No. 126729

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Appellate Court of Illinois, No. 4-17-0787.
Plaintiff-Appellant,	)	
-vs-	)	There on appeal from the Circuit Court of the Sixth Judicial Circuit, Champaign County, Illinois, No. 16-CF-1055.
KELVIN T. HARTFIELD,	)	
Defendant-Appellee.	)	Honorable Thomas J. Difanis, Judge Presiding.

BRIEF OF APPELLEE.
CROSS-RELIEF REQUESTED.

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ISSUES PRESENTED FOR REVIEW

I. Whether Mr. Hartfield's constitutional rights to due process of law and to a jury trial were violated because the trial court responded to the jury's mid-deliberation question with an instruction that excused the state from proving beyond a reasonable doubt two elements of the crime of aggravated discharge of a firearm (peace officer). (Cross-relief requested.)

II. Whether three of Mr. Hartfield's four convictions for aggravated discharge of a firearm (peace officer) are unlawful as surplus convictions because the state did not charge or attempt to prove one discharge per count.

III. Whether Mr. Hartfield's statutory right to a speedy trial was violated because the trial court granted the state's first and third motions for continuance to obtain the results of fingerprint and DNA analyses despite the state's failure to show due diligence to obtain the results within the speedy-trial period. (Cross-relief requested.)

IV. Whether Mr. Hartfield's constitutional right to a public trial was violated because the trial court excluded spectators from the courtroom during jury selection without making findings adequate to support the exclusion and considering reasonable alternatives to the exclusion. (Cross-relief requested.)

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. VI: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury ***."

U.S. Const. amend. XIV, § 1: "No State shall *** deprive any person of life, liberty, or property, without due process of law ***."

Ill. Const. 1970, art. I, § 2: "No person shall be deprived of life, liberty or property without due process of law ***."

Ill. Const. 1970, art. I, § 8: "In criminal prosecutions, the accused shall have the right *** to have a speedy public trial by an impartial jury ***."

Ill. Const. 1970, art. I, § 13: "The right of trial by jury as heretofore enjoyed shall remain inviolate."

720 ILCS 5/24-1.2 (2015), Aggravated discharge of a firearm: See A-1 A-2.

725 ILCS 5/103-5 (2016), Speedy trial: See A-3 A-4.

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STATEMENT OF FACTS

Kelvin T. Hartfield was charged with armed robbery (firearm) and four counts of aggravated discharge of a firearm (peace officer); on July 27, 2016, Mr. Hartfield was taken into custody, where he has remained at all times since. (C. 23, 64-67; R. 440; see R. 60.) Each of the four aggravated-discharge counts alleged that Mr. Hartfield "knowingly discharged a firearm in the direction of" Champaign County Sheriff's Deputies Josh Demko, Richard Ferriman, Casey Donovan, and Robert DeRouchie, respectively, knowing the named deputy to be a peace officer. (C. 64-67.) Noting Mr. Hartfield's objections that he was in custody and ready for trial, the trial court granted six state continuance motions to obtain the results of fingerprint and DNA analyses of physical evidence. (C. 56-58, 70-71, 74-81; R. 36-37, 40, 44, 47, 50, 56; see A-37 A-40.) As to its first four continuance motions, which pushed the case to 147 days past Mr. Hartfield's custody date, the state did not explain why it could not complete the analyses within 120 days of the custody date and gave no indication that it was making any attempt to expedite the analyses. (See A-37 A-40; C. 70-71, 76-77; R. 36-37, 40, 44, 47.)

Just before jury selection began on March 6, 2017 that is, 222 days after Mr. Hartfield was taken into custody the trial court announced: "For the People in the courtroom, I've got 39 jurors coming up. There's not going to be enough room for everybody to be seated, and my jurors. I'm going to have you step out until I get a jury selected. All right, Officer, bring up the jurors, please." (R. 67; see R. 58, 440.) Moments later, Mr. Hartfield's trial counsel, George Vargas, had the following exchange with the court about its exclusion of courtroom

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spectators:

> "MR. VARGAS: *** Judge, [Mr. Hartfield's mother] Ms. Gwendolyn Hartfield is in the room, as well as her mother, and obviously, one of our interns. Can they stay in the room and, if necessary, do you want them all to leave?
> THE COURT: As soon as I get twelve in the box, then I'll have Officer Helm bring them in, so at least I'll have all of my jurors seated."

(R. 67-68; see R. 646.) Mr. Vargas made no further comment regarding the exclusion, and the record does not reflect whether any spectators were brought back into the courtroom at any point during jury selection. (See R. 68-161.) Between the time of this exchange and the time that the first panel of 12 veniremembers was seated in the jury box, all of the veniremembers were brought into the courtroom (R. 68); the trial court read aloud the charges (R. 69-71), the list of potential witnesses (R. 71-72), and the initial jury instructions (R. 72-73); and the veniremembers were sworn (R. 74).

At the two-day trial that followed (R. 163-383, 386-544), the jury heard evidence that around 1 a.m. on July 26, 2016, two men one of whom ("first perpetrator") was brandishing a silver handgun stole about 15 cartons and 3 individual packs of Newport cigarettes ("Newports"), an unspecified number of cigars, and $114.00 in cash from an Urbana gas station (R. 178-85, 187-92, 195-96, 198-204, 206-08, 485-86, 488; S.E. 1, 2a-2h). The jury also heard evidence that, soon after the robbery, a black male believed to be the first perpetrator ("second suspect") eluded Deputies Demko, Ferriman, Donovan, and DeRouchie at a trailer park near the gas station by running away and firing behind him two to five rounds that did not hit any of the four deputies; three of the deputies returned fire at the second suspect, firing a total of about six to seven rounds that did not appear to strike the second suspect. (R. 218-29, 271-87, 289, 291-300, 306-11; S.E. 3, 4a).

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The state presented evidence that a few weeks after the robbery, a revolver containing three spent and two live rounds was found near the trailer park at which the exchange of gunfire had occurred. (C. 115; R. 212-13, 215-16, 365-69, 372-73, 486-89, 499-500; S.E. 18, 22a-22d.) The revolver was seized by police on August 17, 2016, and subjected to forensic testing; neither Mr. Hartfield's fingerprint nor his DNA was located on the revolver. (C. 115; R. 212, 215, 365-67, 372-73, 499-500, 515.) Finally, there was state's evidence that Mr. Hartfield may have been the first perpetrator/second suspect, including evidence that:

- Mr. Hartfield generally resembled the second suspect, in that he was a tall, thin black male (R. 223, 227, 231-32, 289, 294-96, 303, 308-09);
- The day before the robbery, Mr. Hartfield sold or offered to sell cigarettes and cigars to individuals including his co-defendant Kydel Brown, who was believed to be the second perpetrator of the robbery (C. 114-15; R. 181, 195, 301-03, 344-45, 352-53, 360, 362-63, 398-408, 429-30, 465-84, 499-500; S.E. 1, 2b, 4c-4d, 4r-4u, 15, 17);
- Around the time of the robbery, Mr. Hartfield got a cut or other wound on his right forearm (R. 319, 321, 323, 440-41, 445; S.E. 26a-26b);
- A piece of mail addressed to Mr. Hartfield and postmarked two weeks before the robbery was found inside a maroon Hyundai from which the second suspect fled (D.E. 1g; R. 409, 415-16; S.E. 4w);
- Mr. Hartfield's fingerprint was found on an exterior door of the Hyundai and on a single pack of Newports among 15 cartons and 16 individual packs of Newports and about 28 packages of cigars seized from inside that car (R. 223, 225-26, 277-83, 292-97, 307-10, 407-08, 516, 520-28; S.E. 4a, 4e-4f, 4k-4l, 4n-4q, 4s, 4v);
- Tierykah Wiley, a young woman whom the deputies found in the backseat of the Hyundai, inconsistently implicated Mr. Hartfield in the crimes (R. 228-30, 232, 239-44, 246-58, 260-61, 293, 307, 311-13, 458, 460-61, 491; S.E. 5); and
- Ms. Wiley's "best friend," Jamona Collier, claimed that Mr. Hartfield implicated himself in the crimes in conversations with her (R. 263-68).

But there was also state's evidence that it did not find Mr. Hartfield's fingerprint or DNA anywhere at the gas station or on backpacks and clothing seized from inside the Hyundai. (C. 114-15; R. 499-500.)

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During the state's closing argument, Assistant State's Attorney (ASA) Troy Lozar acknowledged that the state's evidence did not prove beyond a reasonable doubt that at least four rounds were fired by the second suspect during his exchange of gunfire with the four deputies:

> "Incidentally, sounds like, it seems like most logically, although obviously we don't, we can't know this, but it seems likely there were probably three shots fired by the Defendant. *** I don't want you to be troubled, I suggest to you you don't need to be troubled by the fact that we've got four officers who are charged with being victims of this offense and only three bullets possibly fired. *** It's entirely possible that he shot more than three, but let's work just let's give the benefit of the doubt, let's work with the proposition that maybe only three shots got fired. Does that mean there are only three counts? No. You could do five counts on one bullet, if you needed to.
>
> The issue is not how many shots were fired, the issue is how many people got shot toward. If you got a bunch of people in a huddle hugging each other, you take one shot towards the huddle, you're shooting in the direction of all of those people. So it's not a matter of, did he pull the trigger three times, therefore there's three counts. It's an issue of how many people did he shoot at, and that's four. He shot at all four of those officers."

(R. 565-66.) ASA Lozar nevertheless urged the jury to convict Mr. Hartfield of all four counts of aggravated discharge of a firearm (peace officer). (R. 591.)

As to each of those aggravated-discharge counts, the jury initially was instructed that the state had to prove beyond a reasonable doubt (1) that Mr. Hartfield knowingly discharged a firearm, (2) in the direction of the deputy named in that count, (3) with knowledge that the named deputy was a peace officer, and (4) while the named deputy was engaged in the execution of his official duties. (R. 620-23.) In the midst of its deliberations, the jury sent out a question: " 'Does suspect need to know there were four cops on the scene in the area where gun was fired to be guilty of all four counts of aggravated discharge of a firearm[?] Third proposition, that the Defendant knew that blank was a peace

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officer.'" (Sup. C. 3; see A-35.) Over Mr. Hartfield's objection, the trial court sent the following written response to the jury:

> "Question #1
> No
> Question #2
> You must determine based on the evidence which officer or officers, if any, may have been in the line of fire when the firearm was discharged."

(R. 632-33; Sup. C. 4; see A-36.)

So instructed, the jury found Mr. Hartfield guilty as charged, and the trial court entered judgment of conviction on each of the five guilty verdicts. (C. 191-95; R. 634-37.) The court denied Mr. Hartfield's timely post-trial motion, which argued in relevant part that the court erred in its answer to the jury's mid-deliberation question, and imposed concurrent 10-year prison sentences for three of the four aggravated-discharge convictions; a consecutive 40-year prison sentence for one of the four aggravated-discharge convictions; and a consecutive 40-year prison sentence for the armed-robbery conviction. (C. 257-58, 271, 274; R. 641, 660-61.) Mr. Hartfield timely appealed. (C. 290; see C. 275-77; R. 665.)

Mr. Hartfield argued on appeal that (1) his statutory right to a speedy trial was violated because the state's first and third motions for continuance were granted despite its failure to show due diligence to obtain the results of fingerprint and DNA analyses within the speedy-trial period; (2) his constitutional right to a public trial was violated because the trial court excluded spectators from the courtroom without making findings adequate to support the exclusion and considering reasonable alternatives; (3) the trial court violated Rule 431(b) because it failed to ensure that the jurors understood and accepted each of the four *Zehr* principles by deviating from the precise language of the rule and commingling all four

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principles into one general proposition of law; and (4) his constitutional rights to due process of law and to a jury trial were violated because the mid-deliberation jury instruction excused the state from proving beyond a reasonable doubt two elements of the crime of aggravated discharge of a firearm (peace officer). (Opening brf. at 21-53; Reply brf. at 1-18.)

On May 21, 2020, the appellate court directed supplemental briefing "on the question of whether the four convictions of aggravated discharge of a firearm violate the one-act, one-crime doctrine." Mr. Hartfield added an argument that his four aggravated-discharge convictions violate the one-act, one-crime rule but continued to emphasize his earlier argument regarding the trial court's mid-deliberation instruction. (Supp. brf. at 3-13; Supp. reply brf. at 1-2.) The appellate court then dispensed with oral argument, which had been requested by Mr. Hartfield at every Supreme Court Rule 352(a) opportunity. (See Opening brf. at cover page; Reply brf. at cover page; Supp. brf. at cover page; Supp. reply brf. at cover page.)

On October 6, 2020, the appellate court filed a published opinion affirming Mr. Hartfield's convictions for armed robbery (firearm) and one count of aggravated discharge of a firearm (peace officer), vacating his convictions for three counts of aggravated discharge, and remanding for resentencing. (A-5 A-34.) Mr. Hartfield timely filed a petition for rehearing, and on November 4, 2020, the appellate court entered an order denying the petition and filed a modified opinion that, again, affirmed Mr. Hartfield's convictions for armed robbery and one count of aggravated discharge, vacated his convictions for three counts of aggravated discharge, and remanded for resentencing. *People v. Hartfield*, 2020 IL App (4th) 170787, ¶¶ 94-95, *as modified on denial of reh'g* (Nov. 4, 2020). The appellate court's judgment

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was based on its determinations that:

(1) Mr. Hartfield's speedy-trial claim must fail because Mr. Vargas "made no objection in the statutorily prescribed matter" and Mr. Hartfield therefore "is considered to have agreed to the first continuance," *Hartfield*, 2020 IL App (4th) 170787, ¶ 45;

(2) Mr. Hartfield did not prove a violation of his public-trial right because the "preliminary procedures" from which all spectators were excluded did not "implicate[]" the right and, "[a]bsent a contrary showing from the record," it must be presumed that at least the three named spectators were present for jury selection, *id.* at ¶ 51;

(3) the trial court did not err in deviating from the precise language of Rule 431(b), and any commingling error is not clear or obvious, *id.* at ¶¶ 58-59;

(4) the mid-deliberation instruction did not lighten the state's burden of proof on the second and third elements of aggravated discharge because "being 'in the line of fire' has a different meaning from having a firearm discharged 'in the direction of' oneself," *id.* at ¶¶ 68-70, and because the number of peace officers at which a defendant shoots a single round is irrelevant to the number of counts of aggravated discharge of which he may be convicted, *id.* at ¶ 90; and

(5) three of Mr. Hartfield's four convictions for aggravated discharge are "statutorily unauthorized surplusage" because "the unit of prosecution" is the discharge, yet the state "differentiated between peace officers instead of between discharges" in the charging document and at trial, *id.* at ¶¶ 75, 81, 91, 94.

The state timely filed a petition for leave to appeal to this Court, making one argument: that "a single discharge of a firearm in the direction of a group of police officers should support multiple convictions of aggravated discharge of a firearm." (State's PLA at 7; see State's PLA at 6-8.) Mr. Hartfield timely filed his own petition for leave to appeal, reasserting each of the four arguments from his opening brief in the appellate court. (PLA at 8-20.) On January 27, 2021, this Court allowed the state's petition for leave to appeal; Mr. Hartfield's petition for

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leave to appeal remains pending. The state timely filed an appellant's brief on May 12, 2021, developing the one argument from its petition for leave to appeal (Appellant's brf. at 9-14) and adding an alternative argument that even if a single discharge of a firearm cannot support multiple aggravated-discharge convictions, "it would be inappropriate to vacate any of defendant's convictions" because "the indictment provided sufficient notice to defendant to prepare his defense and the evidence was sufficient to sustain the convictions" (Appellant's brf. at 14-16). Mr. Hartfield now responds and requests cross-relief.

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ARGUMENT

I. Mr. Hartfield's constitutional rights to due process of law and to a jury trial were violated because the trial court responded to the jury's mid-deliberation question with an instruction that excused the state from proving beyond a reasonable doubt two elements of the crime of aggravated discharge of a firearm (peace officer).

"The function of jury instructions is to provide the jury with accurate legal principles to apply to the evidence so it can reach a correct conclusion." *People v. Pierce*, 226 Ill. 2d 470, 475 (2007). "In a criminal case, fundamental fairness requires that the trial court fully and properly instruct the jury on the elements of the offense, the burden of proof, and the presumption of innocence," *Pierce*, 226 Ill. 2d at 475, because the constitutional rights to due process of law and to a jury trial demand that every element of a crime be proved to a jury beyond a reasonable doubt, *Hurst v. Florida*, 136 S. Ct. 616, 621 (2016); see U.S. Const. amends. V, VI, XIV; Ill. Const. 1970, art. I, §§ 2, 8, 13. A jury instruction that excuses the state from meeting its burden of proof on any element of the crime of conviction, then, not only misstates the law but thereby violates the defendant's constitutional rights to due process, *Middleton v. McNeil*, 541 U.S. 433, 437 (2004), and to a jury trial, *Neder v. United States*, 527 U.S. 1, 12-13 (1999).

The trial court generally must provide additional instruction to a jury that "has posed an explicit question or requested clarification on a point of law arising from facts about which there is doubt or confusion." *People v. Millsap*, 189 Ill. 2d 155, 160 (2000). Any such additional instruction must answer the jury's question or provide the requested clarification with "specificity" and, of course, "accuracy." *People v. Childs*, 159 Ill. 2d 217, 229 (1994). This is so "even [if] the jury was properly instructed originally." *Childs*, 159 Ill. 2d at 228-29. The legal accuracy of any jury

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instruction, including an additional instruction given in response to a question from the jury, is reviewed *de novo.* See *Pierce*, 226 Ill. 2d at 475 ("Although the giving of jury instructions is generally reviewed for an abuse of discretion, when the question is whether the jury instructions accurately conveyed to the jury the law applicable to the case, our review is *de novo*."); *People v. Hasselbring*, 2014 IL App (4th) 131128, ¶¶ 45-46, 48 (reviewing *de novo* the legal accuracy of an instruction given in response to a mid-deliberation question from the jury).

In this case, as to each of the four counts of aggravated discharge of a firearm (peace officer), the jury initially was instructed that the state had to prove beyond a reasonable doubt (1) that Mr. Hartfield knowingly discharged a firearm, (2) in the direction of the deputy named in that count, (3) with knowledge that the named deputy was a peace officer, and (4) while the named deputy was engaged in the execution of his official duties. (R. 620-23.) During its deliberations, the jury sent out the following question: " 'Does suspect need to know there were four cops on the scene in the area where gun was fired to be guilty of all four counts of aggravated discharge of a firearm[?] Third proposition, that the Defendant knew that blank was a peace officer.' " (A-35.) The trial court answered the jury's question in writing, as follows:

> "Question #1
> No
> Question #2
> You must determine based on the evidence which officer or officers, if any, may have been in the line of fire when the firearm was discharged."

(A-36.)

The statutory elements of aggravated discharge of a firearm (peace officer) are: (1) knowing or intentional discharge of a firearm, (2) "in the direction of" a

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person who is a peace officer ("trajectory element"), (3) with knowledge that such person is a peace officer ("knowledge element"), (4) in connection with the officer's official duties. 720 ILCS 5/24-1.2(a) (2015) (A-1). At issue here are the trajectory and knowledge elements, because the mid-deliberation instruction included both a direct and unqualified "no" answer to the jury's yes-or-no question about the knowledge element and an unasked-for, atextual rephrasing of the trajectory element. (See A-35 A-36.) Mr. Hartfield addresses those two elements in turn.

A. The mid-deliberation instruction reduced the state's burden on the trajectory element from proof beyond a reasonable doubt to proof of a mere possibility.

The trajectory element is, again, that a firearm was discharged "in the direction of" a peace officer. 720 ILCS 5/24-1.2(a)(3) (2015) (A-1). That element, like the others, must be proved beyond a reasonable doubt in order to secure a conviction for aggravated discharge of a firearm (peace officer). See *Hurst*, 136 S. Ct. at 621. But according to the mid-deliberation instruction, the state had to prove only that a peace officer "*may have been* in the line of fire when the firearm was discharged." (Emphasis added.) (A-36.) The word "may" is "[u]sed to express possibility or probability." American Heritage Dictionary of the English Language 1086 (5th ed. 2011). Accordingly, the phrase "may have been" means "perhaps was." (Emphasis and internal quotation marks omitted.) IX The Oxford English Dictionary 501 (2nd ed. 1989). Thus by instructing the jury to determine "which officer of officers, if any, *may have been* in the line of fire," the trial court erroneously expressed that the trajectory element could be satisfied by evidence that the named officer perhaps was in the line of fire, reducing the state's burden on the second element of aggravated discharge from proof beyond a reasonable doubt to proof of a mere possibility. (Emphasis added.) (A-36.)

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The appellate court avoided this conclusion by distinguishing one in whose direction a firearm is discharged from one who is in the line of fire of the discharge:

> "[B]eing 'in the line of fire' has a different meaning from having a firearm discharged 'in the direction of' oneself. The 'line of fire' means 'the place where bullets are being shot.' Merriam-Webster Online Dictionary ***. Or, as another dictionary defines the phrase, the 'line of fire' is 'the expected path of gunfire.' New Oxford American Dictionary 991 (2001). Thus, anyone remaining in the line of fire when a firearm is discharged will be hit. Being in the line of fire means being in the expected trajectory of the round. The line is the path of the round, and anyone who intersects that line is in the line of fire. By contrast, the phrase 'in the direction of' is more approximate. It means 'so as to be approaching' or 'toward.' Merriam-Webster Online Dictionary ***. To 'approach' means 'to draw closer to' or 'to come very near to.' Merriam-Webster Online Dictionary ***.
>
> To illustrate this distinction, let us say that, with the intention of merely scaring A, B carefully aims at a window to the side of A and shoots out the glass. A would not be in the line of fire, and, when pulling the trigger, B would know that A was not in the line of fire. Nevertheless, B would fire in A's direction, and B would know he was firing in A's direction."

People v. Hartfield, 2020 IL App (4th) 170787, ¶¶ 68-69, *as modified on denial of reh'g* (Nov. 4, 2020). The appellate court determined that "the differing meanings" prevented the mid-deliberation instruction from lightening the state's burden of proof on the trajectory element, *Hartfield*, 2020 IL App (4th) 170787, ¶ 70, implying equivalence between that instruction's phrase "may have been in the line of fire" and the statutory language "discharge[] *** [was] in the direction of," see *id.* at ¶¶ 67-70. For three related reasons, the appellate court was mistaken.

One, if the jury had shared the appellate court's interpretation of the mid-deliberation instruction, it could not have found beyond a reasonable doubt that any peace officer "may have been in the line of fire when the firearm was discharged." (A-36.) According to the appellate court, "anyone remaining in the line of fire when a firearm is discharged will be hit," *Hartfield*, 2020 IL App (4th) 170787, ¶ 68, and the trial evidence showed that none of the four deputies was

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hit by any of the two to five rounds fired by the second suspect. (See R. 226, 282-88, 297-300, 310-11.) It follows that, "when the firearm was discharged" (A-36), none of the deputies was or even may have been "in the line of fire" as that phrase was defined by the appellate court. To borrow the appellate court's illustration of B shooting out the glass of a window to the side of A, a jury instructed to determine whether A "may have been in the line of fire when the firearm was discharged" would have to answer in the negative, because the evidence showed that A was not hit by the round.

Two, the phrase "line of fire" does not have a single, unyielding meaning. A "line" may be "[a] geometric figure formed by a point moving along a fixed direction and the reverse direction," American Heritage Dictionary, *supra*, at 1020, such that "line of fire" would mean, as the appellate court believed, the exact trajectory of a round. But "line" also may be used less mathematically as "[a] direction or course of movement." VIII The Oxford English Dictionary 978 (2nd ed. 1989); see also American Heritage Dictionary, *supra*, at 1020 (defining "line" to include "[a] course of progress or movement; a route"). On that definition of "line," a reference to the "line of fire" of a round would mean no more than the direction in which the round was fired. The latter meaning seems more apt than the former meaning here, insofar as the mid-deliberation instruction suggested just one line of fire (see A-36), although the trial evidence showed that the second suspect fired no fewer than two and as many as five rounds (see R. 226, 282, 297, 299, 310, 367-69). Each of those rounds had its own exact trajectory, while all of those rounds could have been fired in the same general direction. Indeed, in its appellant's brief, the state itself adopted the latter meaning of "line of fire," using that phrase some 15 times to mean, simply, the direction in which a round was fired. (Appellant's brf. at I, 1, 8-12.)

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And three, lawyerly parsing of the instructional phrase "line of fire" involves a technical precision most jurors would not have brought with them to deliberations. This Court has stated that the correctness of jury instructions "depends upon not whether defense counsel can imagine a problematic meaning, but whether ordinary persons acting as jurors would fail to understand them." *People v. Herron*, 215 Ill. 2d 167, 188 (2005). A corollary is that the correctness of a jury instruction does not turn on whether a reviewing court can mine a dictionary for an acceptable meaning of an isolated instructional phrase, but whether ordinary persons acting as jurors would understand the instruction as a correct statement of law. *Cf. Herron*, 215 Ill. 2d at 191 & n.3 (declining to excuse the trial court's "ambiguous and misleading" insertion into a jury instruction of an errant word "or" on the basis that, "[a]s a matter of statutory instruction," the typically disjunctive "or" is sometimes taken to mean the conjunctive "and"). After all, the question before this Court is not what the trial court meant by its instruction to "determine based on the evidence which officer or officers, if any, may have been in the line of fire when the firearm was discharged." (A-36.) The question before this Court is whether the jury, so instructed, would have understood that the state had to prove beyond a reasonable doubt that a firearm was discharged "in the direction of" a peace officer. 720 ILCS 5/24-1.2(a)(3) (A-1).

The answer is no. Even before receiving the mid-deliberation instruction, the jury seemed not to understand the trajectory element, conflating proof that a peace officer was on the scene when a firearm was discharged and proof that the firearm was discharged in the direction of a peace officer: " 'Does suspect need to know there were four cops on the scene in the area where gun was fired to be guilty of all four counts of aggravated discharge of a firearm[?] Third proposition,

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that the Defendant knew that blank was a peace officer.' " (A-35.) Thus a jury initially instructed with the statutory language "discharge[] *** [was] in the direction of" (R. 620-23) somehow turned that language into "[was] on the scene in the area where [the] gun was fired" (A-35) and then got yet another version from the trial court: "may have been in the line of fire when the firearm was discharged" (A-36). Assuming as it must that the jurors were "ordinary persons" rather than mathematicians, marksmen, or linguists, see *Herron*, 215 Ill. 2d at 188, this Court can be confident that the jury did not understand the mid-deliberation instruction as a correct statement of law on the trajectory element.

B. The mid-deliberation instruction eliminated the knowledge element from all four counts of aggravated discharge.

The knowledge element of aggravated discharge of a firearm (peace officer) requires the state to prove beyond a reasonable doubt the defendant's knowledge that the person in whose direction he discharges the firearm is a peace officer. 720 ILCS 5/24-1.2(a)(3) (A-1). If the defendant knows that the person in whose direction he discharges the firearm is a peace officer ("fact of identity"), then he necessarily knows that the person in whose direction he discharges the firearm is present ("fact of existence"). Differently stated, the defendant cannot know that the person in whose direction he discharges the firearm is a peace officer if he does not know that he is discharging the firearm in the direction of that person. By expressly requiring the defendant's knowledge of the fact of identity, the aggravated-discharge statute implicitly requires the defendant's knowledge of the fact of existence. See 720 ILCS 5/24-1.2(a) (A-1) ("A person commits aggravated discharge of a firearm when he or she knowingly or intentionally *** [d]ischarges a firearm in the direction of a person he or she knows to be a peace officer[.]").

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Here, the jury asked the trial court whether the knowledge element applied to each of the four aggravated-discharge counts: " 'Does suspect need to know there were four cops on the scene in the area where gun was fired to be guilty of all four counts of aggravated discharge of a firearm[?] Third proposition, that the Defendant knew that blank was a peace officer.' " (A-35.) The jury's question called for a yes-or-no answer (see A-35) where "yes" meant that the state had to prove the knowledge element as to each count, and "no" meant that the state did not have to prove the knowledge element as to each count and the trial court answered, unequivocally, "No." (A-36.) The mid-deliberation instruction went on: "You must determine based on the evidence which officer or officers, if any, may have been in the line of fire when the firearm was discharged." (A-36.) Taken together, the two parts of the instruction told the jury that it could convict Mr. Hartfield of as many counts of aggravated discharge as there were peace officers who "may have been in the line of fire," without considering whether Mr. Hartfield knew that they were officers or even that they were present at all. (See A-36.) The instruction thus excused the state from proving by any standard Mr. Hartfield's knowledge of the facts of existence and identity, requiring Mr. Hartfield's knowledge or intent only as to the bare discharge of a firearm, on each of the four counts of aggravated discharge. See 720 ILCS 5/24-1.2(a) (A-1).

In its initial opinion, the appellate court omitted any apparent consideration of the trial court's direct and unqualified "no" answer to the jury's yes-or-no question about the knowledge element. (See A-21 A-25.) After Mr. Hartfield pointed out that omission in his petition for rehearing, the appellate court added the following to the portion of its modified opinion holding that three of Mr. Hartfield's four

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aggravated-discharge convictions are unlawful as surplus convictions:

> "It follows, by the way, that the circuit court was correct when it answered, 'No,' to the jury's question 'Does [the] suspect need to know there were four cops on the scene in the area where the gun was fired to be guilty of all four counts of aggravated discharge of a firearm[?]' Instead of knowing the precise number of peace officers, the suspect would have to know, rather, that he fired the gun four times in the direction of at least one peace officer."

(Alterations in original.) *Hartfield*, 2020 IL App (4th) 170787, ¶ 90. Again, the appellate court was mistaken.

Regardless of whether one discharge of a firearm in the direction of multiple peace officers will support only one aggravated-discharge conviction a question that will be thoroughly addressed in Issue II, below the legal accuracy of the mid-deliberation instruction cannot be determined in the abstract; it must be determined by reference to the criminal charges in this case, as they went to the jury in this case. For even if one discharge in the direction of multiple peace officers will support only one *conviction* for aggravated discharge, a defendant who fired one round in the direction of four peace officers may have violated subsection (a)(3) of the aggravated-discharge statute in four different *ways*, and the state is free to charge, attempt to prove, and request that the jury be instructed on four counts of aggravated discharge, *i.e.*, a count for each officer, in order to maximize its chances of securing the one permissible conviction. *Cf. People v. Crespo*, 203 Ill. 2d 335, 338, 344 (2001), *as modified on denial of reh'g* (Mar. 31, 2003) ("[T]he charging instruments reveal that the State intended to treat the conduct of the defendant [in stabbing the victim three times in rapid succession] as a single act. In order to convict defendant, the State charged him with stabbing in four different ways, based on four different theories.").

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Indeed, the state's motivation to prosecute one count of aggravated discharge per peace officer will be at its zenith in a case like this one, where multiple officers give dramatically varying accounts of the same shooting event. Here, four deputies testified about an exchange of gunfire with the second suspect, and as will be detailed in Issue I.C., below, their testimony was rife with inconsistences regarding their physical positions relative to the second suspect and to each other, and regarding the number, timing, and direction of the rounds fired by the second suspect. (Compare R. 226, with R. 282-84, with R. 297-99, with R. 310-11.) The exchange of gunfire was not captured on video because of the deputies' failure to timely activate their body cameras. (See R. 224, 274-75.) Quite simply, the state had no hope of proving beyond a reasonable doubt how many rounds were fired by the second suspect, as it expressly conceded during closing argument. (See R. 565-66.) In such a case, the state might well make a strategic decision to charge the suspected shooter with as many counts of aggravated discharge as there were officers involved in the shooting, notwithstanding any limitation on the number of convictions that ultimately may be entered if multiple guilty verdicts result.

Mr. Hartfield was charged with four counts of aggravated discharge by: (1) "knowingly discharg[ing] a firearm in the direction of Joshua Demko, a person he knew to be a peace officer," while "Joshua Demko was engaged in the execution of his official duties" (C. 64); (2) "knowingly discharg[ing] a firearm in the direction of Richard Ferriman, a person he knew to be a peace officer," while "Richard Ferriman was engaged in the execution of his official duties" (C. 65); (3) knowingly discharg[ing] a firearm in the direction of Casey Donovan, a person he knew to be a peace officer," while "Casey Donovan was engaged in the execution of his

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official duties" (C. 66); and (4) "knowingly discharg[ing] a firearm in the direction of Rob Derouchie, a person he knew to be a peace officer," while "Rob Derouchie was engaged in the execution of his official duties" (C. 67). Accordingly, the jury initially was instructed as follows:

> "To sustain the charge of aggravated discharge of a firearm in the direction of Joshua Demko, the State must prove the following propositions. First proposition, that the Defendant knowingly discharged a firearm. Second proposition, that the Defendant discharged a firearm in the direction of Joshua Demko. Third proposition, that the Defendant knew that Joshua Demko was a peace officer. And fourth proposition, that the Defendant did so while the peace officer was engaged in the execution of his official duties.
> ***
> To sustain the charge of aggravated discharge of a firearm in the direction of Richard Ferriman, the State must prove the following propositions. First proposition, that the Defendant knowingly discharged a firearm. And second proposition, that the Defendant discharged the firearm in the direction of Richard Ferriman. Third proposition, that the Defendant knew that Richard Ferriman was a peace officer. Fourth proposition, that the Defendant did so while the peace officer was engaged in the execution of his official duties.
> ***
> To sustain the charge of aggravated discharge of a firearm in the direction of Casey Donovan, the State must prove the following propositions. First proposition, that the Defendant knowingly discharged a firearm. And second proposition, that the Defendant discharged the firearm in the direction of Casey Donovan. Third proposition, that the Defendant knew that Casey Donovan was a peace officer. And fourth proposition, that the Defendant did so while the peace officer was engaged in the execution of his official duties.
> ***
> To sustain the charge of aggravated discharge of a firearm in the direction of Rob Derouchie, the State must prove the following propositions. First proposition, that the Defendant knowingly discharged a firearm. And second proposition, that the Defendant discharged the firearm in the direction of Rob Derouchie. Third proposition, that the Defendant knew that Rob Derouchie was a peace officer. And fourth proposition, that the Defendant did so while the peace officer was engaged in the execution of his official duties."

(R. 620-23.)

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The initial instructions completely and correctly stated the law as applied to the state's theory of this case: that Mr. Hartfield knowingly discharged a firearm in the direction of four on-duty deputies, with the knowledge that they were peace officers. See 720 ILCS 5/24-1.2(a) (A-1). Then the jury asked its question: " 'Does suspect need to know there were four cops on the scene in the area where gun was fired to be guilty of all four counts of aggravated discharge of a firearm[?] Third proposition, that the Defendant knew that blank was a peace officer.' " (A-35.) As the state charged, tried, and sent this case to the jury, the only correct answer to that question was yes. (See C. 64-67; R. 620-30.) But the trial court answered, literally, "No." (A-36.)

A hypothetical may help to explain the appellate court's mistaken belief that "the circuit court was correct when it answered, 'No,' to the jury's question 'Does [the] suspect need to know there were four cops on the scene in the area where the gun was fired to be guilty of all four counts of aggravated discharge of a firearm[?]' " (Alterations in original.) *Hartfield*, 2020 IL App (4th) 170787, ¶ 90. If the state had charged Mr. Hartfield with four counts of aggravated discharge by "fir[ing] the gun four times in the direction of at least one peace officer," *id.*, then the trial court's "no" answer would have been perhaps incomplete but not certainly incorrect. For in the hypothetical, the knowledge element would have been satisfied by proof beyond a reasonable doubt that, at the moment of each discharge, the defendant knew that he was firing in the direction of at least one of the four officers. In the hypothetical, then, a specific and accurate answer to the jury's question may have looked something like this: "No. For each count of aggravated discharge of a firearm, you must determine based on the evidence

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whether the defendant knowingly discharged a firearm in the direction of at least one person he knew to be a peace officer while the officer was engaged in the execution of any of his official duties." See 720 ILCS 5/24-1.2(a) (A-1).

But the hypothetical is not this case. The state charged Mr. Hartfield with four counts of aggravated discharge by shooting an unspecified number of rounds in the direction of each of four named peace officers. (C. 64-67.) That being so, the jury could find Mr. Hartfield "guilty of all four counts of aggravated discharge of a firearm" (A-35) only if the state proved beyond a reasonable doubt, among other things, that he knew the facts of existence and identity of all four officers. (See R. 620-23.) Yet the trial court told the jury just the opposite. (A-36.) And by going beyond a bald "no" to further instruct the jury that it could convict Mr. Hartfield of as many counts of aggravated discharge as there were peace officers who "may have been in the line of fire," the court did more than lighten the state's burden of proof on the trajectory element from proof beyond a reasonable doubt to proof of a mere possibility; it neatly erased the knowledge element from all four counts of aggravated discharge. (See A-36.) "[O]rdinary persons acting as jurors" would not *could not* understand the mid-deliberation instruction as a correct statement of law. See *Herron*, 215 Ill. 2d at 188.

C. The mid-deliberation instruction entitles Mr. Hartfield to reversal of all four aggravated-discharge convictions and remand for a new trial.

Despite seeming to defend the legal accuracy of the mid-deliberation instruction, the appellate court also indicated that it was overlooking unspecified errors in that "clarifying" instruction because Mr. Hartfield did not prove that he was prejudiced by the errors, citing *People v. Williams*, 2017 IL App (1st) 142733, ¶ 50,

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for the proposition that " '[i]t is the defendant's burden to demonstrate prejudice resulting from an alleged instruction error.' " (Alteration in original.) *Hartfield*, 2020 IL App (4th) 170787, ¶ 70. But *Williams*, in turn, cited *People v. Wells*, 106 Ill. App. 3d 1077, 1086 (1st Dist. 1982). There the defendant argued that his conviction should be reversed because the trial court made improper comments during the re-cross-examination of a state's witness. *Wells*, 106 Ill. App. 3d at 1079, 1086. In rejecting the defendant's argument, the appellate court reasoned that "reversible error is committed only where it is shown that the judge has made prejudicial statements, and it is defendant's burden to show that he has been harmed by the remarks of the judge." *Id.* at 1086. *Wells* did not involve instructional error, much less the serious instructional error of improper instruction on an element of the crime of conviction. See *id.* at 1086-87. Because *Wells* has no possible application here, neither does *Williams*.

A jury instruction that misdescribes, omits, or presumes an element of the crime of conviction "does not *necessarily* render a criminal trial fundamentally unfair," as would entitle the defendant to automatic reversal. (Emphasis in original.) *Neder*, 527 U.S. at 9-12; see *People v. Thurow*, 203 Ill. 2d 352, 354-55, 361, 368 (2003) (relying on *Neder* to conclude that the *Apprendi* error of imposing an enhanced sentence, although the jury was not instructed on and made no determination with regard to the element that allowed for the enhancement, did not entitle the defendant to automatic reversal of her sentence). It remains, however, that improper instruction on an element of the offense is an error of certain constitutional magnitude. See *Neder*, 527 U.S. at 12-13 (agreeing that "an improper instruction on an element of the offense violates the Sixth Amendment's jury trial guarantee"

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by preventing a " 'complete verdict' on every element" of the crime of conviction); *Middleton*, 541 U.S. at 437 ("In a criminal trial, the State must prove every element of the offense, and a jury instruction violates due process if it fails to give effect to that requirement."). Such an error, if preserved, entitles the defendant to reversal of his conviction and remand for a new trial before a properly instructed jury unless the state proves the error harmless beyond a reasonable doubt. *Neder*, 527 U.S. at 15-16.

The test for harmless error is "whether it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." (Internal quotation marks omitted.) *Id.* at 15. The error cannot be deemed harmless unless it is "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error."*Id.* at 18. Thus harmless-error analysis of a jury instruction's omission of an element of the crime of conviction requires that "a reviewing court conduct a thorough examination of the record" to determine "whether the record contains evidence that could rationally lead to a contrary finding with respect to the omitted element." *Id.* at 19.

As established in Issues I.A. and I.B., above, the mid-deliberation instruction reduced the state's burden on the trajectory element from proof beyond a reasonable doubt to proof of a mere possibility and eliminated the knowledge element from all four counts of aggravated discharge. (See A-36.) The instruction thereby violated Mr. Hartfield's constitutional rights to due process of law, see *Middleton*, 541 U.S. at 437, and to a jury trial, see *Neder*, 527 U.S. at 15-16. Mr. Hartfield raised a contemporaneous objection to the instruction (R. 632-33) and assigned error to it in his timely post-trial motion (C. 257); it follows that the instructional errors in this case are fully preserved. See *People v. McDonald*, 2016 IL 118882, ¶ 45

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("Generally, to preserve a claimed error, a defendant must both object at trial and include the issue in his posttrial motion."). Contrary to the appellate court's implication, then, Mr. Hartfield, was not required to demonstrate prejudice from the instructional errors. See *Hartfield*, 2020 IL App (4th) 170787, ¶ 70. Rather, the state must prove beyond a reasonable doubt that a rational jury would have found Mr. Hartfield guilty of all four counts of aggravated discharge absent the errors. See *Neder*, 527 U.S. at 15-16.

And that the state cannot do. It is hamstrung from the outset by a long line of authority for the proposition that "[i]f conflicting instructions are given, one being a correct statement of law and the other an incorrect statement of law, the error cannot be deemed harmless." *People v. Pollock*, 202 Ill. 2d 189, 212 (2002); see also *People v. Bush*, 157 Ill. 2d 248, 254 (1993) ("[T]he giving of conflicting instructions, one of which is a correct statement of law and the other an incorrect statement of law, is not harmless error."); *People v. Haywood*, 82 Ill. 2d 540, 545 (1980) ("[T]he rule in Illinois is that when conflicting instructions are given, one of which is a correct statement of law and the other is an incorrect statement of law, the error is not harmless."); *People v. Jenkins*, 69 Ill. 2d 61, 66 (1977) ("It is well established that the giving of contradictory instructions on an essential element in the case is prejudicial error, and is not cured by the fact that another instruction is correct.").

Again, the jury was properly instructed on the aggravated-discharge counts before it began its deliberations. (See R. 620-23.) But then the jury received the conflicting, erroneous, and, indeed, constitutionally infirm mid-deliberation instruction in response to its written question. (See A-35 A-36.) This Court therefore

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should conclude, by application of its precedent and without further analysis, that the errors were not harmless. See *Pollock*, 202 Ill. 2d at 216 (concluding that the instructional error was not harmless where "accountability was a fundamental element of the offense charged" and the jury heard both a non-pattern instruction that misstated the law of accountability and a pattern instruction that correctly stated the law of accountability).

Even if this Court declines to view its precedent as foreclosing the possibility of harmless error here, the possibility is not bourne out by the record. The jury's question itself weighs against any determination that the instructional errors did not contribute to one or more of the guilty verdicts on the aggravated-discharge counts. For the question suggests that, as to the trajectory element, the jury was already conflating the requirement of proof that a gun was fired "in the direction of" a peace officer, 720 ILCS 5/24-1.2(a)(3) (A-1), with proof that the officer was "on the scene in the area where [the] gun was fired" (A-35), when it was told by the trial court that it need only determine that the officer "may have been in the line of fire when the firearm was discharged" (A-36). The jury's question further indicates that it had doubts about the state's evidence on the knowledge element at least as to some of the four aggravated-discharge counts until the trial court resolved those doubts by excusing the state from proving the knowledge element by *any* standard and as to *any* of the four counts. (See A-35 A-36.)

What is more, the record shows that the state's evidence on the trajectory and knowledge elements was far from overwhelming. As noted in Issue I.B., above, the four deputies did not testify consistently regarding their physical positions relative to the second suspect and to each other, or regarding the number, timing, and direction of the rounds fired by the second suspect. Deputy DeRouchie testified

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that he and Deputy Demko were "nearly side by side three to five feet separated" and about 30 feet away from the second suspect when the second suspect fired three to five rounds in the direction of Deputies DeRouchie and Demko. (R. 226.) Deputy Demko, on the other hand, testified that Deputy DeRouchie was behind him and that he was only about four feet away from the second suspect when the second suspect fired two rounds in Deputy Demko's direction. (R. 282-84.) Deputy Donovan testified that the second suspect fired "at least three" rounds in the direction of all four deputies. (R. 310-11.) But Deputy Ferriman testified that the second suspect fired two to three rounds in Deputy Demko's direction and in Deputy DeRouchie's general direction. (R. 297-98.) And Deputy Ferriman alone testified that the second suspect subsequently fired a single round in his direction. (R. 299; see R. 226-28, 282-88, 310-11.)

A jury faced with such inconsistent accounts, and unaided by any video evidence due to the deputies' acknowledged failure to activate their body cameras until after the second suspect got away (see R. 224, 274-75), rationally could have found that the state failed to carry its heavy burden of proof beyond a reasonable doubt on the trajectory element and/or the knowledge element as to one or more of the four counts of aggravated discharge. But in the midst of its deliberations, the jury received an instruction that lowered the state's burden of proof on the trajectory element and eliminated the knowledge element entirely. (See A-36.) Such instructional error cannot be deemed harmless beyond a reasonable doubt. Compare *Neder*, 527 U.S. at 17 ("[W]here a reviewing court concludes beyond a reasonable doubt that the omitted element was uncontested and supported by overwhelming evidence, such that the jury verdict would have been the same absent the error, the erroneous instruction is properly found to be harmless.").

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Mr. Hartfield acknowledges that while he raised a contemporaneous objection to the mid-deliberation instruction and repeated his objection in a post-trial motion, he did not expressly argue against the legal accuracy of that instruction. (See C. 257-58; R. 631-33.) To any extent the instructional errors in this case are less than fully preserved, Mr. Hartfield relies on Supreme Court Rule 451, which provides that "substantial [instructional] defects are not waived by failure to make timely objections thereto if the interests of justice require." Ill. S. Ct. Rule 451(c) (eff. Apr. 8, 2013). Under Rule 451(c), this Court may reach an unpreserved instructional error that either was "grave" or was made in a case "so factually close that fundamental fairness requires that the jury be properly instructed." (Internal quotation marks omitted). *People v. Downs*, 2015 IL 117934, ¶ 14. In other words, an unpreserved instructional error may be addressed on appeal where " 'the evidence is close, regardless of the seriousness of the error,' " or where " 'the error is serious, regardless of the closeness of the evidence.' " *People v. Piatkowski*, 225 Ill. 2d 551, 564 (2007) (quoting *Herron*, 215 Ill. 2d at 186-87).

Here, the trial court's instructional errors were serious, indeed, because by its errors the court excused the state from proving beyond a reasonable doubt two elements of the crime of conviction. Any forfeiture of those errors should be excused by their gravity. See *People v. Ogunsola*, 87 Ill. 2d 216, 220-22 (1981) (stating that "[t]he failure correctly to inform the jury of the elements of the crime charged has been held to be error so grave and fundamental that the waiver rule should not apply" and concluding that a jury instruction's omission of an essential element of the crime of conviction was "a substantial one, rising to the level of plain error"); see also *People v. Ayers*, 331 Ill. App. 3d 742, 750 (1st Dist. 2002)

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("Fundamental fairness requires the trial court to give proper instructions on the elements of the offense in order to insure a fair determination of the case and the failure to do so constitutes plain error. Where conflicting instructions are given, one of which is a correct statement of the law and the other is an incorrect statement of the law, the error is not harmless and constitutes grave error.").

So, too, did fundamental fairness require proper instruction on the knowledge and trajectory elements because of the factual closeness of this case. In light of the inconsistencies in the deputies' testimony as described above, the evidence was closely balanced on precisely those two elements. See *Piatkowski*, 225 Ill. 2d at 556-58, 567 (making clear that the evidence may be closely balanced even if the defendant offers no evidence on his own behalf and concluding that the evidence of identity was closely balanced, although two eyewitnesses repeatedly identified the defendant as the perpetrator, where an instructional error "related to how the jury would assess the credibility of that eyewitness testimony"); *People v. Othman*, 2020 IL App (1st) 150823-B, ¶ 70 ("The evidence can be closely balanced where the evidence comes from unreliable witnesses who offer conflicting accounts or from prosecution witnesses who provide evidence favorable to [the defendant]."). Regardless of preservation *vel non*, then, Mr. Hartfield is entitled to reversal of all four aggravated-discharge convictions, and to remand for a new trial before a properly instructed jury.

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II. Three of Mr. Hartfield's four convictions for aggravated discharge of a firearm (peace officer) are unlawful as surplus convictions because the state did not charge or attempt to prove one discharge per count.

A. The appellate court correctly held that the unit of prosecution for aggravated discharge of a firearm is the discharge.

Unless the legislature has unambiguously authorized multiple convictions for simultaneous violations of a single criminal statute, a defendant's simultaneous violations of a single criminal statute may be the basis for only one conviction. *People v. Carter*, 213 Ill. 2d 295, 300-04 (2004).Unauthorized multiple convictions for simultaneous violations of a single criminal statute are unlawful as "surplus" convictions. *Carter*, 213 Ill. 2d at 299. Because "the potential for a surplus conviction and sentence affects the integrity of the judicial process," an unpreserved surplus-conviction issue may be addressed on appeal as second-prong plain error. (Internal quotation marks omitted.) *Id.*; see generally Ill. S. Ct. Rule 615(a) (eff. Jan. 1, 1967) ("Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the trial court."); *People v. Eppinger*, 2013 IL 114121, ¶ 18 (stating that review is appropriate under the second prong of the plain-error doctrine where "a clear or obvious error occurred and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process").

A reviewing court answers *de novo*, as a matter of statutory interpretation, the question of whether the legislature has specifically authorized multiple convictions for simultaneous violations of a single criminal statute. *Carter*, 213 Ill. 2d at 301. The reviewing court's interpretive task is to "determine the statute's 'allowable unit of prosecution,' resolving any ambiguity in favor of the defendant, *i.e.*, against multiple convictions for simultaneous violations. *Id.* at 302 (quoting *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 220-21 (1952)).

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As the United States Supreme Court explained in the federal context, the question for the judicial body is whether the legislative body has, "clearly and without ambiguity," provided that each simultaneous violation be punished as a "single criminal unit." *Bell v. United States*, 349 U.S. 81, 84 (1955). If it has not, then "doubt will be resolved against turning a single transaction into multiple offenses." *Bell*, 349 U.S. at 84.

Carter and its subsequent history show this comity- and lenity-based analysis in action. In *Carter*, the defendant was convicted of four counts of unlawful possession of weapons by a felon based on his simultaneous possession of two handguns and two clips of ammunition for those guns. *Carter*, 213 Ill. 2d at 297-98. This Court construed the statute at issue, which criminalized the knowing possession of "'any firearm or any firearm ammunition'" by a person who has been convicted of a felony, and concluded that the statute was ambiguous as to simultaneous violations because its "use of the term 'any' *** d[id] not adequately define the allowable unit of prosecution." (Emphases and internal quotation marks omitted.) *Id.* at 301-02 (quoting 720 ILCS 5/24-1.1(a) (1996)). Accordingly, this Court held that "in the absence of a specific statutory provision to the contrary, the simultaneous possession of two firearms and firearm ammunition constituted a single offense, and that only one conviction for unlawful possession of weapons by a felon could be entered." *Id.* at 304.

Less than eight months after this Court issued its decision in *Carter*, and "[i]n an apparent response" to that decision, *People v. Almond*, 2015 IL 113817, ¶ 38, the legislature amended the statute at issue to add the following language: "The possession of each firearm or firearm ammunition in violation of this Section constitutes a single and separate violation." P.A. 94-284, § 10, eff. July 21, 2005.

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When subsequently faced with the question of whether the statute, as amended, "authorizes separate convictions for the simultaneous possession of a firearm and ammunition" inside it, this Court answered in the affirmative because "the plain language of the [amended] statute prohibits felons from possessing any firearm or firearm ammunition and unambiguously treats each possession as a separate violation of the statute." *Almond*, 2015 IL 113817, ¶¶ 34, 43.

In this case, the statute at issue provides that "[a] person commits aggravated discharge of a firearm when he or she knowingly or intentionally" discharges a firearm in any one of nine enumerated ways. 720 ILCS 5/24-1.2(a) (2015) (A-1 A-2). One of those ways is to

> "[d]ischarge a firearm in the direction of a person he or she knows to be a peace officer, a community policing volunteer, a correctional institution employee, or a fireman while the officer, volunteer, employee or fireman is engaged in the execution of any of his or her official duties, or to prevent the officer, volunteer, employee or fireman from performing his or her official duties, or in retaliation for the officer, volunteer, employee or fireman performing his or her official duties."

720 ILCS 5/24-1.2(a)(3) (2015) (A-1). The question before this Court is whether the statute may be construed to unambiguously authorize multiple convictions for simultaneous violations, *Carter*, 213 Ill. 2d at 302-04, by reference to the "plain and ordinary meaning" of the statutory language against the backdrop of "the reason for the law and the problems to be remedied." *Almond*, 2015 IL 113817, ¶ 34.

That question must be answered in the negative. As this Court has recognized, "the legislature knows how to authorize, specifically, multiple convictions for simultaneous violations of a single criminal statute." *Carter*, 213 Ill. 2d at 303; see, *e.g.*, 720 ILCS 5/11-20.1(a-5) (2014) (providing as to child pornography that "[t]he possession of each individual film, videotape, photograph, or other similar

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visual reproduction or depiction by computer in violation of this Section constitutes a single and separate violation," except for "multiple copies of the same film, videotape, photograph, or other similar visual reproduction or depiction by computer that are identical to each other"). Yet in the aggravated-discharge statute, the legislature did not include language expressly providing that a single and separate violation occurs for each on-duty peace officer at which the discharge of a firearm is directed. See 720 ILCS 5/24-1.2(a)(3) (A-1).

The legislative history does not fully or definitively explain why such language was not included, but the history does shed some light on the thinking behind the relevant portions of aggravated-discharge statute. Prior to 1993, the statute provided:

> "A person commits aggravated discharge of a firearm when he knowingly: (1) Discharges a firearm at or into a building he knows to be occupied and the firearm is discharged from a place or position outside that building; or (2) Discharges a firearm in the direction of another person or in the direction of a vehicle he knows to be occupied."

Ill. Rev. Stat. 1991, ch. 38, ¶ 24-1.2(a). In other words, the statute enumerated two ways to commit aggravated discharge of a firearm, neither of which depended on the identity of any person placed at risk by the discharge, and both of which were designated a Class 1 felony. Ill. Rev. Stat. 1991, ch. 38, ¶ 24-1.2(a), (b).

Then the statute was amended to enumerate four more ways to commit aggravated discharge of a firearm, each of which depended on the identity of a person placed at risk by the discharge. See P.A. 87-921, § 1, eff. Jan. 1, 1993 (adding subsection (a)(3) as to discharge "in the direction of a person [the defendant] knows to be a peace officer, a person summoned or directed by a peace officer, a correctional institution employee, or a fireman"; subsection (a)(4) as to discharge "in the direction of a vehicle [the defendant] knows to be occupied by a peace officer, a person

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summoned or directed by a peace officer, a correctional institution employee or a fireman"; subsection (a)(5) as to discharge "in the direction of a person [the defendant] knows to be a paramedic, ambulance driver, or other medical assistance or first aid personnel, employed by a municipality or other governmental unit"; and subsection (a)(6) as to discharge "in the direction of a vehicle [the defendant] knows to be occupied by a paramedic, ambulance driver, or other medical assistance or first aid personnel, employed by a municipality or other governmental unit"). The four new aggravated-discharge forms were designated a Class X felony, while the two original forms remained a Class 1 felony. *Id.*

During a House of Representatives debate on Senate Bill 1964, which was passed as Public Act 87-921, one of the bill's House sponsors explained:

> "This Bill is in response to an epidemic of shootings in Chicago. Since January of 1991, 31 police officers have been shot. *This is an attempt to send a message to the people who are shooting these police officers, that you can no longer get put on probation for shooting at a police officer*. It would raise the minimum sentence from four years, which is probational, to a minimum of six years."

(Emphasis added.) 87th Ill. Gen. Assem., House Proceedings, June 11, 1992, at 26 (statements of Representative McAuliffe). Subsection (a)(3), then, was added to the aggravated-discharge statute to deter a particular antisocial act "shooting at a police officer," 87th Ill. Gen. Assem., House Proceedings, June 11, 1992, at 26 by attaching non-probationable Class X felony consequences to that act, as compared to the Class 1 felony consequences that follow the less particular antisocial act of shooting at "another person," Ill. Rev. Stat. 1991, ch. 38, ¶ 24-1.2(a)(2), (b).

The legislature subsequently amended the statute to mandate enhanced sentencing for Class X felony aggravated discharge. See P.A. 88-680, Art. 35, § 35-5, eff. Jan. 1, 1995 (providing that the sentence for a violation of subsection (a)(3), (a)(4), (a)(5), or (a)(6) "shall be a term of imprisonment of no less than 10 years

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and not more than 45 years"), *re-enacted by* P.A. 91-696, Art. 35, § 35-5, eff. Apr. 13, 2000. During a House of Representatives debate on Senate Bill 1153, which was passed as Public Act 88-680, one of the bill's House sponsors stated:

> "[T]hat's the provisions that deal with individuals who shoot at police officers. There's been a great deal of that going on, unfortunately, on our streets these days. There's been a market [*sic*] increase there. *** We had some officers just recently who were ambushed on a street in Chicago and shot with an automatic weapon. Both officers never had a chance to get their guns out of their holster in that one. This is to go after people like that. The penalties right now, to be quite frank, are horribly inadequate with people who shoot at police officers, and this would raise the penalties on that and try to discourage people from going after police officers."

88th Ill. Gen. Assem., House Proceedings, Apr. 14, 1994, at 27-28 (statements of Representative Dart). Again, the focus appears to have been deterrence of the dangerous decision to "shoot at police officers." 88th Ill. Gen. Assem., House Proceedings, Apr. 14, 1994, at 27-28.

The legislative history, like the statutory language, does not lay bare an intent to authorize multiple convictions for a single discharge in the direction of multiple peace officers. It follows that the allowable unit of prosecution for aggravated discharge of a firearm (peace officer) is the discharge, as the appellate court held in this case. *People v. Hartfield*, 2020 IL App (4th) 170787, ¶ 77, *as modified on denial of reh'g* (Nov. 4, 2020). And this Court need not agree with the appellate court that the aggravated-discharge statute is "unambiguous" as to unit of prosecution, see *Hartfield*, 2020 IL App (4th) 170787, ¶¶ 77, 90, to refuse to read the statute as unambiguously authorizing multiple convictions on a single discharge. See *Carter*, 213 Ill. 2d at 302 ("The use of the term 'any' in the statute does not adequately define the 'allowable unit of prosecution.' Consequently, we find the statute to be ambiguous, and we must adopt a construction that favors

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the defendant."); see also *Bell*, 349 U.S. at 81-83 (acknowledging that the Mann Act could be reasonably read to permit two convictions for the knowing transport in interstate commerce for an immoral purpose of "two women on the same trip and in the same vehicle" but rejecting that construction because, "if Congress does not fix the punishment for a federal offense clearly and without ambiguity, doubt will be resolved against turning a single transaction into multiple offenses").

Tellingly, the state does not use the word "ambiguous," or any variation thereof, in its appellant's brief challenging the unit-of-prosecution holding below. (See Appellant's brf. at 7-16.) Neither does the state so much as mention this Court's *Carter* opinion, although the appellate court relied on *Carter* as the primary authority for that holding, see *Hartfield*, 2020 IL App (4th) 170787, ¶¶ 73, 76-77, 80, 91. (See Appellant's brf. at 7-16.) Instead, the state silently flips on its head the rule articulated in *Carter* that a defendant's simultaneous violations of a single criminal statute may be the basis for only one conviction unless the legislature has unambiguously authorized multiple convictions for simultaneous violations of a single criminal statute, *Carter*, 213 Ill. 2d at 300-04 by suggesting that multiple convictions are permissible because the legislature has not specifically indicated otherwise: "Notably, subsection (a)(3) does not provide that it is violated by discharging a firearm at a peace officer *or* peace officers." (Emphasis in original.) (Appellant's brf. at 10.)

As to the language actually employed in subsection (a)(3) of the aggravated-discharge statute, the state argues that the legislature's use of the term "a" indicates its intent to permit convictions for "each officer in the line of fire" of a single round discharged, *i.e.*, each officer in whose direction a single round is discharged, because

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"a" is a "singular term." (Appellant's brf. at 10.) But "a" is not always a singular term. See American Heritage Dictionary, *supra*, at 1 (showing that "a" is sometimes used to mean "[a]ny"); I The Oxford English Dictionary 4 (2nd ed. 1989) (defining "a" as an adjective that may mean "[o]ne, some, any"). Thus this Court interpreted section 402 of the Illinois Controlled Substances Act to authorize just one conviction for the simultaneous possession of more than one type of controlled substance, although section 402 provided that " 'it is unlawful for any person knowingly to possess *a* controlled substance.' " (Emphasis added.) *People v. Manning*, 71 Ill. 2d 132, 134, 137 (1978). Only after the legislature enacted "a statutory provision to the contrary," *Manning*, 71 Ill. 2d at 137 that is, a new clause specifically providing that "[a] violation of this Act with respect to each of the controlled substances listed herein constitutes a single and separate violation of this Act," P.A. 89-404, § 25, eff. Aug. 20, 1995 did this Court view section 402 as unambiguously authorizing multiple convictions for simultaneous violations, *Carter*, 213 Ill. 2d at 303.

Quite simply, the use of the term "a," without more, is not enough to authorize multiple convictions for simultaneous violations of a single criminal statute. See *Manning*, 71 Ill. 2d at 134, 137. And the state offers nothing more to support its position that the aggravated-discharge statute was intended to vindicate the distinct but unrealized risk posed to "each public servant" who is "in the line of fire" of a single discharged round. (Appellant's brf. at 9.) For instance, the state does not discuss any of the available legislative history for the aggravated-discharge statute (see Appellant's brf. at 9-10), perhaps because the history cuts against its position by evincing an intent "to send a message to the people who are shooting these

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police officers" that discharging a firearm in the direction of a peace officer will be punished even more severely than discharging a firearm in the direction of a civilian. See 87th Ill. Gen. Assem., House Proceedings, June 11, 1992, at 26.

The state also claims that its interpretation of subsection (a)(3) is "reinforced by reading the [aggravated-discharge] statute as a whole" because "a defendant would violate more than one provision of the statute if he were to discharge a firearm in the direction of both an officer and a person covered by one of the remaining subsections." (Appellant's brf. at 11.) The state continues: "There is no reason that the legislature would have drafted the statute to provide" that shooting one round in the direction of one peace officer and one paramedic "would support two convictions" but shooting one round in the direction of two peace officers would support only one conviction. (Appellant's brf. at 12.) Actually, there is no reason to believe that the legislature did so, as long as one does not conflate the possibility of simultaneous violations with the permissibility of multiple convictions for simultaneous violations. (See Appellant's brf. at 11-12.) Mr. Hartfield agrees that simultaneous violations of different subsections of the aggravated-discharge statute, like simultaneous violations of a single subsection of that statute, are factually possible. That factual possibility, however, does nothing to advance the state's conclusion on the legal permissibility of multiple convictions.

Indeed, reading the aggravated-discharge statute as a whole reinforces the appellate court's interpretation of the statute not the state's. Consider the following hypothetical. The defendant observes a uniformed police officer patrolling in a marked squad car and intentionally fires a single round at the front driver's side window of the car, simultaneously violating three subsections

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of the statute:

> "(2) Discharges a firearm in the direction of another person or in the direction of a vehicle he or she knows or reasonably should know to be occupied by a person;
> (3) Discharges a firearm in the direction of a person he or she knows to be a peace officer *** while the officer *** is engaged in the execution of any of his or her official duties *** ; [and]
> (4) Discharges a firearm in the direction of a vehicle he or she knows to be occupied by a peace officer *** while the officer *** is engaged in the execution of any of his or her official duties[.]"

720 ILCS 5/24-1.2(a) (A-1). Does that mean the legislature unambiguously authorized *three* convictions to be entered for those simultaneous violations? No. It has done no more than provide three paths to a single conviction, the first path leading to a Class 1 felony conviction and either of the other two paths leading to a Class X felony conviction with enhanced sentencing. See 720 ILCS 5/24-1.2(a), (b) (2015) (A-1 A-2).

The state's final argument for reversal of the appellate court's unit-of-prosecution holding is that "multiple victims justify multiple convictions." (Appellant's brf. at 12-14.) According to the state, that " 'well-settled' principle of Illinois law" is "not confined to one-act, one-crime cases." (Appellant's brf. at 13.) It is true that the sole case it cites in support, *People v. Butler*, 64 Ill. 2d 485, 489 (1976), predates the establishment of the modern one-act, one-crime rule in *People v. King*, 66 Ill. 2d 551, 566 (1977). (See Appellant's brf. at 12-13.) But it is also true that the outcome in *Butler* seems to have had less to do with multiple victims than with multiple perpetrators:

> "Neither the threat posed by the defendant's knife nor the threat posed by his companion's gun was confined to a single person. Both robbers mounted a concerted threat of the use of force against both victims, and it is immaterial which robber took property from which victim. (See *People v. Szatkowski* (1934), 357 Ill. 580, 583 ***.) We hold, therefore, that the defendant was properly convicted of both armed robberies."

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Butler, 64 Ill. 2d at 489; see *Szatkowski,* 357 Ill. at 581, 583 ("It is immaterial which of the two [perpetrators] thrust his hand into the pocket of the [single] victim and took his money, since the testimony shows concerted action on their part.").

In any event, by invoking the rule that "separate victims require separate convictions and sentences," *People v. Shum*, 117 Ill. 2d 317, 363 (1987), the state assumes without citation to authority that a peace officer in whose direction a round is discharged is legislatively categorized as a victim of aggravated discharge. (See Appellant's brf. at 12.) The state's assumption is unsound. As the appellate court explained,

> "the victim the legislature had in mind was public order, not the person fired at. Unlike aggravated assault [citation], which is in part B of Title III of the Criminal Code of 2012, a part titled 'Offenses Directed Against the Person,' aggravated discharge of a firearm [citation] is in part D of Title III, a part titled 'Offenses Affecting Public Health, Safety[,] and Decency.' Part D also includes disorderly conduct [citation]. Carving multiple convictions of aggravated discharge of a firearm out of a single discharge of a firearm is as misguided as carving, say, 30 convictions of disorderly conduct out of a single late-night drunken rant: a conviction for each person in the neighborhood whose sleep was disturbed. If only one episode of disorderly conduct is pleaded, only one conviction of that offense can result. Likewise, if only one aggravated discharge of a firearm was pleaded, only one conviction of that offense can result."

(Alteration in original.) *Hartfield*, 2020 IL App (4th) 170787, ¶ 90. *Shum*, by contrast, involved offenses directed against the person. *Shum*, 117 Ill. 2d at 332-33 (affirming the defendant's convictions and sentences for the murder of a woman and the feticide of her unborn child); see Ill. Rev. Stat. 1981, ch. 38, ¶ 9-1 (showing that the murder statute involved in *Shum* was part of Title III, Part B, of the Illinois Revised Statutes: "Offenses Directed Against the Person"); Ill. Rev. Stat. 1981, ch. 38, ¶ 9-1.1 (showing that the feticide statute involved in *Shum* was part of Title III, Part B, of Illinois Revised Statutes: "Offenses Directed Against the Person").

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For the same reason, the state misses the mark with its related argument that "the appellate court's approach is inconsistent with the construction of other statutes that define criminal acts directed as a person," such as kidnapping and unlawful restraint. (Appellant's brf. at 13-14.) The statutes defining kidnapping and unlawful restraint, 720 ILCS 5/10-1, 10-3 (2021), are part of Part B of Title III of the Criminal Code of 2012; kidnapping and unlawful restraint are, therefore, offenses directed against the person, such that "separate victims require separate convictions and sentences," *Shum*, 117 Ill. 2d at 363. Aggravated discharge, on the other hand, is legislatively classified as an offense affecting public health, safety, and decency, an offense whose victim is the public order. See 720 ILCS 5/24-1.2 (2015) (A-1) (showing that the aggravated-discharge statute is part of Title III, Part D, of the Criminal Code of 2012).

It follows that an offense may have elements involving non-defendant persons and, indeed, may pose serious risks to such persons without being considered an offense directed against the person for unit-of-prosecution purposes. *Cf. Bell*, 349 U.S. at 81-83 (concluding that the unit of prosecution for the Mann Act was the act of transport for an immoral purpose, rather than the number of women or girls transported for an immoral purpose); *United States v. Phillips*, 640 F.2d 87, 96 (7th Cir. 1981) (explaining that "[t]he Mann Act does not protect the individual woman transported in the same way that the kidnapping statute protects a victim" because "[t]he kidnapping statute was enacted to protect individual victims, while the purpose of the Mann Act is to preserve community moral standards"). This Court should not adopt First District dicta suggesting otherwise. See *People v. Hardin*, 2012 IL App (1st) 100682, ¶ 37 (indicating that aggravated

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discharge under subsection (a)(3) is a offense directed against the person without discussing the legislative classification of aggravated discharge as an offense affecting public health, safety, and decency).

The state's attempt to use statutory victim classification to bolster its position, then, does just the opposite. For again, "[w]here a criminal statute is capable of two or more constructions, courts must adopt the construction that operates in favor of the accused." *Carter*, 213 Ill. 2d at 302. And the legislative classification of aggravated discharge as an offense affecting public health, safety, and decency rather than an offense directed against the person shows, at a minimum, that the aggravated-discharge statute is capable of the appellate court's construction as to unit of prosecution. The legislature is free to disavow that construction by amending the statute to unambiguously authorize multiple convictions for simultaneous violations. *Almond*, 2015 IL 113817, ¶¶ 39, 43; see also *Ladner v. United States*, 358 U.S. 169, 171, 178 (1958) (holding that "the single discharge of a shotgun" injuring two federal officers could support only one conviction under a statute criminalizing forcible resistance, opposition, impediment, intimidation, interference with, or assault of any designated officer, reasoning in part that "[i]f Congress desires to create multiple offenses from a single act affecting more than one federal officer, Congress can make that meaning clear").

B. Even if the appellate court's unit-of-prosecution holding was incorrect, Mr. Hartfield's four aggravated-discharge convictions violate the one-act, one-crime rule.

This Court has treated the question of whether multiple convictions are "authorized under the applicable criminal statutory provisions" as separate and distinct from the question of whether multiple convictions run afoul of the one-act,

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one-crime rule. *Almond*, 2015 IL 113817, ¶¶ 33, 45; see also *Carter*, 213 Ill. 2d at 301 ("One-act, one-crime principles apply only if the statute is construed as permitting multiple convictions for simultaneous possession."). A conclusion that statutory authorization exists for multiple convictions therefore does not end the inquiry where, as here (see Supp. brf. at 3-13; Supp. reply brf. at 1-2), the defendant has argued that the convictions run afoul of the one-act, one-crime rule. *Almond*, 2015 IL 113817, ¶ 45.

"The one-act, one-crime rule prohibits convictions for multiple offenses that are based on precisely the same physical act." *People v. Smith*, 2019 IL 123901, ¶ 13. In this context, an "act" is defined as " 'any overt or outward manifestation which will support a different offense.' " *Smith*, 2019 IL 123901, ¶ 18 (quoting *King*, 66 Ill. 2d at 566). The purpose of the one-act, one-crime rule is to "prevent the prejudicial effect that could result in those instances where more than one offense is carved from the same physical act." *Smith*, 2019 IL 123901, ¶ 14. Because a violation of the rule results in one or more surplus convictions, it affects the integrity of the judicial process and therefore may be addressed on appeal as second-prong plain error notwithstanding any procedural forfeiture. *People v. Artis*, 232 Ill. 2d 156, 167-68 (2009). "Whether a violation of the rule has occurred is a question of law that is reviewed *de novo*." *Smith*, 2019 IL 123901, ¶ 15.

The one-act, one-crime rule was clarified by a line of cases that began with *People v. Crespo*, 203 Ill. 2d 335 (2001), *as modified on denial of reh'g* (Mar. 31, 2003). In *Crespo*, the defendant challenged his conviction for aggravated battery (great bodily harm) on the grounds that it was based on the same physical act stabbing the victim three times "in rapid succession" as his conviction for

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armed violence. *Crespo*, 203 Ill. 2d at 337-38, 340. This Court agreed with the state that each of the three stabbings was a separate physical act that "could support a separate offense," emphasizing that an "act" is "any overt or outward manifestation which will support a different offense," even if it is "closely related" to another act. (Internal quotation marks omitted.) *Id.* at 341-42. This Court went on to observe, however, that the charging instrument and the state's theory at trial failed to "apportion" the offenses among the stabbings and, rather, revealed that the state "intended to treat the conduct of the defendant as a single act." *Id.* at 343-45. Reasoning that apportionment would be "improper" on appeal, this Court vacated the defendant's conviction for aggravated battery and held that conduct cannot be treated as multiple physical acts for purposes of the one-act, one-crime rule unless the state's charging and trial decisions reflect such treatment. *Id.* at 344-46.

Thus a rapid series of, *e.g.*, three discharges of a firearm may be treated as three physical acts constituting three criminal offenses. See *id.* at 341-42. But in order to treat the series of three discharges as three physical acts constituting three criminal offenses, the state must apportion each discharge to the offense it is alleged to constitute, both in the charging instrument and in its presentation of evidence and argument at trial. See *id.* at 343-45. Where the state fails to do so, the series of discharges must be treated as a single physical act for one-act, one-crime purposes, meaning that the series generally may constitute only one criminal offense. See *id.* As a narrow exception to that general rule, and as discussed in Issue II.A., above, an unapportioned series of discharges may constitute more than one criminal offense directed against the person if more than one person is victimized by those offenses. See *Shum*, 117 Ill. 2d at 332-33, 363.

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In this case, Mr. Hartfield was charged with four counts of aggravated discharge of a firearm (peace officer). (C. 64-67.) As to each count, the state alleged that Mr. Hartfield "knowingly discharged a firearm in the direction of" Deputies Demko, Ferriman, Donovan, and DeRouchie, respectively, knowing them to be peace officers. (C. 64-67.) The state did not allege that Mr. Hartfield fired more than one round — much less at least four rounds — or apportion to each of the four counts the discharge on which it was based. (See C. 64-67.)

Neither did the state adduce evidence that a unique round was fired in the direction of each deputy, or even that four rounds were fired in *any* direction by the second suspect. Deputy DeRouchie testified that the second suspect fired between three and five rounds in the direction of Deputies DeRouchie and Demko. (R. 226.) Deputy Demko testified that the second suspect fired two rounds in his direction. (R. 282-86.) Deputy Ferriman testified that the second suspect fired two to three rounds in Deputy Demko's direction and in Deputy DeRouchie's general direction and later fired one round in Deputy Ferriman's direction. (R. 297-99.) Deputy Donovan testified that the second suspect fired "at least three" rounds in the direction of all four deputies. (R. 310-11.) And the revolver that may have been used and abandoned by the first perpetrator/second suspect contained only three spent rounds. (R. 212-13, 215-16, 365-69, 372-73, 486-89; S.E. 18, 22a-22d.)

What is more, during the state's closing argument ASA Lozar spelled out its theory on the aggravated-discharge counts:

> "[L]et's work with the proposition that maybe only three shots got fired. Does that mean there are only three counts? No. You could do five counts on one bullet, if you needed to.
>
> The issue is not how many shots were fired, the issue is how many people got shot toward. If you got a bunch of people in a huddle

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> hugging each other, you take one shot towards the huddle, you're shooting in the direction of all of those people. So it's not a matter of, did he pull the trigger three times, therefore there's three counts. It's an issue of how many people did he shoot at, and that's four. He shot at all four of those officers."

(R. 566.) The state's theory, then, was not that each round fired by the second suspect was a separate physical act that "could support a different offense" of aggravated discharge of a firearm. See *Crespo*, 203 Ill. 2d at 341-42. The state's theory was, instead, that the second suspect fired an indeterminate number of rounds in the direction of all four deputies at once. (See R. 565-66.)

Because the charging instrument and the state's theory at trial revealed its intent to treat a series of two to five discharges as a single act (see C. 64-67; R. 565-66), only one conviction for aggravated discharge may be based on that act, and the remaining three aggravated-discharge convictions must be vacated as surplus convictions. See *Crespo*, 203 Ill. 2d at 343-45. And because each of the four counts of aggravated discharge is identical in degree, sentencing classification, and required mental state (see C. 64-67), the proper remedy is remand to the trial court for vacatur of three of Mr. Hartfield's four aggravated-discharge convictions and for resentencing. See *Artis*, 232 Ill. 2d at 170-72, 174, 177, 179 (holding that "when it cannot be determined which of two or more convictions based on a single physical act is the more serious offense," by reference to the offenses' degrees, sentencing classifications, and required mental states, and without consideration of the offenses' aggravating factors, "the cause will be remanded to the trial court for that determination" and for resentencing).

Although the state acknowledges that "the one-act, one-crime and statutory interpretation questions are distinct," it nevertheless skates past the one-act, one-crime question because "the appellate court below conceded that multiple

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convictions would not run afoul of the one-act, one-crime rule." (Appellant's brf. at 12-13.) Of course, a court cannot concede anything on behalf of a criminal defendant and, in any event, the appellate court did no such thing. The state cites paragraphs 79 to 81 as the location of the court's "concession." (Appellant's brf. at 12.) But in that portion of the modified opinion, the appellate court expressly distinguished *Shum* on the basis that the offenses involved there "were significantly different from the offense of aggravated discharge of a firearm" as "the infliction of bodily harm upon two victims." *Hartfield*, 2020 IL App (4th) 170787, ¶ 79.

With aggravated discharge, by contrast, "the victim the legislature had in mind was public order, not the person fired at." *Id.* at ¶ 90; see 720 ILCS 5/24-1.2 (A-1) (showing that the aggravated-discharge statute is part of Title III, Part B, of the Criminal Code of 2012: "Offenses Affecting Public Health, Safety and Decency"). Thus the rule that "separate victims require separate convictions and sentences," *Shum*, 117 Ill. 2d at 363, has no application in this case, whether properly viewed as a narrow one-act, one-crime exception, see *id.*, or improperly imported into the unit-of-prosecution inquiry as the state attempts to do here. (See Appellant's brf. at 13 and Issue II.A., above.)

C. The state's alternative argument on the sufficiency of the charging document and the evidence is forfeited and meritless.

The state closes its brief with a perplexing alternative argument that "four (or at the very least three) of the [aggravated-discharge] convictions were proper even if the statute required multiple discharges of the firearm because the indictment provided sufficient notice to defendant to prepare his defense and the evidence was sufficient to sustain the convictions." (Appellant's brf. at 16; see Appellant's brf. at 14-15.) This alternative argument ("sufficiency argument") fails on both procedural and substantive grounds.

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The procedural failure of the state's sufficiency argument is straightforward. The state made just one argument in its petition for leave to appeal to this Court: that "a single discharge of a firearm in the direction of a group of police officers should support multiple convictions of aggravated discharge of a firearm." (State's PLA at 7; see State's PLA at 6-8.) It did not make any alternative argument, much less an alternative argument based on the sufficiency of the charging document and the evidence. (See State's PLA at 6-8.) The sufficiency argument is therefore forfeited. See *People v. McCarty*, 223 Ill. 2d 109, 122 (2006) (stating that "the failure to raise an issue in a petition for leave to appeal results in the forfeiture of that issue before this court"); see also *People v. Phillips*, 242 Ill. 2d 189, 201 n.1 (2011) (concluding that the state forfeited an alternative argument that it did not raise in its petition for leave to appeal).

The substantive failure of the sufficiency argument is more difficult to demonstrate due to the opacity of that argument. Mr. Hartfield has never claimed that the charging document was deficient. (See Opening brf. at 1, 21-53; Reply brf. at 1-18; Supp. brf. at 3-13; Supp. reply brf. at 1-2). Neither did the appellate court determine that the charging document was deficient. See *Hartfield*, 2020 IL App (4th) 170787, ¶¶ 72-91. Yet the state assumes without authority that certain caselaw on deficient charging documents also applies in surplus-conviction cases, twice citing *People v. Phillips*, 215 Ill. 2d 554, 562 (2005), which is not a surplus-conviction case, see *Phillips*, 215 Ill. 2d at 558-59, for the following correct but irrelevant proposition of law:

> " 'Where a defendant challenges the sufficiency of an indictment or information for the first time on appeal, a reviewing court need only determine whether the charging instrument apprised the defendant of the precise offense charged with enough specificity to prepare his or her defense and allow pleading a resulting conviction as a bar to future prosecution arising out of the same conduct.' "

(Appellant's brf. at 7-8, 14-16.) Based on that unsupported assumption, the state

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appears to reason that surplus convictions are permissible where multiple counts *could have* been prosecuted in such a way as to avoid surplusage, even if they were not actually prosecuted in that way. (See Appellant's brf. at 15.) Applying that reasoning to this case, the state concludes that because the charging document alleged the knowing discharge of a firearm in the direction of each of four named peace officers, *i.e.*, "four individual victims," Mr. Hartfield was on notice that the state intended to pursue a theory that he committed "four separate acts" of discharge. (Appellant's brf. at 15.)

To begin, Mr. Hartfield disputes the state's characterization of the charging document as "clearly signal[ing]" its intent to pursue a theory of four or more distinct discharges. (Appellant's brf. at 15.) As discussed in Issue I.B., above, a defendant who intentionally or knowingly fires one round in the direction of four on-duty peace officers, knowing the facts of existence and identity for each officer, violates subsection (a)(3) of the aggravated-discharge statute in four different ways. In such a case, the state might well charge, attempt to prove, and request that the jury be instructed on four counts of aggravated discharge, even though only one conviction may be entered should multiple guilty verdicts result from that strategy. Because the charging document in this case did not "apportion" multiple discharges among the multiple counts, "differentiate between" multiple discharges, or even expressly allege multiple discharges, see *Crespo*, 203 Ill. 2d at 342, 345, it is most naturally interpreted as indicating the state's intent to treat a series of two to five discharges as a single act directed at all four deputies at once. (See C. 64-67.)

Moreover, as addressed in Issue II.B., above, the state did not pursue a four-discharge theory at trial and, indeed, expressly disclaimed any such theory in closing: "The issue is not how many shots were fired, the issue is how many people got shot toward." (R. 566; see R. 565-66.) Therefore *Crespo*, which the state

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claims as support for its sufficiency argument, defeats that argument by showing that the state is bound on appeal by the theory it actually pursued at trial:

> "[T]he State's theory at trial, as shown by its argument to the jury, amply supports the conclusion that the intent of the prosecution was to portray defendant's conduct as a single attack.
>
> Here, the State specifically argued to the jury that the three stab wounds constituted great bodily harm. The State never argued that only one of the stab wounds would be sufficient to sustain this charge. Again, it must be pointed out that the State could have, under our case law, charged the crime that way, and could have argued the case to the jury that way. The State chose not to do so, and this court cannot allow the State to change its theory of the case on appeal."

Crespo, 203 Ill. 2d at 343-44.

To close out its sufficiency argument, the state appears to invite this Court to examine the trial evidence for proof beyond a reasonable doubt that Mr. Hartfield discharged a unique round in the direction of each of "four (or at the very least three)" of the deputies. (See Appellant's brf. at 15-16.) For two reasons, this Court must decline to do so. First, because the jury was told it need not decide that question of fact, a decision by this Court would invade the province of the jury. See *Crespo*, 203 Ill. 2d at 344 ("It is possible that, although the jury found that all three stab wounds together constituted great bodily harm, the jury would not have considered any one of the stab wounds individually to constitute great bodily harm. This court will not invade the province of the jury and decide this question of fact."). Second, the deputies' inconsistent testimony on the number, timing, and direction of the rounds fired by the second suspect cannot prove beyond a reasonable doubt that a unique round was discharged in the direction of even three of the deputies much less all four of them. (See R. 226-28, 282-88, 297-99, 310-11.) The surplus convictions cannot be saved on appeal.

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III. Mr. Hartfield's statutory right to a speedy trial was violated because the trial court granted the state's first and third motions for continuance to obtain the results of fingerprint and DNA analyses despite the state's failure to show due diligence to obtain the results within the speedy-trial period.

The statutory right to a speedy trial is set forth in section 103-5 of the Code of Criminal Procedure of 1963, which provides: "Every person in custody *** for an alleged offense shall be tried *** within 120 days from the date he or she was taken into custody unless delay is occasioned by the defendant." 725 ILCS 5/103-5(a) (2016) (A-3). "The 120-day speedy-trial period begins to run automatically if a defendant remains in custody pending trial." *People v. Phipps*, 238 Ill. 2d 54, 66 (2010). Criminal charges that are not tried within the 120-day period must be dismissed. See 725 ILCS 5/103-5(d) (2016) (A-4) ("Every person not tried in accordance with subsection[] (a) *** of this Section shall be discharged from custody[.]"); *People v. Ladd*, 185 Ill. 2d 602, 607 (1999) ("The appropriate remedy for a violation of the speedy-trial provision of section 103-5(a) is dismissal of the charges."). Whether the defendant's statutory right to a speedy trial has been violated is legal question subject to *de novo* review. *People v. Pettis*, 2017 IL App (4th) 151006, ¶ 17.

The speedy-trial period is subject to extension for up to 60 days "to obtain evidence material to the case" and to extension for up to 120 days "to obtain results of DNA testing that is material to the case." 725 ILCS 5/103-5(c) (2016) (A-4). But to grant a material-evidence extension or a DNA-testing extension of any length, the trial court must find that the state "has exercised without success due diligence to obtain" the evidence or results within the speedy-trial period. *Id.* The state bears the burden to show due diligence, and the trial court abuses its discretion

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by granting an extension absent a showing of due diligence by the state. *People v. Connors*, 2017 IL App (1st) 162440, ¶¶ 16, 22. Where such abuse of discretion results in trial outside the 120-day speedy-trial period, it results in "a breach of the law's guarantee to a speedy trial." *People v. Battles*, 311 Ill. App. 3d 991, 995 (5th Dist. 2000).

A. The state failed to show due diligence to obtain the results of fingerprint and DNA analyses within the speedy-trial period.

"Due diligence" in this context is not defined by the speedy-trial statute, see 725 ILCS 5/103-5(c) (A-4), which must be liberally construed in the defendant's favor, *People v. Van Schoyck*, 232 Ill. 2d 330, 335 (2009). This Court therefore should look to dictionaries for guidance. See *People v. Witherspoon*, 2019 IL 123092, ¶ 21 ("When a statutory term is undefined we assume the legislature intended the word to have its ordinary and popularly understood meaning and that we may ascertain this meaning through the use of contemporary dictionaries."). Generally, "diligence" is "[s]teady application to one's business or duty" or "persevering effort to accomplish something undertaken." Black's Law Dictionary 573 (11th ed. 2019); see also American Heritage Dictionary, *supra*, at 507 (defining "diligence" as an "[e]arnest and persistent application to an undertaking," a "steady effort," or "[a]ttentive care"). And "due diligence" is that amount of diligence that is "reasonably expected from, and ordinarily exercised by, a person who seeks to satisfy a legal requirement or to discharge an obligation." Black's Law Dictionary, *supra*, at 573.

Non-binding caselaw also provides guidance on due diligence in the speedy-trial context. Appellate courts have concluded that due diligence was shown where the state, for example: specified its multiple attempts over seven months to locate

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and serve its witnesses with subpoenas, *People v. Ealy*, 2019 IL App (1st) 161575, ¶¶ 45-49; specified its multiple attempts over eight months to locate and serve its witness with a subpoena, *People v. McKinney*, 2011 IL App (1st) 100317, ¶ 31; asked the crime lab to expedite DNA testing more than four months before the speedy-trial period expired, *People v. Bonds*, 401 Ill. App. 3d 668, 670, 673-75 (2d Dist. 2010); or asked the crime lab to expedite DNA testing as soon as the lab informed it, about a month and a half before the speedy-trial period expired, that the evidence collection kit contained material suitable for testing, *People v. Swanson*, 322 Ill. App. 3d 339, 343-44. (3d Dist. 2001).

Appellate courts have concluded that due diligence was not shown where the state, for example: did not specify when and how it tried to locate its witness, *Connors*, 2017 IL App (1st) 162440, ¶¶ 17-19; made no attempt to contact its witness until the 119th day of the 120-day speedy-trial period, *People v. Exson*, 384 Ill. App. 3d 794, 800 (1st Dist. 2008); failed to identify any action it took "in an attempt to promote, or expedite" DNA testing of evidence after arguably timely delivery to the crime lab, *Battles*, 311 Ill. App. 3d at 1000-01; or represented that "generally there is a five month delay between a defendant's arrest and the preparation of the crime-lab report" but "failed to articulate any attempts it made in an effort to expedite the crime-lab report," *People v. Durham*, 193 Ill. App. 3d 545, 546 (3d Dist. 1990).

Specifically regarding DNA-testing extensions, the Fifth District has held that, "[s]tanding alone, rapid retrieval of testing materials and delivery of those materials to a crime lab for testing is not enough to show" due diligence. *Battles*, 311 Ill. App. 3d at 1000. The Fifth District has further held that the "mere assertion"

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that the crime lab operates under a backlog likewise cannot show due diligence; the state must "explain what reasonable and prudent effort was made to deal with that backlog and why the backlog hampered the effort to complete the particular testing at issue." *Id.* at 1001.

The final source of guidance on due diligence in the speedy-trial context comes in the form of appellate courts' articulation of best practices for DNA-testing extensions. The Fifth District indicated that the state should "tender a full explanation of each and every step taken to complete DNA testing within the 120-day speedy trial term" and "explain why the efforts engaged in fell short of their objective and resulted in an unavoidable need for delay." *Id.* at 998. "The steps articulated should comprise a course of action that a reasonable and prudent person intent upon completing tests within 120 days would follow." *Id.* Moreover, "where section 103-5(c) is invoked to delay a trial scheduled to begin far in advance of the 120-day expiration date, the State should make a further showing that explains why continued efforts to procure DNA test results within the 120-day term would prove unsuccessful." *Id.* And the Fourth District has urged the trial courts to

> "avoid granting the entire 120 days unless the circumstances strongly suggest such an extension is necessary. Periodic review dates ***, coupled with an order extending the speedy-trial period for a portion of the 120 days, would help to ensure only the time actually needed is given. If the State is unable to obtain the test results within the initial extension, the court, upon the request of the State, may grant additional extensions up to the 120 days allowed by the statute."

Pettis, 2017 IL App (4th) 151006, ¶ 60.

In this case, however, the trial court granted material-evidence and DNA-testing continuances without a state showing of due diligence, thereby violating Mr. Hartfield's statutory right to a speedy trial. Mr. Hartfield was taken into custody

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on July 27, 2016 (R. 440), and he has remained in custody ever since. The 120-day speedy-trial period therefore applied, and Mr. Hartfield's speedy-trial date was November 25, 2016. 725 ILCS 5/103-5(a) (A-3); see *Ladd*, 185 Ill. 2d at 608 (stating that the first day is to be excluded and the last day is to be included when calculating time periods under the speedy-trial statute). Mr. Hartfield respectfully directs this Court's attention to the first and third of the six continuances in his case *i.e.*, continuances that were granted on the state's August 30 and October 25, 2016 motions as they are the continuances that directly caused a speedy-trial violation.

On August 30, 2016, over Mr. Hartfield's objection, the trial court extended the speedy-trial period by 120 days. (C. 58; see A-37 A-38; R. 36-37.) Thus if the first continuance was lawful, Mr. Hartfield's new speedy-trial date was March 26, 2017, and his March 6, 2017 trial did not violate the speedy-trial statute.725 ILCS 5/103-5(c) (A-4). However, the first continuance was not lawful because the state made no showing of due diligence in connection with it. The state's August 30, 2016 motion contained representations regarding its efforts to collect evidence and transport it to the crime lab for fingerprint and DNA analyses. (A-37.) The state also represented that, as of August 29, 2016, those analyses were "pending." (A-38.) But the state made no attempt to explain its apparent belief that it would not obtain the results of those analyses before the speedy-trial date of November 25, 2016, which was then nearly three months away. (See A-37 A-38; R. 36-37.) Neither did the state indicate that it was making any efforts to expedite the pending analyses. (See A-37 A-38; R. 36-37.) According to the state, then, it did nothing more than collect evidence, drop it off at the crime lab, wait until the day before a continuance was needed, and then learn through some unspecified means that the analyses had not been performed. (See A-37 A-38; R. 36-37.)

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This Court should conclude that something more is required to show due diligence. For the legislature itself demanded something more:

> "The original passage of [section 103-5(c)] came at a time when testing labs were in short number and the methods those labs employed were slow. Yet, legislators did not provide a sanctuary from the normal speedy trial term for every case that involved, or potentially could involve, DNA testing. The amendment was designed for use only in those cases where a diligent effort to obtain DNA evidence within the 120-day term had proven unsuccessful. The State was not empowered to expand the normal speedy trial term without showing a diligent but failed attempt to secure DNA testing within the 120-day term. There was no refuge provided for cases where the need for additional time to conduct testing stemmed from the State's neglect or lack of effort."

Battles, 311 Ill. App. 3d at 994. Indeed, "[t]here have been dramatic advances in the methods employed to analyze DNA since the passage of section 103-5(c).*** [T]he State is no longer shackled to a test series that spans several months. The circumstances that gave rise to section 103-5(c) are not what they once were." *Id.* at 1005. Yet here the trial court erroneously treated section 103-5(c) as an automatic-continuance provision. Because the first continuance was unlawful in the absence of a showing of due diligence, Mr. Hartfield's speedy-trial date remained November 25, 2016.

The third continuance, granted on October 25, 2016, over Mr. Hartfield's objection, pushed the matter to November 29, 2016, *i.e.*, four days past Mr. Hartfield's speedy-trial date. (R. 44; see A-39 A-40.) That continuance, too, was unlawful because the state made no showing of due diligence in connection with it. Like the state's August 30, 2016 motion, the state's October 25, 2016 motion contained representations regarding the state's efforts to collect evidence and transport it to the crime lab for fingerprint and DNA analyses. (A-39.) The state also recounted certain facts regarding the first two continuances and represented

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that, as of October 24, 2016, the fingerprint and DNA analyses were "pending." (A-40.) However, the state made no attempt to explain its apparent belief that it would not obtain the results of those analyses before the speedy-trial date of November 25, 2016, which was then a month away. (See A-39 A-40; R. 44.) Neither did the state indicate that it was making any efforts to expedite the pending analyses. (See A-39 A-40; R. 44.) In other words, the state acknowledged that it did nothing more than collect evidence, drop the evidence off at the crime lab, successfully seek two continuances, wait until the day before another continuance was needed, and then learn through some unspecified means that the analyses still had not been performed. (See A-39 A-40; R. 44.) Because due diligence was not shown, the third continuance worked a violation of Mr. Hartfield's statutory speedy-trial right.

Three additional record facts emphasize the state's lack of due diligence in this case. First, each of the state's six motions for continuance references "the body of the deceased," though the crimes under investigation did not involve the death of any person. (A-37, A-39; C. 70, 76, 78, 80.) This small but startling mistake casts a light on the state's one-size-fits-all approach to DNA-testing continuances: copy and paste for trial delay as a matter of course rather than as a matter of demonstrated, case-specific need.

Second, each of the state's six motions for continuance indicates that evidence was seized by the Urbana Police Department from July 26, 2016, the day of the crimes of which Mr. Hartfield was ultimately convicted, to August 17, 2016, the day on which police seized a revolver suspected to have been used and abandoned by the first perpetrator/second suspect. (A-37, A-39; C. 70, 76, 78, 80; see R. 212-13, 215, 365-67, 372-73.) Yet each of the state's continuance motions also indicates

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that the seized evidence was transported to the crime lab on August 16, 2016 *i.e.*, the day *before* police seized the revolver. (A-37, A-39; C. 70, 76, 78, 80.) The revolver was one of the items of physical evidence that underwent fingerprint and DNA analyses. (See C. 115; R. 499-500, 515.) Yet none of the state's motions indicates when the revolver was transported to the crime lab for performance of those analyses, leaving open the possibility that it was not transported to the lab until much later. (See A-37, A-39; C. 70-71, 76-81.)

Third, and most importantly, the state's fifth and sixth motions for continuance *i.e.*, the motions filed on December 20, 2016, and January 17, 2017, respectively arguably do show due diligence. In its December 20, 2016 motion, the state represented that it had contacted the crime lab "as of" December 14, 2016, and "discussed with Forensicist Amanda Humke those items most critical to the case, thereby seeking to streamline as much as possible the analyses critically necessary prior to trial," and that "[i]t is reasonable to expect results in the next 90 days." (C. 79.) In its January 17, 2017 motion, the state similarly represented that "[a]s of [January 16, 2017,] the state is in email contact and phone with lab Forensicist Amanda Humke those [*sic*] items most critical to the case, thereby seeking to streamline as much as possible the analyses critically necessary prior to trial," and that"[i]t is reasonable to expect results in the next 60 days." (C. 81.)

The state's fifth and sixth motions for continuance were filed after the original speedy-trial period had already expired and as the unlawfully extended speedy-trial period was drawing to a close. And the evidence presented at trial shows that the state received the results of the fingerprint and DNA analyses no more than 84 days after its first reported attempt to expedite those analyses. (See C. 79, 114-15; R. 497-533.) Indeed, the March 8, 2017 testimony of the state's expert in fingerprint

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analysis was that the analysis took him just 48 hours to complete:

> "Q. *** [W]hen did you receive this?
> A. It was March 1st of this month of this month, of this year.
> Q. Okay. You received this March 1st, and when did you complete your report?
> A. Ah, March 3rd.
> Q. In forty-eight hours you can do a report just like that?
> A. Yes, uh, huh."

(R. 528-29.) The record therefore shows that had the state contacted the crime lab months earlier and identified "those items most critical to the case" in an effort to "streamline" the fingerprint and DNA analyses it truly needed in order to proceed to trial, the results of those analyses may well have been available in time for a trial within 120 days of Mr. Hartfield's custody date.

B. Mr. Hartfield did not agree to the state's unlawful continuances.

The appellate court did not address this failure of due diligience due to its threshold determination that Mr. Hartfield "is considered to have agreed to the first continuance" because Mr. Vargas "made no objection in the statutorily prescribed matter" to that continuance. *People v. Hartfield*, 2020 IL App (4th) 170787, ¶ 45, *as modified on denial of reh'g* (Nov. 4, 2020). The appellate court was mistaken. The speedy-trial statute provides that "[d]elay shall be considered to be agreed to by the defendant unless he or she objects to the delay by making a written demand for trial or an oral demand for trial on the record." 725 ILCS 5/103-5(a) (A-3). "To prevent the speedy-trial clock from tolling, section 103-5(a) requires defendants to object to any attempt to place the trial date outside the 120-day period," and the objection must include "some affirmative statement in the record requesting a *speedy* trial." (Emphasis in original.) *Phipps*, 238 Ill. 2d at 66.

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Notably, "the statute does not mandate 'magic words' constituting a demand for trial." *Phipps*, 238 Ill. 2d at 66; see also *People v. Huff*, 195 Ill. 2d 87, 92 (2001) ("The statute does not itself require a defendant to invoke its protections in any particular form."). The Second District accordingly suggested that the defendant's recognized objection to a proposed trial delay, declaration of readiness for trial, and use of "language that would be used only in reference to [his] speedy-trial right" is sufficient to affirmatively invoke the speedy-trial right. *People v. Murray*, 379 Ill. App. 3d 153, 161-62 (2d Dist. 2008); *cf. People v. Cordell*, 223 Ill. 2d 380, 391-92 (2006) (refusing to allow "basic requests for trial, made before any delay was even proposed, to qualify as objections to 'delays' not yet proposed" because "section 103-5(a) places the onus on a defendant to take affirmative action when he becomes aware that his trial is being delayed" and "[a] simple request for trial, before any 'delay' is proposed, is not equivalent to an objection").

Here, after the state proposed each of six delays to obtain the results of fingerprint and DNA analyses, Mr. Hartfield objected, reminded the trial court that he was in custody, and declared his readiness for trial. (R. 36, 40, 44, 47, 50, 53.) As to Mr. Hartfield's custodial status, Mr. Vargas said: (1) "Judge, he's in custody"; (2) "Judge, Mr. Hartfield is in custody"; (3) "Judge, he's in the Department of Corrections"; (4) "Judge, Mr. Hartfield is in custody"; (5) "Judge, in custody"; and (6) "Judge, he's in DOC." (R. 36, 40, 44, 47, 50, 53.) Because Mr. Hartfield's custodial status was irrelevant apart from his statutory right to a speedy trial, this was "language that would be used only in reference to [his] speedy-trial right." *Murray*, 379 Ill. App. 3d at 161; see 725 ILCS 5/103-5(a), (b) (2016) (A-3) (providing 120-day speedy-trial period for defendants who are in custody

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and 160-day speedy-trial period for defendants who are not in custody). And it was understood as such, for in granting each of the six continuances, the court specifically noted and overruled Mr. Hartfield's objection to continuance. (C. 10-12; R. 37, 40, 44, 47, 50, 53.) Mr. Hartfield therefore did not agree to any of the delays within the meaning of the speedy-trial statute.

In closing, Mr. Hartfield asks this Court to consider the transcript of the in-court exchange on the first continuance:

> "MR. VARGAS: Judge, he's in custody.
> Ready for trial.
> Please note my objection to the state's motion.
> MR. LOZAR: Judge, that is state's motion to continue.
> * * *
> THE COURT: We'll show the state's motion to continue.
> Objection.
> This is pursuant to 725 ILCS 5/114-4, 725 ILCS 5/103-5(c).
> I'll note the objection. The objection's overruled. We'll continue these matters, September 27, 9:00, this courtroom."

(R. 36-37.) To interpret this exchange as Mr. Hartfield's agreement to the continuance is to deny the reality of his objection for want of unmandated "'magic words.'" *Phipps*, 238 Ill. 2d at 66. This Court should hold that an objection to the proposed delay, which is expressly based on the defendant's custodial status and readiness for trial, is sufficient to invoke the statutory right to a speedy trial.

C. The violation of Mr. Hartfield's statutory speedy-trial right entitles him to outright reversal of each of his convictions.

The trial court thus granted the state's first and third motions for continuance despite Mr. Hartfield's objections and the state's failure to show due diligence to obtain the results of fingerprint and DNA analyses within the speedy-trial period. Because the continuances were unlawful, Mr. Hartfield's speedy-trial date remained November 25, 2016, but he was not tried until March 6, 2017, more than 100 days

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later. Mr. Hartfield's statutory right to a speedy trial was violated, and Mr. Hartfield is entitled to reversal of his convictions, even though he did not file a motion to dismiss the charges or raise the violation in his post-trial motion. Procedural forfeiture in this case may be excused on two independent grounds: second-prong plain error and ineffective assistance of trial counsel.

"Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the trial court." Ill. S. Ct. Rule 615(a) (eff. Jan. 1, 1967). Plain errors affecting substantial rights include "a clear or obvious error *** so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process." (Internal quotation marks omitted.) *People v. Eppinger*, 2013 IL 114121, ¶ 18. Such error is known as second-prong plain error. See *Eppinger*, 2013 IL 114121, ¶ 19. If the defendant shows second-prong plain error, "prejudice is presumed because of the importance of the right involved." (Internal quotation marks omitted.) *Id.* at ¶ 50.

"The speedy trial statute enforces the constitutional right to a speedy trial guaranteed by the federal and Illinois Constitutions." *People v. Mosley*, 2016 IL App (5th) 130223, ¶ 9; see U.S. Const. amends. VI, XIV; Ill. Const. 1970, art. I, § 8. It follows that the unaddressed and unpreserved violation of Mr. Hartfield's statutory speedy-trial right is correctable on appeal as second-prong plain error. See *Mosley*, 2016 IL App (5th) 130223, ¶ 9 (reviewing as second-prong plain error the defendant's claim of an unaddressed and unpreserved violation of the speedy-trial statute); *People v. Smith*, 2016 IL App (3d) 140235, ¶ 10 (same); *McKinney*, 2011 IL App (1st) 100317, ¶ 29 (same); *Murray*, 379 Ill. App. 3d at 157 (same); *People v. Gay*, 376 Ill. App. 3d 796, 799 (4th Dist. 2007) (same).

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Alternatively, trial counsel Mr. Vargas was constitutionally ineffective for failing to follow up on his objection to each of the state's six motions for continuance by filing a motion to dismiss the charges and by raising the speedy-trial violation in Mr. Hartfield's post-trial motion. (See R. 36-37, 40, 44, 47, 50, 53.) Trial counsel's failure to seek discharge of the defendant on speedy-trial grounds "generally will be deemed ineffective assistance of counsel if there is a reasonable probability that the defendant would have been discharged had a timely motion for discharge been made and no justification has been proffered" for the failure. (Internal quotation marks omitted.) *Murray*, 379 Ill. App. 3d at158. Similarly, trial counsel's failure to include a speedy-trial violation in the defendant's post-trial motion "will also constitute ineffective assistance where there is at least a reasonable probability that the client would have been discharged had the issue been addressed in the posttrial motion and there was no justification for counsel's decision not to raise the issue." *People v. Peco*, 345 Ill. App. 3d 724, 729 (2d Dist. 2004).

As established in Issue III.A., above, the state did not show that it exercised due diligence to obtain the results of fingerprint and DNA analyses within the speedy-trial period, yet because of erroneously granted continuances, Mr. Hartfield was tried 222 days after he was taken into custody. It was objectively unreasonable for Mr. Vargas not to follow up on the resulting violation of Mr. Hartfield's speedy-trial right by moving to dismiss the charges and raising the violation in his post-trial motion. See *People v. Dalton*, 2017 IL App (3d) 150213, ¶ 28 ("There is no strategic reason for trial counsel to fail to move to dismiss a charge that violates defendant's right to a speedy trial."). And because a motion to dismiss or post-trial motion raising the speedy-trial violation would have been properly granted, Mr. Vargas's

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failure to file either such motion prejudiced Mr. Hartfield. See *People v. Callahan*, 334 Ill. App. 3d 636, 644-45 (4th Dist. 2002) ("Failure to move to dismiss [certain charges] on speedy-trial grounds was prejudicial to defendant because dismissal on that ground would properly have been granted[.]").

Mr. Vargas's ineffectiveness allowed the violation of Mr. Hartfield's statutory speedy-trial right to go unaddressed and unpreserved. Mr. Hartfield therefore is entitled to reversal of his convictions on that basis. See *People v. Patrick*, 2011 IL 111666, ¶ 36 (stating that if the defendant were successful on his claim that trial counsel's ineffectiveness resulted in the deprivation of his right to a speedy trial, "he would be entitled to reversal of his convictions"); *Callahan*, 334 Ill. App. 3d at 644-45 (reversing the defendant's conviction on a conclusion that trial counsel was ineffective for failing to move for dismissal on speedy-trial grounds).

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IV. Mr. Hartfield's constitutional right to a public trial was violated because the trial court excluded spectators from the courtroom during jury selection without making findings adequate to support the exclusion and considering reasonable alternatives to the exclusion.

Every criminal defendant has a constitutional right to a trial that is not just speedy but also public. U.S. Const. amends. VI, XIV; Ill. Const. 1970, art. I, § 8. The public-trial right "is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions." (Internal quotation marks omitted.) *Waller v. Georgia*, 467 U.S. 39, 46 (1984). The presence of the public also "encourages witnesses to come forward and discourages perjury." *Waller*, 467 U.S. at 46. In short, courtroom spectators who are more likely than jurors to be "poor people, people of color, or both" have normative and constitutional import as the primary "mechanism for popular accountability in modern criminal justice." (Internal quotation marks omitted.) *People v. Radford*, 2020 IL 123975, ¶¶ 109, 116 (Neville, J., dissenting), *reh'g denied* (Sept. 28, 2020), *cert. denied sub nom. Radford v. Illinois*, 141 S. Ct. 1438 (2021).

Because the public-trial right advances "[t]he central aim of a criminal proceeding" to "try the accused fairly," *Waller*, 467 U.S. at 46, that right applies at "any stage of a criminal trial," including the jury selection stage. *Presley v. Georgia*, 558 U.S. 209, 213 (2010) (*per curiam*); see also *Radford*, 2020 IL 123975, ¶ 25 ("The public trial right extends to jury selection."). Whether the defendant's constitutional right to a public trial has been violated is a legal question subject to *de novo* review. See *People v. Hale*, 2013 IL 113140, ¶ 15 ("In general, the standard

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of review for determining if an individual's constitutional rights have been violated is *de novo*."); *People v. Evans*, 2016 IL App (1st) 142190, ¶¶ 7-16 (reviewing *de novo* the legal question of whether the defendant's constitutional right to a public trial was violated).

A. Spectators were excluded from the courtroom during jury selection absent necessary compliance with the four criteria for exclusion.

Exclusion of courtroom spectators from any stage of a criminal trial violates the defendant's right to a public trial unless four criteria are met: (1) there is " 'an overriding interest that is likely to be prejudiced' " absent the exclusion, (2) the exclusion is " 'no broader than necessary to protect that interest,' " (3) the trial court " 'consider[s] reasonable alternatives' " to the exclusion, and (4) the trial court makes " 'findings adequate to support' " the exclusion. *Presley*, 558 U.S. at 213-14 (quoting *Waller*, 467 U.S. at 48). The trial court must consider reasonable alternatives to the exclusion "even when they are not offered by the parties," *id.* at 214, for it is obligated to "take every reasonable measure to accommodate public attendance at criminal trials," *id.* at 215; *Radford*, 2020 IL 123975, ¶ 25.

Courtroom congestion alone cannot justify exclusion of the public from jury selection. *Presley*, 558 U.S. at 215. Reasonable alternatives to exclusion of the public from a congested courtroom may include "reserving one or more rows for the public" or "dividing the jury venire panel to reduce courtroom congestion." *Presley*, 558 U.S. at 215; see also *Evans*, 2016 IL App (1st) 142190, ¶ 12 (noting that "[m]any courtrooms are undersized for their needs" and stating that "even in a cramped physical space, trial courts can deal with this limitation in ways that do not burden a defendant's constitutional rights," such as "calling the potential

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jurors into the room in smaller groups" or asking members of the public or potential jurors to stand until seating becomes available). For having all of the veniremembers sit in the courtroom at one time "is solely a matter of logistics and convenience for courtroom personnel it has no positive effect on the fairness of the trial." *Evans*, 2016 IL App (1st) 142190, ¶ 12. The presence of courtroom spectators, on the other hand, may keep all involved "keenly alive to a sense of their responsibility and to the importance of their functions," discourage perjury, and otherwise promote the "central aim of a criminal proceeding *** to try the accused fairly." (Internal quotation marks omitted.) *Waller*, 467 U.S.at 46.

In this case, the record shows that members of the public, including but not limited to Mr. Hartfield's own mother and grandmother and a public defender (PD) intern, sought to be present in the courtroom for the entire jury-selection process. (R. 67-68; see R. 646.) But the trial court excluded all members of the public from the courtroom just prior to jury selection because "39 jurors [were] coming up" and the court believed that there would not be "enough room for everybody to be seated." (R. 67-68.) The record does not show that any member of the public was allowed back into the courtroom at any point during jury selection (see R. 74-161), although the record suggests that the PD intern and Mr. Hartfield's mother and grandmother may have been allowed back into the courtroom after the trial court read aloud the charges, the list of potential witnesses, and the initial jury instructions; swore the veniremembers; and sat the first panel of 12 veniremembers in the jury box. (See R. 67-68.) At a minimum, then, all members of the public were excluded from certain portions of the jury-selection process, and certain members of the public were excluded from all portions of the jury-selection process.

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Yet no one articulated an overriding interest that was likely to be prejudiced absent the exclusion or created a record showing that the exclusion was no broader than necessary to protect that interest. (See R. 67-68). The trial court made no findings whatsoever, much less findings adequate to support the exclusion. (See R. 67-68.) And the trial court apparently did not consider reasonable alternatives to the exclusion, such as asking courtroom spectators to stand until seats became available. (See R. 67-68.) The exclusion of spectators from the courtroom during jury selection thus worked a violation of Mr. Hartfield's public-trial right. See *Presley*, 558 U.S. at 213-14 (holding that the public-trial right extends to jury selection and listing the four criteria that must be met to constitutionally exclude the public from any stage of a criminal trial).

In its initial decision, the appellate court disposed of the public-trial issue in two short paragraphs, reasoning that the record on appeal does not permit a determination that "any spectators *ultimately* were excluded from the courtroom." (Emphasis in original.) (A-18.) In his petition for rehearing, Mr. Hartfield countered that the record permits and indeed demands a determination all spectators were excluded from the courtroom during identifiable and significant portions of the jury-selection process unless one infers that, after the trial court expressly and unequivocally directed all spectators to leave the courtroom, each of those spectators defied the trial court by staying in the courtroom, and the trial court accepted their defiance without record comment or action. (See R. 67-74.) The appellate court then modified its decision to hold that the portions of the jury-selection process from which all spectators were certainly excluded in this case *i.e.*, the trial court's reading of the charges, the list of potential witnesses, and the initial jury

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instructions, and the swearing-in of the veniremembers are unprotected by the public-trial right because they are not part of "*voir dire* itself." *People v. Hartfield*, 2020 IL App (4th) 170787, ¶ 51, *as modified on denial of reh'g* (Nov. 4, 2020).

The appellate court cited no Illinois or federal authority to squarely support this holding. See *Hartfield*, 2020 IL App (4th) 170787, ¶ 51 (citing a single case from a Washington intermediate appellate court wherein that court applied an "experience and logic test" derived from Washington caselaw and concluded that "swearing in the venire does not implicate the public trial right," *State v. Parks*, 190 Wash. App. 859, 866 (2015)). Instead, the appellate court pointed to a dictionary definition of *voir dire* as "a preliminary examination to determine the competency of a witness or juror" and reasoned that "[w]hen the circuit court read to the prospective jurors the charges, a list of potential witnesses, and initial jury instructions and when the court swore them in, no prospective jurors were being examined, and no jurors were being selected," so the exclusion of the public from those proceedings was not an exclusion of the public from *voir dire* or from jury selection. *Hartfield*, 2020 IL App (4th) 170787, ¶ 51.

The appellate court's narrow view of "*voir dire*" and "jury selection" is not consonant with the caselaw. The United States Supreme Court has described *voir dire* expansively as the "jurors' first introduction to the substantive factual and legal issues in a case." *Gomez v. United States*, 490 U.S. 858, 874 (1989). "Far from an administrative empanelment process," *voir dire* is a textual and contextual exchange of information among the trial court, the parties, and the prospective jurors within an ineffable "atmosphere" comprised of the "gestures and attitudes of all participants." *Gomez*, 490 U.S. at 874-75. And in the public-trial cases, the Supreme Court has used "*voir dire*" and "jury selection" more or less interchangeably

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to refer to the jury-selection phase of trial. See *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1906 (2017) ("*Presley* made it clear that the public-trial right extends to jury selection as well as to other portions of the trial."); *Presley*, 558 U.S. at 213 (holding that "the Sixth Amendment right to a public trial extends to the *voir dire* of prospective jurors"). So, too, has this Court understood "*voir dire*" and "jury selection." See *Radford*, 2020 IL 123975, ¶ 25 (citing *Presley*, 558 U.S. at 213, for the proposition that "[t]he public trial right extends to jury selection").

It must be that all "juror selection proceedings" are protected by the public-trial right, see *Presley*, 558 U.S. at 213, including those parts of the proceedings during which no prospective juror is being examined, excused, or empaneled. Otherwise the sworn examination of a prospective juror is protected, but the administration of the oath that permitted the examination is not; asking veniremembers whether they have a relationship with any potential witness is protected, but giving substance to that question by reading the list of potential witnesses is not; excusing a prospective juror for making a face when she heard the charges against the defendant is protected, but evoking her reaction by giving first voice to the charges is not. The better view is that the jury-selection stage of a criminal trial, like "any stage of a criminal trial," cannot be closed to the public unless and until the four criteria are met. See *Presley*, 558 U.S. at 212-13. And they were not met here.

B. The violation of Mr. Hartfield's constitutional public-trial right entitles him to reversal of each of his convictions and remand for a new trial.

"While the benefits of a public trial are frequently intangible, difficult to prove, or a matter of chance, the Framers plainly thought them nonetheless real." *Waller*, 467 U.S. at 49 n.9. Violation of the constitutional right to a public trial

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therefore is structural error. *Weaver*, 137 S. Ct. at 1908; see *Waller*, 467 U.S. at 49 (agreeing that "the defendant should not be required to prove specific prejudice in order to obtain relief for a violation of the public-trial guarantee"); see also *People v. Schoonover*, 2019 IL App (4th) 160882, ¶ 54 (stating that "a public trial violation is unequivocally a structural error"), *appeal allowed*, 154 N.E.3d 748 (Ill. 2020). Where such violation is preserved and raised on direct appeal, the defendant is entitled to automatic reversal and remand for a new trial, "without any inquiry into prejudice." *Weaver*, 137 S. Ct. at 1905, 1913.

Where a violation of the public-trial right is neither preserved nor raised on direct appeal but is raised in collateral proceedings by way of a claim of ineffective assistance of counsel, the petitioner is entitled to a new trial only if he shows prejudice, as with any other ineffective-assistance claim. *Id.* at 1907, 1913. By contrast, where an unpreserved violation is clear or obvious and raised on direct appeal, it is second-prong plain error requiring reversal without a showing of prejudice. *Schoonover*, 2019 IL App (4th) 160882, ¶¶ 13, 37, 45; see *Radford*, 2020 IL 123975, ¶¶ 38-42 (declining to excuse forfeiture where any public-trial violation was not clear or obvious because (1) the trial court recognized that jury selection must be open to the public, (2) the trial court stated its concern that spectators in a congested courtroom might "react[] or express[] emotion in a way that impacted the venire," (3) the trial court permitted the media and "two family members who favored each side" to remain in the courtroom throughout jury selection, and (4) the defendant actively cooperated in the exclusion by choosing his two supporters to remain in the courtroom); see generally Ill. S. Ct. Rule 615(a) (eff. Jan. 1, 1967) ("Plain errors or defects affecting substantial rights may be noticed although they

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were not brought to the attention of the trial court."); *People v. Eppinger*, 2013 IL 114121, ¶ 18 (stating that review is appropriate under the second prong of the plain-error doctrine where "a clear or obvious error occurred and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process").

As established in Issue IV.A., above, compliance with the four criteria was both required and absent here, so Mr. Hartfield's public-trial right was violated by the trial court's exclusion of spectators from the courtroom during jury selection. And because that violation was second-prong plain error, Mr. Hartfield is entitled to reversal of his convictions and remand for a new and public trial notwithstanding his failure to preserve the public-trial issue in the trial court. See *Schoonover*, 2019 IL App (4th) 160882, ¶¶ 13, 37, 45 (indicating that an unpreserved public-trial violation raised on direct appeal is second-prong plain error, requiring reversal without a showing of prejudice).

Mr. Hartfield acknowledges that in *Schoonover*, but not in his case, the trial court noted for the record a defense objection to the exclusion of spectators from the courtroom. *Schoonover*, 2019 IL App (4th) 160882, ¶¶ 6, 18, 45. At first glance, the trial court's notation of an objection seems a distinguishing fact on the legal question of plain error, in light of certain language in *Weaver* emphasizing the importance of a contemporaneous objection to a public-trial violation. See *Weaver*, 137 S. Ct. at 1912 ("[W]hen a defendant objects to a courtroom closure, the trial court can either order the courtroom opened or explain the reasons for keeping it closed."); see also *Radford*, 2020 IL 123975, ¶ 37 ("A contemporaneous objection is particularly crucial when challenging any courtroom closure.").

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But a closer look at *Schoonover* shows that it cannot be distinguished. That case involved the trial court's *sua sponte* exclusion of certain courtroom spectators during the testimony of the complainant at the defendant's trial on charges of predatory criminal sexual assault of a child, pursuant to section 115-11 of the Code of Criminal Procedure of 1963 (725 ILCS 5/115-11 (2014)). *Schoonover*, 2019 IL App (4th) 160882, ¶¶ 1, 3, 6, 29. Specifically, the following occurred:

> "THE COURT: When [the complainant] testifies, I want the courtroom cleared except for family members.
> [PROSECUTOR]: Thank you, Your Honor.
> [TRIAL COUNSEL]: I'm sorry, Judge. [Defendant's] family members are here. Is that are you barring them?
> THE COURT: Out."

Id. at ¶ 5. Trial counsel made no further comment about the exclusion. See *id.* at ¶¶ 5-6.

Similarly in this case, which was tried in front of the same judge as in *Schoonover*, the following occurred just before jury selection began:

> "THE COURT: For the People in the courtroom, I've got 39 jurors coming up. There's not going to be enough room for everybody to be seated, and my jurors. I'm going to have you step out until I get a jury selected. All right, Officer, bring up the jurors, please.
> DEPUTY: Yes, your Honor.
> THE COURT: Mr. Vargas, any problem with the statement of the nature of the case?
> MR. VARGAS: No, sir. Judge, Ms. Gwendolyn Hartfield is in the room, as well as her mother, and obviously, one of our interns. Can they stay in the room and, if necessary, do you want them all to leave?
> THE COURT: As soon as I get twelve in the box, then I'll have Officer Helm bring them in, so at least I'll have all of my jurors seated."

(R. 67-68.) Mr. Vargas made no further comment about the exclusion. (See R. 68.)

In both cases, then, trial counsel made no formal objection but did give the trial court a clear opportunity to rethink or make findings adequate to support the exclusion it was about to effect. It is that opportunity not the formal

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objection that *Weaver* emphasized as distinguishing "a public trial violation preserved and then raised on direct review and a public-trial violation raised as an ineffective-assistance-of-counsel claim." *Weaver*, 137 S. Ct. at 1912; see also *Radford*, 2020 IL 123975, ¶ 37 (reasoning that, "if there is no objection at trial, there is no opportunity for the judge to develop an alternative plan to a partial closure or to explain in greater detail the justification for it"). What was enough in *Schoonover* was enough here, and *Schoonover*'s plain-error holding therefore applies with equal if not greater force in Mr. Hartfield's case. This Court should reverse Mr. Hartfield's convictions and remand for a new trial at which his constitutional public-trial right is recognized and respected.

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CONCLUSION

For the foregoing reasons, Kelvin T. Hartfield, defendant-appellee, respectfully requests that this Court reverse each of his convictions outright (Issue III). In the alternative, Mr. Hartfield respectfully requests that this Court reverse each of his convictions and remand for a new trial (Issue IV). As a further alternative, Mr. Hartfield respectfully requests that this Court reverse all four of his aggravated-discharge convictions and remand for a new trial (Issue I). And as a final alternative, Mr. Hartfield respectfully requests that this Court affirm the appellate court's judgment and remand to the trial court for vacatur of three of his four aggravated-discharge convictions and for resentencing (Issue II).

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 or words contained in the Rule 341(d) cover, the Rule 341(h)(1) 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 seventy-six pages.

/s/Amy J. Kemp
AMY J. KEMP
Assistant Appellate Defender

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APPENDIX TO THE BRIEF

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Illinois Statutes Annotated - 2015

West's Smith-Hurd Illinois Compiled Statutes Annotated
Chapter 720. Criminal Offenses
Criminal Code
Act 5. Criminal Code of 2012 (Refs & Annos)
Title III. Specific Offenses
Part D. Offenses Affecting Public Health, Safety and Decency
Article 24. Deadly Weapons (Refs & Annos)

720 ILCS 5/24-1.2
Formerly cited as IL ST CH 38 ¶ 24-1.2

5/24-1.2. Aggravated discharge of a firearm

Effective: January 1, 2006
Currentness

§ 24-1.2. Aggravated discharge of a firearm.

(a) A person commits aggravated discharge of a firearm when he or she knowingly or intentionally:

(1) Discharges a firearm at or into a building he or she knows or reasonably should know to be occupied and the firearm is discharged from a place or position outside that building;

(2) Discharges a firearm in the direction of another person or in the direction of a vehicle he or she knows or reasonably should know to be occupied by a person;

(3) Discharges a firearm in the direction of a person he or she knows to be a peace officer, a community policing volunteer, a correctional institution employee, or a fireman while the officer, volunteer, employee or fireman is engaged in the execution of any of his or her official duties, or to prevent the officer, volunteer, employee or fireman from performing his or her official duties, or in retaliation for the officer, volunteer, employee or fireman performing his or her official duties;

(4) Discharges a firearm in the direction of a vehicle he or she knows to be occupied by a peace officer, a person summoned or directed by a peace officer, a correctional institution employee or a fireman while the officer, employee or fireman is engaged in the execution of any of his or her official duties, or to prevent the officer, employee or fireman from performing his or her official duties, or in retaliation for the officer, employee or fireman performing his or her official duties;

(5) Discharges a firearm in the direction of a person he or she knows to be an emergency medical technician-- ambulance, emergency medical technician -- intermediate, emergency medical technician -- paramedic, ambulance driver, or other medical assistance or first aid personnel, employed by a municipality or other governmental unit, while the emergency medical technician -- ambulance, emergency medical technician -- intermediate, emergency medical technician -- paramedic, ambulance driver, or other medical assistance or first aid personnel is engaged in the execution of any of his or her official

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duties, or to prevent the emergency medical technician -- ambulance, emergency medical technician--intermediate, emergency medical technician -- paramedic, ambulance driver, or other medical assistance or first aid personnel from performing his or her official duties, or in retaliation for the emergency medical technician -- ambulance, emergency medical technician -- intermediate, emergency medical technician -- paramedic, ambulance driver, or other medical assistance or first aid personnel performing his or her official duties;

(6) Discharges a firearm in the direction of a vehicle he or she knows to be occupied by an emergency medical technician -- ambulance, emergency medical technician -- intermediate, emergency medical technician -- paramedic, ambulance driver, or other medical assistance or first aid personnel, employed by a municipality or other governmental unit, while the emergency medical technician -- ambulance, emergency medical technician -- intermediate, emergency medical technician -- paramedic, ambulance driver, or other medical assistance or first aid personnel is engaged in the execution of any of his or her official duties, or to prevent the emergency medical technician -- ambulance, emergency medical technician -- intermediate, emergency medical technician -- paramedic, ambulance driver, or other medical assistance or first aid personnel from performing his or her official duties, or in retaliation for the emergency medical technician -- ambulance, emergency medical technician -- intermediate, emergency medical technician -- paramedic, ambulance driver, or other medical assistance or first aid personnel performing his or her official duties;

(7) Discharges a firearm in the direction of a person he or she knows to be a teacher or other person employed in any school and the teacher or other employee is upon the grounds of a school or grounds adjacent to a school, or is in any part of a building used for school purposes;

(8) Discharges a firearm in the direction of a person he or she knows to be an emergency management worker while the emergency management worker is engaged in the execution of any of his or her official duties, or to prevent the emergency management worker from performing his or her official duties, or in retaliation for the emergency management worker performing his or her official duties; or

(9) Discharges a firearm in the direction of a vehicle he or she knows to be occupied by an emergency management worker while the emergency management worker is engaged in the execution of any of his or her official duties, or to prevent the emergency management worker from performing his or her official duties, or in retaliation for the emergency management worker performing his or her official duties.

(b) A violation of subsection (a)(1) or subsection (a)(2) of this Section is a Class 1 felony. A violation of subsection (a)(1) or (a)(2) of this Section committed in a school, on the real property comprising a school, within 1,000 feet of the real property comprising a school, at a school related activity or on or within 1,000 feet of any conveyance owned, leased, or contracted by a school to transport students to or from school or a school related activity, regardless of the time of day or time of year that the offense was committed is a Class X felony. A violation of subsection (a)(3), (a)(4), (a)(5), (a)(6), (a)(7), (a)(8), or (a)(9) of this Section is a Class X felony for which the sentence shall be a term of imprisonment of no less than 10 years and not more than 45 years.

(c) For purposes of this Section:

“School” means a public or private elementary or secondary school, community college, college, or university.

“School related activity” means any sporting, social, academic, or other activity for which students' attendance or participation is sponsored, organized, or funded in whole or in part by a school or school district.

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Illinois Statutes Annotated - 2016

West's Smith-Hurd Illinois Compiled Statutes Annotated
Chapter 725. Criminal Procedure
Act 5. Code of Criminal Procedure of 1963 (Refs & Annos)
Title I. General Provisions
Article 103. Rights of Accused (Refs & Annos)

725 ILCS 5/103-5
Formerly cited as IL ST CH 38 ¶ 103-5

5/103-5. Speedy trial

Effective: January 1, 2014
Currentness

§ 103-5. Speedy trial.

(a) Every person in custody in this State for an alleged offense shall be tried by the court having jurisdiction within 120 days from the date he or she was taken into custody unless delay is occasioned by the defendant, by an examination for fitness ordered pursuant to Section 104-13 of this Act, by a fitness hearing, by an adjudication of unfitness to stand trial, by a continuance allowed pursuant to Section 114-4 of this Act after a court's determination of the defendant's physical incapacity for trial, or by an interlocutory appeal. Delay shall be considered to be agreed to by the defendant unless he or she objects to the delay by making a written demand for trial or an oral demand for trial on the record. The provisions of this subsection (a) do not apply to a person on bail or recognizance for an offense but who is in custody for a violation of his or her parole, aftercare release, or mandatory supervised release for another offense.

The 120-day term must be one continuous period of incarceration. In computing the 120-day term, separate periods of incarceration may not be combined. If a defendant is taken into custody a second (or subsequent) time for the same offense, the term will begin again at day zero.

(b) Every person on bail or recognizance shall be tried by the court having jurisdiction within 160 days from the date defendant demands trial unless delay is occasioned by the defendant, by an examination for fitness ordered pursuant to Section 104-13 of this Act, by a fitness hearing, by an adjudication of unfitness to stand trial, by a continuance allowed pursuant to Section 114-4 of this Act after a court's determination of the defendant's physical incapacity for trial, or by an interlocutory appeal. The defendant's failure to appear for any court date set by the court operates to waive the defendant's demand for trial made under this subsection.

For purposes of computing the 160 day period under this subsection (b), every person who was in custody for an alleged offense and demanded trial and is subsequently released on bail or recognizance and demands trial, shall be given credit for time spent in custody following the making of the demand while in custody. Any demand for trial made under this subsection (b) shall be in writing; and in the case of a defendant not in custody, the demand for trial shall include the date of any prior demand made under this provision while the defendant was in custody.

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(c) If the court determines that the State has exercised without success due diligence to obtain evidence material to the case and that there are reasonable grounds to believe that such evidence may be obtained at a later day the court may continue the cause on application of the State for not more than an additional 60 days. If the court determines that the State has exercised without success due diligence to obtain results of DNA testing that is material to the case and that there are reasonable grounds to believe that such results may be obtained at a later day, the court may continue the cause on application of the State for not more than an additional 120 days.

(d) Every person not tried in accordance with subsections (a), (b) and (c) of this Section shall be discharged from custody or released from the obligations of his bail or recognizance.

(e) If a person is simultaneously in custody upon more than one charge pending against him in the same county, or simultaneously demands trial upon more than one charge pending against him in the same county, he shall be tried, or adjudged guilty after waiver of trial, upon at least one such charge before expiration relative to any of such pending charges of the period prescribed by subsections (a) and (b) of this Section. Such person shall be tried upon all of the remaining charges thus pending within 160 days from the date on which judgment relative to the first charge thus prosecuted is rendered pursuant to the Unified Code of Corrections [1] or, if such trial upon such first charge is terminated without judgment and there is no subsequent trial of, or adjudication of guilt after waiver of trial of, such first charge within a reasonable time, the person shall be tried upon all of the remaining charges thus pending within 160 days from the date on which such trial is terminated; if either such period of 160 days expires without the commencement of trial of, or adjudication of guilt after waiver of trial of, any of such remaining charges thus pending, such charge or charges shall be dismissed and barred for want of prosecution unless delay is occasioned by the defendant, by an examination for fitness ordered pursuant to Section 104-13 of this Act, by a fitness hearing, by an adjudication of unfitness for trial, by a continuance allowed pursuant to Section 114-4 of this Act after a court's determination of the defendant's physical incapacity for trial, or by an interlocutory appeal; provided, however, that if the court determines that the State has exercised without success due diligence to obtain evidence material to the case and that there are reasonable grounds to believe that such evidence may be obtained at a later day the court may continue the cause on application of the State for not more than an additional 60 days.

(f) Delay occasioned by the defendant shall temporarily suspend for the time of the delay the period within which a person shall be tried as prescribed by subsections (a), (b), or (e) of this Section and on the day of expiration of the delay the said period shall continue at the point at which it was suspended. Where such delay occurs within 21 days of the end of the period within which a person shall be tried as prescribed by subsections (a), (b), or (e) of this Section, the court may continue the cause on application of the State for not more than an additional 21 days beyond the period prescribed by subsections (a), (b), or (e). This subsection (f) shall become effective on, and apply to persons charged with alleged offenses committed on or after, March 1, 1977.

Credits

Laws 1963, p. 2836, § 103-5, eff. Jan. 1, 1964. Amended by Laws 1967, p. 2829, § 1, eff. Aug. 11, 1967; P.A. 76-1098, § 1, eff. Aug. 28, 1969; P.A. 79-842, § 1, eff. Oct. 1, 1975; P.A. 79-1237, § 1, eff. June 30, 1976; P.A. 85-293, Art. III, § 14, eff. Sept. 8, 1987; P.A. 86-1210, § 2, eff. Aug. 30, 1990; P.A. 87-281, § 1, eff. Jan. 1, 1992; P.A. 90-705, § 5, eff. Jan. 1, 1999; P.A. 91-123, § 5, eff. Jan. 1, 2000; P.A. 94-1094, § 5, eff. Jan. 26, 2007; P.A. 98-558, § 80, eff. Jan. 1, 2014.

Formerly Ill.Rev.Stat.1991, ch. 38, ¶ 103-5.

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2020 IL App (4th) 170787

NO. 4-17-0787

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
October 6, 2020
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. KELVIN T. HARTFIELD, Defendant-Appellant.	) Appeal from the) Circuit Court of) Champaign County) No. 16CF1055)) Honorable) Thomas J. Difanis,) Judge Presiding.

JUSTICE CAVANAGH delivered the judgment of the court, with opinion.
Justices Knecht and Turner concurred in the judgment and opinion.

OPINION

¶ 1 In the Champaign County circuit court, a jury found defendant, Kelvin T. Hartfield, guilty of one count of armed robbery (720 ILCS 5/18-2(a)(2) (West 2016)) and four counts of aggravated discharge of a firearm (Id. § 24-1.2(a)(3)). For those offenses, the court sentenced him to prison terms that, in their consecutive running, totaled 90 years. He appeals on six grounds.

¶ 2 First, defendant claims a violation of his statutory right to a speedy trial. See 725 ILCS 5/103-5(a) (West 2016). He acknowledges that he has procedurally forfeited this claim. Nevertheless, he seeks to avert the forfeiture by invoking the doctrine of plain error (see Ill. S. Ct. R. 615(a) (eff. Jan. 1, 1967)), purportedly because the error is so serious that the integrity of the judicial process is endangered (see People v. Sebby, 2017 IL 119445, ¶ 50). Setting aside the question of whether a statutory speedy-trial violation, as distinct from a constitutional speedy-trial violation, is an error so fundamental as to threaten the integrity of the judicial process, we find no

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error, let alone a plain error. The reason is this. When the State moved for the continuances at issue, defendant objected but not in the manner required by section 103-5(a) (725 ILCS 5/103-5(a) (West 2016)), that is, by demanding a trial. Consequently, under that statutory provision, notwithstanding defendant's objections and the circuit court's recognition of his objections, he is considered to have agreed to the continuances, eliminating the possibility of a statutory speedy-trial violation. See id.

¶ 3 Second, defendant asserts that his appointed trial counsel rendered ineffective assistance by failing to move for a discharge on statutory speedy-trial grounds and by failing to raise the issue in the posttrial motion, thereby causing a forfeiture of the issue. For the reason set forth in the preceding paragraph, there was no statutory speedy-trial claim for defense counsel to forfeit.

¶ 4 Third, defendant alleges a violation of his constitutional right to have the jury selected in public. In the record before us, we find inadequate support for defendant's allegation that this right was violated.

¶ 5 Fourth, defendant complains of violations of Illinois Supreme Court Rule 431(b) (eff. July 1, 2012) in the admonitions the circuit court gave the potential jurors and in the inquiries the court made of them. We find a procedural forfeiture of this issue. Again, defendant seeks to avert the forfeiture by invoking the doctrine of plain error, this time arguing that the evidence was so closely balanced that the purported Rule 431(b) errors could have made a difference in the outcome of the trial. We find no error in the admonitions. And assuming that, in its questioning of the potential jurors, the court erred by substituting one word in Rule 431(b) for another word that carried the same meaning, we find no possibility of prejudice.

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¶ 6 Fifth, defendant contends that, in answering a mid-deliberation question by the jury, the circuit court violated his right to due process by lightening the State's burden of proof as to some elements of aggravated discharge of a firearm. We disagree that the court's answer to the jury's question had any such import.

¶ 7 Sixth, defendant contends that his four convictions of aggravated discharge of a firearm (720 ILCS 5/24-1.2(a)(3) (West 2016)) violate the one-act, one-crime doctrine. We do not reach that common-law doctrine for the multiple convictions are inconsistent with statutory law. In our interpretation of section 24-1.2(a)(3), we find no textual support for basing the number of convictions on the number of peace officers in the direction of which defendant discharged the firearm.

¶ 8 Therefore, we remand this case with directions to vacate three of the convictions of aggravated discharge of a firearm and to resentence defendant. Otherwise, we affirm the judgment.

¶ 9 I. BACKGROUND

¶ 10 On July 27, 2016, the police arrested defendant. Ultimately, the State charged him with one count of armed robbery (id. § 18-2(a)(2)) and four counts of aggravated discharge of a firearm (id. § 24-1.2(a)(3)).

¶ 11 From August 2016 to January 2017, the State filed six motions to continue the jury trial so that the State could obtain the results of fingerprint and DNA analyses. See 725 ILCS 5/103-5(c) (West 2016).

¶ 12 In its first motion for a continuance, the State "request[ed] a continuance and an additional 60 days as provided by [section 114-4 of the Code of Criminal Procedure of 1963] 725 ILCS 5/114-4 [(West 2016)] and 120 days as provided [by section 103-5(c) (id. § 103-5(c))] to bring the matter to trial as it continue[d] to pursue the referenced forensic evidence."

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¶ 13 On August 30, 2016, in the hearing on the State's first motion for a continuance, defense counsel objected to the motion as follows:

"Judge, he's in custody.

Ready for trial.

Please note my objection to the State's motion."

Noting the objection, the circuit court overruled it and extended the speedy-trial period by 120 days, to March 26, 2017.

¶ 14 Finally, jury selection began on March 6, 2017, after defendant had been in custody for 222 days. The circuit court announced:

"For the People in the courtroom, I've got 39 jurors coming up. There's not going to be enough room for everybody to be seated, and my jurors. I'm going to have you step out until I get a jury selected. All right, Officer, bring up the jurors, please.

DEPUTY: Yes, [Y]our Honor.

THE COURT: Mr. Vargas, any problem with the statement of the nature of the case?

MR. VARGAS: No, sir. Judge, Ms. Gwendolyn Hartfield is in the room, as well as her mother, and obviously, one of our interns. Can they stay in the room and, if necessary, do you want them all to leave?

THE COURT: As soon as I get twelve in the box, then I'll have Officer Helm bring them in, so at least I'll have all of my jurors seated."

¶ 15 To each panel of potential jurors, the circuit court read the four principles in Illinois Supreme Court Rule 431(b) (eff. July 1, 2012) all at once and then had some version of the following dialogue with the panel:

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"THE COURT: The four of you understand those instructions. Is that correct?

FOUR JURORS: (Indicating in the affirmative).

THE COURT: They answer in the affirmative. And the four of you will follow those instructions. Is that correct?

FOUR JURORS: (Indicating in the affirmative).

THE COURT: They answer in the affirmative."

¶ 16 After the jury was selected, the trial began. In a nutshell, the evidence in the jury trial tended to show the following.

¶ 17 Around 1 a.m. on July 26, 2016, two masked men, one of them wielding a revolver, robbed a gas station in Urbana, Illinois. They took not only the cash in the register but also numerous cartons of cigarettes and cigars, which they carried away in a backpack. The gas station attendant saw a tan Buick automobile drive away.

¶ 18 Soon afterward that night, while surveilling another gas station, a deputy sheriff, Josh Demko, looked over at a nearby trailer park and saw a tan Buick back into a parking spot, next to a maroon Hyundai automobile. Demko and some other police officers went into the trailer park to investigate. A man was sitting in the front passenger seat of the Hyundai, and a woman was sitting in the back seat. The man got out of the Hyundai and walked to the trunk and then past the driver's door. He appeared to be, like defendant, a tall black man of a slender build, but none of the police officers got a good enough look at him to positively identify him as defendant. The man ran when the police ordered him to stop. As he was running, he fired in the direction of the four police officers: Demko, Richard Ferriman, Casey Donovan, and Rob Derouchie, all of whom

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were more or less clustered together. Some of the police officers returned fire. The man went over a fence and got away.

¶ 19 The four police officers differed on how many shots the fleeing man had fired. He fired two to five shots, according to their testimony. None of the officers were hit, although, afterward, they found what appeared to be two bullets holes in trailers near where some of them had been standing.

¶ 20 After the shoot-out, the police arrested the woman in the back seat of the Hyundai, Tierykah Wiley. She made several statements to the police. Not all of her statements agreed with one another. In one of her statements, Wiley represented that, the day of the robbery, she accepted a ride in a tan car driven by Kydel Brown. Defendant was in the front seat of the tan car, and she, Wiley, was in the back seat. She saw a lot of cigarettes on the floorboard. They drove to a nearby trailer park to switch cars. Brown got out of the tan car and went inside one of the trailers. Wiley got out of the tan car, too, and into a red car, and defendant moved some bags from the tan car to the trunk of the red car.

¶ 21 In the maroon Hyundai, the police found several items of evidence, including the following: a cell phone with accounts relating to Brown; mail addressed to defendant; a package of photographs with defendant's name on it; a garbage bag containing a single carton of Newport cigarettes; a blue and black backpack and a blue and gray backpack, each containing cartons and individual packs of Newports and packages of cigars; and Newports that were not in any bag. In all, the police found, in the maroon Hyundai, 15 cartons and 16 individual packs of Newports and about 28 packages of cigars.

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¶ 22 Shortly after 8 a.m. on July 26, 2016, Brown emerged from a trailer that the police were surveilling, and they arrested him. The police searched the trailer and found the keys to the tan Buick.

¶ 23 At about 5 p.m. on July 27, 2016, the police were surveilling a hotel in which defendant's mother lived with her boyfriend. Defendant came out of the hotel and got into a taxi. The police pulled the taxi over and arrested defendant. He had a bandage on his forearm. Upon removing the bandage, the police saw a wound and took him to the hospital to get it treated.

¶ 24 On August 17, 2016, John Hampton was in the backyard of his house, which was near the trailer park, and he found a revolver in the weeds behind his shed. The revolver did not belong to him, and he did not know how it had gotten there. He picked up the revolver and called the police, who came and took possession of it. In the cylinder of the revolver were three spent rounds and two live rounds.

¶ 25 Lenore Smith, who lived near Hampton, testified that she had known defendant for 13 or 14 years and that, in the early morning hours of July 26, 2016, defendant awakened her by tapping on the window of her house. She opened the front door, and he came in. She noticed that he had a cut on his arm. He explained that he had gotten the cut by jumping a fence as he ran away from some "guys" who had wanted to fight him. Smith urged defendant go to the hospital and get the cut looked at, but he refused to do so. So, she herself bandaged the cut, which was about an inch and a half long and not bleeding.

¶ 26 Jamono Collier testified that she had known defendant for five or six years. Sometime on July 26, 2016, defendant telephoned Collier, looking for Collier's best friend, Wiley. Defendant requested Collier to "call the hospital or see if [Wiley] was in jail." Defendant gave Collier the following explanation for this request (as Collier recounted in her testimony):

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"[T]hey was at a gas station and [Wiley] was in the back seat of a car or something, and I guess well, I mean I guess well, he said he shot at the police or whatever the case may be. *** He say he shot was shooting at the police and he was with [Wiley] and he wasn't around her no more. *** [H]e was trying to locate her by me."

The prosecutor asked Collier:

"Q. Did he tell you more about the details of what happened after they separated? What did he do next?

A. He went to the trailer parks.

Q. Why?

A. I guess that's where he put the stuff at.

Q. What stuff?

A. That he took out the store.

Q. Did he talk you said he was shooting. Did he talk about a gun?

A. Yeah.

Q. What did he say about the gun?

A. Well, I know he wanted to get a new gun but I don't know what happened with the other one."

¶ 27 Collier further testified that, when defendant came to her house the next day, he had a bandage on his arm and was still was looking for Wiley. He wanted to take Wiley with him out of town "because he didn't want to get caught."

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¶ 28 In addition to the foregoing testimony, the State presented forensic evidence. No DNA or fingerprints were found on the revolver. Defendant's fingerprint was found, however, on the exterior front passenger door of the maroon Hyundai and on one of the packs of Newports.

¶ 29 Finally, the State presented cell phone evidence. Expert testimony and extraction reports showed several calls and text messages between defendant's cell phone and Brown's cell phone. One text message, transmitted from defendant's phone to Brown's phone at 9:43 p.m. on July 25, 2016, read: "U know anyone want square 5$ a pack[,] 3 for 10$[,] 5 for 20$[,] They shorts[.]" The State presented testimony that "squares" was a term for cigarettes and that "shorts" were short cigarettes as distinct from long cigarettes. Approximately 10 messages were sent from defendant's phone to contacts other than Brown during the evening hours of July 25, 2016, in which defendant offered to sell cigarettes, cigarillos, and cigars. Some of the messages proposed a sale price of $45 per carton.

¶ 30 On March 9, 2017, the parties rested, and the jury retired to the deliberation room. During its deliberations, the jury sent out a written question to the judge. The note read: " 'Does suspect need to know there were four cops on the scene in the area where gun was fired to be guilty of all four counts of aggravated discharge of a firearm[?] Third proposition, that the Defendant knew that blank was a peace officer.' " In the discussion of what the reply should be, defense counsel interjected: "Judge, please note my objection to any I believe the appropriate response is, you've been instructed as to the law. Please note my objection to any anything beyond that." Over defense counsel's objection and with the prosecutor's approval, the circuit court sent the following written response to the jury:

> "Question #1
>
> No[.]

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> Question #2
>
> You must determine based on the evidence which officer or officers, if any, may have been in the line of fire when the firearm was discharged."

¶ 31 After receiving that written clarification, the jury found defendant guilty of one count of armed robbery and four counts of aggravated discharge of a firearm. The circuit court entered judgment on each of the five guilty verdicts.

¶ 32 On April 3, 2017, defendant filed a motion for an acquittal or, alternatively, a new trial. He challenged the circuit court's decision to answer the jury's mid-deliberation inquiry. But he raised no speedy-trial issue.

¶ 33 On May 1, 2017, the circuit court denied defendant's posttrial motion. Immediately afterward, the court held a sentencing hearing. The court imposed concurrent sentences of 10 years' imprisonment for the aggravated-discharge convictions as to Demko, Derouchie, and Donovan; a consecutive 40 years' imprisonment for the aggravated-discharge conviction as to Ferriman; and a consecutive 40 years' imprisonment for the armed-robbery conviction.

¶ 34 On May 19, 2017, defendant moved for a reduction of the sentences. He argued that the total of 90 years' imprisonment was excessive, "essentially amount[ing] to a life sentence." He was 22 years old.

¶ 35 On October 23, 2017, the circuit court denied the post-sentencing motion.

¶ 36 On October 27, 2017, defendant appealed.

¶ 37 II. ANALYSIS

¶ 38 A. The Speediness of the Trial

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¶ 39 Defendant acknowledges that because he never moved to be discharged on speedy-trial grounds and because he never raised a speedy-trial issue in his posttrial motion, those objections might be regarded as procedurally forfeited. See People v. Alcazar, 173 Ill. App. 3d 344, 354 (1988) (holding that by failing to apply for discharge prior to his conviction and by failing to raise the speedy-trial issue in his posttrial motion, the defendant had forfeited his right to be discharged on speedy-trial grounds). By invoking the doctrine of plain error, however, defendant seeks to avert a procedural forfeiture. See Ill. S. Ct. R. 615(a) (eff. Jan. 1, 1967).

¶ 40 Plain-error analysis begins with the question of whether the defendant has identified an error. People v. Winchester, 2016 IL App (4th) 140781, ¶ 69. Defendant challenges only the first and third continuances that the circuit court granted to the State, arguing it was those continuances that caused a violation of his statutory right to be tried within 120 days after he was put in custody. See 725 ILCS 5/103-5(a) (West 2016). But if, on the other hand, the first continuance was attributable to defendant instead of to the State, defendant admits that the running of the 120-day period was suspended until the day the case went to trial and that, consequently, he has no statutory speedy-trial claim. To quote from defendant's brief, "if the August 30, 2016[,] continuance was lawful, [defendant's] new speedy-trial date was March 26, 2017, and his March 6, 2017[,] trial did not violate the speedy trial statute. 725 ILCS 5/103-5(c)."

¶ 41 The State observes that, on August 30, 2016, in the hearing on the State's first motion for a continuance, defense counsel announced his readiness for trial instead of demanding a trial as required by section 103-5(a) (id.). As a result, the State argues, the continuance from August 30, 2016, to March 6, 2017, is indeed attributable to defendant, and his statutory speedy-trial claim lacks merit. In support of that argument, the State cites People v. Murray, 379 Ill. App. 3d 153 (2008), in which the appellate court held that stating a readiness for trial and objecting to a

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proposed delay, without "specifically ask[ing] for trial or us[ing] language that would reference the speedy-trial statute," was "not a sufficient oral demand for trial" (*Id.* at 161).

¶ 42 Defendant rejoins that, in the hearing on the State's first motion for a continuance, defense counsel did more than announce a readiness for trial: defense counsel also used language that, according to defendant, could only be understood as referencing the speedy-trial statute. Defense counsel said: "Judge, he's in custody." See 725 ILCS 5/103-5(a) (West 2016) (providing that "[e]very person in custody in this State for an alleged offense shall be tried *** within 120 days from the date he or she was taken into custody"). And not only that, defendant argues, but the circuit court noted, for the record, defense counsel's objection to the continuance, thereby explicitly recognizing defense counsel's response as a *bona fide* objection without being gainsaid by the State. From *Murray*, 379 Ill. App. 3d at 161-62, defendant derives the following holding, which he regards as applicable to his own case:

> "the defendant's declaration of readiness for trial, when coupled with his objection to a proposed trial delay, his additional use of 'language that would be used only in reference to [his] speedy-trial right,' and the trial court's recognition of the defendant's objection to the delay, is sufficient to affirmatively invoke the speedy-trial right." (Emphasis in original.).

¶ 43 *Murray*, however, is distinguishable in two ways. First, the language that *Murray* characterized as "clearly showing an intent to invoke the speedy-trial statute" was defense counsel's "stated *** desire that the delay be attributed to the State." *Id.* at 161. Such language, the appellate court reasoned, "would be used only in reference to [the defendant's] speedy-trial right." *Id.* In the present case, by contrast, defense counsel merely observed that defendant was "in custody." That observation, unlike the defense counsel's request in *Murray*, was not specifically

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and exclusively relevant to the speedy-trial statute. It was relevant to delay in general. Objecting to a continuance because one's client is languishing in jail does not specifically invoke or allude to the speedy-trial statute the way a request to attribute the delay to the State would.

¶ 44 Second, as the appellate court in Murray pointed out, the circuit court's recognition of defense counsel's objection to a continuance was not the same as the circuit's recognition of a demand for trial. Id. In the present case, in the hearing on the State's first motion for a continuance, the circuit court recognized defense counsel's objection to the proposed 120-day continuance, but the court never characterized the objection as a demand for trial.

¶ 45 Under the language of section 103-5(a) (725 ILCS 5/103-5(a) (West 2016)), this distinction is crucial. That section provides: "Delay shall be considered to be agreed to by the defendant unless he or she objects to the delay by making a written demand for trial or an oral demand for trial on the record." Id. That statutory provision is unambiguous, and we are supposed to "apply it straightforwardly, without reading [into it any] exceptions, limitations, or qualifications." People ex rel. Webb v. Wortham, 2018 IL App (2d) 170445, ¶ 31. Thus, under the plain language of section 103-5(a), an objection to a proposed delay, without a demand for trial, operates as an agreement to the delay period: no exceptions, no limitations, no qualifications. In the hearing on the State's first motion for a continuance, defense counsel objected to the proposed continuance without demanding a trial. Unless the objection was made in a certain manner "by making a *** demand for trial" the objection was ineffectual, and the "[d]elay shall be considered to be agreed to by the defendant." 725 ILCS 5/103-5(a) (West 2016). To the State's proposed first continuance, defendant made no objection in the statutorily prescribed manner. It follows that defendant is considered to have agreed to the first continuance and he has no valid statutory speedy-trial claim.

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¶ 46 That being the case, defense counsel could not have rendered ineffective assistance by omitting to file a motion for discharge on statutory speedy-trial grounds or by refraining from raising the issue in the posttrial motion. See People v. Peco, 345 Ill. App. 3d 724, 735-36 (2004). To render effective assistance, defense counsel need not file futile motions. People v. Smith, 2014 IL App (1st) 103436, ¶ 64. Defendant does not argue it was ineffective assistance for defense counsel to omit to demand a trial when objecting to the State's first motion for a continuance. Therefore, any such argument would be forfeited. See Ill. S. Ct. R. 341(h)(7) (eff. May 25, 2018) (providing that "[p]oints not argued are forfeited and shall not be raised in the reply brief, in oral argument, or on petition for rehearing").

¶ 47 B. The Right to a Jury Selection That is Open to the Public

¶ 48 On appeal, defendant contends that, by asking spectators to leave the courtroom so as to make room for the potential jurors, the circuit court violated his constitutional right to have the jury selected in a proceeding that was open to the public. See Presley v. Georgia, 558 U.S. 209, 213 (2010).

¶ 49 The record is insufficient to support that contention. We cannot tell, from the record, if any spectators ultimately were excluded from the courtroom. Officer Helm might have brought them all back in after bringing in the 12 potential jurors. How many spectators were in the courtroom to begin with? And were all of them or only some of them brought back in? The record appears to give no answer. To quote from People v. Radford, 2018 IL App (3d) 140404, ¶ 51, "we cannot know whether a closure occurred."

¶ 50 C. The Zehr Instructions to the Potential Jurors

¶ 51 Under Illinois Supreme Court Rule 431(b) (eff. July 1, 2012), the circuit court must admonish each potential juror on four constitutional principles that are essential to a fair trial. Also,

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the court must ask each potential juror if he or she understands and accepts those principles. The rule provides as follows:

> "(b) The court shall ask each potential juror, individually or in a group, whether that juror understands and accepts the following principles: (1) that the defendant is presumed innocent of the charge(s) against him or her; (2) that before a defendant can be convicted the State must prove the defendant guilty beyond a reasonable doubt; (3) that the defendant is not required to offer any evidence on his or her own behalf; and (4) that if a defendant does not testify it cannot be held against him or her; however, no inquiry of a prospective juror shall be made into the defendant's decision not to testify when the defendant objects.
>
> The court's method of inquiry shall provide each juror an opportunity to respond to specific questions concerning the principles set out in this section." Id.

These are Zehr admonitions and inquiries, so named after People v. Zehr, 103 Ill. 2d 472 (1984).

¶ 52 In the present case, Zehr admonitions were given, and Zehr inquiries were made. On appeal, however, defendant asserts violations of Rule 431(b).

¶ 53 Defendant acknowledges that, in the proceedings below, he never objected to any noncompliance with Rule 431(b), let alone reiterated the objection in a posttrial motion. "[B]oth a trial objection and a written post-trial motion raising the issue are necessary to preserve an issue for review." People v. Enoch, 122 Ill. 2d 176, 186 (1988). Nevertheless, defendant seeks to avert the procedural forfeiture by again invoking the doctrine of plain error. This time, he relies on the first prong of the plain-error doctrine instead of the second prong. That is, instead of arguing that the alleged Rule 431(b) errors were so inherently serious that they require automatic reversal, he argues that that the evidence in the trial was "closely balanced" and that the "clear or obvious"

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violations of Rule 431(b) "threatened to tip the scales of justice against" him. (Internal quotation marks omitted.) Sebby, 2017 IL 119445, ¶ 48. In other words, the reputed errors, regardless of how serious they were in themselves, could have nudged the decision from not guilty to guilty, given the closeness of the evidence.

¶ 54 According to defendant, the circuit court clearly or obviously violated Rule 431(b) in two ways.

¶ 55 First, the circuit court asked the potential jurors if they would "follow" its "instructions" on the Zehr principles instead of asking them if they would "accept" those "principles." Under Rule 431(b), the court was supposed to "ask each potential juror, individually or in a group, whether that juror understood and accepted" the Zehr "principles," not whether that juror understood and would "follow" "instructions" on the Zehr principles. (Emphasis added.) Ill. S. Ct. R. 431(b) (eff. July 1, 2012). Defendant quotes from People v. McGuire, 2017 IL App (4th) 150695, ¶ 35: "Trial courts must exercise diligence when instructing the jury of the Zehr principles as codified in Rule 431(b) and must not deviate in any way from the precise language chosen by the Illinois Supreme Court to be in that rule."

¶ 56 In that judicial dictum, however, McGuire did not go so far as to say that any deviation from the precise language in Rule 431(b) necessarily was reversible error. There is, after all, an opinion by the appellate court, People v. Atherton, 406 Ill. App. 3d 598, 611 (2010), finding no error in the substitution of "follow" for "accept." The appellate court held in Atherton: "[A]sking the potential jurors if they were 'willing to follow' the propositions was just another way of asking the potential jurors if they accepted those propositions. Thus, the trial court's questions as to those principles complied with Rule 431(b)." Id. Atherton is on directly point, and we see no compelling reason to decline to follow Atherton. To "follow" means "to accept as

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authority." Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/follow (last visited Oct. 1, 2020) [https://perma.cc/8J2A-RFKY]. Following *Atherton*, we find no error, let alone plain error, in the substitution of "accept" for "follow" words that carry the same meaning.

¶ 57 The second error in the *Zehr* admonitions and inquiries, according to defendant, was lumping the four principles together instead of reciting one principle at a time and asking the potential jurors if they understood and accepted that principle. If indeed this was an error, it was not a clear or obvious one. Nothing in the text of Rule 431(b) clearly requires delivering the admonitions piecemeal with the inquiries interspersed. As defendant admits, the appellate court is divided on the question of whether it is necessary to do so. *Cf. People v. Willhite*, 399 Ill. App. 3d 1191, 1196-97 (2010) (observing that "Rule 431(b) has no requirement that the trial court ask separate questions of the jurors about each individual principle"); *People v. Othman*, 2019 IL App (1st) 150823, ¶ 60 (holding that, after stating each of the four *Zehr* principles, the circuit court must ask the potential jurors if they understand and accept that principle, necessitating eight inquiries). Because it was not a clear or obvious error for the circuit to follow *Willhite* over *Othman*, the procedural forfeiture of this issue will be honored. *See People v. Albea*, 2017 IL App (2d) 150598, ¶ 17.

¶ 58 D. The Asserted Error in a Jury Instruction

¶ 59 Counts IV to VII of the information charged defendant with committing, on July 26, 2017, four separate offenses of aggravated discharge of a firearm (720 ILCS 5/24-1.2(a)(3) (West 2016)). Count IV alleged that he fired in the direction of one police officer, Demko. Count V alleged that he fired in the direction of a second police officer, Ferriman. Count VI alleged that

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he fired in the direction of a third police officer, Donovan. Count VII alleged that he fired in the direction of a fourth police officer, Derouchie.

¶ 60 During its deliberations, the jury sent out a written inquiry regarding those four counts. The note read: " 'Does suspect need to know there were four cops on the scene in the area where gun was fired to be guilty of all four counts of aggravated discharge of a firearm[?] Third proposition, that the Defendant knew that blank was a peace officer.' " (We quote from the transcript.)

¶ 61 Defense counsel objected to any answer beyond simply referring the jury to the instructions already given. Over defense counsel's objection and with the State's approval, the circuit court sent in to the jury the following written answer:

> "Question #1
>
> No[.]
>
> Question #2
>
> You must determine based on the evidence which officer or officers, if any, may have been in the line of fire when the firearm was discharged."

¶ 62 On appeal, defendant makes the indisputable point that if the circuit court chooses to give a clarifying instruction to the jury, the instruction should be accurate it should be a correct statement of the law. See People v. Childs, 159 Ill. 2d 217, 229 (1994). Defendant maintains that the clarifying instruction the circuit court gave was an incorrect statement of the law. It was incorrect, he argues, in that it reduced the State's burden of proof as to two elements of aggravated discharge of a firearm, thereby violating his right to due process. See Jackson v. Virginia, 443 U.S. 307, 316 (1979); People v. Siguenza-Brito, 235 Ill. 2d 213, 224 (2009).

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¶ 63 The statute defining aggravated discharge of a firearm provides as follows:

> "(a) A person commits aggravated discharge of a firearm when he or she knowingly or intentionally:
>
> * * *
>
> (3) Discharges a firearm in the direction of a person he or she knows to be a peace officer *** while the officer *** is engaged in the execution of any of his or her official duties ***[.]" 720 ILCS 5/24-1.2(a)(3) (West 2016).

Defendant divides this statutory definition into four elements: "(1) knowing or intentional discharge of a firearm, (2) in the direction of a person who is a peace officer, (3) with knowledge that such person is a peace officer, (4) in connection with the officer's official duties."

¶ 64 By its clarifying instruction, defendant argues, the circuit court lightened the State's burden of proof on the second and third of those elements. The court instructed the jury: "You must determine[,] based on the evidence[,] which officer or officers, if any, may have been in the line of fire when the firearm was discharged." (Emphasis added.) According to defendant, this instruction, with its noncommittal language of possibility ("may"), excused the State from proving two propositions beyond a reasonable doubt: (1) defendant's discharge of a firearm was in the direction of a peace officer and (2) defendant knew that the person was a peace officer. Relieved of much of its evidentiary burden, defendant argues, the State only had to prove that (1) defendant's discharge of firearm may have been in the direction of a peace officer and (2) defendant knew that this person may have been a peace officer.

¶ 65 This argument assumes an equivalence between the phrase "in the line of fire" and the phrase "in the direction of" (id.). Do these concepts have the same meaning? If being "in the

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line of fire" means the same as having a firearm discharged "in the direction of" oneself, then defendant's reasoning is valid: the phrase "may have been the line of fire" lightened the State's burden of proof to (1) defendant's discharge of firearm may have been in the direction of a peace officer and (2) defendant knew that this person may have been a peace officer.

¶ 66 But being "in the line of fire" has a different meaning from having a firearm discharged "in the direction of" oneself. The "line of fire" means "the place where bullets are being shot." Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/line%20of%20fire (last visited Oct. 1, 2020) [https://perma.cc/SJK6-2M48]. Or, as another dictionary defines the phrase, the "line of fire" is "the expected path of gunfire." New Oxford American Dictionary 991 (2001). Thus, anyone remaining in the line of fire when a firearm is discharged will be hit. Being in the line of fire means being in the expected trajectory of the round. The line is the path of the round, and anyone who intersects that line is in the line of fire. By contrast, the phrase "in the direction of" is more approximate. It means "so as to be approaching" or "toward." Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/in%20the%20direction%20of (last visited Oct. 1, 2020) [https://perma.cc/DGR8-NPC4]. To "approach" means "to draw closer to" or "to come very near to." Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/approach (last visited Oct. 1, 2020) [https://perma.cc/2SJ9-AY3D].

¶ 67 To illustrate this distinction, let us say that, with the intention of merely scaring A, B carefully aims at a window to the side of A and shoots out the glass. A would not be in the line of fire, and when pulling the trigger, B would know that A was not in the line of fire. Nevertheless, B would fire in A's direction, and B would know he was firing in A's direction.

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¶ 68 Because of the differing meanings of "in the line of" and "in the direction of," we are unconvinced that the clarifying instruction lightened the State's burden of proof on the second and third elements of aggravated discharge of a firearm, as defendant argues. Thus, prejudice from the clarifying instruction is unproven. See People v. Williams, 2017 IL App (1st) 142733, ¶ 50 (holding that "[i]t is the defendant's burden to demonstrate prejudice resulting from an alleged instruction error").

¶ 69 E. Surplus Convictions of Aggravated Discharge of a Firearm

¶ 70 After the first round of briefs in this appeal, we were left with reservations about the multiple convictions of aggravated discharge of a firearm (720 ILCS 5/24-1.2(a)(3) (West 2016)). Therefore, we ordered supplemental briefing on the question of whether these multiple convictions violated the one-act, one-crime doctrine (see People v. King, 66 Ill. 2d 551, 566 (1977)) a violation that, if it occurred, would be reviewable as a plain error (see People v. Smith, 2019 IL 123901, ¶ 14).

¶ 71 The parties filed supplemental briefs. As we were reminded by some of the cases the parties cited in their supplemental briefs, a question of statutory construction must be answered before the one-act, one-crime doctrine becomes relevant. The threshold question is whether section 24-1.2(a)(3) (720 ILCS 5/24-1.2(a)(3) (West 2016)), by its terms, allows four convictions of aggravated discharge of a firearm for fewer than four shots fired in the direction of four peace officers. See People v. Carter, 213 Ill. 2d 295, 300-01 (2004); People v. Aveiar, 2017 IL App (4th) 150442, ¶ 16. Only if we construe section 24-1.2(a)(3) as allowing the four convictions should we then proceed to the further question of whether the four convictions violate the one-act, one-crime doctrine. See Carter, 213 Ill. 2d at 301.

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¶ 72 To be sure, the statute would have allowed a separate conviction for each shot that defendant had fired in the direction of the peace officers. Each shot would have been a "[d]ischarge[ ]" that the statute criminalized. 720 ILCS 5/24-1.2(a)(3) (West 2016). And there was testimony that defendant had fired more than one shot.

¶ 73 But the trouble is this: in the charging instrument, the State did not differentiate between the shots that defendant had fired. Instead, in the charging instrument, the State differentiated between the peace officers that defendant had fired at. Similarly, in its closing argument to the jury, the State took the position that, regardless of the number of shots that defendant had fired, the jury should return four guilty verdicts for aggravated discharge of a firearm: a guilty verdict for each of the four peace officers in the direction of which defendant had fired. It would be too late to change that theory now. See People v. Crespo, 203 Ill. 2d 335, 344 (2001) (stating it would not "allow the State to change its theory of the case on appeal"). The State is stuck with its one-conviction-per-peace-officer theory, be that theory valid or invalid which is the question.

¶ 74 We must decide, then, whether section 24-1.2(a)(3) (720 ILCS 5/24-1.2(a)(3) (West 2016)) allows four convictions of aggravated discharge of a firearm to be carved out of the discharge of a firearm in the direction of four peace officers, regardless of the number of times the firearm was discharged even if the firearm was discharged, say, only once. (It may as well have been only once since, according to the prosecutor's argument to the jury, the number of shots that defendant fired is unimportant and it is the number of peace officers fired at that matters.) Like an alleged violation of the one-act, one-crime rule (see Smith, 2019 IL 123901, ¶ 14), this threshold question of statutory interpretation is reviewable under the plain-error doctrine, despite a procedural forfeiture (see Carter, 213 Ill. 2d at 299 (noting the supreme court's recent holding that

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" 'the potential for a surplus conviction and sentence affects the integrity of the judicial process, thus satisfying the second prong of the plain error rule' ") (quoting People v. Harvey, 211 Ill. 2d 368, 389 (2004))).

¶ 75 Under the unambiguous language of section 24-1.2(a)(3) (720 ILCS 5/24-1.2(a)(3) (West 2016)), the "allowable unit of prosecution" (internal quotation marks omitted) (Carter, 213 Ill. 2d at 302) is the "discharge[ ]" of the firearm, not the number of persons in the direction of which the firearm is discharged. Again, the statute reads as follows:

> "(a) A person commits aggravated discharge of a firearm when he or she knowingly or intentionally:
>
> * * *
>
> (3) Discharges a firearm in the direction of a person he or she knows to be a peace officer *** while the officer *** is engaged in the execution of any of his or her official duties, or to prevent the officer *** from performing his or her official duties, or in retaliation for the officer *** performing his or her official duties ***[.]" (Emphasis added.) 720 ILCS 5/24-1.2(a)(3) (West 2016).

¶ 76 Nothing in the language of section 24-1.2(a)(3) justifies an interpretation that there is a separate offense of aggravated discharge of a firearm for every peace officer in the direction of which a round is fired. If the defendant knowingly or intentionally discharges a firearm once in the direction of four persons whom the defendant knows to be peace officers doing their jobs, the defendant has, ipso facto, in the language of the statute, "[d]ischarge[d] a firearm in the direction of a person he or she knows to be a peace officer *** while the officer *** is engaged in the execution of any of his or her official duties" and the single violation of the statute is complete.

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(Emphasis added.) Id. As the statute is written, there is one offense per "discharge," not one offense per person in the group toward which the firearm is discharged. Id.

¶ 77 This is not to detract from our supreme court's statement in People v. Shum, 117 Ill. 2d 317, 363 (1987): "In Illinois it is well settled that separate victims require separate convictions and sentences." The offenses in Shum, however, were significantly different from the offense of aggravated discharge of a firearm. The offenses in Shum were the infliction of bodily harm upon two victims. The defendant in Shum killed Gwendolyn Whipple and her unborn child (id. at 335), and he was convicted of murder and feticide (id. at 332). He argued to the supreme court that the one-act, one-crime doctrine required the reversal of his feticide conviction since "it arose from the single physical act of killing Gwendolyn Whipple." Id. at 363. The supreme court disagreed with the defendant's one-act, one-crime argument because "separate victims require[d] separate convictions and sentences." Id. Or, as the appellate court has put it, "the one-act, one-crime rule only applies to multiple convictions for acts against a single victim." People v. Leach, 2011 IL App (1st) 090339, ¶ 30.

¶ 78 It is important to keep in mind, though, that, by invoking the one-act, one-crime doctrine, the defendant in Shum implicitly conceded that convicting him of both murder and feticide was consistent with the legislature's intent. Again, "[o]ne-act, one-crime principles apply only if the statute is construed as permitting multiple convictions" for a single act. Carter, 213 Ill. 2d at 301. The defendant in Shum could not have seriously argued that if someone murdered a pregnant woman, the legislature intended to exempt the murderer from criminal liability for feticide. If without justification, A fatally shoots B and the round passes through B and kills C as well, it cannot seriously be contended that the legislature intended to exempt A from criminal liability for the death of C. Common sense would suggest that "multiple harms to different people

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should lead to multiple convictions." People v. Jackson, 2016 IL App (1st) 133823, ¶ 64. Precisely because the legislature intended A to incur criminal liability for the death of C, A might invoke the one-act, one-crime doctrine. And no doubt courts would respond with the multiple-victims exception to the doctrine. See Leach, 2011 IL App (1st) 090339, ¶ 30. But that exception to the one-act, one-crime doctrine does not answer the preceding threshold question of legislative intent in our case. See Carter, 213 Ill. 2d at 300-01.

¶ 79 As we have explained, we see no textual evidence in section 24-1.2(a)(3) (720 ILCS 5/24-1.2(a)(3) (West 2016)) that a single discharge of a firearm in the direction of a group of peace officers may support multiple convictions of aggravated discharge of a firearm. In the way the statute is written, the unit of prosecution is the "discharge," not the number of peace officers. Id. Even if the statutory language were ambiguous in this regard, the rule of lenity would require us to resolve the ambiguity in defendant's favor. See People v. Jones, 223 Ill. 2d 569, 581 (2006). But the statutory language is not ambiguous. One discharge equals one offense.

¶ 80 We acknowledge that this interpretation of section 24-1.2(a)(3) is at odds with the appellate court's interpretation of that section in People v. Hardin, 2012 IL App (1st) 100682, ¶ 37. In Hardin, though, the appellate court stated an interpretation that was undisputed in the appeal it was deciding. The appellate court took the issue as the parties framed it. Consequently, Hardin is of little help. To explain what we mean, let us begin with the facts in Hardin.

¶ 81 In Hardin, the defendant, as he was running away, turned and fired a single shot at a car occupied by two police officers. He was convicted of two counts of aggravated discharge of a firearm in the direction of a vehicle known to be occupied by a peace officer (720 ILCS 5/24-1.2(a)(4) (West 2008)): one count for each of the two peace officers. Hardin, 2012 IL App (1st) 100682, ¶ 1.

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¶ 82 Notice, first of all, that the defendant in *Hardin* was charged under a different subsection of section 24-1.2 than the subsection under which defendant in the present case was charged. In the present case, defendant was charged under subsection (a)(3) (720 ILCS 5/24-1.2(a)(3) (West 2016)), which criminalized "[d]ischarg[ing] a firearm in the direction of a person he or she knows to be a peace officer." (Emphasis added.) *Id.* In *Hardin*, by contrast, the defendant was charged under subsection (a)(4) (720 ILCS 5/24-1.2(a)(4) (West 2008)), which criminalized " '[d]ischarg[ing] a firearm in the direction of a vehicle he or she knows to be occupied by a peace officer.' " (Emphasis in original.) *Hardin*, 2012 IL App (1st) 100682, ¶ 26 (quoting 720 ILCS 5/24-1.2(a)(4) (West 2008)).

¶ 83 The defendant in *Hardin* argued that, under the one-act, one-crime doctrine, one of his convictions of aggravated discharge of a firearm should be vacated. *Id.* ¶ 23. He did not dispute that there had been two peace officers in the car. Even so, the defendant got around the multiple-victims exception this way. "[H]is convictions," he reasoned, "were for shooting at the vehicle itself, and not the officers located inside, and he fired one shot at one police vehicle." Thus, he concluded, he deserved no more than one conviction of aggravated discharge of a firearm: a single shot at a vehicle, a single conviction (720 ILCS 5/24-1.2(a)(4) (West 2008)). *Hardin*, 2012 IL App (1st) 100682, ¶ 25. The State argued, on the other hand, that the two convictions should stand because the single shot victimized the two peace officers occupying the vehicle and, surely, "the criminal statute at issue was designed to protect them, and not the vehicle." *Id.*

¶ 84 Now let us pause here to make a crucial observation about *Hardin*. In their arguments to the appellate court, both parties in *Hardin* assumed that, if indeed the defendant had fired the single shot at the two peace officers, the two convictions of aggravated discharge of a firearm were legitimate. But the defendant insisted that he had fired the single shot not at the two

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peace officers but, instead, at their vehicle. That was, after all, the theory the State had pleaded in its charging instrument. The State countered that, by firing the single shot at the vehicle occupied by the two peace officers, the defendant had fired at the two peace officers and that his attempted distinction between firing at them and firing at their vehicle was meaningless.

¶ 85 The appellate court was unconvinced that the defendant's distinction between firing at the two peace officers and firing at their vehicle could be dismissed as meaningless considering that this was the very distinction the legislature had drawn in subsections (a)(3) and (a)(4) of section 24-1.2 (720 ILCS 5/24-1.2(a)(3), (4) (West 2008)). See Hardin, 2012 IL App (1st) 100682, ¶ 27. "[S]ubsection (a)(4) [had to] be interpreted to prohibit the act of discharging a firearm in the direction of the vehicle, and not the officer, to ensure that it ha[d] meaning and [was] not superfluous." Id. ¶ 29. The defendant had violated subsection (a)(4) by firing one shot at a vehicle occupied by peace officers. Id. ¶ 26. Given the charge, the defendant could "only be convicted of one crime under the statute's plain language." Id.

¶ 86 The appellate court in Hardin added:

> "If [the] defendant had been charged under subsection (a)(3) [(720 ILCS 5/24-1.2(a)(3) (West 2008))] and the State had met its burden of proof, then [the] defendant could have been convicted of two crimes because his criminal act would have been directed at two people. However, [the] defendant was charged and convicted under subsection (a)(4) [(id. § 24-1.2(a)(4))], which defines the criminal act as the discharge of a firearm at a vehicle. As such, we determine that [the] defendant has committed one criminal act under subsection (a)(4) where he fired his gun one time at one vehicle and conclude that he may therefore be convicted of only one crime." (Emphasis added.) Id. ¶ 37.

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¶ 87 The dictum we emphasized in that quoted passage was undisputed in Hardin. But it is disputed in the present case. Because defendant disagrees that, under subsection (a)(3) (720 ILCS 5/24-1.2(a)(3) (West 2016)), a single discharge can yield multiple convictions corresponding to the number of peace officers, Hardin is distinguishable.

¶ 88 As we have explained, under the unambiguous language of section 24-1.2(a)(3), the discharge of the firearm is the unit of prosecution, not the number of persons at which the firearm was discharged. In section 24-1.2(a)(3), the victim the legislature had in mind was public order, not the person fired at. Unlike aggravated assault (720 ILCS 5/12-1(a) (West 2018)), which is in part B of Title III of the Criminal Code of 2012, a part titled "Offenses Directed Against the Person," aggravated discharge of a firearm (id. § 24-1.2(a)(3)) is in part D of Title III, a part titled "Offenses Affecting Public Health, Safety[,] and Decency." Part D also includes disorderly conduct (id. § 26-1). Carving multiple convictions of aggravated discharge of a firearm out of a single discharge of a firearm is as misguided as carving, say, 30 convictions of disorderly conduct out of a single late-night drunken rant: a conviction for each person in the neighborhood whose sleep was disturbed. If only one episode of disorderly conduct is pleaded, only one conviction of that offense can result. Likewise, if only one aggravated discharge of a firearm was pleaded, only one conviction of that offense can result.

¶ 89 In the charging instrument, the State differentiated between peace officers instead of between discharges of the firearm in their direction. Effectively, then, only one discharge was pleaded: the State "portray[ed] defendant's conduct as a single attack" on four peace officers (Crespo, 203 Ill. 2d at 343-44). In our de novo construction of section 24-1.2(a)(3) (see Carter, 213 Ill. 2d at 301), we conclude, then, that only one conviction of aggravated discharge of a firearm

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is permissible. Having so interpreted the statute, we do not reach the one-act, one-crime doctrine, let alone the multiple-victims exception to that doctrine. See id.

¶ 90 That leaves the question of a remedy. For three of the convictions of aggravated discharge of a firearm, the circuit court imposed 10-year prison sentences, and for the fourth conviction of that offense, the court imposed a 40-year prison sentence. Some of the prison terms were concurrent with one another, and other prison terms were consecutive to one another. Given the differing prison terms and the web of concurrent and consecutive sentencing, resentencing appears to be necessary. Therefore, we remand this case with directions to vacate three of the convictions of aggravated discharge of a firearm and to resentence defendant in accordance with section 5-8-4 of the Unified Code of Corrections (730 ILCS 5/5-8-4 (West 2016)). See People v. Artis, 232 Ill. 2d 156, 179 (2009).

¶ 91 III. CONCLUSION

¶ 92 In sum, there was no violation of the speedy trial statute. The alleged violations of Rule 431(b) are procedurally forfeited and are not saved by the doctrine of plain error. We reject, on their merits, the remaining theories of ineffective assistance, a violation of the right to a public trial, and a faulty jury instruction. But we vacate three of the convictions of aggravated discharge of a firearm as statutorily unauthorized surplusage, given the charges. Therefore, we remand this case with directions to vacate three of the four convictions of aggravated discharge of a firearm leaving to the circuit court to decide which three convictions to vacate and to resentence defendant. Otherwise, we affirm the circuit court's judgment.

¶ 93 Affirmed in part and vacated in part; cause remanded with directions.

SUBMITTED - 13860878 - Rachel Davis - 6/29/2021 12:16 PM

No. 4-17-0787

Cite as:	People v. Hartfield, 2020 IL App (4th) 170787
Decision Under Review:	Appeal from the Circuit Court of Champaign County, No. 16-CF-1055; the Hon. Thomas J. Difanis, Judge, presiding.
Attorneys for Appellant:	James E. Chadd, Catherine K. Hart, and Amy J. Kemp, of State Appellate Defender's Office, of Springfield, for appellant.
Attorneys for Appellee:	Julia Rietz, State's Attorney, of Urbana (Patrick Delfino, David J. Robinson, and James Ryan Williams, of State's Attorneys Appellate Prosecutor's Office, of counsel), for the People.

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#12 Does suspect need to know there were 4 cops on the scene in the area where gun was fired to be guilty of all four counts of aggrevated discharge of firearm?

third Proposition: That the defendant Knew that was peace officer.

SUP C3

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Question # 1

No

Question #2

You must determine based on the evidence which officer or officers, if any, may have been in the line of fire when the firearm was discharged

T.J.C.

SUBMITTED - 13860878 - Rachel Davis - 6/29/2021 12:16 PM

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
CHAMPAIGN COUNTY, ILLINOIS

THE PEOPLE OF THE STATE OF ILLINOIS	)	
Plaintiff,	)	
-vs-	)	**No. 2016CF1055**
	)	FILED
KELVIN T. HARTFIELD,	)	SIXTH JUDICIAL CIRCUIT
	)	AUG 30 2016
Defendant.	)	CLERK OF THE CIRCUIT COURT B
		CHAMPAIGN COUNTY ILLINOIS

MOTION FOR CONTINUANCE

NOW COME the People of the State of Illinois by Troy Lozar, Assistant State's Attorney in and for the County of Champaign, State of Illinois, and, pursuant to 725 ILCS 5/114-4 and 725 ILCS 5/103-5(c) , respectfully move that the above-styled cause be continued to the next pretrial and as grounds therefore state that

1 The defendant is charged with Armed Robbery and Attempt 1st Degree Murder for events occurring on or about 7/26/16 During the course of the investigation of this offense, items of physical evidence including property believed to have been stolen, handled, and worn during the Armed Robbery were recovered The recovered items are suitable for the potential recovery of forensic evidence, specifically latent fingerprints and DNA The presence of such evidence on the items and/or the body of the deceased will indicate individuals in recent close proximity to, contacting, or in control of the evidence, as well, potentially, as the nature of that contact

2 Two codefendants have been charged in this offense

   a Defendant Kelvin Hartfield 16CF1055 was taken into custody on 7/28/16 and arraigned that same date The matter set for Preliminary Hearing on 8/19/16 Probable Cause was found and the matter was set to pretrial on 8/30/16 at 9 00 am in Courtroom B
   b Defendant Kydel Brown 16CF1056 was taken into custody on 8/1/16 and arraigned on 8/2/16 The matter was set for Preliminary Hearing on 8/19/16 Probable Cause was found and the matter was set to pretrial on 9/6/16 at 9 00 am in Courtroom C

3 The state filed motions to collect DNA and latent print standards from each defendant on 8/15/16

4 Evidence was seized by Champaign County Sheriff's Office under Department Number C16-2222

5 Evidence was seized by Urbana Police Department under Department Number U16-3949 and by Champaign County Sheriff's Office under Department report Number S16-222 on 7/26/16 through 8/17/16 Seized evidence was transported to the lab on 8/16/16

6 On 8/22/16 The state requested hearing dates for their motions to collect standards filed 8/15/16 No dates have been scheduled the state respectfully renews its request

7 As of 8/29/16, the lab reports evidence received and forensic analyses assigned in latent prints,

SUBMITTED - 13860878 - Rachel Davis - 6/29/2021 12:16 PM

Firearm/toomarks, and forensic biology The evidence sought is material to the state's case and the state would be prejudiced by the absence of the evidence

8 As of 8/29/16, the lab indicates that the work assignments remain in effect and the analyses are pending No reports are available at this time

9 The state therefore submits that it has acted with diligence in this matter and requests the court to continue the matter The state hereby requests a continuance and an additional 60 days as provided by 725 ILCS 5/114-4 and 120 days as provided 725 ILCS 5/103-5(c) to bring the matter to trial as it continues to pursue the referenced forensic evidence

Troy Lozar
Assistant State Attorney

Verification

Pursuant to 735 ILCS 5/1-109 the undersigned certifies that the statements set forth in the attached motion to continue are true and correct to the best of his information and belief

Troy D Lozar
Senior Assistant State's Attorney

SUBMITTED - 13860878 - Rachel Davis - 6/29/2021 12:16 PM

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
CHAMPAIGN COUNTY, ILLINOIS

THE PEOPLE OF THE STATE OF ILLINOIS	)	
Plaintiff,	)	
-vs-	)	**No. 2016CF1055**
	)	
KELVIN T. HARTFIELD,	)	
	)	
Defendant.	)	

FILED
SIXTH JUDICIAL CIRCUIT
OCT 25 2016
CLERK OF THE CIRCUIT COURT
CHAMPAIGN COUNTY ILLINOIS B

MOTION FOR CONTINUANCE

NOW COME the People of the State of Illinois by Troy Lozar, Assistant State's Attorney in and for the County of Champaign, State of Illinois, and, pursuant to 725 ILCS 5/114-4 and 725 ILCS 5/103-5(c) , respectfully move that the above-styled cause be continued to the next pretrial and as grounds therefore state that

1 The defendant is charged with Armed Robbery and Attempt 1st Degree Murder for events occurring on or about 7/26/16 During the course of the investigation of this offense, items of physical evidence including property believed to have been stolen, handled, and worn during the Armed Robbery were recovered The recovered items are suitable for the potential recovery of forensic evidence, specifically latent fingerprints and DNA The presence of such evidence on the items and/or the body of the deceased will indicate individuals in recent close proximity to, contacting, or in control of the evidence, as well, potentially, as the nature of that contact

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3 The state filed motions to collect DNA and latent print standards from each defendant on 8/15/16

4 Evidence was seized by Urbana Police Department under Department Number U16-3949 and by Champaign County Sheriff's Office under Department report Number S16-2222 on 7/26/16 through 8/17/16 Seized evidence was transported to the lab on 8/16/16

5 On 8/22/16 The state requested hearing dates for their motions to collect standards filed 8/15/16 Prior to a date being set in Hartfield 16CF1055 the state and defense agreed on this issue and the court signed an order to that effect on 8/31/16 A meeting for standards collection was coordinated with defense counsel's schedule and standards were collected from defendant Hartfield on 9/6/16 and transported to the lab that same week

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6 As of 8/29/16, the lab reports evidence received and forensic analyses assigned in latent prints, Firearm/toolmarks, and forensic biology The evidence sought is material to the state's case and the state would be prejudiced by the absence of the evidence

7 On 8/30/16 the court granted a motion by the state over objection for continuance and to allow an additional 60 and 120 days to bring the matter to trial to pursue forensic testing

8 On 9/27/16 the State's motion to continue was granted over objection

9 As of 10/24/16, the lab indicates reports are ready in Drug Chemistry and initial Forensic Biology Analyses in DNA, Firearms/Toolmarks, and Latent Prints remain outstanding Those work assignments remain in effect and the analyses are pending

10 The state therefore submits that it has acted with diligence in this matter and requests the court to continue the matter The state hereby requests a continuance and an additional 60 days as provided by 725 ILCS 5/114-4 and 120 days as provided 725 ILCS 5/103-5(c) to bring the matter to trial as it continues to pursue the referenced forensic evidence

Troy Lozar
Assistant State Attorney

Verification

Pursuant to 735 ILCS 5/1-109 the undersigned certifies that the statements set forth in the attached motion to continue are true and correct to the best of his information and belief

Troy D Lozar
Senior Assistant State's Attorney

SUBMITTED - 13860878 - Rachel Davis - 6/29/2021 12:16 PM

No. 126729

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Appellate Court of Illinois, No. 4-17-0787.
Plaintiff-Appellant,	)	There on appeal from the Circuit Court of the Sixth Judicial Circuit,
-vs-	)	Champaign County, Illinois, No. 16-CF-1055.
KELVIN T. HARTFIELD,	)	Honorable Thomas J. Difanis,
Defendant-Appellee.	)	Judge Presiding.

NOTICE AND PROOF OF SERVICE

Mr. Kwame Raoul, Attorney General, 100 W. Randolph St., 12th Floor, Chicago, IL 60601, aagKatherineDoersch@gmail.com;

Mr. David J. Robinson, Deputy Director, State's Attorney Appellate Prosecutor, 725 S. 2nd St., Springfield, IL 62704, 4thdistrict@ilsaap.org;

Ms. Julia R. Rietz, Champaign County State's Attorney, 101 E. Main St., 2nd Floor, Urbana, IL 61801-2731, statesatty@co.champaign.il.us;

Mr. Kelvin T. Hartfield, Register No. M35193, Lawrence Correctional Center, 10930 Lawrence Rd., Sumner, IL 62466

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 June 29, 2021, 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 Springfield, 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.

E-FILED
6/29/2021 12:16 PM
Carolyn Taft Grosboll
SUPREME COURT CLERK

/s/Rachel A. Davis
LEGAL SECRETARY
Office of the State Appellate Defender
400 West Monroe Street, Suite 303
Springfield, IL 62704
(217) 782-3654
Service via email will be accepted at
4thdistrict.eserve@osad.state.il.us

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