No. 129627

IN THE
SUPREME COURT OF ILLINOIS

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

REPLY BRIEF OF PLAINTIFF-APPELLANT
PEOPLE OF THE STATE OF ILLINOIS

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ARGUMENT

As the People's opening brief demonstrated, the appellate court applied the wrong standard of review to the trial court's ruling on defendant's motion to suppress by announcing that it owed no deference to the trial court's factual findings because the trial court did not hear live testimony at the suppression hearing. Peo. Br. 20-24.[1] And, as the People further explained, the appellate court then erred (under any standard of review) in concluding both that defendant's invocation of his Fifth Amendment right to remain silent was not scrupulously honored, *id.* at 24-31, and that the ostensibly erroneous admission of his subsequent custodial confession was not harmless, *id*. at 31-39.

In response, defendant primarily urges this Court to avoid addressing these errors on the grounds of mootness and forfeiture. But he does not offer a compelling reason to follow that drastic course. And his arguments on the merits of the Fifth Amendment and harmless-error questions are likewise unpersuasive. Thus, for the reasons discussed in the People's opening brief and below, this Court should clarify the appropriate standard of review, reverse the appellate court's judgment, and remand for the appellate court to consider defendant's remaining claims.

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[1] "Peo. Br.," "Def. Br.," and "PLA" refer, respectively, to the People's opening brief, defendant's brief, and the People's petition for leave to appeal. Citations to the record and the appendix to the People's opening brief are the same as in the People's opening brief. *See* Peo. Br. 2 n.1.

I. This Court Should Not Dismiss the Appeal.

Defendant repeats his request to dismiss this appeal as improvidently granted, Def. Br. 8-17, which this Court already rejected when it denied defendant's motion to dismiss the appeal on the same grounds, *see* Order of March 29, 2024. No argument in defendant's brief justifies reconsideration of this Court's prior ruling. Thus, for the same reasons discussed in the People's response to defendant's unsuccessful motion to dismiss, this Court should again decline to dismiss this appeal.

II. This Court Should Resolve the Standard of Review Question and Hold That a Trial Court's Factual Findings Deserve Deference Regardless of Whether the Trial Court Heard Live Testimony.

A. This is a frequently recurring question of great public importance.

As explained in the People's opening brief, *see* Peo. Br. 20, this case presents the Court with an opportunity to resolve a frequently recurring and increasingly important question in this age of videorecorded interrogations and other police-citizen encounters: whether the usual rule of appellate deference to a trial court's factual findings applies when the trial court considered only video evidence at a suppression hearing. While the appellate court's statement that no deference is owed to a trial court's factual findings unless the trial court heard live testimony does not appear to have affected the outcome here, *see* Peo. Br. 24, it is still imperative that this Court correct

the appellate court's trend of misstating the governing standard of review in such cases.[2]

The People acknowledge that this Court generally does not "issue advisory opinions on moot or abstract questions of law." *People ex rel. Partee v. Murphy*, 133 Ill. 2d 402, 408 (1990). But this Court has recognized a public-interest exception to that rule, which permits the Court to resolve a question that will not affect the outcome of the case before it when "(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. Each of these criteria is satisfied here.

The proper standard for reviewing a trial court's factual findings based on video evidence is undoubtedly a question "of a public nature" and "likely to recur," *id.*, given the "dramatic escalation of digital evidence presented in trial courts" and "commensurate increase in the frequency with which such digital evidence has been submitted on appeal," Jack M. Sabatino, *The Appellate Digital Deluge: Addressing Challenges for Appellate Review Posed by the Rising Tide of Video and Audio Recording Evidence*, 96 Temp. L. Rev. 11, 22 (2023). For the same reason, "an authoritative determination of the question is desirable for the future guidance of public officers," *Shelby R.*,

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[2] *See, e.g.*, *People v. Dorsey*, 2023 IL App (1st) 200304, ¶ 94, *petition for leave to appeal pending*, No. 130143 (Ill.); *People v. Cox*, 2023 IL App (1st) 170761, ¶ 42; *People v. Flores*, 2014 IL App (1st) 121786, ¶ 35.

2013 IL 114994, ¶ 16, even in the absence of conflicting lower court decisions on the issue, *see id.* at ¶ 20.

Defendant does not dispute that the public-interest exception's criteria are satisfied here. *See* Def. Br. 19-21. Instead, he asserts that this Court has not previously addressed the proper standard of review where the answer to that question was not outcome-determinative. *Id*. at 19. But he cites no precedent establishing a categorical rule against doing so. Contrary to defendant's suggestion, *see id*. at 20-21, *People v. Washington*, 2023 IL 127952, provides no support for such a rule. There, while the majority declined to resolve a standard of review question, it did so not only because the issue was not outcome-determinative, but also because it had not been "raised, briefed, or argued by either party." *Id.*, ¶ 48. Here, in contrast, both parties' briefs address the question of the proper standard of review. And while the parties agree that resolution of the question will not affect the outcome of this case, they do not (as defendant contends, *see* Def. Br. 20-21) agree on the appropriate standard for reviewing a trial court's factual findings that are based on video evidence. *See* Peo. Br. 20-24 (arguing for deferential review); Def. Br. 22-25 (arguing for *de novo* review).

Finally, defendant argues that the People forfeited the argument that this Court should review the standard of review question under the public-interest exception because the People did not invoke the exception in their opening brief. Def. Br. 19. But a party does not forfeit its response to an as-

yet-unmade procedural objection by not preemptively raising it. *See People v. Ramsey*, 239 Ill. 2d 342, 412 (2010) (argument for plain-error review of unpreserved claim made for first time in reply brief was "sufficient to allow [this Court] to review the issue for plain error"). Thus, because the People timely invoked the public-interest exception in response to defendant's mootness argument — and because the standard of review question is of public importance, likely to recur, and has been fully briefed — this Court should resolve the question here.

B. Trial courts' experience and expertise in resolving factual disputes justifies appellate deference no matter the type of evidence presented.

This Court should hold that the traditional bifurcated standard for reviewing a trial court's suppression ruling — under which the reviewing court "defer[s] to the factual findings of the trial court" unless "they are against the manifest weight of the evidence" and considers *de novo* "the legal effect of those facts," *People v. Lindsey*, 2020 IL 124289, ¶ 14 — applies regardless of the nature of the evidence presented at the suppression hearing.

The People acknowledge, *see* Peo. Br. 21-22, that this Court previously has applied *de novo* review to a trial court's factual findings where the trial court considered only documentary evidence. *See People v. Radojcic*, 2013 IL 114197, ¶¶ 34-36; *Addison Ins. Co. v. Fay*, 232 Ill. 2d 446, 453 (2009); *People v. Oaks*, 169 Ill. 2d 409, 447-48 (1996). In these cases, the Court reasoned that *de novo* review was warranted because "the trial court was in no superior position than any reviewing court to make findings." *Addison Ins.*

Co., 232 Ill. 2d at 453. But, as explained, *see* Peo. Br. 22-23, that reasoning overlooks an equally important "rationale for deference" to a trial court's factual findings: the trial court's "major role" as the finder of fact in our legal system. *Anderson v. Bessemer City*, 470 U.S. 564, 574 (1985). With the trial court's "experience in fulfilling that role comes [an] expertise" that warrants appellate deference to the trial court's factual findings regardless of whether the trial court heard live testimony or considered documentary evidence. *Id.*

Defendant argues that *de novo* review of a trial court's factual findings is nonetheless justified "where the reviewing court and the [trial] court consider identical and undisputed evidence." Def. Br. 23. But even in cases where a trial court considers only documentary evidence, there still may be disputed factual issues for the trial court to resolve in its role as factfinder. At a suppression hearing based on a videorecorded custodial interview, for example, the parties may disagree about what the video depicts — from basic facts about what the defendant or a detective said or did, to what inferences about either person's state of mind can be drawn from the person's body language, demeanor, or tone of voice. In such cases, a reviewing court should reject the trial court's factual findings only if they are clearly unsupported or contradicted by the record — in other words, if they are against the manifest weight of the evidence. If the trial court's factual findings are reasonable, it would "advance[ ] no greater good" to permit a reviewing court to substitute its interpretation of the evidence for that of the trial court. *State v. S.S.*, 162

A.3d 1058, 1070 (N.J. 2017); *see Anderson*, 470 U.S. at 574-75 ("Duplication of the trial judge's efforts in the court of appeals would very likely contribute only negligibly to the accuracy of fact determination at a huge cost in diversion of judicial resources.").

Finally, defendant notes that appellate courts in Massachusetts apply *de novo* review to a trial court's factual findings when the trial court considered only documentary evidence. Def. Br. 25. But other jurisdictions — both state and federal — require deferential review in such circumstances. *See S.S.*, 162 A.3d at 1068-69 (collecting competing cases). Because trial courts bear primary responsibility for resolving disputed questions of fact in our legal system, the better view is that a trial court's factual findings are entitled to deferential appellate review no matter the nature of the evidence that the trial court considered. For these reasons, this Court should hold that the appellate court misstated the governing standard of review when it announced that it owed no deference to the trial court's factual findings because the trial court considered only video evidence at the suppression hearing.

III. Defendant's Custodial Confession Was Admissible Because Detectives Scrupulously Honored His Earlier Invocation of His Right to Remain Silent.

As the People's opening brief explained, the appellate court erred under any standard of review when it concluded that the detectives who interviewed defendant did not scrupulously honor his invocation of his right

to remain silent, and that defendant's subsequent custodial confession was therefore inadmissible. *See* Peo. Br. 24-31.

A. This issue is properly presented.

Initially, defendant contends that the People forfeited this argument by not raising it in their petition for leave to appeal (PLA) or brief in the appellate court. Def. Br. 26. But this Court will consider a question not raised in a PLA when it "is inextricably intertwined with other matters properly before the court." *People v. Brown*, 2020 IL 125203, ¶ 31 (cleaned up).[3] Here, the PLA advanced the argument that any error in admitting defendant's custodial confession was harmless. PLA at 19. The question whether there was error at all is inextricably intertwined with the harmless-error question. Indeed, in *In re Rolandis G.*, 232 Ill. 2d 13, 37-38 (2008), this Court concluded that an argument that any error in the admission of certain evidence was harmless was inextricably intertwined with the question whether the evidence was erroneously admitted in the first place because "where a court of review determines that certain evidence was improperly admitted at trial, it is entirely appropriate to consider whether . . . the admission of evidence, though error, was harmless." Although the order in which the issues are raised here is reversed, the same principle should apply.

[3] Contrary to defendant's contention, *see* Def. Br. 28, the People were not required to preemptively advance this argument in their opening brief. *Cf. Ramsey*, 239 Ill. 2d at 412 (plain error argument may be raised for first time in reply brief).

Because the need to assess whether a trial error was harmless arises only if there was in fact an error, the two questions are inextricably intertwined.

The People's failure to raise this argument in the appellate court is likewise no bar to this Court's review. As this Court recently reiterated, when the appellant in this Court was the appellee below, it "may raise any issue[ ] properly presented by the record to sustain the judgment of the trial court," even if it "did not raise the issue in the appellate court or in its petition for leave to appeal." *People v. Gray*, 2024 IL 127815, ¶ 19 (cleaned up); *see also People v. Wells*, 2023 IL 127169, ¶ 29. Contrary to defendant's contention, *see* Def. Br. 27, this rule is not limited to cases where the issue that the appellant seeks to present in this Court was raised in the trial court. Rather, the rule requires that the issue be "properly presented by the record." *Gray*, 2024 IL 127815, ¶ 19. Given that the appellate court expressly addressed whether defendant's invocation of his right to remain silent was scrupulously honored, *see* A35, ¶ 120, the issue is properly presented by the record and thus appropriately raised here.

B. The appellate court erred in holding that defendant's invocation was not scrupulously honored.

As discussed in the People's opening brief, *see* Peo. Br. 28-31, when defendant unambiguously invoked his right to remain silent by telling Detectives Halloran and Murray, "I don't want to say nothing else about it," those detectives immediately halted the interview, *see* PE124 (Disk 2, File 3) at 07:17:35–07:18:20; C643-44. More than five hours then passed before

Detectives Reiff and Murphy resumed the questioning and eventually elicited defendant's confession. *See* PE124 (Disk 3, File 3) at 12:31:02. Among the factors that courts consider in determining whether a defendant's invocation of his right to remain silent was scrupulously honored are whether "the police immediately halted the initial interrogation after the defendant invoked his right to remain silent," *People v. Nielson*, 187 Ill. 2d 271, 287 (1999), whether "a significant amount of time elapsed between the interrogations," *id.*, and whether "the subsequent interrogation was by a different officer," *People v. Easley*, 148 Ill. 2d 281, 304 (1992). Each of these factors supports a finding that the detectives scrupulously honored defendant's invocation of his right to remain silent.

Defendant does not dispute that Detectives Halloran and Murray immediately ended their questioning when defendant said, "I don't want to say nothing else about it." Nor does he dispute that the passage of more than five hours between that invocation of his right to remain silent and the resumption of questioning by Detectives Reiff and Murphy qualifies as a significant amount of time. Instead, he contends that he *also* invoked his right to remain silent on two earlier occasions, and that the detectives did not immediately end the interviews after *those* invocations or allow significant amounts of time to elapse between those invocations and subsequent rounds of questioning. *See* Def. Br. 32-35.

But as explained in the People's opening brief, the first two statements that defendant and the appellate court cite as supposed invocations of defendant's right to remain silent — "I ain't got nothing else to say" and "Got nothing to say" — were ambiguous. *See* Peo. Br. 25-27. In the context in which it was made, the first statement — which came after a lengthy exchange in which Detectives Halloran and Murray told defendant that they knew the alibi he had given them was false and urged him to "explain why [he was] the shooter," C617-18 — can reasonably be understood not to express a desire to end the questioning, but to indicate that defendant was sticking to his story, reiterating his alibi, and continuing to deny involvement in the shooting. Similarly, the context surrounding the second statement — which was made in response to the detectives urging defendant "to ease some of the burden and pain that [he had] caused" by explaining why the shooting happened, C641-42 — can reasonably be understood to mean that defendant did not want to discuss why the shooting happened, and not that he wanted to stop answering all questions about the shooting.

Defendant argues that these two statements — "I ain't got nothing else to say" and "Got nothing to say" — were unambiguous invocations of his right to remain silent because they were "virtually identical in wording" to the later statement — "I don't want to say nothing else about it" — that the People agree unambiguously invoked defendant's right to remain silent. Def. Br. 33; *see* Peo. Br. 27-28. But the statements that defendant *got* (or *had*)

nothing to say are not materially similar to the statement that defendant did not *want* to say anything. Nor were the statements made in similar contexts. Unlike the first two statements, defendant made the third statement in response to the detectives telling him, "If you don't want to say nothing about it . . . then just tell us I'm done talking." C643. In that context, the third statement — unlike the first two statements — cannot reasonably be understood as anything other than an unequivocal invocation of defendant's right to remain silent. *See* Peo. Br. 28.

Accordingly, because the first two statements did not unambiguously invoke defendant's right to remain silent, neither the amount of time that elapsed between those statements and subsequent rounds of questioning, nor whether the detectives immediately ended the questioning after defendant made those statements, is relevant to determining whether defendant's later custodial confession was admissible.[4]

Finally, defendant suggests that the detectives' failure to deliver new *Miranda* warnings when resuming their questioning is "virtually" dispositive of the question whether his invocation of his right to remain silent was scrupulously honored. Def. Br. 32. But, as explained in the People's opening brief, *see* Peo. Br. 29, while the provision of fresh *Miranda* warnings is

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[4] In any event, defendant wrongly contends that the detectives continued to question him after he made the first two statements. Def. Br. 33-34. In both instances, the detectives told defendant that they would "take a break" and then left the interview room. *See* C617-18, 641-42; PE124 (Disk 1, File 2) at 01:41:35–01:42:25; PE124 (Disk 1, File 4) at 04:01:35–04:03:00.

sometimes said to be "[t]he most important factor" in the analysis, *United States v. Hsu*, 852 F.2d 407, 411 (9th Cir. 1988), no single factor is "predominant or dispositive," *United States v. Montgomery*, 555 F.3d 623, 633 (7th Cir. 2009) (cleaned up). Considering all the relevant factors — including that the detectives immediately halted the interview when defendant invoked his right to remain silent and that two different detectives then waited more than five hours before asking defendant further questions — the record "reveals that [defendant's] rights were fully respected." *United States v. Abdallah*, 911 F.3d 201, 214 (4th Cir. 2018) (cleaned up). The appellate court thus erred in holding that defendant's custodial confession was inadmissible.

IV. Any Error in Admitting Defendant's Custodial Confession Was Harmless.

If this Court declines to consider — or rejects — the People's argument that defendant's custodial confession was admissible, it should still reverse the appellate court's judgment on the alternative ground that the appellate court wrongly concluded that the erroneous admission of the confession was not harmless beyond a reasonable doubt. *See* Peo. Br. 31-39.

A. This issue is properly presented.

Defendant argues that the appellate court's determination that the People forfeited the harmless-error argument in that court by not raising it in a timely manner prevents the People from presenting the argument in this Court. Def. Br. 36-37; *see* A35, ¶¶ 121-22. But even if the People had not raised the argument at all in the appellate court, 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." *Wells*, 2023 IL 127169, ¶ 29 (cleaned up); *see also Gray*, 2024 IL 127815, ¶ 19. And here, the fact that the appellate court overlooked the People's forfeiture and considered the harmless-error question on the merits provides an even stronger reason for permitting the People to raise the issue in this Court.

Defendant also contends that the law-of-the-case doctrine prevents the People raising the harmless-error argument in this Court because the People did not challenge the appellate court's forfeiture finding in a petition for rehearing or the PLA. Def. Br. 36-37. But "the law of the case doctrine is inapplicable to this court in reviewing the decision of the appellate court." *Krautsack v. Anderson*, 223 Ill. 2d 541, 552 (2006); *see also People v. Peterson*, 2017 IL 120331, ¶ 25 ("an issue of law decided by the appellate court in a first appeal is generally binding upon *that court* in a second appeal") (emphasis added).

Regardless, the People do not seek to relitigate the appellate court's forfeiture determination in this Court. Given that the appellate court overlooked the People's forfeiture and considered the harmless-error argument on the merits, nothing would be gained by doing so. And, in any event, as just discussed, this Court's well-settled precedent allows the People

to raise the harmless-error argument here despite any forfeiture below. For all these reasons, neither forfeiture principles nor the law-of-the-case doctrine prevents the People from presenting the harmless-error argument here.

B. The independent evidence of defendant's guilt was overwhelming, and the content of his custodial confession was cumulative of other evidence.

As explained in the People's opening brief, *see* Peo. Br. 31-32, each of the factors that courts consider when assessing whether the erroneous admission of a confession was harmless beyond a reasonable doubt, *see People v. Salamon*, 2022 IL 125722, ¶ 121, supports a finding of harmlessness here.

To start, defendant's convictions are "overwhelming[ly]" supported by "other evidence in the case," *id.*, including the substantively admitted grand jury testimony of defendant's friends (Ernest Finner, Demetrius Tucker, and Jarod Randolph) recounting defendant's separate confessions in the minutes and days after the shooting; defendant's incriminating and false exculpatory statements to the detectives made before he even arguably invoked his right to remain silent; eyewitness testimony identifying defendant as the shooter or as looking like the shooter and describing the color of the hooded sweatshirt he was wearing when he was arrested as the same color as the hooded sweatshirt the gunman wore; testimony, surveillance videos, and cell site location data placing defendant near Harsh Park shortly after the shooting in a car of the same make, model, and color as the getaway car, with defendant seated in the seat that a witness saw the gunman enter after the

shooting; and evidence that defendant's mother owned such a car and that defendant had a gang retaliation motive for the shooting, *see* Peo. Br. 32-37.

Like the appellate court, defendant discounts the probative value of his confessions to Finner, Tucker, and Randolph because at trial those witnesses recanted their grand jury testimony and claimed that they had been coerced by detectives. Def. Br. 41-42; *see* A36-37, ¶ 124. But recantations are "inherently unreliable," *People v. Morgan*, 212 Ill. 2d 148, 155 (2004), and these recantations are particularly suspect. As defendant's fellow gang members, Finner, Tucker, and Randolph had a strong motive to not testify against defendant in open court, as the appellate court acknowledged. A24, ¶ 94. That motive was evident from Finner's insistence at trial that he did not even remember testifying before the grand jury, *see* SR1080-1110, and from Tucker's equally unbelievable claim that after he and Finner got in the car with defendant and Williams following the shooting, no one said a word, R563. In these circumstances, no reasonable jury would discredit the grand jury testimony.

Defendant also challenges the strength of the evidence that several of the students who witnessed the shooting identified him as the shooter or as looking like the shooter. Def. Br. 39-41. But the fact that multiple witnesses independently identified defendant, even tentatively, reduces the probability of error. *See United States v. Williams*, 522 F.3d 809, 812 (7th Cir. 2008). In any event, the question is not whether the identifications alone conclusively

establish defendant's guilt, but whether the totality of the evidence does so. *See District of Columbia v. Wesby*, 583 U.S. 48, 60-61 (2018) (when considering the strength of a body of evidence, "the whole is often greater than the sum of its parts — especially when the parts are viewed in isolation").

The other key factor supporting a finding that any error in admitting defendant's custodial confession was harmless is that the confession was "cumulative" to other, "properly admitted evidence," *Salamon*, 2022 IL 125722, ¶ 121, including the grand jury testimony of Finner, Tucker, and Randolph recounting defendant's confessions to them and the expert testimony documenting the gang rivalry that provided defendant's motive for the shooting, s*ee* Peo. Br. 38. Defendant does not dispute that his custodial confession was cumulative to this other evidence. Instead, he again argues that the grand jury testimony of Finner, Tucker, and Randolph should not be believed because they recanted their grand jury testimony at trial. Def. Br. 42-43. But as discussed, *see supra* p. 16, that argument is unavailing. Thus, as in *Salamon*, where this Court found that the erroneous admission of a custodial confession was harmless in light of the defendant's separate confession to a friend and other evidence of his guilt, *see* 2022 IL 125722, ¶¶ 123-27, any error in admitting the custodial confession here was likewise harmless.

CONCLUSION

This Court should reverse the appellate court's judgment and remand for the appellate court to consider defendant's remaining claims.

April 17, 2024

Respectfully submitted,

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RULE 341(c) CERTIFICATE OF COMPLIANCE

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 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, and the certificate of service, is 18 pages.

/s/ Eric M. Levin
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Assistant Attorney General

CERTIFICATE OF FILING AND SERVICE

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. On April 17, 2024, the **Reply Brief of Plaintiff-Appellant People of the State of Illinois** was filed with the Clerk of the Supreme Court of Illinois, using the court's electronic filing system, which provided service of such filing to the email addresses of the persons named below:

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