No. 130447

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, -vs- DEVIN JOHNSON, Defendant-Appellant.	)))))))))))	Appeal from the Appellate Court of Illinois, No. 4-22-1021. There on appeal from the Circuit Court of the Fourteenth Judicial Circuit, Rock Island County, Illinois, No. 21-CF-48. Honorable Frank R. Fuhr, Judge Presiding.

REPLY BRIEF FOR DEFENDANT-APPELLANT

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ARGUMENT

The trial court denied Devin Johnson a fair trial when it reserved ruling on his motion for directed verdict made at the close of the State's evidence, which prejudicially interfered with Johnson's exercise of his fundamental rights to testify, to remain silent, and to effective assistance of counsel.

When a defendant makes a motion concerning the strength of the State's evidence *before* the defense case, he is asking the court for information vital to his decision whether to testify and to counsel's strategic decisions. When the court reserves ruling on such a motion, it prejudices the defendant in his exercise of his rights. And because the court has everything it needs to rule on the motion, its failure to rule withholds that vital information for no reason. That is why 725 ILCS 5/115-4(k) plainly requires a judge to rule on a motion for directed verdict before proceeding to the defense case. Any other reading would allow for unjust results that the legislature could not have intended. This Court should thus find that the trial court violated both Section 115-4(k) and Johnson's constitutional rights when it deferred ruling on his mid-trial motion for directed verdict. (Def Br 12-24)

The State's various counter-arguments boil down to the proposition that a motion for directed verdict only concerns *one* of the defendant's rights: the right to be convicted only upon proof beyond a reasonable doubt. (St Br 17-43) According to the State, because no other right is implicated by such a motion, no prejudice results from reserving ruling, and there is thus no statutory or constitutional bar to doing so. The State's constricted view of the constitutional significance of a motion for directed verdict is unsupported by authority and contrary to this Court's precedent. *See infra* A.

The State's forfeiture and prejudice arguments are likewise incorrect. (St Br 12-17, 44-48) Because this claim is preserved, the State must prove the error was harmless

beyond a reasonable doubt. The State cannot meet that burden because the verdict depended upon the jury's assessment of Johnson's credibility in his statements to the police, and the State offered no objective evidence refuting Johnson's claim that the shooting was an accident. Where Johnson's credibility, and thus his decision to testify, were crucial, the State cannot show the error played no role in the verdict. *See infra* B.1. And even if this Court finds forfeiture, the violation of Section 115-4(k) and Johnson's rights was plain error. It was first-prong plain error because the evidence as to whether Johnson had specific intent to kill was closely balanced. Alternatively, it was second-prong plain error because withholding information critical to Johnson's exercise of his fundamental rights was inherently prejudicial. *See infra* B.2.

This Court should reverse the judgment of the appellate court and remand to the circuit court for a new trial.

Standard of Review

The State agrees questions of statutory construction and constitutional violations are reviewed *de novo*, but argues this applies only to *preserved* claims. Unpreserved claims, according to the State, "are reviewed at most for plain error." (St Br 11) (citing *People v. Williams*, 2022 IL 126918, ¶ 48). The plain-error doctrine, however, "is not a standard of review," but is instead "a standard to help a reviewing court determine when to excuse forfeiture." *People v. Herron*, 215 Ill. 2d 167, 180 n.1 (2005) (quotation omitted). Every question here is reviewed *de novo*. (Def Br 11-12); *see Williams*, 2022 IL 126918, ¶ 48 (whether plain error occurred is reviewed *de novo*).

A. Under Section 115-4(k) and our constitutions, a court must rule on a motion for directed verdict made at the close of the State's evidence before requiring the defendant to waive his fundamental right either to testify or to remain silent, and before requiring defense counsel to choose whether to present other evidence.

A defendant's motion concerning the strength of the State's evidence made before the defense case, like a motion for directed verdict or a *Montgomery* motion, is a request for information vital to his exercise of his rights to testify or to remain silent, and to counsel's strategic decisions. *People v. Patrick*, 233 Ill. 2d 62, 69-73 (2009); *People v. Rascher*, 223 Ill. App. 3d 847, 854-55 (4th Dist. 1992). By reserving ruling, the court forces the defense to make those decisions while withholding that information. Reserving ruling is thus error of "constitutional magnitude." *Patrick*, 233 Ill. 2d at 69-75. A court has the information it needs to rule on a motion for directed verdict, and the State has no interest in delaying the ruling. Given the rights at stake, the absence of any countervailing interests, and the prejudicial impact of reserving rulings, Section 115-4(k) requires a court to rule on a motion for directed verdict before the defense case. Any other reading would lead to unjust results that the legislature could not have intended. *People v. Bradford*, 2016 IL 118674, ¶¶ 15, 25.

The State agrees Section 115-4(k) is designed to protect the right to not be convicted except upon proof beyond a reasonable doubt, but asserts it protects *only* that right. (St Br 22-23, 29, 35) According to the State, therefore, the timing of the ruling on the motion does not matter because an acquittal is an acquittal, regardless of when it occurs. (St Br 24-25) Under the State's premise, the legislature had no need to distinguish between a mid-trial and a post-trial motion and no need to include a "timing requirement" for a ruling, and a court's decision to reserve ruling cannot be prejudicial to any other rights. (St Br 23-26, 37)

The State is incorrect. A defendant's right to move for a directed verdict at the close of the State's evidence is rooted in other fundamental rights. This Court recognized a right to move for a directed verdict to protect the rights to a jury trial and to be

convicted only upon proof beyond a reasonable doubt. *People v. Withers*, 87 Ill. 2d 224, 228 (1981) (citing *People v. Bruner*, 343 Ill. 146, 160-62 (1931)). Because the defendant has a right to challenge the constitutional sufficiency of the State's evidence, the legislature recognized that he likewise has a right to file that motion at the close of the State's evidence, *before* he exercises or waives his right to testify and before counsel decides whether to present evidence. 725 ILCS 5/115-4(k). Courts reading this statute in light of our constitutions have easily concluded that when a defendant makes such a motion, the court must rule before proceeding to the defense case. *Rascher*, 223 Ill. App. 3d at 854-55; *People v. Trump*, 62 Ill. App. 3d 747, 748 (3d Dist. 1978).

Patrick followed this same logic. That case concerned a testifying defendant's right not to be impeached with unfairly prejudicial evidence. 233 Ill. 2d at 68-69 (citing *People v. Montgomery*, 47 Ill. 2d 510, 516-17 (1971)). Concomitant with that is the defendant's right to file a motion to bar that impeachment *before* he decides whether to testify, because the ruling will inform the defense strategy. *People v. Spates*, 77 Ill. 2d 193, 199-200 (1979). A *Montgomery* motion made before the defense case thus implicates not just the right to avoid improper impeachment, but also the rights to testify, to remain silent, and to effective assistance of counsel. *Patrick*, 233 Ill. 2d at 69-73. A court's refusal to rule before the defense case prejudices the exercise of all of those rights. *Id.* Thus, while *Montgomery* itself said nothing about "the proper time for ruling," *Patrick* found the defendant's constitutional interests require that the judge rule on the motion before proceeding to the defense case. *Id.* The fact that reserving ruling does not "compel" or "bar" the defendant's testimony, (St Br 34-35), does not make the error any less "constitutional" in nature. *Patrick*, 233 Ill. 2d at 75.

Under this commonsense reasoning, Section 115-4(k) likewise requires a court

to rule on a motion for directed verdict before the defense case. This is true, first, because contrary to the State, Section 115-4(k) *does* distinguish between mid-trial and post-trial motions: "When, at the close of the State's evidence or at the close of all of the evidence, the evidence is insufficient ... the court ... on motion of the defendant shall" acquit the defendant. 725 ILCS 5/115-4(k). Reading this in light of the purposes behind the statute, and to avoid the same prejudicial impacts identified in *Patrick*, it plainly means that when a defendant moves for a directed verdict at the close of the State's evidence, the court must rule on the motion at that time. But even if this statutory language is ambiguous, that is the only interpretation consistent with construing the statute strictly in favor of the accused. *Fitzsimmons v. Norgle*, 104 Ill. 2d 369, 374 (1984).

The State tries to distinguish *Patrick* by claiming that while a *Montgomery* motion is relevant to a defendant's decision to testify, a motion for directed verdict is not. (St Br 37-38) The State cites no authority for this. If the State were correct, there would be no reason to allow a defendant to move for a directed verdict *before* the defense case. But Illinois law expressly provides for that, and for good reason. Where a defendant has the right to ask the court a question of law concerning the strength of the State's evidence, he also has the right to get an answer to that question before the defense case because that information is "vital" to his and to counsel's decisions. *Patrick*, 233 Ill. 2d at 69-70, 75; *Rascher*, 223 Ill. App. 3d at 854-55.

This is true in every case because the defense always runs the risk of aiding the State by presenting evidence. A defendant is entitled to an answer to his question about the sufficiency of the evidence before deciding whether to run that risk. Federal Rule of Criminal Procedure 29, Advisory Committee Notes to 1994 Amendments.

But it is especially true where the defendant is facing multiple charges. Johnson,

for example, was on trial for attempted murder with a firearm causing great bodily harm, with a sentencing range of 25 years to life, and aggravated battery with a firearm, with a sentencing range of 6-30 years. (C 20-21, 105) The closest question for the jury was whether Johnson acted with intent to kill, the element triggering the greater sentencing range. The cost-benefit analysis Johnson and counsel had to perform at the close of the State's evidence would have looked very different had the court allowed only the aggravated battery charge to go to the jury. Because the court had all the information it needed to rule on the motion, it had no reason to withhold this vital information, and the prejudicial impact of that fell solely on Johnson. *Commonwealth v. Yasin*, 483 Mass. 343, 350-55 (2019).

The State argues that finding Section 115-4(k) requires a court to rule on a mid-trial motion before proceeding further "would be contrary to this Court's precedent." (St Br 26) (citing *People v. Cross*, 40 Ill. 2d 85, 90 (1968)). *Cross*, however, did not concern deferring ruling on a mid-trial motion for directed verdict. It concerned a court's discretion to allow the State to re-open its case. Indeed, the judge in that case *did* rule on the motion before proceeding to the defense case.

The State alternatively argues that even if Section 115-4(k) requires a judge to rule on a motion before the defense case, any violation of that "statutory mandate" is not remediable because it is "directory," not "mandatory." (St Br 27-29) (citing *People v. Delvillar*, 235 Ill. 2d 507, 514-17 (2009); *In re M.I.*, 2013 IL 113776, ¶ 18). That is, a violation has no remedy because the statute does not provide for a remedy, and because the violation does not prejudice any right the statute was designed to protect. (St Br 28-29) The State is wrong on both points.

The State's argument again depends upon its assertion that Section 115-4(k)

only protects the right to avoid conviction except upon proof beyond a reasonable doubt. But if this Court agrees the statute was also designed to protect the rights to testify, to remain silent, and to effective assistance of counsel, then deferring ruling on a mid-trial motion *does* prejudice the rights the provision was designed to protect. That overcomes any presumption the statutory command is merely "directory." *M.I.*, 2013 IL 113776, ¶ 17. Because of this prejudicial impact, deferring ruling on a mid-trial motion for directed verdict in violation of the statute may require a new trial even if the statute does not expressly provide for that remedy. *Patrick*, 233 Ill. 2d at 74-76.

The State further attempts to limit the constitutional significance of motions for directed verdict by arguing that a defendant "does not have a constitutional right" to receive a ruling before he and counsel have to decide whether to present evidence. (St Br 39-42) (citing *People v. Averett*, 237 Ill. 2d 1, 15-17 (2010); *People v. Rosenberg*, 213 Ill. 2d 69, 81 (2004); *United States v. Cronic*, 466 U.S. 648, 661 (1984)). The State claims reserving ruling could only be a constitutional violation if it "prevent[ed]" Johnson from testifying, or made it "impossible" for counsel to advise him. (St Br 40-42)

The State ignores that when a court interferes with the *exercise* of a fundamental right, it *violates* that right. *Brown v. Louisiana*, 383 U.S. 131, 142 (1966). That is what *Patrick* unanimously concluded when it found the court's refusal to rule on the *Montgomery* motion was so prejudicial to the defendant's exercise of his rights to testify and to counsel that it *denied him a fair trial* under the harmless-error standard for *constitutional error*. 233 Ill. 2d at 69-76; *see also People v. Bracey*, 213 Ill. 2d 265, 266, 269-73 (2004) (court's failure to obtain valid jury waiver violates "fundamental right to a jury trial"); *Brewer v. Williams*, 430 U.S. 387, 404 (1977) (court's failure to obtain valid waiver of counsel violates right to counsel).

In every case, the defendant and counsel face risks and uncertainties making their strategic decisions difficult. Those uncertainties are constitutionally tolerable. But what our constitutions do not tolerate is the *court itself* being the source of that uncertainty. When the defense makes a timely request for information vital to its strategic decisions, and the court has no reason not to respond, the court prejudicially interferes with the defendant's exercise of his fundamental rights to testify and to effective assistance of counsel when it withholds that information. *Patrick*, 233 Ill. 2d at 69-76; *Rascher*, 223 Ill. App. 3d at 854-55. That is *not* what happened in *Rosenberg*, where the court ruled on the defendant's motion, and he thus had the information relevant to his decision to testify. 213 Ill. 2d at 80-81. But it is what happened here.

Averett found "the trial court's application of a blanket policy of deferring rulings on motions *in limine* did not violate the defendants' rights to testify or to the 'guiding hand of counsel.'" 237 Ill. 2d at 17. There are three reasons why *Averett* is not dispositive of whether error occurred in this case, or whether that error was constitutional.

First, Johnson raises both a statutory violation and a constitutional violation. (Def Br 12-23) Regardless of whether the error was constitutional in nature, if the judge violated Section 115-4(k), this Court should then determine whether that error denied Johnson a fair trial.

Second, *Averett* should be confined to its facts. *Averett* concerned a judge's "blanket policy" of deferring ruling on *Montgomery* motions, and whether that policy was "reviewable" where the defendant did not testify. 237 Ill. 2d at 12. This case does not involve a judge's blanket policy. Nor does it involve impeachment of the defendant with a prior conviction, an error that can *only* occur if he testifies. Instead, the error here had all the prejudicial impacts identified in *Patrick*, and the error was complete when the court refused to rule on Johnson's motion for directed verdict before proceeding

to the defense case.

And third, insofar as *Averett* applies, this Court should decline to follow it. As *Averett* recognized, *Patrick* found the judge erred in reserving ruling on the *Montgomery* motion, *and* found that error was "constitutional," requiring application of the "harmless-error standard for constitutional errors." 237 Ill. 2d at 10. Nevertheless, *Averett* then declared *Patrick* did *not* find the error was constitutional in nature. *Id.* at 15.

Averett's reasoning does not withstand scrutiny. The majority relied upon *Ohler* and *Rosenberg*. 237 Ill. 2d at 15-16 (citing *Ohler v. United States*, 529 U.S. 753, 759 (2000); *Rosenberg*, 213 Ill. 2d at 81). But neither of those cases involved a judge *withholding* information from the defense. Instead, each judge *ruled on the motion*, and the alleged error concerned the merits of that ruling. 529 U.S. at 755; 213 Ill. 2d at 80-81. The error here, as in *Patrick*, was not in the merits of a ruling, but the judge's act of declining to rule, thus withholding information from the defense. *Averett* failed to recognize this distinction. Contrary to *Averett*, requiring the defendant and counsel to make strategic decisions while the court withholds pertinent information is constitutional error for all of the reasons *Patrick* identified. This error is thus more akin to *Brooks*, where a statute violated the defendant's right to silence by forcing him to decide whether to testify before he had all relevant information. *Patrick*, 233 Ill. 2d at 69-70 (following *Brooks v. Tennessee*, 406 U.S. 605, 609-12 (1972) (also holding, at 611 n.6, claim was reviewable despite defendant's decision not to testify)). Insofar as *Averett* is irreconcilable with *Patrick*, this Court should follow *Patrick*. *Averett*, 237 Ill. 2d at 26-29 (Burke, J., joined by Freeman, J., dissenting).

Finally, contrary to the State, Johnson's other cited authorities remain instructive. (Def Br 19-22; St Br 30-33) The Code of Civil Procedure allows a court to reserve ruling on a motion for directed verdict at the close of all the evidence, but bars reserving ruling

on a mid-trial motion. Johnson is not nonsensically arguing those statutes indicate Section 115-4(k) both allows and bars reserving ruling. (St Br 32) Rather, the absence of language allowing reserved rulings, combined with the necessity to construe the statute strictly in favor of the accused, requires a finding that it bars reserved rulings on *mid-trial* motions, as other state high courts have concluded. *Johnson v. State*, 452 Md. 702, 715-21 (2017); *Commonwealth v. Yasin*, 483 Mass. 343, 351 (2019).

When Johnson moved for a directed verdict at the close of the State's case, he was requesting information vital to decisions he and counsel were about to make. The court had everything it needed to rule, and the State had no interest in delaying the ruling. When the court reserved ruling, it violated Section 115-4(k) and Johnson's rights to testify, to remain silent, and to effective assistance of counsel.

B. The trial court's violation of Section 115-4(k) prejudicially interfered with Johnson's exercise of his rights to testify, to silence, and to effective assistance of counsel, denying him a fair trial.

1. Forfeiture and Harmless Error

Contrary to the State, Johnson's claims are not forfeited. (St Br 12-15)

The State acknowledges Johnson raised both a statutory and a Fifth Amendment claim in the appellate court, but argues he did not raise a Sixth Amendment claim. (St Br 15) No forfeiture occurred in the appellate court. Below, as here, Johnson argued the judge not only violated Section 115-4(k), but also interfered with his exercise of his rights to testify and to remain silent, preventing him from making a knowing waiver of either right, and interfered with his right to effective assistance of counsel. (Def App Ct Br 23-31) Johnson noted *Patrick*'s finding that deferring ruling on a similar motion is error of "constitutional" magnitude. (Def App Ct Br 30) (citing *People v. Patrick*, 233 Ill. 2d 62, 69-70, 75 (2009)). *Patrick*, in turn, noted that a "defendant's

right to testify ... or not ... is rooted in the fifth, sixth, and fourteenth amendments." 233 Ill. 2d at 69 (citing *Rock v. Arkansas*, 483 U.S. 44, 51-53 (1987)). Because the appellate court had "a full and fair opportunity to consider" Johnson's claims under the Fifth, Sixth, and Fourteenth Amendments, no forfeiture occurred. *People v. Denson*, 2014 IL 116231, ¶ 13.

Alternatively, if this Court finds Johnson's Sixth Amendment claim forfeited, it should review that claim as a matter of efficiency. If Johnson is denied relief solely due to appellate counsel's failure to cite the Sixth Amendment below, Johnson would have a meritorious claim of ineffective assistance of appellate counsel in a post-conviction petition. This Court should thus excuse any forfeiture to avoid future litigation. *People v. Cregan*, 2014 IL 113600, ¶ 18.

The State is likewise incorrect that Johnson's claims were forfeited by trial counsel. Counsel moved for a directed verdict at the close of the State's evidence. (R 613) After the court announced it would take the motion "under advisement," the State twice confirmed the court had decided to defer ruling. (R 615-16, 625-26)[1] If this Court agrees Section 115-4(k) requires a judge to rule on a motion for directed verdict before proceeding to the defense case, then counsel's motion triggered that duty, like the *Patrick* motion. (Def Br 25) (citing 233 Ill. 2d at 66, 74-75). Counsel then preserved this claim in his post-trial motion, specifically arguing the court's action led him to advise Johnson to waive his right to testify. (C 258; R 682)

Despite that counsel made the motion and the court twice confirmed it reserved ruling, the State argues Johnson forfeited his claim because trial counsel did not object

[1] The State asserts it was "defense counsel" who asked the second question and who acquiesced in the judge's decision, (St Br 9, 12 n.3), but it was the prosecutor who engaged the court both times. (R 615-16, 625-26)

to the court's decision to reserve ruling. (St Br 12-13) A typical trial error is preserved only if the defendant makes a timely objection, then raises it in his post-trial motion. (St Br 12-13) (citing *People v. Jackson*, 2022 IL 127256, ¶ 15 (failure to object to incomplete polling of jury); *People v. Williams*, 2022 IL 126918, ¶ 48; *People v. Nelson*, 235 Ill. 2d 386, 436-37 (2009) (failure to object to prosecutor's improper remarks)). Such errors are unprompted, so counsel must bring them to the court's attention. But motions *made by defense counsel* are different. By making the motion, counsel meets his burden to bring the issue to the court's attention, triggering the court's duty to rule. And where, as here, counsel makes a motion, and the court's action on that motion is of "constitutional magnitude," *Patrick*, 233 Ill. 2d at 75, the claim is preserved by that motion and the post-trial motion alone. *Denson*, 2014 IL 116231, ¶¶ 13, 18.

The State notes *Patrick* did not address forfeiture. (St Br 14) It is telling that forfeiture was not at issue there, where the facts were nearly identical: counsel made a *Montgomery* motion, then did not object when the court deferred ruling. 233 Ill. 2d at 66-69. When a court declines to rule after "it has sufficient information to make a ruling," that "constitutes an abuse of discretion." *Id.* at 73. That is, the court's abuse of discretion is complete when it defers ruling. The defendant thus preserves the issue by making the motion, then raising the claim in his post-trial motion. *People v. Sanders*, 2021 IL App (5th) 180339, ¶¶ 13-21. Just as the absence of an objection in *Patrick* did not result in forfeiture, nor should it here.

The State is likewise incorrect in asserting that Johnson's decision not to testify bars his claim. (St Br 15-16) (citing *People v. Averett*, 237 Ill. 2d 1, 14, 18-19 (2010)). *Averett*, like *Patrick* and *Phillips*, concerned a judge reserving ruling on a *Montgomery* motion. 237 Ill. 2d at 9-12. In *Averett* and *Phillips*, the same five-Justice majority found each defendant's decision not to testify rendered his claim "unreviewable." *Id.* at 18

(citing *Patrick*, 233 Ill. 2d at 79; *People v. Whitehead*, 116 Ill. 2d 425, 443-44 (1987)).

But that holding turned on the nature of the motion. In those cases, the *potential* error – improper impeachment – could *only* arise if the defendant testified. The defendant's choice not to testify thus "deprived the reviewing court of a reviewable record." *Averett*, 237 Ill. 2d at 11; *see Patrick*, 233 Ill. 2d at 79 (quoting *Whitehead*, 116 Ill. 2d at 443-44) (to preserve claim of improper impeachment, witness must testify to raise possibility of error).

Here, by contrast, if Section 115-4(k) and the rights it protects require a court to rule on a motion for directed verdict before proceeding to the defense case, the court's error is complete when it defers ruling. That is, if reserving ruling violates either the statute or the constitution, or both, then nothing in the defense evidence, or its absence, would make this error any more reviewable. *Commonwealth v. Yasin*, 483 Mass. 343, 351-52 (2019).

Alternatively, if this Court finds *Averett-Phillips* applies here, it should decline to follow that rule. *Patrick* detailed the prejudicial impact to the defendant's rights of a judge's refusal to rule on a *Montgomery* motion prior to the defense case. 233 Ill. 2d at 70-71. *Patrick* granted the defendant a new trial based solely upon the prejudice caused by the court "unjustifiably requir[ing]" him to decide whether to testify without "vital" information the court had no reason to withhold – information that *may* have changed the defendant's mind about whether to testify. *Id.* at 75.

In other words, deferring ruling is prejudicial because it "denies the defendant the information necessary to make a knowing and intelligent decision on *whether* to testify." *Averett*, 237 Ill. 2d at 27 (Burke, J., joined by Freeman, J., dissenting) (emphasis in original). That is why the reviewability of the claim does not depend on the defendant's choice. *Id.* As the *Patrick* dissent noted, the *Phillips* majority went

astray when it conflated the *denial* of a motion with a *deferral* of the ruling. 233 Ill. 2d at 86-88 (Burke, J., joined by Freeman, J., concurring in part and dissenting in part).

Where the court denies the motion, the defendant must testify to preserve the claim because the reviewing court can only determine whether the impeachment was improper if the impeachment *actually occurred*. But where the court *defers* ruling, as in *Patrick* and here, the error lies in the impact of that deferral on the defendant's exercise of his rights, and that error is complete whether or not he testifies. Because the reasoning of the *Phillips-Averett* majority does not withstand scrutiny, and because Johnson's exercise of his rights was prejudiced in the same way as the *Patrick* defendant's, this Court should decline to follow *Phillips-Averett* and find Johnson's decision to remain silent does not bar his claim. *Yasin*, 483 Mass. at 351-52 (citing *Smith v. Massachusetts*, 543 U.S. 462, 471-72 (2005)).

Because Johnson's claim is preserved, the State must prove the error was harmless beyond a reasonable doubt, (St Br 43), a burden the State cannot meet for two reasons. First, it cannot show the error played no role in the outcome. (Def Br 28-30) When a court withholds information vital to the defendant's exercise of his rights, with no countervailing interest supporting a deferred ruling, that is highly prejudicial error. *Patrick*, 233 Ill. 2d at 69-70; *People v. Rascher*, 223 Ill. App. 3d 847, 855 (4th Dist. 1992). That prejudice is manifest here, where Johnson's defense depended upon persuading jurors he did not mean to shoot Bell. Johnson's testimony would have affected the jurors' credibility determination, and obtaining a ruling from the court on his motion for directed verdict may have affected Johnson's decision to testify. That was prejudicial even where Johnson's testimony, as in *Patrick*, "was not absolutely necessary." 233 Ill. 2d at 75.

The State argues the error played no role in the outcome because Johnson had already decided not to testify, asserting that "[i]mmediately" after the court announced it would reserve ruling, counsel reported they had discussed Johnson's possible testimony and he decided not to testify. (St Br 38, 43) But even if counsel discussed this issue with Johnson prior to the motion, that is not objective proof they had no discussion of the effect of the reserved ruling, or that Johnson had irrevocably decided not to testify. Indeed, the record shows counsel "advised" Johnson on the effect of the reserved ruling and, based on that advice, he "chose not to testify." (R 682)

The State similarly argues the error did not affect the verdict because the court's actions on the motion occurred outside the jury's presence. (St Br 44) Johnson, however, is not claiming the judge's actions prejudiced the *jurors*. He is arguing the judge's actions prejudiced *him* in his exercise of his constitutional rights. That prejudice prevents the State from proving the error was harmless. *Patrick*, 233 Ill. 2d at 75.

Just as the State cannot prove the error played no role in the outcome, nor did its evidence overwhelmingly prove Johnson committed attempted murder, and only attempted murder. (Def Br 30-33) After hearing the evidence, the court concluded it "didn't know how this happened," and described Johnson as "playing with guns." (R 715-16) That weighs against finding the evidence was overwhelming. But even setting those comments aside, the State cannot meets its burden because the outcome depended upon the jury's assessment of Johnson's credibility in his final statement to the police, and no objective evidence refuted his claim that this was an accident.

The State asserts Johnson "racked the gun" and "admitt[ed] to shooting Bell" in the head, which "supports the conclusion that" he "d[id] so with an intent to kill." (St Br 45-46) (quoting *People v. Ephraim*, 323 Ill. App. 3d 1097, 1110 (1st Dist. 2001); *People v. Ramirez*, 2013 IL App (4th) 121153, ¶ 84). The State is wrong in two ways.

First, Johnson never admitted to shooting Bell. Instead, he said he pointed the gun at Bell only to scare him, and thought the "gun was on safety." (PE10 2:50-5:00) And the State's reliance upon *Ephraim* and *Ramirez* is misplaced because those cases concerned the *sufficiency* of the evidence. 323 Ill. App. 3d at 1110; 2013 IL App (4th) 121153, ¶¶ 81-86. Here, the State must prove its evidence was so overwhelming that no reasonable jury could have found Johnson not guilty, or guilty of a lesser offense.

Johnson, unlike the *Ephraim* defendant, denied intentionally firing the gun, and no objective evidence refuted this. 323 Ill. App. 3d at 1110-11. And while the presence of the unfired bullet indicated Johnson racked the gun, that was just as consistent with Johnson's stated intent to scare Bell as it was to having intent to kill. If evidence the defendant fired a gun alone "is generally not sufficient to prove a specific intent to kill," then evidence consistent with Johnson's claim of accident cannot constitute overwhelming evidence of such intent. *Id.* at 1110.

The State also points to Johnson's post-shooting conduct. (St Br 45) (citing *People v. Garcia*, 407 Ill. App. 3d 195, 198-202 (1st Dist. 2011)). Again, however, *Garcia* concerned the sufficiency of the evidence, not harmless error. *Id.* at 200-03. Evidence of consciousness of guilt may indicate a reasonable jury could have convicted. But circumstantial evidence of a general consciousness of guilt, as the State had here, did not overwhelmingly prove Johnson could *only* have been acting with intent to kill. (Def Br 31-32) Johnson's behavior was just as consistent with his statement that he "panicked" after the gun fired. (PE10 6:52, 20:06)

Finally, the State claims "the mere fact" Johnson "regretted his actions … does not establish" he never intended to kill. (St Br 46) But it is not Johnson's burden to "establish" he had no intent to kill. It is the State's burden to establish its evidence so overwhelmingly proved intent to kill that no reasonable jury could have found Johnson

not guilty, or guilty only of aggravated battery. Because the State had no objective evidence refuting Johnson's claim of accident, and because the State's circumstantial evidence of intent to kill was equally consistent with Johnson's statements that he only wanted to scare Bell, the State cannot prove the error was harmless beyond a reasonable doubt.

2. Plain Error

Alternatively, even if this Court finds forfeiture, it should remand for a new trial under the plain-error doctrine. (Def Br 33-40)

The State's description of plain-error review conflates the two "analytical step[s]" of that doctrine. *People v. Sebby*, 2017 IL 119445, ¶ 49. A court may consider a forfeited claim when "clear or obvious" error occurred, and either the evidence was closely balanced, or the error compromised the integrity of the proceedings. *Id.* ¶ 48. The first question is whether clear or obvious error occurred. *Id.* at ¶ 49. The second question is whether that error was reversible under either prong of the plain-error doctrine. *Id.* ¶¶ 50-51.

It is undisputed that a "defendant cannot obtain relief on an unpreserved error under the plain-error doctrine if he would not have been entitled to relief on the same error if preserved." *People v. Williams*, 2022 IL 126918, ¶ 49. But the State incorrectly rephrases this rule: "In other words, if an error would not clearly or obviously be *reversible* if preserved, then it is not *clear or obvious error* for purposes of plain-error review." (St Br 17-18, 43) (emphases added) The State then variously describes the question as whether the court "clearly or obviously commit[ted] reversible error," or whether the court "clearly or obviously err[ed]." (St Br 18, 21, 25, 43, 47) Only the latter is correct. The first question in plain-error review is whether error *occurred*. Only after finding clear or obvious error does the question become whether the error

is *reversible*. *Williams*, 2022 IL 126918, ¶¶ 49-57. The analysis of whether clear or obvious error *occurred* does not depend upon first finding the error would have been *reversible* had the claim been preserved. *People v. Jackson*, 2022 IL 127256, ¶¶ 21-23 n.1.

Here, the appellate court declined to answer whether error occurred, and instead limited itself to finding any error was not "clear or obvious" because of a split in authority. *People v. Johnson*, 2023 IL App (4th) 221021-U, ¶¶ 45-54. But if Section 115-4(k) and our constitutions require a judge to rule on a motion for directed verdict before proceeding to the defense case, then the judge's failure to do so is clear or obvious error, even if there was contrary precedent. (Def Br 33-35) The State does not contest this.

Instead, the State focuses upon Johnson's secondary point that insofar as there was a split in the appellate court, this trial court was bound by Third District authority. (Def Br 35-36) The State argues *Trump* merely "cautioned in dicta against reserving ruling" on mid-trial motions, which was not "binding." (St Br 18-19) (citing *People v. Lighthart*, 2023 IL 128398, ¶¶ 50-51). This ignores the difference between *obiter dictum* and judicial *dictum*. The former is not binding because it is unrelated to a point at issue. *Cates v. Cates*, 156 Ill. 2d 76, 80 (1993). Judicial *dictum*, by contrast, is related to "a point … argued by counsel and deliberately passed upon by the court, though not essential to the disposition." *Id.* *Trump* concerned whether a judge may reserve ruling on a motion for directed verdict, and it deliberately passed upon that question. 62 Ill. App. 3d at 748. While its discussion of mid-trial motions was not essential to its holding, it remains judicial *dictum* that "is entitled to much weight, and should be followed unless found to be erroneous." *Cates*, 156 Ill. 2d at 80. But even if *Trump*'s comments constitute *obiter dictum*, that was binding on this trial court because there

was no contrary authority from the Third District. *Cates*, 156 Ill. 2d at 80.

Because the trial court clearly erred when it failed to rule on Johnson's motion for directed verdict at the close of the State's evidence, this Court should remand for a new trial because the evidence as to Johnson's mental state during the incident was closely balanced. (Def Br 36-37); *see supra* B.1.

Alternatively, the error was "structural," and thus presumptively prejudicial, under the second prong of the plain-error doctrine. (Def Br 37-40) The State does not allege Johnson forfeited second-prong plain-error review, (St Br 47-48), so his request for such review is properly before this Court. *People v. McKown*, 236 Ill. 2d 278, 308 (2010).

The State argues the error was not structural because this Court found no structural error in *Averett*. (St Br 47-48) (citing *People v. Averett*, 237 Ill. 2d 1, 13-14 (2010)). *Averett* acknowledged the judge's error in deferring ruling on the motion was "serious." 237 Ill. 2d at 13. Presumably, that was true for the reasons identified by *Averett* and *Patrick*: a court's ruling on such a motion constitutes "information necessary [for the defendant] to make the critical decision on testifying" and "allows a defendant [and counsel] to make reasoned tactical decisions in planning the defense." *Id.* at 10; *People v. Patrick*, 233 Ill. 2d 62, 69-70 (2009). Depriving a defendant of such information when there is no reason to do so prevents him from making a knowing waiver of his right either to testify or to remain silent. *Id.* at 71-72. "It is a matter of simple fairness." *Id.* at 71 (quotation omitted).

As *Averett* noted, *Patrick* indicates this error "affect[s] the *fairness* of the ... trial and challenge[s] the integrity of the judicial *process*." 237 Ill. 2d at 18 (emphases added). That is why this case is similar to *Bracey*, which found second-prong plain error in a judge's failure to provide the defendant information necessary to his decision

to waive a fundamental right. *People v. Bracey*, 213 Ill. 2d 265, 270-73 (2004).

But in apparent contradiction of the language in *Patrick* it approvingly cited, *Averett* found the error did *not* "render [the] trial fundamentally unfair" and did "not affect the framework of the trial process." 237 Ill. 2d at 13-14. *Averett* purported to distinguish *Patrick*, but did so based upon a misreading of that decision. According to *Averett*, *Patrick* performed a "harmless-error review." *Id.* at 14-15. But "[t]his is emphatically *not* what occurred." *Id.* at 28 (Burke, J., joined by Freeman, J., dissenting) (emphasis in original). No reasonable reading of *Patrick* allows a finding that it conducted a "typical harmless-error review" based on the State's evidence or the role the error played in the verdict. *Id.* Instead, *Patrick* found the error was "inherently prejudicial and ... infected the entire proceeding," and thus could not be harmless, *solely* because of its impact on the defendant's exercise of his rights. *Id.* at 28-29.

Under *Patrick*, the court's error here, as in *Bracey*, constituted second-prong plain error because it was inherently prejudicial to Johnson's exercise of his fundamental rights. This Court should remand for a new trial.

CONCLUSION

For the foregoing reasons, Devin Johnson, Defendant-Appellant, respectfully requests that this Court remand to the circuit court for a new trial.

Respectfully submitted,
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CERTIFICATE OF COMPLIANCE

I certify that this reply brief conforms to the requirements of Rules 341(a) and (b). The length of this reply brief, excluding 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, and the certificate of service, is 20 pages.

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No. 130447

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, -vs- DEVIN JOHNSON, Defendant-Appellant.	)))))))))))	Appeal from the Appellate Court of Illinois, No. 4-22-1021. There on appeal from the Circuit Court of the Fourteenth Judicial Circuit, Rock Island County, Illinois, No. 21-CF-48. Honorable Frank R. Fuhr, Judge Presiding.

NOTICE AND PROOF OF SERVICE

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Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. On April 17, 2025, the Reply Brief for Defendant-Appellant 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 petitioner-appellant in an envelope deposited in a U.S. mail box in Chicago, Illinois, with proper postage prepaid. Additionally, upon its acceptance by the court's electronic filing system, the undersigned will send 13 copies of the Reply Brief to the Clerk of the above Court.

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