No. 121371

IN THE

SUPREME COURT OF ILLINOIS

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

REPLY BRIEF FOR DEFENDANT-APPELLEE CROSS-RELIEF REQUESTED

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REPLY BRIEF FOR DEFENDANT CROSS-APPELLANT

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 A .22 Derringer Possessed By Robert Carey Was A Firearm Where The State's Proof Indicated That It Was Long Not Functional.

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).

In his cross-appeal issue, Carey has argued that contrary to settled law the jury at his trial did not actually consider whether the inoperable .22 Derringer in his possession at the time of the charged incident was "a

firearm." The State's answer avoids the thrust of Carey's argument that an evaluation of the evidence demonstrates that the instant Derringer did not constitute a firearm. Analysis, derived from case law, reveals the State's position to be erroneous.

The Finding of "Firearm" is a question of fact, which is to be decided by the evidence.

The issue of "firearm" is a question of fact that the jury is tasked with deciding. *People v. Williams*, 394 Ill. App.3d 286, 289-291 (1st Dist. 2009). Although the functionality of a firearm may be "immaterial," *Williams* recognized that, "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 289, 291. *Williams* affirmed the defendant's UUW conviction in that case because "there was no evidence presented from which the trier of fact could determine that its design was in fact altered or that it was so totally inoperable." *Williams*, 394 Ill. App.3d at 291. Here, in contrast, lack of evidence is decidedly not the case where *the State's own evidence established that Carey's Derringer was inoperable.* (R. DD116-117, 128-129).

The principles discussed in *Williams* are mirrored in cases from this Court. *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). The State fails to

distinguish *People v. Ross*, 229 Ill. 2d 255 (2008) (St. Reply/Cross-Appeal Brf. 34), where *Ross* leaves no doubt that functionality of a recovered weapon must be considered in finding a "firearm." *Ross*, 229 Ill. 2d at 276.

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 272. *Ross* examined previous approaches to the issue of dangerous weapons and observed that the *per se* approach found in *People v. Dwyer*, 324 Ill. 363 (1927), is "less than clear" and carried a "constitutionally suspect" view because it used a presumption that "shifts to the defendant the burden of proving that the weapon was not dangerous." 229 Ill. 2d at 273.

Ross examined previous cases that discussed "dangerous weapon," such as *People v. Skelton*, 83 Ill. 2d 58 (1980), which involved whether a toy gun, made of hard plastic and "tinny metal" could be considered a dangerous weapon. *Ross*, 229 Ill. 2d at 274. After observing *Skelton*'s discussion of various approaches – approaches which *Ross* found had "logical and practical difficulties" (229 Ill. 2d at 274-275) – *Ross* stated that the question of dangerous weapon was a question of fact. 229 Ill. 2d at 274-275. *Ross* observed that "the trier of fact may make an inference of dangerousness based upon the evidence," *and* reaffirmed that Illinois did not create a mandatory presumption that any gun is a dangerous weapon. 229 Ill. 2d at 276. *Ross* concluded:

> 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.

Factually, *Ross* found that "the State proved only that the defendant had a small BB gun and that it was a hard object" and thus did not constitute a dangerous weapon. *Ross*, 229 Ill. 2d at 276.

This Court in *Ross* rejected the presumption that all guns are dangerous. Implicit in that finding is that an article *designed as a firearm*, is *not automatically* "a firearm." The issue presented is a question of fact. Whether an object is a firearm is a determination to be made by the jury, *based on facts* – and not reliance on the design presumption as argued by the State. That same logic applies with equal force to the question of "firearm." In Carey's case, the State's reliance on, and the trial court's acceptance of, the "original design," *i.e.*, the "firearm" definition in the FOID Act, constituted a prohibited mandatory presumption in place of evidence.

Moreover, firearm expert Elizabeth Haley received the Derringer without ammunition (R. DD129), indicating that this article was unloaded at the time of the charged incident. On the subject of an unloaded weapon, after examining *Dwyer*, *Ross* stated: "it is difficult to characterize an unloaded gun as [a dangerous weapon]." *Ross*, 229 Ill. 2d at 273. Thus, *Ross* provides controlling insight on this matter.

The State's evidence failed to prove Carey possessed "a firearm"

In Carey's case, the State's evidence demonstrated conclusively that the Derringer was inoperable. (R. DD116-117, 128-129). State's firearm expert Haley examined Carey's Derringer and 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).

Consequently, based on its own evidence, the State established that, during the incident, Carey possessed an empty, inoperable Derringer, which was wholly unable to satisfy the basic nature of a firearm. It is abundantly logical that to be considered a firearm, a device needs 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. Vincent J. Di Maio, *Gunshot Wounds: The Practical Aspects of Firearms, Ballistics and Forensic Techniques* 47-51 (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.

The State's "original design" argument on appeal

In defense of its position at trial, the State on appeal proffers grounds that misinform defense counsel's actions and misrepresent the evidence. The State argues that defense counsel "invited" any instruction error (*i.e.*, informing the jury that it need only consider "design" to determine "firearm"),

but this position has a number of problems. St. Reply/Cross-Appeal Brf. 25-26. First, the State attempts to make the instant issue an instruction issue where this controversy, at trial and on appeal, has always been advanced as a deficiency in the State's proof.[1] *See* Carey's opening brief in the Appellate Court (Op. Brf. (App. Ct.), 24-27).

Second, the State's position ignores that it effectively precluded Carey at trial from raising the firearm challenge to the Derringer at bar. 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).[2] Consequently, the ruling on the State's motion eviscerated Carey's opportunity for a full challenge to the "firearm" element to the charged felony murder. Therefore, the State advances an egregiously false representation of the record where it contends that "[Carey] *was given free rein to contend that the Derringer was not a "firearm."* St. Reply/Cross-Appeal Brf., 25 (emphasis added); 26 ("defendant was given ample opportunity to present evidence and argument that it was not [a firearm]").

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[1]At trial defense counsel argued: "Carey . . . and his brother had these fake weapons, inoperable weapons"; "those weapons were unloaded." (R. EE86).

[2]Curiously, the State embraces this notion of defense agreement where defense counsel continued arguing against the court's original ruling on the State's motion *in limine* precluding defense challenge to the Derringer as a firearm. This objection is found in Carey's post-trial motion for new trial. (C. 163, ¶12).

Third, the State disregards the fact that defense counsel presented an instruction, albeit non-IPI, with a definition of "firearm" which provided that the device, despite its original design "is not likely to be used as a weapon." (C. 120). However, this instruction was refused. (R. EE24-25).

Finally, the notion that defense counsel agreed to the State's IPI instruction is belied by the record. St. Reply/Cross-Appeal Brf. 25-26. The record does reflect that defense counsel stated that IPI Criminal No. 18.35G was an accurate statement of the law. However, counsel's comment during the instructions conference about this instruction should not be regarded as global approval of the State's position. Rather, defense counsel stated the IPI instruction was accurate "on *that case* [*People v. Hill*, 346 Ill. App.3d 545 (4th Dist. 2004)]." (R. EE24) (emphasis added). *Compare* St. Reply/Cross-Appeal Brf. 26 ("defense counsel agreed that the definition of 'firearm' does not require the [State] to prove that the gun was operable at the time of the offense"). For the State to characterize the record as reflecting defense agreement to its instruction is an inaccurate rendition of the record.

The State contends that the trial court allowed the defense to adduce evidence that the Derringer was not a firearm and that defendant's failure to do so, "presumably" indicated that he was unable to find an expert "who would support his firearm theories." St. Reply/Cross-Appeal Brf. 24. The State may not shift "to the defendant the burden of proving that the weapon was dangerous." *Ross*, 229 Ill. 2d at 273. This is particularly so where the State's own evidence demonstrated that the weapon was inoperable and,

thus, not a firearm. *See People v. Weinstein*, 35 Ill. 2d 467, 470 (1966) (finding the State has the burden of proving all of the necessary facts which constitute a crime and that the burden of proof is always the responsibility of the State, and can never shift to the defense).

The State argues that "design" and the fact that one of the Derringer's barrels could be loaded indicated it to be "a firearm." St. Reply/Cross-Appeal Brf., 26-29. This contention is without support because nowhere in the testimony of its expert firearm witness did she suggest that the Derringer retained any ability (1) to strike the firing pin with suffice force to cause the explosion that expels the projectile; and (2) to expel the projectile out of the barrel. (*See* R. DD115-116). Thus, the State strains credulity in arguing that one barrel of the Derringer, which was physically capable of chambering a cartridge, demonstrates "firearm" even where that Derringer has otherwise lost the core characteristics of what is a firearm.

Alternatively, the State posits that its evidence indicated that the inoperable Derringer "was functional" during the charged incident since Carey "carried the Derringer to protect himself when he was in 'dangerous neighborhoods.'" St. Reply/Cross-Appeal Brf., 35. Based on this speculation, the State assumes that this Derringer "was functional." *Id.* It must be stressed that no such link or connection was suggested at trial. Moreover, the State's reasoning ignores the more logical likelihood that the middle-aged Carey had this inert article in his possession as a ruse, hoping this stratagem would deter younger street predators from bothering him.

The State also contends that in light of the standard of review that accepts "all inferences in favor of the prosecution," that this Court may infer that Carey's Derringer was functional at the start of the incident and that it was subsequently damaged during the "violent physical struggle" with security guard Julio Rodriguez. St. Reply/Cross-Appeal Brf. 35-36. The State alludes to the standard found in *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *accord People v. Cox*, 195 Ill.2d 378, 387 (2001). However, the State omits an important qualifier, that the inference must be *reasonable*. *Jackson*, 443 U.S. at 319. Here, there are *no facts* to support the inference that the Derringer was recently damaged.

Significantly, in the cause at bar, no evidence was adduced that the Derringer had been damaged during the incident, when it was not even displayed. The security guard who Carey tussled with, Rodriguez, testified that he never saw a firearm in Carey's hands. (R. CC66). It stands to reason that if, as the State posits, the Derringer was severely damaged, then the Derringer would have displayed; but, Rodriguez was adamant that he did not see the Derringer, so the weapon had not been displayed. (R. CC66). In fact, the State's recent damage theory is absurd where the Derringer, as found, was almost entirely held together by black duct tape. *See* People's Ex. No. 9.

Critically, Haley, the State's expert firearm witness, was never asked by the prosecution as to how long the Derringer had been damaged, and thus offered no opinion on this question. Therefore, the State's stark conjecture that the damage to the Derringer occurred on the day of the incident is made

of whole cloth and is not a reasonable inference.

The Jury Was Divested of Its Fact-Finding Function Where the State Tendered the Definition of "Firearm" So as to Provide a Mandatory Presumption.

The State's position that original design was the sole test of "firearm" is found in its instruction from IPI - Criminal No. 18.35G that defined "firearm" as it is found in FOID. *See* 720 ILCS 5/2-7.5 (West 2011), *citing* 430 ILCS 65/1.1 (West 2011). *See* St. Reply/Cross-Appeal Brf. 23-26. In its closing argument at trial, the prosecutor informed the jury that "design" of the .22 Derringer in Carey's possession was the only consideration in performing its fact-finding function. (R. EE106-107). Thus, in relying on design as the dispositive factor to determine the nature of the putative firearm, the inoperable Derringer, the actual functionality of the Derringer was excluded from consideration.

"Functionality" must be a consideration in the determination of "firearm," or else the IPI instruction would present an unconstitutional mandatory presumption. For the jury to be told to adhere exclusively to the FOID definition of firearm in its deliberation of the charge would be reliance on a prohibited mandatory presumption. *See People v. Pomykala*, 203 Ill. 2d 198, 204 (2003). As a consequence the jury was divested of its fact-finding function. On appeal to this Court, Carey has argued that any reliance on such a presumption, that design eliminates consideration of evidence pertaining to the putative firearm, is improper. This mandatory presumption is antithetical to approach indicated in *Ross*, 229 Ill. 2d at 273-274.

In its total reliance on the definition of firearm as found in FOID, the State shrinks from Carey's reasonable doubt challenge. St. Reply/Cross-Appeal Brf. 34. The State distinguishes Carey's cases by implementing an analysis that avoids the analytics set out in *Ross*. The State contends that *Ross* only pertains to "dangerous weapons" because that was the titular issue in the case. The State errs in its treatment of *Ross*.

Contrary to the State's position here, Carey's non-functional Derringer did not *ipso facto* qualify as a firearm, so as to fulfill the prosecution's burden of proof simply by this definition. Examining the question of "firearm," as in examining the issue of "dangerous weapon," *is* a fact-finding question to be decided by the jury, not by a statutory definition. *See Ross*, 229 Ill. 2d at 274-275. In its closing argument, the State informed the jury that "design" was the crucial factor in assessing "firearm":

> A firearm has to be designed, "*designed*" to expel a projectile. Your focus should be on the intended purpose of the firearm when it was "designed." *Not the current status of [its] ability to be used as originally intended*. That's why the word "design" is in there. The firearm is an object which is capable. *It has to be designed to [fire].* This was a firearm. Un-refuted [*sic*] testimony this was a firearm.

(R. EE106-107) (emphasis added). *See* (C. 121); IPI - Crim. No. 18.35G.

The notion of original "design" of the firearm cannot be presumptively conclusive to satisfy the State's burden of proof. Here, "firearm" is more than a term of art; *"firearm" is an essential element of the predicate offense.* (C. 31). The State can run, but it cannot hide from the *Ross* approach to the instant sufficiency issue. For the reasons discussed earlier in this section, "firearm" requires a finding that relies more than a statutory definition.

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 State proved 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 proving attempt armed robbery for the instant felony murder. *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) (ruling that without a barrel the item in question lacked the essential characteristics of a firearm).

The State argues that the Derringer satisfied the statutory definition of "firearm" (St. Reply/Cross-Appeal Brf. 27-32); however, reliance on a statutory provision is not the sole factor in the *Ross* rubric, which requires that the putative weapon be found sufficient by the jury as a question of fact and that this finding must be made based on the evidence – without dependence on a mandatory presumption. *See* Argument IIA. For these reasons, the State's reliance on the presumptive character of this statutory definition is misplaced in light of the controlling principles found in *Ross*.

The cases that the State string-cites to support its position where the courts focused only on the weapon's design are distinguishable and may be

broken into two camps. The first group cases involve UUW convictions. *See e.g.*, *People v. Halley*, 131 Ill. App. 2d 1070 (5th Dist. 1971); *People v. Martinez*, 285 Ill. App. 3d 881 (1st Dist. 1996) (St. Reply/Cross-Appeal Brf. 31). In a UUW prosecution, the charged offense is unambiguously delineated by statute; possession is the only requirement for any prescription under the statute. *See People v. Almond*, 2015 IL 113817, ¶¶33, 35-39. Consequently, this Court found in *Almond*, under a UUW statute, it did not matter whether a firearm was loaded or unloaded. *Almond*, 2015 IL 113817, ¶42. In other words, statutory proscription and possession is sufficient for conviction under the UUW statute. Significantly, a robbery charge, however, requires more than mere possession.

The lesson of *Ross* provides that "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." *Ross*, 229 Ill. 2d at 73, *quoting Dwyer*, 324 Ill. at 365. Under the current armed robbery statute, a factual determination must be made of the article's dangerousness if charged as "a dangerous weapon." Similarly, if an article is charged as "a firearm," then "a description of the weapon, from the manner of its use and the circumstances of the case," must be made.[3] *Id.*

The second group of cases relied on by the State are cases where no gun was recovered and the defense asked the reviewing court *to speculate* and

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[3]Likewise, an aggravated robbery charge requires examination of the facts surrounding the accused's conduct, even when he does *not* have a weapon. *See* 720 ILCS 5/18-1(b).

disregard testimonial evidence on whether the complainant provided believable testimony that the defendant wielded a firearm. *See e.g.*, *People v. Toy*, 407 Ill. App. 272 (1st Dist. 2011); *People v. Hill*, 346 Ill. App. 3d 545 (4th Dist. 2004); *People v. Lee*, 376 Ill. App. 3d 951 (1st Dist. 2007); *People v. Clark*, 2015 IL App (3d) 140036; *People v. Washington*, 2012 IL 107993 (St. Reply/Cross-Appeal Brf. 32-33). These cases are easily distinguishable from the cause at bar where the object here was recovered and *the State's evidence demonstrated that Carey's recovered Derringer was inoperable.*

This Court's recent decision in *People v. Wright*, 2017 IL 119561, illustrates the analysis in the second group of cases. *Wright* involved the prosecution of an armed robbery with a firearm by the defendant and a co-defendant. A Bakers Square restaurant had been robbed and evidence established that the co-defendant "dispos[ed] of the weapon before he was apprehended by police, and that no weapon was recovered." *Wright*, 2017 IL 119561, ¶¶3-4.

In the defendant's cross-appeal sufficiency challenge, Wright contended that the State failed to prove that he committed the armed robbery while armed with a firearm "because the victims only briefly saw the handle of the gun and there was evidence that during the robbery co-defendant actually possessed a BB gun." *Wright*, 2017 IL 119561, ¶69. To resolve its issue, *Wright* considered *Washington* (2012 IL 107993).

In reversing the appellate court, this Court in *Washington* relied on the victim's testimony that revealed that the gun had been pointed at him

and was held to his head, and then that defendant used the gun to force the victim into the cargo area of the truck. *Washington*, 2012 IL 107993, ¶¶24-36, *cited in Wright*, 2017 IL 119561, ¶¶72-73. *Washington* found that the victim gave "unequivocal testimony and the circumstances under which he was able to view the gun," which allowed the jury to "reasonably infer[ ]that the defendant possessed a real gun." *Washington*, ¶36.

Wright found the prosecution's evidence sufficient to prove that the co-defendant possessed a firearm, where the victim's testimony offered credible testimony to support that he was robbed with "an actual firearm." *Wright*, ¶¶76-77. Significantly, in contrast, *Wright* found *Ross* distinguishable because in *Ross* a BB gun, not a firearm, was actually recovered and the victim in *Ross* provided inconclusive testimony about the putative weapon, *e.g.*, " 'a black, very portable gun,' which was 'small' and 'something you can conceal.' " *Ross*, 229 Ill. 2d at 258, 276-277, *cited in Wright*, ¶¶74-75.

The appropriate analysis becomes clear when a comprehensive examination of these cases is made. Where a weapon is not recovered and the defense is basically asking the reviewing court to speculate that the complainant's testimony is insufficiently rendered, then consistent with the *Jackson v. Virginia* standard, the courts may consider credible trial testimony to affirm the finding that the article at issue was in fact a firearm. However, where the weapon *is* recovered, as in *Ross* and in the case at bar, then the weapon's actual characteristics or in this case its functionality, *must be considered.* This is no new law; rather, it is a practical application of the

Jackson v. Virginia standard.

Here, it is readily understandable that *Ross* is controlling, and not the State's cases. In *Ross*, the putative weapon (a pellet gun) was actually recovered (*Ross*, 229 Ill. 2d at 258, 272), unlike *Toy*, *Hill, Lee*, *Clark*, *Washington* and *Wright*. In *Ross*, the judge actually was able to determine the exact character of the weapon since it was recovered, although not introduced into evidence. *Ross*, 229 Ill. 2d at 258. In the State's cases, while unspoken, the reviewing courts were reluctant to reward the criminal's craftiness in concealing his weapon. These courts rightly refused to reinforce a maneuver that enabled the defense to ask the trier of fact to discard the victim's testimony as insufficient because the weapon was not recovered.

In sum, the cases cited by the State do not controvert the thrust of Carey's argument that, under *Ross*, the fact-finder must make a factual determination based on the evidence adduced, and not rely on a conclusive mandatory presumption. St. Reply/Cross-Appeal Brf. 25-29. Pursuant to *Ross*, where the actual Derringer was recovered and where the State's expert deemed it inoperable, it could not be considered "a firearm."

The State's procedural contentions

The State alternatively claims that Carey "abandoned" the instant sufficiency argument, because he has not raised the issue at every stage of the appeal process. St. Brf. 22. The State's position is baseless. Contrary to the State's assertion, Carey raised a sufficiency argument in the appellate court. In the initial unpublished Rule 23 Order, the Appellate Court rejected

Carey's sufficiency challenge to the inoperable .22 Derringer. *People v. Carey*, 2015 IL App (1st) 131944-U, Rule 23 Order, ¶¶73-74. The Appellate Court subsequently withdrew the unpublished order and filed an opinion in its place. *People v. Carey*, 2016 IL App (1st) 131944. Though Carey did not advance the instant sufficiency challenge in his petition for rehearing, the State cites no authority that every error must be raised on rehearing. Thus, the State's characterization that his petition for rehearing acted as an "abandonment" of the appellate claim fails.

On the same front, the State insists that Carey only raised in the Appellate Court a challenge to the prosecution's proof of "intent[ ] to rob the armored truck." St. Brf. 22. Carey wishes to dispel the State's obfuscation on the matter. Carey challenged the sufficiency of the prosecution's proof on the predicate felony, arguing in the sub-argument that "[t]he State failed to prove that the item Carey possessed was a firearm." Opg Brf (App. Ct.) 24. The gravamen of this sub-argument contended that –

> [b]ecause the State failed to prove Carey was armed with an item capable of functioning as a firearm, the State failed to prove the predicate offense for the instant felony murder prosecution.
>
> Opg Brf. (App. Ct.) 24.

See also Carey, 2015 IL App (1st) 1311944-U, Rule 23 Order, ¶¶73-74 (where the Appellate Court reviewed the claim that the Derringer did not qualify as a firearm). This is the self-same argument raised in the instant cross-appeal, albeit with additional supporting reasons for his challenge, which challenged the prosecution's "design" paradigm as presenting an inappropriate

mandatory presumption. Opg Brf. 39-42.

Because this issue involves the sufficiency of proof on an essential element of a felony murder case, it is not subject to forfeiture on appeal. *See People v. Walker*, 7 Ill.2d 158, 160 (1955) ("[t]he failure to prove a material allegation . . . beyond a reasonable doubt is fatal to a judgment of conviction, and the question may be raised for the first time upon review"), *cited in People v. Lucas*, 231 Ill.2d 169, 175 (2008). Consequently, the State cannot shirk from its fundamental duty to respond to a challenge to the sufficiency of proof to an essential element of its prosecution.

Finally, the State alternatively asserts that "even if [it] failed to prove that [Carey] was armed with a firearm during the attack, the proper remedy would be to treat the underlying predicate offense as an attempted robbery (rather than attempted armed robbery) and affirm [the] felony murder conviction." St. Reply/Cross Appeal Brf. 36. In its attempt to salvage its felony murder conviction, the State advances a new argument that it failed to raise in the appellate court prior to the instant appeal. Therefore, this argument is forfeited. *Lucas*, 231 Ill. 2d at 175 (the doctrine of forfeiture applies equally to the State), *cited in People v. Holman*, 2017 IL 120655, ¶28. As detailed in Carey's opening brief, the State's "inclusion" contention is premised on a mechanical lesser-included analysis for non-enumerated forcible felonies approach that has been rejected. *See* Op. Brf. 30-35.

The State's new theory, that the failure to prove "firearm" reduces the allegation in the indictment to simple robbery, cannot be accepted in light of

the facts at bar. In Carey's case, there is insufficient proof to support a forcible felony finding for the inchoate offense of attempted robbery. *See* Op. Brf. 34-35. Moreover, the Appellate Court, in reversing Carey's conviction, agreed that the charging instrument was deficient under due process, relying on the *Pujuoe* (*People v. Pujuoe*, 61 Ill. 2d 335 (1975)) line of cases. The State has cited no case for the proposition that a lesser-included offense may be drawn from a constitutionally deficient charge. *See* St. Reply and Cross-Appeal Brf., 36-37.

In sum, for the reasons set forth above, and those found in his opening argument, Robert Carey asks that this Court to reverse his felony murder conviction outright, where the State failed to prove the underlying predicate offense of attempted armed robbery with a firearm.

CONCLUSION

For the foregoing reasons, Robert Carey, defendant-appellee, respectfully requests that this Court affirm the reversal of his conviction under Argument I, or reverse his felony murder conviction outright under Argument II.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I, Manuel S. Serritos, certify that this reply brief conforms to the requirements of Supreme Court Rule 341(a) and (b). The length of this reply brief, excluding pages containing the Rule 341(d) cover and the Rule 341(c) certificate of compliance is 20 pages.

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Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. On October 20, 2017, the Cross-Appeal Reply Brief was filed with the Clerk of the Supreme Court of Illinois using the court's electronic filing system in the above-entitled cause. Upon acceptance of the filing from this Court, persons named above with identified email addresses will be served using the court's electronic filing system and one copy is being mailed to the defendant-appellee in an envelope deposited in a U.S. mail box in 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 Cross-Appeal Reply Brief to the Clerk of the above Court.

/s/Carol Chatman
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