No. 129967

IN THE
SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Respondent-Appellant, v. TRAVARIS GUY, Petitioner-Appellee.	))))))))))	On Appeal from the Appellate Court of Illinois, Third District, Nos. 3-12-0423 & 3-21-0426 There on Appeal from the Circuit Court of Twelfth Judicial Circuit, Will County, Illinois, No. 02-CF-1974 The Honorable David M. Carlson, Judge Presiding.

BRIEF AND APPENDIX OF PLAINTIFF-APPELLANT PEOPLE OF THE STATE OF ILLINOIS

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POINTS AND AUTHORITIES

NATURE OF THE ACTION

The People appeal from the appellate court's judgment vacating petitioner's conviction for attempt first degree murder (attempted murder) without a new trial. No issue is raised concerning the adequacy of the pleadings.

ISSUES PRESENTED FOR REVIEW

Defendant was convicted of the second degree murder of David Woods (David) and the attempted murder of David's daughter, Sheena Woods (Sheena). The trial court, with the agreement of defense counsel, used the Illinois Pattern Jury Instruction (IPI) for attempted murder, which articulated the necessary mental state to convict as the "intent to kill."

On appeal from petitioner's successive postconviction petition, the appellate court held that the required mental state for attempted murder is the "intent to kill without lawful justification." The court further held that this mental state could not be reconciled with the guilty verdict of second degree murder based on unreasonable self-defense.

The issues presented are:

1. Whether petitioner failed to show the cause necessary to file a successive postconviction petition.

2. Whether, where trial counsel agreed to use the IPI, the invited error doctrine barred direct appeal counsel from arguing that the jury instruction was improper.

3. Whether direct appeal counsel provided effective assistance because the IPI correctly set forth the mental state required for attempted murder: intent to kill.

4. Whether the verdicts were consistent even if attempted murder required the "intent to kill without legal justification" because the convictions for second degree murder and attempted murder were based on separate acts.

5. Whether, if the verdicts were inconsistent, the appropriate remedy was retrial or the imposition of a conviction on the lesser included offense of aggravated battery with a firearm, rather than vacatur without retrial.

JURISDICTION

Jurisdiction lies under Supreme Court Rules 315(a), 612(b)(2), and 651(d). On November 29, 2023, this Court allowed the People's petition for leave to appeal.

STATUTES INVOLVED

720 ILCS 5/7-1 (2002)[2]

> A person is justified in the use of force against another when and to the extent that he reasonably believes that such conduct is necessary to defend himself or another against such other's imminent use of unlawful force. However, he is justified in the use of force which is intended or likely to cause death or great bodily harm only if he reasonably believes that such force is necessary to prevent imminent

[2] Revisions to the statutes since 2002, when petitioner committed the crimes at issue, do not alter the outcome in this case.

death or great bodily harm to himself or another, or the commission of a forcible felony.

720 ILCS 5/7-14 (2002)

A defense of justifiable use of force, or of exoneration, based on the provisions of this Article is an affirmative defense.

720 ILSC 5/8-4 (2002)

(a) Elements of the Offense.
A person commits an attempt when, with intent to commit a specific offense, he does any act which constitutes a substantial step toward the commission of that offense.

720 ILCS 5/9-1 (2002)

(a) A person who kills an individual without lawful justification commits first degree murder if, in performing the acts which cause the death:

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

720 ILCS 5/9-2 (2002)

(a) A person commits the offense of second degree murder when he commits the offense of first degree murder as defined in paragraphs (1) or (2) of subsection (a) of Section 9-1 of this Code and either of the following mitigating factors are present:

(1) At the time of the killing he is acting under a sudden and intense passion resulting from serious provocation by the individual killed or another whom the offender endeavors to kill, but he negligently or accidentally causes the death of the individual killed; or

> (2) At the time of the killing he believes the circumstances to be such that, if they existed, would justify or exonerate the killing under the principles stated in Article 7 of this Code, but his belief is unreasonable.
>
> * * *
>
> (c) When a defendant is on trial for first degree murder and evidence of either of the mitigating factors defined in subsection (a) of this Section has been presented, the burden of proof is on the defendant to prove either mitigating factor by a preponderance of the evidence before the defendant can be found guilty of second degree murder. However, the burden of proof remains on the State to prove beyond a reasonable doubt each of the elements of first degree murder and, when appropriately raised, the absence of circumstances at the time of the killing that would justify or exonerate the killing under the principles stated in Article 7 of this Code. In a jury trial for first degree murder in which evidence of either of the mitigating factors defined in subsection (a) of this Section has been presented and the defendant has requested that the jury be given the option of finding the defendant guilty of second degree murder, the jury must be instructed that it may not consider whether the defendant has met his burden of proof with regard to second degree murder until and unless it has first determined that the State has proven beyond a reasonable doubt each of the elements of first degree murder.

STATEMENT OF FACTS

I. Petitioner Was Convicted of the Second Degree Murder of David and the Attempted Murder of Sheena.

Petitioner was charged with the first degree murder of David, C24-25, and the attempted murder of Sheena, C26, after shooting them in the course of an ongoing family feud, R577-78.[3] A warrant issued for petitioner's arrest, but petitioner fled Illinois and remained a fugitive from justice for more than a year. *See* R194, 224, 540-42. The FBI arrested petitioner in Atlanta,

[3] "C_," "R_," and "A_" refer to the common law record, the report of proceeding, and the appendix to this brief.

Georgia; petitioner told the arresting agent that his cousin, Ronald Guy (Ronald), shot David. R194, 224, 540-42, 545.

Prior to trial, the court admonished petitioner about his potential sentences, explaining that the sentences would be served consecutively because there were "two separate shootings." R247-48. After petitioner argued that his actions were "all in one," the trial court responded, "actually it's not," there were "two people, one dead and one wounded," and the two murder counts were based on "one act" and the attempted murder count was based on "a second act." *Id.*

A. Sheena and her fellow passengers testified that petitioner shot at their van, killing David and injuring Sheena.

At trial, Sheena, David L. Woods (David L.), who was Sheena's cousin and David's nephew, and Constance Daniels (Constance), who was David L.'s girlfriend, testified that petitioner opened fire on them, killing David and injuring Sheena.

Specifically, David, Sheena, David L., and Constance were riding in David's van. R271, 307-08, 363. David was driving, David L. was in the front passenger seat, Sheena sat behind her father, and Constance sat behind David L. R272, 363. None of them had guns, R283, 321, 371, and a later gunshot residue analysis found no evidence that David had fired a gun, R815.

While the van was stopped at a traffic light, Constance saw petitioner and Corzell Cole pull up on the driver's side of the van in a Chevrolet Malibu.

R272, 311. She said, "[T]here they go." R272, 311. Sheena looked out her window and saw Cole driving and petitioner in the passenger seat; the Malibu had pulled up alongside the van so that petitioner and Cole were parallel with Sheena and Constance. R272, 287, 313, 365-66. Sheena testified that because David's window was stuck, he opened his door to see who it was because he could not see the Malibu from that angle. R272-73, 283. Petitioner fired a gun, and David fell back. R273, 311-12, 366. David stumbled to the back of the van and lay down, bleeding. R273, 315-16, 367. He then directed the others in the van to take him to a hospital. R273.

After David had been shot and stumbled to the back of the van, Sheena turned to look at her father but fell over; she had also been shot. R273-74, 366. Petitioner fired more shots, R274, and David L. drove away, R275, 316-17, 368-69. The forensic pathologist testified that David was shot in the back of his left arm, and the bullet moved upward though the back of his shoulder, penetrated his neck, and lodged in the base of his neck, killing him. R343-48. Sheena was hospitalized for five days with shattered bones in her back. R276.

B. Petitioner testified that he shot in self-defense because his cousin was feuding with the Woods family.

Petitioner testified that his cousin, Ronald, gave him a gun because Ronald "was into it with the Woods family," who lived near petitioner's girlfriend. R577-78. Petitioner conceded that he was never threatened or shot at. R586. On the day of the shooting, Cole picked up petitioner, who put

the car window down because he was smoking. R579-80. At the intersection, petitioner saw David looking at him with an angry expression. R580-81. Petitioner also saw that there were people in the backseat of the van. R582-83. David opened the door, Cole screamed, and David pulled out a silver gun. R583-84. Petitioner ducked and fired his gun without looking. R584. After the shooting, Cole and petitioner gave the gun and car to Ronald and left town in a different car. R600-02.

Petitioner also presented several witnesses who testified about threats by the Woods family toward members of petitioner's family. *See* R611-12, 629-32, 664, 687, 698-700, 730.

In rebuttal, the People introduced stipulations that various witnesses would testify that Ronald had been aggressive toward the Woods family during the months leading up to the shooting. R835-45.

C. The trial court used the IPI for attempted murder with petitioner's agreement.

The trial court instructed the jury with IPI, Criminal, 6.05X, which states that "[a] person commits the offense of attempt first degree murder when he, without lawful justification, and with the intent to kill an individual, does any act which constitutes a substantial step toward the killing of an individual." C439, 481; R912-13. Petitioner agreed to the instruction. R854.

The court also gave IPI, Criminal, 6.07X and IPI, Criminal, 24-25.06A, which instructed that to sustain the attempted murder charge, the People

had to prove that petitioner "performed an act which constituted a substantial step toward the killing of an individual," "did so with the intent to kill an individual," and "was not justified in using the force." C437, 482. Petitioner did not object to these instructions, either. R854.

Over the People's objection, the court instructed the jury that aggravated battery with a firearm was a lesser included offense of attempted murder. R854-55; C475-76. Specifically, the jury was instructed that it could find petitioner not guilty of attempted murder, guilty of attempted murder, or guilty of aggravated battery with a firearm. C440.

With respect to murder, without objection, the court gave IPI, Criminal, 7.01, which states that a "person commits the offense of first degree murder when he kills an individual without lawful justification if, in performing the acts which cause the death, he intends to kill or do great bodily harm to that individual; or he knows that such acts create a strong probability of death or great bodily harm to that individual." C446. Further, without objection from the People, the court gave petitioner's proposed IPI, Criminal, 7.05, which states that "[a] mitigating factor exists so as to reduce the offense of first degree murder to the lesser offense of second degree murder if at the time of the killing the defendant believes that circumstances exist which would justify the deadly force he uses, but his belief that such circumstances exist is unreasonable." C445, 478; R914-15.

D. The trial court responded to two jury questions during deliberations.

The trial court responded to two questions from the jury during their deliberations. First, the jury asked, "Are there only two counts? Number one, murder of David Woods?, number two, attempt murder of Sheena Woods?" R920. The trial court and the parties agreed to answer that there were three counts: two counts of murder that were merged into one series of verdict forms, and one count of attempted murder. R922-23.

Second, the jury asked, "The attempted murder charge means attempted on whom?" R923. Over the objection of defense counsel, the trial court responded that the answer was contained in the instructions. R926.

E. The jury found petitioner guilty, and the trial court sentenced him to consecutive prison sentences.

The jury found petitioner guilty of second degree murder and attempted murder. C431-32; R928.[4]

Petitioner filed a motion for judgment notwithstanding the verdict, arguing, among other things, that "the finding of guilt on the attempt first degree murder is legally inconsistent with the finding of guilt on the second degree murder." C577. Petitioner also filed a motion for a new trial, arguing, in part, that the jury instructions "failed to properly instruct the jury as to

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[4] In a separate trial, a jury convicted Cole of first degree murder and attempted first degree murder, and the trial court sentenced him to consecutive prison terms of 35 and 15 years. *See People v. Cole*, 2012 IL App (3d) 110787-U.

elements of the offense of attempt 1st degree murder." C581. The trial court denied the motions. R957.

Petitioner also filed a pro se "Motion to Dismiss, Vacate, or Reverse Conviction of Attempted First Degree Murder" and an amended motion, both arguing that he could not be convicted of attempted murder because he was convicted of second degree murder, which contained an inconsistent mental state. C603-05, 611-13. Petitioner also filed a pro se "Post Trial Motion Defendant's Issues to Preserve for Appeal," which argued, among other things, that the jury instructions were incorrect because they misstated that he could be convicted of attempted murder if he did not have the intent to commit murder because he believed he was acting in self-defense. C641, 651. The trial court had previously indicated that it would not rule on petitioner's pro se motions that counsel did not adopt, *see* R82, 86, 90, 99-100, 115, which counsel did not do.

The court sentenced petitioner to consecutive 30-year prison terms. C678; R1020.

F. On remand, the trial court found no allegations of ineffective assistance of counsel that warranted further proceedings.

On direct appeal, the appellate court affirmed, but, in response to this Court's supervisory order, *People v. Guy*, 226 Ill. 2d 596 (2007), the appellate court vacated the portion of its decision concluding that the trial court had adequately addressed petitioner's ineffective assistance of counsel claims and

remanded to the trial court with instructions to examine the allegations in petitioner's posttrial motions pursuant to *People v. Krankel*, 102 Ill.2d 181 (1984). C731. On remand, petitioner filed a pro se "Amended Motion for New Trial," which argued, among other matters, that the verdicts were inconsistent because the second degree murder conviction showed that the jury found that petitioner believed he was acting in self-defense, and that counsel was ineffective for failing to ensure that the jury was properly instructed. C783, 812, 861; *see also* R1249 (defendant arguing about jury instructions and inconsistent verdicts, including that the jury "came back with inconsistent verdict[s]" and "they believed that I acted in self-defense . . . and they seen it was unreasonable how I went about it so it's impossible for me to have intent to kill the person").

The trial court denied the motion. C896; R1314-16. Petitioner appealed but did not raise any argument that the jury verdicts were inconsistent or that the jury instructions regarding attempted murder were improper. *See* A4 ¶ 16. The appellate court affirmed. C1063, 1073.

II. The Appellate Court Vacated Petitioner's Attempted Murder Conviction on Appeal from his Successive Postconviction Petition.

A. The trial court denied petitioner's initial postconviction petition.

Petitioner filed a postconviction petition, raising several claims not now before this Court. C1075-1154. The trial court summarily dismissed the petition as frivolous and patently without merit. C1156-58. The appellate

court affirmed and granted appointed postconviction appellate counsel's motion to withdraw. C1235-37.

B. The trial court granted petitioner a new trial on the attempted murder charge based on the successive postconviction petition's claim regarding the responses to jury questions.

In 2015, petitioner filed a pro se successive postconviction petition, C1469, arguing, among other things, that trial and direct appeal counsel were ineffective for failing to argue that he was innocent of attempted murder because he could not have intended to kill Sheena when he was acting under an unreasonable belief that he needed to defend himself against David, C1509-12. Petitioner further argued that ineffective assistance of trial and direct appeal counsel constituted cause for his failure to raise the claim earlier and that direct appeal counsel "advised [petitioner] to focus on new issues in [his] post-conviction petition." C1522-23. The petition attached two letters from direct appeal counsel: in 2006, while petitioner's direct appeal was pending, his direct appeal counsel stated that counsel believed "it was not possible to challenge your attempt first degree murder conviction in this [direct] appeal" based on *People v. Lopez*, 166 Ill. 2d 441 (1995) (no crime of attempt second degree murder in Illinois), and *People v. Hill*, 276 Ill. App. 3d 683 (1st Dist. 1995) (transferred intent doctrine applies to attempted murder), C1517; in 2010, after the appellate court affirmed petitioner's conviction, direct appeal counsel provided a "general suggestion" that in any

postconviction petition, petitioner "focus on new issues" and not on issues that "could have been raised during trial or the appeal," C1515.

The People responded to petitioner's motion for leave to file, C1576, and the trial court denied leave, finding that petitioner failed to demonstrate cause and prejudice, C1582; R1439. The appellate court vacated the order and remanded with directions for the trial court to consider the petition without input from the People. C1771-74.

On remand, petitioner filed a pro se amended postconviction petition, C1785, which the trial court granted leave to file, R1490.

Petitioner then filed a second amended postconviction petition — with the assistance of counsel — which argued, among other things, that the second degree murder and attempted murder verdicts were inconsistent and that the trial court's responses to jury questions during deliberations were erroneous and confusing. C1865, 1871. In a counseled supplemental petition, petitioner claimed that direct appeal counsel was ineffective for failing to argue that the attempted murder and second degree murder verdicts were inconsistent. C1946-47

The trial court granted the People's motion to dismiss the successive petition as to all but the claim regarding the responses to the jury questions, which the trial court advanced to the third stage. R1665-66. The trial court subsequently held that petitioner was entitled to a new trial on the

attempted murder charge because the responses to the jury's questions, combined with the verdict forms, created confusion. C2020.

C. The appellate court reversed the attempted murder conviction outright based on allegedly inconsistent verdicts.

The appellate court consolidated the People's appeal of the order granting a new trial on the attempted murder charge with petitioner's appeal of the second stage denial of his claim that the inconsistent verdicts required an outright reversal of that conviction. A2 ¶ 1. On appeal, petitioner argued that direct appeal counsel was ineffective for failing to raise claims that (1) the attempted murder verdict was inconsistent with his second degree murder conviction, and (2) the jury was not properly instructed as to the required mental state for attempted murder. *See* A5 ¶¶ 25-26. The appellate court acknowledged that the successive postconviction did not include the latter argument but reasoned that even if counsel's failure to add it "did not rise to the level of unreasonable assistance" to excuse the forfeiture, the court "would reach the same outcome" because the claim "went part and parcel with the inconsistent verdict issue." A6 ¶ 26; *see also* A5 ¶ 25 ("instructional error issue" was "an outgrowth of the inconsistent verdict issue").[5]

[5] Although the matters were consolidated, because the People did not argue in the briefs for petitioner's appeal, *see* A5 ¶ 20, that he failed to satisfy the cause and prejudice necessary to obtain leave to file a successive postconviction petition, *see* 725 ILCS 5/122-1(f); *People v. Griffin*, 2024 IL 128587, ¶ 66, the appellate court did not address whether the advice of direct appeal counsel to petitioner could establish cause for petitioner's failure to include the claim in his initial postconviction petition.

The appellate court acknowledged that this Court had "expressly held that attempted first degree murder requires a specific intent to kill." A6-7 ¶¶ 27, 37 (citing *People v. Trinkle*, 68 Ill. 2d 198 (1977), and *People v. Harris*, 72 Ill. 2d 16 (1978)). But, the appellate court continued, the Court subsequently "suggested that 'intent to kill' was not enough." A7 ¶ 37 (citing *People v. Barker*, 83 Ill. 2d 319 (1980)). Specifically, the appellate court reasoned that in two cases addressing whether Illinois law recognized a crime of second degree murder (and its predecessor, voluntary manslaughter), the Court "implicitly held that the 'intent to kill' in . . . attempted first degree murder, respectively, means an 'intent to kill without lawful justification.'" A7 ¶ 37 (citing *People v. Lopez*, 166 Ill. 2d 441 (1995), and *People v. Reagan*, 99 Ill. 2d 238 (1983)).

By the appellate court's reasoning, the trial court erred by using the IPI, which instructs that the mental state for attempted murder is "the intent to kill," and thus allowed the jury to "simultaneously find that defendant committed attempted first degree murder, which requires an intent to kill without lawful justification, even though it also found that defendant believed in the need for self-defense." A12-13 ¶ 61. According to the appellate court, the jury's determination that petitioner had an unreasonable belief in self-defense was inconsistent with, and precluded, a conviction for attempted murder. A14 ¶ 67.

While acknowledging that the remedy for inconsistent verdicts "is usually to reverse and remand for a new trial," the appellate court determined that retrying defendant on the attempted murder charge would violate the prohibition against double jeopardy. A17-18 ¶¶ 82-83. The appellate court did not consider whether it could enter a conviction for aggravated battery with a firearm or remand for a jury to decide whether petitioner was guilty of that lesser included offense — on which the jury was instructed — because the People "never charged" petitioner with that offense. A18 ¶ 85. Accordingly, the appellate court reversed the attempted murder conviction outright. A18 ¶ 86. Because the appellate court granted relief on petitioner's claim, it did not consider the People's appeal. A2 ¶ 1.

STANDARDS OF REVIEW

This Court reviews de novo whether petitioner demonstrated the necessary cause and prejudice to file a successive postconviction petition, *People v. Montanez*, 2023 IL 128740, ¶ 80, whether the doctrine of invited error applies to bar defendant's claim, *see People v. Sutherland*, 223 Ill. 2d 187, 197 (2006), whether petitioner was denied the effective assistance of counsel, *People v. Johnson*, 2021 IL 126291, ¶ 52, and whether to enter a conviction for a lesser included offense, *People v. Clark*, 2016 IL 118845, ¶ 32.

ARGUMENT

As an initial matter, petitioner failed to demonstrate the cause necessary to file a successive postconviction petition. His assertion that his

direct appeal counsel advised him not to raise the issues presented in his successive petition in his initial postconviction petition does not provide cause because direct appeal counsel did not represent him during the initial postconviction proceedings.

Moreover, for at least three reasons, direct appeal counsel was not ineffective for declining to argue that the IPI did not properly instruct the jury regarding the mental state for attempted murder and that this instructional error led to a verdict inconsistent with petitioner's second degree murder conviction. A5-6 ¶ 26.

First, because trial counsel agreed to the IPI, the doctrine of invited error barred direct appeal counsel from raising the argument.

Second, the IPI accurately stated the law by implementing this Court's precedent holding that "an attempted murder requires an intent to kill." *Harris*, 72 Ill. 2d at 24. Contrary to the appellate court's reasoning, this Court has not overruled *Harris* or held that attempted murder requires an intent to kill "without lawful justification."

Third, even if the IPI misstated the law, the verdicts were legally consistent. A rational jury could have found that petitioner acted with an unreasonable belief in the need for self-defense when he fired the shot at David that led to the second degree murder conviction but had no such belief when he subsequently fired the shot at Sheena that led to the attempted

murder conviction. In other words, even if attempted murder required an intent to kill without lawful justification, the verdicts were not irreconcilable.

Finally, even if the verdicts were inconsistent, the appellate court should not have reversed petitioner's convictions outright. Double jeopardy does not bar retrial on the attempted murder charge because (1) the alleged error was invited by defendant, and (2) the United States Supreme Court has rejected the civil practice issue preclusion rule applied by the appellate court. Alternately, even if double jeopardy did preclude retrial on the attempted murder charge, the proper remedy would be to enter a conviction on the lesser included offense of aggravated battery with a firearm.

I. Petitioner Failed to Demonstrate Cause Necessary to File a Successive Postconviction Petition.

Petitioner failed to show the cause necessary to file a successive postconviction petition. His assertion that direct appeal counsel incorrectly advised him not to raise the inconsistent verdicts issue in his initial postconviction petition cannot constitute cause because direct appeal counsel did not represent petitioner in the initial postconviction proceedings, where petitioner proceeded pro se.

The "legislature designed the Postconviction Act with the intention that defendants be allowed to file only one petition under the statute." *People v. Montanez*, 2023 IL 128740, ¶ 73 (citing 725 ILCS 5/122-1(f)). Because "the deterrent effect of our criminal laws is undermined when criminal convictions lack finality," this Court has "held that the filing of a successive

postconviction petition is highly disfavored . . . and allowed only in very limited circumstances." *Id.* ¶ 73. In particular, "a defendant seeking leave to file a successive postconviction petition must be able to demonstrate to the circuit court that there is 'cause' for his failure to bring the claim in his initial postconviction proceedings and that 'prejudice' results from that failure." *Id.* ¶ 76. "'Cause' refers to some objective factor external to the defense that impeded" the defendant from raising the claim in an earlier proceeding. *Id.* ¶ 77. Advice from a lawyer who does not represent the defendant does not constitute such a circumstance. Petitioner thus cannot demonstrate cause entitling him to a successive postconviction petition.

To begin, it is unclear whether counsel's performance during postconviction proceedings can *ever* constitute cause for failure to raise a claim. *See People v. Ramey*, 393 Ill. App. 3d 661, 669 (1st Dist. 2009) (citing *People v. Szabo*, 186 Ill. 2d 19, 44 (1998)). But even if it could, cause certainly cannot come from the advice of an attorney who does not represent the defendant during the relevant proceedings. *See People v. Flores*, 153 Ill. 2d 264, 281-82 (1992) (suggesting petitioner might show cause for failure to include ineffective assistance of direct appeal counsel claim in initial petition if counsel continued to represent petitioner in postconviction proceedings). And here direct appeal counsel did not represent petitioner following the conclusion of the direct appeal.

In addition, the record shows that petitioner was aware of the inconsistent verdict issue when he prepared his initial postconviction petition, as versions of the argument appeared in both his counseled and pro se posttrial motions. *See supra* pp. 9-10; *see also* C577, 603-05, 611-13, 641, 651. Indeed, the letter from direct appeal counsel advised petitioner that if he disagreed with the manner trial or direct appeal counsel handled his case, he could argue in his postconviction petition "that all of your previous lawyers, including me, were ineffective for missing the issue." C1515. But petitioner decided not to raise the claim. In other words, even if the attorney who previously represented petitioner gave him faulty advice, that does not excuse petitioner's failure to raise the claim in his initial petition.

Nor did the People forfeit this argument, as the appellate court suggested. A5 ¶ 20 (stating that the People did "not argue that [petitioner] failed to satisfy cause and prejudice" in "appeal No. 3-21-0426," which was petitioner's appeal from the second stage denial). The People argued that petitioner failed to satisfy the cause and prejudice requirements in Case No. 3-21-0423, which was the People's appeal from the grant of a new trial based on the answers to jury deliberation questions. Because the matters were consolidated, A2 ¶ 1, the "cause" issue was properly before the appellate court and there was no forfeiture.

Moreover, "[a]n appellee in the appellate court may raise a ground in this [C]ourt which was not presented to the appellate court in order to

sustain the judgment of the trial court, as long as there is a factual basis for it." *Dillon v. Evanston Hosp.*, 199 Ill. 2d 483, 491 (2002); *see also People v. Schott*, 145 Ill. 2d 188, 201 (1991) (same).[6] Alternatively, "because forfeiture is a limitation on the parties and not the court," this Court can "consider the State's argument." *People v. Sophanavong*, 2020 IL 124337, ¶ 21. Accordingly, this Court should hold that because petitioner cannot demonstrate cause entitling him to file his successive postconviction petition, the trial court should have denied leave to file it.

II. Direct Appeal Counsel Was Not Ineffective for Declining to Argue that the IPI for Attempted Murder Misstated the Law and Led to Inconsistent Verdicts.

In any event, direct appeal counsel was not ineffective for declining to raise meritless claims that were also foreclosed by the invited error doctrine. To establish that direct appeal counsel was ineffective, petitioner must show both that "counsel's performance was deficient and that, but for counsel's errors, there is a reasonable probability that the appeal would have been successful." *People v. English*, 2013 IL 112890, ¶ 33. "Appellate counsel is not obligated to raise every conceivable issue on appeal, but rather is expected to exercise professional judgment to select from the many potential claims of error that might be asserted on appeal" and "is not required to raise issues that he reasonably determines are not meritorious." *Id.* ¶¶ 33-34

[6] The People were appellee in the appellate court on all issues but the responses to the jury questions.

(internal quotation marks omitted). Here, counsel reasonably could have determined that petitioner's IPI-related claims were not meritorious, and indeed, there is no reasonable probability that petitioner's direct appeal would have been successful had counsel raised these claims.

First, the invited error doctrine barred direct appeal counsel from arguing that the IPI for attempted murder misstated the law and led to legally inconsistent verdicts. *See infra* Section II.A. Second, the IPI accurately stated the law. *See infra* Section II.B. And third, even if attempted murder requires "an intent to kill without lawful justification" — and it does not — the verdicts were not legally inconsistent because a rational jury could have found that petitioner acted with an unreasonable belief in the need for self-defense when he fired the shot that killed David but had no such belief when he subsequently fired the shot that injured Sheena. *See infra* Section II.C.

A. Direct appeal counsel was not ineffective for declining to raise claims barred by the invited error doctrine.

Because trial counsel agreed to the challenged IPI, *see* R854, the doctrine of invited error barred counsel from arguing on direct appeal that the jury was incorrectly instructed, *People v. Parker*, 223 Ill. 2d 494, 508 (2006); *see also People v. Carter,* 208 Ill. 2d 309, 319 (2003) ("Under the doctrine of invited error, an accused may not request to proceed in one manner and then later contend on appeal that the course of action was in error.").

As the appellate court recognized, based on the instructions given to petitioner's jury — to which petitioner agreed — there was no inconsistency in the verdicts. A17-18 ¶ 83. Because the invited error doctrine barred any argument that the IPI misstated the law, petitioner similarly could not argue that this alleged instructional error led to inconsistent verdicts. In other words, petitioner agreed to proceed in the trial court with the mental state for attempted murder being "intent to kill" and thus he was barred by the invited error doctrine from asserting on appeal any claim premised on the mental state being otherwise. Direct appeal counsel could not be ineffective for declining to raise arguments barred by the invited error doctrine, and the ineffective assistance of appellate counsel claims fails on that basis.[7]

B. The IPI accurately stated that attempted murder requires an "intent to kill."

Even if the claim had not been barred as invited error, direct appeal counsel was not ineffective for declining to argue that the IPI misstated the law because it did not: IPI No. 6.05X correctly implements this Court's decision in *People v. Harris*, 72 Ill. 2d 16 (1978), which remains good law, that to commit attempted murder, a defendant must have the intent to kill.

[7] While direct appeal counsel could have argued that trial counsel was ineffective for agreeing to the instruction, the appellate court acknowledged that the successive postconviction petition did not raise that claim; thus, it was not properly preserved for review. *See* A5-6 ¶ 26 (postconviction "counsel overlooked the instructional error issue").

1. The IPI implemented this Court's holding in *Harris*.

To begin, there is a strong presumption in favor of using an IPI. "Supreme Court Rule 451(a) requires that in a criminal case, if the court determines the jury should be instructed on a subject, and the [IPI], Criminal, contains an applicable instruction, then the IPI instruction 'shall' be given unless the court determines it does not accurately state the law." *People v. Durr*, 215 Ill. 2d 283, 300-01 (2005) (quoting Ill. S. Ct. R. 451(a)); *see also id.* at 301 ("As this [Court] noted [repeatedly], Illinois pattern instructions have been 'painstakingly drafted so as to clearly and concisely state the law.'") (quoting *People v. Pollock*, 202 Ill. 2d 189, 212 (2002)) (cleaned up).

Here, the trial court — with the agreement of both parties — used IPI, Criminal, No. 6.05X, which articulates the "Definition of Attempt First Degree Murder." The instruction states that a "person commits the offense of attempt first degree murder when he, [without lawful justification and] with the intent to kill an individual, does any act which constitutes a substantial step toward the killing of an individual. The killing attempted need not have been accomplished." IPI, Criminal, No. 6.05X (brackets in original). The Committee Note directs courts to use "the phrase 'without lawful justification' whenever an instruction is to be given on an affirmative defense contained in 720 ILCS 5/7-1," Committee Note, IPI, Criminal, No. 6.05X, which the court did in this case. The Committee Note further explains that

this Court "has unequivocally held that the specific intent to kill is an essential element of the offense of attempt first degree murder." *Id.* (citing *Harris*, 72 Ill. 2d 16).

In *Harris*, this Court explained the mental state requirement for attempted murder. In two cases, consolidated on appeal before this Court, the juries were instructed that they had to find that the defendants intended to commit the offense of murder. 72 Ill. 2d at 19, 22. In one case, the jury was instructed that to commit murder, the defendant had to have the intent to kill or do great bodily harm, *id.* at 20, and in the other, that the defendant had to know that his acts created a strong probability of death or great bodily harm, *id.* at 22. Examining the plain language of the attempted murder and murder statutes, the Court held that both instructions misstated the mental state of attempted murder: While "[t]he crime of murder is . . . committed not only when a person intends to kill another individual, but also when he intends to do great bodily harm (par. 9-1(a)(1)), or when he knows that his acts create a strong probability of death or great bodily harm (par. 9-1(a)(2)), or when he is attempting or committing a forcible felony (par. 9-1(a)(3))," because "an attempted murder requires an intent to kill, however, it is obvious that the 'specific offense' referred to in section 8-4(a) cannot be construed as incorporating the alternative definitions of murder contained in section 9-1(a) in their entirety." *Id.* at 23-24.

For example, this Court explained, attempted murder could not be based on felony murder because the "offense of attempt requires 'an intent to commit a specific offense' while the distinctive characteristic of felony murder is that it does not involve an intention to kill.'" *Id.* at 24 (cleaned up). Thus, the Court held that while murder can be established by one of several possible intents, *attempted* murder requires an intent to kill. *Id.* at 26-27. Put differently, a person could be guilty of murder by "'A acting with intent to kill, B with an intent to do serious bodily injury, and C with a reckless disregard of human life,'" but "'if the victims do not die from their injuries, then only A is guilty of attempted murder.'" *Id.* at 27-28 (quoting LaFave and Scott, Criminal Law § 59, at 428-29 (1972)).

But *Harris* did not hold, as the appellate court suggested, "that instructions in attempt murder cases [must] make clear that a defendant have a 'criminal intent to kill.'" A9 ¶ 44 (quoting *Harris*, 72 Ill. 2d at 27). On the contrary, in *Harris*, this Court did not distinguish between the "intent to kill," on the one hand, and the "criminal intent to kill," on the other. *Harris* used the term "criminal intent to kill" only once. When addressing the jury instruction stating that "a person is guilty of the crime of murder 'if, in performing the acts which cause the death, he intends to kill or do great bodily harm to that individual,'" *Harris* explained that this instruction was erroneous because "it permits the jury to return a verdict of guilty upon evidence that the defendant intended only to cause great bodily harm short of

death." 72 Ill. 2d at 27. Instead, an "instruction must make it clear that to convict for attempted murder nothing less than a criminal intent to kill must be shown." *Id.* In other words, the Court used the phrase "criminal intent to kill" only when making the point that to commit murder, the defendant must have the intent to kill, and not merely the intent to do great bodily harm. The Court did not hold that the "criminal" intent to kill is the required mental state for attempted murder.

This Court's subsequent decisions do not suggest a different understanding of *Harris*. Since *Harris*, the Court has used "criminal intent to kill" and "intent to kill" interchangeably. For instance, in *People v. Williams*, 165 Ill. 2d 51 (1995), the Court, citing *Harris*, stated that "a defendant must be shown to have possessed the criminal intent to kill," before holding that an allegedly improper remark by the prosecutor was not prejudicial because "Williams' intent to kill [the victim] was established beyond any doubt." *Id.* at 64-65; *see also People v. Leger*, 149 Ill. 2d 355, 403-05 (1992) (using interchangeably "criminal intent to kill" with "intent to kill" as the intent necessary for attempt murder). At other times, the Court simply stated that the offense of attempted murder requires an "intent to kill." *See People v. Mitchell*, 105 Ill. 2d 1, 9 (1984) ("In order to sustain a conviction for attempted murder, the prosecution must prove that the defendant had the intent to kill the victim.").

In sum, neither *Harris* nor this Court's subsequent decisions hold that to be convicted of attempted murder, a defendant must have a "criminal" intent to kill rather than an "intent to kill," and the appellate court's conclusion otherwise was erroneous.

2. *Harris* and the IPI apply the rules governing affirmative defenses and specific intent crimes.

Indeed, a holding that the requisite mental state for attempted murder is an "intent to kill" follows naturally from the general rules governing specific intent crimes and affirmative defenses.

In *Harris*, this Court applied the rule that "[u]nlike general intent offenses, which only require that the prohibited result be reasonably expected to flow from the accused's voluntary act, specific-intent offenses require the State to prove that a defendant intended to commit the stated offense." *People v. Grayer*, 2023 IL 128871, ¶ 23. "In other words, specific-intent crimes require the State to prove that defendant subjectively desired the prohibited result." *Id.* That is why *Harris* held that reasonably expecting the result described by murder — in other words, someone's death — is insufficient to prove attempted murder, and, instead, the prosecution must prove that the defendant intended to kill someone. 72 Ill. 2d at 28 ("attempted murder requires an intent to bring about that result described by the crime of murder (i.e., the death of another)") (internal quotations and citation omitted). Put differently, because attempted murder is a specific

intent crime, reasonably expecting death to flow from the act is insufficient; the defendant must intend the death.

But the fact that attempted murder is a specific intent crime does not change the fact that self-defense is an affirmative defense that need not be addressed by the People until raised by the defendant, at which point the People must disprove it beyond a reasonable doubt. *People v. Jeffries*, 164 Ill. 2d 104, 127 (1995); *see also* 720 ILCS 5/7-14 ("A defense of justifiable use of force . . . based on the provisions of this Article is an affirmative defense."). In other words, "when a murder defendant asserts self-defense, the State must prove *more* than the three elements of first degree murder." *Jeffries*, 164 Ill. 2d at 127. "The State must also prove that the murder was not carried out in self-defense, and that the defendant's use of force was not legally justified." *Id.* But the absence of self-defense is not an element of murder. Otherwise, the People would have to prove the absence of self-defense beyond a reasonable doubt in *every* case, regardless of whether the defendant raised the defense. Thus, the general rules governing specific intent crimes and affirmative defenses confirm that *Harris* was correct that attempted murder requires an intent to kill and not proof of specific intent that the killing be unlawful.

3. This Court Has Not Overruled *Harris*.

Nor, contrary to the appellate court's reasoning, has this Court *sub silentio* overruled *Harris*. The appellate court stated that "*People v. Barker*,

83 Ill. 2d 319 (1980), . . . suggested that 'intent to kill' was not enough." A7 ¶ 37. But *Barker* supports the People's position that the mental state requirement for attempted murder is "intent to kill."

The issue in *Barker* was whether an indictment adequately charged that a defendant accused of attempted murder acted with the "intent to kill." The indictment at issue charged, in relevant part, that the defendant "knowingly with intent to commit the offense of murder, did acts which constitute a substantial step towards the commission of murder." *Barker*, 83 Ill. 2d at 323. This Court rejected the defendant's argument that the indictment was fatally defective for failing to allege "an essential element of the offense[:] the intent to kill." *Id.* at 324. The Court reasoned that "the literal requirement of the statute has been complied with," while acknowledging that "the indictment could have been in more detail," including by "stat[ing] that the acts were performed with *the intent to kill*." *Id.* at 326. "However," the Court continued, "this further allegation would have been redundant" because "all murders involve a killing, [so] a person cannot intend to commit murder without intending to kill." *Id.*; *see also id.* at 324 (noting that in *Trinkle*, "this [C]ourt held that, to convict one for attempted murder, the State must prove that the accused acted with the intent to kill," and that "[s]ince *Trinkle*, the [C]ourt has adhered to that holding") (collecting cases).

Thus, *Barker* consistently referred to an "intent to kill" as the required mental state for attempted murder. However, the appellate court below misconstrued *Barker* based on the following language:

> Since the indictment has charged that the defendant, with the intent to commit murder, did certain acts, it is unnecessary to again charge that the acts he performed, as a substantial step toward the commission of that offense, were committed with the specific intent to kill. *If the indictment had only charged the defendant with the intent to kill and did not include the allegation that the defendant acted with the intent to commit murder, it would have been defective under section 8-4(a) of the Criminal Code, quoted above, in that it would not have charged the defendant with an intent to commit a specific offense. The act of killing, or even intending to kill, is not necessarily a criminal offense (self-defense, for example).*

A10 ¶ 47 (quoting *Barker*, 83 Ill. 2d at 326-27) (emphasis in original). But this language does not suggest that the intent required for attempted murder is something other than the intent to kill. Rather, it explains that the language in the indictment charging the defendant with attempt had two purposes: it identified the specific offense that the defendant attempted to commit — murder, citing Ill. Rev. Stat. 1977, ch. 38, par. 8-4(a) — and confirmed that the defendant had the required mental state for that offense (intent to kill). By contrast, if the indictment had alleged only that the defendant acted with an intent to kill, then it would have confirmed that the defendant acted with the required mental state, but it would not have identified a specific offense. Thus, far from overruling *Harris*, *Barker* merely held that the indictment in that case complied with *Harris*.

The appellate court likewise erred when it reasoned that two cases addressing whether there exists an offense of attempt second degree murder (and its predecessor, voluntary manslaughter) also "implicitly held that the 'intent to kill' in . . . attempted first degree murder . . . means an 'intent to kill without lawful justification.'" A7 ¶ 37 (citing *People v. Lopez*, 166 Ill. 2d 441 (1995), and *People v. Reagan*, 99 Ill. 2d 238 (1983)). Like *Barker*, *Lopez* and *Reagan* support the People's argument. Both held that there is no offense of attempt second degree murder (or attempt voluntary manslaughter) because "one cannot intend either a sudden and intense passion due to serious provocation or an unreasonable belief in the need to use deadly force." *Lopez*, 166 Ill. 2d at 448; *see also Reagan*, 99 Ill. 2d at 240 ("it is impossible to intend an unreasonable belief"). In reaching this conclusion, this Court explained that first and second degree murder "share the same elements" and that the "mitigating circumstance" in second degree murder is "not an element or mental state." *Lopez*, 166 Ill. 2d at 449. *Lopez* and *Reagan* are thus consistent with *Jeffries*, wherein the Court explained that the "mental states required for . . . second degree murder[] are identical to that required for first degree murder." 164 Ill. 2d at 122; *see also id.* (rather than having "a less culpable mental state," second degree murder "is more accurately described as a *lesser mitigated offense* of first degree murder") (internal quotation marks omitted) (emphasis in original).

The appellate court also was incorrect to rely on *People v. Porter*, 168 Ill. 2d 201 (1995). A14 ¶ 66. *Porter* merely held that a jury's verdicts holding that the defendant's murder of a single person was both provoked (justifying a second degree murder finding) and unprovoked (justifying a first degree murder finding) were inconsistent. 168 Ill. 2d at 214. In other words, the Court held that with respect to the killing of a single victim, the mitigating factor was either present or it was not. The Court did not hold that the required mental state differs for first and second degree murder.

Thus, none of the cases cited by the appellate court overruled *Harris* or held that the mental state for attempted murder is inconsistent with the mental state for second degree murder. Indeed, by statute, a person who has committed second degree murder has committed first degree murder. *See* 720 ILCS 5/9-2(a) ("A person commits the offense of second degree murder when he or she commits the offense of first degree murder . . . and either of the [two] mitigating factors are present."). In other words, second degree murder is not first degree "murder minus" anything, but first degree "murder plus mitigation." *Jeffries*, 164 Ill. 2d at 121; *see also People v. Guyton*, 2014 IL App (1st) 110450, ¶ 41 ("First degree murder and second degree murder share the same elements, including the same mental states, but second degree murder requires the presence of a mitigating circumstance.").

In short, contrary to the appellate court's reasoning, this Court has not overruled *Harris*'s holding that attempted murder requires an intent to kill.

Accordingly, petitioner's direct appeal counsel could not have performed deficiently in agreeing the use of the IPI that implements *Harris*.

C. Even if the IPI misstated the law, the verdicts were legally consistent because the convictions were based on separate acts.

Direct appeal counsel also reasonably declined to argue that the verdicts were inconsistent because there were reconcilable even if the IPI misstated the law. A rational jury could have found that petitioner acted with a belief, albeit unreasonable, in the need for self-defense when he fired the shot that killed David but had no such belief when he subsequently fired the shot that injured Sheena. Thus, even if attempted murder requires an intent to kill "without lawful justification," the verdicts were legally consistent.

"This [C]ourt will exercise all reasonable presumptions in favor of the verdicts, which will not be found legally inconsistent unless absolutely irreconcilable; further, the verdicts will not be considered irreconcilably inconsistent if supported by any reasonable hypothesis." *McQueen v. Green*, 2022 IL 126666, ¶ 51 (cleaned up). "Legally inconsistent verdicts occur when an essential element of each crime must, by the very nature of the verdicts, have been found to exist and to not exist even though the offenses arise out of the same set of facts." *People v. Price*, 221 Ill. 2d 182, 188 (2006). In other words, to be legally inconsistent the verdicts must be impossible to square. *See United States v. Mathis*, 579 F.2d 415, 417-18 (7th Cir. 1978) (rejecting

inconsistent verdict argument because there "is no such logical impossibility of conviction on both counts in this case").

This general rule applies where "a claim of inconsistent guilty verdicts involves multiple shots or victims, [as] the question is whether the trier of fact could rationally find separable acts accompanied by mental states to support all of the verdicts as legally consistent." *People v. Fornear*, 176 Ill. 2d 523, 531-32 (1997) (internal quotation marks omitted); *see also People v. Mahaffey*, 166 Ill. 2d 1, 32 (1995) (no inconsistency in verdicts finding that defendant intended to kill while committing felony but not finding that defendant intended to kill multiple people because "the jury could have found that the defendant possessed the requisite intent/knowledge with regard to one of the victims but not with regard to the other").

Here, the jury could rationally return both verdicts even if attempted murder required an intent to kill "without lawful justification" because a rational jury could have found that petitioner acted with an unreasonable belief in the need for self-defense when he shot and killed David but had no such belief when he fired a second time and injured Sheena. The appellate court's conclusion otherwise — based on evidence that petitioner fired the shots "in quick succession," A18 ¶ 84 — was incorrect. Petitioner did not fire the shots in a single act and, based on the evidence presented, the jury could have concluded that petitioner's belief that he needed to protect himself had dissipated by the time he shot Sheena.

In the opening statement, the prosecutor argued that petitioner shot David, "who was sitting in the driver's seat"; David then stumbled toward the back of the van, where he collapsed; and petitioner "kept shooting . . . into the window where Sheena was sitting." R260-61. This matched the testimony from Sheena, David L., and Constance, who each testified that after being shot, David made it to the back of the van, lay down, and only then directed his companions to get him to a hospital, at which point petitioner shot Sheena. R273-74, 311-16, 367. Thus, the jury heard argument and evidence that petitioner decided to shoot at David and then Sheena in separate acts.

The jury also heard evidence that petitioner believed that he needed to protect himself from David, not Sheena. Petitioner testified was that he fired the gun in response to a threat from David. *See* R584 (petitioner's testimony that he saw David pull a gun); *see also* R629 (defense witness's testimony that David had a reputation of violence); R730 (similar); R664 (testimony by petitioner's grandmother that petitioner worried David would kill him because of threats to the family). Based on this evidence, the jury could have concluded that when petitioner shot David, petitioner genuinely, albeit unreasonably, believed he needed to defend himself, but by the time petitioner shot Sheena petitioner could not have possessed even an unreasonable belief in the need for self-defense.

The appellate court's observation that the prosecution "never tried to distinguish defendant's mental state and intent *vis-à-vis* each specific shot,"

A13 ¶ 64, does not suggest otherwise. The People's theory at trial was that petitioner *never* believed he was acting in self-defense, whether reasonably or unreasonably, while petitioner contended that he was acting in self-defense with respect to both shootings.[8] That the jury credited petitioner's contention in part — that he believed he was acting in self-defense when he shot David (though the jury found such belief unreasonable) — while accepting the People's contention that he was not acting in self-defense when he shot Sheena does not render the verdicts irreconcilable.

Nor was the appellate court correct that the jury necessarily concluded that petitioner was "not looking where he fired." A13 ¶ 64. The People's evidence showed that petitioner fired while looking directly at David and the van. *See* R274 (Sheena's testimony that petitioner "kept his eyes on us" while

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[8] The appellate court's statement that the People "concede[d] that [petitioner's] mental state and intent did not differ when firing the shot that killed David . . . and when firing the shot that injured Sheena," A13 ¶ 64, likewise ignores that the People's position was that petitioner *never* believed he was acting in self-defense. And while the People did not separately argue below that petitioner may have unreasonably believed he was acting in self-defense when he shot David but not when he subsequently shot Sheena, there is no forfeiture of the argument that direct appeal counsel was not ineffective for failing to recognize that the verdicts could be consistent based on a change in petitioner's beliefs. The People asserted below that counsel was not ineffective for failing to argue that the verdicts were inconsistent, and parties are not limited to the supporting arguments made below for preserved claims. *Brunton v. Kruger*, 2015 IL 117663, ¶ 76. In any event, an appellee in the appellate court may raise a new ground for affirmance in this Court, *see supra* pp. 20-21, which is particularly appropriate given that the Court exercises all reasonable presumptions in favor of finding the verdicts consistent, *see supra* p. 34.

shooting); R328 (Constance's testimony that petitioner "was just sitting there looking" before firing). And the jury did not need to credit petitioner's testimony that he shot without looking to conclude that he believed himself, albeit reasonably, to be acting in self-defense. Consider the following hypothetical. A defendant incorrectly believes that a person at the front of a single-file line is going to fire a gun. The defendant fires at the first person, killing him, and keeps shooting, injuring the second person in line. A jury could conclude that the defendant had an unreasonable belief in the need for self-defense as to the first victim, but that such belief terminated when that victim fell. This is effectively how the jury apparently, and rationally, viewed the evidence in this case.

In sum, a rational jury could have concluded that petitioner had an unreasonable belief in the need for self-defense when he fired the bullet that killed David but had no such belief after David was shot and no longer posed a threat, at which point petitioner shot Sheena. Thus, even if attempted murder requires an intent to kill "without lawful justification," the verdicts here were not legally inconsistent, and petitioner's direct appeal counsel could not be ineffective for declining to argue that they were.

III. If Counsel Was Ineffective for Failing to Argue that the Verdicts Were Inconsistent, the Appropriate Remedy Is Either Retrial or Entry of a Conviction of Aggravated Battery With a Firearm.

For inconsistent guilty verdicts, the "proper remedy on appeal is to reverse the convictions and remand for a new trial." *Price*, 221 Ill. 2d at 194;

see also A17 ¶ 82 (appellate court acknowledging this general rule). That is because "it would be improper for the trial court to enter judgment on one of the inconsistent verdicts and, thereby, usurp the jury's independent function to determine guilt or innocence." *People v. Jones,* 207 Ill. 2d 122, 135 (2003). Put differently, if a jury's verdicts are inconsistent, meaning one of them is irrational, there is no way for a reviewing court to know which one it was. Thus, if this Court were to affirm the vacatur of petitioner's attempted murder conviction — and it should not — it should remand for retrial. The same is true if reversal is warranted because counsel should not have agreed to the use of the IPI: the remedy would be a new trial. *See People v. Piatkowski*, 225 Ill. 2d 551, 572 (2007).

The appellate court incorrectly departed from this general rule and held that retrial on the attempted murder charge would violate double jeopardy principles. A17-18 ¶ 83. "The Double Jeopardy Clause, applied to the States through the Fourteenth Amendment, provides that no person may be tried more than once 'for the same offence.'" *Currier v. Virginia*, 585 U.S. 493, 498 (2018) (quoting U.S. Const. Amend V). But double jeopardy does not bar retrial on the attempted murder charge here both because petitioner agreed to the cause of the alleged error and because the United States Supreme Court has rejected the appellate court's reasoning. *See infra* Section III.A. And even if double jeopardy precluded retrial on the attempted murder charge, the proper remedy would be entry of a conviction on the

lesser included offense of aggravated battery with a firearm. *See infra* Section III.B.

A. Double jeopardy does not bar retrial on the attempted murder charge.

As explained, defendant invited any error that occurred here by agreeing to the IPI instruction on attempted murder. *See supra* Section II.A. The doctrine of invited error bars defendant from seeking reversal based on an error he invited, including reversal without opportunity for retrial.

The United States Supreme Court has held that double jeopardy does not apply where the defendant consented to the process that led to the error. In *Currier*, for example, the defendant agreed to sever his trials for burglary, grand larceny, and unlawful possession of a firearm by a convicted felon to avoid the prosecution introducing evidence about his prior convictions to prove the possession charge. 585 U.S. at 497. The Court held that the verdict of acquittal on the burglary and grand larceny charges did not preclude defendant from being subsequently prosecuted on the possession charge or restrict the issues the prosecution could pursue in that prosecution. *Id*. at 499-506; *see also Evans v. Michigan,* 568 U.S. 313, 326 (2013) ("Retrial is generally allowed [when] the defendant consents to a disposition that contemplates reprosecution"); *Jeffers v. United States,* 432 U.S. 137, 150-51 (1977) (no double jeopardy bar to trial on greater offense after first trial ended in acquittal on lesser-included offense where defendant sought separate trials on each count against him). Here, by agreeing to the IPI

regarding attempted murder, petitioner invited any error involving the instruction, including any resulting inconsistent verdicts. Thus, retrial is permitted.

But even if petitioner had not invited the error, due process principles would not preclude retrial on the attempted murder charge. Again, "[t]he general rule is that the Clause does not bar reprosecution of a defendant whose conviction is overturned on appeal." *Justices of Boston Mun. Ct. v. Lydon*, 466 U.S. 294, 308 (1984). The appellate court applied "issue preclusion" to justify deviating from the general rule, A17-18 ¶ 83, but this misapprehends how issue preclusion applies in criminal proceedings for three reasons.

First, to demonstrate "issue preclusion" in the criminal context, a defendant "bear[s] the burden of showing that the issue . . . has been 'determined by a valid and final judgment of *acquittal*.'" *Bravo-Fernandez v. United States*, 580 U.S. 5, 22 (2016) (emphasis added) (quoting *Yeager v. United States,* 557 U.S. 110, 119 (2009)). There was no judgment of acquittal here.

Second, the Double Jeopardy "Clause speaks not about prohibiting the relitigation of issues or evidence but offenses." *Currier*, 585 U.S. at 504. In "narrow circumstances, the retrial of an issue can be considered tantamount to the retrial of an offense," but the "defendant must show an identity of *statutory elements* between the two charges against him." *Id.* (emphasis in

original).[9] The appellate court did not hold petitioner to this requirement: It barred the People from retrying petitioner for attempted first degree murder based on his conviction for second degree murder of a different victim even though the statutory elements of these two offenses are not identical. And even if the two offences involved overlapping issues, that would be irrelevant to double jeopardy, which does not bar "retrial of issues." *Currier*, 585 U.S. at 504.

Third, "[t]o say that the second trial is tantamount to a trial of the same offense as the first and thus forbidden by the Double Jeopardy Clause, the Court must be able to say that it would have been irrational for the jury in the first trial to acquit without finding in the defendant's favor on a fact essential to a conviction in the second." *Id.* at 494. But, as discussed, the jury rationally could have found that petitioner acted with an unreasonable belief in the need for self-defense when he fired the shot that killed David but had no such belief when he subsequently fired the shot that injured Sheena. *See supra* Section II.C.

Thus, setting aside that petitioner invited the any error, the second degree murder conviction does not create a double jeopardy bar to retrial on

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[9] To the extent *People v. Daniels*, 187 Ill. 2d 301, 320-21 (1999), relied on by the appellate court, A18, ¶ 83, suggested a broader application of issue preclusion in criminal proceedings, *Currier* clarified the limited role it plays in double jeopardy analysis. Moreover, *Daniels* held that double jeopardy did *not* bar the defendant's retrial because there was no acquittal, so any discussion of issue preclusion was dicta. 187 Ill. 2d at 321.

the attempted murder charge because (1) the second degree murder conviction did not result in an acquittal, (2) the two offenses do not have the same statutory elements, and (3) a jury rationally could have determined that petitioner had an unreasonable belief in the need for self-defense when he shot David but not when he shot Sheena.

B. If double jeopardy bars retrial on attempted murder, the proper remedy is to enter a conviction for aggravated battery with a firearm.

Even if a retrial for attempted murder were barred by double jeopardy principles, the proper remedy would be to enter a conviction for the lesser included offense of aggravated battery with a firearm and remand for sentencing. The appellate court declined to do so because the People "never charged defendant with aggravated battery with a firearm." A18 ¶ 85. But "a defendant may be convicted of an uncharged offense if it is a lesser-included offense of a crime expressly charged in the charging instrument, and the evidence adduced at trial rationally supports a conviction on the lesser-included offense and an acquittal on the greater offense." *People v. Clark*, 2016 IL 118845, ¶ 30.

Here, aggravated battery with a firearm was a lesser included offense of the attempted murder charge. Indeed, at petitioner's behest, the trial court instructed the jury as to aggravated battery with a firearm as a lesser included offense. R854-55, 918; *see also* C475-76. And the trial court and petitioner were correct that aggravated battery with a firearm was a lesser

included offense. The indictment's attempted murder count charged that petitioner shot Sheena with a handgun with the intent to commit first degree murder. C26 (citing 720 ILCS 5/9-1(a)(1), 720 ILCS 5/8-4(a), (c)(1)(D)). To prove aggravated battery with a firearm, the People had to establish that petitioner knowingly discharged a firearm that injured Sheena. *See* 720 ILCS 5/12-4.2(a) (2002) ("A person commits aggravated battery with a firearm when he, in committing a battery, knowingly or intentionally by means of the discharging of a firearm (1) causes any injury to another person").

The trial evidence established that petitioner discharged his firearm, injuring Sheena. And it necessarily follows from the jury's guilty verdict on attempted murder — which required it to find that petitioner intended to kill Sheena by shooting her — that it found both elements of aggravated battery with a firearm beyond a reasonable doubt. Any double jeopardy bar arising from the jury's finding that petitioner acted with an unreasonable belief in self-defense when he shot David is irrelevant to the intent element of aggravated battery with a firearm, which is not a specific intent crime. *See* 720 ILCS 5/12-4.2(a) (2002). Thus, aggravated battery with a firearm was a lesser-included offense of attempted murder, as charged. Because the evidence supported a conviction of aggravated battery with a firearm, this Court should enter a conviction for aggravated battery with a firearm if it

concludes that retrying defendant for attempted murder is barred by double jeopardy.

CONCLUSION

For these reasons, the People of the State of Illinois respectfully request that this Court reverse the judgment of the appellate court and remand for the appellate court to address the People's appeal of the trial court's order granting a new trial on the attempted murder charge based on allegedly confusing answers to the jury questions.

April 17, 2024

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RULE 341(c) CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 11,186 words.

/s/ Eldad Z. Malamuth
ELDAD Z. MALAMUTH
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CERTIFICATE 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 April 17, 2024, the foregoing **Brief and Appendix of Respondent-Appellant People of the State of Illinois** was filed with the Clerk of the Supreme Court of Illinois, using the Court's electronic filing system, which provided service to the following:

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Appellate Court

People v. Guy, 2023 IL App (3d) 210423

Appellate Court Caption	THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellant and Cross-Appellee, v. TRAVARIS T. GUY, Defendant-Appellee and Cross-Appellant.
District & No.	Third District No. 3-21-0423
Filed	July 26, 2023
Decision Under Review	Appeal from the Circuit Court of Will County, No. 02-CF-1974; the Hon. David M. Carlson, Judge, presiding.
Judgment	No. 3-21-0423, Appeal dismissed. No. 3-21-0426, Reversed.
Counsel on Appeal	James W. Glasgow, State's Attorney, of Joliet (Patrick Delfino, Thomas D. Arado, and Justin A. Nicolosi, of State's Attorneys Appellate Prosecutor's Office, of counsel), for the People. James E. Chadd, Santiago A. Durango, and Dimitri Golfis, of State Appellate Defender's Office, of Ottawa, and Zachary Pollack, of Pollack Law Group, Ltd., of Joliet, for appellee.

Panel JUSTICE BRENNAN delivered the judgment of the court, with opinion.
Justices Hettel and Albrecht concurred in the judgment and opinion.

OPINION

¶ 1 In appeal No. 3-21-0426, defendant, Travaris T. Guy, challenges the stage-two dismissal of a claim set forth in his successive, postconviction petition made pursuant to the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2014)). He argues that the jury was not properly apprised of the mental state required for attempted first degree murder and that his attempted first degree murder conviction was inconsistent with his second degree murder conviction and should be outright reversed with no new trial. In appeal No. 3-21-0423, the State challenges the court's stage-three decision to grant defendant a new trial on the attempted first degree murder charge due to the trial court's allegedly confusing answers to jury questions. On its own motion, this court consolidated the appeals for purposes of decision, with No. 3-21-0426 being the lead case. For the reasons that follow, we agree with defendant's arguments in appeal No. 3-21-0426. We uphold defendant's conviction for second degree murder, which defendant has not challenged, but outright reverse defendant's attempted first degree murder conviction, with no new trial. We necessarily determine that the question posed by appeal No. 3-21-0423, whether potential jury confusion entitles defendant to a new trial on the attempted first degree murder charge, is moot.

¶ 2 I. BACKGROUND

¶ 3 Following a shooting that occurred on November 1, 2002, defendant was charged with three felony counts. Count I charged him with first degree murder for shooting David Woods "without lawful justification and with the intent to kill David Woods" (720 ILCS 5/9-1(a)(1) (West 2002)). Count II charged defendant with first degree murder for shooting David "knowing such act created a strong probability of death or great bodily harm to David Woods" (*id.* § 9-1(a)(2)). Count III charged defendant with attempted first degree murder for shooting Sheena Woods with the intent to commit first degree murder (*id.* §§ 8-4(a), (c)(1)(D), 9-1(a)(1)).

¶ 4 At trial, defendant testified that, at the time of the incident, he was seated on the passenger side of a car that was stopped at a red light. David was the driver of a van stopped in the next lane. David opened the driver's door and exited the van. Defendant testified that he feared David based on a history of violence between their families and that David appeared to be holding a silver gun. Defendant stated that he immediately put his head down, pulled a gun from his jacket pocket, and fired three or four shots. He fired the shots in quick succession and did not look where he was shooting. David was killed. A stray bullet wounded Sheena, who was a passenger in the van.

¶ 5 A. Jury Instructions and Deliberations

¶ 6 As to the first degree murder charge(s) as to David, the jury instructions explained that the State needed to prove the following propositions for either first degree murder or the lesser mitigated offense of second degree murder:

"First Proposition: That the defendant performed the acts which caused the death of David Woods; and

Second Proposition: That when the defendant did so, he intended to kill or do great bodily harm to David Woods;

[or]

he knew such acts created a strong probability of death or great bodily harm to David Woods;

and

Third Proposition: That the defendant was not justified in using the force which he used."

See Illinois Pattern Jury Instructions, Criminal, No. 7.06 (4th ed. 2000) (hereinafter IPI Criminal 4th) (titled "Issues Where Jury Instructed on Both First Degree Murder and Second Degree Murder—Belief in Justification").

¶ 7 With regard to the first degree murder charge(s), the instructions further explained that

"[a] mitigating factor exists so as to reduce the offense of first degree murder to the lesser offense of second degree murder if at the time of the killing the defendant believes that circumstances exist which would justify the deadly force he uses, but his belief that such circumstances exist is unreasonable."

See IPI Criminal 4th No. 7.05 (titled "Definition of Mitigating Factor—Second Degree Murder—Belief in Justification").

¶ 8 As to the attempted first degree murder charge as to Sheena, the jury was instructed: "A person commits the offense of attempt first degree murder when he, without lawful justification and *with the intent to kill an individual*, does any act which constitutes a substantial step toward the killing of an individual. The killing attempted need not have been accomplished." (Emphasis added.) See IPI Criminal 4th No. 6.05X (titled "Definition of Attempt First Degree Murder").

¶ 9 The jury was also instructed as follows:

"To sustain the charge of attempt first degree murder, the State must prove the following propositions:

First Proposition: That the defendant performed an act which constituted a substantial step toward the killing of an individual; and

Second Proposition: That the defendant did so *with the intent to kill an individual*; and

Third Proposition: That the defendant was not justified in using the force he used." (Emphasis added.)

See IPI Criminal 4th No. 6.07X (titled "Issues in Attempt First Degree Murder"); see also IPI Criminal 4th No. 24-25.06A (titled "Issue in Defense of Justifiable Use of Force").

¶ 10 The trial court gave the jury two sets of verdict forms, one set pertaining to the first degree murder charge(s) and another set pertaining to the attempted first degree murder charge. The first set included the following verdict forms: guilty of first degree murder, not guilty of first degree murder, and guilty of second degree murder. The court instructed the jury to select and sign only one verdict form that reflected its verdict.

¶ 11 The second set included the following verdict forms: guilty of attempted first degree murder, not guilty of attempted first degree murder, and guilty of aggravated battery of a firearm. The State had not charged defendant with aggravated battery of a firearm. Rather, defense counsel sought instructions on that offense as a lesser-included offense of attempted first degree murder. The court gave that instruction over the State's objection. The court again instructed the jury to select and sign only one verdict form that reflected its verdict.

¶ 12 During deliberation, the jury asked two questions. First, at 1:38 p.m., the jury asked: "Are there only two counts? Number one, murder of David Woods?, number two, attempt murder of Sheena Woods?" The trial court recalled that it had read the three counts during jury selection. The parties agreed to the trial court's answer: "There were three counts, *i.e.* two counts of murder and one count of attempt murder ***. The two counts of murder have been merged into one series of verdict forms."

¶ 13 Second, at 2:10 p.m., the jury asked: "The attempted murder charge means attempted on whom?" The jury instructions had stated that attempt required "the intent to kill an individual." Defense counsel argued that the court should respond by telling the jury that it meant attempted on Sheena. The State argued that the law reads "on that individual or another" and that the court should respond by telling the jury that the answer to their question is in the instructions. The court responded by telling the jury, "The answer to your questions is in the instructions," over the objection of defense counsel.

¶ 14 The jury found defendant guilty of second degree murder as to David and attempted first degree murder as to Sheena. The trial court sentenced defendant to consecutive 30-year prison terms for each offense.

¶ 15 B. Posttrial Motions, Direct Appeal, and Initial *Pro Se* Postconviction Petition

¶ 16 Defendant filed a posttrial motion, arguing in part that the attempted first degree murder conviction was inconsistent with the second degree murder conviction. The trial court summarily denied the motion in an oral ruling. Defendant did not raise the inconsistent verdict issue in his direct appeal or his initial *pro se* petition for postconviction relief, which was summarily dismissed.

¶ 17 C. The Instant Successive Postconviction Petition

¶ 18 On June 2, 2015, defendant moved for leave to file a successive postconviction petition, which alleged, *inter alia*, inconsistent verdicts. He asserted cause and prejudice, attaching two letters from appellate counsel showing that counsel advised him not to raise the inconsistent verdict issue. The first letter, dated just prior to defendant's direct appeal, cited *People v. Lopez*, 166 Ill. 2d 441 (1995), and advised that it was "not possible to challenge [defendant's] attempt first degree murder challenge." The second letter, dated prior to defendant's initial *pro se* postconviction petition, more generally advised: "having seen the issues that were and were not raised so far in your case, I suggest you focus on new issues."

¶ 19 The State objected to defendant's motion for leave, arguing that his arguments could have been raised earlier. The trial court granted the State's objection and denied defendant's motion for leave. This court reversed, remanding the matter for the trial court to consider defendant's motion for leave without the State's input.

¶ 20 On May 31, 2018, the trial court granted defendant leave to file a successive postconviction petition and appointed counsel, and in appeal No. 3-21-0426, the State does not argue that defendant failed to satisfy cause and prejudice. On February 28, 2020, counsel filed an amended successive postconviction petition. In it, defendant again argued that his attempted first degree murder conviction was inconsistent with his second degree murder conviction. Defendant explained that, in convicting him of second degree murder, the jury found that he intended to kill and that he also believed, albeit unreasonably, in the need for self-defense. His belief in the need for self-defense did not change between the time he fired the shot which caused David's death and formed the basis of the second degree murder conviction and the time he fired the shot that injured Sheena and formed the basis of the attempted first degree murder conviction. In defendant's view, a defendant acting with the belief, albeit unreasonable, in the need for self-defense does not have the mental state required to support a conviction for attempted first degree murder. Defendant also argued that the court's instructions to the jury and answers to its questions during deliberation (see *supra* ¶¶ 12-13) created jury confusion.

¶ 21 On March 9, 2020, the State moved to dismiss the petition. The State argued that defendant's inconsistent verdict issue was controlled by *People v. Guyton*, 2014 IL App (1st) 110450. The State also argued that the jury question issue was without merit, as the trial court's answers to the jury were legally correct.

¶ 22 On June 4, 2021, the trial court dismissed defendant's inconsistent verdict claim at the second stage, accepting the State's argument that *Guyton* controlled. After protracted discussion and amendment to the pleadings, the trial court allowed the jury question issue to proceed to the third stage.

¶ 23 On September 10, 2021, following an evidentiary hearing, the trial court granted defendant a new trial on the attempted first degree murder charge due to potential jury confusion and "fundamental fairness." Defendant and the State each filed separate appeals, which we consolidate herein for the purposes of decision.

¶ 24 II. ANALYSIS

¶ 25 In appeal No. 3-21-0426, defendant challenges the stage-two dismissal of his postconviction petition. Defendant argues that his conviction for attempted first degree murder should be reversed due to (1) inconsistent verdicts and (2) instructional error in that the jury was not properly apprised of the mental state required to prove attempted first degree murder. The instructional error issue, different from the jury question issue in appeal No. 3-21-0423, is an outgrowth of the inconsistent verdict issue. Both issues are subject to *de novo* review. *People v. Price*, 221 Ill. 2d 182, 189 (2006) (inconsistent verdicts); *People v. Parker*, 223 Ill. 2d 494, 501 (2006) (legal propriety of jury instructions). Defendant requests direct relief, as opposed to a remand for stage-three proceedings, because his appeal turns entirely on questions of law. See *People v. Buffer*, 2019 IL 122327, ¶ 47.

¶ 26 Due to the procedural posture of this case, we must consider whether appellate counsel was ineffective for failing to raise either issue and whether successive postconviction counsel provided unreasonable assistance in failing to present the instructional error issue in his amended petition. See *People v. Easley*, 192 Ill. 2d 307, 329 (2000); *People v. Kirk*, 2012 IL App (1st) 101606, ¶ 18. We determine that this procedural bar is cleared. As we will explain, the record shows that appellate counsel affirmatively misstated the law by informing defendant that *Lopez* precludes him from challenging his attempted first degree murder conviction. While

counsel is not obligated to brief every conceivable issue, counsel is ineffective when his appraisal of the merits is patently wrong. *Easley*, 192 Ill. 2d at 329. Successive postconviction counsel, in turn, failed to file a certificate pursuant to Illinois Supreme Court Rule 651(c) (eff. Feb. 6, 2013). Rule 651(c) requires that counsel make any amendments necessary to the adequate presentation of a defendant's claim (*Kirk*, 2012 IL App (1st) 101606, ¶ 18), and here, counsel overlooked the instructional error issue that went part and parcel with the inconsistent verdict issue. Even if we were to determine that postconviction counsel's omission did not rise to the level of unreasonable assistance, we would reach the same outcome. We ultimately agree with defendant on the merits of both the inconsistent verdict issue and the instructional error issue. The instructional error issue informs our understanding of the case, and so we address that issue before the inconsistent verdict issue.

¶ 27 In deciding the instructional error issue and the inconsistent verdict issue, we must first determine the requisite mental state for attempted first degree murder. More specifically, we must determine whether the mental state required to prove attempted first degree murder is "intent to kill" or "intent to kill without lawful justification." For the reasons that follow, we hold that the mental state and specific intent required to prove attempted first degree murder is "intent to kill without lawful justification."

¶ 28 A. Mental State Required for Completed Offenses of First and Second Degree Murder

¶ 29 Before we discuss the nuances that the attempt statute brings to the inconsistent verdict issue, we first consider the completed offenses of first and second degree murder. Also instructive is our supreme court's analysis in *People v. Jeffries*, 164 Ill. 2d 104 (1995), which explains the statutory scheme for first and second degree murder.

¶ 30 The first degree murder statute provides in relevant part:

> "(a) A person who kills an individual without lawful justification commits first degree murder if, in performing the acts which cause the death:
>
> (1) he either intends to kill or do great bodily harm to that individual or another, or knows that such acts will cause death to that individual or another; or
>
> (2) he knows that such acts create a strong probability of death or great bodily harm to that individual or another; or
>
> (3) he is attempting or committing a forcible felony other than second degree murder." 720 ILCS 5/9-1(a) (West 2002).

¶ 31 The second degree murder statute provides in relevant part:

> "(a) A person commits the offense of second degree murder when he commits the offense of first degree murder as defined in paragraphs (1) or (2) of subsection (a) of Section 9-1 of this Code and either of the following mitigating factors are present:
>
> (1) At the time of the killing [the defendant] is acting under a sudden and intense passion resulting from serious provocation by the individual killed or another whom the offender endeavors to kill, but he negligently or accidentally causes the death of the individual killed; or
>
> (2) At the time of the killing [the defendant] believes the circumstances to be such that, if they existed, would justify or exonerate the killing under the principles stated in Article 7 of this Code, but his [or her] belief is unreasonable." *Id.* § 9-2(a).

¶ 32 In *Jeffries*, the supreme court upheld the constitutionality of the statutory scheme for first and second degree murder and explained how the scheme worked in practice. 164 Ill. 2d at 107. In 1986, the legislature renamed the offense of murder to first degree murder. *Id.* at 111. It abolished the offense of voluntary manslaughter and substituted for it the offense of second degree murder. *Id.*

¶ 33 The court clarified that the mental states required for first and second degree murder are identical: "Illinois law recognizes only the following four mental states: intent, knowledge, recklessness, and negligence. [Citation.] Murder and second degree murder each require the same mental state: either intent or knowledge." (Emphases omitted.) *Id.* at 122.

¶ 34 Because first and second degree murder require the same mental state, second degree murder cannot be considered a lesser included offense of murder. *Id.* Rather, it is more accurately described as a lesser mitigated offense of first degree murder. *Id.* The statute only imposes a burden upon the defendant to establish the existence of a mitigating factor—provocation or imperfect self-defense—once the State has met its initial burden in proving beyond a reasonable doubt all the elements of first degree murder. *Id.* at 113, 119.

¶ 35 B. Mental State for the Inchoate Offense of Attempted First Degree Murder

¶ 36 The mental state required for the inchoate offense of attempted first degree murder is not the same as the mental state required for the completed offense of first degree murder. See, *e.g.*, *Lopez*, 166 Ill. 2d at 449 (the attempt statute requires the intent to commit a specific offense, not simply the intent required to commit the predicate offense). Specifically, the attempt statute provides in relevant part: "A person commits an attempt when, *with intent to commit a specific offense*, he does any act which constitutes a substantial step toward the commission of that offense." (Emphasis added.) 720 ILCS 5/8-4(a) (West 2002).

¶ 37 Our supreme court has addressed the mental state required for attempted first degree murder in a series of cases. First, in *People v. Trinkle*, 68 Ill. 2d 198 (1977), and *People v. Harris*, 72 Ill. 2d 16 (1978), the court expressly held that attempted first degree murder requires a specific intent to kill. Second, in *People v. Barker*, 83 Ill. 2d 319 (1980), the supreme court suggested that "intent to kill" was not enough, and, in our view, in *People v. Reagan*, 99 Ill. 2d 238, 240 (1983), and *Lopez*, 166 Ill. 2d at 449, it implicitly held that the "intent to kill" in attempted murder and attempted first degree murder, respectively, means an "intent to kill without lawful justification."

¶ 38 1. *Trinkle* and *Harris*

¶ 39 In *Trinkle*, 68 Ill. 2d at 199, defendant became angered after the bartender refused to serve him, went to a second bar to drink more, returned to the area of the first bar, and shot a handgun through its door. He wounded a patron inside the bar and was charged with attempted murder. *Id.* The indictment and instructions stated that the defendant should be found guilty of attempted murder if he knew that shooting a gun through the door of the bar created a strong probability of death or great bodily harm. *Id.* at 201. The jury found the defendant guilty. *Id.* at 199.

¶ 40 The supreme court explained that the indictment and instructions constituted reversible error. *Id.* at 204. The attempt statute requires that a defendant be guilty of an action "with intent to commit a specific offense." (Internal quotation marks omitted.) *Id.* at 201. Thus, to be guilty

of attempted murder, the defendant must have intended to commit the crime of murder. *Id.* at 200. It was not sufficient that the defendant shot a gun " 'knowing such act created a strong probability of death or great bodily harm.' " *Id.* at 201. If that were the test, "then a defendant who committed a battery with knowledge that such conduct could cause great bodily harm would be guilty of attempted murder. But, in law, he would be guilty of aggravated battery, a completely different offense with a different penalty." *Id.* The court concluded with an excerpt from Wayne R. LaFave and Austin W. Scott (Wayne R. LaFave & Austin W. Scott Jr., Handbook on Criminal Law § 59, at 428-29 (1972)), pointing out that the inchoate offense of attempted first degree murder and the completed offense of first degree murder require different mental states:

> " 'Some crimes, such as murder, are defined in terms of acts causing a particular result plus some mental state which need not be an intent to bring about that result. Thus, if *A*, *B*, and *C* have each taken the life of another, *A* acting with intent to kill, *B* with an intent to do serious bodily injury, and *C* with a reckless disregard of human life, all three are guilty of murder because the crime of murder is defined in such a way [under the criminal scheme upon which LaFave uses for its analysis] that any one of these mental states will suffice. However, if the victims do not die from their injuries, then only *A* is guilty of attempted murder; on a charge of attempted murder it is not sufficient to show that the defendant intended to do serious bodily harm or that he acted in reckless disregard for human life. Again, this is because intent is needed for the crime of attempt, so that attempted murder requires an intent to bring about that result described by the crime of murder (i.e., the death of another).' " *Trinkle*, 68 Ill. 2d at 204.

¶ 41 In *Harris*, 72 Ill. 2d at 18, the supreme court consolidated the appeals of two separate defendants. The jury instructions in each defendant's trial had properly instructed that the crime of attempted first degree murder required the defendant to have intended to commit the crime of murder and perform an act which constitutes a substantial step toward the commission of the crime of murder. *Id.* at 20, 22. However, complimentary instructions then defined murder as requiring a defendant to have killed an individual and, when performing the acts which caused the death, that defendant intended to kill *or* do great bodily harm to that individual (as to defendant A), *or* knew that such acts created a strong probability of death or great bodily harm to that individual (as to defendant B). *Id.*

¶ 42 The supreme court found that the set of instructions was improper, explaining:

> "Since an attempted murder requires an intent to kill ***, it is obvious that the 'specific offense' referred to in section 8-4(a) [of the attempt statute] cannot be construed as incorporating the alternative definitions of murder contained in section 9-1(a) in their entirety [such as intending to do great bodily harm or knowing that one's acts create a strong probability of death or great bodily harm]." *Id.* at 24.

It cautioned: "An instruction must make it clear that to convict for attempted murder nothing less than a criminal intent to kill must be shown." *Id.* at 27.

¶ 43 Despite the supreme court's edict in *Harris*, many trial courts persisted in providing attempted first degree murder instructions that included the full definition of murder. See *People v. Velasco*, 184 Ill. App. 3d 618, 632-33 (1989). As a result, the Illinois Pattern Jury Instructions committee amended the instruction definition of attempt. See IPI Criminal 4th No. 6.05; IPI Criminal 4th No. 6.05X. In attempted first degree murder cases, courts were directed

to no longer give the general definition of attempt, which had provided: "A person commits the offense of attempt when he, with the *intent to commit the offense of* ___, does any act which constitutes a substantial step toward the commission of the offense of ___. The offense attempted need not have been committed." (Emphasis added.) Illinois Pattern Jury Instructions, Criminal, No. 6.05 (2d ed. 1981) (hereinafter IPI Criminal 2d) (titled "Definition of Attempt"). Instead, they were to give a definition of attempt specially crafted for the crime of attempted first degree murder: "A person commits the offense of attempt first degree murder when he, [without lawful justification and] with the *intent to kill an individual*, does any act which constitutes a substantial step toward the killing of an individual. The killing attempted need not have been accomplished." (Emphasis added.) IPI Criminal 4th No. 6.05X.

¶ 44 Replacing "intent to commit the offense of [murder]" in the original definition instructions for attempt (IPI Criminal 2d No. 6.05) with "intent to kill" in the amended definition instructions for attempted first degree murder (IPI Criminal 4th No. 6.05X), removed the risk that a jury would convict a defendant charged with attempted first degree murder who did not have an intent to kill. However, in solving one problem, the committee created another. While the committee purported to follow *Harris* in specifying that a defendant have an "intent to kill," *Harris* in fact had directed that instructions in attempt murder cases make clear that a defendant have a "criminal intent to kill." *Harris*, 72 Ill. 2d at 27. As the supreme court would go on to suggest in *Barker*, "intent to kill" is not enough to satisfy the attempt statute and show that a defendant had the intent to commit the specific offense of first degree murder.

¶ 45 2. *Barker*, *Reagan*, and *Lopez*

¶ 46 In *Barker*, 83 Ill. 2d at 323, the defendant was charged, *inter alia*, with attempted first degree murder. The indictment provided that he " 'knowingly with *intent to commit the offense of murder*, did acts which constitute[d] a substantial step towards the commission of murder, to wit: firing a sawed-off shotgun in the direction of [two police officers, neither of whom died].' " Emphasis added.) *Id.* The defendant pleaded guilty, but later sought to withdraw his plea. *Id.* at 324. He argued that the indictment to which he pleaded guilty was fatally defective for failing to allege an essential element of the offense, *i.e.*, an intent to kill. *Id.* at 322-23.

¶ 47 The supreme court disagreed, explaining that the indictment was adequate. *Id.* at 326-27. Because the attempt statute requires an intent to commit a specific offense and the indictment charged that the defendant intended to commit the specific offense of murder, the indictment complied with the literal requirements of the statute. *Id.* at 326. The court noted that, unlike in *Trinkle* and *Harris*, the case before it involved a guilty plea and an indictment, not jury instructions. *Id.* at 325. Accordingly, there was no danger that a jury would convict a defendant who did not have the intent to kill. *Id.* The erroneous instruction defining the alternative definitions of murder, including intent to do great bodily harm or knowledge that one's acts create a strong probability of death or great bodily harm, was not present in *Barker*. *Id.* Further:

> "Admittedly the indictment could have been in more detail and, in addition to the two allegations it now contains, could have further stated that the acts were performed with the intent to kill. However, this further allegation would have been redundant. Under section 9-1(a) of the Criminal Code of 1961 (Ill. Rev. Stat. 1977, ch. 38, par. 9-1(a)) a person may commit murder without specifically intending to kill anyone. However, since all murders involve a killing, a person cannot intend to commit murder without intending to kill. It is not logical to argue that an indictment charging one with the intent

> to commit murder does not charge that he had the intent to kill. Since the indictment has charged that the defendant, with the intent to commit murder, did certain acts, it is unnecessary to again charge that the acts he performed, as a substantial step toward the commission of that offense, were committed with the specific intent to kill. *If the indictment had only charged the defendant with the intent to kill and did not include the allegation that the defendant acted with the intent to commit murder, it would have been defective under section 8-4(a) of the Criminal Code, quoted above, in that it would not have charged the defendant with an intent to commit a specific offense. The act of killing, or even intending to kill, is not necessarily a criminal offense (self-defense, for example)*." (Emphasis added.) *Id.* at 326-27.

¶ 48 Thus, in *Barker*, the language in the challenged indictment mirrored the language in the original IPI Criminal 2d No. 6.05 defining attempt. *Id.* at 323. In the above italicized quote, the *Barker* court stated that the terms "intent to commit murder" and "intent to kill" are *not* interchangeable, and it is not accurate to replace the term "intent to commit murder" with "intent to kill." *Id.* at 327. However, that is exactly what the committee did in amending the instructions to create IPI Criminal 4th No. 6.05X, which we discuss later (*infra* ¶ 61).

¶ 49 In *Reagan*, 99 Ill. 2d at 240, and *Lopez*, 166 Ill. 2d at 448, our supreme court considered whether the crimes of attempted voluntary manslaughter and attempted second degree murder, respectively, have ever existed in Illinois. The supreme court determined that they have not, explaining in the process that the "intent to kill" required to be convicted of attempted voluntary manslaughter and attempted second degree murder, if those crimes existed, meant the "intent to kill without lawful justification." *Reagan*, 99 Ill. 2d at 240; *Lopez*, 166 Ill. 2d at 448-49.

¶ 50 In *Reagan*, the defendant engaged in a shootout with three police officers, none of whom were killed. *People v. Reagan*, 111 Ill. App. 3d 945, 947 (1982). The trial court instructed the jury on attempted murder and attempted voluntary manslaughter (imperfect self-defense). *Id.* The jury acquitted defendant of attempted murder and convicted him of attempted voluntary manslaughter (imperfect self-defense) and three counts of armed violence. *Reagan*, 99 Ill. 2d at 239.

¶ 51 The supreme court reversed the conviction for attempted voluntary manslaughter, holding that no such crime existed. *Id.* at 241. The court first defined the crimes of voluntary manslaughter and attempt, respectively. *Id.* at 239-40. It noted that " '[a] person who intentionally or knowingly kills an individual commits voluntary manslaughter if at the time of the killing he believes the circumstances to be such that, if they existed, would justify or exonerate the killing under the principles stated in Article 7 of this Code, but his belief is unreasonable.' " *Id.* at 239 (quoting Ill. Rev. Stat. 1979, ch. 38, ¶ 9-2(b)). Attempt, in turn, requires an " 'intent to commit a specific offense.' " *Id.* (quoting Ill. Rev. Stat. 1979, ch. 38, ¶ 8-4(a)). It then explained:

> "*The requirement of the attempt statute is not that there be an intent to kill, but that there be an intent to kill without lawful justification*. If *** defendant at the time of the shooting believed the circumstances to be such that if they existed would justify the killing, then there was no intent to commit an offense.
>
> We agree with the appellate court that 'there is no crime of attempted voluntary manslaughter under section 9-2(b). To commit an attempted voluntary manslaughter, the defendant could not merely have an intent to kill, for that is not a crime. [*Barker*,

> 83 Ill. 2d 319 (1980).] The defendant would have to specifically intend to kill with an unreasonable belief in the need to use deadly force in self-defense. As the State concedes, it is impossible to intend an unreasonable belief. If a defendant intended to kill with the knowledge that such action was unwarranted, he has intended to kill without lawful justification and could be prosecuted for attempted murder. *In the case at bar, the defendant intended to defend himself. Although his belief in the need to defend himself or in the need to use deadly force was unreasonable, his intent was not to commit a crime*. His intent was to engage in self-defense, which is not a criminal offense.' 111 Ill. App. 3d 945, 950-51.' " (Emphases added.) *Id.* at 240-41.

¶ 52 In *Lopez*, 166 Ill. 2d at 442, the supreme court consolidated the appeals of two defendants. One defendant was convicted of attempted first degree murder and armed violence. *Id.* He had asked for and was denied an instruction on the crime of attempted second degree murder (provocation). *Id.* The other defendant was also convicted of, *inter alia*, attempted first degree murder and armed violence. *Id.* at 442-43. He had asked for and was denied an instruction on the crime of attempted second degree murder (imperfect self-defense). *Id.* at 443.

¶ 53 The supreme court agreed that the instructions were properly denied. *Id.* at 451. Just as there was no such crime as attempted voluntary manslaughter, there was no crime of attempted second degree murder. *Id.* at 448, 451. In analyzing the question, the court first reviewed the principles set forth in *Jeffries*, 164 Ill. 2d at 122, which, again, had held that the completed offenses of first and second degree murder require the same mental state. *Lopez*, 166 Ill. 2d at 447.

¶ 54 The supreme court next considered the mental state issue in determining that the inchoate offense of attempted second degree murder did not exist. *Id.* at 447-48. In contrast to the completed offenses of first and second degree murder, which allow for the mental state of intent *or* knowledge, the inchoate offenses of attempted first degree murder and attempted second degree murder, if it existed, would require the specific intent to kill. *Id.* at 445-46. The court noted, however, that simply intending to kill is not necessarily a crime. *Id.* at 446, 448 (discussing *Barker*, 83 Ill. 2d at 327, and *Reagan*, 199 Ill. 2d at 240). As the attempt statute requires the intent to commit a specific crime, "the intent required for attempted second degree murder, if it existed, would be the intent to kill *without lawful justification*, plus the intent to have a mitigating circumstance present." (Emphasis added.) *Id.* at 448. The court reasoned, as in *Reagan*, that one cannot intend the mitigating circumstances of a sudden and intense passion nor can one intend the unreasonable belief in the need to use deadly force. *Id.* Also, concerning the mitigating factor of imperfect self-defense, one cannot intend to kill unlawfully while at the same time intend to use justifiable deadly force. *Id.* at 448-49.

¶ 55 Accordingly, the supreme court expressly rejected the notion that the specific intent required for attempted second degree murder is simply intent to kill:

> "[W]hile *** legal commentators have argued [citations] that the specific intent required for attempted second degree murder is simply the intent to kill, their assertion is without merit. These arguments fail to consider the specific language of Illinois' attempt statute, which plainly requires the intent to commit a specific offense, not simply the intent required to commit the predicate offense. Thus, our decision is based on the wording of our attempt statute rather than some notion of how the crime of attempt should be defined." *Id.* at 449.

¶ 56 Finally, the supreme court addressed the defendants' argument that the failure to recognize the crime of attempted second degree murder results in the possibility that a defendant would be sentenced to a greater term of imprisonment if the victim lives than if the victim dies. *Id.* at 450. To be sure, attempted first degree murder is a Class X felony punishable by a term of 6 to 30 years' imprisonment, without the possibility of probation. *Id.* However, second degree murder is a Class 1 felony punishable by a term of 4 to 15 years' imprisonment, with the possibility of probation. *Id.* The court appeared to accept the defendants' premise that it is possible for a defendant acting subject to alleged mitigating factors to nevertheless have the mental state required to be convicted of attempted first degree murder in certain unspecified circumstances. Even so, the court explained that it would not override the legislature with respect to a sentencing disparity absent a determination that the punishment was cruel, degrading, or so disproportionate to the offense committed as to shock the moral sense of the community. *Id.* at 450-51.

¶ 57 We recognize that *Reagan* and *Lopez* addressed whether the crime of attempted voluntary manslaughter and attempted second degree murder, respectively, were viable offenses. Answering that question required the supreme court to determine the mental state required to be convicted of voluntary manslaughter and attempted *second* degree murder, if those crimes existed. The instant case calls upon us to answer a slightly different question, namely, what is the mental state required for attempted *first degree* murder. Still, we determine that the only reasonable reading of *Reagan* and *Lopez*, and the leading cases upon which they relied, is that the mental state required for attempted first degree murder is *intent to kill without lawful justification*, not simply intent to kill.

¶ 58 As firmly established, the attempt statute requires the intent to commit a specific offense. *Id.* at 447-48. The mere intent to kill is not necessarily a crime. *Barker*, 83 Ill. 2d at 327. If a defendant believed that circumstances were such that, if they existed, would justify a killing, then there would be no intent to commit the offense of first degree murder. *Reagan*, 99 Ill. 2d at 241. If, in contrast, defendant intended to kill with the knowledge that such act was unwarranted, then " 'he *** intended to kill without lawful justification and could be prosecuted for attempted murder.' " *Id.* at 240.

¶ 59 The State at times seems to argue that the specific intent required for attempted first degree murder is simply intent to kill, but this argument fails for the same reason the supreme court rejected the argument that the specific intent required for attempted second degree murder is simply intent to kill—"These arguments fail to consider the specific language of Illinois' attempt statute, which plainly requires the intent to commit a specific offense, not simply the intent required to commit the predicate offense." *Lopez*, 166 Ill. 2d at 449. In the context of the attempt statute, a defendant cannot intend to commit the specific offense of first degree murder unless he intends to kill without lawful justification.

¶ 60 C. Jury Instructions

¶ 61 We next consider defendant's argument that the People's instruction Nos. 15 and 16, modeled after IPI Criminal 4th Nos. 6.05X, 6.07X, and 24-25.06A, regarding attempted first degree murder are incorrect. Again, those instructions provided that "[a] person commits the offense of attempt first degree murder when he, without lawful justification and with the intent to kill an individual, does any act which constitutes a substantial step toward the killing of an individual," and that,

> "[t]o sustain the charge of attempt first degree murder, the State must prove ***
> *** that the defendant performed an act which constituted a substantial step toward the killing of an individual, and *** that the defendant did so with the intent to kill an individual, and *** that the defendant was not justified in using the force he used."

See IPI Criminal 4th No. 6.05X; IPI Criminal 4th No. 6.07X; IPI Criminal 4th No. 24-25.06A. We agree with defendant's observation that objectively acting without lawful justification, as the instructions currently require, is different than intending to kill without lawful justification. Objectively acting without lawful justification is not a mental state or a description of a specific intent. The current instructions fail to inform the jury that the mental state required to prove attempted first degree murder is intent to kill without lawful justification. We have noted that, per *Barker*, 83 Ill. 2d at 327, the terms "intent to commit murder" and "intent to kill" are not interchangeable. We have also held that the specific intent required for attempted first degree murder is intent to kill without lawful justification, not simply intent to kill. Informing the jury that it need find only an intent to kill, not an intent to kill without lawful justification, enabled the jury to simultaneously find that defendant committed attempted first degree murder, which requires an intent to kill without lawful justification, even though it also found that defendant believed in the need for self-defense. We address this point next.

¶ 62 D. Inconsistent Verdicts

¶ 63 Defendant asserts that the mental state required for attempted first degree murder, intent to kill without lawful justification, is inconsistent with the jury's determination that at, the time of the shooting, he believed, albeit unreasonably, in the need for self-defense. Our supreme court has explained:

> " 'Legally inconsistent verdicts occur when an essential element of each crime must, by the very nature of the verdicts, have been found to exist and to not exist even though the offenses arise out of the same set of facts.' [Citation.] When offenses involve mutually inconsistent mental states, a determination that one mental state exists is legally inconsistent with a determination of the existence of the other mental state." *Price*, 221 Ill. 2d at 188-89 (quoting *People v. Frieberg*, 147 Ill. 2d 326, 343 (1992)).

¶ 64 In this case, the State concedes that defendant's mental state and intent did not differ when firing the shot that killed David, resulting in the second degree murder conviction, and when firing the shot that injured Sheena, resulting in the attempted first degree murder conviction. Indeed, defendant fired four shots in rapid succession, not looking where he fired, and the State never tried to distinguish defendant's mental state and intent *vis-à-vis* each specific shot. In conjunction with the second degree murder conviction, the jury determined that, when firing the shot that killed David, defendant had a belief in the need for self-defense, although unreasonable. Therefore, when firing the shot that injured Sheena, defendant also had a belief in the need for self-defense, although unreasonable. We know, given the jury instructions regarding attempted first degree murder and the jury's verdict of guilty as to attempted first degree murder, that the jury determined that defendant intended to kill when he fired the shot that injured Sheena. However, per *Barker*, simply intending to kill is not enough. Per *Reagan* and *Lopez*, attempted first degree murder requires the specific intent to kill without lawful justification. Defendant cannot have intended to kill without lawful justification where he also believed, albeit unreasonably, in the need for self-defense. *Reagan*, 99 Ill. 2d at 240.

¶ 65 Accordingly, we conclude that defendant's conviction for attempted first degree murder is inconsistent with his conviction for second degree murder, where the parties agree that defendant's mental state and intent did not change when committing the acts which formed the basis of each offense.

¶ 66 We recognize that the jury's finding, made in conjunction with the second degree murder conviction, that defendant believed in the need for self-defense is not a "mental state" but, rather, it is a mitigating factor making second degree murder a lesser *mitigated* offense of first degree murder. See *Jeffries*, 164 Ill. 2d at 123. In labeling the belief in the need for self-defense a mitigating factor, *Jeffries* observed that the court's earlier holding in *People v. Hoffer*, 106 Ill. 2d 186, 194-95 (1985), was implicitly overruled. *Jeffries*, 164 Ill. 2d at 121-22 (citing *People v. Wright*, 111 Ill. 2d 18, 28 (1986)). *Hoffer* had incorrectly held that a belief in the need for self-defense was a "mental state" such that voluntary manslaughter was a lesser-*included* offense of murder. *Hoffer*, 106 Ill. 2d at 194-95. However, *Hoffer* had also held that the defendant's convictions for murder and voluntary manslaughter were legally inconsistent because a defendant could not both believe and not believe that circumstances existed justifying the use of force. *Id.* In context, *Jeffries*'s criticism of *Hoffer* was not directed at the gravamen of *Hoffer*'s inconsistent verdict analysis and does not undermine our ruling. *Jeffries* was not an inconsistent verdict case and, just months after *Jeffries*, the supreme court was squarely faced with the question of whether a jury's determination that a mitigating factor both did and did not exist rendered a verdict inconsistent, which the court answered in the affirmative. See *People v. Porter*, 168 Ill. 2d 201, 214 (1995). That the mitigating factor of provocation in *Porter* was not technically a mental state did not stop the supreme court from holding that the defendant's convictions for first and second degree murder were legally inconsistent, as the defendant could not have acted both with and without provocation in murdering the victim. *Id.* Also just months after *Jeffries*, the supreme court held that the belief in the need for self-defense is a finding that cannot coexist with the intent to kill without lawful justification. See *Lopez*, 166 Ill. 2d at 448.

¶ 67 Simply put, the jury's finding that defendant believed in the need for self-defense is a factual determination that precludes a finding of guilt for attempted first degree murder.

¶ 68 We recognize that our holding is at odds with the First District's ruling in *Guyton*, 2014 IL App (1st) 110450,[1] which we conclude was incorrectly decided. The facts in *Guyton* are on all fours with those in the instant case. In *Guyton*, the defendant testified that his vehicle collided with a van. *Id.* ¶ 20. He argued with the van's driver and passenger. *Id.* ¶ 21. The passenger exited the van and threatened the defendant with a gun if the defendant did not pay for the resulting damage. *Id.* The passenger told the defendant that the dispute was not over. *Id.* ¶ 22. The defendant parked his car, took his gun from his car, and began to walk home. *Id.* The defendant saw the van approach. *Id.* The defendant saw the passenger reach down with his right arm, and the defendant thought that the passenger was going to shoot him. *Id.* The

[1]As the State notes, the Second District accepted *Guyton* in an unpublished order. *People v. Russell*, 2022 IL App (2d) 200119-U. However, *Russell* cited *Guyton* in the context of holding that trial counsel did not provide ineffective assistance for failing to ask for instructions concerning imperfect self-defense in an attempted first degree murder case. *Id.* ¶ 55. *Russell* correctly observed that attempted first degree murder cannot be mitigated by imperfect self-defense, and it could have relied exclusively on *Lopez* for that principle. *Id.* ¶ 49. Unlike *Guyton* or the instant case, *Russell* does not involve a defendant convicted of both attempted first degree murder and second degree murder.

defendant shot at the van and ran away. *Id.* The driver was killed, and the passenger suffered a minor injury. *Id.* ¶¶ 4, 15.

¶ 69 The jury convicted defendant of second degree murder as to the driver, attempted first degree murder as to the passenger, and aggravated discharge of a firearm. *Id.* ¶ 1. The defendant argued on appeal that his conviction for second-degree murder shows that the jury determined that he believed in the need for self-defense, although his belief was unreasonable. *Id.* ¶¶ 35, 39. Defendant further argued that his mental state did not differ when firing the shot that killed the driver and resulted in his second degree murder conviction (which would have required an intent to kill, but *no*t an intent to kill without lawful justification) and the shot that injured the passenger and resulted in his attempted first degree murder conviction (which would have required an intent to kill without lawful justification). *Id.* ¶ 40. Therefore, he urged that he could not have had the requisite specific intent to be convicted attempted first degree murder and that conviction should be vacated. *Id.* ¶ 35.

¶ 70 The *Guyton* court held that the verdicts were not inconsistent:

> "*There is no difference between the mental states required to prove attempted first degree murder and second degree murder*. First degree murder and second degree murder share the same elements, including the same mental states, but second degree murder requires the presence of a mitigating circumstance. *Jeffries*, 164 Ill. 2d at 121-22. The presence of a mitigating factor does not negate the mental state of murder because mitigating factors are not elements of the crime. *Jeffries*, 164 Ill. 2d at 121." (Emphasis added.) *Id.* ¶ 41.

¶ 71 The *Guyton* court agreed with the defendant's premise that, in committing the acts that formed the basis of each offense, defendant had the same unreasonable belief in the need for self-defense. *Id.* ¶ 46. It reasoned, however, that because the offense of attempted second degree murder does not exist, the jury was powerless to mitigate the attempted first degree murder conviction based on its determination that defendant had an unreasonable belief in the need for self-defense. *Id.*

¶ 72 The *Guyton* court appeared to recognize a sense of unfairness in this, referencing the dissent in *Lopez* where "Justice McMorrow predicted the precise conundrum presented here: absent a crime of attempted second degree murder, a defendant could be punished more severely if the victim lives than if the victim dies." *Id.* ¶ 43. The *Guyton* court stated that, in 2010, the legislature addressed the sentencing disparity between attempted first degree murder and second degree murder, but only as to second degree murder (provocation) not second degree murder (imperfect self-defense). *Id.* ¶ 44. The legislature added subsection (c)(1)(E) to section 804 (720 ILCS 5/8-4(c)(1)(E) (West 2010); see Pub. Act 96-710 (eff. Jan. 1, 2010)) to the sentencing provisions in the attempt statute, which provided that if, at sentencing, the defendant is able to prove provocation by a preponderance of the evidence, then the sentence for the attempted first degree murder is a Class 1 felony rather than a Class X felony. *Guyton*, 2014 IL App (1st) 110450, ¶ 44.

¶ 73 The *Guyton* court reasoned that the legislature could have added a similar provision addressing the sentencing disparity between attempted first degree murder and second degree murder (imperfect self-defense), but it chose not to. *Id.* ¶ 45. It reasoned that this suggested the legislature's agreement with the supreme court's holding in *Lopez* that the crime of attempted first degree murder cannot be mitigated to attempted second degree murder. *Id.* The *Guyton* court added, "[s]hould our presumption be incorrect, the legislature again has the opportunity

to consider whether subsection 8-4(c)(1)(E) should be amended to allow proof of imperfect self-defense as a basis for mitigation of a sentence for the crime of attempted murder." *Id.*

¶ 74 Thus, the *Guyton* court's analysis may be thought of in two parts: (1) its conclusion that the verdicts were not inconsistent and (2) its recognition that the crime of attempted first degree murder cannot be mitigated by a belief, albeit unreasonable, in the need for self-defense (citing *Lopez*, the *Lopez* dissent, and the legislature's apparent response to the *Lopez* dissent).

¶ 75 The *Guyton* court's conclusion that the verdicts were not inconsistent is set forth in a single sentence without citation to authority: "There is no difference between the mental states required to prove *attempted* first degree murder and [completed] second degree murder." (Emphasis added.) *Id.* ¶ 41. The court subsequently cites *Jeffries* (*id.* (citing *Jeffries*, 164 Ill. 2d at 121-22)), but its reliance on *Jeffries* is misplaced. *Jeffries* compared the mental states of the completed offenses of first and second degree murder, finding them to be the same. *Jeffries* did not address the mental state and intent required for the inchoate offense of attempted first degree murder.

¶ 76 The holding in *Jeffries* that the mental state for first and second degree murder are the same cannot be used to support the *Guyton* court's assertion that there is no difference between the mental states required to prove attempted first degree murder and second degree murder. The mental state required to prove attempted first degree murder cannot be substituted for the mental state required to prove first degree murder. The supreme court has repeatedly indicated that the mental state required to prove an inchoate offense is not the same as the mental state required to prove the completed offense. See, *e.g.*, *Lopez*, 166 Ill. 2d at 449 ("the specific language of Illinois' attempt statute *** plainly requires the intent to commit a specific offense, not simply the intent required to commit the predicate offense"); *Reagan*, 111 Ill. App. 3d at 950 ("The confusion we see here is the result of two different intent requirements: The intent necessary to commit a completed offense differs from the specific intent necessary to commit the inchoate offense of attempt."), *aff'd* 99 Ill. 2d 238; *Barker*, 83 Ill. 2d at 326-27; *Harris*, 72 Ill. 2d at 23, 27-28; *Trinkle*, 68 Ill. 2d at 204. As discussed, the specific intent required to prove attempted first degree murder is intent to kill without lawful justification. See *Lopez*, 166 Ill. 2d at 448-49; *Reagan*, 99 Ill. 2d at 240. The mental state required to prove the completed offenses of first degree murder is simply the intent to kill (setting aside for the purposes of this case the alternative definitions of murder contained in section 9-1(a), such as intending to do great bodily harm or knowing that one's acts create a strong probability of death or great bodily harm). See *Harris*, 72 Ill. 2d at 27; *Trinkle*, 68 Ill. 2d at 201. The mental state required to prove the completed offense of second degree murder is the same, intent to kill. *Jeffries*, 164 Ill. 2d at 122. Emphatically, the mental state required to prove attempted first degree murder and the completed offense of second degree murder are *not*, as the *Guyton* court asserts, the same.

¶ 77 We next turn to the second part of the *Guyton* court's analysis, its recognition that the crime of attempted first degree murder cannot be mitigated—either at the conviction stage as logically impossible or, as is legislatively available for provocation, at the sentencing stage—by a belief, albeit unreasonable, in the need for self-defense. A more critical analysis demonstrates these observations to be irrelevant to the question posed by the *Guyton* defendant: what is the specific intent required to be convicted of attempted first degree murder and is it legally inconsistent with the jury's determination that, at the time of the offense, defendant believed, albeit unreasonably, in the need for self-defense? As we have delineated above, the

mental state required to be convicted of attempted first degree murder is intent to kill without lawful justification and that mental state is indeed inconsistent with a jury's determination that a defendant believed in the need for self-defense, albeit unreasonably.

¶ 78 We agree with defendant that the best explanation for the legislature's failure to address a sentencing mitigation for a defendant who attempted to commit first degree murder yet who also believed, albeit unreasonably, in the need for self-defense, is that there is no such legally convicted defendant. Such a defendant cannot properly be convicted of attempted first degree murder in the first place.

¶ 79 Finally, we note that at oral argument the State agreed that a defendant cannot have the specific intent to murder a victim if the defendant believed he was legally justified. Nevertheless, the State maintains that, per *Guyton*, the latter part of the foregoing statement, belief in justification, is but a mitigating factor which could not be considered until after the jury found the elements of first degree murder to be satisfied. Thus the State argues that considering this mitigating factor in the context of attempted first degree murder "puts the cart before the horse." The State continues that, because the crime of attempted first degree murder cannot be mitigated, this court should not consider defendant's belief in the need for self-defense.

¶ 80 The State's argument fails to recognize that the completed offenses of first and second degree murder are not at issue in this appeal. Unlike those offenses, the inchoate offense of attempted first degree murder does not require a two-step analysis. The jury's determination that defendant had a belief in the need for self-defense, no matter how characterized, makes it legally impossible to establish that defendant intended to kill without lawful justification. This case is not about mitigating the offense of attempted first degree murder. As defendant readily agrees, that is not possible. Rather, this case is about whether defendant may be properly convicted of attempted first degree murder where the jury has found him guilty of second degree murder for a series of shots fired where his intent did not change. He cannot.

¶ 81 E. Remedy

¶ 82 Typically, when a jury returns an inconsistent verdict, the trial court should send the jury back to deliberate further to resolve the inconsistency. *Porter*, 168 Ill. 2d at 214. If the trial court fails to do so, the remedy is usually to reverse and remand for a new trial on all counts. *Id.* at 214-15. The State makes no meaningful argument as to remedy, but it states in conclusory fashion that the remedy should be to remand for a new trial. It does not specify whether it favors a remand for a new trial on all charges or just on the attempted first degree murder charge. Defendant urges that his second degree murder conviction as to David should stand and that his conviction for attempted first degree murder as to Sheena should be outright reversed with no new trial.

¶ 83 This case is different from a typical inconsistent verdict case, where the jury finds that an essential element or mental state both exists and does not exist. In *Porter*, again, the jury found that defendant acted both with provocation and without provocation when he murdered the victim. *Id.* at 214. In contrast, here, the jury did not find that defendant acted both with a belief in the need for self-defense and with an intent to kill without lawful justification when firing the series of shots at the van. Rather, intent to kill without lawful justification is what the jury was required to find to support a conviction for attempted first degree murder but, as explained, the jury instructions for attempted first degree murder as to Sheena merely asked the jury if

defendant objectively lacked lawful justification when he fired the shots. Therefore, the jury never made a finding as to Sheena in contradiction of its finding, as to David, that defendant believed in the need for self-defense when he fired the shots. As such, we see no reason to disturb defendant's conviction for second degree murder as to David. The findings substantiating that conviction were not contradicted and it would violate principles of double jeopardy to subject defendant to the chance that a new jury might convict him of the completed offense of first degree murder as to David. See, *e.g.*, *People v. Daniels*, 187 Ill. 2d 301, 321 (1999).

¶ 84 Moreover, once the second degree murder conviction is locked in place, we see no purpose in remanding for a new trial as to the attempted first degree murder charge. As we have explained, a jury cannot legally find a defendant to have intended to kill without lawful justification when he believed in the need for self-defense. As the State concedes, a jury has already determined that defendant believed in the need for self-defense when he fired four shots in quick succession. When a trier of fact determines an issue of ultimate fact as part of a valid and final judgment—here the second degree murder conviction—that issue cannot be litigated again between the same parties in any future lawsuit. *Id.* at 320-21.

¶ 85 For these reasons, we outright reverse the attempted first degree murder conviction, without remand for a new trial. Nor do we remand for a jury to decide whether defendant is guilty of aggravated battery with a firearm. The State never charged defendant with aggravated battery with a firearm. This was a lesser included instruction provided to the jury over the State's objection that does not survive our outright reversal of the greater offense.

¶ 86 In appeal No. 3-21-0426, we outright reverse defendant's attempted first degree murder conviction. Appeal No. 3-21-0423 is rendered moot and, as such, dismissed. As our analysis has turned entirely on questions of law, there is no need for a remand for stage-three postconviction proceedings. See *Buffer*, 2019 IL 122327, ¶ 47.

¶ 87 III. CONCLUSION

¶ 88 The judgment of the circuit court of Will County is reversed as to the attempted first degree murder conviction. (Defendant's conviction and sentence for second degree murder were not challenged in either appeal No. 3-21-0426 or No. 3-21-423 and remain in force.)

¶ 89 No. 3-21-0423, Appeal dismissed.

¶ 90 No. 3-21-0426, Reversed.

STATE OF ILLINOIS)
) SS
COUNTY OF WILL)

IN THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT
WILL COUNTY ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS

VS. **02 CF 1974**

TRAVARIS GUY

ORDER

After hearing on the Defendant's Amended Supplemental Petition for Post Conviction Relief,

THIS COURT FINDS AS FOLLOWS:

1. That the Court found that Cause and Prejudice were found in the petition and facts from the trial court and Appellate record and proceeding, including but not limited to the failure to raise issues for Appellate review that deal with the Fundamental Rights of the Defendant and the Fundamental Fairness of the trial proceedings and verdict.

2. That Res Judicata does not apply due to the Appellate Court not deciding this issue in the numerous prior appeals.

3. That the State's motion to dismiss was granted in part and denied as it relates to the jury instruction issue and verdicts returned.

4. The jury was given only 2 verdict forms for three charged counts.

5. The elements of Counts One and Two differ with the requisite intent.

6. Count One required the "*intent to kill*" and Count Two required the "*knowing such act created a strong probability of death or great bodily harm...*".

7. Count Three could stand alone or could have required the theory of transferred intent from Count One.

8. Because the intent/knowledge requirement is different between the first two counts, the verdict forms and confusion illustrated by the Jury's questions as well as the principles of Fundamental Fairness,

IT IS THEREFORE ORDERED:

That this court finds that the Defendant should receive a new trial as to Count Three of the Bill of Indictment.

Hon. David M. Carlson, Circuit Judge
September 10, 2021

THE COURT: I guess, Colleen, you probably want to deal with waiver and all those things at this point in time.

MS. GRIFFIN: That would probably be what I put in my answer. Just procedurally I am supposed to file an answer within 20 days.

As far as any evidentiary hearing went I think there would be nothing to present. And if your Honor granted that particular issue, granted the post-conviction petition on that particular issue, it would probably go straight to the Appellate Court. There wouldn't be evidence to actually present as far as witnesses or anything like that.

THE COURT: It's all in the transcripts. Well, quite frankly on the transcript and in the court file I would have to take judicial notice of the actual instructions given I think.

MS. GRIFFIN: Correct.

THE COURT: I think that would be the extent of the third stage proceeding.

MR. KOGUT: No live witnesses.

THE COURT: Correct. So why don't we do this, just so that the record is clear. I am granting the State's motion to dismiss at the second stage on all issues

raised with the exception of the jury issue dealing with the Attempt First Degree Murder charge.

At this time then I am going to deny that part of the State's motion to dismiss. I will give the State leave to file an answer. And then we'll set it for an evidentiary hearing. We'll move to stage three in that context or in that limited scope.

MR. KOGUT: Understood, Judge. Whatever is convenient for the State.

MS. GRIFFIN: 20 days I would have to file by the 24th of June. I am sure I will have it on file prior to that date. So any date after that though would be good for the evidentiary portion.

THE COURT: Do you want to go like mid July?

MR. KOGUT: Fine. Any day of the week better for you?

MS. GRIFFIN: The only day I know I won't be around is July 6th.

THE COURT: I am going to be gone the 21st on.

MR. KOGUT: July 9th?

THE COURT: I am going to be at 26th Street that day.

MR. KOGUT: 16th.

THE COURT: July 16th. We may be able --

NOTICE OF APPEAL

APPEAL TAKEN FROM THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT IN WILL COUNTY, ILLINOIS

APPEAL TAKEN TO THE APPELLATE COURT, THIRD JUDICIAL DISTRICT, ILLINOIS

The People of the State of Illinois

Plaintiffs-Appellees,
-vs-
TRAVARIS GUY - K76336
Defendant-Appellant

Case No. 2002 CF 1974

☐ Joining Prior Appeal / ☑ Separate Appeal / ☐ Cross Appeal
(Mark One)

FILED
2021 SEP 14 PM 3:12
WILL COUNTY, ILLINOIS
CLERK OF THE CIRCUIT COURT

An appeal is taken from the Order of Judgment described below:

(1) Court to which appeal is taken is the Appellate Court.

(2) Name of Appellant and address to which notices shall be sent.
NAME: TRAVARIS GUY - K76336
ADDRESS: WESTERN ILLINOIS CORRECTIONAL CENTER 2500 ROUTE 99 SOUTH
MOUNT STERLING ILLINIOS 62353

(3) Name and address of Appellant's Attorney on appeal.
NAME: Thomas A. Karalis, Deputy Defender
Office of the State Appellate Defender
Third Judicial District
770 E. Etna Rd.
Ottawa, Illinois 61350

If Appellant is indigent and has no attorney, does he/she want one appointed?
YES

(4) Date of Judgment or Order: APRIL 11, 2005
(a) Sentencing Date: JULY 28, 2005
(b) Motion for New Trial: JUNE 20, 2005
(c) Motion to Vacate Guilty Plea:
(d) Other:
POST CONVICTION PETITION

(5) Offense of which convicted:
2ND DEGREE MURDER; ATTEMPTED FIRST DEGREE MURDER

(6) Sentence:
30 YEARS COUNT I; 30 YEARS COUNT II (SENTENCES TO RUN CONSECUTIVE)

(7) If appeal is not from a conviction, nature of order appealed from:

(8) If the appeal is from a judgment of a circuit court holding unconstitutional a statute of the United States or of this state, a copy of the court's findings made in compliance with Rule 18 shall be appended to the notice of appeal.

(Signed) Andrea Lynn Chasteen / KM
(May be signed by appellant, attorney, or clerk of circuit court.)

ANDREA LYNN CHASTEEN
Clerk of the Circuit Court

cc: State's Attorney
Attorney General

NOAPL

STATE OF ILLINOIS)
) SS.
COUNTY OF WILL)

FILED
2021 SEP 10 PM 3:25
CLERK CIRCUIT COURT
WILL COUNTY, ILLINOIS

IN THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT
WILL COUNTY, ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS Plaintiff,	)	
	)	NO. 02 CF 1974
vs.	)	
TRAVARIS GUY, Defendant.	)	The Honorable David Carlson, Judge Presiding

NOTICE OF APPEAL

An appeal is taken from the judgment order described below:

1. Court to which appeal is taken Illinois Appellate Court, Third District

2. Name of appellant and address to which notices shall be sent:

Name: James W. Glasgow, Will County State's Attorney
Address: 57 North Ottawa Street
Joliet, Illinois 60432

3. Name and address of appellant's attorney of appeal:

Name: Thomas Arado
Deputy Director, State's Attorney's Appellate Prosecutor
Address: 628 Columbus St., Suite 300,
Ottawa, Illinois 61350

4. Date of Judgment or Order: September 10, 2021

5. Nature of Order appealed from: Order granting defendant's amended post-conviction petition, in part, and ordering a new trial as to Count III in the Bill of Indictment, attempt murder

Colleen M. Griffin
Assistant State's Attorney, Will County
57 North Ottawa Street
Joliet, Illinois 60432

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