No. 128316

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, -vs- SHAUN N. TAYLOR, Defendant-Appellant.	)))))))))))	Appeal from the Appellate Court of Illinois, No. 3-19-0281. There on appeal from the Circuit Court of the Fourteenth Judicial Circuit, Henry County, Illinois, No. 17 CF 348. Honorable Terence M. Patton, Judge Presiding.

BRIEF AND ARGUMENT FOR DEFENDANT-APPELLANT

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NATURE OF THE CASE

A jury found Shaun N. Taylor guilty of attempt first degree murder of a peace officer and he was sentenced to a prison term of 50 years in the Illinois Department of Corrections. Taylor then appealed his conviction, which was affirmed by the appellate court. *People v. Taylor*, 2022 IL App (3d) 190281. This Court granted Taylor's petition for leave to appeal on May 25, 2022. No issue is raised challenging the charging instrument.

ISSUES PRESENTED FOR REVIEW

1. Does application of the attempt statute's sentence enhancement for the attempt murder of a peace officer prohibit the simultaneous application of one of the attempt statute's other sentence enhancements for the use of a firearm in the commission of the offense?

2. Does an expert's concession that he is unsure he correctly diagnosed a defendant as not being insane at the time of the offense warrant the appointment of a second expert to examine the defendant for insanity at the time of the offense?

STATUTES AND RULES INVOLVED

Pursuant to Supreme Court Rule 341(h)(5), the following statutes are set forth in the Appendix. Ill. S. Ct. R. 341(h)(5) (eff. Oct. 1, 2020).

720 ILCS 5/8-4(c)(1) (2016).

725 ILCS 5/115-6 (2016)

STATEMENT OF FACTS

On October 15, 2017, Illinois State Police Trooper Andrew Scott stopped defendant on Interstate 80 around 9:30 p.m. due to an obstructed windshield (R281-83). *People v. Taylor*, 2022 IL App (3d) 190281, ¶ 7. Defendant was traveling eastbound from Washington to Massachusetts, and had a Global Positioning System unit on his windshield (R283, 286, 408, 548). *Taylor*, 2022 IL App (3d) 190281, ¶ 7. Scott approached defendant's vehicle, identified himself as an Illinois State Trooper, and informed defendant that he was going to give him a warning. *Id*. Defendant had opened the passenger side window about one inch for Scott to communicate with him (R284). Defendant declined to return to Scott's squad car while Scott wrote out the warning. *Id*.

While Scott was preparing the warning, another officer arrived with a canine unit. *Id*. That officer walked the canine around defendant's vehicle, and the canine alerted. Scott and the other officer then asked defendant to exit the car. *Id*. Defendant refused to do so and sped off. *Id*.

Defendant pulled off the interstate at the first available exit, drove south for awhile, and parked his vehicle on a country road (R297). He grabbed two weapons he was carrying in his vehicle – an AR-15 semi-automatic rifle and a .40 caliber handgun – and took up a hidden position in a cornfield directly across from his vehicle (R376, 450). Shortly thereafter, Scott found defendant's vehicle but did not approach it because it was unoccupied (R298). Instead, Scott parked his squad approximately 60 yards from defendant's vehicle with the front of his squad car facing the front of defendant's vehicle (R300-01, 502). Scott then exited his squad car and moved to a spot behind it (R301, 312). When he did so, defendant fired 23 shots in his direction with the AR-15 rifle (R301-02, 3015-17, 331, 451). Scott

survived the incident unharmed. Law enforcement pursued defendant on foot. Several hours later, defendant surrendered. *Taylor*, 2022 IL App (3d) 190281, ¶ 8.

Defendant was charged with one count of attempted first degree murder of a peace officer (720 ILCS 5/8-4(a), (c)(1)(A), 9-1(a)(1) (2016)) and one count of aggravated discharge of a firearm (*id.* § 24-1.2(a)(3)). *Taylor*, 2022 IL App (3d) 190281, ¶ 3. The attempt murder charge alleged that defendant "shot at [Trooper] Andrew Scott with a .223 rifle, knowing Andrew Scott to be a peace officer engaged in the course of performing his official duties, with the intent to prevent the performance by Andrew Scott of his official duties" (C15). The charge cited "720 ILCS 5/8-4(a) and (c)(1)(A) (20-80)" as the statute defendant violated (C15).

Prior to trial, the court appointed clinical psychologist Dr. Kirk Witherspoon to examine defendant and determine whether : defendant could raise the defense of not guilty by reason of insanity (NGRI); (2) defendant could raise the mitigation of guilty but mentally ill (GMBI); and (3) defendant was fit for trial (C28). *Taylor*, 2022 IL App (3d) 190281, ¶ 3. Witherspoon diagnosed defendant as suffering from severe posttraumatic stress disorder, and concluded that defendant met the threshold for a finding of GBMI for the purpose of postsentencing treatment (SEC C10,19, 21). He concluded, however, that defendant did not meet the threshold for asserting the defense of NGRI, and also that he was fit for trial (SEC C10, 19).

In addition to his report, Witherspoon provided defense counsel with a handwritten note which stated:

> "Mr. Taylor is a borderline case. I do not think he meets the threshold for NGRI. However, if his parents can afford it, you may wish to seek a second opinion. If so, I can give you the names of a couple of other good psychologists who can do this work." (SEC 22). *Taylor*, 2022 IL App (3d) 190281, ¶ 4.

In response to Witherspoon's note, defendant filed a motion requesting the appointment of an expert, at the State's expense, to render a second opinion as to whether defendant could raise an NGRI defense (SEC C11-12). *Taylor*, 2022 IL App (3d) 190281, ¶ 5.

The circuit court denied defendant's request because Witherspoon had not included the recommendation for a second opinion in the reports he tendered to the court, unlike other times where he had done so (R64-65). The court explained: "I've seen in previous cases he has filed reports and he has recommended, said that someone needs to be evaluated for something and he can't do it and recommends somebody else" (R64). The court characterized Witherspoon's message as being "a note to the defense attorney, saying, 'Hey, if you can afford it, you might want to get a second one'" (R65).

The jury found defendant guilty of the charges. *Taylor*, 2022 IL App (3d) 190281, ¶ 9. Prior to sentencing, defendant argued that application of the 20-year firearm sentence enhancement of the attempt statute, that would potentially apply, would constitute a double enhancement given that he was already subject to an enhanced sentencing range of 20 to 80 years for the attempt murder of a peace officer. *Taylor*, 2022 IL App (3d) 190281, ¶ 10; 720 ILCS 5/8-4(c)(1)(A), and (C) (2016). The trial court found the firearm sentence enhancement would not constitute a double enhancement because the enhancements served different purposes. *Id*. ¶ 11. The court then sentenced defendant to an aggregate sentence of 50 years in prison comprised of 30 years in prison under the sentence enhancement for the attempt murder of a peace officer plus a 20-year enhancement for discharging a firearm in the attempt (C140-41) (R677, 700). *Id.* The trial court merged the

aggravated discharge of a firearm adjudication of guilty into the attempted murder conviction. *Taylor*, 2022 IL App (3d) 190281, ¶ 9.

Defendant raised two arguments on direct review, and the appellate court affirmed. The panel unanimously rejected defendant's first argument that the circuit court erred in denying defendant's request for a second psychological evaluation to determine whether he was NGRI given Witherspoon's note indicating his case was a "borderline" one. *Taylor*, 2022 IL App (3d) 190281, ¶¶ 16-21.

The panel split on defendant's second argument that the circuit court had erred in adding a 20-year firearm sentence enhancement to his term of imprisonment because he had already been sentenced under the sentence enhancement for the attempt murder of a peace officer. *Taylor*, 2022 IL App (3d) 190281, ¶¶ 23-40. The majority found that the enhanced sentencing range of 20 to 80 years for the attempt murder of a peace officer was actually a baseline sentencing range to which the applicable firearm sentence enhancement could be added. *Taylor*, 2022 IL App (3d) 190281, ¶ 39.

The dissenting Justice would have found the circuit court's imposition of the 20-year firearm enhancement was erroneous. The dissenting Justice reasoned that, under settled rules of statutory construction, the attempt statute's sentencing enhancements for the attempt murder of a peace officer, and for the use of a firearm in the commission of the offense, had to be applied disjunctively, as mutually exclusive options, and not conjunctively. *Taylor*, 2022 IL App (3d) 190281, ¶¶ 46-60 (Lytton, J., dissenting).

This Court allowed defendant leave to appeal on May 25, 2022.

ARGUMENT

I.

Application of the attempt statute's sentence enhancement for the attempt murder of a peace officer prohibits the simultaneous application of one of the attempt statute's other sentence enhancements for the use of a firearm in the commission of the offense.

STANDARD OF REVIEW

Issues of statutory construction are reviewed *de novo*. *People v. Davison*, 233 Ill. 2d 30, 40 (2009).

DISCUSSION

Defendant was sentenced to an aggregate term of imprisonment of 50 years for the attempt murder of a peace officer (C140-41) (R677, 700). The sentence consisted of a 30-year term of imprisonment under subsection (c)(1)(A) of the attempt statute which provides enhanced sentencing for the attempt murder of a peace officer, plus 20 years under subsection (c)(1)(C) of the attempt statute which provides for a 20-year enhancement when a defendant discharges a firearm in committing an attempt murder (C140-41) (R677, 700). *People v. Taylor*, 2022 IL App (3d) 190281, ¶ 10; 720 ILCS 5.8-4(c)(1)(A), and (C) (2016).

In the circuit court, defendant objected to the imposition of the 20-year firearm sentencing enhancement of subsection (C) on the ground that it constituted a double enhancement because the sentencing range of 20 to 80 years of subsection (A) for the attempt murder of a peace officer already subjected him to an enhanced sentencing range. *Taylor*, 2022 IL App (3d) 190281, ¶ 10. The circuit court disagreed, finding that imposition of both sentencing enhancements would not constitute a double enhancement because subsections (A) and (C) served different purposes. *Id*. ¶ 11.

Defendant renewed his objection on direct review and the panel split on the question. *Taylor*, 2022 IL App (3d) 190281, ¶¶ 23-40, 44-60. The majority found that the enhanced sentencing range of 20 to 80 years of subsection (A) for the attempt murder of a peace officer was a baseline sentence for status-based offenses to which the applicable firearm sentencing enhancements of subsections (B), (C), and (D) could be added. *Taylor*, 2022 IL App (3d) 190281, ¶ 39.

The dissenting Justice disagreed, explaining that the attempt statute did not clearly allow for the imposition of a double enhancement, and settled rules of statutory construction, including the use of a semicolon between the sentence enhancement subsections, confirmed that the subsections were to be applied disjunctively. *Taylor*, 2022 IL App (3d) 190281, ¶¶ 55-56,59 (Lytton. J., dissenting). The dissenting Justice would have remanded the cause for resentencing. *Id*. ¶ 60.

The dissent was better reasoned. Therefore, this cause should be remanded for resentencing because: (1) the plain language of the attempt statute shows the sentence enhancement subsections are to be read disjunctively; (2) a prohibited sentencing double enhancement will occur if any two of the sentence enhancement subsections of the attempt statute are applied conjunctively; (3) in the alternative, the sentence enhancement subsections of the attempt statute are ambiguous and must therefore be construed as applying disjunctively under the rule of lenity; and (4) the absence of corrective action by the legislature, after the first opinion to address the question ruled that the sentence enhancement subsections of the attempt statute apply disjunctively, shows that the legislature viewed that judicial interpretation of the statute as being correct.

In pertinent part, the attempt statute provides as follows regarding the sentence for attempt murder:

"(c) Sentence.

A person convicted of attempt may be fined or imprisoned or both not to exceed the maximum provided for the offense attempted but ***:

> (1) the sentence for attempt to commit first degree murder is the sentence for a Class X felony, except that
>
> > (A) an attempt to commit first degree murder [of an individual whom the defendant knew or should have known was a peace officer performing his or her official duties] *** is a Class X felony for which the sentence shall be a term of imprisonment of not less than 20 years and not more than 80 years;
> >
> > (B) an attempt to commit first degree murder while armed with a firearm is a Class X felony for which 15 years shall be added to the term of imprisonment imposed by the court;
> >
> > (C) an attempt to commit first degree murder during which the person personally discharged a firearm is a Class X felony for which 20 years shall be added to the term of imprisonment imposed by the court;
> >
> > (D) an attempt to commit first degree murder during which the person personally discharged a firearm that proximately caused great bodily harm, permanent disability, permanent disfigurement, or death to another person is a Class X felony for which 25 years or up to a term of natural life shall be added to the term of imprisonment imposed by the court; and
> >
> > (E) if the defendant proves by a preponderance of the evidence at sentencing that, at the time of the attempted murder, he or she was acting under a sudden and intense passion resulting from serious provocation by the individual whom the defendant endeavored to kill, or another, and, had the individual the defendant endeavored to kill died, the defendant would have negligently or accidentally caused that death, then the sentence for the attempted murder is the sentence for a Class 1 felony ***." 720 ILCS 5/8-4(c)(1)(A)-(E) (2016).

Interpretation of this language has generated a split in the appellate court as to whether the sentence enhancement of subsection (A) for the attempt murder of a peace officer can be combined with the sentence enhancements of subsections

(B), (C), and (D) for the use of a firearm in the attempt. Put differently, there is a split in the appellate court as to whether the sentence enhancements of subsections (A) thru (D) can be applied conjunctively, thus allowing them to be combined, or whether they must be applied disjunctively, thus making them mutually exclusive options that cannot be combined. Compare *People v. Phagan*, 2019 IL App (1st) 153031, ¶¶ 80-107; *People v. Holley*, 2019 IL App (1st) 161326, ¶¶ 21-33; and *People v. Douglas*, 371 Ill. App. 3d 21, 22-24 (1st Dist. 2007) (enhancements are disjunctive), with *Taylor*, 2022 IL App (3d) 190281, ¶ 39; *People v. Jackson*, 2018 IL App (1st) 150487, ¶¶ 50-51; *People v. Smith*, 2012 IL App (1st) 102354, ¶ 114; and *People v. Tolentino*, 409 Ill. App. 3d 598, 606 (1st Dist. 2011) (enhancements are conjunctive). This split should be resolved in favor of the opinions finding that the sentence enhancements apply disjunctively because applying them conjunctively would plainly violate settled principles of statutory construction.

A. The plain language of the sentence enhancement subsections of the attempt statue confirms that only one subsection is to apply at a time.

When interpreting a statute, the court's beginning point is the relevant statutory text. *United States v. Quality Stores, Inc.*, 572 U.S. 141, 145 (2014); *People v. Deroo*, 2022 IL 126120, ¶ 24. Where it is clear and unambiguous, a court must enforce the statutory language as it has been enacted. *Sun Life Assur. Co. of Canada v. Manna*, 227 Ill. 2d 128, 144 (2007); see also *People v. Woodard*, 175 Ill. 2d 435, 443 (1997) ("There is no rule of construction which allows the court to declare that the legislature did not mean what the plain language of the statute imports"). Further, the court must assume that the legislature did not intend an absurd or unjust result. *People v. Pullen*, 192 Ill. 2d 36, 42 (2000). An examination of the clear and unambiguous language of the sentence enhancement subsections of

the attempt statute confirms that the legislature intended a sentencing scheme by which the individual enhancements create separate penalties not to be intermingled.

The language of the sentence enhancement subsections of the attempt statute is clear. Section (c)(1) describes attempt first degree murder as a "Class X felony," a crime carrying a baseline sentencing range of 6 to 30 years' imprisonment. 720 ILCS 5/8-4(c)(1) (2016); 730 ILCS 5/5-4.5-25 (2016). Through use of the phrase "except that" following the section (c)(1) baseline sentencing range, the legislature has expressly carved out four exceptions to this range. 720 ILCS 5/8-4(c)(1)(A), (B), (C), and (D).

The first exception to the baseline Class X sentencing range is the one applicable in this case. Attempt murder is a Class X felony for which the sentence shall be 20 to 80 years' imprisonment where the aggravating factor is that the intended victim was a peace officer, a fireman, a Department of Corrections (DOC) employee, or a first responder medical worker each in the course of his or her respective duties. 720 ILCS 5/8-4(c)(1)(A), 9-1(b)(1), (2), and (12) (2016).

The other three exceptions to the baseline sentencing range are the "15/20/25-life" sentencing enhancements. 720 ILCS 5/8-4(c)(1)(B), (C) and (D) (2016). Under these sentence enhancements, if the attempt first degree murder is committed while armed with a firearm, the attempt murder is characterized as a "Class X felony for which 15 years" is added to the sentence; if the firearm is discharged during the attempt murder, the crime is a "Class X felony for which 20 years" is added to the sentence, and if the discharge causes great bodily harm, permanent disability, permanent disfigurement, or death to another person, the crime is a "Class X felony for which 25 years" to life is added to the sentence. *Id*. These firearm

sentence enhancements specifically state that they apply to "an attempt to commit first degree murder." They do not state that they apply to the attempt murder of a peace officer. Thus, read as written, the firearm sentence enhancements of subsections (B), (C), and (D) apply only to simple "attempt to commit first degree murder."

Furthermore, although the imposition of firearm enhancements is "mandatory" (*People v. White*, 2011 IL 109616, ¶ 26), it is obvious the legislature did not intend for two, or all, of the firearm sentencing enhancements of subsections (B), (C), or (D) to be used simultaneously because doing so would create an unjust or absurd result, and a sentencing double enhancement. It must follow that it did not also intend subsection (A) to be used simultaneously with subsections (B), (C), or (D). The plain language of the statute requires the State to choose which of the subsections it wants to charge the defendant with: in this case, subsection (A), with its 20 to 80 year term, or, had defendant been charged with the attempt murder of Scott as a civilian and not as a peace officer, subsection (C), with its 6 to 30 year plus 20 year term.

In short, under its plain terms, the statute creates five independent attempt murder crimes, each with its own sentencing scheme. The crimes can either be a baseline Class X felony with a sentencing range of 6 to30 years under section (c)(1), an aggravated Class X felony with an enhanced sentencing range of 20 to 80 years under subsection (A), an aggravated Class X felony with an enhanced sentencing range of 21 to 45 years under subsection (B), an aggravated Class X felony with an enhanced sentencing range of 26 to 50 years under subsection (C), or an aggravated Class X felony with an enhanced sentencing range of 31 years to life under subsection (D).

The Supreme Court's decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), confirms that the four sentencing enhancements of the attempt statute are independent crimes, each with its own sentencing scheme, because each enhancement is based on a different *Apprendi* element. Under *Apprendi*, a fact, other than a prior conviction, that increases the punishment beyond the statutory maximum is an "element" of the crime. *Alleyne v. United States*, 570 U.S. 99, 111, 115-16 (2013); *Apprendi*, 530 U.S. at 483 n.10, 490. As explained by the Court, when an *Apprendi* element is added to an offense, a "new offense," a "new, aggravated crime," a "distinct and aggravated crime," and a "separate legal offense" is created with an enhanced sentence. *Alleyne*, 570 U.S. at 113, 114-15, 115-16; *Apprendi,* 530 U.S. at 483 n.10, 501.

Thus, under *Apprendi*, subsections (A), (B), (C), and (D) of the attempt statue each constitute a distinct and aggravated crime with its own sentencing scheme, not to be intermingled, because each subsection is predicated on a distinguishable element (fact) that enhances the baseline sentencing range of section (c)(1), namely, that the target was a peace officer (A), that the defendant was armed with a firearm (B), that the defendant discharged a firearm (C), or that the defendant's discharge of the firearm "proximately caused great bodily harm, permanent disability, permanent disfigurement, or death to another person" (D). Indeed, an interpretation of the attempt statute that would allow the sentence enhancing subsections to be combined would render the statute unconstitutional under *Apprendi* because such an interpretation would disregard *Apprendi's* constitutional ruling that each subsection is a distinct aggravated crime.

The view that the legislature intended a sentencing scheme by which the individual enhancements of the attempt statute create separate penalties not

to be intermingled is also confirmed by the legislature's use of semicolons between the sentence enhancement subsections since the use of semicolons indicates that each subsection is to be read as a disjunctive, mutually exclusive option that is not to be combined with any other sentence enhancement subsection. *Taylor*, 2022 IL App (3d) 190281, ¶¶ 50, 53 (Lytton, J., dissenting); see also Punctuation, 2A Sutherland Statutory Construction § 47:15 n.4 (7th ed.) ("A semicolon tends to suggest related but separate ideas and stands for 'or,' not 'and.'");[1] Conjunctive and disjunctive words, 1A Sutherland Statutory Construction § 21:14 (7th ed.) ("Generally, courts presume that 'or' is used in a statute disjunctively unless there is clear legislative intent to the contrary.");[2] *Robinson v. Zorn*, 430 N.J. Super. 312, 319 (App. Div. 2013) (the use of a semicolon to separate clauses or subsections in a statute makes them disjunctive in nature).[3] Accordingly, the legislature's use of semicolons between the sentence enhancement subsections of the attempt statute confirms the legislature created separate penalties not to be intermingled because the use of semicolons indicates each subsection must be read disjunctively as a mutually exclusive option.

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[1] Accessed on WestLaw on August 3, 2022, at: https://1.next.westlaw.com/Document/I1bc777de557611da93f1e5b2823a79ce/View/FullText.html?ppcid=026fadf6c2764660aea7fdcd59a1ca3a&originationContext=documenttoc&transitionType=CategoryPageItem&contextData=%28sc.Default%29

[2] Accessed on WestLaw on August 3, 2022, at: https://1.next.westlaw.com/Document/I1b9df6db557611da93f1e5b2823a79ce/View/FullText.html?transitionType=UniqueDocItem&contextData=(sc.RelatedInfo)&userEnteredCitation=1A+Sutherland+Statutory+Construction+s+21%3a14

[3] While this Court is not bound by the decisions of other jurisdictions, it may look to other jurisdictions for guidance. *Nicholson v. Shapiro & Associates, LLC*, 2017 IL App (1st) 162551, ¶ 11.

In sum, the sentence enhancement subsections apply disjunctively because: (1) the plain language of the attempt statue shows each sentence enhancement is an *exception*, with its own sentencing scheme, to the baseline Class X felony sentencing range for simple attempt murder; (2) each sentence enhancement is a distinct and aggravated crime under the plain language of the statue and *Apprendi*; and (3) the legislature's use of semicolons to separate the subsections indicates the subsections are to be read disjunctively.

B. When a defendant is found guilty of the attempt murder of a peace officer, the rule against sentencing double enhancements prohibits combining any of the sentence enhancements of the attempt statute because all of the enhancements are based on the use of a firearm in committing the attempt murder.

An improper sentencing double enhancement occurs when a factor previously used to enhance a penalty is again used to subject a defendant to a further enhanced penalty. *People v. Koppa*, 184 Ill. 2d 159, 174 (1998). A conjunctive reading of the sentence enhancements of the attempt statute will run afoul of this rule because all of the enhancements are based on the use of a firearm in the commission of an attempted murder.

Here, the sentence enhancements of subsections (B), (C), and (D) are expressly based on the use of a firearm in the commission of an attempt murder. The sentence enhancement of subsection (A) for the attempt murder of a peace officer is also based on the use of a firearm since it is clear that enhancement was enacted to deter the use of firearms in the killing of police officers. *Cf. People v. Conover*, 84 Ill. 2d 400, 403-04 (1981) (for purposes of double enhancement analysis, receipt of compensation is implicit in the offenses of burglary and theft and may therefore not be used as an aggravating factor at sentencing).

More specifically, under the plain language of the statute, the legislature enacted the peace officer sentence enhancement of subsection (A) – with its severe 80-year maximum *de facto* life sentence – to deter the intentional killings of police officers. *People v. Smith*, 2012 IL App (1st) 102354, ¶ 115. Because removing firearms as the cause of police officer deaths is what will accomplish the purpose of reducing the intentional killings of police officers to a negligible amount, subsection (A) was aimed at the use of firearms by offenders in the killing of police officers. This conclusion is confirmed by Federal Bureau of Investigation (FBI) statistics that show that in 1993, the year the peace officer sentence enhancement was enacted, 96 percent of the law enforcement officers that were feloniously killed in the nation were killed with a firearm.[4]

FBI statistics also show that for the time span from 2010 thru 2019, 92 percent of the law enforcement officers killed in the nation were killed with a firearm.[5] As to the other causes of death for on-duty officers, the statistics for this

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[4] See Table 3 at p. 12 of the FBI's 1996 "Law Enforcement Officers Killed and Assaulted (LEOKA)" report. Table 3 is included in the Appendix to this brief. The full report is available at:
https://www.fbi.gov/services/cjis/ucr/publications (as visited July 14, 2022)

Judicial notice may be taken at any stage of the proceeding. Ill. R. Evid. 201(f) (eff. Jan. 1, 2011). Defendant respectfully requests that this Court take judicial notice of this report because its accuracy cannot reasonably be questioned. *Id.* 201(b). *Cf. Ashcroft v. Iqbal*, 556 U.S. 662, 667 (2009) (on its own, the Court relies for first time on appeal on FBI statistics cited in Department of Justice report).

[5] See 2019 LEOKA at Table 28. Table 28 is included in the Appendix to this brief. Table available at:
https://ucr.fbi.gov/leoka/2019/tables/table-28.xls (as visited July 14, 2022). Defendant respectfully requests that this Court take judicial notice of these FBI statistics because their accuracy cannot reasonably be questioned. Ill. R. Evid. 201(b), (f) (eff. Jan. 1, 2011).

time period show that 6 percent of the deaths were caused by vehicles, that a negligible .05 percent of the deaths were caused by knives, and that a negligible .09 percent of the deaths were caused by personal combat. *Id.* No deaths were caused by blunt instruments or bombs. *Id*. These statistics confirm that the peace officer sentence enhancement of section (A) was aimed at the use of firearms in the killing of police officers.

Even without reference to the FBI statistics, it is clear that subsection (A) was aimed at the use of firearms by offenders in the killings of police officers because the legislature did not create a maximum *de facto* life sentence of 80 years to protect police officers from attacks with a "butter knife." *People v. Taylor*, 2022 IL App (3d) 190281, ¶ 34. In enacting the enhancement, the legislature must have known what is obvious to everyone: that, in essence, all intentional killings of on-duty police officers are caused by firearms. Indeed, in all of the cases that have addressed the issue raised by this appeal, the attempted murder of the police officers was with a firearm. *Phagan*, 2019 IL App (1st) 153031, ¶¶ 1, 14-15, 18, 20; *Holley*, 2019 IL App (1st) 161326, ¶¶ 6-7; *Jackson*, 2018 IL App (1st) 150487, ¶ 5; *Smith*, 2012 IL App (1st) 102354, ¶¶ 5, 11; *Tolentino*, 409 Ill. App. 3d at 601; *Douglas*, 371 Ill. App. 3d at 22.

Further, at the time the peace officer enhancement was enacted, the legislature must have also understood that other weapons, such as knives or clubs, do not require the same level of deterrence because they do not pose the same heightened risk to police officers that firearms do since they are not as inherently lethal as a firearm, and since only a foolish person will bring a knife or a club to a gunfight.

Lastly, a double enhancement is proper if there is a clear legislative intent to allow it. *Koppa*, 184 Ill. 2d at 174. Here, however, there is nothing in the attempt statute that reveals a clear legislative intent to allow imposition of a sentencing double enhancement. *Jackson*, 2018 IL App (1st) 150487, ¶ 53. Accordingly, since subsection (A) is directed at the use of firearms by offenders in the killings of police officers, combining the subsection (A) sentence enhancement with any of the firearm sentence enhancements of subsections (B), (C), or (D) will violate the rule against double enhancements because doing so will punish a defendant twice for the use of a firearm in the attempt murder of a peace officer.

C. In the alternative, the sentence enhancement provisions of the attempt statute are ambiguous and must therefore be construed disjunctively under the rule of lenity.

In the alternative, the sentence enhancing subsections of the attempt statute are ambiguous, and must therefore be construed as applying disjunctively under the rule of lenity. "Where the traditional tools of statutory interpretation yield no clear answer, the judge's next step isn't to legislative history or the law's unexpressed purposes. The next step is to lenity." *Wooden v. United States*, ___ U.S. ___, 142 S. Ct. 1063, 1085-86 (2022) (Gorsuch, J., concurring).The rule of lenity "teach[es] that ambiguities about the breadth of a criminal statute should be resolved in the defendant's favor." *United States v. Davis*, ___ U.S. ___, 139 S. Ct. 2319, 2333 (2019); see also *Fitzsimmons v. Norgle*, 104 Ill. 2d 369, 374 (1984) (settled principles of statutory construction provide that if a penal statute calling for the enhancement of a penalty can reasonably be construed in more than one way, the rule of lenity applies to construe the statute strictly in favor of the accused).

The rule of lenity is of constitutional dimension because it "works to enforce the fair notice requirement of [due process] by ensuring that an individual's liberty

always prevails over ambiguous laws." *Wooden*, 142 S. Ct. at 1082 (Gorsuch, J., concurring). The rule vindicates the fundamental principle that no one should be subject to "criminal liability" without "fair warning." *Crandon v. United States*, 494 U.S. 152, 158 (1990). Put differently, the rule of lenity ensures that ordinary persons are provided fair notice of the law and consequences for violating it. *Id.*; *Davis*, 139 S. Ct. at 2333.

The rule of lenity is also of constitutional dimension because when a "court exceeds its own authority by imposing *** punishments not authorized by Congress, it violates *** the constitutional principle of separation of powers in a manner that trenches particularly harshly on individual liberty." *Whalen v. United States*, 445 U.S. 684, 689 (1980). Courts do not "possess the authority to punish individuals under ambiguous laws in light of [their] own perceptions about some piece of legislative history or the statute's purpose." *Wooden*, 142 S. Ct. at 1085 (Gorsuch, J., concurring). Lenity therefore "safeguard[s]" the legislature's "power to punish" by "preventing judges from intentionally or inadvertently exploiting 'doubtful' statutory 'expressions' to enforce their own sensibilities." *Id.* at 1083. Put differently, lenity keeps the power of punishment firmly "in the legislative, not in the judicial department." *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820). It "embodies 'the instinctive distastes against men languishing in prison unless the lawmaker has clearly said they should.'" *United States v. Bass*, 404 U.S. 336, 348 (1971) (quoting H. Friendly, *Mr. Justice Frankfurter and the Reading of Statutes*, in Benchmarks 196, 209 (1967)). That is as it should be in a democracy, where the boundaries of criminal punishment should be clearly delineated by law, not judicial interpretation.

Here, whether the enhancements apply conjunctively or disjunctively is debatable as confirmed by the difference of opinion on the question between counsel for the State and defendants, between trial judges, and between appellate court justices. Put differently, the sentencing enhancement subsections of the attempt statute are ambiguous because making sense of the subsections has befuddled the attorneys, judges, and justices who have addressed the issue. See *Solon v. Midwest Med. Records Ass'n, Inc.*, 236 Ill. 2d 433, 440 (2010) (a statute is ambiguous where it can be understood in two or more different ways by reasonably well-informed people). These differences of opinion between reasonable minds trigger application of the rule of lenity because they reveal that "the traditional tools of statutory interpretation yield no clear answer" as to how the subsections are to be applied. *Wooden*, 142 S. Ct. at 1085-86 (Gorsuch, J., concurring). Accordingly, under the rule of lenity, the question of whether the sentence enhancements of the attempt statute should be applied conjunctively or disjunctively must be resolved in favor of defendants as being disjunctive due to the statute's ambiguity.

This conclusion is confirmed by the rule of lenity principle that a more specific statute will be given precedence over a more general one. See *Busic v. United States*, 446 U.S. 398, 406 (1980) (utilizing the rule of lenity with principle that a more specific statute will be given precedence over a more general one). Thus, where there exists a general statutory provision and a specific statutory provision, either in the same or in another act, both relating to the same subject, the specific provision controls and should be applied. *People v. Botruff*, 212 Ill. 2d 166, 175 (2004); *People v. Latona*, 184 Ill. 2d 260, 269-70 (1998).

In this case, enhanced sentencing for attempt murder is the same subject that all of the subsections relate to. The specific sentencing enhancement that applies to defendant is the enhancement of subsection (A) which expressly applies to the attempt murder of a peace officer. The sentencing enhancements that generally address the same subject are the firearm enhancements of subsections (B), (C), and (D) of the attempt statute which broadly apply to all attempt murders with a firearm. Accordingly, here, the sentence enhancement of subsection (A) overrides the sentence enhancements of subsections (B), (C), and (D) because it is specifically tailored to apply to defendant's attempt murder of a peace officer.

In short, the rule of lenity applies here due to the ambiguity of the sentence enhancements of the attempt statute. Under lenity, the question of whether the sentencing enhancements of the attempt statute should be applied conjunctively or disjunctively must be resolved in favor of defendants as being disjunctive. Further, under the lenity principle that a more specific statute will be given precedence over a more general one, it is the sentence enhancement of subsection (A) of the attempt statute, and no other, that applies to defendant's offense of attempt murder of a peace officer with a firearm.

D. The absence of corrective action by the legislature to the seminal opinion interpreting the sentence enhancement subsections of the attempt statute as being disjunctive confirms that the legislature viewed that judicial interpretation as being correct.

The fact that the legislature did not amend the sentence enhancement provisions of the attempt statute, after the seminal appellate court opinion on the question interpreted the subsections as being disjunctive, confirms that the legislature viewed that judicial interpretation of the statute as being correct. More specifically, in 2007, the appellate court examined for the first time the issue under

discussion. There, the appellate court held in *Douglas* that once a court applies a sentence under subsection (A), "the sentence already is enhanced, without the need for further provision." *Douglas*, 371 Ill. App. 3d at 26. The legislature was presumably aware of *Douglas* when it later amended the attempt statute in 2010 to add subsection (E). Pub. Act 96-710, § 25 (eff. Jan. 1, 2010). Further, there was no opinion that disagreed with *Douglas* at the time. Yet, when the legislature added subsection (E), it did not amend the statute to correct the holding of *Douglas*. This demonstrates legislative approval of the interpretation of the statute set forth in the *Douglas* opinion because, in amending a statute, the legislature is presumed to have been aware of judicial decisions interpreting the statute and to have acted with this knowledge. *Bruso by Bruso v. Alexian Bros. Hosp.*, 178 Ill. 2d 445, 458-59 (1997).

Moreover, the absence of action by the legislature in response to the *Douglas* opinion was not an oversight. The legislature has shown that it will amend the sentencing enhancement for the attempt murder of a peace officer when it believes an amendment is necessary. More specifically, the legislature amended the attempt statute in 1995 to increase the already enhanced sentencing range of subsection (A) from 15 to 60 years, to 20 to 80 years. 720 ILCS 5/8-4(c)(1) (A) (1995 Supp.); Pub. Act 88-680, Art. 35, § 35-5 (eff. Jan. 1, 1995). Therefore, the absence of corrective action by the legislature in response to the *Douglas* opinion was not an oversight because the legislature has shown that it will amend the sentencing enhancement for the attempt murder of a peace officer when it believes an amendment is necessary. In short, the fact that the legislature did not amend the sentence enhancement provisions of the attempt statute to apply conjunctively, after the seminal appellate court opinion on the question interpreted the subsections

as being disjunctive, confirms the legislature viewed that judicial interpretation of the statute as being correct.

E. The reasoning of the opinions that have found the sentence enhancement subsections of the attempt statute apply conjunctively is not persuasive.

Next, the reasoning of the opinions that have found the sentence enhancement subsections of the attempt statute can be read conjunctively is not persuasive. A premise common to all of these opinions is that subsection (A) is a baseline sentence and not a sentence enhancement. Therefore, according to the opinions, the firearm sentence enhancements of subsections (B), (C), or (D) can be applied to increase the subsection (A) baseline sentence. *Taylor*, 2022 IL App (3d) 190281, ¶ 33; *Jackson*, 2018 IL App (1st) 150487, ¶ 52; *Smith*, 2012 IL App (1st) 102354, ¶ 114; *Tolentino*, 409 Ill. App. 3d at 606.

But, if subsection (A) is a baseline sentence, why was it included by the legislature in the sentence enhancements subsection? Further, these opinions fail to acknowledge that *section* (c)(1) sets the baseline sentence for simple attempt murder which is then followed by the phrase "*except that*," which is then followed by *subsections* (A), (B), C), and (D), all of which provide for a higher maximum sentence than the baseline sentence of section (c)(1). This plain language and structuring of the statute shows the legislature considered the standard Class X felony sentencing range set forth in section (c)(1) to be the baseline sentence, and all of the sentence enhancing subsections to be enhanced sentence exceptions to that baseline sentence. Accordingly, the assertion that subsection (A) is a baseline sentence that can be enhanced by subsections (B), (C), or (D) is not persuasive.

Two opinions also maintain that the 20 to 80 year range of subsection (A) is a baseline sentence because subsection (A) does not contain the words "shall

be added to the term of imprisonment imposed by the court" unlike the firearm sentence enhancements of subsections (B), (C), and (D). *Taylor*, 2022 IL App (3d) 190281, ¶ 33; *Tolentino*, 409 Ill. App. 3d at 606. However, because the 80-year maximum sentence of subsection (A) is an increase over the maximum 30-year baseline sentence of section (c)(1), and because that increase is based on the fact that the victim of the attempt murder was a peace officer, then the sentence of subsection (A) is an enhanced sentence as a matter of law under *Apprendi* since subsection (A) increases the sentence for attempt murder "beyond the prescribed statutory maximum" due to the "fact" that the victim was a peace officer. *Alleyne*, 570 U.S. at 113, 114-15, 115-16; *Apprendi,* 530 U.S. at 490. Accordingly, the 20 to 80 year sentencing range of subsection (A) is not a baseline sentence because it clearly constitutes an enhanced sentence under *Apprendi*

Some of the opinions assert that adding one of the firearm enhancements of subsections (B), (C), or (D) to a sentence under subsection (A) is permissible because the purpose of subsection (A) differs from the purpose of subsections (B), (C), and (D) since the purpose of subsection (A) is to deter the killing of police officers while the purpose of the subsections (B), (C), and (D) is to the deter the use of firearms in the commission of attempt murders. *Taylor*, 2022 IL App (3d) 190281, ¶ 34; *Tolentino*, 409 Ill. App. 3d at 606. These opinions maintain that it is improper to depart from the plain language of subsection (A) to speculate whether the implicit purpose of subsection (A) is also to deter the use of firearms. *Taylor*, 2022 IL App (3d) 190281, ¶ 34; *Smith*, 2012 IL App (1st) 102354, ¶ 114.

However, as argued above, it is clear the purpose of subsection (A) was to deter the killing of police officers with firearms. If subsection (A) was not primarily intended to deter the killings of police officers with firearms, then what weapon

was it the legislature intended to deter given that clubs and knives cause a negligible number of the intentional murders of on-duty police officers according to FBI statistics? Accordingly, the assertion that it is permissible to apply the firearm enhancements to subsection (A) because the purpose of subsection (A) differs from the purpose of subsections (B), (C), and (D) is not persuasive.

Some opinions have justified their reasoning by interpreting the semicolons between the subsections as meaning "and," when they generally mean"or," and by interpreting the "and" at the end of subsection (D) as meaning "or." *Taylor*, 2022 IL App (3d) 190281, ¶¶ 38-39; *Jackson*, 2018 IL App (1st) 150487, ¶ 51. In this case, the appellate court added that the mitigation afforded by subsection (E) does not apply to subsection (A) because subsection (E) is also a *baseline* sentence. *Taylor*, 2022 IL App (3d) 190281, ¶ 39. Thus, apparently, the mitigation afforded by subsection (E) also does not apply to the *baseline* sentence for attempt murder set forth in section (c)(1). This is patently wrong under the plain language of the statute.

These strained interpretations, which construe words and punctuation marks to mean the opposite of what they usually mean, which impose a limitation on the mitigation of subsection (E) which is nowhere to be found in the statue, and which ignore the legislature's clear indication that all of the sentence enhancing subsections are exceptions to the baseline sentence set forth in section (c)(1), betray a struggle to achieve a preferred conclusion. *People v. Wright*, 194 Ill. 2d 1, 29 (2000); see also *Wooden*, 142 S. Ct. at 1083 (Gorsuch, J., concurring) (lenity safeguards the legislature's power to punish by preventing "judges from intentionally or inadvertently exploiting 'doubtful' statutory 'expressions' to enforce their own

sensibilities"). As such, these strained interpretations of the statute are not persuasive.

Lastly, these opinions are not sound for the additional reasons that they fail to recognize that: (1) the sentence enhancement subsections apply disjunctively since no corrective action was taken by the legislature after *Douglas* found that the firearm enhancements did not apply to subsection (A); (2) each subsection is a distinct aggravated offenses not to be intermingled under *Apprendi*; and (3) the rule of lenity should be applied to construction of the statute before resort to examination of the purposes and punctuation marks of the sentence enhancing subsections.

F. Conclusion.

In sum, the appellate court's ruling requires correction because: (1) the plain language of the attempt statute shows the sentence enhancement subsections of the statute are to be read disjunctively; (2) it overlooked the fact that a sentencing double enhancement will occur if any of the sentence enhancement subsections are combined; (3) it failed to apply the rule of lenity to an ambiguous statute; and (4) it overlooked the fact that the absence of corrective action by the legislature, after the first opinion to address the question ruled that the subsections apply disjunctively, confirmed that the legislature viewed that judicial interpretation of the statute as being correct. Accordingly, defendant respectfully requests that this cause be remanded for resentencing because the circuit court clearly relied on an improper factor, a firearm enhancement, in sentencing him. *People v. Heider*, 231 Ill. 2d 1, 21-25 (2008).

II.

An expert's concession that he is unsure he correctly diagnosed a defendant as not being insane at the time of the offense warrants the appointment of a second expert to examine the defendant for insanity at the time of the offense.

STANDARD OF REVIEW

A judge's decision as to whether an additional expert should be appointed is reviewed for an abuse of discretion. *People v. Page,* 193 Ill. 2d 120, 153 (2000); *People v. Lawson*, 163 Ill. 2d 187, 230 (1994).

DISCUSSION

Prior to trial, the court appointed clinical psychologist Dr. Kirk Witherspoon to examine defendant and determine whether: (1) he could raise the defense of not guilty by reason of insanity (NGRI); (2) he could raise the mitigation of guilty but mentally ill (GMBI); and (3) he was fit for trial (C28). *People v. Taylor*, 2022 IL App (3d) 190281, ¶ 3. Witherspoon diagnosed defendant as suffering from severe posttraumatic stress disorder, and concluded that defendant met the threshold for a finding of GBMI for the purpose of postsentencing treatment (SEC C10,19, 21). He concluded that defendant did not meet the threshold for asserting the defense of NGRI, and also that he was fit for trial (SEC C10, 19).

However, in addition to his report, Witherspoon provided defense counsel with a handwritten note which stated:

> "*Mr. Taylor is a borderline case*. I do not think he meets the threshold for NGRI. However, if his parents can afford it, *you may wish to seek a second opinion*. If so, I can give you the names of a couple of other good psychologists who can do this work." (SEC 22). (Emphases added.) *Taylor*, 2022 IL App (3d) 190281, ¶ 4.

In response to Witherspoon's note, defendant filed a motion requesting the appointment of an expert, at the State's expense, to render a second opinion as

to whether defendant could raise an NGRI defense (SEC C11-12). *Taylor*, 2022 IL App (3d) 190281, ¶ 5.

The circuit court denied defendant's request because Witherspoon had not included the recommendation for a second opinion in the reports he submitted to the court, unlike other times where he had done so (R64-65). The court explained: "I've seen in previous cases he has filed reports and he has recommended, said that someone needs to be evaluated for something and he can't do it and recommends somebody else" (R64). The court characterized Witherspoon's message as being "a note to the defense attorney, saying, 'Hey, if you can afford it, you might want to get a second one'" (R65).

On direct review, relying on *Ake v. Oklahoma*, 470 U.S. 68 (1985), and *McWilliams v. Dunn*, ___ U.S. ___, 137 S. Ct. 1790 (2017), defendant argued the circuit court erred in not granting his request for a second psychiatric evaluation to determine whether he was NGRI given Witherspoon's note indicating his case was a "borderline" one, and suggesting defendant obtain a second opinion. *Taylor*, 2022 IL App (3d) 190281, ¶¶ 16-21. The appellate court disagreed. The appellate court first observed that "if a defendant indicates that he or she may rely on the defense of insanity or plead guilty but mentally ill,"section 115-6 of the Code of Criminal Procedure of 1963 "provides that the trial court 'may order additional examinations if the Court finds that additional examinations by additional experts will be of substantial value in the determination of issues of insanity or drugged conditions.'" *Id*. ¶ 18; 725 ILCS 5/115-6 (2016).

The appellate court concluded that the expert's examination had met the requirements of *Ake* due to the expert's "thorough evaluation of defendant's mental condition ***." *Taylor*, 2022 IL App (3d)190281, ¶ 19. The court reasoned that

"given the information submitted by Witherspoon after examining defendant, there was no substantial value in ordering another evaluation." *Id.* ¶ 21. The court further reasoned that "[a]lthough an additional expert witness may have been helpful to defendant, the State was not required to finance the assistance to assure defendant's access to a complete defense." *Id.*¶ 21. In short, relying on section 115-6, a section which on its face does not apply to defendants, the appellate court decided the expert's conclusion that defendant was not insane at the time of the offense was good enough, although the expert himself had stated a second opinion was advisable because defendant's case was a close one. The appellate court's opinion requires correction because defendant was not afforded the meaningful expert assistance guaranteed by *Ake*, and because the appellate court erred in relying on section 115-6 to affirm the denial of defendant's request for a second expert's opinion.

A. The appellate court's opinion requires correction because defendant was not afforded the meaningful assistance of an expert guaranteed by *Ake*.

In *Ake*, the Supreme Court of the Unites States noted that "a criminal trial is fundamentally unfair if the State proceeds against an indigent defendant without making certain that he has access to the raw materials integral to the building of an effective defense." *Ake*, 470 U.S. at 77. Thus, "when a defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial, the State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense." *Ake*, 470 U.S. at 83.

In explaining its ruling, the Court noted"the pivotal role that psychiatry has come to play in criminal proceedings."*Ake*, 470 U.S. at 79 - 80. Crucially, the

Court recognized that "[p]sychiatry is not, however, an exact science, and psychiatrists disagree widely and frequently on what constitutes mental illness, on the appropriate diagnosis to be attached to given behavior and symptoms, on cure and treatment, and on likelihood of future dangerousness." *Id*. at 81. This observation by the Court lends weight to the recognition that second opinions are particularly valuable when the question involves the "inexact science of psychiatry, where opinions and diagnoses on the same person may differ widely." *Woods v. State*, 59 S.W.3d 833, 837 (Tex. App. 2001), *rev'd on other grounds*, *Woods v. State*, 108 S.W.3d 314 (Tex. Crim. App. 2003); see also *United States v. Durant*, 545 F.2d 823, 828 (2d Cir. 1976) ("the imprecise state of psychiatry makes that field especially prone to differing professional opinions"); *Rey v. State*, 897 S.W.2d 333, 338 (Tex. Crim. App. 1995) ("[m]edicine in any of its sub-specialties eludes mathematic precision, as evidenced by the need for a 'second opinion' with regard to any important medical question").[6]

The Court revisited *Ake* in *McWilliams v. Dunn*, ___ U.S. ___, 137 S. Ct. 1790 (2017). In that case, McWilliams was charged with rape and murder in Alabama. *McWilliams*, 137 S. Ct. at 1794. Prior to his jury trial, he was examined by a three-member "Lunacy Commission" composed of three psychiatrists who concluded he "was competent to stand trial and that he had not been suffering

[6] While this Court is not bound by the decisions of other jurisdictions, it may look to other jurisdictions for guidance. *Nicholson v. Shapiro & Associates, LLC*, 2017 IL App (1st) 162551, ¶ 11. Absent an Illinois determination on a point of law, the courts of this state will look to other jurisdictions as persuasive authority. *Pekin Ins. Co. v. Fid. & Guar. Ins. Co.*, 357 Ill. App. 3d 891, 898 (4th Dist. 2005).

from mental illness at the time of the alleged offense." *Id.* The jury found McWilliams guilty of murder. *Id*. at 1795.

For McWilliams' capital sentencing hearing, defense motions were granted for the production of mental health records and for an additional psychological examination of McWilliams. *McWilliams*, 137 S. Ct. at 1795. However, the psychological exam report was not filed until two days before the capital sentencing hearing. *Id.* at 1795-96. The mental health records were not filed until the day before the capital sentencing hearing and the day of the hearing. *Id.* at 1796. The report and mental health records indicated McWilliams had psychological problems. *Id.*

At the capital sentencing hearing, defense counsel asked a number of times for the appointment of another expert – who would help him understand the new medical information – so he could present mitigation at a rescheduled sentencing hearing. *McWilliams*, 137 S. Ct. at 1796-97. These motions were denied and defendant was sentenced to death. *Id.* at 1797.

McWilliams appealed, arguing that the trial court had denied him the right to the meaningful expert assistance guaranteed by *Ake*. *McWilliams*, 137 S. Ct. at 1797-98. The Alabama Court of Criminal Appeals rejected his argument, reasoning, much as the appellate court did in this case, "that *Ake's* requirements 'are met when the State provides the [defendant] with a competent psychiatrist,'" and that by "allowing [one expert] to examine" McWilliams, "[it] had satisfied those requirements." *Id.* See *Taylor*, 2022 IL App (3d) 190281, ¶ 19 (Witherspoon's "thorough evaluation" of defendant met the *Ake* requirements).

In federal habeas court, the magistrate judge similarly ruled that McWilliams had "received the assistance required by *Ake"* because the expert "completed the

testing" that McWilliams requested. *McWilliams*, 137 S. Ct. at 1798. A divided panel of the Eleventh Circuit Court of Appeals affirmed, and the Court granted review. *Id.* at 1798, 1801.

In reversing the Court of Appeals, the Supreme Court specifically rejected the holding of the Alabama court of criminal appeals that the requirements of *Ake* are met simply by allowing a psychiatrist to examine the defendant. *McWilliams*, 137 S. Ct. at 1800. The Court stated that this "was plainly incorrect" because "*Ake* does not require just an examination. Rather, it requires the State to provide the defense with 'access to a competent psychiatrist who will conduct an appropriate [1] examination and assist in [2] *evaluation*, [3] *preparation*, and [4] *presentation* of the defense.'[Citation.]" (Emphases added by the Court.) *McWilliams*, 137 S. Ct. at 1800. Therefore, according to the Court, even *Ake's* "most basic" requirements were not met in McWilliams' case. *Id.*

The foregoing summary shows the appellate court's opinion in this case was "plainly incorrect." *McWilliams*, 137 S. Ct. at 1800. Here, the appellate court found that Witherspoon's examination of defendant was sufficient to satisfy the requirements of *Ake* because it was thorough in that it indicated Witherspoon found defendant was not insane at the time of the offense after he "carefully studied the mental examination data, considered the investigative reports, and analyzed the evaluation of defendant in light of these records." *Taylor*, 2022 IL App (3d) 190281, ¶ 20. According to the appellate court, due to Witherspoon's thorough examination, there was "no *substantial value* in ordering another evaluation." (Emphasis added.) *Id.* ¶ 21.

However, as noted, the Court has made it clear that "*Ake does not require just an [appropriate] examination*." (Emphasis added.) *McWilliams,* 137 S. Ct.

at 1800. Rather, it requires the State to provide the defense with access to a competent psychiatrist who, in addition to conducting "an appropriate [1] examination," will also "assist in [2] evaluation, [3] preparation, and [4] presentation of the defense." *Id.* (citing *Ake*, 470 U.S. at 83) (internal quotation marks and emphases omitted). "Unless a defendant is 'assure[d]' the assistance of someone who can effectively perform these functions, he has not received the 'minimum' to which *Ake* entitles him." *McWilliams*, 137 S. Ct. at 1794 (citing *Ake*, 470 U.S. at 83).

In this case, even if Witherspoon conducted an "appropriate examination," he could not have helped the defense evaluate, prepare, and present a defense. Witherspoon could not have helped the defense "prepare direct or cross-examination of any witnesses" because direct examination of a defense witness, or cross-examination of a State witness about defendant's case being a borderline one would have been undermined by Witherspoon's report that defendant was sane at the time of the offense. *McWilliams,* 137 S. Ct. at 1800-01. Witherspoon could not have effectively "testified at the judicial *** hearing" about defendant's case being a borderline one because any such assertion by him would have been undermined by his report that defendant was sane at the time of the offense. *Id.* Witherspoon could not have helped defense counsel effectively evaluate an insanity defense because his opinions were self-refuting. That is, his belief that defendant may have been insane at the time of the offense was refuted by his simultaneous belief that defendant was sane at the time of the offense, and vice versa. In short, defendant did not receive the "minimum" to which *Ake* entitled him because he was not assured the assistance of someone who could "effectively perform these functions." *McWilliams*, 137 S. Ct. at 1794

The appellate court justified its conclusion, that the appointment of an additional expert was not warranted, with the observation that "[a]lthough an additional expert witness may have been helpful to defendant, the State was not required to finance the assistance to assure defendant's access to a complete defense." *Taylor*, 2022 IL App (3d) 190281, ¶ 21. Alabama advanced a similar proposition in *Ake* where it asserted "that to provide Ake with psychiatric assistance *** would result in a staggering burden to the State." *Ake,* 470 U.S. at 78. The Court, however, stated that it was "unpersuaded by this assertion." *Id.* The Court reasoned that the government's fiscal "interest in denying [a defendant] the assistance of a psychiatrist is not substantial, in light of the compelling interest of both the State and the individual in accurate dispositions."*Ake*, 470 U.S. at 78-79. Thus, under the facts of this borderline case, the potential cost of a second opinion did not provide a legitimate basis for affirming the denial of defendant's request for a second examination due to the "compelling interest of both the State and the individual in accurate dispositions."*Id.* at 79. Accordingly, the appellate court's opinion requires correction because defendant was not afforded the meaningful assistance of an expert guaranteed by *Ake*.

B. The appellate court erred in relying on section 115-6 of the Code of Criminal Procedure of 1963 to affirm the denial of defendant's request for a second expert's opinion.

Next, the appellate court mistakenly relied on section 115-6 of the Code of Criminal Procedure of 1963 to affirm the denial of defendant's request for a second expert's opinion. The appellate court supported its ruling with the finding that "there was *no substantial value* in ordering another evaluation." (Emphasis added.) *Taylor*, 2022 IL App (3d) 190281, ¶ 21. The appellate court's reliance on the "no substantial value" standard was incorrect because that is not the standard

a trial court is to apply when a defendant asks for an additional examination by a psychiatrist for insanity.

The appellate court's "no substantial value" standard is derived from section 115-6 of the Code of Criminal Procedure of 1963. In pertinent part, section 115-6 provides that:

> "If the defendant has given notice that he may rely upon the defense of insanity *** or if the facts and circumstances of the case justify a reasonable belief that the aforesaid defenses may be raised, the Court shall, on motion of the State, order the defendant to submit to examination by at least one clinical psychologist or psychiatrist, to be named by the prosecuting attorney. The Court shall also order the defendant to submit to an examination by one neurologist, one clinical psychologist and one electroencephalographer to be named by the prosecuting attorney if the State asks for one or more of such additional examinations. *The Court may order additional examinations if the Court finds that additional examinations by additional experts will be of substantial value in the determination of issues of insanity or drugged conditions*. The reports of such experts shall be made available to the defense." (Emphasis added.) 725 ILCS 5/115-6 (2016).

This language plainly states that the "substantial value" standard applies only to the *court* when it considers whether to order an additional examination of its own accord. Therefore, the appellate court erred in relying on the "no substantial value" standard to affirm the denial of defendant's request for a second expert's opinion because that standard does not apply to a request by a defendant for an additional examination. Instead, the correct standard in this case was whether the defendant was granted access to a psychiatrist who effectively assisted in the evaluation of an insanity defense. *McWilliams*, 137 S. Ct. at 1800; *Ake*, 470 U.S. at 83. This standard was not met here because the expert's judgment that defendant was a "borderline case" was too inconclusive to assist in evaluating whether an insanity defense was available or foreclosed.

The appellate court's mistaken reliance on section 115-6 is further demonstrated by its erroneous statement that "[i]n Illinois, a defendant's right

of access to a psychiatric examination is protected *** [u]nder section 115-6 of the Code of Criminal Procedure of 1963 ***." *Taylor*, 2022 IL App (3d) 190281, ¶ 18. However, section 115-6 does not apply to defendants. In relevant part, section 115-6 states that:

> "the Court shall, *on motion of the State*, order the defendant to submit to examination by at least one [psychiatric expert] *** *to be named by the prosecuting attorney*. The Court shall also order the defendant to submit to an examination [by another psychiatric expert] ***to *be named by the prosecuting attorney if the State asks for one or more of such additional examinations*. *** *The reports of such experts shall be made available to the defense*." (Emphases added.) 725 ILCS 5/115-6 (2016).

The foregoing plainly shows that defendants enjoy no rights to request a psychiatric examination under section 115-6. Instead, the plain language of section 115-6 makes it clear it is intended to provide the State with a statutory right to its own psychiatric examinations of defendants. See *United States ex rel. Merneigh v. Greer*, 772 F.2d 322, 323 n.1 (7th Cir. 1985) (section 115-6 gives the State a statutory right to have its experts examine the defendant for sanity). Accordingly, the appellate court's mistaken reliance on section 115-6 to affirm the denial of defendant's request for a second expert's opinion is further demonstrated by its erroneous statement that section 115-6 gives defendants a statutory right to psychiatric examinations.

At any rate, no court or party may rely on section 115-6 because that section violates due process by giving the State rights to additional psychiatric examinations that are not enjoyed by defendants. In *Wardius v. Oregon*, 412 U.S. 470 (1973), the Court examined an Oregon statute that required the defendant to reveal witnesses in every case, but not the State. *Id.* at 472. The Court expressed suspicion of state rules which provide non-reciprocal benefits to the state when the lack

of reciprocity interferes with a defendant's ability to receive a fair trial. *Id*. The Court noted that due process is offended by rules that upset "the balance of forces between the accused and his accuser." *Id*. at 474. The Court observed that due process embraces a rule "'which is designed to enhance the search for truth in the criminal trial by insuring both the defendant and the State ample opportunity to investigate certain facts crucial to the determination of guilt or innocence.'" *Id*. (quoting *Williams v. Florida*, 399 U.S. 78, 82 (1970)). Thus, *Wardius* stands for the proposition that, under the due process clause, the State cannot obtain any discovery to which the defendant is not entitled. *Id*. at 476.

Here, section 115-6 violates due process under *Wardius* because that section allows the State to obtain an additional expert's opinion regarding the defendant's sanity simply by asking for it where the defendant does not enjoy the same discovery right reciprocally. More specifically, section 115-6 provides that "[t]he Court *shall* *** order the defendant to submit to an examination by [another psychiatric expert] *** *to be named by the prosecuting attorney if the State asks for one or more of such additional examinations*." (Emphasis added.) 725 ILCS 5/115-6 (2016). Thus, by requiring courts to allow requests by the State for additional expert opinions, section 115-6 gives the State more discovery rights than defendants enjoy, and allows the State to doctor shop. This is so because a defendant who seeks an additional examination must, unlike the State, make a showing, which is subject to denial by the court in its discretion, that he was not granted access to a first expert who effectively assisted in the evaluation of an insanity defense. In short, section 115-6 gives the State a right to additional discovery, *i.e.*, the right to additional psychiatric examinations simply by asking for them, that is not reciprocally enjoyed by defendants. Therefore, section 115-6 violates due process

under *Wardius*. Accordingly, the appellate court erred in relying on section 115-6 to affirm the denial of defendant's request for a second opinion as to his sanity at the time of the offense.

Lastly, this case does not present a situation where defendant's request for a second opinion was frivolous or doctor shopping. Instead, defendant made a legitimate request for a second opinion because his expert indicated one would be advisable. Given these circumstances, it is evident defendant would have sought the second opinion had he possessed the independent financial means to pay for it. Further, if a second expert's opinion is not warranted under the facts of this case, where the appointed expert suggested a second opinion was advisable, then it is difficult to foresee a situation for a defendant where a second expert's opinion on insanity will be warranted. Consequently, as matters stand now, the only expert's opinion here as to defendant's sanity at the time of the offense offers no assurance defendant was fairly and accurately convicted.

In short, since the suggestion by defendant's expert that defendant obtain a second opinion as to his sanity at the time of the offense demonstrated the issue could be a significant factor at trial, defendant was entitled to access to another psychiatrist who would conduct an appropriate examination, and who would assist in evaluation, preparation, and presentation of the defense. *McWilliams, 137* S. Ct. at 1793 (citing *Ake*, 470 U.S. at 83). Therefore, the appellate court's opinion requires correction because defendant was not afforded the meaningful expert assistance guaranteed by *Ake*, and because the appellate court erred in mistakenly relying on section 115-6 to affirm the denial of defendant's request for a second expert's opinion. Accordingly, defendant respectfully requests that his conviction be reversed and that this cause be remanded for a new trial.

CONCLUSION

For the foregoing reasons, Shaun N. Taylor respectfully requests that this Court reverse his conviction and remand this cause for a new trial, or vacate his sentence and remand this cause for resentencing under appropriate sentencing factors.

Respectfully submitted,

THOMAS A. KARALIS
Deputy Defender

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342, is 39 pages.

/s/Santiago A. Durango
SANTIAGO A. DURANGO
Assistant Appellate Defender

APPENDIX TO THE BRIEF

Shaun N. Taylor No. 128316

IN THE CIRCUIT COURT OF THE FOURTEENTH JUDICIAL CIRCUIT

HENRY COUNTY, ILLINOIS

THE PEOPLE OF THE STATE OF ILLINOIS,	)	
Plaintiffs,	)	No. 17-CF-348
	)	18-TR-614
vs.	)	18-TR-615
SHAUN N. TAYLOR,	)	
Defendant.	)	

SENTENCING HEARING

REPORT OF PROCEEDINGS of the hearing before the Honorable TERENCE M. PATTON on the 15th day of March, 2019.

APPEARANCES:

MR. MATTHEW P. SCHUTTE,
State's Attorney of Henry County,
for the People of the State of Illinois

MR. HECTOR L. LAREAU,
Appointed Counsel,
for the Defendant

Defendant, in person

Peggy E. McDonnell
Official Court Reporter 4
CSR License No. 084-002411

a strong mitigating factor. His mental health issues are related to his service to the country. That doesn't excuse what he did, but I am giving that great weight.

The Court is bound by the sentencing guidelines. I can't give him less than 20 years. I can't sentence him to more than 80. And this is without the 20-year enhancement. I'm going to choose the appropriate sentence, and then whatever that sentence is, the 20 years gets added to it. But I -- I can't go lower than 20. I can't go higher than 80. That's simply the law.

It's going to be the judgment and sentence of this Court that the defendant, on Count 1, attempted first-degree murder, is sentenced to 30 years in the Illinois Department of Corrections, with credit for time served, and that's followed by three years of mandatory supervised release. The 20-year enhancement will apply. That would make it a total of 50 years. That's 85 percent, so that means he will serve approximately 42.5 years before he is eligible for release. He will get credit for time served. He has about 515 days' credit or a little more than that. I'll order court costs, including the $100 Violent

Crime Victims Fund fee. I'll order restitution, a total of $14,345.55.

The aggravated discharge of a firearm, that is merged into Count 1. No sentence is imposed on that.

18-TR-614, disobeying a peace officer, that's a petty offense. There is a -- the statute reads that there's a -- I believe a mandatory fine of $150, so I'll impose a $150 fine plus costs.

On 18-TR-614 [sic], a concurrent 364 days in the Henry County Jail and costs only.

THE REPORTER: You said 614?

THE COURT: I'm sorry. 615, on the fleeing and eluding. Thank you.

The fines, costs, fees, and restitution, that's going to be reduced to judgment. Based on his age, he's going to be -- well, taking into account credit for time served, he'll be close to 80 years old when he gets released, so the chances of collecting any money from him at that time, of him having the financial ability to pay, is pretty small.

Any questions about the sentence before appeal rights?

MR. SCHUTTE: No, Your Honor.

IN THE CIRCUIT COURT OF HENRY COUNTY, ILLINOIS
FOURTEENTH JUDICIAL CIRCUIT

Date of Sentence 03/15/19
Date of Birth 01/23/81

PEOPLE OF THE STATE OF ILLINOIS)
)
-vs-) No. 17-CF-348
)
SHAUN N. TAYLOR,)
Defendant.)

JUDGMENT – SENTENCE TO ILLINOIS DEPARTMENT OF CORRECTIONS

WHEREAS, the above-named defendant has been adjudged guilty of the offenses enumerated below. IT IS THEREORE ORDERED that the defendant be and hereby is sentenced to confinement in the Illinois Department of Corrections for the term of years and months specified for each offense.

COUNT	OFFENSE	DATE OF OFFENSE	STATUTORY CITATION	CLASS	SENTENCE	MSR
1	ATTEMPT FIRST DEGREE MURDER	10/15/17	720 ILCS 5/9-1(a)(1); 720 ILCS 5/8-4; 720 ILCS 5/8-4(c)(1)(A)	X	50 YRS	3 YRS
To be served at 85% pursuant to 730 ILCS 5/3-6-3						

The Court further finds that the defendant is entitled to receive credit for time actually served in custody (of 516 days as of the date of this order) from 10/16/17 - 03/14/19. The defendant is also entitled to receive credit for the additional time served in custody from the date of this order until defendant is received at the Illinois Department of Corrections. The defendant shall also receive credit for any time previously served in the Illinois Department of Corrections on this case. The defendant is eligible for day for day credit.

(x) Defendant shall pay a $100.00 Violent Crime Victim fee, which is reduced to judgment;

(x) Defendant shall pay restitution in the amount of $14,345.55, which is reduced to judgment;

The Clerk of the Court shall deliver a certified copy of this order to the Sheriff. The Sheriff shall take the defendant into custody and deliver defendant to the Department of Corrections which shall confine said defendant until expiration of this sentence or until otherwise released by operation of law.

Filed 03-18-19 C 140
Jackie Oberg, Clerk of Circuit Court
By _____ Deputy

IT IS FURTHER ORDERED that, pursuant to 730 ILCS 5/5-4-3, the defendant shall provide specimens of his blood or saliva within 45 days of this Order at a collection site designated by the Illinois Department of State Police. The Illinois Department of State Police shall provide all equipment and instructions necessary for the collection of blood or saliva samples. The collection of samples shall be performed in a medically approved manner. Only a physician authorized to practice medicine, a Registered nurse, or other qualified person approved by the Illinois Department of Public Health may withdraw blood for the purpose of this Order. Samples shall thereafter be forwarded to the Illinois Department of State Police, Division of Forensic Services and Identification, for analysis and categorizing into genetic marker groupings. The defendant is hereby ordered to cooperate with the collection of the specimen pursuant to this Order and defendant shall pay a $250.00 lab analysis fee to the Henry County Circuit Clerk for said DNA testing.

IT IS FURTHER ORDERED that the defendant shall pay the costs of this proceeding, which are reduced to judgment.

This Order is effective immediately.

DATE: 3/10/19 ENTER: _____
TERENCE M. PATTON

C 141

IN THE CIRCUIT COURT OF THE 14TH JUDICIAL CIRCUIT
HENRY COUNTY, ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,

vs. CASE NO. 17CF348

SHAUN N TAYLOR

NOTICE OF APPEAL

01) Court to which appeal is taken:

THIRD DISTRICT APPELLATE COURT
1004 COLUMBUS ST
OTTAWA IL 61350

02) Name of Appellant and address to which notices shall be sent:

SHAUN N TAYLOR Y35428
STATEVILLE CORR CENTER
NORTHERN RECEPTION CENTER
16830 S BROADWAY ST
JOLIET IL 60434

03) Name and address of Appellant's Attorney on Appeal:

APPELLATE DEFENDER'S OFFICE
3RD JUDICIAL DISTRICT
1100 COLUMBUS ST
OTTAWA IL 61350

04) Date of final disposition:

MAY 15, 2019
DENIAL OF MOTION TO RECONSIDER

Filed 051519
Jackie Oberg, Clerk of Circuit Court
By _____ Deputy

C 150

05) Offense of which convicted:

CT I-- ATTEMPTED FIRST DEGREE MURDER
CT II- AGGRAVATED DISCHARGE OF A FIREARM

06) Sentence:

CT I—50 YR DEPARTMENT OF CORRECTIONS; COURT COSTS; RESTITUTION.

CT II—MERGES INTO COUNT I

Jackie Oberg, Circuit Clerk

2022 IL App (3d) 190281

Opinion filed February 18, 2022

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2022

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. SHAUN N. TAYLOR, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of the 14th Judicial Circuit, Henry County, Illinois. Appeal No. 3-19-0281 Circuit No. 17-CF-348 Honorable Terence M. Patton, Judge, Presiding.

JUSTICE SCHMIDT delivered the judgment of the court, with opinion.
Justice Holdridge concurred in the judgment and opinion.
Justice Lytton dissented, with opinion.

OPINION

¶ 1 Defendant Shaun N. Taylor appeals from his conviction of attempted first degree murder of a peace officer. The lower court sentenced defendant to 30 years in prison plus an additional 20 years for using a firearm during the commission of the offense. On appeal, he argues that (1) the trial court erred in denying his request for a second expert to evaluate his mental state at the time he committed the offense and (2) the 20-year firearm enhancement for attempted murder of a peace officer does not apply. For the reasons that follow, we affirm.

¶ 2 I. BACKGROUND

¶ 3 Defendant was charged with one count of attempted first degree murder of a peace officer (720 ILCS 5/8-4(a), (c)(1)(A), 9-1 (West 2016)) and one count of aggravated discharge of a firearm (id. § 24-1.2(a)(3)) for shooting at Illinois State Police Trooper Andrew Scott after Scott initiated a traffic stop of defendant's vehicle. Prior to trial, the court appointed clinical psychologist Dr. Kirk Witherspoon to examine defendant and determine whether he was fit to stand trial and whether he could raise the defense of not guilty by reason of insanity (NGRI). Witherspoon conducted an evaluation and diagnosed defendant as suffering from posttraumatic stress disorder stemming from his military service in Afghanistan. Applying multiple psychological factors, Witherspoon concluded that defendant was fit for trial and failed to meet the threshold for asserting the defense of NGRI. In an addendum to his report, Witherspoon noted that defendant reported using "psychostimulants" to stay awake while driving at the time of his arrest. Witherspoon stated that the ingestion of such stimulants would, in his opinion, preclude defendant's ability to plead not guilty by reason of insanity. Witherspoon concluded that, in the event defendant was found guilty, a guilty-but-mentally-ill presumption would apply. Specifically, he recommended that defendant "be considered as reasonably experiencing significant and debilitating posttraumatic stress disorder, irrespective of psychostimulant use, relative to adjudicatory and dispositional considerations."

¶ 4 In addition to his report, Witherspoon provided defense counsel with a handwritten note, opining:

> "Mr. Taylor is a borderline case. I do not think he meets the threshold of NGRI. However, if his parents can afford it, you may wish to seek a second opinion. If so, I can give you the names of a couple of other good psychologists who can do this work."

¶ 5 In response to Witherspoon's note, defendant filed a motion requesting the appointment of a psychologist, at the State's expense, to conduct an evaluation and provide a second opinion as to his mental state at the time he committed the offense. In support of his motion, defendant cited Witherspoon's report, the addendum, and the handwritten note.

¶ 6 Following a hearing on the motion, the trial court denied defendant's request. The court found that defendant had met the threshold requirement of establishing that he was indigent. It then discussed whether there was a need for a second expert. The court noted that defendant had already been evaluated by Witherspoon at the State's expense with Witherspoon finding defendant did not meet the requirements of an insanity defense. The court noted that Witherspoon's report did not include a recommendation that the court appoint another evaluator. The court emphasized that, in prior cases, Witherspoon's report included a recommendation for a second evaluation if needed and found that the psychologist's failure to do so in this case was significant.

¶ 7 At trial, evidence revealed that Scott stopped defendant on Interstate 80 around 9:30 p.m. on October 15, 2017. Defendant was traveling from the state of Washington to Massachusetts. Scott approached defendant's vehicle, identified himself as an Illinois State Trooper, and informed defendant that he was going to give him a warning. He asked defendant to return to the squad car with him, but defendant declined the invitation. While Scott was preparing the warning, another officer arrived with a canine unit. The officer walked around defendant's vehicle, and the dog alerted. Scott and the other officer then approached the vehicle and asked defendant to exit the car. Instead, defendant sped off.

¶ 8 Defendant pulled off the interstate at a nearby exit and parked his car on a country road. He grabbed his AR-15 semiautomatic rifle and a .40-caliber handgun and took a position with a line of sight of his vehicle in a nearby cornfield. Moments later, Scott pulled up behind defendant's

vehicle. He exited his squad car but did not approach defendant's vehicle, instead, moving toward the back of his squad car. That is when defendant fired 23 shots in Scott's direction with the semiautomatic rifle. Scott survived the incident unharmed. Law enforcement pursued defendant on foot. Several hours later, defendant surrendered.

¶ 9 The jury found defendant guilty of attempted murder of a peace officer and aggravated discharge of a firearm. The trial court merged the aggravated discharge conviction into the attempted murder conviction.

¶ 10 Prior to sentencing, the court entertained argument on the propriety of applying a 20-year enhancement to defendant's sentence for personally discharging a firearm. The State focused on the term "shall" in the firearm enhancement language and argued it was mandatory. Defendant argued that application of the firearm enhancement would constitute a double enhancement under the statute given that he was already subject to the enhanced sentencing range of 20 to 80 years.

¶ 11 Relying on People v. Jackson, 2018 IL App (1st) 150487, and People v. Tolentino, 409 Ill. App. 3d 598 (2011), the court found the 20-year enhancement would not constitute a double enhancement. Specifically, the court stated,

> "When the victim is a peace officer, the sentencing range is enhanced in recognition of the heightened risk officers take in performing their duties, seeking to deter the intentional killings of police officers. The 20-year firearm enhancement, the purpose of that is to deter the use of firearms in the commission of felonies due to the greater risk posed by their use. So the Court found that those are designed to address different situations; therefore, it's not a double enhancement to impose both[.]"

¶ 12 The court imposed an aggregate term of 50 years in prison. The court's sentence consisted of a 30-year term under section 8-4(c)(1)(A) of the attempt statute based on Scott's status as a peace officer plus a 20-year firearm enhancement under section 8-4(c)(1)(C) for defendant's personal discharge of a firearm. 720 ILCS 5/8-4(c)(1)(A), (C) (West 2016).

¶ 13 Defendant appeals.

¶ 14 II. ANALYSIS

¶ 15 A. Request for Second Expert Opinion

¶ 16 Defendant argues the trial court erred in denying his request for the appointment of a second expert to determine whether he was insane at the time of the offense.

¶ 17 A defendant has a constitutional right to present a complete defense and compel necessary witnesses on his or her behalf regardless of a defendant's ability to pay. People v. Lawson, 163 Ill. 2d 187, 220 (1994). An indigent defendant, however, is not entitled to an expert merely because the expert would be useful, helpful, valuable, or important to the defense. People v. Shelton, 401 Ill. App. 3d 564, 575 (2010). The defendant must show that the requested expert assistance is necessary in proving a crucial issue in the case and that the lack of funds for the expert will therefore prejudice him. Lawson, 163 Ill. 2d at 221. We review a trial court's denial of a motion for an expert witness for an abuse of discretion. In re Commitment of Lingle, 2018 IL App (4th) 170404, ¶ 39. A trial court abuses its discretion when its ruling is arbitrary, fanciful, or unreasonable, or where no reasonable person would take the view adopted by the trial court. People v. Donoho, 204 Ill. 2d 159, 182 (2003).

¶ 18 In Ake v. Oklahoma, 470 U.S. 68, 83 (1985), the United State Supreme Court established that, "when a defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial, the State must, at a minimum, assure the defendant access to a

competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense." In Illinois, a defendant's right of access to a psychiatric examination is protected by statute as well. Under section 115-6 of the Code of Criminal Procedure of 1963 (725 ILCS 5/115-6 (West 2020)), if a defendant indicates that he or she may rely on the defense of insanity or plead guilty but mentally ill, "the Court shall *** order the defendant to submit to examination by at least one clinical psychologist or psychiatrist." Section 115-6 also provides that the trial court "may order additional examinations if the Court finds that additional examinations by additional experts will be of substantial value in the determination of issues of insanity or drugged conditions." Id.

¶ 19 In this case, the requirements of Ake have been met. Defendant demonstrated that he was indigent and that his sanity was to be a significant issue at trial. Thus, the State was required to provide defendant with access to a psychiatric evaluation. See Ake, 470 U.S. at 86. The trial court appointed Witherspoon at the State's expense to determine whether defendant was sane at the time he committed the offense, fulfilling the mandate of Ake. Witherspoon, a clinical psychologist, conducted a thorough evaluation of defendant's mental condition and reported that defendant was not insane when he fired upon Scott.

¶ 20 In his report, Witherspoon stated that he interviewed defendant on two occasions. Defendant was well oriented for person, place, and time, showing no signs of hallucinations or delusions. Based on several mental assessment procedures, including a mental status exam and the Million Clinical Multiaxial Inventory-III, Witherspoon opined that defendant suffered from bipolar I disorder, in partial remission, and severe posttraumatic stress disorder. In relation to defendant's sanity at the time of the offense, Witherspoon reviewed the case file and police interviews and reported that defendant's actions were based on paranoia and fear. He stated that,

although defendant had paranoid thoughts, his self-defense motive did not comport with the nature of his calm and compliant surrender to police. Defendant was able to reflect on his actions and describe the events of that day; he described paranoid but rational behavior. Based on his evaluation, Witherspoon concluded that defendant's actions did not reflect psychosis or a degree of irrationality that would have prevented him from understanding the criminality of his behavior. In other words, his behavior did not demonstrate insanity. Witherspoon's addendum also states that defendant's condition did not meet the clinical threshold to present the defense of NGRI. Witherspoon's evaluation indicates that he carefully studied the mental examination data, considered the investigative reports, and analyzed the evaluation of defendant in light of these records. It is for those reasons we cannot conclude that the denial to appoint an additional psychiatric expert was an abuse of discretion.

¶ 21 Defendant maintains that Witherspoon's reference to defendant's case as "borderline" in his handwritten note to defense counsel required the trial court to order a second evaluation, at the State's expense. However, given the information submitted by Witherspoon after examining defendant, there was no substantial value in ordering another evaluation. Although an additional expert witness may have been helpful to defendant, the State was not required to finance the assistance to assure defendant's access to a complete defense. See Lingle, 2018 IL App (4th) 170404, ¶ 42 (finding that second expert was not required where first expert provided thorough evaluation and diagnosis). Accordingly, the trial court's failure to approve additional funds for further psychiatric evaluation did not amount to an abuse of discretion.

¶ 22 B. 20-Year Firearm Enhancement

¶ 23 Next, defendant challenges his sentence. He claims that the trial court erred in applying both the status-based sentencing range under section 8-4(c)(1)(A) and the 20-year firearm

enhancement under section 8-4(c)(1)(C) of the attempt statute when formulating his sentence for attempted first degree murder of a peace officer. 720 ILCS 5/804(c)(1)(A), (C) (West 2020). He argues that, once a sentencing court applies the status-based 20- to 80-year sentencing range in subsection (A), the other subsections of the attempted first degree murder statute cannot apply without running afoul of the prohibition against double enhancements.

¶ 24 Defendant notes a split of authority on this issue, citing People v. Phagan, 2019 IL App (1st) 153031, leave to appeal denied, No. 125249 (Ill. Nov. 26, 2019); People v. Holley, 2019 IL App (1st) 161326, leave to appeal denied, No. 125078 (Ill. Sept. 25, 2019); and People v. Douglas, 371 Ill. App. 3d 21 (2007) (holding that, once a court applies the status-based sentencing range in section 8-4(c)(1)(A), it cannot apply a firearm enhancement) as compared to Jackson, 2018 IL App (1st) 150487, leave to appeal denied, No. 123784 (Ill. Sept. 26, 2018); People v. Smith, 2012 IL App (1st) 102354, appeal denied, No. 115292 (Ill. Jan. 30, 2013); and Tolentino, 409 Ill. App. 3d 598, appeal denied, No. 112553 (Ill. Sept. 28, 2011) (adopting a conjunctive reading of the attempt statute, allowing application of the sentencing range in section 8-4(c)(1)(A) as well as a firearm enhancement). Defendant urges us to follow the Phagan line of cases and vacate the 20-year firearm enhancement from his sentence.

¶ 25 The Illinois attempt statute sets forth the elements of attempt and provides sentencing guidelines for attempted offenses, including first degree murder. Section 8-4(c)(1) states:

> "[T]he sentence for attempt to commit first degree murder is the sentence for a Class X felony, except that
>
> (A) an attempt to commit first degree murder when at least one of the aggravating factors specified in paragraphs (1), (2), and (12) of subsection (b) of Section 9-1 is present is a Class X felony for which the

sentence shall be a term of imprisonment of not less than 20 years and not more than 80 years;

(B) an attempt to commit first degree murder while armed with a firearm is a Class X felony for which 15 years shall be added to the term of imprisonment imposed by the court;

(C) an attempt to commit first degree murder during which the person personally discharged a firearm is a Class X felony for which 20 years shall be added to the term of imprisonment imposed by the court;

(D) an attempt to commit first degree murder during which the person personally discharged a firearm that proximately caused great bodily harm, permanent disability, permanent disfigurement, or death to another person is a Class X felony for which 25 years or up to a term of natural life shall be added to the term of imprisonment imposed by the court; and

(E) if the defendant proves by a preponderance of the evidence at sentencing that, at the time of the attempted murder, he or she was acting under a sudden and intense passion resulting from serious provocation by the individual whom the defendant endeavored to kill, or another, and, had the individual the defendant endeavored to kill died, the defendant would have negligently or accidentally caused that death, then the sentence for the attempted murder is the sentence for a Class 1 felony[.]" 720 ILCS 5/8-4(c)(1)(A)-(E) (West 2020).

¶ 26 We apply the de novo standard of review when construing a statute. Jackson, 2018 IL App (1st) 150487, ¶ 47. The primary objective of statutory construction is to ascertain and give effect to the legislature's intent. People v. Casler, 2020 IL 125117, ¶ 24. All other rules of statutory construction are subordinate to this principle. Id. "In determining the intent of the legislature, the court may properly consider not only the language of the statute, but also the reason and necessity for the law, the evils sought to be remedied, and the purpose to be achieved." People v. Frieberg, 147 Ill. 2d 326, 345-46 (1992). While penal laws are to be construed strictly, they are not to be construed so strictly as to defeat the obvious intention of the legislature. People v. Kirkrand, 397 Ill. 588, 590 (1947). We construe statutes presuming the legislature did not intend absurd, unjust, or inconvenient results. People v. Lewis, 234 Ill. 2d 32, 44 (2009).

¶ 27 When presented with a similar issue regarding the attempt statute, Justice Wolfson writing for a unanimous court in Douglas, 371 Ill. App. 3d 21, found that section 8-4(c)(1)(A) was not an enhancement but, rather, the enhancements were contained in the following subsections of (B), (C), and (D). Id. at 26. At this point in his analysis, Justice Wolfson was one for one. Nonetheless, the Douglas court went on to preclude the application of the firearm enhancements by engaging in presumptions of what the legislature may have intended. See id. ("[T]he legislature well might have believed it was authorizing trial judges to impose severe sentences."). By engaging in speculation regarding the legislature's intent, Justice Wolfson ended up only batting 0.500 on his analysis, which is not bad considering not even Babe Ruth achieved that average.

¶ 28 Next came Tolentino, 409 Ill. App. 3d 598. The court in Tolentino agreed that the analysis in Douglas was only partially correct, finding that speculation as to what the legislature "might have believed" was dicta and declined to follow it. Id. at 606. Analyzing the statute, the court

[1] Babe Ruth only achieved a career batting average of 0.342. Major League Baseball, **********.mlb.com/search?q =babe%20ruth&playerId=121578 (last visited Feb. 14, 2022) [https://perma.cc/DR6X-TU6U].

found no express prohibition on the application of the firearm enhancements when sentencing under section 8-4(c)(1)(A). Id. The court also delineated that the public policy concerns underlying section 8-4(c)(1)(A) differ from those underlying the firearm enhancement provisions. Id.

¶ 29 The attempt statute was amended in 2010, adding section 8-4(c)(1)(E) along with the now infamous "and." Pub. Act 96-710, § 25 (eff. Jan. 1, 2010) (amending 720 ILCS 5/8-4(c)(1)). The Jackson court had the first crack at interpreting the amended statute. Jackson, 2018 IL App (1st) 150487. The court conceded the use of semicolons between the subsections signaled a disjunctive reading was appropriate, only allowing one subsection to apply to a given case. Id. ¶ 51. Nonetheless, the use of "and" before section 8-4(c)(1)(E) signaled that the General Assembly intended for section (c)(1)'s exceptions to apply conjunctively, not disjunctively. Id. The court held that the most natural reading was that section 8-4(c)(1)(A) was the baseline sentence with one of the firearm enhancements applying based on the facts of the case. Id. ¶ 52.

¶ 30 In 2019, the appellate court came to the opposite result, first in Phagan and then in Holley. In those cases, the appellate court indulged in a disjunctive reading of the statute precluding the application of a firearm enhancement to a sentence under section 8-4(c)(1)(A).

¶ 31 Turning to Phagan, the decision in that case is full of tortured reasoning that overlooks the plain language of the statute. One example of this obfuscation is the detour into the discussion of Apprendi v. New Jersey, 530 U.S. 466 (2000). Phagan, 2019 IL App (1st) 153031, ¶ 88. Apprendi is irrelevant to the issues in either Phagan or this case. Apprendi is not dispositive as to whether section 8-4(c)(1)(A) is a sentencing enhancement, as Apprendi stands for the proposition that a sentencing enhancement still must be proven beyond a reasonable doubt. Pointing to the State's compliance with Apprendi in finding section 8-4(c)(1)(A) a nonelement sentencing enhancement

is illogical when the State needed to advance proof beyond a reasonable doubt regardless of the statutory section's classification. Id.

¶ 32 When addressing the merits, Phagan disparaged the analysis in Jackson because of the failure to address the content of section 8-4(c)(1)(E). Id. ¶ 100. Once engaged in statutory construction, Phagan found that reading subsection (E) with the other subsections conjunctively, as the court did in Jackson, brought about "absurd results." Id. ¶ 101. The court then turned its attention to subsections (B) through (D), finding a conjunctive reading equally absurd owing to the fact a sentencing court could apply all three of the firearm enhancements if the State proved the facts necessary to apply the most serious of the three. Id. Both of these alleged problems were solved at once by a disjunctive reading of subsections (A) through (E). Id. ¶ 103.

¶ 33 Phagan was wrongly decided.[2] A review of section 8-4(c)(1)(A)-(E) of the Criminal Code of 2012 (720 ILCS 5/8-4(c)(1)(A)-(E) (West 2020)) makes clear that section 8-4(c)(1)(A) is not an enhancement but, rather, the base sentencing range for a status-based offense such as the one at issue. The plain unambiguous language of the statute states that in the presence of certain aggravating factors, while still a Class X felony, "the sentence shall be a term of imprisonment of not less than 20 years and not more than 80 years." (Emphasis added.) Id. § 8-4(c)(1)(A); Smith, 2012 IL App (1st) 102354, ¶¶ 110-16. Common sense dictates that the 20 to 80-year baseline

[2] The Phagan court's finding that it could merely vacate the firearm enhancement absent a remand for resentencing is also incorrect. Courts craft terms of imprisonment mindful of firearm enhancements, thereby reaching a just sentence for the accused offense. There is no need to cite authority for this contention as experience and logic are adequate support. Phagan provides a defendant the unjust windfall of vacating the mandatory enhancement absent remand for resentencing. Phagan improperly relied on one act, one crime principles in arriving at the conclusion the court could vacate the less severe of the enhancements and forego resentencing. What does one act, one crime principles have to do with this issue? That's right: nothing! It is apparent that the lower court in this case did not view a 30-year sentence, only 4 years above the minimum for the same offense not committed against a peace officer a just result. It is more than likely that had the trial judge known the 20-year firearm enhancement was inapplicable, he would have sentenced defendant differently under section 8-4(c)(1)(A). When a firearm enhancement is vacated, the cause should be remanded for resentencing.

sentence is not an enhancement. This interpretation is enforced by the remainder of the statute with subsections (B), (C), and (D) of section 8-4(c)(1) setting forth sentence enhancements that "shall be added" to whichever sentence range is applicable for the Class X felony. 720 ILCS 5/8-4(c)(1)(B)-(D) (West 2020); Smith, 2012 IL App (1st) 102354, ¶¶ 110-16. Absent from the statute is language prohibiting the imposition of the firearm enhancements. Smith, 2012 IL App (1st) 102354, ¶ 115.

¶ 34 Further, supporting this interpretation are the separate evils sought to be prevented by the status-based offense and the firearm enhancements. The legislature has been explicit in its intent to punish attempt first degree murder of a peace officer more severely than the same attempt on an ordinary citizen. Moreover, the legislature has clearly expressed its intent to punish offenses perpetrated with firearms with sentencing enhancements. See id. (noting public policy concern of section 8-4(c)(1)(A) is to deter the intentional killing of peace officers who take heightened risks in performing their duties, as opposed to the policy concerns underlying the following subsections of (B), (C), and (D) that are meant to deter the use of firearms in the commission of felonies due to the greater risk their use poses to society at large); see also Tolentino, 409 Ill. App. 3d at 606; People v. Felton, 2019 IL App (3d) 150595, ¶ 64. There is more than one way to attempt to take the life of a peace officer. An attempt first degree murder of a peace officer using an AR-15 should be punished more harshly than the same attempt using a butter knife. Any speculation that the legislature has already contemplated the use of firearms in an attempt to commit first degree murder of a peace offer and has addressed those concerns via the 20 to 80-year sentencing range is unwarranted. See Smith, 2012 IL App (1st) 102354, ¶ 114.

¶ 35 As the State points out, if defendant in this case would have fired upon a civilian rather than the trooper, Class X sentencing would apply with a baseline sentence in the 6 to 30-year range

along with a mandatory 20-year firearm enhancement. The minimum possible sentence in that scenario is 26 years, 6 years more than the minimum allowed under section 8-4(c)(1)(A). The end result of the interpretation advocated by defendant would allow for an individual attempting to murder a peace officer while discharging a firearm to receive a sentence below the mandatory minimum sentence of an attempt first degree murder of an ordinary citizen under the same facts. This runs afoul of the legislative intent to punish these status-based crimes and crimes committed with a firearm more severely. Despite the legislature's express intent, defendant's interpretation of the statute leads to absurd results. To engage in this suggested reading would do nothing more than place form over substance.

¶ 36 Defendant points to the reasoning in Phagan, arguing that a conjunctive reading of the statute is impossible. First, he argues that a conjunctive reading of the statute would require the lower court to apply the 15, 20, and 25-year firearm enhancements in certain situations. Second, he notes the incompatibility of section 8-4(c)(1)(A) and section 8-4(c)(1)(E) under a conjunctive reading.

¶ 37 To the first point, having found from the plain language that section 8-4(c)(1)(A) is a base sentencing range, under a conjunctive reading, only one of the firearm enhancements can apply. This is because double enhancements to a sentence are prohibited unless the legislature clearly intended such a penalty and "that intention is clearly expressed" in the statute. People v. Guevara, 216 Ill. 2d 533, 545-46 (2005); see also Jackson, 2018 IL App (1st) 150487, ¶ 53 (noting we will not interpret a statute as permitting double enhancements). The Jackson court was correct in finding "unfounded" the notion that a court would apply all three of the firearm enhancements when the State was able to prove the most serious of the three. Id. The Phagan court conceded that there was no such case in which all three firearm enhancements were applied. Phagan, 2019 IL

App (1st) 153031, ¶ 102. We similarly find defendant's contention that a lower court would apply more than one firearm enhancement "unfounded." Jackson, 2018 IL App (1st) 150487, ¶ 53.

¶ 38 As to the second contention, the court in Jackson was on the right track when interpreting this statute, but as pointed out in Phagan, Jackson failed to address the content of section 8-4(c)(1)(E). The Jackson court conceded that the use of semicolons between the subsections generally indicate a disjunctive reading. Id. ¶ 51. This concession is perplexing as the use of a semicolon often replaces a coordinating conjunction, most often the word "and." Nonetheless, the Jackson court found that the use of "and" at the end of the series of subsections, before subsection (E), signaled the intent of the General Assembly for the subsections to be read conjunctively.

¶ 39 What the Jackson court left out is that the legislature at times has difficulty properly codifying its intent. See Goldblatt v. City of Chicago, 30 Ill. App. 2d 211, 217 (1961) ("The use of 'or' and 'and' is so frequently inaccurate in statutory enactments that the courts readily change 'or' to 'and' and vice versa, whenever such conversion is required by the context."). Section 8-4(c)(1)(E) is not an enhancement, rather, it describes mitigating circumstances that lessens the provided for Class X sentencing to that of a Class 1 felony. Similar to section 8-4(c)(1)(A), section 8-4(c)(1)(E) is a baseline sentence. In the presence of serious provocation, the sentencing court is instructed to treat the offense as a Class 1 felony, thereby rendering the firearm enhancements inapplicable. Although the legislature intended section 8-4(c)(1)(A) and the appropriate firearm enhancement that follows to apply in the cumulative as evidenced by the "and" before section 8-4(c)(1)(E), it is proper to read the "and" as an "or" in light of the content of section 8-4(c)(1)(E), allowing that section alone to apply disjunctively. See County of DuPage v. Illinois Labor Relations Board, 231 Ill. 2d 593, 606 (2008) ("In construing statutes, the strict meaning of words like 'and' 'is more readily departed from than that of other words.' " (quoting John P. Moriarty, Inc. v. Murphy, 387 Ill. 119, 129 (1944))); Martin v. Office of the State's Attorney, 2011 IL App

(1st) 102718, ¶ 11 ("[I]f reading 'and' in a statute literally would create an inconsistency in the statute or render the sense of the statute dubious, then the term 'and' will be read as 'or.' " (citing County of DuPage, 231 Ill. 2d at 606)). Ergo, subsection (A) is the baseline sentence in cases dealing with status-based offenses such as the one here, with either subsection (B), (C), or (D) also applying when a firearm is used in the commission of the offense.

¶ 40 Accordingly, the circuit court did not err in sentencing defendant.

¶ 41 III. CONCLUSION

¶ 42 For the foregoing reasons, we affirm the judgment of the circuit court of Henry County.

¶ 43 Affirmed.

¶ 44 JUSTICE LYTTON, dissenting:

¶ 45 I concur with the finding that the trial court did not abuse its discretion in denying defendant's motion for a second expert regarding the determination of insanity at the time of the offense. However, I disagree with the majority's conclusion that the trial court appropriately applied both the status-based enhancement under section 8-4(c)(1)(A) and the 20-year firearm enhancement under section 8-4(c)(1)(C) to defendant's sentence for attempted first degree murder of a peace officer.

¶ 46 IT IS ALL ABOUT THE SEMICOLONS

¶ 47 When interpreting a statute, our primary objective is to give effect to the legislature's intent, which we do by looking to the language in the statute and determining its plain and ordinary meaning. Jackson, 2018 IL App (1st) 150487, ¶ 48. In construing legislative intent, we must consider the entire statute in light of the subject it addresses, presuming the legislature did not intend absurd, unjust, or inconvenient results. Lewis, 234 Ill. 2d at 44. Double enhancements to a sentence are prohibited unless the legislature clearly intended such a penalty and "that intention is clearly expressed" in the statute. People v. Guevara, 216 Ill. 2d 533, 545-46 (2005).

¶ 48 In interpreting criminal statutes, we are mindful to apply the statutory language strictly in favor of the accused; nothing should be taken by implication beyond the plain and obvious meaning of the statute. People v. Lavallier, 187 Ill. 2d 464, 468 (1999). Thus, if a criminal statute is ambiguous, it will generally be construed in a defendant's favor. People v. Johnson, 2017 IL 120310, ¶ 30.

¶ 49 In this case, defendant argues that the 20-year enhancement for personally discharging a firearm does not apply to his conviction for attempted first degree murder of a peace officer because the plain language of the attempt statute only allows the court to impose one enhancement or the other, not both. See Phagan, 2019 IL App (1st) 153031, ¶ 103; Holley, 2019 IL App (1st) 161326, ¶ 32; and Douglas, 371 Ill. App. 3d at 26.

¶ 50 As a baseline, the plain language of the attempt statute requires attempted first degree murder to be sentenced as a Class X offense, carrying a sentencing range of 6 to 30 years. 720 ILCS 5/8-4(c)(1) (West 2020); 730 ILCS 5/5-4.5-25(a) (West 2020). The semicolons between the subsections that follow indicate that each exception must be read disjunctively. See Jackson, 2018 IL App (1st) 150487, ¶ 51 (conceding that the use of semicolons between subsections ordinarily means that the subsections are related but separate concepts that should be read disjunctively). If the victim is a peace officer, the statute increases the sentencing range to 20 to 80 years. 720 ILCS 5/8-4(c)(1)(A), 9-1(b)(1) (West 2020). If a firearm is used during the commission of the offense, the statute requires the imposition of an additional 15 years to the Class X sentence. Id. § 8-4(c)(1)(B). If the defendant personally discharges a firearm during the commission of the offense, the statute requires the imposition of an additional 20 years. Id. § 8-4(c)(1)(C). If the defendant's actions caused great bodily harm, permanent disability, permanent disfigurement, or death, the statute mandates the imposition of an additional 25 years. Id. § 8-4(c)(1)(D). However, if certain

mitigating factors are present, the sentence is reduced to the sentence for a Class 1 felony. Id. § 8-4(c)(1)(E). I believe each subsection applies separately, not collectively.

¶ 51 The placing of a semicolon at the end of each subsection and use of the word "and" between subsections (D) and (E) may seem confusing to some, but the grammatical structure of section 8-4(c)(1) as a whole is clear. The rules of punctuation in the English language are well defined. The semicolon is used to separate "two or more clauses which are of more or less equal importance" as a means of indicating discontinuity. The New Fowler's Modern English Usage 699 (R.W. Burchfield ed., 3d ed. 1996); Karen Elizabeth Gordon, The New Well-Tempered Sentence: A Punctuation Handbook for the Innocent, the Eager, and the Doomed 61 (1993). Its function is "to separate contact clauses that is, clauses that are not linked by a conjunction." Theodore M. Bernstein, The Careful Writer; A Modern Guide to English Usage 373 (1965).

¶ 52 Jackson agrees with these rules but relies on the word "and" between subsection (D) and (E) to support a conjunctive interpretation. See Jackson, 2018 IL App (1st) 150487, ¶ 51. The majority follows Jackson, ignoring the purpose of the semicolon. Both, however, miss the point.

¶ 53 The use of a semicolon between each subsection is significant. A semicolon signals a stop; it forces the reader to contemplate each sentencing exception independently. A semicolon is not a comma. A comma indicates a pause, not a stop, and is used to combine elements in a series. Gordon, supra at 46 ("three or more elements in a series are separated by commas"); see also Bernstein, supra at 359 (discussing correlative conjunctions and the use of commas to combine related material in a series). Unlike commas, nothing in the rules of punctuation suggests that the use of a semicolon allows for a conjunctive reading of equally weighted provisions. See The New Fowler's Modern English Usage 699 (R.W. Burchfield ed., 3d ed. 1996). Likewise, the semicolons between subsections (A) through (E) in the attempt statute mean something: they provide an interruption of grammatical construction, they signal discontinuity between the subsections, and,

most importantly, they indicate there are five distinct factors that modify the Class X sentence for attempted murder.

¶ 54 The "and" between subsections (D) and (E) connects subsections (A) through (D) with subsection (E) to cohere them into a complete sentence, nothing more. It links them into a whole; it does not add them together.

¶ 55 Moreover, the plain text of the statute does not contain a statement clearly indicating legislative approval of a double enhancement. See Guevara, 216 Ill. 2d at 545-46 (applying more than one enhancement is prohibited unless the statute clearly expresses that intention). Thus, under the rules of statutory construction, as well as English grammar, a conjunctive reading cannot be adopted.

¶ 56 My view is supported by the court's analysis in Phagan and Holley. Phagan held that the 20-year firearm enhancement imposed by the trial court did not apply to the charged offense of attempted murder of a peace officer. Phagan, 2019 IL App (1st) 153031, ¶ 107. The court construed the attempted first degree murder statute and concluded that the statute contains five distinct sentencing exceptions that are mutually exclusive. Id. ¶ 103. Phagan rejected Jackson, Smith, and Tolentino. It found that a conjunctive reading of subsections (A) through (D) failed to consider the addition of subsection (E) to the attempt statute, which allows the sentencing court to lessen the class of attempted murder under certain mitigating circumstances. Id. ¶¶ 92-100. The Phagan court explained:

> "Jackson relied on the word 'and' to support its conjunctive interpretation of the subsections without taking account of what came after the 'and.' One simply cannot read subsection (A) and subsection (E) conjunctively. Applying the conjunctive reading proposed in Jackson to the remainder of the subsections would require us to acquiesce in an impossible

> reading of the statutory scheme as a whole, an absurd result we are obligated to avoid. [Citation.]" Id. ¶ 100.

The court noted that reading the statute conjunctively led to an impossible sentence because the mitigating circumstances that allow for the application of subsection (E) did not apply to the aggravated versions of attempted murder described in subsections (A) through (D). Id. ¶ 99. Indeed, logically, how could it?

¶ 57 The Phagan court also reasoned that reading subsections (A) through (D) conjunctively would produce an absurd result when a defendant, charged with attempted first degree murder of a peace officer, personally discharged a firearm that proximately caused great bodily harm, permanent disability, permanent disfigurement, or death. In that situation, the sentencing court would be required to impose the 15-year, 20-year, and 25-year enhancements in addition to subsection (A) for attempted murder of a police officer. Id. ¶ 101. To avoid both of these illogical results and unintended multiple enhancements, the court read subsections (A) through (E) disjunctively and concluded that only one subsection could apply at a time. Id. ¶ 103.

¶ 58 In Holley, the court applied a similar analysis and concluded that the legislature intended for subsections (A) through (E) to be alternative sentencing options, not cumulative. Holley, 2019 IL App (1st) 161326, ¶ 30. It noted that the State's argument advocated for a "selectively cumulative reading" of section 8-4(c)(1). Id. ¶ 31. The State in Holley acknowledged that subsections (A) and (E) cannot be applied cumulatively without running afoul of double enhancement concerns but encouraged the court to apply the status-based enhancement in subsection (A) and the firearm enhancements in (B), (C), and (D) together. Id. The court declined by stating:

> "What the State is actually asking us to do is treat subsection (A) as the baseline in [the defendant's] case with a permissible sentencing enhancement to be drawn from subsections (B), (C), or (D). However, this reading would only make sense if the 'and' that the State relies on were placed immediately after subsection (A)." Id.

The court determined that the general structure of the statute indicated that subsections (A) through (E) were separate paragraphs with separate applications and found that the trial court erred in applying the 25-year firearm enhancement to the defendant's convictions of attempted murder of a peace officer. Id. ¶¶ 32-33.

¶ 59 The majority disregards Phagan, but I find Phagan and Holley to be well reasoned. Following Jackson, as the majority suggests, leads to an illogical and unintended result that directly contradicts the prohibition against double enhancements.

¶ 60 Applying the rule of statutory construction, as we must, the first degree murder provision of the attempt statute does not allow for the imposition of a 20-to-80-year sentence under subsection (A) combined with the firearm enhancements in subsections (B), (C), and (D). I would therefore vacate the 20-year firearm enhancement and remand the cause for resentencing.

No. 3-19-0281

Cite as:	People v. Taylor, 2022 IL App (3d) 190281
Decision Under Review:	Appeal from the Circuit Court of Henry County, No. 17-CF-348; the Hon. Terence M. Patton, Judge, presiding.
Attorneys for Appellant:	James E. Chadd, Thomas A. Karalis, and Santiago A. Durango, of State Appellate Defender's Office, of Ottawa, for appellant.
Attorneys for Appellee:	Catherine Runty, State's Attorney, of Cambridge (Patrick Delfino, Thomas D. Arado, and Justin A. Nicolosi, of State's Attorneys Appellate Prosecutor's Office, of counsel), for the People.

APPEAL TO THE APPELLATE COURT OF ILLINOIS
THIRD JUDICIAL DISTRICT
FROM THE CIRCUIT COURT OF THE FOURTEENTH JUDICIAL CIRCUIT
HENRY COUNTY, ILLINOIS

PEOPLE	)	
Plaintiff/Petitioner	)	Reviewing Court No: 3-19-0281
	)	Circuit Court No: 2017CF348
	)	Trial Judge: Terence M Patton
v	)	
	)	
	)	
TAYLOR, SHAUN N	)	
Defendant/Respondent	)	

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APPEAL TO THE APPELLATE COURT OF ILLINOIS
THIRD JUDICIAL DISTRICT
FROM THE CIRCUIT COURT OF THE FOURTEENTH JUDICIAL CIRCUIT
HENRY COUNTY, ILLINOIS

PEOPLE	)	
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	)	
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Defendant/Respondent	)	

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People v. Taylor, Shaun N
17-CF-348 3-19-0281

WITNESS	DX	CX	RDX	CDX
James E. Spencer	R484	R515	R530	
Shaun N. Taylor	R538	R549	R551	

West's Smith-Hurd Illinois Compiled Statutes Annotated
Chapter 720. Criminal Offenses
Criminal Code
Act 5. Criminal Code of 2012 (Refs & Annos)
Title III. Specific Offenses
Part A. Inchoate Offenses
Article 8. Solicitation, Conspiracy and Attempt

720 ILCS 5/8-4
Formerly cited as IL ST CH 38 ¶ 8-4

5/8-4. Attempt

Effective: January 1, 2010
Currentness

§ 8-4. Attempt.

(a) Elements of the offense.

A person commits the offense of attempt when, with intent to commit a specific offense, he or she does any act that constitutes a substantial step toward the commission of that offense.

(b) Impossibility.

It is not a defense to a charge of attempt that because of a misapprehension of the circumstances it would have been impossible for the accused to commit the offense attempted.

(c) Sentence.

A person convicted of attempt may be fined or imprisoned or both not to exceed the maximum provided for the offense attempted but, except for an attempt to commit the offense defined in Section 33A-2 of this Code:

(1) the sentence for attempt to commit first degree murder is the sentence for a Class X felony, except that

(A) an attempt to commit first degree murder when at least one of the aggravating factors specified in paragraphs (1), (2), and (12) of subsection (b) of Section 9-1 is present is a Class X felony for which the sentence shall be a term of imprisonment of not less than 20 years and not more than 80 years;

(B) an attempt to commit first degree murder while armed with a firearm is a Class X felony for which 15 years shall be added to the term of imprisonment imposed by the court;

(C) an attempt to commit first degree murder during which the person personally discharged a firearm is a Class X felony for which 20 years shall be added to the term of imprisonment imposed by the court;

(D) an attempt to commit first degree murder during which the person personally discharged a firearm that proximately caused great bodily harm, permanent disability, permanent disfigurement, or death to another person is a Class X felony for which 25 years or up to a term of natural life shall be added to the term of imprisonment imposed by the court; and

(E) if the defendant proves by a preponderance of the evidence at sentencing that, at the time of the attempted murder, he or she was acting under a sudden and intense passion resulting from serious provocation by the individual whom the defendant endeavored to kill, or another, and, had the individual the defendant endeavored to kill died, the defendant would have negligently or accidentally caused that death, then the sentence for the attempted murder is the sentence for a Class 1 felony;

(2) the sentence for attempt to commit a Class X felony is the sentence for a Class 1 felony;

(3) the sentence for attempt to commit a Class 1 felony is the sentence for a Class 2 felony;

(4) the sentence for attempt to commit a Class 2 felony is the sentence for a Class 3 felony; and

(5) the sentence for attempt to commit any felony other than those specified in items (1), (2), (3), and (4) of this subsection (c) is the sentence for a Class A misdemeanor.

Credits

Laws 1961, p. 1983, § 8-4, eff. Jan. 1, 1962. Amended by Laws 1967, p. 2595, § 1, eff. Aug. 3, 1967; P.A. 77-2638, § 1, eff. Jan. 1, 1973; P.A. 78-342, § 1, eff. Oct. 1, 1973; P.A. 80-1099, § 1, eff. Feb. 1, 1978; P.A. 81-923, § 1, eff. Jan. 1, 1980; P.A. 84-1450, § 2, eff. July 1, 1987; P.A. 87-921, § 1, eff. Jan. 1, 1993; P.A. 88-680, Art. 35, § 35-5, eff. Jan. 1, 1995; P.A. 91-404, § 5, eff. Jan. 1, 2000. Re-enacted by P.A. 91-696, Art. 35, § 35-5, eff. April 13, 2000; P.A. 96-710, § 25, eff. Jan. 1, 2010.

Formerly Ill.Rev.Stat.1991, ch. 38, ¶ 8-4.

720 I.L.C.S. 5/8-4, IL ST CH 720 § 5/8-4
Current through P.A. 102-804 of the 2022 Reg. Sess. Some statute sections may be more current, see credits for details.

End of Document

West's Smith-Hurd Illinois Compiled Statutes Annotated
Chapter 725. Criminal Procedure
Act 5. Code of Criminal Procedure of 1963 (Refs & Annos)
Title VI. Proceedings at Trial
Article 115. Trial (Refs & Annos)

725 ILCS 5/115-6
Formerly cited as IL ST CH 38 ¶ 115-6

5/115-6. Appointment of Psychiatrist or Clinical Psychologist

Effective: January 25, 2013
Currentness

§ 115-6. Appointment of Psychiatrist or Clinical Psychologist. If the defendant has given notice that he may rely upon the defense of insanity as defined in Section 6-2 of the Criminal Code of 2012 [1] or the defendant indicates that he intends to plead guilty but mentally ill or the defense of intoxicated or drugged condition as defined in Section 6-3 of the Criminal Code of 2012 [2] or if the facts and circumstances of the case justify a reasonable belief that the aforesaid defenses may be raised, the Court shall, on motion of the State, order the defendant to submit to examination by at least one clinical psychologist or psychiatrist, to be named by the prosecuting attorney. The Court shall also order the defendant to submit to an examination by one neurologist, one clinical psychologist and one electroencephalographer to be named by the prosecuting attorney if the State asks for one or more of such additional examinations. The Court may order additional examinations if the Court finds that additional examinations by additional experts will be of substantial value in the determination of issues of insanity or drugged conditions. The reports of such experts shall be made available to the defense. Any statements made by defendant to such experts shall not be admissible against the defendant unless he raises the defense of insanity or the defense of drugged condition, in which case they shall be admissible only on the issue of whether he was insane or drugged. The refusal of the defendant to cooperate in such examinations shall not automatically preclude the raising of the aforesaid defenses but shall preclude the defendant from offering expert evidence or testimony tending to support such defenses if the expert evidence or testimony is based upon the expert's examination of the defendant. If the Court, after a hearing, determines to its satisfaction that the defendant's refusal to cooperate was unreasonable it may, in its sound discretion, bar any or all evidence upon the defense asserted.

Credits

Laws 1963, p. 2836, § 115-6, added by P.A. 76-1134, § 1, eff. Aug. 28, 1969. Amended by P.A. 82-553, § 2, eff. Sept. 17, 1981; P.A. 97-1150, § 635, eff. Jan. 25, 2013.

Formerly Ill.Rev.Stat.1991, ch. 38, ¶ 115-6.

Footnotes

1 720 ILCS 5/6-2.

2 720 ILCS 5/6-3.

725 I.L.C.S. 5/115-6, IL ST CH 725 § 5/115-6
Current through P.A. 102-804 of the 2022 Reg. Sess. Some statute sections may be more current, see credits for details.

Table 2. — Law Enforcement Officers Feloniously Killed, 1987–1996
Type of Weapon by Region

Type of Weapon	Total	Northeast	Midwest	South	West	U.S. Territories/ Foreign
Total	**696**	**88**	**129**	**297**	**131**	**51**
Handgun	**496**	66	82	212	89	47
Rifle	**103**	7	28	39	26	3
Shotgun	**38**	3	7	21	7	0
Total Firearms	**637**	**76**	**117**	**272**	**122**	**50**
Knife	**12**	5	0	5	1	1
Bomb	**10**	1	0	9	0	0
Personal Weapons	**5**	1	1	1	2	0
Other	**32**	5	11	10	6	0

Table 3. — Law Enforcement Officers Feloniously Killed, 1987–1996
Type of Weapon

Year	Total	Handgun	Rifle	Shotgun	Total Firearms	Knife	Bomb	Personal Weapons	Other
Total	**696**	**496**	**103**	**38**	**637**	**12**	**10**	**5**	**32**
1987	**74**	49	9	9	**67**	3	0	0	4
1988	**78**	63	11	2	**76**	0	0	0	2
1989	**66**	40	10	7	**57**	2	0	1	6
1990	**66**	48	8	1	**57**	3	0	2	4
1991	**71**	50	14	4	**68**	0	1	0	2
1992	**63**	43	9	2	**54**	1	1	1	6
1993	**70**	50	14	3	**67**	0	0	0	3
1994	**79**	66	8	4	**78**	0	0	0	1
1995	**74**	43	14	5	**62**	2	8	0	2
1996	**55**	44	6	1	**51**	1	0	1	2

U.S. DEPARTMENT OF JUSTICE • FEDERAL BUREAU OF INVESTIGATION • CRIMINAL JUSTICE INFORMATION SERVICES DIVISION

2019 LAW ENFORCEMENT OFFICERS KILLED & ASSAULTED

Table 28

Law Enforcement Officers Feloniously Killed

Type of Weapon, 2010–2019

Download Excel

Type of weapon	Total	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019
Number of victim officers	511	55	72	49	27	51	41	66	46	56	48
Total firearms	471	54	63	44	26	46	38	62	42	52	44
Handgun	343	38	49	34	18	33	29	37	32	39	34
Rifle	100	15	7	7	5	10	7	23	9	10	7
Shotgun	22	1	6	3	3	3	1	1	1	2	1
Multiple firearms used by offender(s), unable to determine which caused fatal injury[1]	2	—	1	0	0	0	0	1	0	0	0
Type of firearm unknown	2	0	0	0	0	0	1	0	0	0	1
Type of firearm not reported	2	0	0	0	0	0	0	0	0	1	1
Knife or other cutting instrument[2]	0	0	—	—	—	—	—	—	—	—	—
Knife[2]	3	—	1	1	0	0	0	0	1	0	0
Other cutting instrument[2]	0	—	0	0	0	0	0	0	0	0	0
Blunt instrument	0	0	0	0	0	0	0	0	0	0	0
Bomb	0	0	0	0	0	0	0	0	0	0	0
Personal weapons (hands, fists, feet, etc.)	5	0	2	2	0	1	0	0	0	0	0
Vehicle	32	1	6	2	1	4	3	4	3	4	4
Other	0	0	0	0	0	0	0	0	0	0	0
Number of victim officers who had prior knowledge that a weapon might be involved in the incident	167	20	25	6	8	15	17	26	11	24	15

- [1]Beginning in 2011, a new option was added: "Multiple firearms used by offender(s), unable to determine which caused fatal injury."
- [2]For 2010, the type of weapon categories "Knife" and "Other cutting instrument" were combined.

No. 128316

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, -vs- SHAUN N. TAYLOR, Defendant-Appellant.	)))))))))))	Appeal from the Appellate Court of Illinois, No. 3-19-0281. There on appeal from the Circuit Court of the Fourteenth Judicial Circuit, Henry County, Illinois, No. 17 CF 348. Honorable Terence M. Patton, Judge Presiding.

NOTICE AND PROOF OF SERVICE

Mr. Kwame Raoul, Attorney General, 12th Floor, 100 W. Randolph St., Chicago, IL 60601, eserve.criminalappeals@ilag.gov;

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Mr. Shaun N. Taylor, Register No. Y35428, Dixon Correctional Center, 2600 North Brinton Avenue, Dixon, IL 61021

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. On August 11, 2022, the Brief and Argument was filed with the Clerk of the Supreme Court of Illinois using the court's electronic filing system in the above-entitled cause. Upon acceptance of the filing from this Court, persons named above with identified email addresses will be served using the court's electronic filing system and one copy is being mailed to the defendant-appellant in an envelope deposited in a U.S. mail box in Ottawa, Illinois, with proper postage prepaid. Additionally, upon its acceptance by the court's electronic filing system, the undersigned will send 13 copies of the Brief and Argument to the Clerk of the above Court.

/s/Esmeralda Martinez
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