreover, as the plain language of the Illinois criminal code and defendant's own cases show, defendant's new theory is meritless because the People are not required to prove that a gun was operable and loaded to be a "firearm." And finally, even if the People were required to prove the Derringer was functional during the attack, the People met that burden.

**B. Even if Defendant's Firearm Theories Were Correct, the Proper Remedy Would Be to Affirm Defendant's Felony Murder Conviction Based On a Predicate Felony of Attempted Robbery.**

For the reasons explained in the People's opening brief, pp. 23-26, and *supra* 17-21, even if the People failed to prove that defendant was armed with a firearm during the attack, the proper remedy would be to treat the underlying predicate offense as attempted robbery (rather than attempted armed robbery) and affirm defendant's felony murder conviction. Defendant does not dispute that (1) reviewing courts have the power to convict a defendant of a lesser-included offense that was not charged or considered by the trier of fact; (2) attempted armed robbery is a lesser-included offense of attempted armed robbery; and (3) the evidence was sufficient to support a conviction for attempted

robbery. Def. Br. 30-31. And defendant's claim that attempted robbery is not the type of crime that may serve as the predicate offense for felony murder ignores the plain language of the criminal code. *Supra* 18-21; 720 ILCS 5/9-1(a)(3); 720 ILCS 5/2-8. Thus, even if defendant's sufficiency of the evidence argument were preserved and correct (it is not), defendant's felony murder conviction should still be affirmed.

## CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the Appellate Court and affirm defendant's conviction.

August 30, 2017

Respectfully submitted,

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**RULE 341(c) CERTIFICATE**

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

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**PROOF OF FILING AND SERVICE**

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. On August 30, 2017, the foregoing **Reply and Cross-Appellee's Brief of Plaintiff-Appellee People of the State of Illinois** was (1) filed with the Clerk of the Supreme Court of Illinois, using the court's electronic filing system, and (2) served by transmitting a copy from my e-mail address to the e-mail addresses of the persons named below.

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

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