No. 128805

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellant, -vs- OLVAN QUEZADA, Defendant-Appellee.	))))))))))	Appeal from the Appellate Court of Illinois, No. 2-20-0195. There on appeal from the Circuit Court of the Nineteenth Judicial Circuit, Lake County, Illinois, No. 16 CF 1655. Honorable James K. Booras, Judge Presiding.

BRIEF AND ARGUMENT FOR DEFENDANT-APPELLEE

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ISSUES PRESENTED FOR REVIEW

I. Whether unpreserved plain errors, also referred to as clear and obvious errors, should continue to be considered in a cumulative error analysis, as they have been historically.

II. Whether the State waived any argument that the appellate court was wrong when it identified two plain errors by the trial court and one instance of deficient performance by trial counsel and that this case was not closely balanced because these arguments were not raised its petition for leave to appeal.

III. Whether the appellate court was correct when it held that the trial court erred in admitting a highly prejudicial prior consistent statement by Dominic Longmire.

IV. Whether the appellate court was correct in holding that it was a clear and obvious error for the circuit court to allow the unfounded "expert" gang opinion evidence against Quezada because it lacked foundation and allowed the jury to hear a trove of improper evidence.

V. Whether the appellate court was incorrect in holding that this was not a closely balanced case even where Quezada was not identified as the shooter of the charged crimes, testimony that Quezada was the man on the surveillance video is utterly improbable given the color distortions, and the evidence equally points to an alternative suspect.

STATEMENT OF FACTS

The statement of facts contained in the State's brief is generally sufficient for an understanding of the issues presented. Those additional facts necessary for the Appellee's analysis of the issues raised will be included, together with appropriate record references, in the argument portion of this brief.

ARGUMENT

I. The Appellate Court was correct in finding cumulative error in this case where it found two unpreserved clear and obvious errors that were not individually reversible and one instance of deficient performance by trial counsel and held the cumulative effect of those errors deprived Quezada a fair trial.

The appellate court held that, while not individually reversible errors, the cumulative effect of the admission of Longmire's entire interrogation video, counsel's failure to move to sever the sole gang-related charge, and the admission of opinion gang evidence deprived Quezada of his due process right to a fair trial. *People v. Quezada*, 2022 IL App (2d) 200195, ¶¶ 75-76. The State is asking this Court to hold that unpreserved clear and obvious errors that are not individually reversible cannot be considered as part of a cumulative error analysis. (St. Br. 17); (St. PLA 8). In doing so, it is asking this Court to fundamentally change how reviewing courts look at cumulative error and go against the very reason why such an analysis exists. Specifically, here, the appellate court found two separate clear and obvious errors. It also found an instance of deficient performance, but the State has not mentioned that finding in its PLA or its opening brief to this Court. While it held each error on its own was not reversible, both errors and the deficient performance taken together cumulatively deprived Quezada of his due process right to a fair trial. This holding was in line with numerous cases that have been reversed due to the cumulative impact of multiple unpreserved errors, including this Court's opinion in *People v. Blue*, 189 Ill. 2d 99 (2000). There, this Court specifically held that multiple unpreserved errors not individually reversible deprived the defendant a fair trial. *Blue*, 189 Ill. 2d at 127, 139 (even though "the State correctly observe[d]

that defendant failed to properly preserve this argument for [] review," this Court considered multiple errors in the prosecutor's closing rebuttal in its cumulative error analysis). This Court should uphold the logic of *Blue* and affirm the appellate court decision.

This Court considers *de novo* both cumulative and plain error review. *People v. Graham*, 206 Ill. 2d 465, 474 (2003); *People v. Schoonover,* 2021 IL 124832, ¶ 26.

Failure to preserve an issue at trial results in forfeiture of that issue on appeal. *People v. Enoch*, 122 Ill. 2d 176, 187 (1988). "Forfeiture, however, is a limitation on the parties, not on the reviewing court." *In re Marriage of Holthaus*, 387 Ill. App. 3d 367, 378 (2d Dist. 2008) (citing *Village of Lake Villa v. Stokovich*, 211 Ill. 2d 106, 121 (2004)). "When necessary to obtain a just result or to maintain a sound and uniform body of precedent, we may overlook forfeiture and address the merits of the issue." *Holthaus*, 387 Ill. App. 3d at 378. That said, a forfeited issue can be addressed by a reviewing court where the error is plain, and either (1) the case was closely balanced; or (2) the error affected the fairness of the defendant's trial and challenged the integrity of the judicial process. *People v. Herron*, 215 Ill. 2d 167, 178-79 (2005). This analysis is widely known as the "plain-error doctrine."

The first step in the plain-error doctrine is to determine whether a "plain error" occurred. *People v. Piatkowski*, 225 Ill. 2d 551, 564-65 (2007) ("the defendant must show both that there was plain error and that the evidence was so closely balanced that the error alone severely threatened to tip the scales of justice against

him"). Many times, reviewing courts and litigants will refer to this first step as determining whether the error is "clear and obvious." See, *e.g. People v. Henderson*, 2017 IL App (3d) 150550, ¶ 47 ("Having found a clear and obvious error, we now consider whether the error rises to the level of plain error.") This is likely for clarity in differentiating between the plain error identified in the first step of the plain-error doctrine and the plain-error doctrine itself. However, this Court has made it clear that the word "plain" is synonymous with "clear" and is equivalent to "obvious." *Piatkowski*, 225 Ill. 2d 565 n. 2.

Further, where a single error does not rise to the level of reversal, multiple trial errors may create a pervasive pattern of unfair prejudice to the defendant's case. *Blue*, 189 Ill. 2d at 139. This is known as cumulative error. When looking at cumulative error, the reviewing court applies the same test as prong two of the plain error analysis. *Id.* Specifically, the court should assess whether or not two or more errors considered together threaten the integrity of the judicial process and reverse where the fairness and reputation of the judicial process would not be preserved otherwise. *Id.* (citing *People v. Green*, 74 Ill. 2d 444, 455 (1979) (Ryan, J., specially concurring)). So, while cumulative error applies a similar standard as the second prong of the plain-error analysis, it is a separate analysis that encompasses multiple trial errors rather than a single clear and obvious error.

A. Unpreserved errors are frequently considered by reviewing courts in a cumulative error analysis and the appellate court was correct in finding cumulative error in this case.

The plain-error doctrine was applied by the appellate court below, in relevant part, in two separate issues: (1) the admission of the entirety of Longmire's

interrogation, and (2) the opinion testimony of Detective Amaro concerning gang membership. The appellate court held, while both of these were clear and obvious errors, they were not by themselves reversible. *People v. Quezada*, 2022 IL App (2d) 200195, ¶¶ 56-57, 64-65. However, it held that the cumulative impact of these errors, in conjunction with deficient performance by trial counsel in failing to move to sever the gang related charge, deprived Quezada of a fair trial and reversed all of his convictions. *Id.* at ¶¶75-76.

The State argues that the appellate court was wrong for considering two clear and obvious errors as part of its cumulative error analysis. Specifically, the State argues:

> Neither of the errors that [Quezada] alleged as components of his claim of cumulative error rise to the level of plain error under the first- or second-prong standard. . . . [E]ven if [Quezada] could show clear and obvious errors, the appellate court correctly found that the evidence was not closely balanced and that neither evidentiary error undermined the integrity of the judicial process. Therefore, neither alleged error could be considered as components of defendant's due process claim of cumulative error . . . (St. Br. 23) (internal citation omitted).

In arguing that the appellate court could not consider two unpreserved errors in a cumulative error analysis, the State has confused two concepts. Not every "clear and obvious" error is a "reversible error." But when discussing reversible error in the plain error context, courts frequently state that a reversible clear and obvious error is one that "rises to the level of plain error." Yet, the State cites to numerous cases that blend these concepts. None of the cases the State cites holds that a clear and obvious error cannot be considered in a cumulative error analysis. See *e.g.* (St. Br. 17) (citing *People v. Scott*, 148 Ill. 2d 479 545-46 (1992)

(this Court would not consider issues raised by the defendant where no error or invited error was found nor would it consider issues not raised by the defendant in a cumulative error analysis); *People v. Caffey*, 205 Ill. 2d 52, 117 (2001) (this Court held that there was no cumulative error based on the sole error identified and potential other errors, without addressing whether multiple clear and obvious errors could be used in such analysis); *People v. Hall*, 194 Ill. 2d 305, 350 (2000) ("Individual trial errors may have the cumulative effect of denying a defendant a fair trial."); *People v. Barnett*, 2023 IL App (4th) 220402. ¶ 66 (where there was only one unpreserved error that was clear and obvious, cumulative error does not exist).

The State is essentially asking this Court to limit a reviewing court's cumulative error analysis to only those errors that were preserved at trial, due to ineffective assistance of counsel, or unpreserved but individually reversible. Despite the State's claims otherwise, this is something this Court has never done.

The State's confusion of terms comes from how reviewing courts have used the term "plain error." For example, all of the following statements have been made by reviewing courts in Illinois:

> "[D]efendant must show both that there was plain error and that the evidence was so closely balanced that the error alone severely threatened to tip the scales of justice against him." *Herron*, 215 Ill. 2d at 187.
>
> "[T]he word 'plain' here is synonymous with 'clear' and is the equivalent of 'obvious.'" *Piatkowski*, 225 Ill. 2d at 565 n. 2 (2007).
>
> "Having found a clear and obvious error, we now consider whether the error rises to the level of plain error." *Henderson*, 2017 IL App (3d) 150550, ¶ 47.

As these statements demonstrate, there is a difference between a "plain" error and an error that is reversible under the "plain-error doctrine." *Piatkowski*, 225 Ill. 2d at 565 n. 2; *Herron*, 215 Ill. 2d at 187; *Henderson*, 2017 IL App (3d) 150550, ¶ 47. The State attempts to exploit the confusing double use of the term "plain," but the best way to avoid the confusion is to mirror the language used in *Henderson*, that "a plain error" is a "clear and obvious error" and such an error that satisfies one of the two prongs of the plain-error doctrine is one that "rises to the level of plain error." It is this confusion of words that the State is exploiting here to argue that an unpreserved plain error must be individually reversible to be considered in a cumulative error analysis.

The State's misappropriation of the term "rises to the level of plain error" is evident in its argument that:

> [U]nder settled forfeiture principles, an unpreserved claim of error may be reviewed only if it rises to the level of plain error; if an unpreserved error does not rise to the level of plain error, then it is not subject to review, but may be considered only as the basis for a claim of ineffective assistance of counsel. (St. Br. 18) (citing to *People v. Byron*, 164 Ill. 2d 279, 295 (1995).

Byron does not support the State's argument. Rather, the language the State cites is from this Court's finding that *individual errors* did not rise to the level of plain error because, though there were clear and obvious errors identified, they did not require reversal under either prong of the plain-error doctrine. *Byron*, 164 Ill. 2d at 295. This Court clearly "reviewed" these unpreserved errors under a basis other than ineffective assistance of counsel, but held they were not individually reversible. *Id.* ("Where an alleged error has been waived, the threshold inquiry must rise to the level of plain error or ineffective assistance of counsel.

Neither circumstance exists here."). Further, there was no cumulative error argument in *Byron*. Had there been, this Court had discretion, as it always has, to consider the errors it held were not individually reversible in a cumulative error analysis. See *Blue*, 189 Ill. 2d at 127, 138.

Beyond, the State's misinterpretation of *Byron*, the next case it cites directly contradicts its argument. Specifically, the State cites to *People v. Denson*, 2013 IL App (2d) 110652, ¶ 10, for the notion that "[w]here an issue is forfeited, [the appellate court] may review it only for plain error or ineffective assistance of counsel." (St. Br. 18). In that case, the defendant did not argue plain error in his opening or reply brief, but maintained that the error was preserved. *Id*. The appellate court held that it could only review the forfeited issue had the defendant raised the issue through plain error or ineffective assistance. *Denson*, 2013 IL App (2d) 110652, ¶ 10. It did not hold, as the State argues, that it had to be individually reversible to reach the issue, but rather that it *could have* reached the issue had it been framed as a plain error argument. *Id*.

Further, the State cites to *United States v. Caraway*, 534 F. 3d 1290, 1302 (10th Cir. 2008), for the notion that "'[i]f [courts] reviewed the cumulation of preserved and unpreserved error for harmless review,' even though the unpreserved errors would be reviewable only for plain error if raised alone, 'it would undermine plain-error review.'" (St. Br. 19-20) (quoting *Caraway*, 534 F. 3d at 1302). However, the State fails to point out that immediately after its selected language, the Tenth Circuit went on to describe exactly how unpreserved plain errors that are not individually reversible *should* be analyzed in the cumulative error analysis when

also considering a preserved error. *Caraway*, 534 F. 3d at 1302. Yet, the State is using that language to support its argument that *no* unpreserved errors can be used in a cumulative error analysis. (St. Br. 20).

The State's argument conflicts with this Court's opinion in *People v. Blue*, 189 Ill. 2d 99 (2000), which the State does not cite. In that case, there were several unpreserved errors involving statements made by the prosecutor in closing argument. *Blue*, 189 Ill. 2d at 127 ("The State correctly observes that defendant failed to properly preserve this argument for our review.") While this Court held that those unpreserved errors did not on their own warrant reversal, the cumulative impact of those errors, along with an otherwise harmless preserved error, deprived the defendant a fair trial. *Id*. at 138. Without the unpreserved errors, there would be only a single harmless error remaining, so there would be no cumulative error analysis. *Id*.

For this Court to accept the State's argument, it would have to overturn *Blue*, which is often cited specifically for its cumulative error analysis. See *e.g. People v. Johnson*, 208 Ill. 2d 53, 60 (2003); *People v. Smith*, 2017 IL App (1st) 143728, ¶¶ 44-45. This Court directly equated cumulative error analysis to the second prong of plain error when determining that reversible error had occurred. *Blue*, 189 Ill. 2d at 138. In that context, it is illogical for the State to argue that unpreserved errors not individually warranting reversal cannot be considered for their cumulative depravation of the defendant's right to a fair trial. (St. Br. 17-18) (arguing "the framing of an error in terms of due process cannot excuse forfeiture"). Further, this analysis is not exclusive to *Blue*, as courts frequently

consider unpreserved errors that are not reversible on their own in a cumulative error analysis. See *e.g. People v. Mitchell*, 155 Ill. 2d 344, 354–55 (1993); *Smith*, 2017 IL App (1st) 143728, ¶¶ 44-45; *People v. Redmon*, 2022 IL App (3d) 190167, ¶¶ 32-36; *People v. Johnson*, 2013 IL App (2d) 110535, ¶¶ 58, 67, 73–77, 80–81; *People v. Brown*, 319 Ill. App. 3d 89, 98–101 (4th Dist. 2001).

The State's argument thwarts the purposes of cumulative error analysis, which is to review multiple errors in conjunction to assess whether the accumulated impact of those errors deprived the defendant his constitutional right to a fair trial. *Blue,* 189 Ill. 2d 138-39. A reviewing court's goal of preserving the right to a fair trial should not be affected by the concept of forfeiture, particularly where forfeiture is not a limitation on the reviewing court. *Enoch*, 122 Ill. 2d at 187. Since reversal based on unpreserved errors is at the discretion of the reviewing court, the consideration of how the error came up at trial, how and why it was unpreserved, and the severity of the issue is something the reviewing court can and should consider in its cumulative error analysis. *People v. Clark*, 2016 IL 118845, ¶ 42. Adopting the State's argument would defy logic as it would require an unpreserved error to be reversible on its own to be considered in a cumulative error analysis. But if an issue is reversible on its own, the cumulative error analysis would not even be needed because the case is already reversible.

Ultimately, affirming the appellate court's use of two unpreserved errors, not reversible on their own, in a cumulative error analysis does not change existing case law. Rather, such a holding would uphold it. Therefore, this Court should affirm the appellate court decision vacating Quezada's convictions because the

errors in his case deprived him of his due process right to a fair trial.

B. Cumulative error and second-prong plain error encompass more than just the limited scope of structural errors defined by the State.

Additionally, the State argues that a second-prong plain error and/or cumulative error analysis are limited to only cases where the error is structural. (St. Br. 39). However, State limits the scope of the structural errors to those that "effect [] the integrity of defendant's trial equivalent to a trial before a biased judge, the complete denial of counsel, or failure to swear the jury to perform its function." (St. Br. 42) (citing *People v. Jackson*, 2022 IL 127256, ¶¶ 26, 64).

The State's view on what constitutes second-prong plain error and cumulative error is significantly more narrow than that of this Court. In fact, this Court has explicitly held that second-prong plain error is not merely limited to the structural errors cited by the State in its brief, but also include instances where the integrity and reputation of the court are at risk. *People v. Clark*, 2016 IL 118845, ¶ 46 ("although our decisions in *Glasper* and *Thompson* equated second-prong plain error with structural error, we did not restrict plain error to the types of structural error that have been recognized by the Supreme Court.") (internal citations omitted). As discussed above, this Court held that multiple errors are reversible when their cumulative effect threatens the integrity and reputation of the judicial process and/or violates the defendant's due process rights to a fair trial because of the accumulation of errors. See Argument I.A., *supra*; *Blue*, 189 Ill. 2d at 139.

C. Conclusion

In sum, the appellate court correctly decided that the errors in this case

denied Quezada a fair trial. The State is confusing the concept of a "plain" error with the whole of the "plain-error doctrine," and this Court should not follow its lead. Under the State's logic, a trial could contain dozens of unpreserved errors, yet still be deemed "fair" because none of those errors were individually reversible. Such logic is self-evidently wrong, and this Court should accordingly affirm the appellate court's finding that Quezada was denied his right to a fair trial by the cumulative effect of the errors in his case.

II. Waiver applies to the State's second issue, which seeks to challenge the appellate court's findings of individual errors, and to the appellate court's holding that trial counsel was deficient for failing to move to sever the sole gang charge, since those matters were not raised in its petition for leave to appeal.

The sole argument raised in the State's petition for leave to appeal (hereinafter "PLA") was that "forfeited errors that do not individually constitute plain error or ineffective assistance of counsel cannot be combined to create reversible error under a cumulative error analysis." (St. PLA 8). In its opening brief, however, the State also argues that the appellate court was wrong when it found that the trial court erred in admitting Dominic Longmire's complete interrogation video and opinion testimony that Quezada was a member of a gang. (St. Br. 21-41). Because the State's PLA does not even mention the appellate court's findings on these individual errors, the State should be precluded from challenging them now.

Supreme Court Rule 315(b) states that a PLA must contain "a statement of the points relied upon for reversal of the judgment of the Appellate Court." Ill. Sup. Ct. R. 315(b). Rule 315(b) also requires "a short argument (including

appropriate authorities) stating why review by the Supreme Court is warranted and why the decision of the Appellate Court should be reversed or modified." *Id.* Accordingly, this Court should limit the argument in this case to only that which was raised in the PLA, that the appellate court was incorrect in using unpreserved plain errors that are not individually reversible in a cumulative error analysis. *People v. Anderson*, 112 Ill. 2d 39, 44 (1986) ("Rule 315(b)(3) requires that the petition for leave to appeal state the points relied on for reversal of the judgment of the appellate court"). As the State did not argue that the appellate court was incorrect in finding error in the admission of the interrogation video or the gang evidence, it should be precluded from arguing those points now. See *People v. Whitfield*, 228 Ill. 2d 502, 509 (2007) ("We need not address the forfeiture argument raised by the State . . . because the State did not include the [] issue in its petition for leave to appeal to this court").

Because the State failed to include the substance of Issue II of its brief in its PLA, those arguments have been waived and this Court should limit its consideration to the sole issue raised in the PLA. Ill. Sup. Ct. R. 315(c). That said, Quezada will address the arguments as presented in the State's opening brief for the purpose of completeness.

III. The appellate court was correct in holding that it was a clear and obvious error for the circuit court to admit the entire interrogation of Dominic Longmire.

The entire interrogation of Dominic Longmire was admitted into evidence by the circuit court, which is documented in People's Exhibit 90. However, this interrogation did not contradict Longmire's trial testimony and contained a

significant amount of additional inadmissible evidence, such as hearsay, gang-related information, and detailed information about the investigation into the instant offense. As a result, the appellate court determined that admitting the video into evidence was an error. *People v. Quezada*, 2022 IL App (2d) 200195, ¶¶ 56-57. The problems associated with the interrogation video were further compounded by the fact that it was admitted substantively under 725 ILCS 5/115-10.1 (West 2019). This permitted the jury to consider an inadmissible prior consistent statement as substantive evidence. See *People v. Tisdel*, 201 Ill. 2d 210, 217 (2002), which states that prior consistent statements are only admissible to refute an allegation of recent fabrication or if the prior statement is one of identification. Yet, the State contends, for the first time, that there was no error in admitting the video, not because the evidence was admissible, but because defense counsel acquiesced to its admission. (St. Br. 23-24); see Argument II, *supra* (issues not raised in the PLA and/or appellate court are waived). However, defense counsel did not procure or encourage the admission of the evidence, so it cannot be said that he acquiesced to it. Therefore, this Court should uphold the appellate court's determination that admitting the entire Longmire interrogation was clear and obvious error.

This Court reviews the trial court's decision to admit the video evidence under the abuse of discretion standard. *People v. Taylor*, 2011 IL 110067, ¶ 27. However, with regard to the appellate court findings, this Court considers *de novo* both cumulative and plain error review. *People v. Graham*, 206 Ill. 2d 465, 474 (2003); *People v. Schoonover,* 2021 IL 124832, ¶ 26.

A. The admission of the almost two-hour Longmire interrogation was clear and obvious error.

The appellate court was correct in holding that it was a clear and obvious error to admit and publish People's Exhibit 90, almost two hours of Longmire's interrogation, without any redaction, as impeachment and substantive evidence. *People v. Quezada*, 2022 IL App (2d) 200195, ¶¶ 56-57. The appellate court agreed that the interrogation was not proper impeachment evidence because it was not materially inconsistent with Longmire's trial testimony and the State failed to lay any impeachment foundation. *Id.* at ¶ 56. Also, Longmire's testimony did nothing to harm, but in fact aided, the State's case. *Id.* Further, the unredacted video contained improper layers of hearsay, police narrative and opinions on Quezada's guilt, and inflammatory gang references. *Id.* It was a key piece of evidence for the State's case, that the prosecution extensively cited in closing by arguing: "he said so on the stand, he said so on the video;" "there was a telling point on the video;" and "I know that was a very significant part of the trial." (R. 789, 812). Even with all these issues, jurors were given an instruction to consider the video as substantive evidence. (C. 312).

Prior consistent statements are inadmissible as they unfairly enhance a witness's credibility because a jury is more apt to believe something that is repeated. See *People v. Harris*, 123 Ill. 2d 113, 139 (1988). Prior consistent statements are only admissible to rebut a charge or an inference that the witness was motivated to testify falsely or that their testimony was a recent fabrication, where the witness told the same story before the motive came into existence or before the time of the alleged fabrication. See *People v. Williams*, 147 Ill. 2d 173, 227, 167 (1991); see also Illinois Rule of Evidence 613(c) (eff. Sept. 17, 2019). None of the exceptions

were present here.

In the video interrogation, there were repeated prior consistent statements by Longmire that Quezada fired the gun during the second shooting. Longmire's trial testimony that Quezada shot the firearm was not inconsistent with his video statement about the shooting. Although Longmire first told the police that he did not see anything (People's Exhibit 90.1 42:04, 54:58),[1] he later repeatedly told them that Quezada shot the gun. See *e.g.* (People's Exhibit 90.1 1:27:52; People's Exhibit 90.2 26:52); (R. 615). At trial, Longmire testified Quezada fired the gun in the air. (R. 615). In his video statement, he repeated this multiple times. (See, *e.g.,* People's Exhibit 90.2 26:41, 26:45, 33:00). Further, most times when Longmire refers to Quezada shooting a gun, he mimes firing a gun straight up into the air. (See, *e.g.*, People's Exhibit 90.2 34:40). Any minor variations between the video and the testimony did not justify the introduction of the video, as the substance of the two was identical.

This video was not admissible as a prior inconsistent statement. 725 ILCS 5/115-10.1 permits the use of a prior inconsistent statement as substantive evidence if it "narrates, describes, or explains an event or condition of which the witness had personal knowledge" and if "the statement is proved to have been accurately recorded by a tape recorder, videotape recording, or any other similar electronic means of sound recording." 725 ILCS 5/115-10.1. "The purpose of section 115-10.1

[1] People's Exhibit 90 is split into two separate videos in the record. The video titled "Longmire Interview.mp4" will be cited as "People's Exhibit 90.1." The video titled "Longmire Interview 2.mp4" will be cited as "People's Exhibit 90.2."

of the Code is to protect parties from turncoat witnesses who, while on the stand at trial, disown a prior statement by testifying differently or professing inability to remember the subject matter." *People v. Brothers*, 2015 IL App (4th) 130644, ¶ 65 (internal quotations omitted); see also *People v. Cruz*, 162 Ill. 2d 314, 362 (1994). Here, Longmire was not a turncoat witness; he testified that Quezada fired the gun in the charged counts. (R. 615). He never flipped on the State.

Instead of using the video to confront a turncoat witness, the State used Longmire's interrogation as a prior consistent statement that Quezada committed the charged shooting, and through this improper evidence, was allowed to introduce inadmissible evidence substantively against Quezada. This bolstered Longmire's trial testimony and allowed the jury to hear collateral prejudicial information and an ongoing narrative of the police investigation, including interrogating officers telling Longmire that other people had implicated Quezada in the shooting. The appellate court was correct that it was clear and obvious error to admit this interrogation at trial.

B. Failing to spontaneously object to improper evidence does not preclude the defendant from raising that issue on appeal for plain error.

In the appellate court, the State argued the video was properly admitted for both impeachment purposes and as substantive evidence. *Quezada*, 2022 IL App (2d) 200195, ¶ 55. Here, however, the State argues for the first time that defense counsel invited the error by acquiescing to the admission of the video. (St. Br. 23-29). Accordingly, this Court should deem the issue waived not only because it was not part of the PLA, but also because it advances arguments not

previously raised. See *People v. Adams*, 131 Ill. 2d 387, 395 (1989) (where the State failed to raise a specific argument in front of the trial and appellate court, this Court deemed that argument waived).

To the extent that this Court considers the State's argument that defense counsel invited the error in admitting the video, it should nevertheless reject the State's contentions. Illinois courts have applied the invited error doctrine in numerous cases to bar a defendant from claiming error in the admission of improper evidence where the admission was procured or invited by the defendant. See *e.g. People v. Harvey*, 211 Ill. 2d 368, 386 (2004). However, none of those cases support the conclusion that defense counsel acquiesced to or invited the improper admission of Longmire's interrogation. Certainly, neither this Court nor any reviewing court has ever held that simply not objecting to evidence is an affirmative acquiescence to the admission of improper evidence.

People v. Harvey, the main case cited by the State for this notion, distinguishes between merely failing to preserve an issue and acquiescing to the improper evidence. *Id*. There, this Court consolidated three different cases with different levels of acquiescence. *Id*. This Court held that it was error in all three cases for the judge to allow mere-fact impeachment. *Id*. at 384; see also *People v. Cox*, 195 Ill. 2d 378, 381, (2001) (mere-fact impeachment is where the jury only hears that a prior felony conviction exists, as opposed to informing the jury of the specifics). In one case (Harvey)[2], defense counsel stipulated to the mere-fact impeachment

[2] Any discussion of the overall case *People v. Harvey,* 211 Ill. 2d 368 (2004) will be specified by the italicized *"Harvey*." Any discussion about the specific Harvey case within the consolidated case *People v. Harvey* will be without using

as a means to avoid the details of the defendant's prior convictions being heard by the jury; in another (Lyons), defense counsel agreed with the judge to proceed with mere-fact impeachment; and in the third (Barefield), defense counsel specifically requested the mere-fact impeachment. *Id.* at 375, 376, 381.

This Court ruled on these cases, asking if the defendant either "procured or invited" the admission of the improper evidence. *Id.* at 386. Specifically, "[u]nder the doctrine of invited error, an accused may not request to proceed in one manner and then later contend on appeal that the course of action was in error." *Id.* at 385 (citing *People v. Carter*, 208 Ill. 2d 309, 319 (2003)). This Court held that since Barefield specifically requested, and Lyons agreed with the judge's proposal for, mere-fact impeachment, they acquiesced to the improper evidence in the trial court. *Id.* at 386. However, in Harvey, even though defense counsel stipulated to the mere-fact impeachment, it was neither invited nor procured because the issue of mere-fact impeachment was never brought to the attention of the trial court nor did he procure the mere-fact impeachment. *Id.* at 384-85 ("The factual distinction between a defendant's failure to bring an error to the attention of the trial court, as in Harvey, and a defendant's active participation in the direction of the proceedings, as in Barefield and Lyons, carries with it a legal significance").

The failure to object in this case arguably shows less acquiescence than that seen in Harvey, which this Court held was not an invited error. In Harvey, defense counsel stipulated to the improper evidence as a means to avoid bad facts coming to evidence, whereas here, defense counsel simply failed to object at the

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italics as "Harvey."

time the evidence was offered. (R. 670). Defense counsel here did not participate in the admission of the improper evidence, which is how this Court determined that Barefield and Lyons acquiesced to it. *Id.* at 368. Yet, the State argues that by defense counsel saying "[n]o objection, Judge," per *Harvey*, the defense acquiesced. (St. Br. 24). Clearly, the failure to object is not the same as inviting or acquiescing to the error.

The other cases cited by the State to support its argument are distinguishable. For instance, in *People v. Caffey*, 205 Ill. 2d 52 (2001), the defendant was precluded from arguing on appeal that the judge abused his discretion in failing to provide a limiting instruction regarding the contents of a 911 call. *Id.* at 113-14. While the State has merely quoted the language used by defense counsel in *Caffey* ("No objection, judge"), it has failed to discuss the context of the holding in *Caffey* and why there was acquiescence given the facts of that case. There, the issue was not whether or not improper evidence was admitted, but rather whether or not the judge abused his discretion in failing to issue a limiting instruction regarding admissible evidence that was not requested by the defense. *Id.* Specifically, the defense acquiesced to the improper use of the 911 call where the defense did not (1) object to the call at its admission; (2) object to the improper use of the evidence during the State's closing arguments; and (3) request the limiting instruction after the State used it for an improper purpose. *Id.* Given all of these failures, the defendant could not, on appeal, argue that the judge erred in failing to provide the limiting instruction where the defense did not even request it. *Id.*

Here, in contrast, there is no issue regarding the failure to give an

unrequested limiting instruction with respect to admissible evidence. Rather, on appeal, Quezada attacked the admission of clearly inadmissible evidence. *Quezada*, 2022 IL App (2d) 200195, ¶ 51. In *Caffey*, defense counsel had numerous opportunities to object or request the instruction and he failed to do so every time. *Caffey*, 205 Ill. 2d at 113-14. Here, defense counsel failed to object to inadmissible evidence the sole time he was able when it was offered by the State. (R. 670). Further, here, unlike *Caffey*, the jurors were given the instruction affirmatively telling them the contents of the video could be used substantively, rather than just not hearing an instruction limiting how they could use it. *Id.* This cannot be viewed as an acquiescence.

The other cases that the State cites suffer a similar fate, as none of them deal with the admission of improper evidence or the mere failure to object to it. Rather, like in *Caffey*, the cases cited by the State were all situations where the evidence itself was admissible, but there was a simple problem that could have easily been remedied had defense counsel taken the proper steps at trial. For instance, in *People v. Cox*, 2017 IL App (1st) 151536, there was admissible evidence in the form of a document, but the document was not certified properly. *Cox*, 2017 IL App (1st) 151536, ¶ 74. There, the appellate court held "the trial court asked defense counsel on three separate occasions during trial whether defendant had any objection to the certification" and had defense counsel objected the State could have easily remedied the proper certification. *Id.* Similarly, *People v. Aquisto*, 2022 IL App (4th) 200081, dealt with an arguably improper foundation of admissible evidence that also could have easily been fixed had there been an objection, not

whether or not the evidence was proper. *Aquisto*, 2022 IL App (4th) 200081, ¶ 53. Lastly *People v. Parker*, 223 Ill. 2d 494 (2006), dealt with an incorrect verdict form that was submitted by defense counsel who also had no objection to the State's arguably incomplete verdict form. *Parker*, 223 Ill. 2d at 508.

Many, if not most, plain error cases involve a failure to object by the defense. Accepting the State's argument would limit plain error cases to only those that were objected to at trial, but not addressed in a post-trial motion, which is antithetical to the plain-error doctrine as a means of arguing forfeited issues on appeal.

C. The failure to object to the admission of the Longmire interrogation was an error, not a strategic decision.

The State also argues that defense counsel made a strategic decision to admit the video, since he mentioned it during his opening arguments. (St. Br. 25). But, at the time defense counsel could not have known that the State was going to admit the statement and defense counsel could not have anticipated what Longmire's testimony was going to be. Defense counsel's comments regarding Longmire's interrogation were likely in anticipation of Longmire testifying in a way that suggested Quezada fired at police officers rather than straight up into the air. After Longmire's testimony was in line with his interrogation, any concerns regarding how his statements differed should have been quelled, so any reasonable strategy for admitting the interrogation was gone.

The cases that the State relies upon are unpersuasive. For instance, the State argues that this case is "materially indistinguishable" from *People v. Precup*, 73 Ill. 2d 7 (1978). (St. Br. 27). Yet, *Precup* did not deal with the admission of

improper evidence. Rather, it concerned whether or not a judge should have stopped proceedings to admonish, or likely re-admonish, co-defendants regarding their right to conflict-free representation. *Precup*, 73 Ill. 2d at 17. This Court held that the judge did not err because, though the record was not entirely clear on the issue, it strongly suggested that both defendants had been admonished at least twice regarding the risks of proceeding to trial with joint counsel and chose to proceed that way in spite of the admonishments. *Id*. Further, since it was a trial strategy to proceed with joint counsel, defense counsel failing to object to testimony about each co-defendant's statements that could have incriminated the other had to have been in furtherance of that strategy, or, in the least, any issue with the improper testimony was waived when they affirmatively chose to proceed with the same attorney. *Id*.

Here, Quezada made an entirely separate challenge than that in *Precup,* as he challenged, and the appellate court agreed, that it was an error to admit Longmire's interrogation as substantive evidence when there was no viable reason for its admission. *Quezada*, 2022 IL App (2d) 200195, ¶¶ 52-53. While the State claims *Precup* is "materially indistinguishable," *Precup* was based on the fact that it appeared that both defendants were warned multiple times that the type of improper evidence there could come out at trial and they chose to proceed in spite of the warnings. *Precup*, 73 Ill. 2d at 17. There is nothing in the record to suggest that defense counsel's trial strategy was to admit this improper evidence or that Quezada agreed on the record to the improper evidence as seen in *Precup*. The clear distinction here is that there were no pre-trial proceedings where Quezada

agreed to allow the State to present this improper evidence. Further, even if the interrogation fit any proper purpose, the State woefully failed to lay the proper foundation for impeachment evidence. *Id.*

The appellate court was correct to find that it was clear and obvious error to admit an almost two-hour interrogation video as impeachment evidence where it did not impeach the State's witness. *Quezada*, 2022 IL App (2d) 200195, ¶¶ 56-57. This Court should affirm that holding.

IV. The appellate court was correct in holding that it was plain error for the circuit court to introduce the unfounded "expert" gang evidence against Quezada and it was deficient performance for his attorney to not object to it.

Again, as discussed above, the State did not advance any arguments regarding the appellate court's finding of error with the gang evidence in its PLA, so it should be precluded from making them here. See Argument II, *supra.*

Further, the State's argument fails because even if this Court agrees that it was not error to admit Detective Amaro's opinion testimony, the State has not challenged the holding that trial counsel was deficient for failing to sever the gang-related charge. *Quezada*, 2022 IL App (2d) 200195, ¶¶ 65, 75-76. Had counsel done so, Amaro would not have been allowed to provide any gang testimony, because it was the sole gang-related charge that allowed it in. If this counsel's performance was deficient, as the appellate court found, then this Court does not need to assess whether or not the appellate court erred in finding clear and obvious error for admitting the gang evidence.

Admission of expert testimony is reviewed for an abuse of discretion. *People v. Howard*, 305 Ill. App. 3d 300, (2d Dist. 1999). However, the ultimate question

of whether a forfeited claim is reviewable as plain error is a question of law that is reviewed de novo. *People v. Graham*, 206 Ill. 2d 465, 474 (2003); *People v. Schoonover,* 2021 IL 124832, ¶ 26.

A. The issues the appellate court identified with Detective Amaro's expert testimony went beyond the failure to lay a proper foundation; however, the appellate court was within its power to identify clear and obvious error because of the lack of foundation alone.

The appellate court below spent two pages of its opinion detailing all of the problems with Detective Amaro's "expert" testimony and found that its admission was clear and obvious error. *Quezada*, 2022 IL App (2d) 200195, ¶ 64. The State agreed below that it failed to prove the "Spanish Gangster Disciples" was a street gang, which was the only reason for Amaro's testimony. *Id*. at ¶ 69. Further, the State seemingly admits that the proper foundation was not laid to qualify Detective Amaro as an expert witness as its argument is that this Court should forgive its prior failure in establishing the foundation. (St. Br. 30-31). Yet, the State wants this Court to overturn the appellate court holding that the admission of the testimony was a clear and obvious error. (St. Br. 30-31).

Establishing a foundation is a prerequisite for all expert opinions, whether deemed "scientific" or not. *City of Chicago v. Anthony*, 136 Ill. 2d 169, 186 (1990). It is the trial court, not the jury, that decides if a foundation has been laid. *Id*. Only after a proper foundation has been laid can the jury determine how much weight can be assigned to the opinion testimony. *People v. Jennings*, 252 Ill. 534, 546 (1911). But, the appellate court has held where there is no foundation or even an explanation as to what the basis for the expert opinion was, "[a] vigorous

cross-examination [] as to the absence of details is hardly an adequate test of the substance of [an expert opinion]." *People v. Safford*, 392 Ill. App. 3d 212, 227 (1st Dist. 2009). As such, "[I]f there are no facts given regarding how the opinion was reached, there effectively cannot be any relevant and probative cross-examination of an expert's reasons and bases for his or her opinion, and the burden is indeed shifted entirely to the defense." *Id.*

The State's claim that the appellate court had only two issues with this problematic testimony misunderstands the holding below. (St. Br. 29). The two reasons that the State points out are the lack of foundation to Amaro's expertise and that the probative value of the evidence was not clearly and obviously outweighed by the prejudice to Quezada. (St. Br. 29). However, the appellate court also took issue with the following aspects of Amaro's testimony:

- It "lacked foundation establishing when and to whom Servin introduced defendant as 'Shorty Folks;'"
- "[T]here was no description of the tattoo [Amaro used to form his opinion] and no indication of whether it [was connected to any gang];"
- There was no explanation as to "when covering up a gang tattoo would imply leaving a gang or former membership . . .;"
- It unnecessarily contained "a long narrative describing gang nations and listing numerous gangs purportedly in the area (which was arguably more prejudicial than probative);"
- Amaro's testimony actually suggests that Quezada was not in a gang because "[a] failure to 'be around much,' coupled with a cover-up tattoo, could suggest *no* gang membership" (emphasis in original); and
- It "explained that [Quezada] wore a 'blowout' hairstyle" without linking that hairstyle with gang membership. *Quezada*, 2022 IL App (2d) 200195, ¶ 64.

In spite of those issues, the State argues that Amaro's testimony was not

improper even where it concedes that there was no foundation for the vast majority of it and that it failed to prove the sole purpose of his testimony, that Quezada was a gang member. (St. Br. 30-31).

Further, the State argues any error with a foundation goes to the weight, not the admissibility, of the evidence. (St. Br. 30) (citing *People v. Pingleton*, 2022 IL 127680, ¶ 58). However, *Pingleton* does not support that assertion. Instead, *Pingleton* concerned, in relevant part, whether or not a doctor who is not a gynecologist can testify as an expert witness "to opine as to whether the absence of physical evidence of trauma was inconsistent with the victims' allegations of sexual assault." *Pingelton*, 2022 IL 127680, ¶ 57. Further, the defendant argued that "the doctors were not qualified to testify that most examinations of sexual assault victims do not reveal physical evidence of trauma." *Id*. In other words, the defense did not attack the foundation, but rather the qualifications of the expert witnesses. *Id*. In that case, this Court held that "any vulnerability relating to an expert witness's qualifications, experience, or basis for opinion may be explored on cross-examination and will affect the weight of that testimony rather than its admissibility." *Id*. at ¶ 58. That opinion had nothing to do with the lack of foundation for deeming that the doctor was an expert or that their opinions were ascertained by means commonly used in the relevant field.

In contrast, here, the appellate court held that even the most basic foundational requirements to testify as a gang expert were not met. *Quezada*, 2022 IL App (2d) 200195, ¶ 59. Specifically, Amaro "never testified that the evidence upon which he relied in forming his opinions is the type that is typically considered

by experts to evaluate a suspect's gang membership." *Id*. This is not a question of Amaro's qualifications as seen in *Pingelton*, but rather a question of basic foundational errors in his entire testimony. Further, foundational errors do not always go to the weight of the testimony rather than admissibility as the State claims, but can go so far as being individually reversible. See *Jones*, 2015 IL App (1st) 121016, ¶ 77. Here, no foundation was laid for Amaro's opinions. The appellate court was certainly within its power to identify clear and obvious error for the lack of foundation. As such, this Court should affirm the appellate court holding that it was clear and obvious error to admit expert testimony with no foundation for the opinions given.

B. The gang evidence entered against Quezada went well beyond the mere opinion that Quezada was a gang member and was more prejudicial than probative.

The appellate court below held that, "gang references were not necessary to explain that various persons had nicknames, and a context argument does not justify voluminous evidence that was clearly more prejudicial than probative." *Quezada*, 2022 IL App (2d) 200195, ¶ 76. Yet, the State's analysis of the probative nature of Amaro's testimony is limited to "the evidence that [Quezada] was a gang member." (St. Br. 35). The State's argument is short sighted and does not take into account all of the issues the appellate court identified with Amaro's testimony. See Argument IV.A.., *supra*. Further, the appellate court's holding did not come down to the probative value versus the prejudicial effect alone. It held that this evidence should not have been in this trial in the first place because defense counsel should have moved to sever the sole gang charge. *Quezada*, 2022 IL App (2d) 200195,

¶ 76.

The State's argument is interesting here because the appellate court reversed the gang-related charge that made Amaro's opinion admissible because his opinion did not even prove gang membership beyond a reasonable doubt. *Id.* at 69. The State conceded this point below. *Id*. Yet, now the State argues that this evidence was "highly probative" in order to prove that Quezada was a member of a gang. (St. Br. 35). In other words, the State ignores all of the aspects of Amaro's testimony that the appellate court used to determine that it was more prejudicial than probative in order to argue that it was all necessary to prove a single point, gang membership, something it concedes Amaro's testimony failed to do.

The appellate court found a laundry list of problems with Amaro's testimony beyond the fact that it failed to prove gang membership beyond a reasonable doubt. It was well within its scope as a reviewing court to make this finding. Further, the reasons it found clear and obvious error are not contingent on whether or not the evidence was more prejudicial than probative. Regardless, this Court should affirm the appellate court's finding of clear and obvious error in allowing Amaro's testimony.

V. This Court should affirm the reversal of Quezada's convictions even if it disagrees that there was cumulative error, as the evidence was closely balanced.

The appellate court was correct when it found reversible error from the three identified errors cumulatively. However, it applied the wrong standard when it assessed whether or not the case was closely balanced. In the opinion below, when assessing whether or not the first prong of the plain-error doctrine was

satisfied, the court asked whether or not Quezada could have still been convicted if the improper evidence was not admitted. *People v. Quezada*, 2022 IL App (2d) 200195, ¶¶ 57, 65. That is not the correct standard when assessing whether a case was closely balanced.

Rather, to show the case was closely balanced the defendant must show that the evidence was so close that the error alone severely threatened to tip the scales of justice against him. *People v. Herron*, 215 Ill. 2d 167, 187 (2005). In that sense, rather than taking the improper evidence out of the analysis, the appellate court should have looked at all the other evidence and then asked whether or not the improper evidence could have influenced the jury's guilty verdict. *Id*. That was not done below.

Further, to determine if a case is closely balanced, a reviewing court evaluates the totality of the evidence and conducts a qualitative, commonsense assessment of it within the context of the case. *People v. Olla*, 2018 IL App (2d) 160118, ¶ 32. This requires the reviewing court to assess the evidence with regard to the elements of the charged offense or offenses, along with any evidence regarding the credibility of the witnesses. *Id*. This Court has clarified that the quintessential closely balanced case is one that boils down to a contest of credibility, defined as evidence showing opposing versions of events without extrinsic evidence to corroborate or contradict either version. *People v. Sebby*, 2017 IL 119445, ¶ 63.

Looking at the elements of this crime, to be found guilty of either charge involving Quezada shooting the gun, the State had to prove beyond a reasonable doubt that Quezada was the one that fired the weapon, as there was no accomplice

theory advanced. 720 ILCS 5/9-1(a)(1); 720 ILCS 5/8-4(a); 720 ILCS 5/24-1.2(a)(3) (West 2016). So, in the least, the appellate court should have considered the evidence presented that Quezada was the one who fired the shots. 720 ILCS 5/9-1(a)(1); 720 ILCS 5/24-1.2(a)(3). If, given the State's evidence, it was plausible that Quezada was not the shooter, this is a closely balanced case. See *Sebby*, 2017 IL 119445, ¶ 63 (the elements of the offenses charged must be considered); see also *People v. Cain*, 2021 IL App (1st) 191921, ¶ 31 (concluding that an alternative theory where one of the elements of the offense was not met was not "fanciful," therefore the case was close).

The State's argument that Longmire witnessed Quezada fire a gun at police officers is not supported by its own evidence. The State's evidence that Quezada was the shooter was largely circumstantial. To prove its case, the State put forth the testimony that someone had a gun earlier in the night at a party, the testimony of Dominic Longmire, the surveillance video in conjunction with the testimony of Officer Sliozis, testimony that Quezada was in the area around the time of the shootings, and testimony that Quezada was on a couch where the gun was found. There was no physical evidence linking Quezada to the gun that was used.

A. The sole eyewitness account put forth by the State shares nothing in common with the video of the shooting that Quezada was charged.

Dominic Longmire was the only person who testified that Quezada fired a gun that night. For the State's case to be strong, Longmire's testimony should at least be corroborated by the known facts of the case. Longmire testified that he was walking behind Quezada when Quezada fired the gun in the air only one

time. (R. 614-15, 633). However, the gun would have had to have been fired multiple times at a near horizontal angle to match the ballistics evidence the State presented. 720 ILCS 5/9-1(a)(1); 720 ILCS 5/8-4(a); 720 ILCS 5/24-1.2(a)(3) (both charges require specific intent to kill, harm, or fire in the direction of a police officer). Longmire denied shooting the gun and testified no one else was with them. (R. 616).

This account of the shooting does not match the evidence that the State put forth to show that Quezada fired shots with the intent to kill police officers. If Quezada fired the gun into the air, there is no way he could have fired with the intent to hit anyone in particular. The State presented testimony that the shots were fired at or near a horizontal angle because of how they struck the vehicles. (R. 418-19, 426-27, 450); (E. 8, 23-28). Also, there were multiple bullets that hit various locations in the parking lot near the police. Further, the State ballistics expert testified that the bullets could not have been fired straight up in the air. (R. 449-50). So, either the only eyewitness is lying, or the State charged Quezada with crimes that its evidence does not support. Said another way, the evidence that it was Quezada that fired the shots in the direction of the officers was exceedingly weak.

B. Officer Slizous's testimony that he identified Quezada as the shooter by comparing the clothing worn by someone in the video to that Quezada was wearing when he was arrested is fantastical.

As Longmire's testimony is entirely antithetical to the notion that Quezada fired multiple shots toward police officers, the appellate court should have then turned to the other evidence to determine whether or not this case was closely

balanced. However, all the appellate court discussed was the conclusory statement that "there was a video recording *apparently* depicting [Quezada] with a gun . . ." *Quezada*, 2022 IL App (2d) 200195. ¶ 57 (emphasis added).

First, the face of the purported shooter cannot be seen and the footage is in black and white. Also, as the color of the captured images is so distorted, it is impossible to even determine the race of the purported shooter. Specifically, this Court should take notice of the color of the shooter's shirt as seen in the video. The State claims this is a black shirt. (R. 467). However, the image captured by the surveillance camera is a grey several shades lighter than black, in fact, closer to white than black. (See, *e.g.,* People's Exhibit 89 12:15). Also, no logo can be seen on the shirt. (See, *e.g.*, People's Exhibit 89 12:15). Further, the State argues that the pants seen in the footage were "light blue," yet in the footage, they are nearly the same color as the shirt that the State also argues was black. (R. 778); (People's Exhibit 89 12:15). In that regard, a viewer cannot look at the skin color of the shooter and make a determination of his race, as skin color would suffer the same distortion as the clothing. Yet, the State claims in its statement of facts that a Hispanic male can be seen in the video. (St. Br. 4).

The State cannot have it both ways. It wants this Court to believe a shirt that appears nearly white with no logo on it is a black shirt with a large blue logo. (St. Br. 5, 8) (People's Exhibit 91). It also wants this Court to believe that it can determine the race of the individuals seen in such a distorted image, specifically stating as fact that the man in the video is Hispanic. (St. Br. 5). Even assuming the skin color of the man seen is light, there is no possible way to differentiate

this individual's race. Certainly, the State did not present any expert testimony about the video that supports the arguments it now presents.

Yet, given these issues with the color distortion in the video, Officer Slizous identified Quezada as the man seen in the video based on clothing alone. (R. 466-69). He did not identify him in court, or by his face as seen in the video. Rather, Officer Slizous identified Quezada as the purported shooter seen in the surveillance video exclusively by comparing the clothing seen in the video to that Quezada was wearing when he was arrested later that evening. (R. 466-69).

As discussed above, the clothing of the purported shooter seen in the video is completely nondescript to the point that the shirt, pants, and shoes appear to be very close to the same color. (People's Exhibit 89 12:11-12:18). Further, none of the articles of clothing seen in the video have *any* defining features. As such, Sliozis contradicted himself on the stand regarding his supposed identification. Specifically, on direct, he testified that the clothing he collected from Quezada was the same clothing he saw the purported shooter wearing in the video. (R. 466-69). Looking at the video, that testimony is completely unbelievable because, as seen below, the video is in black and white the clothing seen in the video is utterly nondescript.[3]

[3] These are screen shots taken from People's Exhibit 89 for demonstrative purposes. (People's Exhibit 89 12:10, 12:16). These screen shots are immediately before the what the State claims was the first, uncharged shooting.

On cross examination, Sliozis admitted that there was nothing specific about the shoes Quezada was wearing that night to link them to the shoes in the video. (R. 469). In fact, he could not even tell if the shoes in the video were Nike brand. (R. 469). Further, the shoes collected from Quezada that Slizous used to identify Quezada appear different from the shoes seen in the video. See (People's Exhibit 94). The shoes in the video have a different, much darker, color sole than the rest

of the shoe. (People's Exhibit 89 12:15) Yet, the shoes collected from Quezada were white with a slightly off-white sole. (People's Exhibit 94). Regarding the jeans, Slizous testified on direct that they were the same jeans seen in the video, but on cross he admitted that he could not tell the jeans in the video "from any number of a hundred thousand other jeans." (R. 467, 470). There is nothing about the jeans seen in the video that is at all unique.

Most importantly are the differences in the shirt collected from Quezada and the shirt the video shows on the shooter. See (People's Exhibit 91). There is no way Slizous could have looked at Quezada's shirt and equated it with that in the video. First, as discussed, the video is not even clear that the shirt is black. (People's Exhibit 89 12:09-12:17). Certainly the video is capable of capturing objects that are black as there are a multitude of objects depicted that are many shades darker than the shirt. Further, Quezada's shirt had a very large blue logo that included the familiar Nike "swoosh" logo and the word "Nike" and the letters "SB." (People's Exhibit 91). Despite the State's claims of fact otherwise, there are no logos apparent on the shirt in the video. (St. Br. 4). For all intents and purposes, the shirt in the video appears to be a solid color with no logo. (People's Exhibit 89 12:09-12:17). It is an impossibility that Slizous could have watched the surveillance video and concluded that People's Exhibit 91 was the same shirt worn by the man seen in the video.

The fact that the clothing seen in the video has no identifying features shows that Slizous's identification of Quezada as the shooter is utterly unreliable. Besides Longmire's testimony that in no way matched the ballistic evidence or the purported

number of shots fired, this is the only other identification of Quezada as the shooter. Given this, it is more than plausible and far from a fanciful notion that Quezada was misidentified, so this case is closely balanced.

C. This case is closely balanced because it is plausible that Quezada was not the shooter as the State's own evidence equally points to Longmire as the shooter.

This case might also be considered closely balanced because the evidence is weak and equally points to Longmire as the shooter. Longmire's testimony implicated Quezada while distancing himself from the blame, yet the weapon that was linked to both shootings was found in his house while he and Quezada were there. (R. 595). Given the obvious discrepancies in his story discussed above, his testimony that Quezada took the gun into his house and put into the couch is equally not credible. (R. 619). Further, the reason that the officers even went to Longmire's house was that they were informed that Longmire, not Quezada, was involved in the shooting. (R. 483). And Longmire, and not Quezada, was seen fleeing officers after the first shooting. (R. 515-16). Longmire got away, leaving Servin and Cardona behind with no gun, but a shell casing that matched the gun linked to the second shooting. (R. 518, 697-98). His mother's testimony that she had never seen the gun before does nothing to make the case not close because, presumably, if a teenage Dominic Longmire had or was carrying a gun, he likely would not freely show it to his mother. (R. 568-69). Rather, he would likely hide it. Further, her testimony placing Quezada on the couch does nothing to indicate who put the gun into the couch because it does not exclude the notion that Longmire placed it there before Quezada sat on it. (R. 568). Lastly, the video does not exclude

Longmire because it did not capture the shooting that Quezada was charged with. The State argued that Quezada can be seen with the gun right before the shooting in question, but it also argued that Longmire was right next to Quezada. Certainly he could have given the gun to Longmire off camera, especially considering the testimony that a gun was freely passed around earlier in the night. (R. 534, 789).

This is a closely balanced case because, given the entirety of the State's evidence, it is far from a fanciful notion that Quezada was misidentified as the shooter. Beyond Longmire being an alternate suspect, the sole remaining identification by Slizous is completely implausible and neither DNA nor fingerprints linked Quezada to the gun. Even though Elise Salas testified that there was a gun at the party, she testified that she did not know who brought it or who left with it. (R. 534, 547, 551). Importantly, there was no testimony that Quezada brought the gun to the party. (R. 551). Also, Salas testified that Quezada left prior to Servin, Cardona, and Longmire, who were seen fleeing together after the first shooting and were found with a shell casing matching the gun used in the second shooting and later found in Longmire's apartment. (R. 536).

The State has not explained how Quezada could leave the party with the gun and then somehow meet back up with Servin, Cardona, and Longmire who left separately so that his gun somehow ejected the shell casing found when Cardona was arrested. It seems much more probable, or in the least far from a fanciful notion, that Longmire left with the gun along with Servin and Cardona. Then when he fired the first shot the shell casing ejected and got stuck in Cardona's clothing. In that scenario, Longmire would either still have the gun or he would

have had to pass it to Quezada afterward.

D. Given the closeness of the evidence, the jury's verdict could have been influenced by the police narrative heard in Longmire's interrogation or the introduction of improper gang evidence into Quezada's trial.

The appellate court's finding that the evidence was not closely balanced is belied by the record. Allowing the police narrative about their theory of Quezada's guilt, incriminating hearsay statements of other people interviewed who did not testify at trial allegedly pointing the finger at Quezada, and the multitude of prejudicial gang references allowed the State to bolster the weaknesses in its case. The video of Longmire's interrogation allowed the jury to hear a clear explanation of what the police said happened that night that does not match the trial testimony based on unknown witnesses and information, much of which is not supported elsewhere. Ultimately, the admission of the complete interrogation and/or the improper gang evidence very likely tipped the scales. Further, this Court has opined about the prejudicial nature of gang evidence. See *People v. Gonzales*, 142 Ill. 2d 481, 488-89 (1991) (discussing the inherently high prejudicial effect of gang evidence on a jury). And Amaro's testimony allowed in a trove of improper evidence based on hearsay and unfounded opinion. Either error was singularly reversible because this was a closely balanced case.

Ultimately, should this Court agree with the State's argument that the appellate court was wrong to consider two unpreserved plain errors in a cumulative error analysis Quezada's convictions should still be reversed because this was a closely balanced case. As such, Quezada asks that this Court affirm the appellate court's reversal of his convictions and remand for a new trial.

CONCLUSION

For the foregoing reasons, Olvan Quezada, defendant-appellee, respectfully requests that this Court affirm the appellate court's reversal of Quezada's convictions and remand for new trial proceedings.

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 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 40 pages.

/s/Andrew Thomas Moore
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No. 128805

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellant, -vs- OLVAN QUEZADA, Defendant-Appellee.	))))))))))	Appeal from the Appellate Court of Illinois, No. 2-20-0195. There on appeal from the Circuit Court of the Nineteenth Judicial Circuit, Lake County, Illinois, No. 16 CF 1655. Honorable James K. Booras, Judge Presiding.

NOTICE AND PROOF OF SERVICE

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

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Mr. Olvan Quezada, Register No. Y41744, Hill Correctional Center, P. O. Box 1700, Galesburg, IL 61402

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 November 15, 2023, the Brief and Argument was filed with the Clerk of the Supreme Court of Illinois using the court's electronic filing system in the above-entitled cause. Upon acceptance of the filing from this Court, persons named above with identified email addresses will be served using the court's electronic filing system and one copy is being mailed to the defendant-appellee in an envelope deposited in a U.S. mail box in Elgin, Illinois, with proper postage prepaid. Additionally, upon its acceptance by the court's electronic filing system, the undersigned will send 13 copies of the Brief and Argument to the Clerk of the above Court.

/s/Vinette Mistretta
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