No. 128316

IN THE

SUPREME COURT OF ILLINOIS

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| PEOPLE OF THE STATE OF ILLINOIS,<br><br>Plaintiff-Appellee,<br><br>-vs-<br><br>SHAUN N. TAYLOR,<br><br>Defendant-Appellant. | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | Appeal from the Appellate Court of Illinois, Third Judicial District, No. 3-19-0281.<br><br>There on appeal from the Circuit Court of the Fourteenth Judicial Circuit, Henry County, Illinois, No. 17 CF 348.<br><br>Honorable Terence M. Patton, Judge Presiding. |

# REPLY BRIEF FOR DEFENDANT-APPELLANT

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## ARGUMENT

### I. Application of the attempt statute's sentence enhancement for the attempt murder of a peace officer prohibits the simultaneous application of one of the attempt statute's other sentence enhancements for the use of a firearm in the commission of the offense.

At the outset, the State asserts that "[l]egislative intent is the overriding concern when interpreting statutes" and "the plain and ordinary meaning of the statutory language is the best indicator of the legislature's intent" (State's Br. at 11). When identifying the primary purpose of statutory interpretation, the State incorrectly elevates the importance of the legislature's intent above the statute's language. The legislature's intent is not the law. And statutory language is not evidence of the law. Statutory language *is the law*. Thus, the overriding concern when interpreting a statute is ascertaining the meaning of the statute. See *People v. Deroo*, 2022 IL 126120, ¶ 24 ("The meaning of a rule or statute is determined first by examining the language of the provision itself, not extratextual sources."); *People v. Woodward*, 175 Ill. 2d 435, 443 (1997) ("There is no rule of construction which allows the court to declare that the legislature did not mean what the plain language of the statute imports."); *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 98 (2003) ("Our precedents make clear that the starting point for our analysis is the statutory text. . . . And where, as here, the words of the statute are unambiguous, the 'judicial inquiry is complete.'"); Oliver Wendell Holmes, *The Theory of Legal Interpretation*, 12 Harv. L. Rev. 417, 419 (1899) ("We do not inquire what the legislature meant; we ask only what the statute means."). Certainly, the plain and ordinary meaning of the statute's language is the best indicator of the statute's meaning. Of course, a statute should not be so strictly construed as to be given a meaning contrary to its obvious purpose or an obvious legislative intent. *DuBois v. Gibbons*, 2 Ill. 2d 392, 305 (1954).

The State argues that by using the word "and" between subsections (c)(1)(D) and (c)(1)(E), the legislature plainly stated its intent that subsections (c)(1)(A) through (c)(1)(E) apply conjunctively, with "the elements of the list to work in combination" (State's Br. at 13). However, reading subsections (c)(1)(A) through (c)(1)(E) conjunctively leads to absurd results. Subsection (c)(1)(E) cannot be read conjunctively with subsections (c)(1)(A) through (c)(1)(D) because the former is a Class 1 felony and the latter are Class X felonies. 720 ILCS 5/8-4(c)(1)(A)–(E) (2017). Furthermore, subsections (c)(1)(B) through (c)(1)(D) cannot be read conjunctively because combining them would sanction an absurd double enhancement. See *id.*; *People v. Koppa*, 184 Ill. 2d 159, 174 (1998) (stating that an improper double enhancement occurs where the same factor is twice used to enhance a penalty). The State acknowledges this in its brief (State's Br. at 22, 26–27). Thus, the State is not arguing for a conjunctive reading of section 8-4(c)(1) but, rather, a selectively conjunctive reading.

The plain language of the statute does not support the selectively conjunctive reading offered by the State. Essentially, the State is arguing that the word "and" should be inserted after the semicolon in subsection (c)(1)(A); the word "or" should be inserted after the semicolons in subsections (c)(1)(B) and (c)(1)(C); and the word "and" appearing after the semicolon in subsection (c)(1)(D) should be replaced with the word "or." Such a drastic rewriting of the statute is not permissible. See *People v. Carpenter*, 228 Ill. 2d 250, 271 (2008) ("[C]ourts may not rewrite statutes to make them consistent with the court's idea of orderliness and public policy."); *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 138 S. Ct. 617, 629 (2018) ("[T]his Court is not free to 'rewrite the statute' to the Government's liking."). Had the legislature

intended a reading of subsection 8-4(c)(1) that was both conjunctive in one instance and disjunctive in others, it would have expressly done so. It did not. Instead, it used a single conjunction after subsection (c)(1)(D). 720 ILCS 5/8-4(c)(1)(A)–(E) (2017). Although that conjunction, "and," generally signifies a conjunctive reading, such a reading leads to absurd results. Consequently, this Court should construe the "and" as an "or," rendering subsections (c)(1)(A) through (c)(1)(E) disjunctive, which would avoid each of the problems that the parties acknowledge a conjunctive reading would cause. To be sure, this Court has explained, "It is the settled law of this State that the words 'or' and 'and' will not be given their literal meaning when to do so renders the sense of a statutory enactment dubious. The strict meaning of such words is more readily departed from than that of other words." *John P. Moriarty, Inc. v. Murphy*, 387 Ill. 119, 129 (1944). Thus, the word "and" is sometimes considered to mean "or." *Id.* at 129–30. A disjunctive reading of subsections (c)(1)(A) through (c)(1)(E), by interpreting "and" to mean "or," is the only reasonable interpretation that does not run afoul of the rules of statutory interpretation.

In further opposition to a disjunctive reading, the State argues that the legislature's amendment to section 8-4(c)(1), where it added subsection (c)(1)(E) and inserted the word "and," illustrates that the legislature disagreed with *People v. Douglas*, 371 Ill. App. 3d 21 (1st Dist. 2007), and "confirms the General Assembly's intent to apply the mandatory firearm enhancements to attempted murders of peace officers" (State's Br. at 21). This Court should not be persuaded.

The addition of subsection (c)(1)(E), providing for an instance where attempt first-degree murder is mitigated to a Class 1 felony, does not speak to whether subsections (c)(1)(B) through (c)(1)(D) can be combined with subsection (c)(1)(A).

And, as previously explained, if the insertion of the word "and" was interpreted to convey that subsections (c)(1)(A) through (c)(1)(E) should be read conjunctively, requiring each subsection to be applied with any other, it would lead to absurd results. A disjunctive reading is the most appropriate reading.

Significantly, if the legislature wanted an aggravated form of attempt first-degree murder on the basis of both victim status and the role of a firearm in the offense, it would have clearly done so in section 8-4(c)(1), as it has explicitly done for other offenses. For example, the baseline offense of predatory criminal sexual assault of a child includes the victim's age (less than 13 years old) as an element of the offense and results in a sentence of 6 to 60 years' imprisonment. 720 ILCS 5/11-1.40(a)(1), (b)(1) (2023). In the very next subsection, the statute expressly lists four aggravated forms of predatory criminal sexual assault of a child, nesting the victim-age element (less than 13 years old) with an additional element. 720 ILCS 5/11-1.40(a)(2)(A)–(D) (2023). In particular, subsection (a)(2)(A) nests the victim's age with the element that the defendant was armed with a firearm. 720 ILCS 5/11-1.40(a)(2)(A) (2023). And subsection (a)(2)(B) nests the victim's age with the element that the defendant personally discharged a firearm during the offense. 720 ILCS 5/11-1.40(a)(2)(A) (2023). Ultimately, the statute provides that 15 years and 20 years shall be added to the prison sentence imposed by the trial court for violations of subsection (a)(2)(A) and (a)(2)(B), respectively. 720 ILCS 5/11-1.40(b)(1) (2023).

Another example can be found in the aggravated-assault statute. The statute expressly provides for different aggravated-assault offenses on the basis of victim status, the defendant's use of a deadly weapon, and *both* victim status and the

defendant's use of a deadly weapon. 720 ILCS 5/12-2(b)–(d) (2023). In particular, subsection (b)(4.1) makes the victim's status as a peace officer an element of one aggravated-assault offense, a Class 4 felony. 720 ILCS 5/12-2(b)(4.1), (d) (2023). Subsection (c)(1) makes the defendant's use of a firearm (other than discharging the firearm) an element of another aggravated-assault offense, a Class A misdemeanor. 720 ILCS 5/12-2(c)(1), (d) (2023). And subsection (c)(6) nests both the defendant's use of a firearm (other than discharging the firearm) and the victim's status as a peace officer as elements of, yet, another aggravated-assault offense, a Class 4 felony. 720 ILCS 5/12-2(c)(6), (d) (2023).

Thus, the legislature has demonstrated the ability to clearly enact an offense that is aggravated on the basis of both victim status and the role of a firearm in the offense. A comparison of the two statutes discussed above with the attempt-murder statute illustrates that the legislature did not disagree with the *Douglas* court's holding that subsections (c)(1)(A) through (c)(1)(D) delineate different offenses that cannot be combined. *Douglas*, 371 Ill. App. 3d at 26. The plain language of section 8-4(c)(1) does not provide for an offense of attempt first-degree murder on the basis of both victim status and the role of a firearm in the offense. 720 ILCS 5/8-4(c)(1)(A)–(E) (2017).

The State next argues that a disjunctive reading of subsections (c)(1)(A) through (c)(1)(E) is inappropriate because it "defies common sense" for the minimum sentence to be 20 years' imprisonment for attempting to murder a peace officer with a firearm but for the minimum sentence to be 26 years' imprisonment for attempting to murder an ordinary civilian using a firearm (State's Br. at 17–18). However, there is nothing nonsensical about reading the statute disjunctively.

The reason for the minimum-sentence disparity in the State's scenario (where the murder is attempted with the discharge of a firearm) is that subsection (c)(1)(A) was designed to address *all cases* of attempt first-degree murder of peace officers, whether it be by a defendant's bare hands, a rope, a knife, a firearm, or some other instrument. See 720 ILCS 5/8-4(c)(1)(A) (2017). The legislature provided a broad sentencing range—20 to 80 years' imprisonment—to fashion a sentence for the attempt murder of a peace officer. *Id.* This broad sentencing range allows trial courts to account for differing degrees of severity in attempt murders of peace officers, given the instrumentality the defendant used in the offense. In contrast, subsection (c)(1)(C) is confined to the attempt murder of an ordinary citizen where a firearm is discharged; it does not address less severe offenses where a firearm is not used. See 720 ILCS 5/8-4(c)(1)(C) (2017). Consequently, the sentencing range for a violation of subsection (c)(1)(C) is much narrower, as the severity of the offense is more concrete because the instrument used to commit the offense is fixed. Significantly, the State's argument neglects that when the offense involves the discharge of a firearm, the maximum sentence for the attempt murder of a peace officer is *30 years more* than the maximum sentence for the attempt murder of an ordinary citizen. See 720 ILCS 5/8-4(c)(1)(A), (C) (2017); 730 ILCS 5/5-4.5-25(a) (2023). Therefore, section (c)(1)(A) does account for the difference in severity of an attempted murder when the defendant discharges a firearm and the victim is a peace officer, rather than an ordinary citizen. There is no need to intermingle subsection (c)(1)(A) with subsections (c)(1)(B) through (c)(1)(D) to punish defendants who use a firearm to attempt to murder a peace officer.

Although not discussed by the State in its brief, defendant would be remiss not to address that subsection (c)(1)(D) provides for a maximum sentence of natural life imprisonment where a defendant personally discharges a firearm, causing great bodily harm. 720 ILCS 5/8-4(c)(1)(D) (2017). Admittedly, subsection (c)(1)(A) does not allow for a sentence of natural life imprisonment. 720 ILCS 5/8-4(c)(1)(A) (2017). Nevertheless, the maximum 80-year sentence in subsection (c)(1)(A) is a *de facto* life sentence. Further, should a state's attorney wish to pursue a natural life sentence for a defendant who has attempted to murder a peace officer by personally discharging a firearm, causing great bodily harm to the officer, nothing prevents that state's attorney from prosecuting the defendant for a violation of subsection (c)(1)(D). Certainly, our legislature knew this when drafting, and later amending, the statute. Thus, when read disjunctively, the plain language of section 8-4(c)(1) does not create a nonsensical scenario where trial courts must impose more severe sentences for defendants who attempt to murder ordinary citizens than it does for defendants who attempt to murder peace officers.

With regard to defendant's argument on the basis of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Alleyne v. United States*, 570 U.S. 99 (2013), the State argues that these cases are "inapposite" (State's Br. at 25). In his opening brief, defendant argued that pursuant to *Apprendi* and *Alleyne*, subsections (c)(1)(A) through (c)(1)(D) "each constitute a distinct and aggravated crime with its own sentencing scheme" (Op. Br. at 13). To be sure, the Supreme Court has repeatedly said that when a factual finding alters a legally prescribed punishment for an offense so as to aggravate it, a new, separate, and aggravated offense is formed. *Alleyne*, 570 U.S. at 113–16. In its response brief, the State neither acknowledges

nor contests this legal principle (State's Br. at 26). Thus, as a matter of constitutional law, subsections (c)(1)(A) through (c)(1)(D) constitute four distinct aggravated crimes, each containing an element that the other does not, with their own prescribed punishment. The legislature's placement of these offenses within the sentencing provision of section 8-4 does not dictate a different conclusion. See *Apprendi*, 530 U.S. at 495 ("[W]e agree wholeheartedly . . . that merely because the state legislature placed its hate crime sentence 'enhancer' 'within the sentencing provisions' of the criminal code 'does not mean that the finding of a biased purpose to intimidate is not an essential element of the offense.'"). It is important that this Court interpret the attempt statute through this lens, as a statutory construction that raises a legitimate doubt as to a statute's constitutional validity is disfavored. *People v. Scheib*, 76 Ill. 2d 244, 252 (1979).

The State argues that "neither *Apprendi* nor *Alleyne* prohibits combining multiple, adequately proven facts to increase the sentencing range that applies to a defendant's conduct" (State's Br. at 26). However, the State is trying to combine two separate offenses delineated in subsections (c)(1)(A) and (c)(1)(C), and their separate prescribed punishments, to create a new offense with a new punishment, which our legislature did not expressly provide for in the attempt statute. Of course, a crime may be comprised of lesser offenses in combination, either with each other or other elements. *Spies v. United States*, 317 U.S. 492, 497 (1943). But it is the legislature, not the prosecution, that establishes and defines offenses. *Sanabria v. United States*, 437 U.S. 54, 69 (1978). "If the legislature undertakes to define by statute a new offence, and provide for its punishment, it should express its will in language that need not deceive the common mind. Every man should be able to know with certainty when he is committing a crime." *United States v. Reese*,

92 U.S. 214, 220 (1875). Here, the plain language of section 8-4(c)(1) delineates five distinct crimes and their respective sentences: the baseline offense of attempt first-degree murder and four aggravated forms of attempt first-degree murder, one on the basis of victim status and the three others on the basis of the role of a firearm in the offense. 720 ILCS 5/8-4(c)(1)(A)–(D) (2017). The legislature did not expressly delineate additional aggravated attempt first-degree murder offenses, each comprised of both a victim-status element and an element concerning the role of a firearm in the offense.

Next, the State argues that because subsections (c)(1)(A) and (c)(1)(C) address "distinct dangers," violence against particular victims and the danger posed by the use of a firearm, the legislature must have intended them to apply together in cases such as this, where a victim falls within the scope of subsection (c)(1)(A) and the defendant personally discharged a firearm (State's Br. at 14–15). The State's perception of what the legislature intended is driving this argument, not the plain language of the statute, making the argument nothing more than an expression of a policy preference. Even the best policy argument for what a statute should mean cannot overcome the statute's plain meaning. See *Carpenter*, 228 Ill. 2d at 270–71 ("When a statute is unambiguous, it must be enforced as enacted, and a court may not depart from its plain language . . . . The responsibility for the wisdom or justice of legislation rests with the legislature[.]"); *Sandoz Inc. v. Amgen Inc.*, 137 S. Ct. 1664, 1678 (2017) ("Even if we were persuaded that Amgen had the better of the policy arguments, those arguments could not overcome the statute's plain language . . . ."). For the reasons previously discussed, both the plain language of the statute and constitutional concerns require that subsections (c)(1)(A) through (c)(1)(E) be interpreted disjunctively, with subsections (c)(1)(A) through (c)(1)(D) each constituting distinct, aggravated crimes.

Finally, the State argues that the rule of lenity is not implicated in this case because section 8-4(c)(1) is unambiguous (State's Br. at 28). For the reasons provided in defendant's opening brief and this reply brief, defendant agrees with the State that section 8-4(c)(1) is unambiguous, albeit for different reasons. The plain language of the statute demonstrates that subsections (c)(1)(A) through (c)(1)(E) are disjunctive. And, subsections (c)(1)(A) through (c)(1)(D) are each distinct aggravated crimes that cannot be intermingled. The decisions of *Apprendi* and *Alleyne* reinforce this. Nevertheless, defendant recognizes that this Court may conclude that the plain language of the statute is ambiguous and that traditional rules of statutory construction do not present a clear answer as to whether subsections (c)(1)(A) through (c)(1)(D) may be intermingled. In such a circumstance, the rule of lenity would apply, and any ambiguity must be resolved in defendant's favor. See *People v. Gaytan*, 2015 IL 116223, ¶ 39 (explaining that under the rule of lenity, courts adopt the more lenient interpretation of a criminal statute when, after consulting traditional canons of statutory construction, courts are left with an ambiguous statute). Of course, the State does not dispute that application of the rule of lenity would entail construing the statute in defendant's favor (State's Br. at 28).

Accordingly, defendant respectfully requests that this Court vacate the trial court's imposition of the 20-year firearm enhancement.

**II. An expert's concession that he is unsure he correctly diagnosed a defendant as not being insane at the time of the offense warrants the appointment of a second expert to examine the defendant for insanity at the time of the offense.**

At the outset, defendant would be remiss not to respond to an assertion in the State's statement of facts. Specifically, the State asserts that Dr. Witherspoon "noted that defendant's self-reported use of 'psychostimulants' at the time of the shooting precluded his ability to plead NGRI" (State's Br. at 4). The "psychostimulants" defendant reported using were caffeine, ibuprofen, cayenne pepper, and dandelion—rather innocuous substances (SC18). Significantly, Dr. Witherspoon opined that it was "unknowable" whether defendant's use of these items may have triggered a brief psychotic episode or circumscribed delusion (SC21). The most Dr. Witherspoon could say about their effect was that they "*may have* led to hyperarousal and accentuated [defendant's] described reactivity" (SC19) (emphasis added). In contrast, the doctor gave a more definitive opinion with regard to the effect of defendant's mental illness, opining, "Certainly [defendant's] history of [PTSD] suggested that that problem may have contributed to his reactivity" (SC21). Under this Court's precedent, voluntary drug use will preclude an insanity defense where it resulted in the defendant being in a state of "intoxication" or "toxic psychosis." *People v. Free*, 94 Ill. 2d 378, 406–07 (1983). Given Dr. Witherspoon's uncertainty and failure to opine that these innocuous substances actually induced a state of intoxication or toxic psychosis, it is puzzling that he would conclude that their use "would appear to obviate" an insanity defense (SC21). This is not a case of voluntary intoxication or toxic psychosis.

The State argues that defendants may seek the appointment of experts pursuant to 725 ILCS 5/115-6 (State's Br. at 31–32). The State is wrong. By its

plain language, section 115-6 addresses only State requests for experts. An indigent defendant's statutory right to obtain experts is contained in section 113-3. 725 ILCS 5/113-3(d) (2018); *People v. Watson*, 36 Ill. 2d 228, 234 (1966) (holding that for noncapital felonies, section 113-3 provides a mechanism for indigent defendants to obtain state-funded experts). Thus, the State's contention that "defendant has waived (or at the very least forfeited) any argument that he had a statutory right to the appointment of a second expert" because he has argued that section 115-6 does not apply to him lacks merit (State's Br. at 36).

To be sure, section 113-3(d) provides for the appointment of expert witnesses, at the State's expense, for indigent defendants in noncapital felony cases where the expert is "necessary." 725 ILCS 5/113-3(d) (2018); *Watson*, 36 Ill. 2d at 234. Although this Court has opined that to obtain an expert under section 113-3(d), the issue the indigent defendant seeks an expert to address must be "crucial" or go to "the heart of the defense," it has not expressly addressed when an expert is "necessary" to prove such an issue. See, *e.g.*, *Watson*, 36 Ill. 2d at 234; *People v. Lawson*, 163 Ill. 2d 187, 221 (1994). It has, however, warned that indigence should not prevent a defendant from offering a defense, including expert testimony that "may have established his innocence." *Watson*, 36 Ill. 2d at 233–34; accord *Griffin v. Illinois*, 351 U.S. 12, 19 (1956) ("There can be no equal justice where the kind of trial a man gets depends on the amount of money he has.").

Significantly, federal law also provides indigent defendants with a statutory right to experts when the services of an expert are "necessary." 18 U.S.C. § 3006A(e) (2023). And, there is a well-established standard in federal courts for determining whether the services of an expert, particularly those of a psychiatrist, are "necessary." The test is an objective "private attorney" standard, which provides

that an indigent defendant is entitled to the services of an expert at the government's expense where (1) "a reasonable attorney would engage such services for a client having the independent financial means to pay for them" and (2) the "defendant may have a plausible defense." *United States v. Stapleton*, 56 F.4th 532, 541 (7th Cir. 2002); see also *United States v. Alden*, 767 F.2d 314, 318–19 (7th Cir. 1984) (applying private attorney standard); *United States v. Bass*, 477 F.2d 723, 725 (9th Cir. 1975) (same); *United States v. Durant*, 545 F.2d 823, 826–27 (2d Cir. 1976) (same); *Brinkley v. United States*, 498 F.2d 505, 510 (8th Cir. 1974) (same). Various state jurisdictions have applied this test or a variation of it premised on reasonableness and considering what a financially able defendant would do. See, *e.g.*, *City of Mount Vernon v. Cochran*, 855 P.2d 1180, 1185–86 (Wash. Ct. App. 1993); *State v. Sahlie*, 245 N.W.2d 476, 480 (S.D. 1976); *State v. McGhee*, 220 N.W.2d 908, 911–13 (Iowa 1974). Federal courts have opined that this test strikes an appropriate balance between the concerns that a defendant should not be prejudiced by his or her indigence and the government should not be forced to fund a "fishing expedition." See *Durant*, 545 F.2d at 827; *Alden*, 767 F.2d at 318–19. Notably, the First District of the Illinois Appellate Court has cited the private-attorney standard with favor. See *People v. Djurdjulov*, 2017 IL App (1st) 142258, ¶¶ 51–54 (discussing *Durant*, the private-attorney standard, and finding *Durant* "persuasive") (opinion of Neville, P.J.). Defendant urges this Court to adopt this test to assist Illinois courts in determining when the services of a state-funded expert for an indigent defendant are "necessary."

Next, the State argues that under *Ake v. Oklahoma*, 470 U.S. 68 (1985), and *McWilliams v. Dunn*, ___ U.S. ___, 137 S. Ct. 1790 (2017), "defendant's constitutional right is limited to *access* to an expert" (State's Br. at 32) (emphasis

in original). This is not an accurate statement of the law. Rather, if an indigent defendant's mental condition is relevant and "seriously in question," then "a defendant must receive the assistance of a mental health expert who is sufficiently available to the defense and independent from the prosecution to effectively 'assist in evaluation, preparation, and presentation of the defense.'" *McWilliams*, 137 S. Ct. at 1798–99.

The State next argues that Dr. Witherspoon "expressed no doubt as to his opinion that defendant was sane" and his note to defense counsel is insufficient to warrant another expert (State's Br. at 35). The State is wrong as it ignores the plain meaning of "borderline," which means "having an uncertain, indeterminate, or debatable status." Dictionary.com, http://www.dictionary.com/browse/borderline (last accessed Feb. 9, 2023). Moreover, the medical definition of "borderline" is "being in an intermediate position or state: not fully classifiable as one thing or its opposite" or "exhibiting typical but not altogether conclusive symptoms." Merriam-Webster Online Medical Dictionary, https://www.merriam-webster.com/dictionary/borderline#medicalDictionary (last accessed Feb. 9, 2023). Thus, by characterizing defendant as a "borderline case," Dr. Witherspoon signaled to defense counsel that his opinion of defendant's sanity was uncertain, debatable, and not conclusive (SC22). To be sure, defense counsel told the court that Dr. Witherspoon "thought it was important that a second evaluation be obtained because . . . it was a very, very close call" (R65). If Dr. Witherspoon had no lingering doubt about defendant's sanity, why would he suggest that defense counsel seek a second opinion? Certainly, Dr. Witherspoon was aware that psychiatry "is not . . . an exact science" and that "psychiatrists disagree widely and frequently on what constitutes mental illness, on the appropriate diagnosis to be attached to given behavior and symptoms, [and] on cure and treatment . . . ." *Ake*, 470 U.S. at 81.

The State next argues that *McWilliams* is distinguishable from the instant case because, here, "defense counsel never suggested that he needed a second opinion to understand Witherspoon's report or defendant's medical records" (State's Br. at 33). This Court should not be persuaded. The defense attorneys in both this case and *McWilliams* explicitly asked for an additional expert to provide a "second opinion" concerning the severity of their respective client's mental problems (R60–61, 65; SC11, 22). *McWilliams*, 137 S. Ct. at 1796. Of course, psychiatry plays a "pivotal role" in criminal trials. *Ake*, 470 U.S. at 79. In both *McWilliams* and this case, the need for a second opinion arose due to uncertainty created by prior expert opinion(s), leaving a defense on the basis of mental illness plausible and justifying the need for an additional expert. The only difference is that the uncertainty in this case arose due to the opinion of a single expert, whereas the uncertainty in *McWilliams* arose due to the suggestion by a single expert that the shared opinion of three prior experts was incorrect. *McWilliams*, 137 S. Ct. at 1794–98. If McWilliams's sanity remained "seriously in question" given the uncertainty created by a fourth expert's opinion, defendant's sanity remained in serious question as well after the uncertainly expressed by Dr. Witherspoon.

The State contends defendant is arguing that "he is entitled to the appointment of an expert who would render an opinion beneficial to his defense" (State's Br. at 33). The State insists experts are not required to "ensure" that an insanity defense is viable (State's Br. at 33). And it fears defendant's position "would require the serial appointment of additional experts, *ad infinitum*, until a favorable opinion could be found" (State's Br. at 34). The State mischaracterizes defendant's argument, and its fears are unwarranted.

Defendant is not arguing that he is entitled to an expert who will ensure his insanity defense is viable. Rather, he is arguing that indigent defendants are entitled to obtain an additional expert where the issue of sanity *remains a significant issue* after the initial expert expressed an uncertain or inconclusive opinion that the defendant was sane, leaving the expert unable to effectively assist in the preparation and presentation of an insanity defense that remained plausible. See *McWilliams*, 137 S. Ct. at 1798–99 (stating that an indigent defendant is entitled to an expert to effectively assist in the preparation and presentation of the insanity defense where sanity is seriously in question). As for the State's concerns that it would be funding expert shopping until the defense obtains a favorable expert opinion, if either the initial or the second expert renders a decisive opinion that the defendant was sane, then the defendant's sanity would no longer be a serious question for trial and an additional expert would be neither necessary nor obtainable. Moreover, if a second expert were to give the same opinion as the first, a trial court could reasonably conclude that the initial expert's opinion has been solidified by the second expert and that the issue of the defendant's sanity, although a close call, is no longer a serious question that warrants an additional expert.

It is important to recognize that if the shoe were on the other foot—that is, if a State expert had opined that defendant was insane but, nonetheless, suggested that a second opinion be sought because the case was borderline—any reasonable prosecutor would obtain a second opinion. Doing so could in no way be considered "expert shopping" or a "fishing expedition." It would be the rational, diligent thing to do in a field that is "not . . . an exact science" and where "psychiatrists disagree widely and frequently." *Ake*, 470 U.S. at 81. Indigent defendants should be able to take the same rational step. Indigence should not foreclose diligence.

Finally, the State insists that "the constitution [does not] require the State to 'purchase for an indigent defendant all the assistance that his wealthier counterpart might buy'" (State's Br. at 33) (quoting *Ake*, 470 U.S. at 77). Defendant agrees. But the State neglects that defendants cannot be prejudiced due to their indigence. *Lawson*, 163 U.S. at 221. Denying defendant's request for an additional expert for an insanity defense that remains plausible and the heart of his defense, when a reasonable private defense attorney would engage an additional expert in the same circumstances, demonstrates that defendant is being prejudiced due to his indigence.

In sum, this Court should conclude that Dr. Witherspoon's uncertain opinion regarding defendant's sanity warranted the appointment of a second expert. Both the United States and Illinois Constitutions required it, as did section 13-3(d) of the Code of Criminal Procedure. Because Dr. Witherspoon expressed uncertainty in his opinion that defendant was sane and suggested that the defense seek a second opinion, defendant's sanity at the time of the offense remained "seriously in question" and a "significant factor" for trial; additionally, Dr. Witherspoon could not "effectively assist" in the preparation and presentation of the insanity defense given his uncertain opinion. *Ake*, 470 U.S. at 83; *McWilliams*, 137 S. Ct. at 1798–99. In other words, defendant's sanity at the time of the offense remained a "crucial issue" and "the heart of the defense," notwithstanding Dr. Witherspoon's opinion. *Lawson*, 163 Ill. 2d at 221; *Watson*, 36 Ill. 2d at 234. The appointment of a second expert was "necessary" for the defense. 725 ILCS 5/113-3(d) (2018). Where a reasonable private attorney with financial means would engage an additional expert for a second opinion on the issue of defendant's sanity given the circumstances of this case, denying defendant a second expert prejudiced him because of his

indigence. *Lawson*, 163 Ill. 2d at 221; *Djurdjulov*, 2017 IL App (1st) 142258, ¶52; *Durant*, 545 F.2d at 826–27. The trial court abused its discretion.

Accordingly, defendant respectfully requests that this Court reverse his conviction and remand for further proceedings.

## CONCLUSION

Shaun N. Taylor respectfully requests that this Court reverse his conviction and remand for further proceedings because the trial court abused its discretion by not granting his request for a second expert on the issue of insanity.

If this Court concludes that reversal of Taylor's conviction is not warranted, Taylor respectfully requests that this Court vacate the trial court's imposition of the 20-year firearm enhancement.

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 19 pages.

/s/Dimitri Golfis
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Assistant Appellate Defender

No. 128316

IN THE

SUPREME COURT OF ILLINOIS

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| PEOPLE OF THE STATE OF ILLINOIS,<br><br>Plaintiff-Appellee,<br><br>-vs-<br><br>SHAUN N. TAYLOR,<br><br>Defendant-Appellant. | ) | Appeal from the Appellate Court of Illinois, Third Judicial District, No. 3-19-0281.<br><br>There on appeal from the Circuit Court of the Fourteenth Judicial Circuit, Henry County, Illinois, No. 17 CF 348.<br><br>Honorable Terence M. Patton, 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 February 21, 2023, the Reply Brief 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-appellant in an envelope deposited in a U.S. mail box in Ottawa, 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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