No. 129627

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellant, -vs- MICHEAIL WARD Defendant-Appellee.		Appeal from the Appellate Court of Illinois, First District, Sixth Division No. 1-19-0364 There Heard on Appeal from the Circuit Court of Cook County, Criminal Division No. 13-CR-5242 Honorable Nicholas Ford, Judge Presiding.

BRIEF AND ARGUMENT FOR DEFENDANT-APPELLEE

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POINTS AND AUTHORITIES

ISSUES PRESENTED

1. Should this court dismiss this appeal on the ground that the petition for leave to appeal was improvidently granted?
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3. Should this court apply de novo review in suppression cases where all of the evidence consists of a videotaped interrogation?
4. Should this court find that the State forfeited the issue of whether the interrogators "scrupulously honored" Micheail Ward's invocation of his right to remain silent, where the State did not argue the issue in the appellate court and failed to include the issue in its petition for leave to appeal?
5. Where Micheail Ward was questioned on multiple occasions and repeatedly asserted his right to remain silent, did detectives scrupulously honor that assertion where they did not immediately half the interrogation, suggested to Micheail that he was only requesting a "break," failed to re-Mirandize him, and always questioned him about the same crime?
6. Did the State forfeit its argument that the admission of Micheail's statements was harmless beyond a reasonable doubt where the appellate court held that the argument had been forfeited and the State did not challenge that argument on appeal?
7. Was the erroneous admission of Micheail's statements harmless beyond a reasonable doubt where all of the remaining evidence against Micheail was questionable or highly compromised?

ARGUMENT

I:

THE STATE'S APPEAL SHOULD BE DISMISSED ON THE GROUNDS THAT THE STATE'S PETITION FOR LEAVE TO APPEAL WAS IMPROVIDENTLY GRANTED

This State's appeal should be dismissed on the grounds that the State's petition for leave for appeal was improvidently granted.

Micheail Ward originally appealed form his convictions for first degree murder and aggravated battery of a firearm and his sentence of 84 years in prison.

On his appeal to the appellate court, Micheail Ward raised seven issues: (1) whether the evidence was sufficient sustain Micheail Ward's conviction, (2) whether the trial judge erred in denying Micheail Ward's motion to suppress statements, where the statements were obtained in violation of his right to remain silent (3) whether the trial judge's refusal to allow Micheail Ward to present witnesses on false confessions and police interrogation tacits deprived him of the right to present a defense, (4) whether the trial judge's failure to ask any potential jurors if they accepted the principles set for tin Supreme Court Rule 413(b) required a new trial, (5) whether the prosecutor's pervasive denigrations of defense counsel and their expert witness, and repeated misstatements of fact deprived Michaeil Ward of a fair trial, (6) whether the state violated Micheail Ward's constitutional rights by arresting him pursuant to an investigative alert, and (7) whether the court should remand to determine if Micheail Ward's 84 year de facto life sentence violated the federal and Illinois constitutions. (Appendix A, Def. App. Br., at 1-2).

With respect to issue (2), Micheail Ward argued that the motion to suppress should have been granted. (Appendix A, Def. App. Br., at 31-37). Micheail Ward argued that review should be de novo because evidence did not include live testimony and consisted only of the video of the interrogation. (Appendix A, Def. App. Br., at 31-32). Micheail Ward also argued that the video showed that he unambiguously invoked his right to remain silent and that the interrogators did not scrupulously honor his invocation of that right. (Appendix A, Def. App. Br., at 31-37). Finally, Micheail Ward argued that the improper admission of his statements was not harmless beyond a reasonable doubt. (Appendix A, Def. App. Br., at 37-38).

In response, the State argued that the standard of review for findings of fact should be the manifest weight of the evidence, but did not respond to Micheail Ward's argument that because all of the evidence was on the videotape, review should be de novo. (Appendix B, St. App. Br., at 27-28). The State also argued that the Micheail Ward's invocation of his right to remain silent was not unambiguous, because Ward did not "ever signal his desire to stop the conversation altogether." (Appendix B, St. App. Br., at 29, 28-32).

With respect to whether Micheail Ward's invocation of his right to remain silent was scrupulously honored, the State chose to not argue that point, saying merely: "Finally, defendant's argument that his right to remain silent was not 'scrupulously honored' is predicated on his assertion that he invoked that right. Because, as proved, defendant never equivocally and unambiguously invoked the right to remain silent, his analysis here is inapt." (Appendix B, St. App. Br., at 32).

The State did not argue in its brief that any error in the admission of Micheail Ward's statements was harmless beyond a reasonable doubt. (Appendix B, St. App. Br., at 27-32). Two days before oral argument, the State filed a motion to file a supplemental brief, in part to argue that any error in the admission of the statement was harmless. The appellate court granted leave for the State to file the supplemental brief. *People v. Ward*, 2023 IL App (1st) 190364, ¶121.

The appellate court below conducted a de novo review of the trial court's decision on the motion to suppress and concluded that the motion to suppress should have been granted. *People v. Ward*, 2023 IL App (1st) 190364, ¶¶ 97-120. After carefully examining the record, the appellate court found that Micheail Ward had unambiguously invoked his right to remain silent. *People v. Ward*, 2023 IL App (1st) 190364, ¶¶ 97-120.

With respect to whether Micheail Ward's invocation had been scrupulously honored, the appellate court stated:

> "Once a defendant has invoked his right to silence, 'the interrogation may be resumed and any statement resulting from renewed questioning is admissible only if the suspect's right to remain silent was 'scrupulously honored.' [Cites]. The State does not even suggest in its brief that that was the case here, relying solely on its argument that there was no invocation."

People v. Ward, 2023 IL App (1st) 190364, ¶ 120. (Emphasis supplied).

With respect to whether the wrongful admission of Micheail Ward's statements was harmless, the appellate court held that by failing to raise this argument in its initial brief, the State had forfeited the argument. *People v. Ward*, 2023 IL App (1st) 190364, ¶ 120. (Emphasis supplied). The court went on to conclude that the error in admission of

the statements was not harmless beyond a reasonable doubt. *People v. Ward*, 2023 IL App (1st) 190364, ¶ 122-24.

Following the appellate court's reversal of Micheail Ward's conviction and remand for a new trial, the State filed a petition for leave to appeal. In the petition, the State claimed that the appellate court erred as to the "suppression question" by applying de novo review. (St.. PLA, at 1-4). The State identified the "suppression question" as "whether the defendant unambiguously asserted his rights." (St. PLA, at 1).

The State did not argue, even in the alternative, that the interrogating detectives had scrupulously honored Micheail Ward's invocation of his right to silence. (St. PLA, passim). Apart from a brief nod to harmless error, the State's entire argument in the petition concerned whether de novo review was appropriate in video tape evidence suppression cases involving the "factually complex" issue of whether a suspect had unambiguously invoked his right to counsel. (St. PLA, at 1-5, 12-20).

The State acknowledged, as this court has held in *People v. Oaks*, 169 Ill. 2d 409, 448 (1996), that de novo review was appropriate in other videotaped suppression cases where the issue was whether the suspect was coerced by an interrogators' misleading statements and lies. (St. PLA, at 15-16). At no point in the petition did the State argue that the issue of whether a suspect's invocation was "scrupulously honored," was a factually complex question which could not be reviewed de novo on videotaped evidence. (St. PLA, passim).

The petition concluded by arguing that the petition should be granted to "bring *Flores* and its progeny in line with *Ornelas*, and to correct *Flores*'s mistaken endorsement

of a de novo standard for reviewing the trial court's factual determinations in every case for which the evidence consists only of recorded interview, regardless of the complexity of the facts and depth of the trial court's observations necessitated by that recording." (St. PLA, at 19-20).

On March 6, 2024, after four granted extensions, the State filed its brief in this case. (St. Br, passim). In this brief, the State appears to have abandoned its position that they have been impacted by the appellate court's application of de novo review.

After acknowledging, as it must, that a trial court's legal conclusions are subject to de novo appellate review, the State concedes: "the appellate court's legal conclusions that defendant unambiguously invoked his right to remain silent and that detectives failed to scrupulously honor the invocation do not appear to rest on a rejection of any factual finding by the trial court, but instead on an independent assessment of the 'legal effect of 'undisputed facts.'" (St. Br., at 24).

Indeed, the State concedes that the appellate court's application of what it argues was the wrong standard of review "does not appear to have been critical to the outcome" Bu the State wants this court to "clarify that the appellate court applied the wrong standard of review when it stated that it would give no deference to the trial court's factual findings." (St. Br., at 19). The State goes on to argue, despite its concession that there was no error in the appellate court's use of de novo review, that "the appellate court's incorrect articulation of the standard of review that applies when a trial court makes factual findings based on video evidence threatens to cause confusion in future cases." (St. Br., at 24).

In the brief, the State also abandons its position that the appellate court erred by holding that Micheail Ward unambiguously invoked his right to remain silent. (St. Br., at 24-25). Indeed, the State explicitly concedes that Micheail Ward unambiguously invoked his right to remain silent when he told detectives: "I ain't got nothing else to say about it." (St. Br., at 24-25).

The State explains that in the appellate court, the State disputed that this last statement was made because the transcript of Micheail's response described it as "inaudible." Apparently, after reviewing the actual recording before preparing their brief, counsel for the State heard Micheail Ward say "I ain't got nothing else to say about it." (St. Br., at 27). After hearing that statement, the State now oncedes that the trial court's finding that Micheail Ward had not unambiguously invoked his right to counsel was erroneous even under the manifest weight of the evidence standard and that with respect to that factual conclusion, the appellate court was correct. (St. Br., at 27-28).

The State, however, argues, for the first time, that the appellate court erred because detectives "scrupulously honored" Micheail Ward's invocation of his right to silence even though the interrogators did not re-Mirandize Micheail Ward and did not question him about a different offense. (St. Br., at 28-31). The State concedes that they did not make this argument to the appellate court. (St. Br., at 28, n.5).

The State also does not argue that the appellate court erred by reviewing the "scrupulously honor" determination de novo on videotaped evidence. (St. Br., at 28-31). Nor does the State argue that the "scrupulously honor" determination is a "factual" or

"factually complex" issue which should be reviewed under the manifest weight of the evidence standard, even in videotaped evidence cases. (St. Br., at 28-31).

Following the filing of the State's brief, Micheail Ward filed a motion to dismiss the appeal as improvidently granted, making arguments in his motion which are also included in this brief. (Def. Mt., *passim*). In response, the State filed an objection. (St. Obj., *passim*).

In its objection, the State conceded that the question of the standard of review was "moot," but argued that it should be considered under the public interest exception to the mootness doctrine. (St. Obj., at 5-7). The State also argued that the question of harmlessness was of general importance, which also merited review by the court. (St. Obj., at 7-9).

Under these circumstances, this court should find that the State's petition for leave to appeal was improvidently granted and should dismiss the appeal.

After a case has been added to this court's discretionary docket, "briefing and oral argument may disclose to us sound reasons for deciding then to dismiss the appeal as having been improvidently granted." *Disposition of Petitions for Leave to Appeal*, 157 Ill. 2d 524, 525 (1994) (Miller, J. dissenting); see *Belcher v. Stengel*, 429 U.S. 118, 119-20 (1976). Grounds typically advanced for dismissal of an appeal once taken include the following: (1) the underlying judgment is not a final judgment, *Phelps v. Elgin, Joliet & Eastern Ry. Co.*, 28 Ill.2d 275, 279 (1963); *Wilkey v. Illinois Racing Board*, 96 Ill.2d 245, 251 (1983), (2) the issues have become moot, *In re Marriage of Peters–Farrell*, 216 Ill.

2d 287 (2005)); and (3) the petition for leave to appeal was not timely filed. *Roth v. Illinois Farmers Insurance Co*., 202 Ill.2d 490, 497 (2002).

This court has also dismissed an appeal where the appellant took a different position in this court than the appellant took in the appellate court. See *People v. Jackson & Lee*, 2011 IL 110615, ¶ 26 (appeal dismissed as improvidently granted where defendant Lee took the position in the supreme court that a pre-amended version of a statute applied, but in the appellate court had taken the position that the post-amended version applied). Finally, this court has also acknowledged that an appeal may be dismissed as improvidently granted where, after an initial grant of a petition for leave to appeal, it appears that a case falls outside the commonly accepted grounds for review by this court. See *Carney v. Union Pac. R.R. Co*., 2016 IL 118984, ¶ 19.

In this case, given the novel arguments in the State's brief, and the change in its position between the petition for leave to appeal and the brief, the principal ground urged for the grant of the petition for leave to appeal is now moot. In addition, the case now falls outside the commonly accepted grounds for review by this court.

As this court is well aware, the standard for the discretionary grant of a petition for leave to appeal are stated by Rule 315:

> "The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered: the general importance of the question presented; the existence of a conflict between the decision sought to be reviewed and a decision of the Supreme Court, or of another division of the Appellate Court; the need for the exercise of the Supreme Court's supervisory authority; and the final or interlocutory character of the judgment sought to be reviewed."

In its petition for leave to appeal, the State argued that the question of the application of de novo review to a finding that a suspect unambiguously invoked his right to counsel and the interrogation was recorded on videotape was a question of general importance. Now, however, the State concedes that this question is effectively moot, because the appellate court did not err in finding that Micheail Ward unambiguously invoked his right to counsel, regardless of the standard of review applied.

This court generally declines to resolve the question of the appropriate standard of review where the result would be the same regardless of the standard employed. See, e.g., *People v. Washington*, 2023 IL 127952, ¶ 47; *People v. Torres*, 2012 IL 111302, ¶¶ 46, 49. Here, the State is now arguing, essentially, that this court should decide the standard of review in a case where it concedes that the appellate court's decision on the issue was correct, regardless of the standard employed. In other words, the State is arguing for a decision on an issue which the State now concedes is "moot," or "abstract." Such a decision would violate the well settled rule that Illinois courts "cannot pass judgment on mere abstract propositions of law, render an advisory opinion, or give legal advice as to future events.'" *In re Luis R*, 239 Ill. 2d 295, 306 (2010).

In its objection to the motion to dismiss, the State acknowledges this principle but claims, for the first time, that the standard of review is a question of "public importance," which should be decided as an exception to mootness.

For the reasons given in Point II, the State's argument that this court should address the standard of review issue as a "question of public importance," is both forfeited (because not raised in its opening brief) and without merit.

In addition, the State's decision to argue that the appellate court should be reversed on the ground that the interrogators scrupulously honored Micheail Ward's invocation of his right to remain silent, after choosing not to argue the point in the appellate court, raises serious questions of forfeiture which also militate in favor of dismissing the appeal. (See Point IV, below).

Similarly, there is a substantial question as to whether this court should continue to hear the appeal with respect to the issue of harmlessness, an issue which the appellate court ruled that the state had forfeited. (See Point VI, below).

In its objection to the motion to dismiss, the State now claims that the issue of harmlessness merits this court's review because the appellate court applied what "amounts to rule of 'near-automatic' reversal," and that this is an issue of "general importance." (St. Obj., 8-9). But this is not an argument which the State made in its petition for leave to appeal, where it merely claimed that the appellate court's harmlessness determination was incorrect. (St. PLA, at 19)

For all of these reasons, the court should dismiss the appeal because the petition for leave to appeal was improvidently granted.

II:

THIS COURT SHOULD NOT DECIDE THE QUESTION OF WHETHER THE APPELLATE COURT "ERRED" BY APPLYING A DE NOVO STANDARD OF REVIEW TO A SUPPRESSION CASE RESTING SOLELY UPON A VIDEOTAPED INTERROGATION

As stated above, despite its concession that any error in the appellate court's application of de novo review was not "critical,' the State maintains, nonetheless, that this court should decide the question of whether de novo review should apply to a suppression case resting solely upon a videotaped interrogation. The State is wrong.

In its petition for leave to appeal, the State argued that the question of the application of de novo review to a finding that a suspect unambiguously invoked his right to counsel and the interrogation was recorded on videotape was a question of general importance. Now, however, the State concedes that this question is effectively moot, because the appellate court did not err in finding that Micheail Ward unambiguously invoked his right to counsel, regardless of the standard of review applied.

As this court is well aware, this court generally declines to decide the question of the appropriate standard of review where the result would be the same regardless of the standard employed. See. e.g., *People v. Washington*, 2023 IL 127952, ¶ 47; *People v. Torres*, 2012 IL 111302, ¶¶ 46, 49. Here, the State is now arguing, essentially, that this court should decide the standard of review in a case where it concedes that the appellate court's decision on the issue was correct, regardless of the standard of review employed.

Such a decision would violate the well settled rule that Illinois courts "cannot pass judgment on mere abstract propositions of law, render an advisory opinion, or give legal

advice as to future events.'" *In re Luis R*, 239 Ill. 2d 295, 306 (2010). The State may want legal advice as to the proper standard of review for suppression cases involving videotaped evidence. But, absent a real case and controversy, this court is not required to provide that legal advice.

In its opening brief to that this court the State did not argue that any exception, such as the "public interest" to mootness should apply. See *McHenry Twp. v. The Cnty. of McHenry*, 2022 IL 127258 ¶ 50 (2022). By failing to make this argument in its opening brief, the State has forfeited any such claim of "public interest."

It is true that the State does make such an argument in its objection to Micheail Ward's motion to dismiss, (St. Obj., at 5-7). and Micheail Ward anticipates that the State will again make such an argument in its reply brief. Although raising such a claim in its reply brief would not evade a forfeiture, see *People v. Nieves*, 192 Ill. 2d 487 (2000), the argument as to "public interest" is not, in any event, well taken.

As the State accurately states, under the public interest exception to the mootness doctrine, the court may resolve "an otherwise moot question" if: "(1) the question presented is of a public nature; (2) an authoritative determination of the question is desirable for the future guidance of public officers; and (3) the question is likely to recur." *In re Shelby R.*, 2013 IL 114994, ¶ 16.

But this court has never resolved a question of the standard of review in a case where the issue was moot, or where the case would have been decided in the same way regardless of which standard of review was employed. Indeed, time and again, this court, has refused to decide the standard of review under such circumstances. See, e.g., *People*

v. Washington, 2023 IL 127952, ¶ 47 (declining to decide standard of review for certificate of innocence cases where petitioner was entitled to certificate of innocence regardless of standard employed); *People v. Torres*, 2012 IL 111302, ¶¶ 46, 49 (declining to decide standard of review for admissibility of preliminary hearing testimony where admission was erroneous regardless of standard of review employed).

In these cases, the courts have declined to decide the proper standard of review even though the parties disagreed about the choice of standard, because the case would be decided in the same way regardless. But here, the State is arguing that this court should decide the issue of the standard of review in a case where both parties *agree* that the proper standard of review is de novo. The State is inviting this court to decide the proper standard of review in other hypothetical cases, not before this court. This court should decline that invitation.

The State's only support for its argument that this court should decide the standard of review is Justice Rochford's concurrence in *People v. Washington*, 2023 IL 127952, ¶ ¶¶68-78, where she argued that the court should decide the standard of review "in the interests of judicial economy." But the reasoning of Justice Rochford's concurrence was not adopted by the majority, which decisively rejected it.

In *Washington*, the State asserted, without argument, that the standard of review should be abuse of discretion, and the defense did not "challenge the State's assertion" *People v. Washington*, 2023 IL 127952, ¶ 47. Although the court acknowledged that there was a conflict in the appellate court as to the proper standard of review, the court concluded that deciding the issue was inappropriate because:

> "Simply put, the issue the special concurrence wishes us to answer was not raised, briefed, or argued by either party here in the supreme court. Nor was the issue presented in petitioner's petition for leave to appeal. Nor was the issue presented below on direct appeal or analyzed by the appellate court. Considering these facts, along with the fact that petitioner is entitled to relief under either standard, we believe that the appropriate approach in the instant case is to refrain from addressing unbriefed issues."
>
> *People v. Washington*, 2023 IL 127952, ¶ 48.

Here, the issue was presented in the petition for leave to appeal and was arguably raised on direct appeal. But in this case, both parties agree on the appropriate standard of review regardless of the result. Under this circumstances consideration of the proper standard of review in an unknown, unbriefed, and hypothetical case would violate the rule that:

> "[Courts] do not, or should not, sally forth each day looking for wrongs to right. We wait for cases to come to us, and when they do we normally decide only questions presented by the parties. Counsel almost always know a great deal more about their cases than we do ***." [Citation.]"'
>
> *People v. Washington*, 2023 IL 127952, ¶ 49.

This court should wait for a concrete case to decide the standard of review to be applied to factual questions in videotaped confession cases. Since that case is not yet before the court, this court should not decide the issue.

III:

IN THE ALTERNATIVE, THIS COURT SHOULD HOLD THAT DE NOVO REVIEW IS APPROPRIATELY APPLED TO A SUPPRESSION CASE RESTING SOLELY UPON A VIDEOTAPED INTERROGATION

In the alternative, if this court does address the standard of review, it should hold that the appellate court did not err by applying de novo review to the question of whether Micheail Ward unambiguously asserted his right to counsel.

The appellate court below acknowledged that a circuit court's rulings on a motion to suppress are normally reviewed under a two-part standard of review when examining a trial court's ruling on a motion to suppress – the trial court's findings of fact are reviewed for "clear error," and the trial court's ultimate legal ruling as to whether suppression is required is reviewed *de novo*. *People v. Ward,* 2023 IL App (1st) 190364, ¶ 99.

The court went on, however, to find, citing *People v. Flores*, 2014 IL App (1st) 121786, ¶ 35, that there is an exception to this standard where the circuit court's rulings on a motion to suppress are based solely upon a video taped recording of the interrogation, without additional witnesses or other evidence. In such an instance, where the appellate court is reviewing the same evidence as the circuit court, the appellate court ruled that review was *de novo*.

Appellant takes the position that *de novo* review is not appropriate and that *Flores* and its progeny should be overruled. But appellant is wrong, and it is wrong for several reasons.

This court has already accepted the general principle that -- at least in many instances -- de novo review is an appropriate standard where the reviewing court and the circuit court consider identical and undisputed evidence.

The most recent leading case on this general principle, *Addison Insurance v. Fay*, 232 Ill. 2d 446, 448 (2009), involved the review of an insured's liability for injuries under an insurance policy. The question was whether the injuries to two boys who were killed in an excavation pit insured by plaintiff constituted single or multiple occurrences. 232 Ill. 2d at 448. The hearing was conducted by the submission of discovery depositions into evidence, without live testimony. 232 Ill. 2d at 453. Commenting on the standard of review of the circuit court's decision, this Court concluded that the proper standard of review was de novo:

> "In this case, the trial court heard no live testimony. Both parties acknowledged at oral argument that all testimony was submitted by admitting discovery depositions into evidence. The trial court was not required to gauge the demeanor and credibility of witnesses. [Citation omitted}. Instead, the trial court made factual findings based upon the exact record presented to both the appellate court and to this court. Without having heard live testimony, the trial court was in no superior position than any reviewing court to make findings, and so a more deferential standard of review is not warranted. Thus, although this court has not done so recently, we reiterate that where the evidence before a trial court consists of depositions, transcripts, or evidence otherwise documentary in nature, a reviewing court is not bound by the trial court's findings and may review the record de novo. [Citations omitted]. In the case at bar, this court will review the trial court's findings de novo, and to the extent that the appellate court reviewed the record de novo, we hold that the appellate court did not err in doing so."
>
> 232 Ill. 2d at 453.

As the court in *Addison Insurance* noted, the general principle that a finding based on documentary evidence is reviewed de novo has existed from time out of mind.

For example, in *State Bank of Clinton v. Barnett*, 250 Ill. 312 (1911), this court found that where a special master in chancery had taken evidence and had reported the evidence to the trial court "without any conclusions as to the facts," the trial court had "therefore no better means of judging the relative candor, fairness, and credibility of the respective witnesses than we have, so the appeal may be regarded substantially as presenting the case to us for a hearing de novo upon the same evidence." The same rule has been uniformly followed in the appellate court. See *Delasky v. Village of Hinsdale,* 109 Ill. App. 3d 976, 980 (2d Dist. 1982)(de novo review where trial judge reviewed transcript of prior jury trial); *Wolverine Insurance Co. v. Jockish*, 83 Ill. App. 3d 411, 413-14 (3d Dist. 1980)(de novo review where trial judge reviewed case based upon discovery depositions).

In *People v. Oaks,* 169 Ill. 2d 409, 447 (1996), this court applied the principle of de novo review to the question of the voluntariness of a defendant's statement because the record contained both "a videotape and a transcript of the interrogation, so that neither the facts nor the credibility of witnesses is in issue." This court's decision is *Oaks* has been followed by the appellate court in cases in which the statement is on video, no live witnesses testify, the facts are essentially uncontroverted and the credibility of witnesses is not at issue. In such a case, where the appellate court is reviewing the same evidence as the lower court, review is de novo. *People v. Glass*, 2023 IL App. (5th) 210267, ¶ 19; *People v. Cox,* 2023 IL App (1st) 170761, ¶ 42; *People v. Flores*, 2014 IL App (1st) 121786, ¶ 31; *People v. Flores*, 315 Ill. App. 3d 387, 391-92 (1st Dist. 2000).

The position of the Illinois courts on this issue is consistent with the positions of other courts in this new age of videotaped interrogations. Where, as here, there is a video

recording of the interview of the suspect, an appellate court "may independently review [the] documentary evidence, and *** findings drawn from such evidence are not entitled to deference." *Commonwealth v. Tremblay*, 480 Mass. 645, 654-655, 107 N.E.3d 1121 (2018). *Accord, Commonwealth v. Molina*, 467 Mass. 65, 72, 3 N.E.3d 583 (2014), quoting *Commonwealth v. Hoyt*, 461 Mass. 143, 148-149, 958 N.E.2d 834 (2011) ("we will 'take an independent view' of recorded confessions and make judgments with respect to their contents without deference to the fact finder, who 'is in no better position to evaluate the[ir] content and significance' ").

The State argues, nonetheless, that even in cases turning solely on videotaped evidence, the appellate court should give some sort of unspecified deference to the trial court's findings as to factual inferences to be drawn from such evidence. The State does not make clear what sort of factual inferences those might be, since the State concedes that the legal conclusions to be drawn from undisputed facts are to be reviewed de novo.

In any event, with no dispute remaining over whether the appellate court should have reviewed the issues below de novo, the State's theoretical concern over the boundaries between the provinces of the trial and the appellate courts "smells of the lamp." *Burke v. Kodak Retirement Income Plan*, 336 F.3d 103, 109 (2d Cir. 2003). This court should reaffirm the general holdings of *Addison*, *Oaks*, and *Flores*, and leave the details of the application of their rules to future cases.

IV:

THE STATE HAS FORFEITED THE ARGUMENT THAT MICHEAIL WARD'S INTERROGATORS SCRUPULOUSLY HONORED HIS INVOCATION OF HIS RIGHT TO SILENCE

The State argues that the appellate court erred by finding that Micheail Ward's interrogators scrupulously honored his invocation of his right to silence. As detailed above, the State failed to make this argument either in its brief to the appellate court or in its petition for leave to appeal. Given these twin failures, this court should deem the State's argument forfeited.

With respect to the petition for leave to appeal, the general rule is that the failure to raise an issue in a petition for leave to appeal results in the forfeiture of that issue before this court. *People v. Carter*, 208 Ill. 2d 309, 318 (2003); *People v. Anderson*, 112 Ill. 2d 39, 43-44 (1986). Accord, *People v. McCarty*, 223 Ill. 2d 109, 122-23 (2006). Having failed to raise the "scrupulously honor" issue in its petition for leave to appeal, the State has forfeited the issue.

As the *Carter* court noted, Supreme Court Rules 341(e)(7) and 315(g) provide that a party must raise arguments and provide citation to legal authority or to the record in the petition for leave to appeal. In *Carter*, the State attempted to argue in this court that the facts of the case did not warrant an instruction on involuntary manslaughter, 208 Ill. 2d at 317-18. But the State had failed to raise that issue in the appellate court or in its petition for leave to appeal. 208 Ill. 2d at 318.

Under these circumstances, while acknowledging that waiver was a limitation on the parties rather than on the court, this court held that, given the States's repeated failure to raise the issue, the issue was waived. 208 Ill. 2d at 318-19.

This case is on all fours with *Carter*. As in *Carter*, the State twice failed to raise the issue it wants this court to consider – once in the appellate court and once in the petition for leave to appeal. And although this court has the power to decide the issue despite the forfeiture, *People v. Brown*, 2020 IL 125203, ¶ 31, the State has provided no reason to do so. The issue, and the argument, should be deemed forfeited.

The State does argue, in a footnote, that its failure to raise the issue in the appellate court should be excused because the appellate court addressed it on the merits and because it is well settled" that when "the appellee in the appellate court *** brings the case to this court on appeal, that party may raise any issues properly presented by the record to sustain the judgment of the trial court, even if those issues were not raised in the appellate court," *People v. Wells*, 2023 IL 127169, ¶ 29. The State does not address, or even excuse, its failure to raise the issue in its petition for leave to appeal.

In *Wells*, this court did hold that there was no forfeiture in the appellate court because the argument had been presented to the trial court, and the trial court had ruled in the State's favor on the issue. *People v. Wells*, 2023 IL 127169, ¶ 29. Here, however, the trial court never made a ruling on the issue of whether the interrogators had scrupulously honored Micheail Ward's invocation of his right to silence.

In the court below, the trial judge ruled that none of Micheail Ward's statements, including his statement that he had "nothing else to say," (S.R. 344), were unambiguous

invocations of his right to silence. (S.R. 340-46). The judge never ruled that the interrogators had "scrupulously honored," any invocation. Nor did the State argue, even in the alternative, that any unambiguous invocation had been "scrupulously honored." (S.R. 329-338).

Therefore, *Wells* is inapplicable, and this court should follow *Carter*, not *Wells*.

The State could have, but did not, argue that the "scrupulously honor" issue is properly considered because it was "inextricably intertwined," with other matters properly raised in the petition for leave to appeal and properly before the court. *People v. McKown*, 236 Ill. 2d 278, 310 (2010). Since the State did not make this argument in its opening brief it is forfeited.

But, in any event, the issue of "scrupulously honor" is hardly "inextricably intertwined" with the issue of de novo review of the unambiguous invocation issue, which has now been effectively abandoned. And while the State does make another "inextricably intertwined" argument in its objection to the motion to dismiss, this argument is not well taken.

In its objection, the State argues that the "scrupulously honor" issue is "inextricably intertwined" with the issue of whether the erroneous admission of the statement was harmless beyond a reasonable doubt. (St. Obj., at 8-9). It does not argue that the "scrupulously honor" issue is inextricably intertwined with the "unambiguous invocation," or "standard of review" issues raised in the petition for leave to appeal.

In the only case cited by the State in support of this claim, *In re Rolandis*, 232 Ill. 2d 13, 37 (2008), the State raised a harmlessness argument for the first time in its brief

before this court, despite forfeiting the argument in its appellate brief and its petition for leave to appeal. Despite defendant's lack of objection to the harmlessness argument, this court raised and considered the issue *sua sponte*. 232 Ill. 2d at 37-38.

This court found that the forfeited issue of harmlessness was "inextricably intertwined" with the issue of admissibility because "where a court of review determines that certain evidence was improperly admitted at trial, it is entirely appropriate to consider whether any exceptions to inadmissibility apply and whether the admission of evidence, though error, was harmless." 232 Ill. 2d at 37-38. Here, however, the same logic does not apply. Where a reviewing court determines that the erroneous admission of evidence was harmful, but the State waives any argument that the reviewing court erred by determining the evidence was improperly admitted, the question of the erroneous admission is hardly "inextricably intertwined" with the question of harmlessness.

After all, if the State had raised the "scrupulously honor" argument in the appellate court, instead of expressly renouncing it, and the court had *agreed*, there would have been no need for the court to address the issue of harmlessness at all. Merely raising the issue of harmlessness in its petition for leave to appeal does not give the State the right to launch every conceivable attack against the appellate court's opinion.

Therefore, this court should hold that the State has waived the "scrupulously honor" issue and not consider it further.

V:

EVEN ASSUMING THAT THE ARGUMENT WAS PRESERVED, THE APPELLATE COURT PROPERLY FOUND THAT MICHEAIL WARD'S INTERROGATORS DID NOT SCRUPULOUSLY HONOR HIS INVOCATION OF HIS RIGHT TO SILENCE

Even assuming this issue has not been forfeited, the appellate court did not err when it found that the interrogators did not "scrupulously honor" Micheail Ward's invocation of his right to remain silent.

When a suspect in a custodial interrogation invokes his right to remain silent, any statement obtained in violation of that right must be suppressed. U.S. Const. amends. V, XIV; Ill. Const., art. I, §10*; People v. Henenberg*, 55 Ill. 2d 5, 11-12 (1973), citing *Miranda v. Arizona*, 384 U.S. 436, 444-45 (1966). Before beginning a custodial interrogation, police must warn the suspect that he "has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires." *Miranda*, 384 U.S. at 479. Statements made after these warnings must be suppressed if the defendant indicates in any manner, either prior to or during questioning, that he wishes to remain silent. *Henenberg*, 55 Ill. 2d at 10-11, citing *Miranda*, 384 U.S. at 444-45.

If a defendant unambiguously invokes his right to remain silent after Miranda warnings are given, either prior to or during questioning, the interrogation must cease. *Berghuis v. Thompkins*, 560 U.S. 370, 381-82 (2010); *Henenberg*, 55 Ill. at 10-11. "The mere fact that [the accused] may have answered some questions or volunteered some statements on his own does not deprive him of the right to refrain from answering any

further inquiries." *People v. Turner*, 56 Ill. 2d 201, 206 (1973), quoting *Miranda*, 384 U.S. at 445. Failure to "scrupulously honor" a request to remain silent renders any subsequent statements inadmissible. *People v. R.C*, 108 Ill. 2d 349, 353 (1985)

Here, as the appellate court correctly found, the interrogators did not scrupulously honor Micheail Ward's invocation of his right to remain silent.

In reviewing the question of whether interrogators scrupulously honored Micheail Ward's invocation his right to counsel, courts have considered the following factors: whether: (1) "police immediately halted the initial interrogation after the defendant invoked his right to remain silent"; (2) "a significant amount of time elapsed between interrogations"; (3) "a fresh set of Miranda warnings were given prior to the second interrogation"; and (4) "the second interrogation addressed a crime that was not the subject of the first interrogation." *People v. Nielson*, 187 Ill. 2d 271, 286-87 (1999), *citing Michigan v. Mosley*, 423 U.S. 96, 104-106 (1975).

Despite the State's failure to argue that the interrogators had "scrupulously honored," Micheail Ward's invocation, the appellate court did briefly address the "scrupulously" honor inquiry. Although the appellate court found that the detectives "temporarily" halted the interrogation, each time Micheail Ward invoked, the court found that Micheail was never given a fresh set of *Miranda* warnings and he was never interrogated about anything other than the shooting of Hadiya Pendleton. *People v. Ward*, 2023 IL App (2st) 190364, ¶ 120. The appellate court's decision was eminently reasonable and should be affirmed.

As the State concedes, the provision of fresh Miranda warnings before re-interrogating a suspect who invoked his right to silence is the "[t]he most important factor," *United States v. Hsu*, 852 F.2d 407, 411 (9th Cir. 1988). (St. Br., at 29). Illinois courts have characterized the provision of fresh Miranda warnings (or at least asking whether the suspect understood Miranda rights given earlier) as "crucial" or "pivotal" to whether the right to silence was scrupulously honored. See e.g. *People v. Chambers*, 261 Ill. App. 3d 123, 129 (4th Dist. 1994); *People v. Payton*, 91 Ill. App. 3d 78, 81 (1st Dist. 1980); *People v. Young*, 115 Ill. App. 3d 455, 462 (2d Dist. 1983) (this is the "pivotal question").

In virtually every Illinois case which has found a failure to scrupulously honor, the officers failed to provide a fresh set of Miranda warnings. See, e.g. *R.C.*, 108 Ill. 2d at 354 (violation where officer questioned defendant "without fresh Miranda warnings" after invocation); *People v. Brown*, 171 Ill. App. 3d 993, 998 (1st Dist. 1988) (same). Conversely, in virtually every case which courts have found the invocation was scrupulously honored, fresh Miranda warnings were given. See *Nielson*, 187 Ill. 2d at 289-90 (two-hour gap plus "two sets of fresh Miranda warnings" sufficient); *People v. Welch*, 365 Ill. App. 3d 978 (5th Dist. 2005) (16-day gap plus Miranda sufficient); And in some instances, even the provision of fresh Miranda warnings has been held to be insufficient. See *People v. Savory*, 82 Ill. App. 3d 767, 773 (3d Dist. 1980) (lapse of time and new Miranda not sufficient; record must show that "defendant changed his mind and that there was some reason for his change of mind").

The State next attempts to shift the focus by claiming that the entire course of the interrogation reveals that Micheail's invocation was "fully respected." In addition to noting that detectives Halloran and Murray halted the interview after Micheail said: "I don't want

to say nothing else about it," the State also argues that the right was respected because detectives "immediately" ceased their questioning even after what they claim are Micheail's "ambiguous" statements that he had "nothing else to say," and "nothing to say." (St. Br., at 29). The State uses this contention as the linchpin of its argument that five hours elapsed between the only unambiguous invocation it acknowledges, the last one, and the renewal of custodial interrogation.

The State's argument ignores the appellate court's finding that both of Micheail's earlier statements, or at least the two statements considered together, were "unambiguous" invocations of his right to remain silent:

> "Mr. Ward says in his brief that, in response to the detective saying, "[c]an't hear you," he said, "I don't want to say nothing else about it." The State disputes this because the record does "not indicate the nature of his response." We note that what Detective Halloran said next suggests that Mr. Ward's claim about his own response is accurate. Nevertheless, because we are not relying on just this last statement, but rather all of the statements together, we need not make any determination as to exactly what Mr. Ward said that caused the detectives to leave the room at the end of the 7:17 a.m. exchange."

People v. Ward, 2023 IL App (1st) 190364, ¶ 107.

Given the entire context of the interchange between Micheail and the detectives, this conclusion was eminently reasonable.

Micheail's first invocation: "I ain't got nothing else to say," (C. 618; St. Ex. 125A, 1:41:53).was virtually identical in wording to his last invocation: "don't want to say nothing else about it." (C. 642, 634, St. Ex. 125 A, 7:17:35-7:18.18). And the first invocation came in response to detective Halloran's accusation that Micheail was the "shooter," and that Micheail could explain why he was the shooter. (C. 617-18, St. Ex. 125A, 1:41:35-1:42:12). Moreover, instead of respecting this unambiguous assertion of the

right to silence and "immediately" halting the questioning, detective Halloran twice suggested that Micheail could "take a break" from the questioning (C. 617-18, St. Ex. 125A, 1:41:35-1:42:12). – a clear signal his invocation was not being respected and that the questioning might continue. And although Halloran then said "you don't have to talk to me," after Micheail did not respond to the "take a break" suggestion, this last statement strongly suggests that Halloran recognized that Micheail had unambiguously invoked. (C. 617-18, St. Ex. 1:41:35-1:42:12).

As the appellate court noted, this first invocation of Micheail's right to silence occurred at 1:41 a.m., approximately one hour after he received *Miranda* warnings, a similar period of time as in *People v. Cox*, 2023 IL App (1st) 170761, ¶ 52, where the court held that the suspect had unambiguously invoked.

Moreover, Halloran illegally renewed the questioning a mere two hours later, at 3:17 a.m. After 46 minutes of vigorous and intensive interrogation, Halloran again directly accused Micheail by asking him "why did it happen?" and Micheail responded: "Got nothing to say." Yet again, Halloran indicated that he did not respect this unambiguous invocation by saying: "You got nothing to say? All right, we'll take a break, all right." (C641-42, St. Ex. 125A., 4:01:35-4:02:56).

The last illegal interrogation by Halloran and his partner occurred approximately four hours later at 7:17 a.m., after Micheail had fallen asleep and had been awakened at 7:02 a.m. After Micheail had been fingerprinted, Halloran asked Micheail if he was still going to try to "lie" his "way out of it." Halloran then remarked that if Micheail did not want to say "nothing about it," they would not question him further. It was at that point

that Micheail made the statement which the State acknowledges as an unambiguous invocation: "I don't want to say nothing else about it." (St. Ex 125A, 7:17:35-7:18:18).

Because the State claims that only the last statement was an unambiguous invocation, the State argues that another five hours elapsed before Micheail was questioned and finally confessed. But this conclusion is based upon the false premise, which the appellate court rightly rejected, that the earlier invocations were ambiguous. In fact, if the first invocation occurred at 1:41 a.m., the next round of interrogation took place less than two hours later. Although the third round of interrogation took place approximately three hours later, Micheail was sleeping for nearly all of this time. Therefore, it would be more accurate to say that only fifteen minutes, the time between 7:02 a.m., when Micheail was awakened, and 7:17 a.m. when the second interrogation started, elapsed between invocation and renewed questioning.

In sum, nearly all of the factors which go into the "scrupulously honor," analysis compel the conclusion that Micheail Ward's invocations were not honored. The interrogators did not "immediately halt" questioning after invocation but continued some questioning and suggested that what Micheail really wanted was a "break," not a halt to all further questioning. A significant time did not elapse, particularly between the second and third rounds of questioning. No fresh set of Miranda warnings was ever provided. And no subsequent interrogation addressed a different crime.

Therefore, the appellate court did not err when it found that Micheail's invocation was not scrupulously honored. As the state concedes, this was a legal conclusion which the appellate court was entitled to review de novo, but even under a manifest weight of the evidence standard, no reasonable fact finder could conclude that the detectives

scrupulously honored Micheail's invocation. The decision of the appellate court should be affirmed.

VI:

THE STATE FORFEITED THE ARGUMENT THAT THE ADMISSION OF MICHEAIL WARD'S STATEMENT WAS HARMLESS BEYOND A REASONABLE DOUBT

The State concedes that they did not initially argue in the court below that the admission of Micheail Ward's statement was harmless error, and that the appellate court found that they had forfeited this argument by raising it for the first time in a supplemental brief filed shortly before oral argument. As with the issue of the "scrupulously honor" requirement, the State again argues in a footnote that they are entitled to raise the issue because they are entitled to raise any issue which could have been a ground for affirmance in the appellate court. (St. Br., at 18, 31, n. 6).

With respect to this harmlessness argument, the State did raise it in the petition for leave to appeal (PLA, at 19) so the procedural bar is perhaps not so high as is the case with the "scrupulously honor" argument. But apart from the prudential argument against granting a petition for leave to appeal on an issue which appears to have been a last-minute afterthought, there is also a significant claim as to forfeiture.

Rightly or wrongly, the appellate court held that the issue was forfeited by the failure of the State to include the issue in its appellate brief. This failure was particularly notable because Micheail Ward's appellate brief explicitly addressed harmless error. The State did not challenge the appellate court's forfeiture finding in its petition for leave to

appeal and therefore forfeited any argument against forfeiture. See *People v. Carter*, 208 Ill. 2d 309, 318 (2003).

Given the failure of the State to challenge the appellate court's forfeiture ruling, either by petition for rehearing, or in its petition for leave to appeal, reconsideration of this issue would violate the "law-of-the-case" doctrine, which prohibits the reconsideration of issues that have been decided by a reviewing court in a prior appeal. *In re Christopher K*, 217 Ill. 2d 348, 363 (2005).

Therefore, this court should find that any issue as to harmlessness has been forfeited.

VII:

EVEN ASSUMING THAT THE STATE'S ARGUMENT IS PROPERLY PRESERVED, THE ADMISSION OF MICHEAIL WARD'S STATEMENT WAS NOT HARMLESS BEYOND A REASONABLE DOUBT

Even assuming that this argument is properly raised, the appellate court did not err when it found that the erroneous admission of Micheail Ward's statement was not harmless beyond a reasonable doubt.

Despite finding that the State had waived the argument as to harmlessness, the appellate court went on to address the issue in considerable detail.

The court noted that confessions carry "extreme probative weight," and therefore that the wrongful admission of a confession is rarely harmless error. The court went on to note that while the evidence against Micheail Ward was sufficient, "it was certainly not overwhelming." *People v. Ward*, 2023 IL App (1st) 190364, ¶ 124.

No physical evidence directly linked Micheail to the shooting. Testimony that Micheail made inculpatory statements to third persons was largely recanted at trial. In a lineup held just days after the shooting, the only witness to positively identify Micheail at trial was not certain of his identification. The same witness admitted that he had kept up with the case and had viewed photographs of Micheail on social media. *People v. Ward*, 2023 IL App (1st) 190364, ¶ 124.

The court reasoned that the remaining evidence was consistent with the State's theory of the case, but was also "circumstantial." That a car involved in the shooting was a car similar to Micheail's mother's car, that Micheail owned a sweatshirt of the same shade of blue as the shooter, and that Micheail's cellphone hit the same cell tower as his codefendant's cellphone did not, by themselves, prove Micheail guilty beyond a reasonable doubt. *People v. Ward*, 2023 IL App (1st) 190364, ¶ 124.

The appellate court noted that the State largely relied upon the fact that counsel for the State had devoted relatively little of his closing argument to Micheail's confession, but rejected this argument on the grounds that closing arguments are not evidence. *Ward*, 2023 IL App (1st) 190364, ¶ 123. The appellate court concluded that it could not say, beyond a reasonable doubt, that the admission of the confession did not contribute to the jury's verdict of guilt. *Ward*, 2023 IL App (1st) 190364, ¶¶ 123, 124.

The appellate court's reasoning was eminently sound. As the State accurately notes, the erroneous admission of a confession elicited in violation of *Miranda* can only be deemed harmless when it is "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." *Neder v. United States*, 527 U.S. 1, 18 (1999). In making that assessment, a reviewing court should "(1) focus on the error to

determine whether it might have contributed to the conviction, (2) examine the other evidence in the case to see if overwhelming evidence supports the conviction, and (3) determine whether the improperly admitted evidence is merely cumulative or duplicates properly admitted evidence." *People v. Salamon*, 2022 IL 125722, ¶ 12. And, as the appellate court noted, and as the State concedes, , "[c]onfessions carry 'extreme probative weight,' and therefore the admission of an unlawfully obtained confession rarely is harmless error." *People v. St. Pierre*, 122 Ill. 2d 95, 114 (1988).

In response, the State argues, contrary to what the appellate court explicitly determined, the evidence against Micheail was "overwhelming." (St. Br., at 32-37). The State also argues that Micheail's statements to the police were cumulative of his alleged statements to third parties. (St. Br., at 37-38). Neither argument has merit.

With respect to its "overwhelming" argument, the State does not cite any cases where a similar quantum of evidence was held to be "overwhelming" in the context of a wrongly admitted confession. But a review of the evidence reveals that the State is simply rehashing their case, while minimizing the obvious weaknesses of its case.

The State relies on the existence of eyewitnesses "identifying defendant as the shooter or looking like the shooter." (St. Br., at 32). This argument is not well taken.

With respect to the eyewitnesses, the appellate court's observations about the lack of a positive identification by all of the eyewitnesses but one, and the impeachment of that one with a failure to identify Micheail Ward at a lineup, are all well taken. But in addition, the witnesses gave wildly varying descriptions of the shooter, and expert testimony supported the defense argument that none had sufficient opportunity to view and the ability to perceive was also affected by weapon focus and stress.

The eyewitnesses who gave tentative, but not positive, identifications of Micheail Ward were wildly inconsistent. The witnesses described the shooter as everything from 5'6" to 6'1" tall (a seven-inch difference), having short hair but also dreadlocks; wearing a black skullcap, a blue hat, a baseball cap, and no hat; wearing jeans and khaki cargo pants; a hoodie that was blue, black, and "dark"; a blue shirt, a white shirt, a grey crewneck with no hoodie, and a "loose-sleeve top." (Supp.R. 940-941, 963, 990-991, 1184, 1264, 1269, 1274, 1288, 1305, 1336, 1347-1348, 1361-1363, 1390, 1402-1403; R. 1188). The witnesses similarly heard a different number of shots, one hearing three, one four, one four or five, one five, and one six. (Supp.R. 941, 1243, 1286, 1326, 1390, 1415).

The eyewitnesses also had only a very limited opportunity to view. The shooting at Harsh Park took place in a matter of seconds. The eyewitnesses were standing in a circle under a canopy, so many were not facing the alley where the shooter was. (Supp.R. 938-939, 1220, 1242, 1285, 1325, 1345, 1389). They all ran when the shooting started. (Supp.R. 943, 1184, 1207, 1221, 1244, 1339, 1391).

In addition, the event was extremely stressful, as was apparent from the testimony of the eyewitnesses, as well as the 911 call recordings. (Supp.R. 944, 965, 1207, 1246, 1277, 1416; St. Ex. 19). Some of the eyewitnesses focused on the gun, rather than the shooter's face.. (Supp.R. 941, 1390). And many of the eyewitnesses were were smoking cannabis while in the park, and marijuana is known to impair a person's ability to perceive and recall events. (Supp.R. 936, 1182, 1241, 1261-1262, 1283, 1325, 1344); *People v. Gaines*, 235 Ill. App. 3d 239, 250-51 (1st Dist. 1992).

The weaknesses of the eyewitnesses' tentative identifications was underlined by the testimony of Dr. Gerald Loftus, who provided the scientific evidence of the many

factors which can lead to wrongful identifications, such as stress, lack of opportunity to view, and weapon focus. (R. 1098-1100, 1115-1128). And an added factor in this high profile media case was national media attention.

Micheail's photo was plastered across television and computer screens via news and social media for years on end. (R. 683-684; Supp.R. 1304, 1420-1428); e.g. https://chicago.cbslocal.com/2013/02/12/pendleton-murder-suspect-violatedprobation-3-times/ (reporting Ward's arrest); https://www.cnn.com/2013/02/11/justice/illinois-chicago-killing/index.html (same). This media attention is precisely the type of post event information Dr. Loftus explained fills the gaps in a witness' memory, causing the witness to believe a memory far clearer and stronger than in actuality. (R. 1097-1105, 1117-1130).

The State next argues that the recanted statements of Ernest Finner, Demetrius Tucker, and Jarod Randolph attributing inculpatory statements to Ward constitute overwhelming evidence of guilt. (St. Br., at 32-34). But this is a complete non sequitur.

The pretrial statements of all three witnesses were impeached by their in court recantations. But, in addition, the three recanters also testified to coercion and threats which explain why they gave false statements implicating Ward.

After police threatened Tucker and Finner with probation and parole violations, each said that Williams and Ward picked them up shortly after the shooting at 39th and Indiana, and that Williams said they had "done a drill" at the park; officers also threatened that Finner's mother would lose her job at the sheriff's office. (R. 562-597, 602-608; Supp.R. 1126-1130). Randolph similarly did not recall telling police that he talked to Ward several times after the shooting and that Ward expressed regret about it, and he told an investigator that he went along with what police wanted him to say about Ward so they

would not charge him with a parole violation for having a gun in a rap video posted on YouTube. (R. 485-504, 1165-1166).

Many cases which similarly rested upon recanted witness statements have been reversed outright. See *People v. Parker* , 234 Ill. App .3d 273, 274 (5th Dist. 1992),; *People v. Brown*, 303 Ill. App. 3d 949, 965 (1st Dist. 1999); *People v. Arcos*, 282 Ill .App. 3d 870, 876 (1st Dist, 1996); *People v. McCarthy*, 102 Ill. App. 3d 519, 524 (1st Dist. 1981). And although the appellate court found that there was sufficient evidence to affirm Micheail's conviction on appeal, it noted the weaknesses in the recanter's testimony. The case against Micheail Ward was not overwhelming.

In support of its "cumulativeness" argument, the State does not cite the facts of any other case in which the erroneous admission of a confession has been held to be cumulative and therefore harmless. But the one case mentioned by the State in connection with this argument, *People v. Salamon*, 2022 IL 125722, is distinguishable.

In *Salomon*, defendant's erroneously admitted confession was cumulative of a third-party confession to defendant's friend of 15 years, to whom defendant detailed his participation in the burglary of a bar during which his codefendant killed the bar owner by hitting him with a pipe. *Salamon*, 2022 IL 125722, ¶ 124. It was further corroborated by the testimony of another witness, who described how defendant and his codefendant solicited a witness for help in the burglary and described their plan. 2022 IL 125722, ¶ 125.

Unlike the witnesses in this case, almost all of whom recanted their accounts of Micheail's alleged statements, the witnesses in *Saloman* were "unimpeached," More importantly, at trial, defendant did not deny he was with his codefendant on the night of

the murder. Indeed, during closing argument, defense counsel conceded that defendant had participated in the burglary, but argued only that he was not accountable for the murder committed by the codefendant. 2022 IL 125722, ¶ 126. Under these circumstances, where defense counsel was not contesting the existence of the statement, only its implications, any error in admission of the custodial statements was truly harmless.

Here, in contrast, as the appellate court noted, virtually all of the third-party statement witnesses recanted their testimony at trial which, by definition, impeached their prior statements. And virtually all of these witnesses were subject to impeachment because they were on probation or parole when they were questioned by the police and were threatened with prosecution.

Under these circumstances, admission of Micheail's statements was not "cumulative" of other evidence. Therefore, the decision of the appellate court, excluding Micheail's statements, should be affirmed.

CONCLUSION

For the reasons given in Point I, the appeal should be dismissed as improvidently granted. For the reasons given in Points II-VII, the decision of the appellate court should be affirmed, the trial court's decision should be reversed, and the cause should be remanded for a new trial.

Respectfully submitted,

/s/ Stephen L. Richards

_____

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IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellant, -vs- MICHEAIL WARD Defendant-Appellee.		Appeal from the Appellate Court of Illinois, First District, Sixth Division No. 1-19-0364 There Heard on Appeal from the Circuit Court of Cook County, Criminal Division No. 13-CR-5242 Honorable Nicholas Ford, Judge Presiding.

CERTIFICATE UNDER RULE 341 (c)

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 38 pages.

Respectfully submitted,

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APPENDIX A

No. 1-19-0364

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APPELLATE COURT 1ST DISTRICT

IN THE

APPELLATE COURT OF ILLINOIS

FIRST JUDICIAL DISTRICT

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, -vs- MICHEAIL WARD, Defendant-Appellant.	)	Appeal from the Circuit Court of Cook County, Illinois No. 13 CR 5242 Honorable Nicholas Ford, Judge Presiding.

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TABLE OF CONTENTS AND POINTS AND AUTHORITIES

NATURE OF THE CASE

Micheail Ward was convicted of first-degree murder and aggravated battery with a firearm after a jury trial and was sentenced to 84 years in prison.

This is a direct appeal from the judgment of the court below. No issue is raised challenging the charging instrument.

ISSUES PRESENTED FOR REVIEW

I. Whether the evidence is insufficient to sustain Micheail Ward's convictions beyond a reasonable doubt where none of the eyewitnesses had sufficient opportunity to see the shooter and all gave wildly varying descriptions, and where statements implicating Ward are not believable.

II. Whether the trial judge erred in denying Micheail Ward's motion to suppress his statements, where the statements were obtained in violation of his right to remain silent.

III. Whether the trial judge's refusal to allow Micheail Ward to present expert witnesses on false confessions and police interrogation tactics deprived him of his right to present a defense.

IV. Whether the trial judge's failure to ask any potential jurors if they accepted the principles set forth in Supreme Court Rule 431(b) requires a new trial.

V. Whether the prosecutor's pervasive denigrations of defense counsels, their arguments, and their expert witness, and repeated misstatements of the evidence deprived Micheail Ward of a fair trial.

VI. Whether the State violated Micheail Ward's state constitutional right against unreasonable seizures by arresting him pursuant to an investigative alert.

VII. Whether, alternatively, this Court should remand to determine whether

Micheail Ward's 84-year *de facto* life sentence violates the federal and Illinois constitutions as applied to him.

JURISDICTION

Micheail Ward appeals from a final judgment of conviction in a criminal case. Appellant's motion to reconsider sentence was denied on January 14, 2019. (Supp.R. 2209). Notice of appeal was timely filed on January 14, 2019. (C. 2318). Jurisdiction therefore lies in this Court pursuant to Article VI, Section 6, of the Illinois Constitution, and Supreme Court Rules 603 and 606.

STATEMENT OF FACTS

Shooting and investigation

At around 2:00 p.m. on January 29, 2013, students from King College Prep high school were released early following final exams. (Supp.R. 932-935, 1178-1180, 1217, 1238, 1258, 1281, 1342). It was an unseasonably warm day, and a group of those students, including Hadiya Pendleton, Lazerick Bowdry, Sabastian Moore, Lawrence Sellers, Klyn Jones, Danetria Hutson, Kyra Caldwell, Veronica Hansberry, Jordan Dillon, and Stephan Abdul walked to nearby Harsh Park, a small playground tucked into a lot on the 4400 block of South Oakenwald. (Supp.R. 932-935, 1178-1180, 1217, 1238, 1258, 1281, 1342).

The group dispersed around the playlot, with Pendleton and Jones sitting on the swings, and others rolling joints. (Supp.R. 937, 1262, 1283). Shortly after they arrived, a light rain started, and the group congregated under a canopy in the park, smoking pot and chatting. (Supp.R. 938, 1181-1182, 1220, 1241, 1263, 1284, 1325, 1345). The group stood in a circle, so some of the students were facing the street, some the alley behind the playlot, and some a bit of both. (Supp.R. 938,

1181-1182, 1220, 1241, 1263, 1284, 1325, 1345). At some point, shots rang out from the alley. (Supp.R. 940, 1184, 1221, 1243, 1263, 1286, 1326, 1345). The students scattered, running toward the street. (Supp.R. 940, 1184, 1221, 1243, 1263, 1289, 1326, 1345). A few looked toward the alley and saw a black man. (Supp.R. 940, 1183-1184, 1264, 1287-1288, 1326-1327, 1347-1348).

As the students ran out to Oakenwald and then south, Pendleton slowed and fell. (Supp.R. 944). Jones called 911 and shouted for the others. (Supp.R. 944). Sellers, who had been shot in the leg, came back, as did Hutson and Hansberry. (Supp.R. 944, 1244, 1253, 1264-1265, 1328). Others kept running. (Supp.R. 1187, 1289-1290). Sabastian Moore ducked behind a car and dumped what he thought was a rock out of his boot and then ran home; he eventually discovered he had been shot in the foot. (Supp.R. 1221-1224).

Ronald Evans lived in a building across the street from the park, at 4431 South Oakenwald, and was getting ready for work when he noticed the students going to the park. (Supp.R. 982, 987). Some minutes later, he heard gunshots and looked out the window. (Supp.R. 988). He saw a black man running north in the alley west of Oakenwald, holding a gun in his right hand. (Supp.R. 989). The man wore jeans and a hoodie a shade of blue Evans could not describe, no hat, and had a "low" haircut. (Supp.R. 990-991, 1032). Evans said the man put the gun in his hoodie pocket and got into the passenger side of a white four-door Nissan parked at the mouth of the alley along 44th Place. (Supp.R. 992-993). The car took off immediately and went north on Oakenwald, away from the park. (Supp.R. 993). Evans called 911 and described the car to the dispatcher. (Supp.R. 998).

Police and EMTs responded, and Pendleton died later at the hospital. (R.

539, 546, 995; Supp.R. 998). Sellers and Moore were both treated for their wounds. (Supp.R. 1224-1225, 1233, 1253).

Police interviewed the students who were in the park. (Supp.R. 946). Each described the shooter differently. Jones said he was 5'8", "medium dark-complected," wearing a blue hoodie and dark jeans, and had short hair. (Supp.R. 940-941). She heard four shots, and saw the gun recoil. (Supp.R. 941). Bowdrey described a blue hoodie and a black skullcap. (Supp.R. 1184). Moore saw someone walking in the alley, but could not describe him, and did not identify anyone in a lineup. (Supp.R. 1221, 1225). Sellers did not see the shooter, but said he heard six shots. (Supp.R. 1243-1244). Hutson described only dark clothes, and said she did not see the shooter's face, but later identified Micheail Ward in a lineup, saying he was the only person who fit when she imagined a baseball cap on the lineup participants. (Supp.R. 1264, 1268-1269). Caldwell described the shooter as wearing a blue hoodie with the hood up or a black hat, and dark-complected. (Supp.R. 1288, 1305). She heard three shots. (Supp.R. 1286). Hansberry described a tall man, and tentatively identified Ward and another person in the lineup based on their height. (Supp.R. 1327, 1330). Dillon was facing the street but ducked and turned when he heard the shots. (Supp.R. 1345-1346). He described the shooter as 5'6" and wearing a blue skullcap, a crewneck shirt, a gray hoodie, and either khaki pants or jeans, and said the shooter was dark complected. (Supp.R. 1347-1348, 1363). Abdul described a tall man of 6'1" or 6'2" with dark skin and dreadlocks, wearing a blue shirt, blue jacket, khaki cargo pants, and a black hat. (Supp.R. 1390, 1402, 1414). He heard five shots. (Supp.R. 1390, 1414).

Sergeant Jose Lopez, a gang specialist officer, went to the scene. (R. 995).

Based on the white car going north when it left the scene, Lopez surmised that the shooting was gang-related, because the area north of the park was Suwu territory, while the park itself was 46 Terror territory. (R. 966-968, 996). There had been shootings back and forth between the Suwus and 46 Terrors in July and September of 2012. (R. 976-979). Ward and Kenneth Williams were both known to Lopez before the shooting; Williams had been shot by a 46 Terror member the previous summer, as had another Suwu, Dejuan Jackson. (R. 976-977, 991).

Lopez found a video on YouTube called "JB It's a Stickup" that had been filmed in Harsh Park, and also showed the CHA building at 3939 South Lake Park (a known Suwu building, along with its neighbor highrise, 3983 South Lake Park). (R. 968, 997-998; St. Ex. 115). Lopez noted the presence of two parolees who appeared in the video, Ernest Finner and Demetrius Tucker, and contacted each man's parole agent and had them brought in for questioning. (R. 1000-1003).

Finner was on parole for a gun case. (R. 1001). He thought he was being taken to the police station for a drug drop, but was instead questioned about the Harsh Park shooting. (Supp.R. 1058, 1126-1128). Finner eventually told police he went to school that morning, and left with Demetrius Tucker in the early afternoon. (R. 670; Supp.R. 1614). When they were near 39th and Indiana, a car honked at them. (Supp.R. 1619). It was Ward and Williams in Ward's mother's car, though Williams was driving. (R. 671). Finner and Tucker got in. (R. 671). A POD camera captured the two getting into the car. (Supp.R. 1136-1137, 1619).

Finner told detectives that inside the car, Williams was acting twitchy, checking the mirrors and looking around a lot. (R. 671). Williams told Finner and Tucker that he and Ward had just "done a drill," meaning they shot at rival 46

Terror gangbangers. (R. 672). Williams saw some kids from King High School in the crowd, and because he briefly attended that school, he feared he would be recognized. (St. Ex. 38). So, he and Ward swapped seats and Ward did the shooting. (St. Ex. 38). Ward was angry that Williams was talking. (St. Ex. 38).

Finner said that a week later, on February 8, 2013, there was a Suwu meeting at Ricky's house at 67th and Lowe to talk about the police being "hot." (Supp.R. 1078-1079). Williams was not at the meeting. (Supp.R. 1078). Ward was, and he was angry at Williams talking about the shooting and "putting him under the bus" when it was Williams who pointed out who to shoot at. (Supp.R. 1079). Ward told everyone to lay low and keep their mouths shut. (Supp.R. 1079).

Assistant State's Attorney (ASA) George Canellis took a handwritten statement from Finner, and ASA John Dillon presented him to the grand jury. (R. 644-661, 734-782).

Demetrius Tucker was also brought into the station in handcuffs after being arrested in the common room of his apartment building. (R. 565, 598-599; Supp.R. 1626). According to law enforcement, he told a story similar to Finner's: that he and Finner saw Williams and Ward in Ward's mom's car after school, they joined them, and Williams was agitated and talking about having just done a drill. (Supp.R. 1626-1627). Tucker also identified himself and Finner on stills printed from the POD camera video. (Supp.R. 1627). As with Finner, ASA Canellis took a handwritten statement from Tucker, and ASA Dillon presented him to the grand jury. (R. 662-679, 782-801).

Finally, police took Evans to 632 East 59th Street in a covert vehicle and asked him to look at a white car. (Supp.R. 1002). They parked near Ward's home,

and Evans agreed that the white Nissan Sentra parked along the street looked like the car he saw drive away after the shooting. (Supp.R. 1002-1003, 1606, 1670).

Detective Salvador Esparza of the Cold Case Unit searched for Ward and Williams in the contact card database, and found a card noting that Ward was pulled over driving a white Nissan on January 27, 2013, at 6600 South Martin Luther King Jr. Drive for not having the headlights on. (R. 1158-1160).

Arrest and interrogations

Based on their investigation, police issued an investigative alert for Ward's and Williams's arrests. (Supp.R. 1627). Ward was arrested at 11:55 p.m. on February 9, 2013. (R. 849-851).

Detective John Halloran and his partner John Murray interviewed Ward starting at 12:32 a.m. (Supp.R. 1850-1851). That first interview lasted for about an hour and 15 minutes. (Supp.R. 1855). Ward told the detectives that he spent the afternoon around the time of the shooting picking his little brothers up from school. (C. 567-568, 570-574)[1]. The detectives said they did not believe him, and much of the interview consisted of Halloran and Murray shouting at Ward and telling him that they had a "ton" of evidence against him and that he needed to "get in front of it." (St. Ex. 125A, 19:25, 20:28, 20:48, 22:32, 22:44, 23:55, 27:23, 28:10, 44:01, 45:10, 55:38-57:03; C. 588-617). At the end of that interrogation, Halloran said to Ward, "You can explain why you were the shooter." (St. Ex. 125A, 1:41:51; C. 617). Ward responded, "I ain't got nothing else to say." (C. 618; St. Ex. 125A, 1:41:53). Halloran said they would take a break. (C. 618).

After police took the hoodie Ward had been wearing, Ward went to sleep

[1]A transcript of the interrogations is in the record at C. 564-766.

on the interrogation room floor. (C. 619; St. Ex. 125C, 126). After about 80 minutes, Halloran and Murray returned to the interrogation room and Halloran told him to wake up, and said, "All right, the last time we talked you said uh, you didn't have no more to explain to us at that time. I got a couple of more questions I got to ask you." (St. Ex. 126; C. 620). Ward said only, "Yeah." (C. 620).

Halloran went on to say, "You want to entertain them and listen to me – and feel [*sic*] those questions? Uhm, are you awake? Yea? Okay, so you want to talk to me for a couple of minutes here. I got a question about the car – your ma's car, you know." (C. 620; St. Ex. 126, 1:45). Halloran continued with a litany of questions, ending by asking if the gun was at Ward's mom's house, to which Ward said no. (C. 620; St. Ex. 126, 2:32). That interrogation continued, again with Halloran and Murray alternating yelling at Ward, telling him that people picked him out of photo arrays without hesitation, and that it would be better for him if he showed remorse. (C. 621-642; St. Ex. 126, 7:41, 8:30, 11:45, 20:02-44:40). After 46 minutes, Murray asked, "Why'd this happen? Why'd this happen? This time, that day, that park – why did it happen?" (C. 642; St. Ex. 126, 45:01). Ward said, "Got nothin' to say." (C. 642; St. Ex. 126, 45:36). Murray responded, "You got nothin' to say? All right, we'll take a break. All right." (C. 642; St. Ex. 46:00).

Ward went back to sleep for the next three hours, until detectives woke him just after 7:00 a.m. for fingerprints and photos. (Supp.R. 1863; C. 642). Back in the room, Detective Murray said, "Yeah, you know last time we were here you said you didn't want to tell us anything. You've been thinkin' since we took off? Or did you just fall asleep and conked out for an hour and a half? Two hours, three hours." (C. 643). Ward responded, "Went to sleep." (C. 643). Murray: "You went

to sleep. All right, well now that you're awake and you see you're being processed for this murder, any thoughts? Still gonna try to lie your way out of it?" (C. 643). Ward again said he did not want to talk about it. (C. 643).

Shortly after that, one of the detectives said, "If you don't want to say nothin' about it, if you don't want to say nothin' about it then just tell us, and I'm done talkin' okay, that's fine, all right." (C. 643). Ward said, "I don't want to say nothing else about it. (C. 644).

A few hours later, Ward needed to use the bathroom, and asked for water. (C. 645-646). Ward said he asked if he was under investigation, and Detective Scott Reiff confirmed that he was. (C. 648). Reiff and Cullen Murphy launched into telling Ward that they had a "mountain" of evidence against him, and repeatedly said he needed to tell his side of the story. (C. 649-653). Reiff insisted Ward needed to show remorse, to explain if it was an accident, urging him to say that it was a mistake. (C. 652-655, 656-657, 663-664, 666-667). Reiff said they knew Ward did it, because there were "countless" cameras. (C. 653, 657; St. Ex. 129, 25:04). One of the detectives also showed Ward a booking photo of Williams. (C. 653). Finally, Ward sighed, "Fuckin' Kenny," and went on to say that he shot at kids in the park. (St. Ex. 129, 31:00; C. 675). He said that a 46 Terror called Zac was in the park, and that someone used Pendleton as a shield. (C. 675, 691-694; St. Ex. 129, 34:04-33:30).

The State subsequently charged Ward and Williams with multiple counts of first-degree murder and aggravated battery with a firearm. (C. 2341-2502).

Pretrial proceedings

There was extensive pretrial litigation. Defense counsel moved to quash

Ward's arrest and suppress evidence because Ward was arrested without a warrant and, counsel argued, without probable cause. (C. 158-160). After hearing testimony from Detective Frank Casale about the investigation leading to Ward's mother's car, the judge denied the motion. (Supp.R. 155-238, 442).

Counsel also filed a motion to suppress Ward's statement, arguing that the detectives failed to scrupulously honor multiple invocations of Ward's right to silence, and that police used coercive tactics to obtain an involuntary confession. (C. 530-563). After hearing extensive arguments and testimony from expert Dr. Richard Ofshe, the judge denied the motion. (R. 70-216; Supp.R. 292-349).

The State successfully sought to introduce gang evidence and to present Sergeant Jose Lopez as an expert on gangs. (C. 1061-1096; Supp.R. 464-484).

The defense sought to introduce testimony from three experts: Dr. Geoffrey Loftus on eyewitness identifications, Dr. Richard Ofshe on false confessions, and retired detective James Trainum on police interrogation procedures that lead to false confessions. (C. 1281-1394, 1325-1391, 1731-1740). Counsel submitted reports from each expert, and Ofshe testified at a pretrial hearing. (C. 1291-1316; 1325-1391, 1730-1740). Ofshe's report and testimony detailed the tactics used by detectives in questioning Ward and concluded that the statement, "was the product of the use of tactics designed to lead a suspect to perceive his or her situation as hopeless as well as tactics that function to motivate a suspect to decide to confess by leading the suspect to believe the confession, whether true or false, is his or her best choice." (C. 1291-1316). Trainum concluded that the detectives in this case employed the Reid Technique, which, while commonly used by police across the country, is now known to result in false confessions. (C. 1325-1391). After hearing Ofshe's testimony

and counsels' arguments, the judge denied both experts, finding Trainum's conclusions "ridiculous" and Ofshe's area of expertise something the jurors would already know. (R. 70-216; Supp.R. 530-550).

Over the State's objection, the judge agreed to allow Loftus to testify, but limited his testimony to exclude information about wrongful convictions or any other "superfluous" information. (R. 230-240).

Jury selection

At the beginning of voir dire, the judge listed the principles outlined in Supreme Court Rule 431(b). (Supp.R. 692). Addressing the first panel of potential jurors, the judge asked if they understood that Ward was presumed innocent, and if any "take issue with that?" (Supp.R. 703). All of the potential jurors agreed that they understood the State had the burden of proof beyond a reasonable doubt, and none said they would "take issue with that[.]" (Supp.R. 703). The veniremembers similarly said they understood and did not "take issue" with the principles that Ward was not required to offer evidence and they could not hold his decision not to testify against him. (Supp.R. 704). Addressing the second panel of potential jurors, the judge asked if they understood each of the four principles, and all assented. (Supp.R. 843).

Trial

Trial began with opening statements on August 14, 2018. (Supp.R. 895). The State set forth its theory that Williams and Ward were driving around looking for rival gang members to shoot, but instead Ward shot a group of high school students. (Supp.R. 895-900). The defense theory was that no credible evidence linked Ward to the shooting, and that inaccuracies in Ward's supposed confession

demonstrated that it was not believable. (Supp.R. 900-915).

State's case

Klyn Jones, Lazerick Bowdry, Sabastian Moore, Lawrence Sellers, Danetria Hutson, Kyra Caldwell, Veronica Hansberry, Jordan Dillon, and Stephan Abdul testified about the shooting and their attempts to identify the shooter. (Supp.R. 937-958, 1182-1198, 1221-1226, 1243-1252, 1263-1271, 1287-1299, 1325-1333,1345-1358, 1389-1401). They identified photos of the park and photo arrays from which some of them made tentative identifications. (Supp.R. 946-954, 1188-1198, 1225-1226, 1247-1251, 1267-1271, 1277, 1292-1299, 1330-1332, 1352-1358, 1392-1400). Each provided a different description of the shooter, as set forth above. (Supp.R. 940-941, 1184, 1264, 1269, 1288, 1327, 1336, 1347-1348, 1361, 1390, 1402-1403).

Ronald Evans also testified about the shooting, as described above. (Supp.R. 982-1021). He acknowledged federal convictions for wire fraud, money laundering, and false statements. (Supp.R. 981, 1034-1036). The State published his 911 call, in which he described a "dirty, white Nissan" with small wheels. (Supp.R. 1020-1021; St. Ex. 36). Evans looked at a photo array on January 31; one photo "grabbed [his] attention," but he did not identify that person as the shooter. (Supp.R. 1000-1001). A few days later, he went with police in a covert car to 632 East 59th Street, where police pointed out a white Nissan sedan and asked if he recognized it. (Supp.R. 1001-1002). He said it was the same make, model, and color, but lacked any distinguishing marks to allow him to say it was the same car as the one at the shooting. (Supp.R. 1003).

Sergeant Jose Lopez testified as a gang expert over defense objection. (R. 944-992). He testified at length about historical and current gangs in Chicago,

and about investigating the Harsh Park shooting, as described above. (R. 944-1003).

On cross-examination, Lopez acknowledged that 46 Terror had trouble with gangs other than Suwu, but did not investigate other gangs for this shooting. (R. 1023-1024). He focused on Suwu because of the direction in which the white car fled – north of the park was Suwu territory. (R. 968, 1021-1022).

Sergeant Velma Guerrero also testified about the investigation. She said police focused on Suwus because Harsh Park was 46 Terror territory and 46 Terror was in an ongoing war with Suwu, and the car that fled the scene headed into Suwu territory. (Supp.R. 1583). Guerrero discussed photo arrays and lineups shown to multiple witnesses, and said that Hutson, Hansberry, and Caldwell said that Ward and another individual looked "similar" to the shooter. (Supp.R. 1631-1634). Bowdrey and Abdul also made tentative identifications. (Supp.R. 1636-1637).

Guerrero interviewed Antoine Rice at the Cook County Jail, and based on that asked Lopez to bring in Ernest Finner. (Supp.R. 1611). Finner initially denied knowing anything until he was confronted with video showing two young men getting into a white Nissan a few blocks away from Harsh Park. (Supp.R. 1612-1614). Finner eventually told the story about him and Tucker getting into the car with Williams and Ward. (Supp.R. 1614, 1620).

Tucker told a story similar to Finner's when brought in. (Supp.R. 1625-1627).

On cross-examination, Guerrero said she did not actively include members of gangs other than Suwu in the photo arrays or lineups. (Supp.R. 1648-1654).

Tyron Lawrence, a former Suwu "associate," testified that on January 29, 2013, at around 2:30 p.m., he was in a red car with Nurldon Green and Anthony Pearson. (R. 388-391). There was also a reddish bag in the backseat. (R. 393).

They drove to a gas station at King Drive & 35th. (R. 393). Lawrence got out to get on the bus, while Green got out to get change. (R. 394). Lawrence passed the reddish bag into the backseat of a white car that had pulled up next to them. (R. 394-395, 402). He recognized Finner and Tucker in the backseat. (R. 395, 396). Lawrence identified himself in video from the gas station. (R. 399-400).

On cross-examination, Lawrence said he initially denied knowing anything. (R. 418). Detective Halloran showed him a video called "Scary Movie" he found on YouTube, and Lawrence acknowledged he was in the video. (R. 412-415). Lawrence was on probation for a drug case at the time, and Halloran threatened to violate his probation, saying he knew the judge personally. (R. 416-417). Halloran then showed Lawrence a video from the gas station and, insisting that the murder weapon was in the bag passed from the red car to the white car, threatened to charge Lawrence with "association to murder." (R. 419-420). Lawrence then told Halloran all of the names of the people in the cars. (R. 421). Lawrence said he was held in custody for 18 hours with no food, and was then taken immediately to the grand jury. (R. 426-427). His probation was not violated. (R. 429).

Ernest Finner testified that he did not remember where he was on January 29, 2013. (Supp.R. 1049). He did not remember being at 41st and Indiana, getting into Ward's white Nissan, or Ward being the front passenger while Williams drove the car. (Supp.R. 1049-1051). He likewise did not recall Williams acting nervous and looking around, or Williams saying that he and Ward had "done a drill" and that Ward shot at 46 Terror members after they switched seats in the car. (Supp.R. 1052-1054). And he did not recall a Suwu meeting without Williams on February 8 at which Ward told people not to talk about the shooting. (Supp.R. 1055-1056).

Finner remembered his parole officer called him the next day. (Supp.R. 1056). When he arrived, police swarmed the car and treated him like he had done something wrong. (Supp.R. 1058). He was handcuffed and taken inside not for a drug drop, as expected, but questioning about the shooting. (Supp.R. 1126-1129).

Finner was unclear on whether he remembered making a written statement with ASA George Canellis. (Supp.R. 1059-1060). He did not recall circling himself in pictures from a POD camera, and did not remember the content of the statement. (Supp.R. 1066). He did not recall testifying to the grand jury. (Supp.R. 1080).

On cross-examination, Finner said the police threatened to charge him with a "dirty drop" even though he had not done a drop at all. (Supp.R. 1128). They also threatened that his mother, who worked in the sheriff's office, would be fired. (Supp.R. 1129-1130). So he cooperated, and went along with what police wanted him to say. (Supp.R. 1130). He did not recall prior convictions for aggravated robbery and gun cases in 2009 and 2010, but agreed he was on parole when he was questioned about this case. (Supp.R. 1123, 1159). Finner also did not recall going to court for an aggravated assault in 2014, but acknowledged a failure to register as a gun offender charge in 2016 as well as a domestic battery in 2017. (Supp.R. 1151-1154). Those charges were all dropped, but Finner said he was "not exactly" cooperating with the State. (Supp.R. 1154).

Demetrius Tucker lived at 39th and Lake Park in 2013. (R. 548). He was a Suwu member, like Ward and Williams. (R. 549-551). He did not recall if the Suwus were rivals with 46 Terror in January 2013. (R. 554). On January 29, 2013, he left school with Ernest Finner. (R. 555-556). They saw Ward's mom's Nissan and got into the car. (R. 558-559). Tucker did not recall who was driving, and did

not recall Williams saying they had done a drill. (R. 560-564).

Tucker agreed that he went to Area Central and talked to police about the shooting on February 9, 2013. (R. 565). He told Casale and Canellis that he did not know what was said in the car. (R. 567). Tucker acknowledged his signature on each page of an exhibit labeled as his statement. (R. 568). He did not know if the people circled in a photo were himself and Finner. (R. 572). Tucker did not tell Casale and Canellis that Williams said they did a drill, or that any shooting had occurred. (R. 576). He was not allowed to make any changes to the statement, and did not say that he was treated well by police. (R. 577, 579). He was not given food or drink, and was not allowed to go to the bathroom or sleep. (R. 580).

Tucker similarly denied making most of the statements attributed to him in a grand jury transcript. (R. 582-597). Tucker acknowledged prior convictions for gun and drug possession. (R. 550).

On cross-examination, Tucker said he was arrested in the common room of his apartment building, after officers told him someone else was using his name, and he had to come to the station. (R. 598-602). Tucker protested, and was handcuffed. (R. 602). He was locked in an interrogation room and then questioned about the shooting. (R. 603-604). He told police he did not know anything. (R. 605). Police said he would get ten years for the case he was on probation for. (R. 608). The officers wanted Tucker to say that Ward was responsible for the shooting and intimidated him, but Tucker said he did not know what happened. (R. 608).

Tucker said he did not volunteer any information to police, but went along with what police wanted him to say so his probation would not be violated. (R. 611-612). Only when he signed the statement police prepared for him was he allowed

to go home. (R. 615).

Jarod Randolph testified that he grew up with Ward and Williams, and was briefly a Suwu member, though he did not know if Ward and Williams were. (R. 482). He acknowledged prior convictions for gun possession, aggravated robbery, and burglary. (R. 481-482). Randolph said he did not recall Ward calling him on January 30, 2013 and saying that "a little girl got killed on 46, him and Kenny went through, and . . . he popped out." (R. 485). Randolph did not recall seeing Ward on January 31 and Ward saying he regretted the shooting and felt "bogus as hell," or a similar conversation on February 1, with Ward saying he regretted the shooting. (R. 486-487). Randolph likewise did not remember a Suwu meeting on February 8 at 67th & Lowe, at which the other members were told not to talk about the shooting because of police pressure. (R. 488-490).

Randolph acknowledged that he testified to the grand jury on February 26, 2013, but denied recalling the content of that testimony (which was that he spoke to Ward several times between the shooting and his testimony and each time Ward expressed regret for his role in the shooting). (R. 492-504).

On cross-examination, Randolph insisted he was not lying about not remembering his grand jury testimony. (R. 506-507). He did not recall talking to police only because his parole officer told him to come to the station or he would be violated. (R. 510). He also did not recall telling an investigator in 2014 that police threatened to violate his parole and charge him with a gun offense. (R. 513).

Randolph also did not recall police showing the "Scary Movie" video to him, and invoked the Fifth Amendment when asked if he was holding a gun in the video. (R. 512-517). He did not recall telling an investigator that when he was

at the station, police told him what they wanted him to say, and that he repeated it so his probation would not be violated. (R. 518-519).

ASA Canellis testified about taking statements from Finner and Tucker. (R. 641-644, 662). He denied having any script prepared for either young man. (R. 676). Canellis had no role in the police investigation, and was not present for Finner or Tucker's initial questioning by police. (R. 686).

ASA Dillon testified that he presented both Finner and Tucker to the grand jury. (R. 734, 786). Each gave the same information to the grand jury that was in his handwritten statement; namely, that they got into Ward's mom's car, Williams was driving, Williams was acting anxious and looking around, and Williams said they had done a drill. (R. 741-782, 790-800).

According to an assistant medical examiner, Pendleton suffered a single gunshot wound to the back. (R. 536-546). An evidence technician identified photos of the scene. (Supp.R. 1433-1452). He did not collect a cigarette butt in the alley at the back of the park. (Supp.R. 1473).

FBI special agent Joe Raschke testified over defense objection as an expert on historical cell site analysis. (Supp.R. 1742). Raschke published a PowerPoint presentation showing the T-Mobile cell towers around the area of Harsh Park and other locations provided by the State. (Supp.R. 1745-1748). He detailed when Williams and Ward's phones pinged off those towers at various times between 1:00 and 4:00 p.m. on the day of the shooting; both phones pinged off a tower near Harsh Park before and after the time of the shooting. (Supp.R. 1756-1171).

Detective Halloran testified about his two interrogations of Ward. (Supp.R. 1849-1865). The State published the video of those interrogations. (Supp.R. 1860-

1862). On cross-examination, Halloran acknowledged that he spent a lot of the interrogations shouting or talking loudly at Ward. (Supp.R. 1877-1879, 1908). He also acknowledged that he lied to Ward when he told him the shooting had been captured on camera and that multiple witnesses had identified him. (Supp.R. 1889-1893, 1898-1900). He repeatedly told Ward that his situation was hopeless. (Supp.R. 1882-1884, 1889, 1897, 1916).

Detective Reiff testified about Ward's third interview on February 10, 2013. (Supp.R. 1919-1920). The State published that interrogation. (St. Ex. 129). Reiff acknowledged on cross-examination that he told Ward they had "amazing" evidence against him and that he needed to express remorse. (Supp.R. 1928-1932, 1948). Reiff acknowledged that Ward's statement did not exactly match the evidence police had, as there were no 46 Terror members in the park, and no witnesses said anyone used Pendleton as a shield. (Supp.R. 1934-936).

Defense case

Dr. Geoffrey Loftus testified as an expert on human perception and memory. (R. 1090). He was being paid for his time. (R. 1090-1091). Loftus explained that people get only a small amount of information from any event. (R. 1094). First, conscious information – the sensory data coming in through sense organs – establishes a conscious representation of what is happening. (R. 1095). The brain then transfers the conscious representation into the initial memory for the event. (R. 1095). The initial memory information is generally accurate, but very sparse, because there is too much information for the brain to process. (R. 1096-1097).

However, people supplement the original memory with postevent information, which fills gaps to create a better picture. (R. 1098). Postevent information is

unlimited, and a memory can be added to forever. (R. 1098). There is no way to know if postevent information is accurate, and an individual cannot distinguish between original and postevent information once postevent information has been obtained. (R. 1099). Thus, there is no way to know if the postevent information reflects the original event. (R. 1099-1100). As a result, a witness can have a strong, detailed, and real-seeming memory that, unbeknownst to the witness, is potentially false because it is made up of dubious, postevent information. (R. 1100).

Loftus gave the example of witnessing a car crash. (R. 1101). The conscious experience is the crash, and the end of the crash is the end of the conscious memory. (R. 1101). In the aftermath, the witness overhears an EMT saying that the driver of one car is "drunk most of the time." (R. 1102). That statement is postevent information that allows the witness to supplement their original memory to include the possibility of that driver being drunk. (R. 1102). The postevent information ripples out, causing the witness to reimagine the moments leading up to crash, which in turn may cause them to imagine the car driving erratically, and maybe running a stop sign. (R. 1102-1103).

Loftus also explained that in the context of witnessing a shooting, the stressful nature of the situation, the body's desire for self-preservation, plus the phenomenon of weapon focus diminishes a person's's ability to perceive the offender. (R. 1109-1117). Witness memory following a very stressful event is bad, first because the witness did not have a long time to get much detail or conscious information. (R. 1114-1115, 1117). Then, there are multiple opportunities for postevent information to intrude because the witness thinks about it, is interviewed about it repeatedly, reads about it, sees it on the news or social media, and so on. (R. 1118-1119).

Loftus gave a real-life example: a plane crashed in Colorado Springs, killing everyone on board. (R. 1119). There were several eyewitnesses interviewed a number of times. (R. 1119-1120). Many of them reported vivid memories of seeing passengers clawing at the windows as the plane was crashing, but those in fact were not real memories because the interior of the plane could not be seen into from the outside. (R. 1120). Additionally, the plane was going so fast and was so far away that none of the witnesses would have been able to perceive anything about passengers' expressions even if they could have seen inside. (R. 1120). These vivid memories came from postevent information, either from the witness' own imaginations of imagining themselves or fellow passengers, which they added to the postevent information. (R. 1121). While not part of the conscious experience, that postevent information became a "memory." (R. 1121-1122).

The State cross-examined Loftus at length about his fees. (R. 1133-1135). Loftus explained that he did not interview any of the witnesses in this case, and did not need to, because his opinion was not about any specific witness's testimony, and in any event an individual is incapable of distinguishing between root conscious experience and postevent information. (R. 1136-1139).

On redirect, Loftus explained again that he did not talk to any witnesses because his role was not to determine what the witnesses saw or to conclude if the witnesses were correct or not, only to give information to the jury to use as a tool to decide which witnesses to believe. (R. 1144).

Private investigator Brad Thompson testified that he interviewed Jarod Randolph on May 25, 2014, after several failed attempts to meet up with him. (R. 1162-1164, 1169). Randolph told Thompson that he only gave a statement because, based on the video showing him with a gun, police threatened to violate

his parole. (R. 1165). So he told the officers what they wanted him to say, repeating back the story the officers told him. (R. 1165-1166).

Another investigator identified photos of Harsh Park and nearby Kennicott Park. (R. 1172-1185). Kennicott was a few blocks away from Harsh Park, near 45th and Greenwood, and was larger, with a big grassy field. (R. 1176-1181).

The parties stipulated that: 1) Dillon said the shooter was wearing khaki pants and a hoodie; 2) Bowdry said the shooter was 6 feet tall, skinny, and wearing black pants; 3) Guerrero viewed a lineup with Stephan Abdul, who did not qualify his lack of certainty and did not say he was 50% certain; and 4) Randolph told Murray that he heard the gun used in the shooting was in a house at 47th and Indiana. (R. 1187-1190).

Ward declined to testify on his own behalf. (R. 1194).

Closing arguments

In closing, the prosecutor discussed the elements of first-degree murder and aggravated battery with a firearm, and argued that the evidence supported each element. (Supp.R. 1978-2010). The prosecutor noted how several witnesses claimed "amnesia" but told the jury it could consider the grand jury testimony of those witnesses as substantive evidence. (Supp.R. 1987-1994).

Defense counsel argued that because of the intense media focus on this shooting, Sergeant Lopez immediately assumed it was a gang shooting based solely on the car going north to leave the scene. (Supp.R. 2011-2012). But it was obvious that the car would go north, given that the kids from the park fled south and they could not have gone east or west because of dead ends. (Supp.R. 2013). Counsel noted that Evans never identified the offender despite his training as a police officer. (Supp.R. 2014). Instead, Lopez rounded up the "usual suspects" and

threatened them with parole and probation violations. (Supp.R. 2015).

Counsel pointed out that the kids in the park gave wildly varying descriptions of a shooter they had barely seconds to see, and noted that someone other than Ward was visible in the YouTube video wearing a blue jacket and khaki pants, which matched some witnesses' descriptions of the shooter. (Supp.R. 2018-2024).

Counsel also urged the jury to conclude that the police wanted a statement that fit their theory, and pushed Ward into telling a story consistent with that theory. (Supp.R. 2033-2045).

In rebuttal, ASA Brian Holmes launched into a tirade about the defense argument, and insisted that there was no bad police procedure, and no coercion or lies. (Supp.R. 2046-2047). Holmes said of the defense, "It's the last passion of the scoundrel, let's blame the police." (Supp.R. 2047). The prosecutor accused the defense of speculating and inventing a "grand conspiracy," saying the speculation was "The million dollar man, Dr. Loftus." (Supp.R. 2048). He continued, saying that the defense did not "buy the bonus package for the doctor to talk to the witnesses," and speculated about bad police action, insulting the jury's intelligence. (Supp.R. 2048-2049). Objections were overruled. (Supp.R. 2046-2050).

Saying the defense counsels must have "senioritis" and "bad senioritis," ASA Holmes accused the defense of "denigrating" and "deflecting." (Supp.R. 2051-2052). The prosecutor again accused the defense of being disingenuous, and an objection was sustained. (Supp.R. 2058). He went on to say that "You can't make chicken salad out of chicken shit." (Supp.R. 2048).

ASA Holmes then spoke about going to the 9/11 Memorial, and read a quote from the memorial. (Supp.R. 2063). Saying Pendleton had a short "book of life," Holmes said she had the jury to give her justice, and implored the jury to "write

the final chapter of her life and entitle it Justice." (Supp.R. 2064-2065).

The jury returned a verdict finding Ward guilty of first-degree murder and aggravated battery with a firearm, and finding he had personally discharged a firearm proximately causing death. (Supp.R. 2106-2109).

Post-trial motion and sentencing

Defense counsel filed a detailed motion for new trial on Ward's behalf. (C. 2183-2229). The judge denied it. (Supp.R. 2118-2124).

At sentencing, Pendleton's brother and mother read victim impact statements. (Supp.R. 2126-2136). In mitigation, the defense presented several letters from family and community members. (Supp.R. 2137). Ward's mother testified at length, describing Ward as helpful with his younger brothers. (Supp.R. 2138-2141). Ward's arrest was a hardship for the family, plus Ward was repeatedly beaten and harassed in jail, and got death threats because of the case's notoriety. (Supp.R. 2144-2145).

The State argued in aggravation for a substantial sentence, calling Ward sophisticated, "maniacal and cunning . . . a sociopath." (Supp.R. 2177). In mitigation, defense counsel asked the judge to believe in rehabilitation. (Supp.R. 2182-2186).

The judge said he considered the evidence in aggravation and mitigation, and believed there was no regret in Ward's allocution. (Supp.R. 2198-2199, 2207). Saying he considered all the factors and that Ward was "young," the judge imposed a sentence of 70 years for murder, plus 14 years for aggravated battery, for a total of 84 years. (Supp.R. 2207; C. 2315).

Counsel filed a motion to reconsider the sentence, which the judge denied. (C. 2316-2317). Counsel filed a timely notice of appeal on Ward's behalf. (C. 2318).

ARGUMENT

I. The Evidence Is Insufficient To Sustain Micheail Ward's Convictions Beyond a Reasonable Doubt Where None of the Eyewitnesses Had Sufficient Opportunity To See the Shooter and All Gave Wildly Varying Descriptions, and Where Statements Implicating Ward Are Not Believable.

No believable evidence links Micheail Ward to the shooting at the Harsh Park playlot on January 29, 2013. The students in the park who said they saw the offender gave wildly varying descriptions of him, and generally lacked a sufficient opportunity to create a believable memory of his appearance, considering the stress and brevity of the shooting and weapon focus. Gang members cajoled into inculpating Ward disavowed those statements, and Ward's own inculpatory statement did not match the facts and resulted from coercive tactics known to produce false confessions. That is, given the known problems with eyewitness identifications, the circumstances under which the shooting took place, the wildly varying descriptions of the offender, the tentative nature of the identifications, and the unbelievability of the remaining evidence, there is at least a reasonable doubt of Ward's guilt. *People v. Ehlert*, 211 Ill. 2d 192, 213 (2004). This Court should reverse Ward's convictions outright.

Due process requires the State to prove every element of a charged offense beyond a reasonable doubt in order to sustain a conviction. *In re Winship*, 397 U.S. 358, 364 (1970); U.S. Const., amends. V, XIV; Ill. Const. 1970, art. I, §2. This includes the offender's identity. *People v. Slim*, 127 Ill. 2d 302, 307 (1989). When considering a challenge to the sufficiency of the evidence, a reviewing court must determine whether, viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *People v. Smith*,

185 Ill. 2d 532, 541 (1999). While the factfinder's decision to accept testimony is entitled to deference, it is not conclusive and does not bind a reviewing court. *People v. Cunningham*, 212 Ill. 2d 274, 280 (2004).

A single eyewitness identification can sustain a conviction if the identification is sufficiently reliable, considering relevant factors and the totality of the circumstances. *Slim*, 127 Ill. 2d at 307. However, it is well established that eyewitness identifications are highly fallible and that "the annals of criminal law are rife with instances of mistaken identification." *Perry v. New Hampshire*, 132 S. Ct. 716, 728 (2012). Misidentifications contribute to a large number of wrongful convictions. *People v. Lerma*, 2016 IL 118496, ¶24, *quoting State v. Dubose*, 699 N.W.2d 582, 591-92 (Wis. 2005) (observing "eyewitness misidentification is now the single greatest source of wrongful convictions in the United States, and responsible for more wrongful convictions than all other causes combined").

The shooting at Harsh Park took place in a matter of seconds. The students were standing in a circle under a canopy, so many were not facing the alley where the shooter was. (Supp.R. 938-939, 1220, 1242, 1285, 1325, 1345, 1389). They all ran when the shooting started. (Supp.R. 943, 1184, 1207, 1221, 1244, 1339, 1391). Nevertheless, some of the students tentatively identified Ward as the shooter. (Supp.R. 1190, 1268, 1296, 1303, 1330, 1345, 1395). But those tentative identifications are insufficiently reliable to sustain Ward's convictions. Courts assess the reliability of an identification under the totality of the circumstances, considering the witness's: (1) opportunity to view the offender at the time of the crime, (2) degree of attention, (3) accuracy of the prior description, (4) level of certainty demonstrated at the identification confrontation, and (5) the length of time between the crime and identification. *Neil v. Biggers*, 409 U.S. 188, 199-200

(1972). Factors contributing to unreliable identifications include the stress of the event and weapons focus. *Lerma*, 2016 IL 118496, at ¶26. Thus, even if the students believed their identifications to be accurate, the impact of these factors, based on scientific research as explained by defense expert Dr. Geoffrey Loftus, calls into question the reliability of their identification. *Lerma*, at ¶26; (R. 1096-1126).

Most of the factors suggesting unreliability are present here. The stress of the event was apparent from the students' testimony as well as the 911 call recordings. (Supp.R. 944, 965, 1207, 1246, 1277, 1416; St. Ex. 19). Jones and Abdul focused on the gun. (Supp.R. 941, 1390). The high-stress nature of the situation affected the students' perception and memory, given, as Dr. Loftus explained, that research shows that people are poorer at mental functioning during stressful situations, and are especially poor at encoding details into memories, resulting in false details being filled in by post-event information. (R. 1098-1100, 1115-1128).

This inability to "encode details" is demonstrated by wildly inconsistent descriptions provided by the eyewitnesses: the students described the shooter as everything from 5'6" to 6'1" tall (a seven-inch difference), having short hair but also dreadlocks; wearing a black skullcap, a blue hat, a baseball cap, and no hat; wearing jeans and khaki cargo pants; a hoodie that was blue, black, and "dark"; a blue shirt, a white shirt, a grey crewneck with no hoodie, and a "loose-sleeve top." (Supp.R. 940-941, 963, 990-991, 1184, 1264, 1269, 1274, 1288, 1305, 1336, 1347-1348, 1361-1363, 1390, 1402-1403; R. 1188). The witnesses similarly heard a different number of shots, one hearing three, one four, one four or five, one five, and one six. (Supp.R. 941, 1243, 1286, 1326, 1390, 1415). Weapon focus was also a problem, with some of the witnesses specifically mentioning a gun. (Supp.R. 940, 964, 1390). Finally, many of the students were smoking cannabis while in

the park, and marijuana is known to impair a person's ability to perceive and recall events. (Supp.R. 936, 1182, 1241, 1261-1262, 1283, 1325, 1344); *People v. Gaines*, 235 Ill. App. 3d 239, 250-51 (1st Dist. 1992). Between the need to survive, weapon focus, and drug use, the witnesses simply did not have time to perceive the shooter sufficiently to create a believable memory of his appearance. (R. 1097, 1105, 1108-1125).

Thus, the wildly varying descriptions of the offender demonstrate that the eyewitnesses did not have a sufficient opportunity to view him, given the quick, stressful nature of the shooting and weapon focus. (Supp.R. 940-941, 963, 990-991, 1184, 1264, 1269, 1274, 1288, 1305, 1336, 1347-1348, 1361-1363, 1390, 1402-1403; 1415; R. 1097, 1188). In addition, this case garnered national media attention, causing Ward's photo to be plastered across television and computer screens via news and social media for years on end. (R. 683-684; Supp.R. 1304, 1420-1428); *e.g.* https://chicago.cbslocal.com/2013/02/12/pendleton-murder-suspect-violated-probation-3-times/ (reporting Ward's arrest); https://www.cnn.com/2013/02/11/justice/illinois-chicago-killing/index.html (same). This media attention is precisely the type of postevent information Dr. Loftus explained fills the gaps in a witness' memory, causing the witness to believe a memory far clearer and stronger than it could actually be. (R. 1097-1105, 1117-1130). Considering the totality of circumstances, the witnesses' identification of Ward as the shooter is unworthy of belief. *Slim*, 127 Ill. 2d at 308.

Next, recanted statements from Ernest Finner, Demetrius Tucker, and Jarod Randolph attributing inculpatory statements to Ward are also unworthy of belief. After police threatened Tucker and Finner with probation and parole violations, each said that Williams and Ward picked them up shortly after the

shooting at 39th and Indiana, and that Williams said they had "done a drill" at the park; officers also threatened that Finner's mother would lose her job at the sheriff's office. (R. 562-597, 602-608; Supp.R. 1126-1130). Randolph similarly did not recall telling police that he talked to Ward several times after the shooting and that Ward expressed regret about it, and he told an investigator that he went along with what police wanted him to say about Ward so they would not charge him with a parole violation for having a gun in a rap video posted on YouTube. (R. 485-504, 1165-1166). These recantations, and the explanations for why they gave the original statements, call into question the reliability of the prior statements. *People v. Reyes*, 265 Ill. App. 3d 985, 989-90 (1st Dist. 1993) (reversing upon finding recanted prior statements suspect).

Ward's own statement is equally unworthy of belief. First, Ward's confession resulted from coercive interrogation tactics known to produce false confessions. (C. 1281-1391; R. 77-165, 205-210; Supp.R. 537-547); W. Kozinski, *The Reid Interrogation Technique and False Confessions: a Time for Change*, 16 Seattle J. For Soc. Just. 301 (Fall 2017) (discussing Reid Technique and its problems). Detectives consistently overstated and at times directly lied about the strength of the evidence they had collected, and repeatedly told Ward that expressing remorse would earn him leniency. (C. 589-594, 606-607, 609, 614, 625-642, 649-659; Supp.R. 1889-1893, 1898-1900). Ultimately, Ward concluded that, "it ain't no point in sayin' nothin' 'cause even if – even if I was never – even if I didn't do it I – and I am still in this predicament" and gave an inculpatory statement. (C. 660-693). But the statement Ward gave is contradicted by other evidence. *See People v. Wiley*, 205 Ill. 2d 212, 227 (2001) (confession contradicted by other evidence need not be believed). Notably, Ward said that Williams dropped him off at 45th and Greenwood,

a six- or seven-minute walk to the playlot, and that Williams was waiting for him right by the park; it makes little sense for Williams to have dropped Ward off so far away from Harsh Park if Harsh was the target. (C. 690)[2]. From 45th and Greenwood, Ward would have had to walk past Kennicott Park, a larger park with an open field, to get to Harsh, but Ward said that he was at the park immediately when he got out of the car – but that means he was at Kennicott Park, not Harsh. (C. 690-692; R. 1174-1180; Def. Ex. 32A-H). Ward also said that a group of 46 Terror gangbangers, including one called Zac, were in the park, separate from another group, and that someone used Hadiya Pendleton as a shield when the shooting started. (C. 691-694). But the King students said they were the only group in the park, that no one used Pendleton as a shield, and none of them were named Zac. (Supp.R. 937, 945, 1187, 1218, 1241, 1260, 1343). Ward's confession is unworthy of belief. *Wiley*, 205 Ill. 2d at 227; (C. 1281-1391; R. 77-165, 205-210; Supp.R. 537-547).

Finally, no forensic evidence links Ward to the shooting. No shell casings were recovered, no gun or ammunition were recovered from Ward, and no gunshot residue was found in his car or on his clothing. (R. 882-883; Supp.R. 1449, 1473, 1513-1518, 1538-1539); *see Smith*, 185 Ill. 2d at 542 (reversing defendant's conviction where no physical evidence corroborated weak State evidence).

In sum, no reliable evidence links Micheail Ward to the shooting at Harsh Park on January 29, 2013: the eyewitnesses lacked a sufficient opportunity to

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[2]Google Maps route at: https://www.google.com/maps/dir/S+Greenwood+Ave+%26+E+45th+St,+Chicago,+IL+60653/Harsh+Park,+Chicago,+IL/@41.8139872,-87.5995716,17z/data=!3m1!4b1!4m14!4m13!1m5!1m1!1s0x880e295fd08b78b1:0x386c57a353d32a08!2m2!1d-87.5993517!2d41.8132597!1m5!1m1!1s0x880e2961c0ae36d3:0x9c3f3953bb42fb4c!2m2!1d-87.595415!2d41.8139593!3e2?hl=en

see the offender and create an accurate memory of his appearance, as evidenced by the inconsistent descriptions and tentative nature of their identifications, plus the high-stress nature of the event and weapon focus further hindered the witnesses' perception. Neither the recanted statements implicating Ward nor Ward's own statement are worthy of belief, and no other evidence links Ward to the shooting. In total, the evidence leaves at least a reasonable doubt of Ward's guilt, and this Court should reverse his conviction. *Smith*, 185 Ill. 2d at 542.

II. The Trial Judge Erred In Denying Micheail Ward's Motion To Suppress His Statements, Where the Statements Were Obtained In Violation of His Right To Remain Silent.

Three times while he was being questioned by detectives, Micheail Ward told them that he had "nothin' else to say," and did not "want to say nothing else about it." (C. 618, 642-643; St. Ex. 125A, 1:41:51, 4:03:01, 7:17:35). Each time, the detectives took a "break," but then resumed questioning Ward without re-reading his *Miranda* rights. (C. 620, 642-643; St. Ex. 124 3:17:23, 7:17:35, 12:31:01). Thus, police did not "scrupulously honor" Ward's invocations of his constitutional right to silence, his post-invocation statements are inadmissible, and the trial judge erred when he refused to suppress them. *People v. Flores*, 2014 IL App (1st) 121786, ¶¶37, 44; *People v. R.C.*, 108 Ill. 2d 349, 354-55 (1985), *citing Michigan v. Mosley*, 423 U.S. 96, 103-04 (1975).

The State has the burden of proving by a preponderance of the evidence both that a confession was voluntary and that it was not obtained in violation of a defendant's Fifth Amendment rights. 725 ILCS 5/114-11(d) (2007); *Flores*, at ¶36. In reviewing the denial of a motion to suppress, this Court's review is *de novo* where, as here, the trial judge did not hear live testimony, but instead viewed the recordings of the interrogations. *Flores*, at ¶35; *citing People v. Sorenson*, 196

Ill. 2d 425, 431 (2001). This issue is preserved. (C. 530-563, 2183-2229).

When a suspect in a custodial interrogation invokes his right to remain silent, any statement obtained in violation of that right must be suppressed. U.S. Const. amends. V, XIV; Ill. Const., art. I, §10; *People v. Henenberg*, 55 Ill. 2d 5, 11-12 (1973), *citing Miranda v. Arizona*, 384 U.S. 436, 444-45 (1966). Before beginning a custodial interrogation, police must warn the suspect that he "has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires." *Miranda*, 384 U.S. at 479. Statements made after these warnings must be suppressed if the defendant indicates in any manner, either prior to or during questioning, that he wishes to remain silent. *Henenberg*, 55 Ill. 2d at 10-11, *citing Miranda*, 384 U.S. at 444-45.

If a defendant unambiguously invokes his right to remain silent after *Miranda* warnings are given, either prior to or during questioning, the interrogation must cease. *Berghuis v. Thompkins*, 560 U.S. 370, 381-82 (2010); *Henenberg*, 55 Ill. at 10-11. "The mere fact that [the accused] may have answered some questions or volunteered some statements on his own does not deprive him of the right to refrain from answering any further inquiries." *People v. Turner*, 56 Ill. 2d 201, 206 (1973), *quoting Miranda*, 384 U.S. at 445. Failure to "scrupulously honor" a request to remain silent renders any subsequent statements inadmissible. *R.C.*, 108 Ill. 2d at 354-55, *citing Mosley*, 423 U.S. at 103-04.

Here, Ward invoked his right to silence multiple times. At the end of the first interrogation, Detective John Halloran was speaking at length, concluding with, "You can explain why you were the shooter." (C. 617; St. Ex. 125A 1:41:51).

Ward responded, "I ain't got nothin' else to say." (C. 618; St. Ex. 125A 1:41:53). Halloran responded that they would take a break, and left the room. (C. 618; St. Ex. 125A 1:41:58). After a break of about 80 minutes, Halloran woke Ward and, after asking if he needed to use the bathroom, reinitiated questioning, without advising Ward of his *Miranda* rights, saying: "You got a clear head? You awake? Do me a favor, move over a little bit. All right, the last time we talked you said uh – you didn't have no more to explain to us at that time. I got a couple of more questions I got to ask you." (C. 620; St. Ex. 124 3:17:23). Ward said, "Yeah," and Halloran followed by resuming the interrogation. (St. Ex. 124 3:17:46-58; C. 620).

This second interrogation, which consisted largely of the detectives speaking at length and yelling at Ward, continued for 45 more minutes, until Detective Murray demanded, "Why'd this happen? Why'd this happen? This time, this day, that park – why did it happen?" (C. 642; St. Ex. 124 4:02:57). Ward responded, "Got nothing' to say." (St. Ex. 124 4:03:01; C. 642). Murray then said they would take a break. (C. 642).

Three hours later, detectives woke Ward for fingerprinting and photos. (C. 642; St. Ex. 124 7:02:59). On returning to the cell, Murray asked if Ward had "been thinkin'" or if he slept. (C. 643). Ward responded that he had slept. (C. 643). Murray then said, "All right, well now that you're awake and you see you're being processed for this murder, any thoughts? Still gonna try to lie your way out of it?" (St. Ex. 124 7:17:35). Ward did not respond, and Murray pressed, but Ward again said he did not want to talk. (C. 643-644; St. Ex. 7:17:38).

At 12:31 p.m., a new set of detectives physically shook Ward awake. (St. Ex. 124 12:31:01). Detective Murphy asked, "What's up man? Get up. Hey, you, you all right?" (St. Ex. 124 12:31:05). Murphy asked if Ward ate and if he wanted

a cigarette, and confirmed how to pronounce his name. (C. 648; St. Ex. 124 12:31:12). Ward asked if he was under arrest, and Scott Reiff answered affirmatively, said they had looked over the previous interrogations, and asked if Ward had been to jail before. (St. Ex. 124 12:32:15; C. 648). A long interrogation followed, culminating in Ward giving an inculpatory statement. (C. 660-693).

Ward unambiguously invoked his right to remain silent at 1:41:53 a.m. (St. Ex. 124 1:41:53; C. 618). The detectives did not scrupulously honor that invocation, instead reinitiating the interrogation at 3:17 a.m. (C. 620; St. Ex. 124 3:17:23). The detectives did not re-*Mirandize* Ward, and simply informed him that they were going to ask him more questions; it was not an option for him to refuse. (C. 620). Ward answered Halloran's persistent questions about the gun, and otherwise endured the detectives' long diatribes before again unambiguously invoking his right to silence by saying, "Got nothin' to say." (C. 620-642; St. Ex. 124 4:03:01). Shortly after 7:00 a.m., Detective Murray again reinitiated interrogating Ward without reading *Miranda*. (C. 642-643; St. Ex. 124 7:17:35). After Ward again said he did not "want to say nothing else about it," detectives again re-started the interrogation by shaking Ward awake at 12:31 p.m. and questioning him, again without re-reading *Miranda*. (C. 643, 648; St. Ex. 124 7:17:35, 12:31:01).

By saying, "I ain't got nothin' else to say,""Got nothin' to say," and "I don't want to say nothing else about it," at 1:41 a.m., 4:03 a.m., and 7:17 a.m., Ward clearly and unambiguously invoked his right to remain silent. (C. 618, 642; St. Ex. 125A 1:41:53, 4:03:01, 7:17:35); *Flores*, at ¶57 ("Not really. No." is unequivocal expression of right to remain silent); *R.C.*, 108 Ill. 2d at 352 (defendant saying he did not want to talk to detective invoked right to silence); *People v. Hernandez*,

362 Ill. App. 3d 779, 785-86 (1st Dist. 2005) ("No, not no more" was unequivocal invocation of right to silence). The judge's conclusion to the contrary, finding that Ward saying he had "nothing else to say" was "absolutely not" an invocation and that "no rational person" would think so is contrary to well-established law. (Supp.R. 344-345); *Flores*, at ¶57; *R.C.*, 108 Ill. 2d at 352; *Hernandez*, 362 Ill. App. 3d at 785-86; *People v. Strong*, 316 Ill. App. 3d 807, 814 (3d Dist. 2000).

Equally clear is that the detectives did not scrupulously honor Ward's invocation. Reviewing this question, courts consider whether 1) "police immediately halted the initial interrogation after the defendant invoked his right to remain silent"; 2) "a significant amount of time elapsed between interrogations"; 3) "a fresh set of *Miranda* warnings were given prior to the second interrogation"; and 4) "the second interrogation addressed a crime that was not the subject of the first interrogation." *People v. Nielson*, 187 Ill. 2d 271, 286-87 (1999), *citing Mosley*, 423 U.S. at 104-106.

None of the factors are present in this case. When Ward first invoked, Detective Halloran pestered him, saying, "You want a break? You can take a break. You don't want to talk to me you don't have to talk to me. You got nothin' else to say? All right man, when you want somethin' I want you to bang on that door real loud, okay?" (C. 618; St. Ex. 124 1:42:12). Ward did not ask for a "break," he invoked his right to remain silent. *Flores*, at ¶57. Similarly, the second time Ward invoked, Detective Murray said they would "take a break." (C. 643; St. Ex. 124 4:03:05). Again, Ward did not ask for a "break," but for the interrogation to cease altogether. *Flores*, at ¶57. Fewer than two hours passed between Ward's invocations and the detectives reinitiating the interrogation, so no "significant" time passed for the second factor. *Mosley*, 423 U.S. 96 at 104-106 (two-hour break

satisfied the second factor). Even if this Court finds that "significant" time passed, the State cannot establish the third and fourth factors, as detectives at no point re-advised Ward of his *Miranda* rights before jumping right back into the interrogation where they had previously left off. *Nielson*, 187 Ill. 2d at 286-87; *Flores*, at ¶62; (C. 620, 642-643; St. Ex. 124 3:17:23, 7:17:35, 12:31:01).

Giving fresh *Miranda* warnings before re-interrogating a suspect who invoked his right to silence, or at least asking whether he understood *Miranda* rights given earlier, is "crucial" to whether that right was scrupulously honored. *See e.g. People v. Chambers*, 261 Ill. App. 3d 123, 129 (4th Dist. 1994); *People v. Payton*, 91 Ill. App. 3d 78, 81 (1st Dist. 1980); *People v. Young*, 115 Ill. App. 3d 455, 462 (2d Dist. 1983) (this is the "pivotal question"). Given that the detectives here repeatedly continued to interrogate Ward after he invoked his right to silence, without readvising him of his *Miranda* rights, they did not scrupulously honor his invocation of his right to silence. *Compare R.C.*, 108 Ill. 2d at 354 (violation where officer questioned defendant "without fresh *Miranda* warnings" after invocation) *and People v. Brown*, 171 Ill. App. 3d 993, 998 (1st Dist. 1988) (same) *with Nielson*, 187 Ill. 2d 289-90 (two-hour gap plus "two sets of fresh *Miranda* warnings" sufficient) *and People v. Welch*, 365 Ill. App. 3d 978 (5th Dist. 2005) (16-day gap plus *Miranda* sufficient); *see also People v. Savory*, 82 Ill. App. 3d 767, 773 (3d Dist. 1980) (lapse of time and new *Miranda* not sufficient; record must show that "defendant changed his mind and that there was some reason for his change of mind").

Further, the fact that Ward ultimately answered some of the detectives' questions after the detectives violated his right to remain silent does not change the analysis. *Flores*, 2014 IL App (1st) 121786, ¶ 38. "An accused's postrequest responses to further interrogation may not be used to cast retrospective doubt

on the clarity of the initial request itself." *Id., quoting Smith v. Illinois*, 469 U.S. 91, 98 (1984).

Finally, the State cannot prove that the improper admission of Ward's statements was harmless beyond a reasonable doubt. *People v. Patterson*, 217 Ill. 2d 407, 428 (2005); *see Chapman v. California*, 386 U.S. 18, 24 (1967). This is an "extremely high standard." *See People v. Magallanes*, 409 Ill. App. 3d 720, 747 (1st Dist. 2011). Ward's video statements were crucial State evidence, and the prosecutors repeatedly emphasized that evidence in closing arguments. (Supp.R. 2003-2008, 2049, 2056-2061). The State's evidence was not otherwise overwhelming, as argued at length above. *See* Argument I, *supra*. The students in the park lacked a sufficient opportunity to see the shooter for long enough to perceive sufficient details and create an accurate memory of his appearance, which explains why the students gave wildly differing descriptions of the shooter and made only tentative identifications of Ward and at least one other person. (Supp.R. 940-941, 963, 990-991, 1184, 1264, 1269, 1274, 1288, 1305, 1336, 1347-1348, 1361-1363, 1390, 1402-1403; 1415; R. 1097, 1188). Other inculpatory statements attributed to Ward were threatened out of gang members and recanted at trial. (R. 485-504, 562-597, 602-608, 1165-1166; Supp.R. 1126-1130). And no forensic evidence linked Ward to the shooting, as no shell casings, gun, or gunshot residue was found, and there were no fingerprints or DNA. (R. 882-883; Supp.R. 1449, 1473, 1513-1518, 1538-1539). The improper admission of Ward's alleged confession thus "might have contributed to [his] conviction[,]" and was not harmless beyond a reasonable doubt. *Patterson*, 217 Ill. 2d at 428; *see also People v. St. Pierre*, 122 Ill. 2d 95, 114 (1988) (confessions carry "extreme probative weight"; admitting an unlawfully obtained confession at trial "rarely is harmless error").

Because detectives did not scrupulously honor Ward's right to remain silent, any statements he made after he invoked that right, including those in the interrogation video clips the State presented at trial, should have been suppressed. *R.C.*, 108 Ill. 2d at 354-55; *Flores*, at ¶¶62-63. The trial judge's ruling to the contrary was erroneous, and the improper introduction of Ward's statement was not harmless beyond a reasonable doubt. *Patterson*, 217 Ill. 2d at 428. This Court should reverse and remand for a new trial at which Ward's post-invocation statements are not admissible. *Flores*, at ¶¶ 62-63.

III. The Trial Judge's Refusal To Allow Micheail Ward To Present Expert Witnesses On False Confessions and Police Interrogation Tactics Deprived Him of His Right To Present a Defense.

The inculpatory statement Micheail Ward ultimately gave to police was the key piece of the State's case against him. To counter that evidence, the defense sought to present two expert witnesses, Dr. Richard Ofshe and James Trainum, experts in the phenomenon of false confessions and police interrogation techniques, to identify and explain the tactics used in this case and how those tactics pressed Ward into confessing. But the trial judge refused to allow either expert to testify, rejecting the idea of expertise in the phenomenon of false confessions and the existence of the interrogation technique used in this case, the Reid Technique. Thus, Ward was unable to present useful information to the jury on a critical piece of evidence and effectively support his theory of defense. Reviewing this preserved issue for an abuse of discretion, this Court should reverse and remand for a new trial. *Thompson v. Gordon*, 221 Ill. 2d 414, 428-29 (2006); (C. 2185; R. 70-217, 524-525; Supp.R. 530-550).

The right to offer the testimony of witnesses "is, in plain terms, the right to present a defense." *People v. McLaurin*, 184 Ill. 2d 58, 88 (1998); *see Washington*

v. Texas, 388 U.S. 14, 19 (1967); U.S. Const., amends. VI, XIV; Ill. Const. 1970, art. I, §8 . Few rights are more fundamental than the right of an accused to present witnesses in his own defense; the right is an essential attribute of the adversary system. *Taylor v. Illinois*, 484 U.S. 400, 408 (1988). Among the witnesses a defendant may present are lay and expert witnesses, subject to demonstrating that the testimony will be relevant. *McLaurin*, 184 Ill. 2d at 88-89; *People v. Allen*, 376 Ill. App. 3d 511, 521 (1st Dist. 2007).

With regard to expert testimony, an individual may testify as an expert if his experience and qualifications afford him knowledge that is not common to laypersons, and where his testimony will aid the trier of fact in reaching its conclusions. *Thompson*, 221 Ill. 2d at 428; Ill. R. Evid. 702. "There is no predetermined formula for how an expert acquires specialized knowledge or experience and the expert can gain such through practical experience, scientific study, education, training or research." *People v. Miller*, 173 Ill. 2d 167, 186 (1996). Thus, "formal academic training or specific degrees are not required to qualify a person as an expert; practical experience in a field may serve just as well to qualify him," so an expert "need only have knowledge and experience beyond that of an average citizen." *Thompson*, 221 Ill. 2d at 429, *quoting Lee v. Chicago Transit Auth.*, 152 Ill.2d 432, 459 (1992), and *Miller*, 173 Ill. 2d at 186.

Similarly, a lay witness may testify to his opinions if the opinion testimony will help the jury understand his testimony or determine a fact at issue; the question is one of relevance. *People v. Owens*, 372 Ill. App. 3d 616, 622-23 (4th Dist. 2007). According to both Federal and Illinois Rules of Evidence 701, a lay witness may testify to an opinion where the opinion or inferences are "(a) rationally based on the perception of the witness, and (b) helpful to a clear understanding of the witness'

testimony or the determination of a fact in issue." Fed. R. Evid. 701; Ill. R. Evid. 701; *People v. Novak*, 163 Ill. 2d 93, 102 (1994); M. Graham, *Handbook of Illinois Evidence*, §701, at 515-16 (8th ed. 2004).

Here, the defense sought to present Dr. Richard Ofshe as an expert in false confessions, and James Trainum, a retired detective and expert on police interrogation tactics, to testify about police interrogation methods and the phenomenon of false confessions resulting from coercive interrogation tactics. (C. 1281-1391; R. 70-217, 524-525; Supp.R. 530-550). Detective John Halloran acknowledged that he lied to Ward about the evidence they had, overstating both the amount and certainty of the evidence linking him to the shooting, and saying it was acceptable for him to lie to Ward. (Supp.R. 1889, 1891-1893, 1897-1900, 1911, 1916). Both Halloran and Reiff acknowledged that they told Ward to express remorse so he would receive leniency, and to say it was an accident and "minimize" his responsibility. (Supp.R. 1882-1884, 1928-1933, 1948). The defense sought to illustrate through both experts that the detectives used a well-known technique known to produce false confessions, the Reid Technique, in questioning Ward, and that Ward's ultimate confession resulted from those tactics. (C. 1281-1391; R. 77-165, 205-210; Supp.R. 537-547). Through Dr. Ofshe in particular, the defense also sought to educate the jury about the phenomenon of false confessions generally, and then how the police used recognized tactics to induce Ward to perceive himself as being in a hopeless situation, resulting in a confession based on what Ward understood the detectives promised him would result in him receiving leniency. (C. 1291-1295; R. 77-165).

At the time of trial, Ofshe and Trainum both unquestionably qualified as experts, as both men had extensive training and experience in police interrogation

tactics, and additionally for Ofshe, education and studies in psychology and the phenomenon of false confessions, giving both men "knowledge and experience beyond that of an average citizen." *Thompson*, 221 Ill. 2d at 429; (C. 1394-1402; R. 70-76). Nevertheless, the trial judge refused to allow the defense to present either expert, even though Ofshe and Trainum's testimony on the question of whether Ward's confession resulted from coercive tactics known to produce false confessions would have assisted the jury in making conclusions on a crucial issue bearing directly on the State's proof and the defense theory of the case. (Supp.R. 547-550); *Thompson*, 221 Ill. 2d at 428; *Owens*, 372 Ill. App. 3d at 622.

The trial judge's refusal was based on practical and factual misunderstandings. First, the judge's skepticism that the Reid Technique – the interrogation technique employed by police in this case – even existed is plainly factually wrong. (Supp.R. 550; R. 102-103, 142, 167, 190-193); *see People v. Radford*, 2020 IL 123975, ¶80 (Neville, J., dissenting) (noting detective's admitted use of Reid Technique to interrogate defendant); *People v. Henderson*, 394 Ill. App. 3d 747, 749-50 (4th Dist. 2009) (detective explaining he was trained in Reid Technique). Indeed, the Reid Technique was developed in 1942 and popularized by a Chicago police officer shortly thereafter, and was widely taught and employed by law enforcement nationwide before social science research demonstrated that the technique leads to false confessions. *See* W. Kozinski, *The Reid Interrogation Technique and False Confessions: a Time for Change*, 16 Seattle J. For Soc. Just. 301 (Fall 2017) (analysis of Reid Technique, its history, and its problems); D. French, *The Cutting Edge of Confession Evidence; Redefining Coercion and Reforming Police Interrogation Techniques In the American Criminal Justice System*, 97 Tex. L. Rev. 1031, 1040-45 (April 2019) (describing well-established Reid Technique).

The judge was also wrong to flatly reject Ofshe's expertise in favor of his personal belief that the jury did not need "a doctor" to tell them whether the confession was true or not. (R. 548-550). On the contrary, jurors are not equipped to make that determination, and they need social science to show them what coercive interrogation tactics are and how they increase the risk of false confessions; it is not a matter of everyday knowledge. French, 97 Tex. L. Rev. at 1045 ("The social sciences ... have shown how coercive interrogation techniques ... increase the risk of false confessions"); *see also Dassey v. Dittman*, 877 F.3d 297, 332 (7th Cir. 2017) (Rovner, J., dissenting) (legal authority permitting police deception during interrogations was "born in an era when the human intuition that told us that 'innocent people do not confess to crimes," but social science research has shown that this "fifty-year-old understanding of human behavior" is "unequivocally incorrect"). The trial judge's insistence to the contrary, which prevented Ward from proffering Trainum and Ofshe as experts, was wrong. *Thompson*, 221 Ill. 2d at 429; French, 97 Tex. L. Rev. at 1045.

And, the judge's errors in refusing to allow Ofshe or Trainum to testify was not harmless. Ward's statement was critical evidence in a case otherwise based on questionable, tentative identifications and unbelievable, largely recanted witness statements. *See* Argument I, *supra*; *People v. Miller*, 2013 IL App (1st) 110879, ¶82 (confessions are "strongest possible evidence" against defendant; effect described as "incalculable"). Without Ofshe and Trainum's testimony explaining interrogation procedures and the phenomenon of false confessions, and Ofshe's opinion that Ward's confession resulted from coercive tactics known to produce false confessions, Ward was unable to fully present his defense and rebut both the inculpatory statement itself and the testimony of Detective Reiff, who said he believed 90%

of what Ward said in his ultimate confession. (Supp.R. 1925, 1946, 1948). The State's evidence was not otherwise overwhelming, as it was based on recanted statements from other Suwu gangbangers and "tentative" identifications from eyewitnesses who had minimal opportunity to see the shooter, who the witnesses all described differently. *See* Argument I, *supra*. Thus, testimony from Ofshe and Trainum rebutting the confession and Reiff's opinion about it would have played an important role in the jury's deliberations.

The trial judge in this case abused his discretion when he refused to allow the defense to present expert testimony from Dr. Ofshe and James Trainum on police interrogation techniques and the phenomenon of false confessions. The judge frustrated Ward's ability to call witnesses in his own defense, in turn preventing him from effectively rebutting key State evidence, denying him a fair trial. This Court should reverse and remand for a new trial.

IV. The Trial Judge's Failure To Ask Any Potential Jurors If They Accepted the Principles Set Forth In Supreme Court Rule 431(b) Requires Reversal and Remand For a New Trial.

Illinois Supreme Court Rule 431(b) imposes a duty on the trial judge to ensure all potential jurors understand and will apply the four fundamental principles of criminal law. *People v. Zehr*, 103 Ill.2d 472 (1984); Ill. S. Ct. R. 431(b); *People v. Stevens*, 2018 IL App (4th) 160138, ¶21. Compliance with Rule 431(b) requires that the judge ascertain both understanding and acceptance of all four principles. *People v. Wilmington*, 2013 IL 112938, ¶32. In this case, when the trial judge questioned the venire, he failed to ask if the potential jurors accepted all four of the principles. (Supp.R. 703-704, 843). Thus, the judge failed to comply with Rule 431(b), and, reviewing this issue *de novo*, this Court should reverse Ward's convictions and remand for a new trial because the evidence was at most closely

balanced. *People v. Thompson*, 238 Ill.2d 598, 606 (2010).

Prior to the *voir dire* of the individual panel members, the trial judge advised the entire group of potential jurors about the principles of law set forth in Illinois Supreme Court Rule 431(b). (Supp.R. 692). Then, when questioning the first set of potential jurors, the judge asked, after reciting each principle, if the jurors "understand" and "take issue with that [principle]?" (Supp.R. 442, 703-704). To the second panel of potential jurors, the judge asked only if the jurors understood each of the principles. (Supp.R. 843).

The "clear and unambiguous" language of Rule 431(b) requires a specific question and response process. *Thompson*, 238 Ill.2d at 607. Compliance with the rule requires asking whether the potential jurors both **understand and accept** each of the enumerated principles." *Id.*, *emphasis added*. Here, the judge did not strictly comply when he failed entirely to ask any of the potential jurors if they accepted any of the principles. (Supp.R. 703-704, 843); *Wilmington*, 2013 IL 112938, ¶¶28, 32 (asking if potential jurors "disagree[d]" with principles inadequate). Thus, the judge did not strictly comply with Rule 431(b) in his *voir dire* of the jury.

Because the language of Rule 431(b) is "clear and unambiguous," deviating from the "precise language" of the rule is error. *People v. Stevens*, 2018 IL App (4th) 160138, ¶¶25-26, *quoting People v. McGuire*, 2017 IL App (4th) 150695, ¶35. For compliance purposes, it does not matter whether the judge explained all four of the principles if he then did not ascertain the jurors' understanding and acceptance of each of the principles. *People v. Bell*, 2020 IL App (4th) 170804, ¶107.

Ward did not object to the impanelment of a jury not properly questioned pursuant to Rule 431(b) and failed to include the issue in his post-trial motion, but this Court should review the issue as first-prong plain error. Ill. S. Ct. R. 615(a);

People v. Sebby, 2017 IL 119445, ¶52 (Rule 431(b) error qualifies as first-prong plain error in closely-balanced case). To determine whether the evidence at trial was close, a reviewing court must evaluate the totality of the evidence and conduct a "qualitative, commonsense assessment" of it. *Sebby*. at ¶53. This inquiry "involves an assessment of the evidence on the elements of the charged offense or offenses, along with any evidence regarding the witnesses' credibility." *Id.* When error occurs in a close case, a reviewing court errs on the side of fairness, so as not to convict an innocent person. *People v. Naylor*, 229 Ill.2d 584, 605-06 (2008).

The evidence in this case was at least closely balanced, if not insufficient to sustain Ward's convictions. *See* Argument I, *supra*. Eyewitnesses gave wildly varying descriptions of the shooter, likely because none had a sufficient opportunity to view the shooter, and their ability to perceive was also affected by weapon focus and the stressful nature of the situation. (R. 1112-1118, 1140; Supp.R. 1183-1184, 1204-1206, 1264, 1277, 1288, 1305, 1327, 1335-1336, 1347-1348, 1362-1363, 1390, 1400, 1414-1415). Ernest Finner, Demetrius Tucker, and Jarod Randolph all disavowed their statements implicating Ward, and had been threatened with parole and probation violations if they did not go along with what police wanted. (R. 485-504, 509-521, 562-608, 611-615, 618; Supp.R. 1049-1111, 1125-1146). And Ward's confession itself is questionable, given the tactics used to obtain it and the fact that he appeared to be describing a different, larger park, as well as individuals who were not at Harsh Park that day. (Supp.R. 940-941, 962-963, 990-991, 1933-1938). Given the varying descriptions and circumstances of the shooting, as well as the recantations and contradictions, the State's evidence was not credible. *See People v. Smith*, 185 Ill. 2d 532, 542-46 (1999) (contradictions diminish credibility). Thus, the evidence was at least closely balanced. *Sebby*, at ¶¶62, 73.

In sum, the trial judge unquestionably failed to comply with Supreme Court Rule 431(b), and the evidence at trial was closely balanced, turning on the credibility of the witnesses, who all gave conflicting accounts of the events. *Sebby*, at ¶¶60-61; *People v. Richardson*, 2013 IL App (1st) 111788, ¶¶27-34. Accordingly, this Court should reverse Ward's convictions and remand for a new trial. *Sebby*, at ¶72.

V. The Prosecutor's Pervasive Denigrations of Defense Counsels, Their Arguments, and Their Expert Witness, and Repeated Misstatements of the Evidence Deprived Ward of a Fair Trial.

"You can't make chicken salad out of chicken shit and that's what they had to do in this case." (Supp.R. 2048). This was the theme of Assistant State's Attorney Brian Holmes's rebuttal closing argument at Micheail Ward's jury trial. Holmes consistently denigrated the defense – the theory, the evidence and arguments, and defense counsels themselves, who he accused of having "senioritis." (Supp.R. 2051-2052). That is, instead of being fair to Ward and simply presenting and arguing the evidence, the prosecutor engaged in improper tactics to distract, provoke, and confuse the jurors about the actual issues at trial, depriving Ward of the fair trial to which he was entitled. Reviewing this issue *de novo*[3], this Court should reverse and remand for a new trial. *People v. Wheeler*, 226 Ill. 2d 92, 121 (2007).

Every criminal defendant has the right to a fair trial untainted by bias or prejudice caused by irrelevant evidence or improper argument. U.S. Const., amend. XIV; Ill. Const. 1970, art. I, §2; *People v. Blue*, 189 Ill. 2d 99, 138-40 (2000).

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[3]The Illinois Supreme Court has applied both *de novo* and abuse of discretion standards to claims of prosecutorial misconduct. *See People v. Land*, 2011 IL App (1st) 101048. Here, the transcript indisputably shows that the prosecutor made the remarks in question, so there are no factual or credibility issues, leaving only the application of law to facts; this Court's review should be *de novo*. *People v. Sims*, 192 Ill. 2d 592, 615 (2000). Under either standard, the prosecutor's remarks were improper and prejudicial.

Indeed, though a criminal trial is an adversarial proceeding, prosecutors have a duty as public officials to safeguard a defendant's constitutionally-protected right to a fair trial. U.S. Const., amend XIV; Ill. Const.1970, art. 1, §2; *People v. Sales*, 151 Ill. App. 3d 226, 233 (1st Dist. 1986). Prosecutorial misconduct that deliberately undermines the process by which citizens determine a defendant's guilt must not be tolerated. *Wheeler*, 226 Ill. 2d at 122. Though the State may comment on the "persuasiveness of the defense theory of the case," prosecutors must avoid accusing defense counsel of wrongdoing. *People v. Holmon*, 2019 IL App (5th) 160207, ¶¶57, 58. "Unless predicated on evidence that counsel behaved unethically, it is improper for a prosecutor to accuse defense counsel of attempting to create reasonable doubt by confusion, misrepresentation, or deception." *People v. Johnson*, 208 Ill. 2d 53, 82 (2003); *see also People v. Herrera*, 257 Ill. App. 3d 602, 619 (1st Dist. 1994) (improper to characterize defense counsel as unethical). "Comments disparaging the integrity of defense counsel and implying that the defense presented was fabricated at the direction of counsel have consistently been condemned." *People v. Starks*, 116 Ill. App. 3d 384, 394 (1st Dist. 1983). And although comments based on facts in evidence or on reasonable inferences drawn therefrom are within the scope of proper argument, prosecutors may neither make comments "calculated solely to arouse the prejudice and inflame the passions of the jury," nor misstate the law or facts of the case. *People v. Lyles*, 106 Ill. 2d 373, 412 (1985); *People v. Carbajal*, 2013 IL App (2d) 111018, ¶29.

Despite his duty as a public official to safeguard Ward's constitutionally-protected right to a fair trial, the prosecutor in rebuttal closing argument repeatedly denigrated the defense and misstated critical facts. *Sales*, 151 Ill. App. 3d at 233. As quoted above, Holmes characterized the defense as trying to "make chicken

salad out of chicken shit." (Supp.R. 2048). He elaborated, saying that the defense was "when everything is against you, you get up there and throw it all against the wall and you hope someone will believe it," (Supp.R. 2046), and "It's the last passion of the scoundrel, let's blame the police," (Supp.R. 2047). The prosecutor went on to claim that the defense attorneys' arguments were "disingenuous" and "ridiculous" and that they had "denigrate[d]" the case. (Supp.R. 252, 2052, 2054, 2058-2059). And Holmes did not stop there, as he directly attacked defense counsels, accusing them of having "a bad case of senioritis" repeatedly; he was perhaps encouraged by the judge's repeated personal attacks on the lead defense attorney throughout pretrial proceedings and the trial itself, such as saying she suffered from "intemperance," baselessly accusing her of "playing games," exclaiming, "You're unbelievable" and calling her "a terrible failure" for amending her discovery answer, though the judge's own misconduct is no excuse for the State's. (Supp.R. 359, 527, 579-590, 605, 1135, 1831, 2051-2052); *see also Peoplev. Mitchell*, 228 Ill. App. 3d 167, 171 (1st Dist. 1992) (judge's hostility and disparagement of defense counsel show bias); *People v. Mpulamasaka*, 2016 IL App (2d) 130703, ¶116 (judge has duty to maintain order in courtroom and to restrain prosecutorial misconduct).

Yet defense counsel here did nothing more than try to convince the jury that there was a reasonable doubt of Ward's guilt. The prosecutor's comments were needlessly denigratory towards defense counsel and the defense arguments. There is no other way to interpret these remarks than as an unwarranted attack on counsel's ethics, and they constituted error. *Herrera*, 257 Ill. App. 3d at 619; *Johnson*, 208 Ill. 2d at 82; *People v. Emerson*, 97 Ill. 2d 487, 498 (1983) (improper for prosecutor to distract jury from evidence by attacking defense counsel).

With no reason to be deterred, as the judge sustained only one of myriad

defense objections, Holmes attacked the defense evidence as well. (Supp.R. 2046-2048, 2058, 2064-2065); *Mpulamasaka*, at ¶110 (overruling objections gives comments appearance of propriety). Holmes specifically attacked the defense expert, Dr. Geoffrey Loftus, denigrating him and misstating his testimony. The ASA accused the defense of speculating, "Want to talk about speculation? The million dollar man, Dr. Loftus." (Supp.R. 2048). Holmes went further, saying that the defense "mustn't have bought the bonus package for the doctor because he wouldn't go talk to them." (Supp.R. 2049). Attacking a well-respected scholar for accepting payment for his services – a perfectly commonplace occurrence – is unquestionably improper. *Mpulamasaka*, at ¶110; *People v. Moss*, 205 Ill. 2d 139, 170-71 (2001).

Holmes continued, further denigrating Loftus's testimony by misstating it, complaining that Loftus "never spoke to any of the witnesses. They want to talk about a doctor. You know when you go to the doctor, he looks at the patient before he renders an opinion," (Supp.R. 2048), and "if you really want to find out what was going on in someone's mind . . . go and talk to them," (Supp.R. 2049). Attacking Loftus for not interviewing witnesses misstated Loftus's testimony and ignored the State's own successful pretrial attempt to limit Loftus's testimony — at the State's request, the judge limited Loftus's testimony ***so he could not talk about the specifics of this case***. (Supp.R. 612, 673, 2048-2049; R. 230-240; C. 1722-1729). Moreover, Loftus explained that interviewing the witnesses was unnecessary, because he was testifying about how memories are formed, not about whether any particular witness in this case had a believable memory or not. (R. 1093-1130, 1144). The prosecutor plainly misrepresented Loftus's testimony; his comments were clearly error. *Mpulamasaka*, at ¶110 (misrepresenting expert testimony error); *Carbajal*, at ¶29 (misstating evidence improper).

Holmes misstated other facts, too. Early on, he told the jury that there were no lies involved in the police interrogation of Ward. (Supp.R. 2046). In fact, Detectives Halloran and Reiff both lied to Ward during the interrogations; Halloran admitted doing so. (Supp.R. 1889-1893; C. 625, 621-622, 634, 650; St. Ex. 125A, 126, 129). Holmes similarly said none of the witnesses identified anyone other than Ward as the shooter, when in fact Hansberry, Hutson, and Caldwell all said a second person looked similar to the shooter, and their identifications of Ward were tentative. (Supp.R. 1198, 1268, 1277, 1297, 1303, 1327, 1330, 1354, 1393, 1594, 1631-1634, 2046, 2053). The prosecutor's arguments on these points plainly misstated facts, and were improper. (Supp.R. 2046, 2053); *Carbajal*, at ¶29.

Finally, ASA Holmes told the jury about his personal trip to the 9/11 Memorial, and quoted a poem inscribed on the tribute. (Supp.R. 2064-2065). The prosecutor then urged the jury to follow the dictates of the quotation, and "write the final chapter of [Pendleton's] life and entitle it Justice." (Supp.R. 2065). The prosecutor relating his own personal experience was improper, as was evoking images of a terrorist attack. Such comments only served to distract the jury from the ultimate issue and inflame the jurors' passions. *People v. Shief*, 312 Ill. App. 3d 673, 679 (1st Dist. 2000) (error to discuss personal experience in closing); *United States v. Moore*, 375 F.3d 259, 264 (3d Cir. 2004) (error to invoke 9/11 terrorists). Holmes's comments about his visit to the 9/11 memorial were improper and prejudicial. *Shief*, 312 Ill. App. 3d at 679.

Even one error that endangers the integrity of the judicial process is sufficient to justify reversing a conviction obtained improperly. *See People v. Young*, 347 Ill. App. 3d 909, 926 (1st Dist. 2004). Even if this Court were to conclude that each instance of improper conduct alone does not require reversal, the cumulative

effect of the instances of misconduct requires reversal: "Where there are numerous instances of improper prosecutorial remarks, a reviewing court may consider their cumulative impact rather than assessing them in isolation." *People v. Abadia*, 328 Ill. App. 3d 669, 684 (1st Dist. 2001). Here, the prosecutor's misconduct pervaded the rebuttal closing argument, creating a pattern of unfairness and denying Ward a fair trial. *Blue*, 189 Ill. 2d at 139; *Mpulamasaka*, at ¶¶110-119.

Critically, the evidence in this case was not strong. *See* Argument I, *supra*. The eyewitnesses in this case lacked a sufficient opportunity view the offender, as the shooting happened very quickly and was very stressful, which may explain the highly variant descriptions of the shooter, as well as the tentative nature of the identifications some of those witnesses ultimately made. (R. 1112-1118, 1140; Supp.R. 1183-1184, 1204-1206, 1264, 1277, 1288, 1305, 1327, 1335-1336, 1347-1348, 1362-1363, 1390, 1400, 1414-1415). The witnesses who claimed Ward adopted Williams's statements immediately after the shooting implicating Ward and that Ward expressed remorse all disavowed those statements, and said police had threatened them with parole and probation violations. (R. 485-504, 509-521, 562-608, 611-615, 618; Supp.R. 1049-1111, 1125-1146). Ward's confession itself is not believable, as he confessed only after detectives used coercive tactics to make him feel hopeless; Ward also described a different park and people who were not at Harsh Park that day. (Supp.R. 940-941, 962-963, 990-991, 1933-1938). Given the inconsistent descriptions and circumstances of the shooting, as well as the recantations and contradictions, the State's evidence was not credible.

Moreover, the prejudicial effect of the prosecutor's conduct was exacerbated by the fact that defense counsel could not address the improper comments made during rebuttal. (Supp.R. 2045-2065); *People v. Green*, 209 Ill. App. 3d 233, 245

(1st Dist. 1991) (prejudicial effect of prosecution's improper comments compounded by fact they were made during rebuttal, depriving defense of opportunity to address them). And although there is no way to determine to what extent the prosecutor's remarks influenced the jury's guilty verdict, in such a closely-balanced case, this Court should not presume that the jury was unaffected by the improper comments, and must resolve any doubt as to the comments' harmful effect in Ward's favor. *People v. Weinstein*, 35 Ill. 2d 467, 471-72 (1966).

The prosecutor's pervasive improper comments in rebuttal argument require a new trial: denigrating defense counsels, a key defense witness, and the defense theory of the case, accusing the defense of denigrating the evidence, and misstating the evidence violated the prosecutors' ethical duty to safeguard Ward's rights and to ensure that he was afforded a fair trial. That is, the prosecutors' misconduct deprived Ward of a fair trial, and this Court should remand for a new trial.

VI. The State Violated Micheail Ward's State Constitutional Right Against Unreasonable Seizures By Arresting Him Pursuant To an Investigative Alert.

The Illinois constitution has always required a determination of probable cause made by a neutral magistrate and supported by an affidavit to make an arrest. Ill. Const. 1870, art. I, §6; Ill. Const. 1970, art. I, §6. Chicago police violated that requirement by making a probable cause determination themselves in an unsworn "investigative alert," and arresting Micheail Ward based on that alert. This Court held in *People v. Bass*, 2019 IL App (1st) 160640, *appeal allowed*, No. 125434, that the investigative alert process violates the Illinois constitution. Under *Bass,* Ward's arrest violated the Illinois constitution, and the trial judge erred in denying his motion to quash arrest and suppress evidence. This Court should suppress the fruits of Ward's illegal arrest, reverse his convictions, and remand

for a new trial.

A trial judge's ruling on a motion to quash and suppress involves mixed questions of fact and law, and this Court reviews factual findings against the manifest weight of the evidence and the ultimate ruling *de novo*. *People v. Stehman*, 203 Ill. 2d 26, 33 (2002). This issue is preserved. (C. 165-168, 2183; Supp.R. 155); *People v. Redmond*, 341 Ill. App. 3d 498, 506-07 (1st Dist. 2003).

Both the United States and Illinois Constitutions require warrants issued on probable cause and supported by affidavit. U.S. Const., amend. IV; Ill. Const. 1970, art. I, §6; *Wong Sun v. United States*, 371 U.S. 471, 481-82 (1963). Although Illinois courts have previously approved warrantless arrests made pursuant to an investigative alert, this Court recently condemned that practice under the state constitution as a substitute for the finding of a judge. *Bass*, at ¶¶62,71; *see also People v. Hyland*, 2012 IL App (1st) 110966, ¶45 (Salone, J., concurring, joined by Neville, J.) (expressing concern that investigative alert used as "end run" around warrant requirement); *People v. Starks*, 2014 IL App (1st) 121169, ¶77 (same); *but see People v. Braswell*, 2019 IL App (1st) 172810, ¶37 (declining to follow *Bass*); *People v. Thornton*, 2020 IL App (1st) 170753, ¶46 (same); *People v. Simmons*, 2020 IL App (1st) 170650, ¶64 (same); *People v. Bahena*, 2020 IL App (1st) 180197, ¶64 (same).

Here, Ward was arrested pursuant to the same kind of investigative alert condemned in *Bass*: Detective Casale testified that, based on police investigation, he and Sergeant Lopez "decided" they had probable cause to arrest Ward. (Supp.R. 198-199). They did not seek an arrest warrant. (Supp.R. 223). The State obtained significant evidence from Ward's arrest, most notably an inculpatory statement Ward gave after several hours of interrogation, which was published to the jury

and referred to in the State's closing arguments. (Supp.R. 1851-1864, 1921-1924; St. Ex. 125A, 125B, 125C, 129). Ward was also tentatively identified as the shooter in lineups following his arrest. (Supp.R. 1190, 1268-1269, 1296-1298, 1330, 1354). And, the State collected Ward's cellphone, which was used to broadly track Ward's movements around the time of the shooting, as well as his sweatshirt, identified as similar to what the shooter was wearing by at least one witness. (R. 436-437, Supp.R. 1019, 1746-1770, 1859, 1996, 1998-2002, 2003-2008, 2058-2063).

Given the substantial evidence obtained as a result of Ward's illegal arrest, the State cannot establish that this error was harmless beyond a reasonable doubt. *See People v. Miller*, 2013 IL App (1st) 110879, ¶82 ("confession is the most powerful piece of evidence the State can offer, and its effect is incalculable"); *People v. Patterson*, 217 Ill. 2d 407, 428 (2005) (State bears burden to prove beyond reasonable doubt that constitutional violation "did not contribute to the verdict obtained"). This Court should reverse and remand for a new trial. *Bass*, at ¶¶82, 97.

VII. Alternatively, This Court Should Remand To Determine Whether Micheail Ward's 84-Year *de facto* Life Sentence Violates the Federal and Illinois Constitutions As Applied To Him.

Micheail Ward was 18 years and five months old at the time of the shooting in this case. (Supp.R. 2147). Statutes required the trial judge to impose a minimum of 45 years in prison for murder, to be served without good-conduct credit, plus a minimum of six for aggravated battery with a firearm. 730 ILCS 5/5-4.5-20(a)(1), 25(a); 730 ILCS 5/5-8-1(a)(1)(d)(iii). The mandatory minimum for murder would not apply – and would be unconstitutional – if Ward had been just six months younger at the time of the offense. 730 ILCS 5/5-4.5-105(b); *People v. Buffer*, 2019 IL 122372, ¶40. Defense counsel noted Ward's young age, but did not argue that the federal and Illinois Constitutions forbade the application of Illinois sentencing

statutes to Ward in light of his personal situation and history. (Supp.R. 2181-2186). The trial judge noted only that Ward was "young." (Supp.R. 2207).

But while the special constitutional protections for sentencing of young defendants set forth in *Miller v. Alabama*, 567 U.S. 460 (2012), and subsequent cases do not categorically apply to defendants over 17, the Illinois Supreme Court has specifically held it an unresolved question whether they apply to particular older defendants based on their individual circumstances. *People v. Harris*, 2018 IL 121932, ¶ 46. An appellate court is not in a position to reach a determination whether constitutional protections apply to defendants over the age of 17, but within or below their mid-20s, without the relevant issues first being addressed in an evidentiary hearing in which the trial judge makes findings on how "the evolving science on juvenile maturity and brain development that helped form the basis for the *Miller* decision" applies to the defendant. *Harris*, at ¶46. Thus, if this Court does not reverse Ward's convictions under the above issues, then in the interests of the judicial efficiency, rather than waiting for a post-conviction petition, this Court should simply remand this case to the circuit court for an evidentiary hearing contemplated by *Harris*.

The federal Constitution forbids the imposition of "cruel and unusual punishments." U.S. Const., amend. VIII. The Illinois Constitution requires that "[a]ll penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship." Ill. Const. 1970, art. 1, §11. A sentence violates the proportionate penalties clause where "the punishment for the offense is cruel, degrading, or so wholly disproportionate to the offense as to shock the moral sense of the community." *People v. Miller*, 202 Ill. 2d 328, 338 (2002). Whether a punishment shocks the moral sense of the

community is based on an evolving standard of decency that marks the progress of a maturing society. *Id., quoting Trop v. Dulles*, 356 U.S. 86, 101 (1958). Thus, "as our society evolves, so to do our concepts of elemental decency and fairness which shape the 'moral sense' of the community." *Miller*. 202 Ill. 2d at 339.

The Eighth Amendment and proportionate penalties clauses mandate particular procedures and limits on sentencing young people. In *Miller v. Alabama*, 567 U.S. 460 (2012), the Supreme Court held that common sense and developing neuropsychology show that young offenders have "diminished culpability and greater prospects for reform" than adults, rendering life sentences uniquely inappropriate for them, including lack of maturity and responsibility, increased vulnerability to external pressures, and other less fixed traits. *Miller*, 567 U.S. at 471-72.

While *Miller* held that the Eighth Amendment forbids imposing a mandatory term of life in prison without parole on a defendant under 18 years of age at the time of the crime, *id.* at 479, the Illinois Supreme Court has recognized that the logic of *Miller* reaches farther than that specific holding. *People v. Holman*, 2017 IL 120655, ¶38. A judge may not impose a life sentence on an under-18 defendant without first considering the particular circumstances of youth relevant to that defendant and determining, "that the defendant's conduct showed irretrievable depravity." *Id.* ¶46. Further, a "life sentence" for purposes of *Miller* includes a prison term of longer than 40 years. *People v. Buffer*, 2019 IL 122327, ¶40.

Though *Miller* protections do not categorically extend to young adults over 18 – emerging adults – but the supreme court has left as-applied challenges open. *People v. Harris,* 2018 IL 121932, ¶¶53-61. The *Harris* court held that a defendant must develop a record for such a claim, with the trial judge hearing evidence and making findings "about how [evolving neuropsychology] applies to the circumstances

of defendant's case, the key showing for an as-applied constitutional challenge." *Harris*, 2018 IL 121932, ¶45. "[B]asic information about [the] defendant, primarily from the presentence investigation report," is not sufficient; the record must show that the judge made "findings on the critical facts needed to determine whether *Miller* applies to [the] defendant." *Harris*, 2018 IL 121932, ¶46.

Here, the judge did not hold the type of evidentiary hearing contemplated by the supreme court in *Harris*, despite Ward's age of 18 years and five months. The judge heard victim impact statements and testimony from Ward's mother and grandmother; there was also the presentence investigation report. (Supp.R. 2125-2186; Sec.C. 4-13). Defense counsel did not present any neuropsychology source material or ask the judge to take judicial notice of any sources, or provide detail on how that material would apply to any aspect of Ward's case other than his raw age. (Supp.R. 2181-2186). Nor did the judge make any effort to determine whether *Miller* protections were required for Ward other than to note that he was "young," and did not apply any of the *Miller* analysis in his findings. (Supp.R. 2198-2208). Given that statutory minimum term of 51 years in prison was already a *de facto* life sentence, a judge applying *Miller* would have found the relevant sentencing statutes unconstitutional as applied absent a finding that Ward's "conduct showed irretrievable depravity." *Holman*, 2017 IL 120655, ¶46.

Under *Harris*, an emerging adult claim cannot be properly raised on direct appeal unless an evidentiary hearing was held below; no such hearing took place here. *Harris*, 2018 IL 121932, ¶¶ 44-46; (Supp.R. 2124-2208). However, instead of delaying a hearing until Ward files a post-conviction petition, this Court should remand for such a hearing here, if it denies relief on all other claims; *Harris* did not foreclose such a remedy. *Harris*, at ¶¶47-48. The State has endorsed such

a procedure in *People v. House*, 2020 IL 125124. State PLA, at 7-8. Accordingly, if it otherwise denies relief, this Court should remand for an evidentiary hearing contemplated by *Harris* at which the judge can determine whether Ward bore a "lack of maturity and an underdeveloped sense of responsibility," such that the traits that led to the shooting were "less fixed" than that of a person with a fully developed adult brain. *Miller,* 567 U.S. at 471. *Harris*, at ¶¶47-48.

CONCLUSION

For the foregoing reasons, Micheail Ward, Defendant-Appellant, respectfully requests that this Court reverse his convictions outright under Issue I, reverse his convictions and remand for a new trial pursuant to Issues II-VI, or vacate his sentences and remand for a new sentencing hearing under Issue VII.

Respectfully submitted,

DOUGLAS R. HOFF
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COUNSEL FOR DEFENDANT-APPELLANT

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 58 pages.

/s/ Jennifer L. Bontrager
JENNIFER L. BONTRAGER
Assistant Appellate Defender

APPENDIX TO THE BRIEF

INDEX TO THE RECORD

Common Law Record ("C") **Page**

Supplement to the Common Law Record ("SUP C 3 -SUP C21")

Supplement to the Report of Proceedings ("SUP R 22 - SUP R 2231")

Supplement to the Report of Proceedings ("SUP R 3-SUP R 2212")

129627

IN THE CIRCUIT COURT OF COOK COUNTY

PEOPLE OF THE STATE OF ILLINOIS)
V.)
MICHEAIL WARD)
Defendant

CASE NUMBER 13CR0524201
DATE OF BIRTH 08/09/93
DATE OF ARREST 02/09/13
IR NUMBER 2062909 SID NUMBER 016631191

ORDER OF COMMITMENT AND SENTENCE TO ILLINOIS DEPARTMENT OF CORRECTIONS

The above named defendant having been adjudged guilty of the offense(s) enumerated below is hereby sentenced to the Illinois Department of Corrections as follows:

Count	Statutory Citation	Offense	Sentence	Class
035	720-5/9-1(a)(1)	MURDER/INTENT TO KILL/INJURE	YRS. 070 MOS.00	M
	and said sentence shall run concurrent with count(s) ___ ___ ___ ___			
150	720-5/12-3.05(e)(1)	AGG BATTERY/DISCHARGE FIREARM	YRS. 014 MOS.00	X
	and said sentence shall run consecutive to count(s) 001 ___ ___ ___			
___	_____	_____	YRS. ____ MOS. ___	___
	and said sentence shall run (concurrent with)(consecutive to) the sentence imposed on:			
___	_____	_____	YRS. ____ MOS. ___	___
	and said sentence shall run (concurrent with)(consecutive to) the sentence imposed on:			
___	_____	_____	YRS. ____ MOS. ___	___
	and said sentence shall run (concurrent with)(consecutive to) the sentence imposed on:			

On Count ___ defendant having been convicted of a class _ offense is sentenced as a class x offender pursuant TO 730 ILCS 5/5-5-3(C)(8).

On Count ___ defendant is sentenced to an extended term pursuant to 730 ILCS 5/5-8-2.

The Court finds that the defendant is entitled to receive credit for time actually served in custody for a total credit of 2166 days as of the date of this order Defendant is ordered to serve 0003 years Mandatory Supervised Release.

IT IS FURTHER ORDERED that the above sentence(s) be concurrent with the sentence imposed in case number(s) _____ _____ _____ _____
AND: consecutive to the sentence imposed under case number(s)
_____ _____ _____ _____ _____

IT IS FURTHER ORDERED THAT COUNT 35 DEFT IS SENTENCED TO 45YRS PLUS 25YRS AS PERSON ___ WHO DISCHARGED FIREARM; COUNT 15 IS CONSECUTIVE TO COUNT 35; SENTENCE TOTAL__ IS 84 YEARS; M/S NOLLE ALL OTHER COUNTS_____

IT IS FURTHER ORDERED that the Clerk provide the Sheriff of Cook County with a copy of this Order and that the Sheriff take the defendant into custody and deliver him/her to the Illinois Department of Corrections and that the Department take him/her into custody and confine him/her in a manner provided by law until the above sentence is fulfilled.

DATED JANUARY 14, 2019
CERTIFIED BY P GLIKIS
DEPUTY CLERK
VERIFIED BY _____

ENTERED: 01/14/19
JUDGE NICHOLAS FORD-1756
JAN 14 2019
DOROTHY BROWN JUDGE: FORD, NICHOLAS R. 1756
CLERK OF THE CIRCUIT COURT OF COOK COUNTY, IL
DEPUTY CLERK

CCG N305
C 2315

TO THE APPELLATE COURT OF ILLINOIS
IN THE CIRCUIT COURT OF COOK COUNTY
CRIMINAL DIVISION

PEOPLE OF THE STATE OF ILLINOIS)
)
) **Case No:** **13 CR 524201**
vs.) **Judge:** **FORD**
) **Attorney:** **KOEHLER**
)

MICKIEAL WARD

NOTICE OF APPEAL

An Appeal is taken from the order of judgment described below:

APPELLANT'S NAME: Mickieal Ward
APPELLANT'S ADDRESS: Dept. of Corrections
APPELLANT'S ATTORNEY: Office of the State Appellate Defender
ATTORNEY'S ADDRESS: 203 North LaSalle Street, 24th Floor, Chicago, IL 60601
ATTORNEY'S EMAIL: 1stDistrict@osad.state.il.us
OFFENSE: Murder, Aggravated Battery x 2
JUDGMENT: Guilty Murder
DATE OF JUDGMENT: 8/22/2018
SENTENCE:

Julie Koehler
APPELLANT/APPELLANT'S ATTORNEY

VERIFIED PETITION FOR REPORT OF PROCEEDINGS COMMON LAW RECORD AND FOR APPOINTMENT OF COUNSEL ON APPEAL

Under Supreme Court Rules 605-608, appellant asks the Court to order the Official Court Reporter to transcribe an original and copy of the proceedings, file the original with the Clerk and deliver a copy to the Appellant; order the Clerk to prepare the Record on appeal, and to appoint the State Appellate Defender as counsel on appeal. Appellant, being duly sworn, says that at the time of his conviction he was and is now unable to pay for the Record or to retain counsel on appeal.

Julie Koehler
APPELLANT/APPELLANT'S ATTORNEY

ORDER

IT IS ORDERED that the State Appellate Defender be appointed as counsel on appeal and the Record and Report of Proceedings be furnished to appellant without cost, within 45 days of receipt of this Order.
Dates to be Transcribed: 1/12/15, 3/22/16, 5/10/16, 6/16/16, 7/12/16, 2/13/16, 1/23/17, 2/23/17, 6/6/17, 6/27/17, 7/19/17, 8/28/17, 12/20/17, 3/29/18, 6/18/18, 7/11,/18, 7/27/18, 8/13/18, 8/14/18, 8/15/18, 8/16/18, 8/17/18, 8/20/18, 8/21/18, 8/22/18, 1/14/19

ENTERED
JUDGE NICHOLAS FORD-1756
JAN 14 2019
DOROTHY BROWN
CLERK OF THE CIRCUIT COURT
OF COOK COUNTY, IL
DEPUTY CLERK

DATE: 1-14-2019 ENTER:

JUDGE

No. 1-19-0364

IN THE

APPELLATE COURT OF ILLINOIS

FIRST JUDICIAL DISTRICT

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, -vs- MICHEAIL WARD, Defendant-Appellant.	)	Appeal from the Circuit Court of Cook County, Illinois No. 13 CR 5242 Honorable Nicholas Ford, Judge Presiding.

NOTICE AND PROOF OF SERVICE

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

Mr. Micheail Ward, Register No. Y34150, Pontiac Correctional Center, P.O. Box 99, Pontiac, IL 61764

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 March 12, 2021, the Brief and Argument was filed with the Clerk of the Appellate Court 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 appellant in an envelope deposited in a U.S. mail box in Chicago, Illinois, with proper postage prepaid. Additionally, upon its acceptance by the court's electronic filing system, the undersigned will send 6 copies of the Brief and Argument to the Clerk of the above Court.

/s/ Alicia Corona
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APPENDIX B

E-FILED
Transaction ID: 1-19-0364
File Date: 11/2/2021 2:33 PM
Thomas D. Palella
Clerk of the Appellate Court
APPELLATE COURT 1ST DISTRICT

NO. 1-19-0364

IN THE

APPELLATE COURT OF ILLINOIS

FIRST JUDICIAL DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff-Appellee,

vs.

MICHEAIL WARD,

Defendant-Appellant.

Appeal from the Circuit Court of Cook County, Criminal Division.
Honorable **NICHOLAS FORD**, Judge Presiding.

BRIEF AND ARGUMENT FOR PLAINTIFF-APPELLEE

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IN THE

APPELLATE COURT OF ILLINOIS

FIRST JUDICIAL DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff-Appellee,

vs.

MICHEAIL WARD,

Defendant-Appellant.

TABLE OF CONTENTS

POINTS AND AUTHORITIES

STATEMENT OF FACTS

Defendant was charged with the first degree murder of Hadiya Pendleton and the aggravated battery with a firearm of Sabastian (or "Sebastian," as it appears at times in the record) Moore and Lawrence Sellers on January 29, 2013. C2376, 2491-92; SupR12. A jury found defendant guilty of those charges. SupR2106-07 Defendant was thereafter sentenced to consecutive terms of 70 years in prison for first degree murder and 14 years in prison for aggravated battery with a firearm, for an aggregate prison term of 84 years. C2315; SupR2207-10.

Before trial, the circuit court denied defendant's motion to suppress evidence that argued that his arrest was accompanied by neither a warrant nor probable cause. C158-60; SupR233-38.

Defendant also filed a motion to suppress his February 10, 2013 custodial statements, arguing that they were involuntary and obtained in violation of his right to remain silent. C530-63. At the March 22, 2016, hearing on defendant's motion, the circuit court viewed video of defendant's time in custody and accompanying transcript of his conversation with detectives. SupR291-349. The circuit court found that defendant never unequivocally invoked his right to remain silent and that defendant's admissions were not involuntary. SupR340-49. On August 28, 2017, the circuit court allowed defendant to reopen his motion to suppress and present testimony from Dr. Richard Ofshe concerning police interrogation tactics. C964-66; R69-210. Following the hearing, the circuit court again denied the motion, finding that "there certainly isn't anything unconstitutional in the way he was treated by the police or in the manner in which his statements were obtained." R210-16.

On November 28, 2017, defendant filed motions to admit the expert testimony of Drs. Ofshe and John Trainum at trial to explain "coercive police interrogation and the phenomenon of false confessions" and "interrogation tactics used by law enforcement agencies," respectively. C1281-1316, 1317-1402. At a hearing on defendant's motion, the People argued that their testimony was not beyond the common knowledge of lay people, would not aid the jury in reaching its conclusion, and thus was not required or permitted. SupR531-33. In response, defendant argued "there are conditions out there, methods out there used by the Chicago Police to obtain a confession. And [the jury has] a right to know that those methods are being used." SupR 545.

The circuit court denied defendant's motion to admit the expert testimony, stating, "[T]he question that's before me is whether or not a juror could having watched the video make a determination about whether or not the defendant was in anyway [*sic*] coerced into making a false confession in the case and the answer is overwhelmingly yes." SupR548)[1] However, the circuit court noted, "I am not at all removing from the defendant his ability to draw into question the confession that was made, alleged to have been made in this case." SupR548.

The case proceeded to trial. Klyn Jones was 15 years old and attending King High School on January 29, 2013. After school, Klyn went to nearby Harsh Park with a group of friends including Hadiya Pendleton. It started to rain, and the group moved under a canopy near the street. Klyn and Hadiya were facing the street, with their backs to the alleyway. Klyn noticed a man in the alley pointing a gun toward the group. Klyn

[1] In denying defendant's motion, the circuit court did not, as defendant asserts, "find[] Trainum's conclusions 'ridiculous.'" Br11) SupR547-50)

described the man as black, with a "medium dark" complexion, around 5-feet, 8-inches tall, short hair, and wearing a blue hoodie and dark wash jeans. SupR932-34, 938-41.

Klyn saw the man fire four gunshots toward the group. Klyn did not see anyone in the group using Hadiya as a "shield." The group scattered, and Klyn ran south to Oakenwald Avenue. A video from a nearby security camera showed the group running down the street. Hadiya grabbed her chest and said "I think I got shot." Hadiya fell to the ground and Klyn called 911. SupR941-45, 955, 959, 944; P. E. 6, 9 (911 recording).

Later that night, Klyn learned at Comer Hospital that Hadiya had passed away. On cross-examination, Klyn acknowledged that while at the hospital, she told Chicago Police Detective Jones that the shooter was a male, medium-complected black teenager, who was approximately 5-feet, 9-inches tall and wearing a black cap, loose-sleeve top, and jeans. Klyn met with Chicago Police detectives on January 31 and February 10, 2013 but was unable to identify anyone in a photo array and live lineup. SupR946-47, 962-63.

Ronald Evans, a retired Chicago Police sergeant, had prior felony convictions for fraud, wire fraud, and money laundering. On January 29th, Ronald lived in a third floor condominium just north of Harsh Park. At approximately 2:00 p.m. that afternoon, Ronald looked out his bedroom window facing Oakenwald and noticed a group of high school-aged children walking east on 44th Place and then south on Oakenwald. Approximately 15 to 20 minutes later, Ronald heard gunshots coming from the front of his building. Ronald looked out the window again and saw "a male black in the alley across from me running northbound with a firearm in his hand." Ronald believed that this person was a teenager and was wearing a blue hooded sweatshirt and jeans, had short hair, and was carrying the gun in his right hand. Ronald later identified a recovered blue

sweatshirt that he saw this person wearing. The man ran north toward 44th Place, where a white, four-door Nissan was parked at the mouth of the alley. The man put the gun inside the pocket of his sweatshirt and entered the front passenger seat. The car drove east on 44th Place and then north on Oakenwald. SupR981-82, 985-90, 992-96, 1019; P.E. 37.

On January 31, 2013 Ronald identified codefendant Williams in a photo array at the police station but did not tell the detective that Williams was "the guy who did it." On February 2, detectives transported Ronald to 362 East 59th Street, where they asked Ronald if a nearby parked car was the same one he saw on January 29. Ronald told them "it was the same make, model, same amount of doors, but I can't say that is the car." SupR1000-03, 1016, 1028, P.E. 33.

Ernest Finner grew up with defendant, with whom he was a member of the SUWU street gang. Ernest testified that the SUWUs were rivals with the 4-6 Terror gang, and that Harsh Park is in 4-6 Terror's territory. Ernest claimed that he remembered nothing from the afternoon of January 29, 2013, or the events thereafter. Ernest admitted on cross-examination that he had previously been convicted of aggravated robbery and unlawful use of a weapon by a felon. SupR1045-57, 1132. Ernest stated that on February 9, 2013, he was brought to the 51st Street station to meet with his parole officer. SupR1058. He admitted that while there he gave a statement to former Assistant State's Attorney ("ASA") George Canellis and identified his signature on the statement, but disavowed most of the contents of that statement. Canellis later testified that he and Detective Velma Guerrero met with Ernest on February 9, 2013, at the 51st Street police station and took a handwritten statement from him at approximately 2:00 a.m. the next

morning. The People subsequently published the contents of Ernest's statement. R640-52; SupR1058-64, 1069-79; P.E. 38, 39.

Ernest also claimed that could not recall testifying before the grand jury on February 11, 2013 and disavowed his testimony from that proceeding. Former ASA John Dillon later testified that he met with Ernest at the courthouse at 26th and California on February 11, 2013, and that Ernest was sworn in and testified before the grand jury the same day. The People published a transcript of Ernest's grand jury testimony. R734-40; SupR1080-1110; P.E. 55. The following is a summary of Ernest's handwritten statement and grand jury testimony. Ernest said that recent shootings between the SUWU and 4-6 Terror gangs "keep[ ] the bad blood going strong." SUWU kept guns throughout their territory because they "never know when we need them." Ernest spent the morning of January 29 at school and left with Demetrius Tucker at approximately 2:00 p.m. As they walked toward a friend's house, Ernest heard a car horn. He looked and recognized the white car that honked as belonging to defendant's mother. R655-57, 745-49.

Codefendant Williams was driving the car and defendant sat in the front passenger seat. Ernest and Demetrius entered the backseat of the car; Williams began driving but was acting nervously. Williams told Ernest that he and defendant "had just done a drill," which Ernest understood as a shooting. Williams explained that he and defendant were driving around looking for 4-6 Terror members when they drove by the park and saw a group of people. Williams recognized people in the group and was afraid that they would recognize him, so defendant did the shooting. Ernest told Williams to drop him off, and the three men remaining in the car drove away. R657-59, 748-56.

On February 8, 2013, Ernest saw defendant again at a SUWU meeting at 67th and Lowe where the attendants discussed "all the heat about the shooting of the girl" from the media and police. Defendant was angry at Williams because he was "running his mouth about [defendant] shooting the girl," "saying that he was glad that he didn't shoot" and "putting it all on [defendant] even though [Williams] was the one who pointed out the people in the park." Defendant told everyone to "lay low" and that "he didn't want to hear any more talk about the shooting because it would lead to the police finding them." The next day, Ernest went to the police station and agreed to give a statement to ASA Canellis. There, he was treated "with respect" "good," and not threatened. Ernest also testified that there were no considerations made for his pending cases in exchange for giving a statement or testifying. R678-79, 756-69, 773-74.

On cross-examination, Ernest claimed that when he got to the police station, he was pulled out of his mother's car, handcuffed, and threatened. He admitted that Detective Halloran showed him video from a POD camera in which he and Demetrius got into defendant's car on January 29. Ernest acknowledged that he had been arrested for multiple misdemeanor offenses in 2014, 2016, and 2017 that were later dropped, although he denied working with the prosecutors. SupR1127-30, 1137, 1151-54; P.E. 4.

Tyron Lawrence lived in the same building as defendant at 3982 South Lake Park and in 2013 was "associated" with the SUWU gang. On January 29 around 2:30 p.m., Tyron was in back seat of a car with two others. The group drove to a BP station at 35th and King Drive, where Tyron exited the car with a bag, which he passed to a white car parked nearby. Tyron recognized Ernest and Demetrius in the back seat of the white car, and

defendant and Williams in the front. Tyron identified himself in a security camera video from the BP passing the bag to the white car. R388-402; P.E. 5 (video).

On cross-examination, Tyron testified that he was "picked up" at his home on February 10th by Detective Halloran and brought to the 51st Street station. Detective Halloran showed Tyron a music video entitled "Scary Movie" that showed Tyron and others rapping in a park. Tyron acknowledged that he was on probation for a prior drug conviction when he talked to Detective Halloran. R416. Tyron claimed that Detective Halloran threatened to violate his probation and charge him with "[a]ssociation to murder" if he did not cooperate. Tyron acknowledged that his probation was never violated. R411-20, 429-32; P.E. 42 (video).

Jarod Randolph, a former SUWU member, knew defendant and was previously convicted of burglary, aggravated robbery, and unlawful use of a weapon by a felon. Jarod claimed that he did not remember the events occurring between January 30 and February 8, 2013 and did not recall meeting with Chicago Police on February 26th at the 51st Street station. Jarod disavowed his subsequent grand jury testimony but acknowledged that he had signed a photograph of defendant before the grand jury. Former ASA Jennifer Sexton later testified that on February 26th, she met with Jarod at 26th and California where he was sworn in and testified before the grand jury. The People published a transcript of Jarod's grand jury testimony. R.481-504; SupR1547, 1556-57; P.E. 43, 117.

At the grand jury, Jarod testified that on January 30, 2013, he received a call from defendant, who said that "a little girl got killed on 4,6. Him and [Williams] went through. He popped out." Jarod understood this to mean that defendant had been the one to shoot

Hadiya. Jarod told defendant that they should not talk about it over the phone and ended the call. The next day at approximately 4:00 p.m., Jarod met defendant at 41st and Indiana. Defendant "explained how he feel [*sic*] bogus as hell. He wish [*sic*] I never did it. He regret [*sic*] it." Jarod knew that defendant was speaking about the murder of Hadiya. The following day at approximately 4:00 or 5:00 p.m., Jarod again met with defendant and others at 39th and Lake Park. Defendant said that he was sorry, expressed remorse, regretted the shooting, and wished he never had done it. During a SUWU meeting on February 8, Jarod learned that Williams had been "talking" too much, causing unwanted attention from police. On cross-examination, Jarod testified that he does "a lot of drugs" and did not remember meeting with a defense investigator named Brad Thomson on May 25, 2013. R505, 513; SupR1558-65.

Dr. Lauren Woertz from the Cook County Medical Examiner's Office performed Hadiya's autopsy and opined that the cause of death was a gunshot wound to the back and that the manner of death was homicide. R535, 546.

Demetrius Tucker was a SUWU member with two prior felony convictions. At the time of trial he was in custody for two pending felony cases. On January 29th, after school, Demetrius with walked with Ernest to another friend's house. Demetrius saw defendant's white Nissan car. Defendant and Williams were in the car; Demetrius and Ernest got into the back. Demetrius claimed that no one spoke. Eventually, Ernest got out of the car, and Demetrius claimed that he was dropped off at his home. R549-63.

On February 10th, Demetrius went to the 51st Street police station and around 5:15 a.m. met with Detective Frank Casale and ASA Canellis but denied answering any questions. Demetrius acknowledged that he signed a handwritten statement, as well as

photos of defendant, the white Nissan, and Demetrius, defendant, codefendant, and Ernest standing outside the car. After providing this testimony, Demetrius then disavowed portions of the handwritten statement. Canellis later testified that he and Detective Casale met with Demetrius on February 10th at the 51st Street police station, where he took Demetrius's a handwritten statement. Portions of the statement were published to the jury. R564-81, 666; P.E. 51. Demetrius also acknowledged meeting with ASA Dillon on February 11, 2013, at 26th and California and testifying at the grand jury the same day. Demetrius thereafter disavowed portions of his grand jury testimony. The People subsequently published a portion of a transcript of Demetrius's grand jury testimony pursuant to Section 115-10.1. R581-97, 790; P.E. 56 The following is a summary of Demetrius's handwritten statement and grand jury testimony.

Demetrius and Ernest left school at approximately 2:00 p.m. on January 29th. When Demetrius and Ernest got in the back seat of the car, Williams was acting strangely and looking around frequently. When defendant and Williams told them that they had "just done a drill," Demetrius understood they had just done a shooting. Demetrius testified that he was treated well and was not threatened at the station, and there were no considerations made for his pending probation in exchange for giving a statement or testifying. On cross-examination, Demetrius admitted he never thought his probation would be violated. R599, 604, 670-72, 790-91, 796-800.

Lazerick Bowdry, Sebastian Moore, Lawrence Sellers, Danetria Hutson, Kyra Caldwell, Veronica Hansberry, Jordan Dillon, and Stephan Abdul all walked to Harsh Park after school with Hadiya on January 29th. Each described their different vantage points from under the canopy: Jordan was facing Oakenwald with his back to the

alleyway; Lazerick was facing north, with the road to his right and the alley to his left; Sabastian, Lawrence, Danetria, Kyra, Veronica, and Stephan were facing the alley and had their backs to the road SupR1179-82, 1217-20, 1238-42, 1258-63, 1281-85, 1323-25, 1342-45, 1389.

Each of the students described what they observed from under the canopy: Lazerick heard gunshots coming from the alley and saw a black man wearing a blue jacket and black skull cap standing in the alley and pointing a gun toward the group. Sabastian saw an individual walking in the alley and heard gunshots shortly thereafter. Lawrence heard approximately six gunshots coming from the alley but did not see the shooter. Danetria heard gunshots and noticed that the shooter was wearing dark-colored clothing, but she did not see the shooter's face. Kyra heard three of the gunshots coming from the alley and saw a black man with a dark complexion, wearing a hoodie with and hood covering his head, and pointing his arm toward the group. Veronica saw a black man in the alley shoot four to five times at the group. Jordan heard multiple gunshots and saw a black man with a dark complexion wearing a blue hat, sweatshirt, and jeans, in the alley shooting toward the group. Stephan noticed something moving to his left and saw a man fire five shots at the group. Stephan described the shooter as "between the height of five-eleven to six-one, at least. Not too big of a complexion [*sic*]. Medium size. Dark skin. And from what I remember dreadlocks of some sort," and wearing "a blue top and a blue jacket of some sorts and khaki pants, maybe cargo pants [and] a hood or a hat that was on his head." SupR1183-84, 1220-21, 1243-44, 1264, 1286-87, 1326-27, 1346-48, 1390, 1400.

The students ran from the park, scattering north and south on Oakenwald. While running, Lawrence noticed that he had been shot in the left leg, and Sabastian noticed that

he had been shot in the foot. Meanwhile, Hadiya fell to the ground, where she remained until an ambulance arrived and took her to Comer Hospital. (SupR943-46, 1184-85, 1221-22, 1233-35, 1244-46, 1264, 1289, 1328, 1349, 1391; R546.

As he ran out of the park, Lazerick saw the shooter running toward a white car. Lawrence identified himself and the group of friends running down Oakenwald in a video, which also showed Hadiya falling to the ground. Sabastian and Lawrence were treated for their wounds. SupR1184-85, 1221-25, 1233-35, 1244-47, 1251-53; P.E. 6 at 14:15:38, 14:16:24.

That night at the hospital, Danetria described the shooter to Detective Jones as a male black wearing a dark hoodie and dark cap. On the night of January 31, Kyra met with detectives but was unable to identify anyone in a photo lineup. Kyra tentatively described the shooter to Detective Garcia as wearing a blue hoodie or a black hat. The same day, Lazerick met with detectives but was unable to identify anyone in a photo lineup, and Stephan indicated that three individuals in a photo array had "similar characteristics" to the shooter. Stephan recognized Williams in the photo array but knew that he was not the shooter. SupR1188, 1266, 1273-74, 1291-94, 1305, 1392-97, 1429; P.E. 78.

Mid-afternoon on February 5th, Jordan met with Detectives Guerrero and McGavock. Jordan identified defendant in a photo array as the shooter but was "[n]ot a hundred percent" sure of his identification. SupR1351, 1354-55; P.E. 75.

On the evening of February 10th, Danetria met with detectives and identified defendant as the shooter in a physical lineup but was not "a hundred percent sure." She identified defendant because, "I kind of pictured the baseball cap being on everybody's head in the lineup, and it just didn't match anybody but him." Around the same time,

Veronica met with detectives and identified two individuals in a physical lineup as "resembling" the shooter "based on their height." SupR1267-69, 1329-32; P.E. 16, 85.

Lawrence met with detectives but was unable to identify anyone in a physical lineup, and Kyra identified defendant as the shooter in a physical lineup, but did not do so "confidently." The parties also stipulated that Kyra identified another individual in the live lineup who "looked similar" to the shooter. That same evening, Sabastian met with detectives but did not identify anyone in a physical lineup. Less than an hour later, Lazerick identified defendant in a photo lineup as the shooter but cautioned that he was "50 percent" sure. Minutes later, Stephan met with detectives and identified defendant in a live lineup as the shooter. Stephan noted that his identification was "pretty solid" at the time, but "a hundred percent." SupR1395. At trial, Stephan identified defendant as the shooter and said that his in-court identification was "[a] hundred percent guaranteed." SupR1189-94, 1225, 1247-48, 1294-1303, 1393-95, 1398; P.E. 61, 84, 86.

The afternoon of February 11th, Jordan again met with detectives but was unable to identify the shooter in a physical lineup. On cross,, Jordan acknowledged that he spoke to detectives on the day of the shooting and described the shooter as having dark skin and wearing a gray hoodie and blue skull cap, but on the next day described the shooter as "roughly" five-foot, six-inches tall and wearing a gray crewneck sweatshirt and royal blue skull cap. He told the detectives that he saw a white car around the time of the shooting. Finally, Jordan acknowledged that he met with defendant's counsel and investigator on March 30, 2017 at his home in Edwardsville. SupR1356-67; P.E. 62.

Chicago Police Officer Marcos Ceballos stopped defendant as he was driving a white, four-door Nissan Sentra at 6600 South Martin Luther King Drive at around midnight on

January 27, 2013. Defendant was given a warning for driving without headlights and a contact card was composed that listed him as a male, black, five-foot, eight-inches tall, 163 pounds, medium build, short hairstyle, and dark-complected. R821-30; P.E. 101.

Chicago Police Officer Kevin Kilroy stopped defendant as he was driving the white Nissan in the area of 6600 South King Drive at approximately 11:55 p.m. on February 9, 2013, arrested defendant, and recovered his cellular telephone. R844-50; P.E. 104.

Anita Shah, a computer forensic examiner for the Federal Bureau of Investigation ("FBI"), testified that she extracted a SIM card from defendant's phone and obtained the phone number belonging to the device. Joseph Sierra, a custodian of records with T-Mobile, provided the call detail records for that telephone number from January 29, 2013, through February 9, 2013. R890, 896, 924-25; P.E. 112.

Chicago Police Sergeant Jose Lopez, a gang crimes specialist, testified about the history and geography of and rivalry between the SUWU and 4-6 Terror gangs. In 2013, defendant was the leader of SUWU, of which Williams was a member. On July 11, 2012, there was a shooting between SUWU and 4-6 Terror during which Williams was injured. On September 26, 2012, another shooting at 3939 South Lake Park between the gangs resulted in the death of an SUWU member. R965-77, 991.

On January 29, 2013, Sergeant Lopez went to the scene of the shooting, informed the officers there that Harsh Park was in 4-6 Terror territory, and learned that the shooter had fled northbound into SUWU territory. In his investigation, Sergeant Lopez discovered a video on YouTube entitled "JB, It's a Stickup," filmed in Harsh Park and featuring 4-6 Terror members. During Sergeant Lopez's search for gang members on parole or

probation, he found Ernest Finner and Demetrius Tucker, and made arrangements for their questioning on February 9, 2013 by other officers. R995-1003, 1022; P.E. 115.

Mary Wong, a forensic scientist with the Illinois State Police, testified that gunshot residue tests collected from defendant's car and clothing yielded a "negative" result. SupR1509, 1517.

Chicago Police Sergeant Velma Guerrero met with Ronald Evans. Ronald was shown a photo array and made a "tentative identification" of Williams as a person that "caught [his] eye." Ronald also noted that "the shooter did not have dreads." Later that day, Sergeant Guerrero met with Lazerick but he was unable to identify anyone in a photo array. That night, Sergeant Guerrero met with Stephan and showed him a photo array. Stephan did not identify anyone as the shooter but commented that Williams, who had "similar features as the shooter," was not the shooter. SupR1581, 1594-01.

On February 1st, Sergeant Guerrero found defendant's white Nissan, and on February 5th, met with Jordan Dillon, who made a "tentative identification" of defendant as the shooter. SupR1603-09; P.E. 75, 101.

Sergeant Guerrero found video from a POD Camera at 39th and Indiana depicting Ernest and defendant's car. Sergeant Guerrero also found video from a Chicago Housing Authority building nearby, showing defendant exiting the front passenger seat of the car, Demetrius from the back passenger seat, and codefendant exiting from the driver's seat. SupR1618-24; P.E. 3, 4 (videos).

On February 8th, Sergeant Guerrero met with Antoine Rice at the Cook County Jail. Based on this meeting, Sergeant Guerrero requested that Sergeant Lopez look for Ernest Finner. Sergeant Guerrero met with Ernest on February 9th, Ernest initially denied

knowing anything about the shooting, but after viewing the video footage showing the Nissan, he told Sergeant Guerrero what happened on the day of the shooting. Later that day, Sergeant Guerrero met with Demetrius, who told her that Williams was driving the car and that he and defendant had just "done a drill on 4-6 terror." Later that night, Sergeant Guerrero informed her colleagues to arrest defendant and Williams. SupR1611-15, 1626-27.

On the evening of February 10th, after defendant had been arrested, Danetria, Tyra, and Veronica separately and tentatively identified defendant in a live lineup as resembling the shooter. That same evening, Lawrence, Sabastian, and Klyn were unable to identify anyone in live lineups, but Lazerick and Stephan separately identified defendant in a live lineup as resembling the shooter. SupR1632-38.

FBI Special Agent Joseph Raschke testified over defendant's objection as an expert in the field of historical cell site analysis. SA Raschke analyzed the T-Mobile cell phone records of defendant and codefendant with reference to the T-Mobile cellular towers around Harsh Park. His analysis revealed that defendant made 25 calls between 1:00 and 3:30 p.m. on January 29th, and that both defendant's and Williams's cell phones "pinged" off a tower near Harsh Park before and after the time of the shooting. SupR1731, 1742-47, 1785, 1760-71; P.E. 111, 112, 123.

Retired Chicago Police Detective John Halloran began investigating the shooting on the night of February 9, 2013. Just after midnight the next day, defendant met with Detective Halloran and his partner, Detective John Murray, in an interview room at the 51st Street station that was equipped with video and audio recording equipment. In total, defendant was in the interview room for just over 22 hours, all of which was recorded.

P.E. 124. At approximately 12:32 a.m., the detectives met with defendant. PE. 125A, B, C (recording) They returned to the room at approximately 3:17 a.m. for a second interview. P.E. 126 (recording). They interviewed defendant a third and final time at 7:16 a.m. P.E. 128 (recording), SupR1849-57, 1860-64; P.E. 130 (transcript). At around 12:31 that afternoon, Chicago Police Detective Scott Reiff and his partners, Detectives Murphy and Stanek, met with defendant in the interview room and their conversation was video-recorded. SupR1921-24; P.E. 129 (recording). All four videos were published to the jury.

Detective Reiff noted that he first heard about the BP gas station from defendant during the interview, and he subsequently obtained the security video footage from the station. SupR1924-25; P.E. 5.

Following the testimony of Detective Reiff, the People rested. SupR1949. The circuit court heard and denied defendant's motion for direct verdict. SupR1951.

Dr. Geoffrey Loftus testified on behalf of defendant as an expert in the field of human perception and memory. According to Dr. Loftus, there are two "roots" by which information becomes memory: conscious information and "post-event" information. According to Dr. Loftus, any person who witnesses a violent crime tries to "stay safe." As a result, eyewitnesses tend to focus on the perpetrator's weapon. Dr. Loftus also attempted to explain how stress affects memory, but admitted "that studying stress in a scientific laboratory, particularly studying high stress, is challenging." Dr. Loftus then testified that people's mental functioning generally gets worse under very stressful conditions and, conversely, under non-stressful conditions. R1086, 1089, 1095-98, 1109-11, 1115-16.

On cross-examination, Dr. Loftus admitted that in 419 of the 420 criminal trials in which he had testified, he did so on behalf of the defense. Dr. Loftus admitted that he had interviewed no eyewitnesses despite having access to all police reports. He admitted that he had no opinion as to the veracity of any of the witnesses' testimony in this particular case. He conceded that his conclusions were entirely theoretical. He also admitted that weapon focus is less important when a person sees the perpetrator before the weapon is displayed. R1131-40.

Investigator Brad Thomson was hired by the defense to interview Jarod Randolph. Jarod told him that the police had used a music video to threaten to violate his parole, that he had given his statement as a result of that coercion, and that the police had told him what to say in his statement. On cross-examination, Thompson related that Jarod had told him that he wanted to help defendant and Williams. R1163-69.

Defendant waived his right to testify and rested. After closing arguments, the circuit court instructed the jury and the jury retired for deliberations. Following its deliberations, the jury found defendant guilty of the first degree murder of Hadiya Pendleton by personally discharging a firearm, and two counts of aggravated battery with a firearm of Sabastian Moore and Lawrence Sellers. SupR1191, 1194, 2102, 2106-07.

The circuit court heard and denied defendant's motion for new trial, in which he argued, *inter alia*, that the circuit court erred in denying his pretrial motions to suppress his statements and to admit the expert testimony of Trainum and Dr. Ofshe, erred in overruling his objections to the People's closing arguments, and that the People did not prove him guilty beyond a reasonable doubt. C2183-2229; SupR2124.

At sentencing, the People offered victim impact statements from Hadiya's brother and mother and defendant's criminal background, which included a 2012 conviction for aggravated unlawful use of a weapon and a 2011 juvenile adjudication for theft from a person, as well as numerous arrests. In mitigation, defendant presented the circuit court with letters from family and friends and testimony from his mother and grandmother. In allocution, defendant claimed that he had not been proven guilty, and that "I can't say that I feel remorseful about being in this situation." SecC6; SupR.2125-68, 2186-98.

At the conclusion of the hearing, the circuit court began by noting that it had reviewed defendant's presentence investigation report ("PSI") and was considering the evidence presented at trial, the evidence offered in aggravation and mitigation, and the statutory sentencing factors. The circuit court stated that it had given defendant "a second chance" when it had previously sentenced defendant to a term of probation after his conviction for aggravated unlawful use of a weapon. The circuit court sentenced defendant to a term of 70 years' imprisonment for first degree murder, which included the mandatory 25-year firearm enhancement, and 14 years' imprisonment for aggravated battery, to be served consecutively, for an aggregate term of 84 years in prison, and later denied his motion to reconsider sentence, in which he argued generally that his sentence was excessive. C2316-17, 2331, 2315; SupR2198-10. This appeal follows.

ARGUMENT

I. DEFENDANT WAS PROVEN GUILTY OF FIRST DEGREE MURDER AND AGGRAVATED BATTERY WITH A FIREARM.

Defendant first contends that the People failed to prove him guilty because "[n]o believable evidence" linked him to the shooting. Br25. The relevant inquiry for a court reviewing the sufficiency of the evidence is whether "after reviewing the evidence in the

light most favorable to the prosecution *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319 (1979). This standard of review applies in all criminal cases, whether the evidence is direct or circumstantial. People v. Gilliam, 172 Ill.2d 484, 515 (1996). "Once a defendant has been found guilty of the crime charged, the factfinder's role as weigher of the evidence is preserved through a legal conclusion that upon judicial review *all of the evidence* is to be considered in the light most favorable to the prosecution." Jackson, 443 U.S. at 319. "This means the reviewing court must allow all reasonable inferences in favor of the prosecution." People v. Cunningham, 212 Ill.2d 274, 280 (2004). Accordingly, because the standard of review does not allow a reviewing court to substitute its judgment for that of the fact finder, People v. Sutherland, 155 Ill.2d 1, 17 (1992), a conviction will not be reversed unless the evidence is so unreasonable, improbable or unsatisfactory that it raises a reasonable doubt of defendant's guilt. People v. Evans, 209 Ill.2d 194, 209 (2006).

Viewing the evidence under this standard, any rational trier of fact could have convicted defendant of first degree murder and aggravated battery with a firearm. Multiple sources of evidence established that defendant shot at the group of individuals at Harsh Park on January 29, 2013, striking and injuring Lawrence and Sabastian, and killing Hadiya. The evidence included not just the testimony of the students, but also testimony and video that placed defendant's car at the scene of the murder, cell phone records that placed defendant in the area of the murder, his admissions to his friends and fellow gang members, and his admissions to police detectives after he was arrested.

On January 29, 2013, defendant and Williams drove to and parked at Harsh Park R968, 974-75, 995-96; Sup R. 1048; P.E. 129 at 12:58:58-13:01:33, and phone record analysis revealed that their cell phones "pinged" off of a tower near Harsh Park during this time. SupR1760-71; P.E. 129 at 13:13:33. Defendant admitted that he armed himself with a handgun, exited the car approached the park through a nearby alleyway, P.E. 129 at 13:02:25-13:05:15, and fired six shots at a group of people. P.E. 129 at 13:15:18.

This group was made up of students from King High School including Hadiya, Lawrence, Sabastian, Klyn, Lazerick, Danetria, Kyra, Veronica, Jordan, and Stephan.

Multiple students testified about their observations and the identification process. At trial, Stephen identified defendant as the shooter with "[a] hundred percent guaranteed" certainty. SupR1395, 1398; P.E. 86. Earlier, he had identified defendant as the shooter in a live lineup, SupR1392-97; P.E. 78, and said that his identification was "pretty solid" but not "a hundred precent" certain.[2] SupR1395. Jordan identified defendant in a photo array as the shooter but was "[n]ot a hundred percent" sure. SupR1351-55; P.E. 75. Danetria identified defendant as the shooter in a physical lineup but was not "a hundred percent sure." SupR1267-69; P.E. 16. Kyra identified defendant as the shooter in a physical lineup but "not confidently," and identified another individual (not defendant) as looking "similar" to the shooter. SupR1294-98, 1303; P.E. 84. Lazerick identified defendant in a photo lineup as the shooter with "50 percent" certainty. SupR1189-94; P.E. 61. Veronica

[2] Defendant incorrectly claims that the parties stipulated that Stephan "did not qualify his lack of certainty and did not say he was 50% certain." Br22. Instead, the parties stipulated that "Stephen [*sic*] Abdul viewed a lineup and never qualified his certainty with a number *by saying that* he was 50 percent sure." R1189 (Emphasis added) Stephan testified at trial that he "was not a hundred percent" sure at the time he viewed the lineup. SupR1395. Lazerick was the only witness to testify that he was "50 percent" sure of his identification. SupR1190.

identified two individuals, including defendant, in a physical lineup as "resembling" the shooter "based on their height." SupR1330-32; P.E. 85. Ronald Evans identified codefendant in a photo array but made clear that he did not tell detectives that he was "the guy who did it." SupR1001, 1028. Klyn was unable to identify anyone in a photo or physical lineups, SupR946-47, and Lawrence and Sabastian were unable to identify anyone in separate physical lineups, SupR1225, 1247-48

Apart from defendant's confession and the eyewitness testimony, other strong proof rounded out the prosecution's case. As he ran out of the park, Lazerick saw the shooter running towards a white car. SupR1184-85 Defendant admitted that after the shooting he ran back to the car and Kenny drove them away from the scene; Ronald Evans observed all of this from his bedroom window. SupR990-93, 996; P.E. 129 at 13:16:47 Shortly thereafter, defendant and codefendant picked up Ernest and Demetrius. R560-61, 658, 750-51; P.E. 129 at 13:18:41 Williams said that he and defendant "had just done a drill," meaning that they had just done a shooting, and that defendant had been the shooter. R658, 672, 752, 792-93.

Tyron saw defendant in the car with Ernest, Demetrius, and Williams at a BP gas station. R391-95, 398-402; P.E. 5, P.E. 129 at 13:22:30 The next day defendant admitted to Jarod Randolph that he had shot Hadiya. SupR1558-62 At a February 8th meeting of the SUWUs, defendant expressed his anger at Williams for "running his mouth about [defendant] shooting the girl." R678-79, 756-60; Sup R. 1563-64

Defendant was arrested on February 9, 2013, at approximately 11:55 p.m., while driving the white Nissan and, a little more than 12 hours later, admitted to committing the

shooting at Harsh Park on January 29, 2013. R848-50; Sup R. 1849-50; P.E. 129 at 12:58:58.

This was not a close case. Any rational trier of fact, viewing this evidence — including (1) defendant's inculpatory, custodial statements, (2) multiple eyewitness accounts, including a 100% positive in-court identification from Stephen and other identifications of varying degree from other student-victims, (3) corroborating and inculpatory statements from Ronald Evans, defendant's friends, and his fellow SUWU gang members, (4) cell phone tower data and surveillance videos confirming defendant's presence at the scene, and (5) all reasonable and common-sense inferences flowing from this combination of direct evidence — in a light most favorable for the prosecution, could have found defendant guilty.

Defendant asserts that the "tentative identifications" of defendant by the students "are insufficiently reliable." Br26. This argument intrudes on the jury's fact-finding authority. Eyewitness reliability, and the weight assigned to eyewitness testimony, are questions for the trier of fact and a single eyewitness identification is enough to convict. People v. Starks, 2014 IL App (1st) 121169, ¶ 48. Defendant however asks this Court to apply the five factor test derived from Neil v. Biggers, 409 U.S. 188, 199-200 (1972), to measure the eyewitness' reliability. These criteria include (1) the opportunity the witness had to view the offender; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description; (4) the level of certainty demonstrated by the witness; and (5) the length of time between the crime and the identification This approach cannot be reconciled with the limitations on challenges to the sufficiency of the evidence, and to eyewitness reliability in particular. The relevant question on appeal is not, as defendant

suggests, whether in this Court's independent, *de novo* judgment the identifications were reliable under Biggers. Rather, the relevant question is whether, viewing that testimony "in a light most favorable to the State" — that is, as having positively identified defendant as the shooter to varying degrees, including a 100% positive identification from Stephen, that defendant was the shooter — any rational jury could have found defendant guilty. See People v. Richardson, 123 Ill.2d 322, 353-54 (1988) (credibility of and weight assigned to identification witness testimony are solely matters for trier of fact). Reweighing questions of eyewitness reliability on appeal with multi-factor, fact-bound tests of this nature should not be countenanced. See People v. Brown, 2013 IL 114196, ¶ 48 ("a reviewing court will not substitute its judgment for that of the trier of fact on issues involving the weight of the evidence or the credibility of the witnesses").

Defendant's analytical error is especially evident where, as here, the jury was instructed to apply these same principles derived from Biggers in resolving issues of eyewitness reliability. See IPI 3.15 (instructing that jury "should consider" five factors); SupR1969, 2081; People v Johnson, 2020 IL App 1st 162332, ¶ 61 ("we presume the jury follows the trial court's instructions"). The jury's application of IPI 3.15 is significant. Applying these factors here would effectively entail a reassessment—and potential displacement—of the jury's conclusion on the question of eyewitness reliability under the very same five-part criteria on which it was instructed *via* IPI 3.15, and that it dutifully applied during its deliberations. This approach, in turn, would provide an effective and improper end-run around the rule barring the appellate re-litigation of witness credibility issues, including challenges to the reliability of eyewitnesses on sufficiency review. Because "[t]he reliability of identification testimony is an issue of fact

for the jury to resolve," People v. Benson, 266 Ill.App.3d 994, 1005 (1st Dist. 1994), and the jury already has resolved that "issue of fact" against defendant as applied through IPI 3.15, this Court should decline defendant's invitation to apply these factors anew and replace the jury's verdict in that manner.

Although defendant cites Biggers and claims that "[m]ost of the factors suggesting unreliability are present here," he fails to address *any* of the five enumerated factors. Br27-28. Instead, defendant focuses on alleged inconsistencies between the student witnesses. Br28. However, the jury heard the testimony of Jordan, Danetria, Veronica, Lazerick, and Stephan, in which they described the offender, the conditions in the park, and their varying certainty during the identifications process, and it must be presumed that it considered those differences in degree and did not find that they were grounds to find reasonable doubt. See People v. Bradford, 187 Ill.App.3d 903, 916-17 (1st Dist. 1989) ("Minor inconsistencies in testimony do not constitute grounds for reversal of a criminal conviction (citations omitted) and the effect of minor testimonial discrepancies upon the credibility of the witnesses is a matter for the [trier of fact's] determination"). In this case, five of the students subsequently identified defendant as the shooter in Harsh Park. These identifications corroborated the admissions made by defendant to Ernest, Demetrius, Jarod, as well as his confession to police. The jury was the only judge the reliability of the identifications and the weight to afford to them. See People v. Vaughn, 2011 IL App (1st) 092834, ¶ 24.

Defendant also claims that so-called "weapons focus" and stress, as discussed by Dr. Loftus, could have distracted the witnesses. Br27. Whether, and to what extent, Loftus's testimony was credible were questions for the jury. People v. Sims, 374 Ill.App.3d 231,

251 (1st Dist. 2007) ("It is for the trier of fact to evaluate the expert testimonies and weigh their relative worth in context.") Further, Dr. Loftus acknowledged that he interviewed no witnesses and had no opinion about the reliability of their identifications, and that his opinions on eyewitness memory were merely predictive. R1135-40. Dr. Loftus also admitted that weapon focus is less at play when, as here, a person sees the perpetrator before the weapon is displayed. R1140; Sup R. 940-41, 1389-90.

And assuming the jury believed Loftus's opinion that certain viewing conditions may undermine the reliability of eyewitness memory, it was equally entitled to believe that the identifications here suffered none of these defects. Or alternatively, it could have believed that even if one or more of the factors discussed by Loftus was present, it was outweighed by otherwise believable and credible eyewitness accounts. In short, the jury was not obligated to believe any aspect of Loftus's testimony or assign any weight to it, and to the extent that it did so, it still could have convicted defendant on the balance of the eyewitness testimony and other evidence. See People v. McCarter, 2011 IL App (1st) 092864, ¶ 22 (trier of fact "is free to accept or reject as much or as little of a witness's testimony as it pleases"); People v. Gino W., 354 Ill.App.3d 775, 779 (2d Dist. 2005) (the "trier of fact may believe part of [a witness's] testimony without believing all of it") (citation omitted).

Defendant also complains that the "recanted statements" from Ernest, Demetrius, and Jarod are "unworthy of belief." Br28. But prior inconsistent statements can be sufficient to support a conviction, even without corroborating evidence. See People v. Cox, 377 Ill.App.3d 690, 700 (1st Dist. 2007). The jury's assessment of the truthfulness of Ernest, Demetrius, and Jarod when they provided statements to police and testified before the

grand jury, in contrast to their truthfulness at trial, cannot be second-guessed on appeal. See Brown, 2013 IL 114196, ¶ 48 (appellate court may not disturb jury's conclusions on witness credibility); Cox, 377 Ill.App.3d at 700.

Defendant further contends that his own custodial and inculpatory statement "is equally unworthy of belief and in support relies on an article as ultimate-fact evidence that was not presented to the circuit court, subject to the rules of evidence, or made a part of the record on appeal. Br29. This sandbagging strategy is not acceptable. See People v. Magee, 374 Ill.App.3d 1024, 1030 (1st Dist. 2007) (striking defendant's citation to secondary source opinions for "their substance as ultimate findings" because they raised hearsay concerns and no cross-examination was possible); People v. Mehlberg, 249 Ill.App.3d 499, 531-32 (5th Dist. 1993) (declining to consider defendant's citation to DNA articles for first time on appeal, and characterizing strategy as improper "attempt to interject expert-opinion evidence into the record" that was not presented at trial; the court declined to consider those references). Defendant also argues that detectives "overstated and at times directly lied about the strength of the evidence they had collected" to defendant. Br29. But the "fact that a confession was procured by deception or subterfuge does not invalidate the confession as a matter of law." People v. Melock, 149 Ill.2d 423, 450 (1992). Ultimately, "the credibility of a defendant's confession is to be weighed by the trier of fact, which may accept all, parts, or none of the confession." People v. Pecoraro, 144 Ill.2d 1, 11 (1991) Any inconsistencies between defendant's admissions and other evidence were properly resolved by the jury.

Finally, defendant complains that "no forensic evidence links [him] to the shooting." Br30. In doing so, defendant fails to acknowledge the testimony of FBI Special Agent

Raschke, who noted that both defendant's and codefendant's cell phones "pinged" off a tower near Harsh Park immediately before and after the time of the shooting. SupR1760-71; P.E. 123. In any case, physical or other corroborating evidence is not required to convict in an identification case. See People v. McArthur, 2019 IL App (1st) 150626-B, ¶ 40 (law has never required "corroborating" evidence to bolster otherwise credible eyewitness testimony); People v. Schott, 145 Ill.2d 188, 202-03 (1991) (conviction may be affirmed solely on the victim's credible testimony). In sum, any rational trier of fact assessing the evidence in a light most favorable to the People could have found that defendant was guilty. Defendant's convictions should be affirmed.

II. THE CIRCUIT COURT PROPERLY DENIED DEFENDANT'S MOTION TO SUPPRESS BECAUSE HE DID NOT UNEQUIVOCALLY AND UNAMBIGUOUSLY INVOKE HIS RIGHT TO REMAIN SILENT.

Defendant contends that the circuit court erred in denying his motion to suppress the statement he gave to detectives on February 10th because detectives questioned him after he had invoked his right to remain silent. Br31. There was no error defendant never affirmatively invoked his right to remain silent after answering questions.

When reviewing a trial court's ruling on a motion to suppress, this Court applies a two-part standard of review. People v. Luedemann, 222 Ill.2d 530, 542 (2006). Under this standard, this Court affords great deference to the trial court's findings of fact and reverse those findings only if they are against the manifest weight of the evidence, People v. Cosby, 231 Ill.2d 262, 271 (2008), which occurs "only when an opposite conclusion is apparent or when the findings appear to be unreasonable, arbitrary, or not based on the evidence," People v. Harris, 2015 IL App (1st) 133892, ¶ 20. The trial court's ultimate ruling as to whether the suppression is warranted is reviewed *de novo*. People v.

Chambers, 2016 IL 117911, ¶ 76. In reviewing a trial court's ruling on a motion to suppress, this Court may consider evidence adduced at trial as well as at the suppression hearing. People v. Richardson, 234 Ill.2d 233, 252 (2009).

Davis v. United States held that in invoking his right to counsel, "a suspect must do so unambiguously." 512 U.S. 452, 459 (1994). In Berghuis v. Thompkins, the Court applied this rule to suspects alleging Miranda violations of any iteration. 560 U.S. 370, 381 (2010) Echoing these rules, this Court has held that "[i]f verbal, the individual's demand to end the interrogation must be specific," meaning unambiguous, unequivocal, and clear. People v. Kronenberger, 2014 IL App (1st) 110231, ¶ 33. A Miranda violation occurs when questioning continues despite "an *expressed* unwillingness to continue." People v. Hart, 214 Ill.2d 490, 516 (2005). Not every negative or evasive act is an invocation of rights; only those that clearly indicate a desire to cease questioning count. See People v. Pierce, 223 Ill.App.3d 423, 430-31 (2nd Dist. 1992).

Even where the suspect's statements are arguably clear, courts review the circumstances surrounding to the exchange in determining if those statements are, indeed, invocations. See People v. Aldridge, 79 Ill.2d 87, 95 (1980) (finding that defendant did not attempt to terminate questioning but merely resisted answering questions concerning particular details of the offense, saying, "[t]here's nothing I want to add to it," and "you've got everything you need here now"); Kronenberger, 2014 IL App (1st) 110231, ¶¶ 36-37 (defendant's response, "yeah" to detective's question, "are you done talking to all of us?" was inadequate where it was unclear whether he was invoking his right to remain silent or had nothing else to tell the detective after his 14-minute conversation with the detective). Against this backdrop, defendant's invocation of his right to remain

silent was too ambiguous and equivocal to conclude that his rights under Miranda were violated. That is, the record establishes that in several instances defendant declined to answer specific questions put to him by investigators related to specific details of the crime. He did not, in contrast, ever signal his desire to stop the conversation altogether.

Defendant claims that his first invocation was at 1:41 a.m. on February 10th, Br32-33, during which this exchange between Detective Halloran and defendant took place:

DETECTIVE: You think you have nowhere to go because we've already thrown at you we know you're the shooter and you really don't have [*sic*]. You can't turn around and say, yeah, but Kenny was the shooter. Yeah, I was there but I was drivin' and Kenny was the shooter. You really can't do that. You can explain why you were the shooter.

DEFENDANT: ***I ain't got nothin' else to say***.

DETECTIVE: You want to take a break? You can take a break. You don't want to talk to me you don't have to talk to me. You got nothin' else to say? All right man, when you want somethin' I want you to bang on that door real loud, okay? P.E. 125A at 01:41:41 (Emphasis added)

Notably, this exchange took place after defendant had claimed that he was in the car with only his brothers but, after being confronted with video, admitted that Kenny, Demetrius, and Ernest were in the car. P.E. 125A at 01:08:50. Given the continuing, back-and-forth nature of the conversation, there is nothing that defendant did or said indicating his unequivocal and unambiguous invocation of his right to remain silent and cease all questioning. Just as in Kronenberger and Aldridge, defendant's statement was interpreted as an attempt to resist answering questions about details of the offense, rather than a desire to stop all questioning going forward about anything related to the offense.

The second instance occurred shortly after 4:00 a.m. on February 10th. Br33. Immediately preceding the statement in question, Detective Halloran told defendant, "all

right the last time we talked you said uh – you didn't have no more [*sic*] to explain to us at that time. I got a couple of [*sic*] more questions I got to ask you." P.E. 126 at 3:17:51. Defendant responded, "Yeah." P.E. 126 at 3:18:01. In accordance with defendant's willingness to continue the conversation, Detective Halloran and Detective Murray continued asking questions, and defendant continued providing answers, maintaining that he was not at the park during the shooting. P.E. 126 at 3:18:21-3:39:18. The following exchange between Detective Halloran and defendant then took place:

DETECTIVE: Why'd this happen? Why'd this happen? This time, that day, that park – why'd it happen?

DEFENDANT: ***Got nothin' to say.***

DETECTIVE: You got nothin' to say? All right, we'll take a break, all right. P.E. 126 at 04:02:45 (Emphasis added)

Once again, considering his contemporaneous willingness to discuss the subject, defendant's statement did not signal an unambiguous and unequivocal desire to cease all questioning and invoke his right to remain silent, but instead a desire not to answer the question "why'd it happen."

In the final instance, the following exchange took place between Detective Halloran, Detective Murray, and defendant at approximately 7:17 a.m. on February 10th:

DETECTIVE HALLORAN: You went to sleep. All right, well now that you're awake and you see you're being processed for this murder any thoughts? Still gonna [*sic*] try to lie your way out of it?

DETECTIVE MURRAY: (Inaudible) it's real simple. If you don't want to say nothin' about it, if you don't want to say nothin' about it then just tell us I'm done talkin'. Okay, that's fine, all right. Just so we don't have to keep comin' in here and botherin' you.

DEFENDANT: (Inaudible)

DETECTIVE HALLORAN: Can't hear you.

DEFENDANT: (Inaudible)

DETECTIVE HALLORAN: You don't want to talk about it. Okay, all right man.

DETECTIVE MURRAY: Just remember the chance is yours, boss, chance is yours. P.E. 128 at 7:17:17.

In this instance, there was zero indication that defendant wanted to cease all questioning and invoke his right to remain silent, let alone an unambiguous and unequivocal invocation because the record did not indicate the nature of his response. Defendant's assertion that he said, "I don't want to say nothing else about it," is therefore belied by the transcription of the interview. Br34; P.E. 130 pg. 80.

The circuit court correctly denied defendant's motion on these grounds. In finding that defendant did not unambiguously and unequivocally invoke his right to remain silent, it stated:

> Does that mean they [*sic*] invoked his rights to remain silent[?] Absolutely not. Absolutely not. Because he offered them an explanation of his conduct and [*sic*] alleged explanation of his conduct and had been results of a prolonged dialog.
>
> That was — I didn't see it — no rational person would see it as nothing other than a desire just at that point to say I can't add anything to it. That wouldn't mean I never want to talk to you again. That wouldn't absolutely mean I chose [sic] to remain silent or I wish to say nothing further about this crime. It just means at this point I got nothing else to say about that. I told you already that I have got an alibi. SupR345.

The circuit court's well-reasoning ruling was wholly supported by the record in this case and therefore was not in error.

The cases cited in support by defendant are distinguishable. Br34-35. In In re R.C., 108 Ill.2d 349 (1985), the defendant, after being advised of his rights, stated that he did

not wish to talk to his interviewer, who replied that R.C. "had that right, but that he had been identified." Id. at 352. This statement unambiguously encompassed the whole of the custodial interrogation and plainly signaled that the defendant did not wish to talk about anything at all. Id. Here, in contrast, defendant did not want to answer specific questions about the crime but remained willing to talk about other subjects related to his arrest, and he did so throughout the interrogation. The other cases cited by defendant are distinguishable on this ground, as well. See People v. Flores, 2014 IL App (1st) 121786, ¶ 44 (defendant's response that he was not "gonna say nothing about nothing" qualified as unambiguous invocation of right to remain silent about everything); People v. Hernandez, 362 Ill.App.3d 779, 781-82 (1st Dist. 2005) (defendant's response to question whether he "wish[ed] to talk"—"No, not no more"—was unambiguous invocation of right to remain silent). Defendant's responses in this case could reasonably be interpreted as urging the detectives to move on from the particular topic because he had nothing more to say about the current subject of conversation. As such, the circuit court properly denied defendant's motion to suppress, and his convictions should be affirmed.

Finally, defendant's argument that his right to remain silent was not "scrupulously honored" is predicated on his assertion that he invoked that right. Br35. Because, as proved, defendant never unequivocally and unambiguously invoked the right to remain silent his analysis here is inapt. Br35-36, citing People v. Nielsen, 187 Ill.2d 271 (1999).

III. THE CIRCUIT COURT PROPERLY EXERCISED ITS DISCRETION WHEN IT RULED THAT DEFENDANT'S EXPERTS WOULD NOT BE PERMITTED TO TESTIFY.

Defendant contends that the circuit court improperly denied his pretrial motion to admit expert testimony from Dr. Richard Ofshe and James Trainum regarding false

confessions and police interrogation techniques. Br38. The record establishes that the circuit court did not abuse its discretion in this respect because their opinions did not fall beyond the common knowledge of lay persons and would not have aided the jury in reaching its conclusion.

"Motions *in limine* are addressed to the trial court's inherent power to admit or exclude evidence' and 'generally, a reviewing court will not disturb the trial court's ruling absent an abuse of discretion." People v. Voit, 355 Ill.App.3d 1015, 1023 (1st Dist. 2004). Expert testimony is proper where such testimony is needed to explain matters beyond the common knowledge of ordinary citizens, and where such testimony will aid the fact finder in reaching its conclusion." People. v. Bennett, 376 Ill.App.3d 554, 571 (1st Dist. 2007). "Expert testimony is not admissible on matters of common knowledge." Id.; People v. Becker, 239 Ill.2d 215, 235 (2010). In exercising its discretion, the trial court should consider the necessity and relevance of the expert testimony under the particular facts of the case before admitting it. People v. Enis, 139 Ill.2d 264, 290 (1990).

Here, as discussed above, defendant moved to suppress his videotaped confession as the result of material misrepresentations and psychological and mental coercion. C530-63. At the initial hearing on defendant's motion, the circuit court found, based on its review of video of defendant's time in custody and accompanying transcripts of his custodial statements, that defendant did not unambiguously invoke his right to remain silent, and that his confessions, therefore, were not involuntary. SupR291-349.

The circuit court later allowed defendant to reopen his motion to suppress statements. C964-66; R69. At the reopened hearing, defendant called Dr. Ofshe to testify about police interrogations. R70, 75. Dr. Ofshe testified that he analyzed defendant's confession for

voluntariness by reviewing police reports, the video recording, and transcript of the interrogation. R80, 85. Dr. Ofshe opined that the police used "evidence ploys" and "coercive motivation strateg[ies]" to obtain defendant's confession. R88-102, 104-65. He also opined that the detectives used the "Reid technique," a method of interrogation that involves "using claims to evidence in order to diminish confidence," but later admitted that confessions obtained via this method are not necessarily coerced. R103, 192.

On cross-examination, Dr. Ofshe admitted that he did not talk to defendant or any of the detectives in forming his opinion; that he did not know if any of the detectives were taught the "Reid technique"; that the truth of the evidence ploys had nothing to do with his voluntariness evaluation; that he had no concerns about defendant's ability to understand what the detectives told him and that nothing suggested that defendant suffered physical abuse from the detectives. R166-71, 179, 181.

Following arguments, the circuit court denied defendant's motion to suppress:

> The statement is, was one made voluntarily. The product of his discourse of [*sic*] police, I don't know whether his final admission regarding his conduct was an effort by him to mitigate his conduct, which is a form of manipulation.
>
> Or whether his final admission was, one confession of spirit which he is trying to admit what he has done and move forward in some sort of spiritiual way. I don't know what the motivation was. I didn't interview the defendant. I wasn't in a position to interview the defendant.
>
> But I do know there certainly isn't anything unconstitutional in the way he was treated by the police or in the manner in which his statements were obtained. R210-16.

On November 28, 2017, defendant filed motions to admit the expert testimony of Dr. Ofshe and John Trainum to explain "coercive police interrogation and the phenomenon of false confessions," and the "interrogation tactics used by law enforcement agencies." C. 1281-1316, 1317-1402. He also submitted a report from Dr. Ofshe that mirrored his

testimony described above, and a report from Mr. Trainum, who also similarly concluded that the detectives improperly utilized the Reid technique. C1291-1316, 1325-91.

After a hearing, the circuit court denied defendant's motion, stating, "[T]he question that's before me is whether or not a juror could having watched the video make a determination about whether or not the defendant was in anyway [*sic*] coerced into making a false confession in the case and the answer is overwhelmingly yes." SupR548. However, the circuit court noted, "I am not at all removing from the defendant his ability to draw into question the confession that was made, alleged to have been made in this case." SupR548.

This well-reasoned ruling was not an abuse of discretion because the matters about which they would testify were not complicated and technical theories beyond the common knowledge of lay persons. Defendant's claim that "jurors are not equipped" to make the determination of whether a confession was voluntary, and that "they need social science to show them what coercive interrogation tactics are and how they increase the risk of false confessions" is not true. Br42. Precedent instructs that a defendant's susceptibility to interrogative suggestion is not a difficult concept lying beyond the understanding of laypersons, and that a circuit court, therefore, does not abuse its discretion in barring that testimony. See People v. Gilliam, 172 Ill.2d 484, 513 (1996) ("Whether defendant falsely confessed to protect his family is not a concept beyond the understanding of ordinary citizens, and it is not difficult to understand); People v. Wood, 341 Ill.App.3d 599, 608 (1st Dist. 2003) (expert's opinion that defendant was easily coerced and susceptible to intimidation is not beyond understanding of ordinary citizens or difficult to understand).

People v. Polk, 407 Ill.App.3d 80 (1st Dist. 2010), is especially instructive. After the trial court denied his motion to suppress, the defendant in Polk sought to admit expert testimony on how defendant's low IQ and the police interrogation techniques created a risk of false confession. Id. at 88. The circuit court barred the expert because the jury could determine on its own the weight to give the defendant's statement and whether the confession was false. Id. This Court affirmed. It found that the proposed testimony about the risk of false confessions was neither difficult to understand nor beyond the understanding of ordinary citizens, nor a concept difficult to understand, considering that the jury was aware of the defendant's educational background and intellectual level, saw the videotaped interrogation, and heard testimony from the interrogating police officer, and where the defendant was able to comment on the evidence during opening statements, trial, and closing arguments. Id. at 102-03.

Here, as in Polk, the circuit court allowed defendant to challenge the credibility and weight of his confession. SupR548. The jury watched the videotaped interrogation and heard testimony from the police detective who questioned defendant, and defendant had the opportunity to comment on that evidence during opening statements, trial, and closing arguments. Defendant has not alleged that his IQ contributed to the involuntariness of his confession, as the defendant in Polk alleged. If the defendant in Polk was not entitled to present expert testimony on more egregious facts, than defendant was not entitled either. The jury did not require expert testimony to understand the concept of defendant's susceptibility to interrogative suggestion.

Relatedly, defendant contends that the circuit court viewing with "scepticism that the Reid Technique—the interrogation technique employed by police in this case—even

existed" amounted to an abuse of discretion. Br41. Defendant has not established, though, that the technique was used against defendant in the first place. Br41. Neither detective testified that they used such a technique while interviewing defendant. SupR1849-1915, 1919-48. Moreover, even *if* such a technique had been used, Dr. Ofshe admitted that it would not automatically prove a coerced confession. R192.

In sum, the circuit court did not abuse its discretion in denying defendant's motion to admit the expert testimony where the proposed testimony related to matters that were not beyond the common knowledge of lay persons and would not have aided the jury in reaching its conclusion.

IV. THE FAILURE OF THE CIRCUIT COURT TO ASK THE POTENTIAL JURORS WHETHER THEY ACCEPTED THE SUPREME COURT RULE 431(b) PRINCIPLES DID NOT RISE TO THE LEVEL OF PLAIN ERROR.

Defendant contends that the circuit court erred by failing to ensure that the prospective jurors understood and *accepted* all four of the principles set forth in Illinois Supreme Court Rule 431(b). Ill. S. Ct. R. 431(b); Br43. This issue is forfeited because defendant neither objected to the error during *voir dire* nor raised the issue in a post-trial motion

People v. Zehr held that "essential to the qualification of jurors in a criminal case is that they know that [the] defendant is presumed innocent, that he is not required to offer any evidence on his own behalf, that he must be proved guilty beyond a reasonable doubt, and that his failure to testify [on] his own behalf cannot be held against him." 103 Ill.2d 472, 477 (1984). These principles were encoded in Rule 431(b). In 2007, Rule 431(b) was amended to impose an affirmative *sua sponte* duty on the trial courts to ask potential jurors whether they understand and accept them. People v. Magallanes, 409 Ill.App.3d

720, 742 (1st Dist. 2011). Rule 431(b) "mandates a specific question and response process. The trial court must ask each potential juror whether he or she understands and accepts each of the principles in the rule." People v. Thompson, 238 Ill.2d 598, 607 (2010). "[A]broad statement of the applicable law followed by a general question concerning the juror's willingness to follow the law" is inadequate. Id. People v. Wilmington, 2013 IL 112938, ¶ 32, held that "[w]hile it may be arguable that the court's asking for disagreement, and getting none, is equivalent to juror *acceptance* of the principles, the trial court's failure to ask jurors if they *understood* the four Rule 431(b) principles is error in and of itself." Compliance with Rule 431(b) is reviewed *de novo*. Thompson, 238 Ill.2d at 606.

Here, the circuit court read each of the four principles to the prospective jurors at the beginning of *voir dire*. SupR692. When addressing the first panel of prospective jurors, the circuit court asked if they understood each of the principles. SupR703-04. For three of the principles, the circuit court asked whether any juror "took issue" with the principles. SupR703-04. The circuit court did not do this for the fourth and final principle, however. SupR704. Addressing the second panel of prospective jurors, the circuit court again asked whether they understood each of the principles but did not ask if they accepted each of them. SupR843. The circuit court thus erred in its Rule 431(b) admonishments

However, defendant has forfeited his Rule 431(b) claim. To preserve an issue for review, a defendant must both object at trial and include the alleged error in a written post-trial motion. People v. Enoch, 122 Ill.2d 176, 186 (1988). Here, defendant failed to object during *voir dire* when the circuit court failed to adequately admonish the venire and failed to raise the issue in a post-trial motion. C2183-2229; SupR703-04, 843.

Therefore, defendant has forfeited this issue and this Court can review only for plain error. People v. Piatkowski, 225 Ill.2d 551, 566 (2007). Plain error exists where a clear or obvious error is committed, and the defendant shows either that the evidence is closely balanced or that the error affected the fundamental fairness of the proceedings. Id.

Defendant does not argue that the error affected the fundamental fairness of the trial, and thus has waived analysis under that prong. Br44-46. See People v. Sebby, 2017 IL 119445, ¶ 52 (a Rule 431(b) violation is not cognizable under the second prong of the plain error doctrine, absent evidence that the violation produced a biased jury).

Defendant's argument for first prong plain error is meritless. When considering whether the first prong has been satisfied, this Court must consider whether defendant has shown that the evidence was so closely balanced that the "error alone severely threatened to tip the scales of justice." Sebby, 2017 IL 119445, ¶ 51. "In determining whether the evidence adduced at trial was close, a reviewing court must evaluate the totality of the evidence and conduct a qualitative, commonsense assessment of it within the context of the case. Id. at ¶ 54. This involves assessing the evidence on the elements of the charged offenses, along with any evidence regarding the credibility of the witnesses. Id. Here, the evidence was not closely balanced; rather, as previously established, the evidence of his guilt was overwhelming. See Argument I, *supra*.

The People presented consistent, corroborated, and reliable testimony from numerous witnesses, including the students in the park, Ronald Evans, and four of defendant's friends and fellow gang members; as well as cell phone tower data and surveillance videos and, most importantly, the admissions of defendant himself. See Argument I, *supra*. No matter how often or strenuously defendant asserts that the evidence was close,

the record compels the opposite conclusion. Defendant's Rule 431(b) claim is forfeited and review for first-prong plain error is unwarranted.

V. THE PROSECUTOR'S COMMENTS DURING CLOSING ARGUMENT WERE PROPERLY BASED ON THE EVIDENCE AND IN RESPONSE TO DEFENDANT'S ARGUMENT.

Defendant asserts that he is entitled to a new trial where the prosecutor "engaged in improper tactics to distract, provoke, and confuse the jurors about the actual issues at trial" during rebuttal closing argument. Br46. This argument is meritless, because each of the complained-of comments was based on the evidence and reasonable inferences therefrom, or was made in response to defendant's arguments.

Defendant did not object to all of the complained-of comments, and thud has forfeited them. SupR2048, 2052, 2054, 2059; see People v. Enoch, 122 Ill.2d 176, 186 (1988). Defendant cannot meet his burden under plain error for these forfeited claims. See People v. Lewis, 234 Ill.2d 32, 43 (2009) As the first step, this Court must determine whether any error occurred at all. People v. Thompson, 238 Ill.2d 598, 613 (2010). No error occurred here, as the People's rebuttal closing argument was based on the evidence and reasonable inferences drawn therefrom, or responded to defendant's argument.

Prosecutors are given a great deal of latitude during opening statements and closing arguments. People v. Nicholas, 218 Ill.2d 104, 121 (2006). Allegations of prosecutorial error require arguments of both the prosecutor and defense counsel to be reviewed in their entirety and allegations of improper comments must be placed in their proper context. People v. Williams, 192 Ill.2d 548, 573 (2000). Defendant urges this Court to review *de novo* the People's comments during closing argument. Br46. Defendant is incorrect, as this Court has more recently held that the applicable standard is abuse of discretion.

People v. Phagan, 2019 IL App (1st) 153031.

During closing argument, a prosecutor may comment on the evidence and draw all legitimate inferences therefrom, discuss witnesses and their credibility, and challenge a defendant's credibility as well as his theory of defense. People v. Pasch, 152 Ill.2d 133, 184-85 (1992). A defendant "faces a substantial burden in attempting to achieve reversal of his conviction based upon improper remarks made during closing argument." People v. Moore, 358 Ill.App.3d 683, 693 (1st Dist. 2005). Reviewing courts will consider the closing argument as a whole and without undue focus on selected phrases or remarks. People v. Runge, 234 Ill.2d 68, 142 (2009). A new trial is not warranted unless the comments were of such magnitude that they resulted in substantial prejudice to defendant and constituted a material factor in his conviction. People v. Gonzalez, 388 Ill.App.3d 566, 587 (1st Dist. 2008). Comment during rebuttal argument is proper if invited by defense counsel's closing argument. People v. Love, 377 Ill.App.3d 306, 313 (1st Dist. 2007).

Defendant first claims that comments made by the prosecutor during rebuttal closing argument "denigrated the defense and misstated critical facts." Br47. The circuit court sustained defendant's objection to one of these comments — "And they do it all disingenuously" — and instructed the jury to disregard questions and comments that were successfully objected to, remedial measures that cured any error. SupR2058, 2066; Br48); People v. Moore, 171 Ill.2d 74, 105-06 (1996).

Furthermore, defendant points to short excerpts, and in some cases single words, as allegedly improper. Br47-48. Properly viewed in context, the comments during closing argument were appropriate. Specifically, defendant points to the following comments:

> The evidence which you shall consider consists only of the testimony – only of the testimony of the witnesses, the exhibits and the stipulations which the Court has received.
>
> What does that mean? No speculation. Do not speculate. Don't guess. No innuendo. That's what the law tells you. It's not what they tell you. It's what the law tells you. Did you just hear all that speculation? Did you just hear all that innuendo that you're not supposed to consider? Why do you think they did that? Because when the facts are against you, you argue the law. *And when the law's against you, you get up there and throw it against the wall and you hope someone will believe it*. SupR2046 (Emphasis added); Br48.

Later, in addressing the detectives' interviews of defendant, the prosecutor argued:

> Did you hear all speculation about what they told, they told him to say this, they told him – they never told him to say it was an accident. They never told him – look at that video. They never told him to confess to a set of facts for leniency. They told him several times, they put the brakes on, we're not talking about that when this guy is trying to cut his last meal.
>
> *It's the last passion of the scoundrel, let's blame the police*. It's really not their fault. SupR2047 (Emphasis added); Br48.

Shortly thereafter, the prosecutor commented:

> When this case came in over five years ago, the investigation was complete. The evidence was gathered. The statements were made.
>
> These are fine attorneys. They're doing their job. There's very little that they had to work with.
>
> ***
>
> *You can't make chicken salad out of chicken shit* and that's what they had to do in this case. So I guess you get up here and you speculate and it's bad police. And I guess we're in on it. It's a grand conspiracy. SupR2048 (Emphasis added); Br48.

Finally, the prosecutor argued:

> Now we got Jarrod [*sic*]. That makes absolutely no sense. That red car and the backpack tells you one thing, that Kenny Williams was at one time in that red car when he had to get his backpack back. The gun is in the backpack. Jarrod [*sic*] is the shooter. They can just throw anything out there. What's their response? *Deny, deflect, denigrate the three D's. Bad case of senioritis over there on that side of the room*. SupR2052 (Emphasis added); Br48.

Viewed in proper context, these remarks merely responded to defendant's argument

in which he attempted to discredit the People's case with hypothetical situations and rhetorical questions. SupR2011-45; see Love, 377 Ill.App.3d at 313. For example, defense counsel asserted that, "[t]he police formed a theory very, very early on in the investigation, the same day it happens. And then they pursue that theory blocking out everything around them that would take them off of that theory until they ended with that confession in that room and they had their man. *But what really happened here*?" SupR2012 (Emphasis added) Then, after discussing witness Ronald Evans, counsel argued, "[b]ased on that, and that alone, Sergeant Lopez concludes that this must be a gang shooting, that the gang involved must be the SUWUs because in his experience when the gang member does a shooting he goes home. Well, *how ridiculous is that?"* SupR2013 (Emphasis added) Counsel continued his attack on Ronald's testimony: "He didn't come into court and say yeah, that's him. Why is that? Well, the [S]tate wanted you to make a lot of circumstantial conclusions and inferences from the evidence. How about this? How about he can't because [defendant] is not the shooter? How about that? Maybe that's why Ronald Evans never identified him." SupR2014-15.

Counsel later argued that Ernest and Demetrius were "liars. They're unreliable witnesses. It is not good evidence. It is not good testimony" and contended that "[T]here are pieces that don't fit in this puzzle that the police didn't even look at. And I guess the biggest glaring one was Jarrod [*sic*] Randolph." SupR2017-18.

Viewed against defense counsel's closing argument, the prosecutor's comments were not an attack on defense counsel, but merely served as commentary on the strength of defendant's case. Br48. Such comments are appropriate and do not equate to a personal attack on defendant or defense counsel. See People v. King, 182 Ill.App.3d 501, 506 (4th

Dist. 1989) (comments should not be considered in isolation, and comments on "the quality and strength of defendant's case" are not prejudicial). People v. Phillips, 127 Ill.2d 499, 523-26 (1989) (prosecutor's comment, "It is all part of a shotgun defense. Throw out and see what sticks. It is nothing more than a red herring intended to distract you from the real issues in this case," was proper).

Next, defendant complains that the prosecutor "attacked the defense expert, Dr. Geoffrey Loftus, denigrating him and misstating his testimony," but again deprives the issue of necessary context. Br49. Viewed properly, this comment merely challenged Dr. Loftus's *credibility*, and was not a personal attack on the witness itself. See People v. Hudson, 157 Ill.2d 401, 445 (1993) ("The credibility of a witness is a proper subject for closing argument if it is based on the evidence or inferences drawn from it.") See also People v. Ligon, 365 Ill.App.3d 109, 124-25 (1st Dist. 2006) (prosecutor's description of defendant's argument as "ridiculous" and "pathetic" not improper). The fuller text of the prosecutor's argument is as follows:

> *Want to talk about speculation? The million dollar man, Dr. Loftus*.
>
> ***
>
> He *never spoke to any of the witnesses*. They want to talk about a doctor. You know when you go to the doctor, he looks at the patient before he renders an opinion.
>
> ***
>
> He never even — he doesn't have to talk to any of the witnesses. You know, *if you really want to find out what was going on in someone's mind or how they're affected by something, go and talk to them*. They want to talk about speculation. They *mustn't have bought the bonus package for the doctor because he wouldn't go talk to them.*

SupR2048-49 (Emphasis added); Br49.

Not only were these remarks permissible challenges to Dr. Loftus's testimony, but they were properly based on the evidence and reasonable inferences therefrom. See

People v. Kirchner, 194 Ill.2d 502, 549 (2000) ("The State may challenge a defendant's credibility and the credibility of the theory of defense in closing argument when there is evidence to support such a challenge.") Defendant claims that the prosecutor "misstated Loftus's testimony," but the record compels the opposite conclusion. Br49. On cross-examination, Dr. Loftus admitted that he did not interview any witnesses despite his access to all police reports, had no opinion as to the veracity of the witnesses' testimony, and conceded that whether post-event information affected a person's memory of that event could not be ascertained, and this too was a fair area of criticism. R1138-40.

Dr. Loftus would not have been prohibited from testifying that he interviewed witnesses as part of his analysis *if* he had done so. Br49. The circuit court merely prohibited him from testifying about the distinct issue of wrongful convictions. R239. At no point did the circuit court "limit[] Loftus's testimony *so that he could not talk about the specifics of the case*." Br49. (Emphasis is defendant's) But Dr. Loftus cannot have so testified because he did not interview any witnesses, and it was fair for the prosecutor to comment on this.

These comments were also invited by defense's closing argument, during which counsel argued, "[W]e had to call Dr. Loftus. He's not cheap." SupR2026. Defense counsel continued, "The best the [S]tate could do on their cross was, you know, how much do you charge? They didn't criticize the science. If you go to a doctor, you pay for the doctor. Doctors are not cheap." SupR2027. Defense counsel also argued:

> *And would he talk to the people? No. Because that's not that [sic] he's here for.* He wasn't here to tell you you can believe this and you can't believe that or, you know, I think this person is lying or I think this person is mistaken. That's not what he's here about. That's not the purpose of his testimony. SupR2027 (Emphasis added)

Thus, not only were the People's comments based on the evidence at trial, but they also were invited by defense counsel's argument.

Next, defendant contends the prosecutor "misstated other facts" in arguing "that there were no lies involved in the police interrogation of [defendant]." Br50. This misconstrues the argument, which was as follows:

> Let's talk about all the bad police procedure you heard in this case. We're done. There was none. Coercive, lies, we're better than that. Ladies and Gentlemen, that videotape[d] statement is in front of you as proper evidence. The Judge told you last week he decides what evidence you see. Don't let anyone get up here and say they were speculating that they did something wrong. SupR2046-47.

This clearly disputed defense counsel's own closing argument and was, in fact, based on the evidence at trial. As such, there was nothing improper about the comment.

Defendant also claims that the prosecutor "said none of the witnesses identified anyone other than [defendant] as the shooter." Br50. This too is rebutted by the record. The prosecutor stated:

> What's also significant is all those witnesses when they looked at all those other photo arrays, they never picked anyone out as the shooter. That shows you they just weren't willy-nilly trying to help out trying to make this better. They were trying to find the actual person. And the fact they didn't you can use that and consider that to support when they did.

SupR2053. These comments were rooted firmly in the evidence. Sergeant Guerrero testified that during the various lineup procedures Danetria, Veronica, and Lazerick made "tentative" identifications of defendant, and that Tyra and Stephan identified defendant as looking "similar" to the shooter. SupR1632-34, 1637-38. Thus, none of the individuals identified anyone but defendant *as the shooter*, and it follows that the prosecutor's comment was proper.

Finally, defendant complains that the prosecutor improperly referred to his own

personal experience in discussing his trip to the 9/11 memorial in New York, and that Hadiya would not be forgotten, just as the victims of the 9/11 attack would not be forgotten: "No day shall erase you from the memory of time. No day shall erase you from the memory of time," Br50; SupR2064-65. This comment, according to defendant, distracted the jury from the issues and inflamed its passions. Br50. But viewed in context, the reference to the 9/11 memorial was only to explain the source of the quotation, and not to tie Hadiya's murder to the 9/11 terrorist attacks. Cf. United States v. Moore, 375 F.3d 259, 264 (3d Cir. 2004) (prosecutor's comment on eve of one-year anniversary of September 11th terrorist attacks that Moore was a "kind of terrorist," even if "not one of *those* terrorists," was improper); People v. Shief, 312 Ill.App.3d 673, 679 (1st Dist. 2000), (prosecutor's comment in closing argument concerning the death of his own son "served only to bolster the credibility of the victim and her testimony").

Moreover, any error (and there was none) was adequately cured by the court's repeated instructions that opening statements and closing arguments are not evidence. SupR1977-78, 2070. See People v. Willis, 409 Ill.App.3d 804, 814 (1st Dist. 2011). It is presumed that jurors follow the circuit court's instructions, and that such instructions lower the risk of influence by improper argument. People v. Illgen, 145 Ill.2d 353, 376 (1991). Faith in the ability of a properly instructed jury to follow its instructions is one of the cornerstones of our jury system. Id. Therefore, defendant's argument is without merit.

VI. THE CIRCUIT COURT PROPERLY DENIED DEFENDANT'S PRETRIAL MOTION TO QUASH ARREST AND SUPPRESS EVIDENCE.

Next, defendant cites People v. Bass, 2019 IL App (1st) 160640 (Bass I), to argue that the circuit court erred in denying his pretrial motion to quash arrest and suppress evidence because, he argues, Chicago Police arrested him pursuant to an investigative alert. Br52-

54. However, the portion of this Court's opinion relied on by defendant was vacated by the Illinois Supreme Court in People v. Bass, 2021 IL 125434, ¶¶ 31-34 (Bass II).

In Bass II, the Supreme Court:

> agreed with the appellate court's finding that the traffic stop of the defendant (which led to the discovery of the investigative alert issued for the defendant) was unreasonably extended and the motion to suppress should have been granted. [Id. at ¶ 26.] The supreme court affirmed the appellate court's decision to reverse the defendant's conviction and remand for a new trial. Id. at ¶ 27. However, having disposed of the case on those narrow grounds, it declined to "express any opinion on the limited lockstep analysis, its application to warrants or investigatory alerts, or the constitutionality of investigative alerts. Those portions of the appellate opinion dealing with these issues are vacated." Id. at ¶¶ 29-31.

People v. Little, 2021 IL App (1st) 181984, ¶ 63.

Thus, the arrest in this case, based on an investigative alert, was constitutional because it was based on probable cause, whether or not the probable cause was accompanied by an investigative alert. Defendant does not contest that his arrest was based on probable cause. Br52-54. That being the case, defendant's now-vacated argument premised on Bass I is irrelevant, and the circuit court's denial of defendant's motion to quash arrest and suppress evidence as supported by probable cause remains undisturbed.

VII. THIS COURT SHOULD NOT REMAND WHERE DEFENDANT IS NOT ENTITLED TO HAVE AN EVIDENTIARY HEARING.

Finally, defendant cites Miller v. Alabama, 567 U.S. 460 (2012), to challenge his 84-year sentence for offenses he committed when he was over 18 years old under the Eighth Amendment of the federal Constitution and the Illinois Constitution's Proportionate Penalties Clause. Br54-58. Defendant argues that the circuit court failed to consider his age or the characteristics of youth before imposing sentence. Br55, 57.

Defendant received a sentence of 70 years' imprisonment for murder during which he personally discharged a firearm proximately causing death. C2315; SupR2106-07. The applicable range for this offense was from 45 years to life imprisonment. 730 ILCS 5/5-4.5-20(a) (Range is 20 to 60 years); 730 ILCS 5/5-8-1(a)(1)(d)(iii) (25 years up to a term of natural life for using firearm). Additionally, defendant was sentenced to 14 years' imprisonment for aggravated battery with a firearm, from a range of six to 30 years' imprisonment. 720 ILCS 5/12-3.05(e)(1), (h); 730 ILCS 5/5-4.5-25(a).

Defendant urges this Court to find that the circuit court's sentencing procedure was improper because it did not hold an evidentiary hearing as "contemplated by Harris." Br55; People v. Harris, 2018 IL 121932. As an initial matter, defendant's Eighth Amendment claim is foreclosed entirely because he was not a juvenile when he committed these crimes. Id. at ¶ 61. As far as the proportionate-penalties aspect of the claim, defendant failed to request that review in the circuit court, and it is too late now to seek remand. As-applied constitutional challenges may not be raised for the first time on direct appeal because they are "dependent on the specific facts and circumstances of the person raising the challenge. Id. at ¶¶ 39-40. Because defendant did not raise his as-applied challenge in the circuit court, he deprived the court of holding an evidentiary hearing and making factual findings concerning his proportionate penalties claim.

Defendant seeks remand to the circuit court for that purpose, but no authority supports that remedy. Indeed, Harris rejected an identical request finding that "defendant's claim is also more appropriately raised in another proceeding. Accordingly, we decline to remand this matter for an evidentiary hearing." Id. at ¶¶ 47-48. Neither is defendant in this case entitled to have this case remanded for an evidentiary hearing.

Defendant claims that the People endorsed remand in their petition for leave to appeal in People v. House, IL Case No. 125124. Br57-58. But People v. House concerned the second-stage dismissal of the defendant's post-conviction petition, and not a direct appeal as here. 2019 IL App (1st) 110580-B, ¶ 23-24. A post-conviction proceeding is the proper venue to raise constitutional claims that were not raised at trial. Harris, 2018 IL 121932, ¶ 48. Thus, the People's argument here is not undermined by its position in House.

This Court recently clarified in another direct appeal that under Harris, "remand for this purpose is foreclosed." People v. Ortega, 2021 IL App (1st) 182396, ¶ 112. Just as it did in Ortega, this Court should decline to remand to the circuit court where no as-applied challenge was raised below. Instead, defendant's sentence should be affirmed.

CONCLUSION

The People of the State of Illinois respectfully request that this Honorable Court affirm defendant's convictions for first degree murder and aggravated battery with a firearm.

Respectfully Submitted,

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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 containing the Rule 341 (d) cover, the Rule 341 (h)(1) table of contents and statement of points and authorities, the Rule 341 (c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 50 pages.

BY: /s/ Tyler J. Cox
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NOTICE OF FILING

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PLEASE TAKE NOTICE that on October 28, 2021, the foregoing Notice and Brief and Argument was filed with the Clerk of this Appellate Court of Illinois, First District, using the court's electronic filing system.

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CERTIFICATE OF SERVICE

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. I further certify that on October 28, 2021, I caused the foregoing Notice and Brief and Argument to be served on the above mentioned person at the above listed email address using the court's electronic filing system.

BY: /s/ Tyler J. Cox
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No. 129627
IN THE
SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellant, -vs- MICHEAIL WARD, Defendant-Appellee		Appeal from the Appellate Court of Illinois, First Judicial District, No. 1-19-0364 There on Appeal from the Circuit Court of Cook County, Illinois No. 13-CR-5242 The Honorable Nicholas Ford, Judges Presiding

PROOF OF SERVICE

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Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct:

The undersigned, an attorney, certifies under 735 ILCS 5/1-109 under penalty of perjury that we efiled the attached **BRIEF AND ARGUMENT FOR DEFENDANAPPELLEE** . on March 18, 2024 in the above-entitled cause to the Clerk of the above Court and served all parties by service through the Odyssey efile system.

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