No. 127670

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellant, -vs- JASON L. CONWAY, Defendant-Appellee.	)))))))))))	Appeal from the Appellate Court of Illinois, No. 1-17-2090. There on appeal from the Circuit Court of Cook County, Illinois , No. 15 CR 19055. Honorable Charles P. Burns, Judge Presiding.

BRIEF OF APPELLEE.
CROSS-RELIEF REQUESTED.

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NATURE OF THE CASE

After a bench trial, defendant–appellee Jason Conway was found guilty of armed habitual criminal and sentenced to 14 years' imprisonment. On direct appeal, the appellate court reversed and remanded for a new trial before a different judge, holding that an on-the-record finding entered by the trial court was not supported by the evidence and finding that the trial court had exhibited a pro-police bias.

No question is raised on the pleadings.

ISSUES PRESENTED FOR REVIEW

I. **Insufficient witness identification.** During the charged shooting, a police officer observed the front and left sides of the shooter's face for a matter of seconds from a distance of 150 feet. The officer subsequently identified Jason Conway as the shooter. As a matter of law, did that distance render the identification not sufficiently reliable to permit the trier of fact to rationally conclude, beyond a reasonable doubt, that Conway was the shooter? And, if so, was the circumstantial evidence also insufficient to sustain a conviction? (*Cross-relief requested.*)

II. **Credibility finding unsupported by evidence.** In the appellate court, Jason Conway argued that his due-process rights were violated because there was no evidence to support the trial court's finding that the police officer who identified Conway had received "training" that made him less likely to make a misidentification. The appellate court held that the trial court's finding was unsupported by any evidence. It also held that the trial court's unsupported finding exhibited a bias in favor of police officers. It therefore reversed and remanded with instructions to assign the case to a different judge. Did the appellate court reverse based on Conway's argument that the trial court made an unsupported finding? And, if it did, should the appellate court's judgment be affirmed in whole or in part? (*Response to State's brief.*)

STATEMENT OF FACTS

A. Officer Story witnesses a shooting from 150 feet away and then identifies Conway as the shooter.

It was about 11:45 a.m. on November 2, 2015. (R 63.) Chicago Police Department Officer Donald Story, who was functioning that day as a surveillance officer on a narcotics team, was sitting in his car at the northwest corner of Hamlin and Monroe on the west side of the city while he waited for his team to regroup after he had blown his cover at a surveillance point a few blocks away. (R 63–65, 78–79.) The car was pointed south. (R 65.)

Story heard a gunshot ring out off to his right. (R 65–66.) He turned and looked down the block. (R 66.) He was not using binoculars. (R 83.) There was a man wearing a blue sweatshirt firing a gun from the parkway on the north side of Monroe. (R 66–67, 70.) Story had a clear view down the block because there was a large vacant lot at the corner, followed by an alley, a building, and then the building the shooter was in front of. (R 84.) Although there were trees, they did not block his view. (R 85.) Thus, he had an unobstructed view of both the front and the left side of the shooter's face. (R 82–83, 101–02.) He estimated that the shooter was roughly 150 feet away from him. (R 66.)

Story heard seven shots fired over a span of five seconds. (R 80.) The apparent target was a silver SUV, which turned off of Monroe into an alley and raced off. (R 66–67.) The shooter then opened the door to a car parked right in front of him, which was later determined to be a black Pontiac. (R 68, 74; State's Ex. 1.) He leaned in for a moment before closing the door and starting to walk away. (R 68.) He then doubled back and reached inside of the car again before going inside 3822 West Monroe Street, which was the building the car was parked in front of. (R 68.)

Because Story was operating that day without a police radio, he got in touch with his team using the push-to-talk feature on his Kyocera cellular phone so they could relay the information to have it put out over the air. (R 65, 69.) Eight or ten minutes passed, and then responding officers from all over the district started flooding into the area.[1] (R 69, Sup R 20.) Owing to a miscommunication, they entered 3820 West Monroe, which was one lot to the east of 3822. (R 69–70.) Upon seeing this, Story scrambled out of his car to redirect them. (R 70, 95.) He reached the officers at the front of the building first and told them to hit the next building to the west, and then he ran around to the rear to repeat the message to the officers who were entering through the back. (R 70, 95–96.) Once he had sent everyone to 3822, Story went back around to the front door and followed other officers in through the first-floor entrance, which led to a living room.[2] (R 70, 96; Sup R 26.)

The first thing Story saw upon his entry was Jason Conway, who was sitting on the floor next to a blue-and-gray or blue-and-white sweatshirt that Story believed was the one the shooter had worn. (R 70–71, 93.) Story told nearby officers that Conway was the shooter, and Conway was arrested. (R 71, 98–99.) Officers searched him and found keys to the Pontiac. (R 72.)

Having detained the man he believed to be the shooter, Story then entered the basement apartment, which was a separate unit. (R 71, 99–100.) He wanted to find out what was going on down there. (R 71.) As he walked down the hallway, he looked to his left into a bedroom. (R 71.) He spied what looked like the handle of a bag or a purse dangling out from between two

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1. The length of time it took for officers to respond was elicited at the suppression hearing.

2. The fact that the room was a living room was elicited at the suppression hearing.

mattresses. (R 71–72.) On a hunch, he pulled the bag out and opened it. (R 72.) Inside, he found two semiautomatic pistols. (R 72.) Later forensic testing matched one of the two guns to seven spent shell casings found in front of 3822 West Monroe. (R 106–08, 118, 140.)

At the police station following his arrest, gunshot residue kits were taken from Conway's hands as well as the sleeves of the sweatshirt. (R 109–11.) Testing revealed that the sweatshirt's right sleeve-cuff had particles on it consistent with gunshot residue, but Conway's hands did not. (R 125–130.) Investigators also collected biological swabs from the guns and Conway for DNA testing, though the results—if any—were not made a matter of record. (C 80; R 15, 118.)

B. Based on Officer Story's status as a "trained" police officer, the trial court credits his long-distance identification and finds Conway guilty.

After his arrest, Conway was charged with one count of armed habitual criminal, one count of aggravated discharge of a firearm, and eight counts of aggravated unlawful use of a weapon. (C 20–38.)

Before trial, Conway filed a motion to suppress the guns found in the downstairs unit. (Sup C 4–5.) Following an evidentiary hearing, the trial court found that Conway, who lived in a building across the street from 3822 West Monroe (Sup R 16), lacked standing to contest the search of the downstairs unit because he did not have a reasonable expectation of privacy in the property and because he did not acknowledge a possessory interest in the guns. It therefore denied the suppression motion. (Sup R 32–33.)

The case proceeded to a bench trial, which was held on September 13, 2016. (R 57–161.) The State proceeded only on the counts of the indictment

charging armed habitual criminal and aggravated discharge of a firearm. (R 59.) The evidence showed the facts described above, and the parties stipulated to the two predicate convictions necessary to establish the elements of armed habitual criminal. (R 143.)

At trial, the State argued that Story was able to identify Conway based on seeing the shooter's face during the incident. (R 151–52, 154.) Story did not testify that he observed any particular facial features on the shooter.

Because the forensic scientist who had performed the gunshot-residue analysis for this case had since retired, the gunshot-residue evidence came in through the testimony of a different forensic scientist who had reviewed the original analyst's notes and report. (R 124–25.) The testifying scientist did not offer an opinion about whether Conway's hands or the sleeve of the sweatshirt had been in the presence of a gun being fired.

Before entering its findings, the trial court noted that the dispositive issue in the case was identity and that a single eyewitness identification can prove guilt beyond a reasonable doubt if the witness is "credible and … has the ability and opportunity to observe the occurrence." (R 155–56.) It then turned to Story's identification testimony, first observing that the shooting occurred just before noon in natural sunlight and that Story had an unobstructed view of the shooter from 150 feet away. (R 156.) Describing Story as "a trained police officer, … not a civilian," it stated that he had been "in a position to immediately react when the shots were fired." (R 156.) It noted that Story testified that he was able to see the shooter's face and that, because the shooter went into and out of the Pontiac twice, Story had more time to make his observations. (R 156–57.) It noted that the sweatshirt found next to Conway inside the house, which Story had testified had been worn by the shooter, had gunshot residue on the sleeves. (R 157–58.)

Explaining that Story had a "unique opportunity to view the shooter," the trial court found his identification of Conway credible. (R 158–59.) It emphasized that any concerns it may have had about Story's ability to make an accurate identification were allayed by the fact that he was a police officer:

> I do find that the officer was not startled, he was not in a situation where his perception might have been affected or that he might have been distracted. Again, he is a professional. He is a law enforcement official, which I think is something that I can take into consideration as compared to an individual who's never had any such training and the dangers of false identification become more concerning th[a]n with a police officer. This is not a general statement. That is specifically to this officer.

(R 159.) The court then stated that the identification was corroborated by the fact that the shooter had entered the building Conway was found in and that the guns were found "inside that same residence."[3] (R 155, 159.)

Based on Story's identification, the court found that Conway was the shooter. It therefore found him guilty of armed habitual criminal and aggravated discharge of a firearm. (R 159–60.) It subsequently sentenced him to 14 years' imprisonment for armed habitual criminal only. (C 112; R 206.)

C. Holding that the trial court's finding concerning Officer Story's "training" was not supported by any evidence, the appellate court reverses and remands for a new trial.

In 2018, this Court authorized Conway to file a late notice of appeal from his conviction and sentence. *See People v. Conway*, no. 122816, 94 N.E.3d 674

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3. The finding that the guns were found "inside that same residence" as Conway was not consistent with Officer Story's testimony that the guns were found in "a modified different unit possibly or basement apartment," not the upstairs apartment. (R 100.)

(Jan. 18, 2018). (C 143.) He raised four issues in his appellate briefs, two of which are at issue in this Court. First, he argued that the distance from which Officer Story viewed the shooter was too far to permit a reliable identification based solely on recognizing the shooter's face, which meant that the evidence was insufficient to prove that Conway was the shooter. (Conway's App. Ct. Br. 14–25.) Second, he argued that the trial court's finding that Officer Story's "training" made him less likely to make a misidentification was plain error because it was not supported by any evidence that he had received such training. (Conway's App. Ct. Br. 38–41.) Conway also argued that introducing the results of gunshot-residue testing through a witness other than the original analyst denied him his constitutional right to confront the witnesses against him and that, if it did not reverse his conviction, the appellate court should remand for further proceedings on ineffective-assistance claims that Conway had raised *pro se* at sentencing. (Conway's App. Ct. Br. 26–37, 42–52; R 190–203.)

The appellate court reversed and remanded for a new trial. *People v. Conway*, 2021 IL App (1st) 172090. Although it observed that the State had "presented a weak case" and that "the corroborating evidence present[ed] some problems," the appellate court ultimately found that the evidence was sufficient to sustain a conviction because Story's identification of Conway was adequately corroborated by the discovery of the gun used in the shooting, Conway's proximity to the sweatshirt, and the presence of the Pontiac's keys in Conway's pocket. *Conway*, 2021 IL App (1st) 172090, ¶ 20. A majority of the court, however, agreed with Conway that no evidence supported the trial court's determination that Officer Story had received training that reduced the danger of a misidentification:

> No evidence supports the judge's finding that Story's training gave him a better ability than any other witness to identify a face he saw for a few seconds from 150 feet away.
>
> Hence, there was no evidence in the record supporting the trial judge's finding that this police officer was better equipped than lay witnesses to identify a stranger's face in seconds from 150 feet away.

Conway, 2021 IL App (1st) 172090, ¶¶ 26–27. Finding the evidence closely balanced, the majority therefore reversed because "[t]he trial judge improperly relied on unsupported assertions about the effects of police training on the ability to identify a face seen for a few seconds from 150 feet away." *Id.* ¶¶ 20, 31.

In so holding, the majority further found that the trial court's finding evinced a bias in favor of law enforcement. It explained that the trial court's remarks showed that it had relied on a presumption in favor of government authority and a presumption that police officers are trustworthy. *Id.* ¶¶ 26, 29. It emphasized that "a trial judge cannot find a witness more credible solely because of his or her status as a police officer." *Id.* ¶¶ 26, 28. Because the trial court's "preconceived notions regarding the veracity" of Officer Story's testimony led it to credit Story's identification and find Conway guilty, the majority found that he was denied a fair trial. *Id.* ¶ 28 (quoting *People v. Kennedy*, 191 Ill. App. 3d 86, 91 (1st Dist. 1989)). It therefore remanded to the circuit court with instructions to reassign the case. *Id.* ¶¶ 29, 31. It did not address Conway's confrontation claim or his request to remand for further proceedings on his ineffective-assistance claims.

The State filed a petition for rehearing, which was denied. This Court subsequently granted the State's petition for leave to appeal.

ARGUMENT

I.

Conway's conviction should be reversed because, as a matter of law, the distance at which Officer Story saw the shooter was too far to enable an identification reliable enough to sustain a conviction.

(cross-relief requested)

Suppose you performed an experiment where two people—a witness and a suspect—stood one mile apart. Further suppose that the suspect was asked to slowly walk toward the witness, whose job it would be to observe the suspect and try to identify him. At the start of the experiment, the witness would have no chance. But, as the suspect slowly made his way closer, that would change. First, there would come a point where the witness would be able to make out just enough of the suspect to venture a guess as to his identity, although the chances of that guess being accurate would be vanishingly small. With each step the suspect took, the likelihood that the witness could make an accurate identification would increase. At some point, the witness's guess would become an educated one. Sooner or later, the suspect would be close enough to the witness that any attempted identification would have even chances of being right or wrong. And eventually, the suspect would draw so near to the witness that the accuracy of the witness's identification would be almost certain, leaving no reasonable doubt about who the suspect was.

This case is about where that point falls. At trial, Officer Story testified that he saw the shooter from approximately 150 feet away. (R 66.) He testified that, despite this distance, he was able to see both the front and left sides of the shooter's face, which allowed him to later identify Jason Conway

as the shooter. (R 71, 82.) The question for this Court is whether a trier of fact could rationally conclude that, given how hard it is at that distance to discern the fine facial features by which human beings recognize each other, Story's identification of Conway was so reliable—so likely to be accurate—that it proved beyond a reasonable doubt that Conway was the shooter. The answer, which is provided by common sense and confirmed by scientific inquiries into the accuracy of eyewitness identifications at various distances, is *no*. Because no rational trier of fact could find that Story's identification was sufficiently reliable to prove the shooter's identity beyond a reasonable doubt, it was insufficient to sustain a conviction on its own. And, contrary to what the appellate court found, the circumstantial evidence did not make up for the inadequacy of Story's identification. *See People v. Conway*, 2021 IL App (1st) 172090, ¶ 20. Conway's conviction should be reversed outright.

A. A single eyewitness identification is adequate to sustain a conviction only if a trier of fact can rationally conclude that it is reliable enough to establish identity beyond a reasonable doubt.

In criminal prosecutions, due process of law does not permit the defendant to be found guilty "except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he was charged." *In re Winship*, 397 U.S. 358, 364 (1970); *see also* U.S. Const., amend. XIV, § 1 (due-process clause); Ill. Const. 1970, art. I, § 2 (same). The reasonable-doubt standard is no mere "trial ritual." *Jackson v. Virginia*, 443 U.S. 307, 316–17 (1979). The trier of fact must "rationally apply that standard to the facts in evidence." *Jackson*, 443 U.S. at 317. When the evidence is such that the trier of fact could not have rationally found that the defendant was guilty beyond a

reasonable doubt, the conviction must be reversed as a matter of due process. *Id.* at 317–18.

When evaluating whether the evidence was sufficient to permit the trier of fact to find the defendant guilty, the question is "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* at 319; *accord People v. Wright*, 2017 IL 119561, ¶ 70. Viewing the evidence in the light most favorable to the prosecution preserves the factfinder's traditional responsibility to resolve conflicts, weigh evidence, and draw reasonable inferences. *Jackson*, 443 U.S. at 319. Where possible, then, the reviewing court should draw those reasonable inferences that favor the prosecution. *People v. Cunningham*, 212 Ill. 2d 274, 280 (2004). At the same time, though, the reviewing court must take into account "*all of the evidence*." *Jackson*, 443 U.S. at 319. It follows that, when the evidence permits only one reasonable inference, that inference must be drawn "even if it favors the defendant." *Cunningham*, 212 Ill. 2d at 280.

The application of the *Jackson* sufficiency standard to the evidence introduced at trial presents a question of law. *Musacchio v. United States*, 577 U.S. 237, 243 (2016) (citing *Jackson*, 443 U.S. at 319). Questions of law are reviewed *de novo*. *Monson v. City of Danville*, 2018 IL 122486, ¶ 14. Hence, although the *Jackson* standard is deliberately deferential to finding of guilt entered by the trial court in its role as trier of fact, this Court need not defer to the trial court's implicit legal conclusion that the evidence rationally supported that finding beyond a reasonable doubt. *See Cunningham*, 212 Ill. 2d at 280 ("[T]he fact finder's decision … is entitled to great deference but is not conclusive and does not bind the reviewing court.").

Under Illinois law, one of the essential elements of every criminal offense that must be proven beyond a reasonable doubt is that the defendant was the person who committed the offense. *People v. Lara*, 2012 IL 112370, ¶ 17. Here, that meant proving that Conway possessed one of the guns recovered from the basement unit at 3822 West Monroe. (C 20.) *See* 720 ILCS 5/24–1.7(a) (2015) (defining armed habitual criminal). But there was no direct evidence—no forensics, no testimony, no inculpatory statements—linking Conway to either gun. The only way that the State could prove possession, then, was through the fact that one of those guns was used in the shooting that Story saw. (R 106–08, 118, 140.) So, as the trial court observed when it entered its findings, the State's case turned on Officer Story's identification of Conway as the shooter. (R 155–56.)

A single eyewitness's identification is sufficient to sustain a conviction so long as the witness saw the suspect "under circumstances permitting a positive identification." *People v. Slim*, 127 Ill. 2d 302, 307 (1989). This means that the witness must have "had an adequate opportunity to view" the suspect and that the in-court identification testimony is both "positive and credible." *Slim*, 127 Ill. 2d at 307. Traditionally, the reliability of an eyewitness identification is measured by the *Slim–Biggers* factors, which are:

(1) the witness's opportunity to view the suspect at the time of the crime;

(2) the witnesses's degree of attention;

(3) the accuracy of the witness's prior description of the suspect;

(4) the witness's level of certainty at the identification confrontation; and

(5) the length of time between the crime and the confrontation.

See id. at 307–08 (citing *Neil v. Biggers*, 409 U.S. 188, 199–200 (1972)). But the first of these factors is also, in essence, a threshold condition. This is because the sufficiency of an identification to support a conviction turns on "whether the witness had a full and adequate opportunity to observe the [suspect]." *People v. Middleton*, 2018 IL App (1st) 152040, ¶ 27 (quoting *People v. Robinson*, 206 Ill. App. 3d 1046, 1051 (1st Dist. 1990)). In other words, to make a reliable identification, the witness must have been "close enough to the [suspect] for a sufficient period of time under conditions adequate for observation." *People v. Tomei*, 2013 IL App (1st) 112632, ¶ 40 (quoting *People v. Carlton*, 78 Ill. App. 3d 1098, 1105 (1st Dist. 1979)).

B. Officer Story did not have a legally adequate opportunity to make an identification reliable enough to sustain a conviction because he was too far away to perceive the details of the shooter's face so as to accurately identify him later.

With the foregoing principles in mind, no rational trier of fact could find that Officer Story had the "full and adequate opportunity to observe" the shooter necessary to permit an identification reliable enough to prove guilt beyond a reasonable doubt. Story testified that, using only his naked eyes, he was able to identify Conway because he saw the left and front sides of the shooter's face from 150 feet away, and the State argued that it was that view of the shooter's face that enabled him to make an identification. (R 66, 82, 83, 151–52.) Neither Story nor the State ever articulated some other basis on which he would have been able to recognize that Conway was the shooter. And the notion that Story could see the shooter in enough detail from 150 feet away to be able to recognize him up close several minutes later is implausible on its face. A distance of 150 feet is half the length of a football field. That might be near enough to make out some basic features such as

hairstyle or skin color. It might also enable you to discern, in broad strokes, what somebody is wearing—in this case, for example, Story was able to recognize the shooter's sweatshirt based on its distinctive blue-and-gray or blue-and-while coloring. (R 70, 71, 89, 93.) But, purely as a matter of common sense, at a distance of 150 feet, it is not possible to make out the fine facial features that distinguish one person from another, which means it is not possible to make an identification that is so likely to be accurate that it can rationally support a conviction beyond a reasonable doubt.

Indeed, in at least one published decision, the appellate court has found that an identification made after perceiving a suspect from a significantly shorter distance was not reliable enough to sustain a conviction. In *People v. Hernandez*, 312 Ill. App. 3d 1032 (1st Dist. 2000), the prosecution's sole eyewitness was a school-bus driver who was sitting in his bus while waiting to make a pick-up. *Hernandez*, 312 Ill. App. 3d at 1034. For about 10 minutes, he watched two young men, including one he identified as the defendant, who were standing 90 feet away from him between two vans. *Id.* At some point, the defendant got into an argument with a third man before drawing a gun, shooting the man several times, and speeding away in one of the vans. *Id.* About one month after the shooting, the eyewitness viewed a photo array that included the defendant but did not affirmatively make an identification. *Id.* But a month after that, the witness identified the defendant in a different photo array based on having seen the profile of the shooter's face at one point before or during the incident, and he subsequently confirmed that identification in a live lineup. *Id.* at 1034, 1035.

The defendant appealed, arguing that the evidence was insufficient to sustain his conviction, and the appellate court reversed, holding that the witness's identification was insufficiently reliable to establish guilt beyond a

reasonable doubt. *Id.* at 1036–37. The court identified the distance of 90 feet and four other factors—the brevity of the witness's view of the shooter's profile, differences in the witness's estimates of the shooter's height and weight given two weeks after the incident and at trial, the suggestiveness that arose from including the defendant in two photo arrays, and the absence of corroborating evidence—as leading it to conclude that the identification was "fatally weak." *Id.*

The distance involved in this case, 150 feet, is more than the distance that was held insufficient to sustain a conviction in *Hernandez*. To be sure, there were additional factors that undermined the reliability of the identification in *Hernandez* that are not present in this case. But it is also true that the distance between Story and the shooter here was substantially greater than the distance in *Hernandez*. So, while *Hernandez* does not dictate the outcome of this case, its holding that a purported identification based on viewing the suspect from 90 feet away was insufficient certainly supports the common-sense conclusion that no rational trier of fact could have found that Story, or any other witness, could have seen the shooter's face in enough detail from 150 feet away to make an identification that proved the shooter's identity beyond a reasonable doubt.

The common-sense proposition that 150 feet is simply too long a distance to permit a reliable identification has been confirmed by studies designed to test eyewitness perception at various distances, which uniformly show that the ability to make an identification diminishes rapidly as the distance between the witness and the suspect increases. *See* Ruth Horry *et al.*, *Archival Analyses of Eyewitness Identification Test Outcomes: What Can They Tell Us About Eyewitness Memory?*, 38 Law & Hum. Behav. 94, 103 (2014) (surveying academic literature). For people with normal vision, the ability to

identify another person's face begins diminishing at roughly 25 feet. *State v. Cabagbag*, 127 Haw. 302, 310 n.11 (2012) (citing Geoffrey R. Loftus & Erin M. Harley, *Why Is It Easier to Identify Someone Close than Far Away?*, 12 Psychonomic Bull. & Rev. 43, 63 (2005)[4]). By about 110 feet (33.5 meters), a person's ability to make out a familiar face is essentially zero. Horry *et al.*, *supra* p.16, at 103 (citing Loftus & Harley, *supra*, at 63). And Officer Story purportedly identified Conway based on seeing the shooter from 150 feet away. (R 66.)

But Officer Story was not identifying a familiar face. There was no evidence that Story knew Conway from a previous encounter. And a witness's ability to accurately identify an *unfamiliar* face becomes "very poor" beyond merely 65 feet (20 meters). *Id.* (citing R.C.L. Lindsay *et al.*, *How Variations in Distance Affect Eyewitness Reports and Identification Accuracy*, 32 Law & Hum. Behav. 526 (2008)). In one study, witnesses who viewed the subject at a distance of 65 or more feet before being immediately shown a six-person photo array were only able to correctly identify the suspect's picture 37.2% of the time. Witnesses were actually slightly more likely to make a *misidentification*, which happened 39.4% of the time. The results for witnesses who were shown photo arrays not containing the suspect's picture—a possibility that the witnesses were advised of ahead of time—were even worse: only 30.8% of witnesses correctly stated that the suspect was not in the array, but the number of witnesses who made false identifications rose

4. *Available at* https://link.springer.com/content/pdf/10.3758%2FBF03196348.pdf (last visited Aug. 29, 2022).

to a whopping 55.7%. Lindsay *et al.*, *supra* p.17, at 528–29 (describing procedure used); *id.* at 532 tbl.3 (tabulating results).[5]

In a section of its brief addressing the appellate court's determination that the trial court's findings exhibited a pro-police bias, the State cites a study that found "evidence for an upper distance threshold at 100 [meters] [approximately 328 feet] for correct identifications." *See* Thomas J. Nyman *et al.*, *The Distance Threshold of Reliable Eyewitness Identification*, 43 Law & Hum. Behav. 527, 527 (2019).[6] The State argues that the Nyman study provides "scientific evidence that accurate identifications are possible at 150 feet." (State's Br. 24–25.) It is certainly true that the study found that 100 meters was "an absolute upper distance threshold" at which an identification might be possible. Nyman, *supra*, at 539. But it should be understood that *possible* does not mean the same thing as *accurate* or *reliable*. Indeed, the study's authors found that identifications purportedly made at such a distance should "by no means … be viewed as reliable." *Id.* And for good reason: the data collected during the course of the study showed that purported identifications made after viewing a subject at 45 meters (about 147 feet and 8 inches) were highly *unreliable*. Within the study's primary age group, which was 18-to-44-year-olds, 76 individuals were asked to view a set of photographs that included the subject they had just seen. Only 15 (19.7%)

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5. These percentages relate the results generated using the "immediate" judgment condition, which called on participants to turn around before viewing the photo array. *Id.* at 528. The results were similar to those obtained under the "perception" judgment condition, in which participants viewed the photo array while continuing to look toward where they had seen the no-longer-visible suspect. *Id.* at 528, 532 tbl.3.

6. *Available at* https://psycnet.apa.org/fulltext/2019-38765-001.pdf (last visited Aug. 29, 2022). The document is also available in HTML format at https://psycnet.apa.org/fulltext/2019-38765-001.html (last visited Aug. 29, 2022).

made an accurate identification, while 29 (38.2%) made no identification and, alarmingly, the remaining 32 (42.1%)—more than twice the number that got it right—identified *the wrong person*. The 84 people in that age range who viewed a set of photographs that did not include the subject they had just seen also fared poorly: a majority of 50 (59.5%) made a false identification while only 34 (40.5%) correctly rejected everybody they were shown. The results for older adults were even worse: when the subject's photograph was present, only 10.3% made an accurate identification, while 43.6% identified the wrong person; when the subject's photograph was absent, a whopping 71.2% made a false identification anyway.[7] These results simply reinforce Conway's argument that an identification premised on viewing a suspect at a distance of 150 feet is not sufficient on its own to rationally support a finding of guilt beyond a reasonable doubt.

In the appellate court, the State took issue with Conway's reliance on scientific studies to support the common-sense notion that 150 feet is too great a distance to enable a witness to observe the distinctive facial features that would allow a later identification of the same person because those studies were not entered into evidence at trial. (State's App. Ct. Br. 14–16.) In this Court, the State does not specifically criticize the appellate court for relying on scientific studies, but it does cite two cases where the appellate court declined to consider scientific studies cited in appellate briefs because they were not presented to the trial court.[8] *See People v. Magee*, 374 Ill. App.

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7. The raw data used to compute these numbers can be found in appendix 3 to the article, which can be downloaded alongside other supplemental materials at the link noted on the article's first page.

8. The State also argues in its brief that the appellate-court majority improperly relied on *testimony* offered by experts in two out-of-state cases. *See Conway*, 2021 IL App (1st) 172090, ¶ 23. (State's Br. 22.) To be

3d 1024, 1030 (1st Dist. 2007); *People v. Clemons*, 2021 IL App (1st) 200507–U, ¶ 20. (State's Br. 22.) Both the State's position in the appellate court and the decisions it cites in this Court fail to appreciate the crucial conceptual distinction between adjudicative facts and legislative facts.

Adjudicative facts are simply the particular facts of the case that must be established so that the law can be applied. *See Adjudicative Fact, Black's Law Dictionary* 709 (10th ed. 2014). Adjudicative facts are usually established by introducing evidence, although courts may take judicial notice of certain adjudicative facts that are beyond dispute. *See People v. Davis*, 65 Ill. 2d 157, 163 (1976) (quoting Fed. R. Evid. 201, advisory committee's note to 1972 proposed rules). One way or another, though, adjudicative facts must be put forward in the trial court.

The same does not hold true for legislative facts, which serve a very different purpose than adjudicative fact-finding. "Legislative facts … are those [that] have relevance to legal reasoning and the lawmaking process," which occurs when courts formulate legal principles or articulate rulings. *People v. Davis*, 65 Ill. 2d 157, 162–63 (1976) (quoting Fed. R. Evid. 201, advisory committee's note to 1972 proposed rules). Unlike adjudicative facts, sources of legislative facts can be considered by a reviewing court whether or not they were introduced into evidence in the trial court. Perhaps the most common example of considering legislative facts happens when a court draws on "common-sense notions of how the world works." *See* Charles A. Sullivan, *The Phoenix from the Ash: Proving Discrimination by Comparators*, 60 Ala. L.R. 191, 225 (2009).

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clear, Conway does not rely on any testimony given in other cases, only studies published in peer-reviewed journals and therefore appropriate for consideration as secondary sources.

But reviewing courts have also long drawn legislative facts from information presented in social-science studies. *See* Deanna Pollard Sacks, *Children's Developmental Vulnerability and the Roberts Court's Child-Protective Jurisprudence: An Emerging Trend?*, 40 Stetson L. Rev. 777, 777–79 (2011) (identifying three United States Supreme Court cases involving children where the Court engaged in "legislative fact-finding"). For more than a century, courts of review—led by the United States Supreme Court—have relied on social-science studies and similar sources when formulating rules of law, even when those materials were not put before trial courts. *See Muller v. Oregon*, 208 U.S. 412, 419 n.† (1908) (citing a "copious collection" of various social-science materials catalogued in party's brief written by future Associate Justice Louis Brandeis to support holding that states may validly enact labor regulations intended to benefit women). The Court famously relied on social-science materials in the course of rejecting the separate-but-equal doctrine when it cited six psychological research articles as "modern authority" to support its finding that racially segregated public schools harmed minority children and were therefore inherently unequal. *Brown v. Bd. of Educ.*, 347 U.S. 483, 494–95 & n.11 (1954). More recently, the Court has relied on social-science materials to find that particular psychological differences between juveniles and mature adults mean that certain severe sentencing practices violate the Eighth Amendment as applied to juveniles. *E.g.*, *Roper v. Simmons*, 543 U.S. 551, 569–70, 573 (2005); *see also* Sacks, *supra*, at 790–91 (discussing the use of social-science research in *Graham v. Florida*, 560 U.S. 48 (2010)).

This Court, moreover, is no stranger to using legislative facts drawn from secondary authorities. For instance, in *People v. Huddleston*, 212 Ill. 2d 107 (2004), this Court cited several such authorities in the course of finding that

a mandatory life sentence for committing predatory criminal sexual assault of a child against two different victims was not disproportionate under the Illinois Constitution. *See Huddleston*, 212 Ill. 2d at 134–38. Similarly, in *People v. McCarty*, 86 Ill. 2d 247 (1981), this Court cited three studies showing that "the use of cocaine causes a high degree of psychological dependence and tolerance" and four additional studies or research articles addressing various evils associated with freebase-cocaine use to support its holding that the legislature had validly classified cocaine as a Schedule II narcotic. *See McCarty*, 86 Ill. 2d at 256–57. These are not the only examples. *See, e.g.*, *People v. Braggs*, 209 Ill. 2d 492, 510–11 (2003) (citing secondary sources showing that intellectually disabled individuals are "more susceptible to the impression that they are … in custody" to support holding that defendant's intellectual disability was relevant to assessing whether a reasonable person in his position would have felt free to leave); *People v. Keith*, 148 Ill. 2d 32, 44 (1992) (citing secondary sources identifying potential reliability problems with breath-alcohol analyzer used on defendant); *see also People v. Birge*, 2021 IL 125644, ¶ 152 (Neville, J, dissenting) (citing various secondary sources discussing concept of implicit bias in support of argument in favor of amending Rule 431(b)).

So too has the appellate court relied on scientific studies for legislative facts. Some of those cases, like this one, have involved the reliability of eyewitness identifications. *See People v. Starks*, 2014 IL App (1st) 121169, ¶ 87 (Hyman, J., concurring, joined by Pucinski, J.) (collecting cases citing research on the accuracy of eyewitness identifications); *People v. Tisdel*, 338 Ill. App. 3d 465, 467–68 (1st Dist. 2003) (acknowledging "numerous studies in the area of eyewitness psychology" and citing article discussing purposes of expert testimony about eyewitness perception but holding that

trial court did not abuse discretion by barring expert's testimony about such research). Others have addressed other matters relevant to the court's legal reasoning. *See, e.g.*, *People v. Brown*, 2015 IL App (1st) 130048, ¶ 46 (citing various sources showing that most criminal offenders "mature out of lawbreaking before reaching middle age" to support holding that sentencing court did not adequately consider whether defendant could be restored to useful citizenship); *People v. Rivera*, 2011 IL App (2d) 091060, ¶ 40 (citing journal article for proposition that "[i]nnocent people do confess to crimes they did not commit"). Suffice it to say that the practice of drawing on secondary authorities as sources for legislative facts has long been employed by not only the United States Supreme Court but also by Illinois courts of review.

As the foregoing explains, this Court can consider, and *has* considered, information gleaned from secondary sources in the course of evaluating legal questions put before it. And that means that it can consider the available scientific literature on eyewitness perception as legislative facts in this case. That is because the issue before this Court is not whether Officer Story's identification of Conway as the shooter was, *in fact*, correct—that is an adjudicative fact that was, as it had to be, submitted to the trier of fact for resolution. The issue here is whether, in light of Officer Story's testimony that he was 150 away from the shooter, the evidence on that point allowed the trier of fact to *rationally conclude*, beyond a reasonable doubt, that Conway was the shooter. And, as noted above, what a given set of evidence would rationally permit the trier of fact to find is a question of law, not fact. *See Musacchio*, 577 U.S. at 243 (2016) (citing *Jackson*, 443 U.S. at 319). The findings of studies concerning the effect of distance on the reliability and accuracy of eyewitness identifications are relevant to the legal question of

how far is too far when it comes to a naked-eye identification of an unknown individual based on facial characteristics. Accordingly, they are properly considered by this Court.

While both common sense and scientific authority should lead this Court to conclude that Officer Story's identification of Conway was insufficient to sustain a conviction because he was too far away from the shooter to make a sufficiently reliable identification, in a section of its brief critiquing the appellate court's disposition of Conway's claim that the trial court made a finding not supported by the evidence, the State cites two appellate-court cases purportedly holding that 150 feet is close enough to enable an identification reliable enough to support a conviction. (State's Br. 25–26.) One of those cases is distinguishable, the other cannot be cited as authority, and neither controls the outcome of this case.

The published case cited by the State, *People v. Davis*, 2018 IL App (1st) 152413, involved the sufficiency of recanted witness identifications of two men involved in a shooting. Although the State asserts that the identifications in *Davis* were based on viewing the shooters from 150 feet away, it is not at all clear that the case actually involved any identifications from that distance. It is true that, as the court noted, one of the defendants *argued* on appeal that the witness identifications of him were made from a distance of 150 feet. *See id.* ¶ 54. But the distance is mentioned nowhere else in the opinion, and the court's analysis of the sufficiency of the evidence does not expressly consider what effect, if any, the distance had on the witness's opportunity to see the defendants. *See id.* ¶¶ 54–56.

In any event, *Davis* is distinguishable for three reasons. First, the witnesses in *Davis* were identifying two people they already knew, and they "instantly recognized" the defendants as soon as they saw them. *Id.* ¶ 56. It is

far easier to identify a person known to you than a stranger. Here, by contrast, there is no evidence that Story had ever seen Conway before the charged incident. Courts have long known that "[t]he identification of strangers is proverbially untrustworthy." *United States v. Wade*, 388 U.S. 218, 228 (1967) (citing Felix Frankfurter, *The Case of Sacco and Vanzetti* 30 (1927)). Second, *Davis* involved not one witness but three. Consequently, their identifications of the same defendants were mutually corroborative in a way that a single witness's identification can't be. Third, there is nothing in the *Davis* opinion indicating that the identifications were based solely on observing facial features, which would indeed have been difficult at a distance of 150 feet. Here, by contrast, Story's identification was based solely on an angular view of the shooter's face. *Davis* is, accordingly, inapposite.

The other case cited by the State, *People v. Rodriguez*, 2019 IL App (1st) 172576–U, ¶ 25, is an unpublished order issued under Rule 23(b) before January 1, 2021. As such, it is not precedential, is does not even qualify as persuasive authority, and it cannot be cited except under limited circumstances that are not present here. *See* Ill. S. Ct. R. 23(e)(1). The State's claim that it is not citing *Rodriguez* "as persuasive legal authority" is belied by the fact that its citation is in support of the proposition that "the appellate court itself has found it reasonable to believe that eyewitnesses can make correct identifications at 150 feet." (State's Br. 25.) Nevertheless, *Rodriguez* is of no help to the State. The State cites only that portion of the unpublished order stating that *Davis* purportedly affirmed a 150-foot identification. *See Rodriguez*, 2019 IL App (1st) 172576–U, ¶ 25. As just discussed, that misreads *Davis*, and *Rodriguez* is not otherwise relevant to this case. The evidence showed that the defendant, who had attacked the victim's daughter at a party the night before and was known to her family, was seen by both

the victim and her daughter riding in a car that drove by the front of their home only a matter of minutes before, from that same car, he opened fire on the family in alley behind the house. *See id.* ¶¶ 5–8. That such evidence was sufficient to prove that the defendant in *Rodriguez* was the shooter has no bearing on whether Officer Story's identification of Conway was sufficient to support a conviction.

In its critique of the appellate-court majority's bias determination, the State also suggests that neither defense counsel nor the trial court treated the 150-foot distance between Story and the shooter as a significant fact. (State's Br. 18–19.) The record, however, shows that the parties and the trial court were all well-aware that the distance involved tended to undermine Story's identification of Conway. Defense counsel twice questioned his ability to actually see the shooter's face from 150 feet away:

> I would point out to you, Judge, that when I was talking to Mr. Story, the policeman, the story he gave seemed a little strange, a little on the side of the angels.
>
> What I mean by that is sometimes policemen or prosecutors or priests think a little white lie or a little exaggeration is okay if you're on the side of the angels.
>
> Now, *he says 150 feet away for Mr. Conway he can see his face*, Judge. He said he angled off. He walked at an angle. I suggest to the Court, based on your own life's experience, if I walked in here and angled off in front of you, sir, whether I'm going to your left or whether I'm going to your right, I [*sic*] can't see my face. That's the first thing I would point out to the Court.
>
> …
>
> Do I think somebody was shooting a gun? Absolutely. Absolutely. But there were a bunch of people in [3822 West Monroe]. And why he was singled out has never been brought to you.

> Now, the State's going to argue he was singled out because *Story could see him from 150 feet away*. Well, the Court considers that. You can consider that, your Honor. You can believe Story or you can doubt him. It's you, you're the trier of fact.

(R 146–47, 150 (emphasis added).) Recognizing the problem, the prosecutor applied rhetorical judo at the start of his own closing argument by transforming Story's testimony about the lengthy distance into a reason to *credit* his identification:

> Your Honor, you heard directly from Officer Story. Officer Story testified clearly and convincingly. Under intense cross-examination he was clear. There was never anything obstructing his clear line of sight of this defendant from 150 feet away. You can accept his testimony as true. He did not embellish it. He didn't tell you he was there ten feet away or 50 feet away. He was honest in his testimony that he was 150 feet away.

(R 151.) And in its findings, the trial court expressly noted that Story "was about 150 feet away," which was "50 yards, half of a football field." (R 156.) It is therefore plain from the record that, at trial, the parties and the court were all aware that Story's distance from the shooter diminished the reliability of his identification.

Finally, the State emphasizes the following remark made by defense counsel during closing argument: "You can believe Story or you can doubt him. It's you, you're the trier of fact." (R 150; State's Br. 18.) The State twice spins this as some kind of admission or concession "that it was possible to credit Story's testimony." (State's Br. 18, 21.) It was nothing of the sort. This statement was counsel's unremarkable acknowledgment that "[d]etermining the credibility of witnesses … is a function reserved primarily for the trier of fact." *People v. Locascio*, 106 Ill. 2d 529, 538 (1985). Far from conceding that Story had an adequate opportunity to view the shooter, counsel vigorously

argued that he did not. (*See supra* pp.26–27 (quoting R 146–47, 150).) Conway did not in any way admit or concede that viewing a suspect from 150 feet away was adequate to permit an identification so reliable that it would be legally sufficient to sustain a criminal conviction.

The court below did not expressly decide whether Story's identification, standing alone, could rationally establish guilt beyond a reasonable doubt. Nevertheless, it recognized that "Story's identification belies the reality of human cognition." *Conway*, 2021 IL App (1st) 172090, ¶ 27. That apt observation is supported by both scientific knowledge and plain common sense. From 150 feet away, a human being simply cannot discern the distinct facial features necessary to identify another person later on—at least not reliably enough to rationally supply proof of identity beyond a reasonable doubt. Officer Story's identification was therefore inadequate to support Conway's conviction.

C. The circumstantial evidence did not make up for the insufficient identification.

Because Officer Story's identification could not, standing alone, provide sufficient evidence to sustain a conviction, the question becomes whether there was enough circumstantial evidence to allow one to rationally conclude beyond a reasonable doubt that Conway was the shooter. Although acknowledging that the State's case was "weak" and that "the corroborating evidence present[ed] some problems," the appellate court ultimately found that the evidence was sufficient because Story's flawed identification was corroborated by "the discovery of the gun, Conway's proximity to the hoodie, and the testimony that the shooter reached into the car for which Conway held the keys." *Conway*, 2021 IL App (1st) 172090, ¶ 20. Contrary to the

appellate court's analysis, although this evidence may have been technically probative of identity, none of it was significant enough to allow a trier of fact to rationally conclude that there was no reasonable doubt that Conway was the shooter.

First, the discovery of the gun in the same building as Conway meant very little. (R 106–08, 112–13, 140.) A court evaluating the sufficiency of the evidence is bound to consider "*all of the evidence*." *Jackson*, 443 U.S. at 319. And the evidence showed that, even though the gun was found in the same *building* as Conway, it was found in a *separate apartment* located in the basement. (R 100.) There was no evidence that Conway was ever in, or had access to, the basement apartment. So, if anything, the discovery of the gun in the basement made it less likely that the culprit was Conway, not more.

Second, the discovery of the shooter's sweatshirt on the floor near Conway—he was not wearing it—could not rationally be assigned significant weight by the trier of fact. "Mere proximity" does not prove "actual possession." *People v. Schmalz*, 194 Ill. 2d 75, 81 (2000). And, other than Story's unreliable long-distance identification, mere proximity was the only link between Conway and the sweatshirt. He was not wearing it. There was no evidence that his DNA was found on it. There was no testimony that it belonged to him or that he had worn it in the past. He never claimed that it was his. There was not even evidence that it fit him. The mere fact that Conway was sitting near that discarded sweatshirt when police entered the building meant very little.

Any evidentiary value that Conway's proximity to the sweatshirt might have had, moreover, was minimized by the undisputed fact that, while at least one of the sweatshirt's sleeve cuffs had gunshot residue on it, Conway's hands did not. (R 108–09 110–11, 113, 128–29, 130.) That inconvenient fact

obviously cut against a conclusion that Conway was the shooter in a general sense. But more than that, had Conway been the person wearing the sweatshirt during the shooting, one would have expected the condition of his hands to match that of the sleeve cuffs—and they didn't. The absence of gunshot residue on Conway's hands seriously undermined any inference that he had worn the sweatshirt or even touched its sleeves after the shooting.

Furthermore, the sweatshirt was found lying on the floor in a room that was evidently just inside the building's first-floor entrance. (R 68, 70–71; Sup R 25–26.) Given that the shooter entered the building to hide the guns, it's hardly a surprise that he also attempted to evade detection by ridding himself of his distinctive sweatshirt at the first opportunity. Thus, even when the evidence is viewed in the light most favorable to the State, the fact that Conway was found near the sweatshirt worn by the shooter added very little to the State's case.

Third, although it is true that the keys to the Pontiac were found on Conway, giving rise to a reasonable inference that he either owned or drove that car, it does not follow that he and the shooter were one and the same. (R 72.) There was no evidence that the shooter locked or unlocked the Pontiac, only that he opened and closed the passenger-side door. (R 68.) Given that the Pontiac was parked next to the location the shooter fired from and directly in front of the house the shooter went into afterwards, the shooter—whose reason for opening and closing the car door remains unknown—could well have used it simply because it was convenient. (R 68, 106–07, 115; State's Exs. 5, 6.) There was nothing else that connected the car to the shooter. Because there was no evidence that the car was ever searched, there was no evidence that anything related to the shooting was found inside of it. For that matter, other than the keys, nothing connected the car to

Conway. There was no evidence that anything belonging to Conway was found inside of it. There was no evidence that the car was registered to Conway or to one of his friends or relatives. And the limited value of the keys is underscored by the fact that the trial court didn't even mention them while entering its fairly detailed oral findings. (R 154–60.) As with the other circumstantial evidence, the fact that Conway had the keys to the Pontiac on him at the time of his arrest had, at best, only minimal probative value.

Finally, it is worth noting that Conway's presence in the building that the shooter entered was no more probative than the gun being in the basement. The evidence showed that he was only one of several Black men inside that building, any one of whom might have been the shooter. (R 68, 70, 97–98.) As the appellate court correctly noted, Story never described the shooter's appearance apart from his clothing, so there was no way to evaluate how he zeroed in on Conway as opposed to any of the other candidates. (R 70–71.) *See Conway*, 2021 IL App (1st) 172090, ¶ 19. Furthermore, after the shooter ran inside the building, there was a delay of eight to ten minutes while officers responded to the scene. (Sup R 20.) Story, who testified that he remained in place while waiting for other officers to arrive, presumably watched the front door during that time. (R 94–95.) But there was no evidence that anybody had eyes on the back door, which means, as the appellate court once again noted, that the shooter could easily have fled the building without being detected. *See Conway*, 2021 IL App (1st) 172090, ¶ 19. Indeed, because the shooter's gun and his sweatshirt were found in different parts of the building, the evidence tended to show that the shooter did *not* remain in the first-floor living room where Conway was found. In light of these facts, a trier of fact could not rationally assign Conway's presence in the building several minutes after the shooting any substantial weight.

When viewed in the light most favorable to the State, as it must be, these circumstances may have provided a minor degree of corroboration to Officer Story's legally insufficient identification of Conway as the shooter. Putting all the evidence together, one could rationally conclude that Conway *might* have been the shooter. But "the fact that [the] defendant is 'probably' guilty does not equate with guilt beyond a reasonable doubt." *People v. Ehlert*, 211 Ill. 2d 192, 213 (2004). The prosecution's burden to prove the defendant guilty beyond a reasonable doubt "is a protection of 'surpassing importance.'" *Ehlert*, 211 Ill. 2d at 212 (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 476 (2000)). That demanding standard is deliberately designed to err on the side of acquitting guilty defendants rather than convicting innocent ones. *Winship*, 397 U.S. at 364 (quoting *Speiser v. Randall*, 357 U.S. 513, 525–26 (1958)). When viewed in the light most favorable to the prosecution, the evidence established that Conway was a likely suspect—no more. The reasonable-doubt standard requires the trier of fact to "reach a subjective state of *near certitude* of the guilt of the accused." *Jackson*, 443 U.S. at 315 (emphasis added) (citing *Winship*, 397 U.S. at 372 (Harlan, J., concurring)). And that was not possible here. No trier of fact could have rationally concluded that Story's unreliable identification and the minimally probative circumstantial evidence left no reasonable doubt about the shooter's identity. Accordingly, the evidence was insufficient to sustain Conway's conviction, which must be reversed outright.

II.

Alternatively, the appellate court's judgment reversing and remanding for a new trial should be affirmed because it correctly found that there was no basis in the evidence for the trial court's finding that Officer Story had received "training" that reduced the risk he would make a misidentification.

(response to State's brief)

The appellate court did not reverse Jason Conway's conviction and remand for a new trial based on an unraised issue. In his briefs, Conway asked the appellate court to reverse and remand because there was no evidentiary basis for the trial court's finding that Officer Story had received some kind of "training" that reduced the risk that he would make a mistaken identification. (Conway's App. Ct. Br. 38–41; App. Ct. Reply Br. 13–14.) The appellate court squarely addressed that argument and reversed and remanded because it *agreed* with it. *See People v. Conway*, 2021 IL App (1st) 172090, ¶¶ 22–23, 26–27. (*Infra* Arg. II.A.1.) The appellate court's further determination that the trial court's finding displayed pro-police bias was merely the basis for its instruction to reassign the case on remand—a proper exercise of its authority under this Court's rules. *See Conway*, 2021 IL App (1st) 172090, ¶¶ 26, 28–29, 31. (*Infra* Arg. II.A.2.)

On the merits, moreover, the appellate court's core judgment reversing and remanding was correct and should be affirmed. By entering an unsupported finding, the trial court violated Conway's due-process right to be tried solely on the evidence. (*Infra* Arg. II.B.) That error requires reversal because the trial court's unsupported finding went directly to the reliability of Officer Story's identification, which was the central issue at trial, so it was not harmless and it amounted to plain error—and, in this Court, the State does not argue otherwise. (*Infra* Arg. II.C.) The appellate court's additional

finding of bias was an appropriate basis for it to order that the case be reassigned on remand. (*Infra* Arg. II.D.) Accordingly, this Court should either affirm the judgment of the appellate court in full or, alternatively, vacate only that part of the judgment ordering the case to be reassigned on remand. (*Infra* Arg. II.E.)

A. The State misreads the decision of the appellate court, which did not reverse Conway's conviction based on an unraised claim that the trier of fact was biased.

The State argues that the appellate court "sua sponte revers[ed] … based on a claim that [Conway] did not raise." (State's Br. 10.) The appellate court's decision shows otherwise.

1. The appellate court reversed and remanded for a new trial because it agreed with Conway's argument that the trial court erred by entering a finding that was not based on any evidence.

There is no dispute that one of the four issues Conway raised in the appellate court was the trial court's unsubstantiated finding that Officer Story's "training" reduced the risk that he would make a misidentification. (Conway's App. Ct. Br. 38–41; State's Br. 6, 9.) Conway noted that the trial court had twice remarked that Story was a trained police officer, not a civilian, and expressly found that Story's "training" reduced the risk of a misidentification. (Conway's App. Ct. Br. 38, 39 (citing R 156, 159)). He further contended that there was no evidence in the record concerning Officer Story's "training" or how it would have helped him make a more reliable identification. (Conway's App. Ct. Br. 39.) Thus, he argued that "the record affirmatively show[ed] that the trial court relied on facts not in evidence when it found Officer Story's long-distance identification to be credible."

(Conway's App. Ct. Br. 39.) And, because a finding that is not based on the evidence violates due process, he argued that the trial court's unsupported finding amounted to plain error, and he asked the appellate court to reverse and remand for a new trial. (Conway's App. Ct. Br. 38–39, 40–41.)

The State contends that the appellate court's decision to reverse and remand was based on a "sua sponte" finding that the trial judge was biased. (State's Br. 10.) Not so. In the very first paragraph of its opinion, the appellate court stated that it was holding "that the trial court's *unsupported assertions* about the special perceptual powers of police officers require reversal and remand for a new trial." *Conway*, 2021 IL App (1st) 172090, ¶ 1 (emphasis added). The body of its opinion, moreover, shows that it not only *addressed* Conway's argument that the trial court entered an unsupported finding but reversed and remanded for a new trial because it *agreed* with that argument:

> No evidence supports the assertion that police officers have any advantage over other witnesses in identifying strangers they have seen once or that officers are less prone to false identifications. [Citation.] The trial judge here stated, "He is a law enforcement official, which I think is something that I can take into consideration as compared to an individual who's never had any such training and the dangers of false identification ***. That is not a general statement. That is specifically to this officer."
>
> **We find that no evidence distinguished Story's ability to make identification** from the abilities of any other officer. Story's emphasis on his unobstructed view of the shooter's face shows that he intended the court to rely on his ability to recognize facial features of a person he saw for five seconds from 150 feet. …
>
> …
>
> **No evidence supports the judge's finding** that Story's training gave him a better ability than any other witness to identify a face he saw for a few seconds from 150 feet away.

> Hence, **there was no evidence in the record supporting the trial judge's finding** that this police officer was better equipped than lay witnesses to identify a stranger's face in seconds from 150 feet away.

Id. ¶¶ 22–23, 26–27 (emphasis added). These portions of the appellate court's opinion—which are conspicuously absent from the State's description of that decision (State's Br. 6–7)—refute any contention that the appellate court reversed Conway's conviction based an unraised claim. They cannot be construed as anything other than a holding that the trial court's finding about Story's "training" was improper because it was not based on evidence, which is *exactly* the argument that Conway raised. And that holding was a proper and sufficient basis upon which to reverse. (*See infra* Arg. II.B.)

2. The appellate court's further determination that the trial court's unsubstantiated finding showed pro-police bias was merely the basis upon which it ordered that the case be reassigned on remand.

In addition to agreeing with his argument that the trial court made a finding that was not based on evidence, the appellate court further concluded that the trial court's unsupported finding evinced a bias in favor of police officers. The State argues that this was the basis for the appellate court's decision to reverse. (State's Br. 9–12.) Once again, that argument misreads the appellate court's decision, which makes clear that it did not reverse because the trial court displayed a pro-police bias. Instead—as the appellate court expressly stated in its opinion—that conclusion justified its decision to *reassign* the case to a new judge on remand:

> We find that the record shows the "judge harbored preconceived notions regarding the veracity of the [prosecution] witnesses which led him to reject [the] defense without due consideration. We also find that defendant was not afforded a fair and impartial trial." *People v. Kennedy*, 191 Ill. App. 3d 86, 91, 138 Ill. Dec. 467, 547 N.E.2d 634

> (1989). Just as "a prosecutor may not argue that a witness is more credible because of his [or her] status as a police officer" (*Clark*, 186 Ill. App. 3d at 115-16, 134 Ill. Dec. 138, 542 N.E.2d 138), a trial judge cannot find a witness more credible solely because of his or her status as a police officer.
>
> The judge's comments show "an underlying presumption favoring the exercise of government power" (Morgan Cloud, *The Dirty Little Secret*, 43 Emory L.J. 1311, 1340 (1994)), and "work[ed] under the principle that police officers are presumptively trustworthy" (David N. Dorfman, *Proving the Lie: Litigating Police Credibility*, 26 Am. J. Crim. L. 455, 472 (1999)). Accordingly, we remand to the presiding judge of the criminal division for reassignment and a new trial. Under Illinois Supreme Court Rule 366(a)(5) (eff. Feb. 1, 1994), we may, in our discretion, direct that this case be reassigned to a new judge on remand. *People v. Serrano*, 2016 IL App (1st) 133493, ¶ 45, 404 Ill. Dec. 189, 55 N.E.3d 285. **We exercise that discretion here because of the trial judge's pronounced bias in favor of police testimony.** Because of our disposition on this issue, we do not address the remaining arguments on appeal.

Conway, 2021 IL App (1st) 172090, ¶¶ 28–29 (emphasis added) (alteration marks in original). In fact, under this Court's precedent, the appellate court's reassignment order would not have been proper in the absence of this finding. *Cf. Raintree Homes, Inc. v. Village of Long Grove*, 209 Ill. 2d 248, 263 (2004) (reversing reassignment order where appellate court entered it "without discussing any bias on the part of the trial judge" in its decision). So, not only did the appellate court *say* that it was reassigning the case because of the trial judge's pro-police bias, its bias finding was *legally necessary* to exercise its discretion to reassign in the first place.

The State's contention that the appellate court reversed because the trial judge exhibited a pro-police bias is further refuted by its finding that the evidence was closely balanced. In the appellate court, Conway was forced to concede that he had forfeited his argument that the trial court's

unsubstantiated finding was error by not raising it in the trial court, but he argued that it was nonetheless reviewable as plain error. (Conway's App. Ct. Br. 40–41.) As the State's brief notes, trial before a biased trier of fact is a structural error requiring automatic reversal. (State's Br. 9.) *See People v. Glasper*, 234 Ill. 2d 173, 201 ("[A] trial before a biased tribunal would constitute structural error not subject to harmless-error review."). By definition, a structural error is one that "necessarily renders a criminal trial fundamentally unfair or … an unreliable means of determining guilt or innocence." *People v. Moon*, 2022 IL 125959, ¶ 28. Thus, structural errors are reviewable under the second prong of the plain-error doctrine, which may be invoked if an error "threatens the integrity of the judicial process." *See Moon*, 2022 IL 125959, ¶ 28. Had the appellate court reversed Conway's conviction on the ground that the trial judge was biased, then reversal would be a foregone conclusion under the second prong of the plain-error doctrine, and the appellate court would have proceeded accordingly. But it didn't. Instead, the appellate court expressly found that the evidence was "closely balanced." *Conway*, 2021 IL App (1st) 172090, ¶ 20. That finding spoke to *first*-prong plain error, which requires the defendant to show "that the evidence was so closely balanced the error alone severely threatened to tip the scales of justice." *Moon*, 2022 IL 125959, ¶ 23 (quoting *People v. Sebby*, 2017 IL 119445, ¶ 51). That finding would not have been necessary if, as the State contends, the appellate court had reversed because it found that Conway had not been tried by an impartial tribunal.

The appellate court's written opinion shows that its finding of bias was not the basis for reversing Conway's conviction but its justification for ordering reassignment on remand—an instruction that was entirely proper under the circumstances. (*See infra* Arg. II.D.) Instead, the appellate court

reversed because it agreed with Conway that the trial court had made a finding not supported by the evidence. This Court should therefore reject the State's misinterpretation of the appellate court's opinion.

B. The appellate court correctly held that the trial court's finding concerning Officer Story's "training" was not supported by the evidence.

Because it was not based on the evidence presented at trial, the trial court's finding that Officer Story's "training" reduced the risk of a misidentification denied Conway his constitutional right to due process. The appellate court therefore correctly reversed and remanded for a new trial.

Due process of law requires a fair trial. *People v. Joiner*, 2018 IL App (1st) 150343, ¶ 69; *see* U.S. Const., amend. XIV, § 1; Ill. Const. 1970, art. I, § 2. A trial court's deliberations "must necessarily be limited to the record before it." *People v. Steidl*, 177 Ill. 2d 239, 266 (1997). When the trial court relies on evidence that is outside the record, such as the judge's own personal knowledge or information obtained through a private investigation, due process is denied. *People v. Nelson*, 58 Ill. 2d 61, 66 (1975); *accord People v. Jenk*, 2016 IL App (1st) 143177, ¶ 53. Due process is also denied when the trial court fails to recall evidence that is crucial to the defense. *People v. Williams*, 2013 IL App (1st) 111116, ¶ 75. While the trial court is presumed to only consider admissible evidence, that presumption may be rebutted by the record. *Jenk*, 2016 IL App (1st) 143177, ¶ 53. Whether the trial court's deliberations violated the defendant's right to due process is reviewed *de novo*. *Williams*, 2013 IL App (1st) 111116, ¶ 75.

The presumption that the trial court considered only the facts in evidence when finding Conway guilty is rebutted in this case. The record

affirmatively shows that the court relied on facts not in evidence when it found Officer Story's long-distance identification to be credible. During its discussion of Officer Story's opportunity to see the shooter, the court emphasized that he was "a *trained* police officer, … not a civilian." (R 156 (emphasis added).) Later, after noting that the officer was not startled or distracted during the shooting, the court found that his training as a law enforcement officer obviated the danger of a misidentification:

> Again, he is a professional. He is a law enforcement official, which I think is something that I can take into consideration as compared to an individual who's *never had any such training* and the dangers of false identification become more concerning th[a]n with a police officer. That is not a general statement. That is specifically to this officer.
>
> (R 159 (emphasis added).)

But there was no evidence at all touching on Officer Story's training, much less evidence that he had ever been trained to make reliable identifications. The State points to nothing in the record suggesting otherwise.

This finding, moreover, went to the crux of Conway's defense. At trial, defense counsel argued that, although Officer Story had seen the shooting, he was not in a position to make a positive identification. (R 146–47, 150.) The trial court also believed that the case turned on whether it credited Story's identification testimony. (R 155–56, 158.) And in crediting Officer Story's identification, the trial court expressly found that he had received "training" that reduced "the dangers of false identification"—a proposition that was not supported by the evidence. (R 159.)

In the course of criticizing the appellate court's bias determination, the State argues that the trial court's finding about Story's "training" merely went to whether Story was paying attention to the shooting as it unfolded, not the distance from which Story saw the shooter. (State's Br. 18–19.) *See*

People v. Slim, 127 Ill. 2d 302, 307–08 (1989) (identifying a witness's "degree of attention" is a relevant factor when assessing an identification). The notion that distance wasn't an issue at trial is refuted by the record, which shows that the parties and the trial court were well-aware that the reliability of Story's identification was impaired by the distance from which he saw the shooter. (*See supra* Arg. I.B, at 26–27.) But even if one assumes that the trial court's finding that Story's "training" made "the dangers of false identification" less "concerning" than they otherwise would be went only to the degree-of-attention factor, it would not make a difference. Regardless of what factor or factors that finding addressed, the fact remains that it was not supported by evidence, which means that it was error.

The trial court's finding cannot be defended as a reasonable inference from the evidence that Story was a "veteran police officer." (State's Br. 20.) The State cites three cases that purportedly stand for the proposition that police officers may be assumed to pay a higher degree of attention when observing a suspected criminal. *See Manson v. Brathwaite*, 432 U.S. 98, 115 (1977); *United States v. Frink*, 328 Fed. Appx. 183, 192 (4th Cir. 2009); *State v. Findlay*, 171 Vt. 594 (2000). These cases do not support the State's proposed inference. All three cases involved undercover drug purchases where law-enforcement officers were *specifically tasked* with paying close attention to the defendants during the transaction for the *purpose* of making a later identification, which means that they would "be expected to pay scrupulous attention to detail" in order to "subsequently … find and arrest" the seller who was being targeted. *Manson,* 432 U.S. at 115. Thus, the officer in *Manson* saw the defendant from two feet away while making an undercover drug purchase at the defendant's apartment. *Manson,* 432 U.S. at 99–100. Similarly, the officer in *Frink* made an undercover street purchase of

crack cocaine, which gave him the chance to get an up-close look at the individual who delivered the drugs to the scene. *Frink*, 328 Fed. Appx. at 187. And in *Findlay*, an undercover officer charged with watching while an informant bought marijuana from a man in a car followed the seller to a convenience store, where the seller got out of his car, allowing the officer to see his face. *Findlay*, 171 Vt. at 594–95. So, in all three of these cases, the officers in question had been specifically assigned to make or watch drug purchases so they could see who the seller was. Identifying the seller was the entire point of their job on those days.

Here, by contrast, Officer Story was *not* specifically tasked with watching pedestrians walking on the sidewalk north of West Monroe Street for the purpose of identifying those individuals at a later point in time in case one of them pulled a gun out and started shooting. According to his own testimony, he was not conducting active surveillance at the time the shooting happened. Instead, he was parked on the side of the road while waiting for his narcotics team to regroup because he had blown his cover while doing a drug surveillance mission "a few blocks down." (R 63–65, 79.) Because he was not conducting active surveillance of the shooter for the purpose of making a later identification, and simply looked down the block when he unexpectedly heard gunfire, Officer Story was merely "a casual or passing observer" with respect to the shooting. *See Mason*, 432 U.S. at 115. There is, accordingly, no basis for inferring that he was paying particularly close attention to the shooter's identity.

Furthermore, these cases cannot be read as permitting an inference that *any* officer may be deemed "a trained police officer" who is better at making identifications than other people. (State's Br. 20 (quoting *Frink*, 328 Fed. Appx. at 192).) Any such argument would rely on the unstated assumption

that there was no evidence of the officers' training in *Manson*, *Frink*, and *Findlay*. But the opinions in those cases do disclose, one way or another, whether there had been any testimony at trial about the officers' training. There is no reason to think that these courts simply assumed, without any evidence, that the officers in question had received identification training. In fact, such testimony is commonly offered to bolster the reliability or credibility of an identification offered to prove the defendant's identity. *See, e.g.*, *United States v. Sanchez*, 988 F.2d 1384 (5th Cir. 1993) (officer assigned to make undercover drug purchases testified that "[h]e had been trained to be observant and to pay close attention to detail"); *United States v. Bothwell*, 465 F.2d 217, 220 (9th Cir. 1972) (customs agent testified that he had been "throughly trained in the art of identifying individuals through observation of their physical features").[9] This is true not only for police officers but for other witnesses who, for whatever reason, have received some kind of training that might be relevant to their ability to make accurate identifications. *See, e.g.*, *Killebrew v. Endicott*, 992 F.2d 660, 665 (7th Cir. 1993) (bank teller trained to look for unique characteristics of bank robbers); *State v. McDuffie*, 450 N.J. Super. 554, 573–75 (2017) (former military sniper spent three months undergoing training in "memory, observation, and concentration"); *State v.*

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9. *See also State v. Rojo-Valenzuela*, 235 Ariz. 617, 621 (Ct. App. 2014) (officer testified "that he had been trained to take note of a suspect's clothing and build while in pursuit"); *People v. Perez*, 203 A.D.2d 123, 124 (N.Y. Sup. Ct. App. Div. 1994) (officer properly testified about his training regarding identification procedures); *People v. Ramos*, 192 A.D.2d 324, 324 (N.Y. Sup. Ct. App. Div. 1993) (trial court properly admitted "evidence regarding the identification training received by undercovers"); *Tutson v. State*, 530 S.W.3d 322, 327 (Tex. Ct. App. 2017) (officer testified that he "dr[ew] on his years of identification training" while pursuing suspect); *Morris v. State*, 696 S.W2d 616, 619 (Tex. Ct. App. 1985) (officers "testified that they [were] highly trained observers").

Gallegos, 2016 UT App 172, ¶¶ 10, 49, 59 (former club bouncer trained to memorize appearance of "perpetrators" to aid later criminal investigations).

No similar testimony was elicited here. And when there is no evidence that a police officer has received specialized identification training, any "inference" that the officer has been trained in such a way as to minimize the likelihood of a misidentification is tantamount to crediting that officer's testimony based merely on his or her status as a police officer. It is well-established that a witness's status as a police officer may not be used to bolster his or her credibility. *See People v. Adams*, 2012 IL 1111658, ¶ 20 ("[A] prosecutor may not argue that a witness is more credible because of his status as a police officer."). Because a jury cannot be asked to credit an identification based on the witness's status as a police officer, the trier of fact in a bench trial also cannot credit a witness on that basis. *See People v. Barnham*, 337 Ill. App. 3d 1121, 1135 (5th Dist. 2003) ("A trial court, sitting without a jury, has the obligation to … act on principles that it would direct a jury to follow.") (citing *People v. Rivers*, 410 Ill. 410, 419 (1951)). Because there was no evidence that Officer Story had received specialized identification training, there was no proper basis for the trial court to draw the inference that he had.

The State also argues that there was no error because, in addition to the unsupported finding about Story's supposed "training," the trial court relied on other considerations that went to the credibility of Story's identification: his demeanor while testifying, the favorable lighting conditions, the absence of visual obstructions, and supposedly corroborative circumstantial evidence. (State's Br. 14.) That the trial court considered different matters that were supported by some kind of evidence, however, does not change the fact that it entered a finding about Story's "training" for which there was *not* evidentiary

support. An erroneous finding does not transform into a proper one merely because the court avoids making additional errors. If anything, the State's argument might be relevant to whether the trial court's error was harmless—but the State does not contend that it was. (*See infra* Arg. II.C, at 46–47.)

In short, the record plainly discloses that the trial court found that Officer Story had received "training" that, in some way, reduced "the dangers of false identification." (R 159.) The State does not dispute that no evidence about Story's supposed training was adduced at trial, and it fails to identify any proper inference from the evidence that was presented that would support that finding. The trial court's unsupported finding therefore violated Conway's right to due process.

C. The trial court's violation of Conway's due-process right to be found guilty based solely on the evidence requires reversal.

Because trial counsel did not object to the trial court's improper finding or challenge it in a posttrial motion, that error was technically forfeited. *See People v. Sebby*, 2017 IL 119445, ¶ 48. In the appellate court, Conway argued that the trial court's finding amounted to plain error because the evidence was closely balanced and because it undermined the integrity of the judicial process by denying Conway a fair process for determining his guilt. (Conway's App. Ct. Br. 40–41.) The appellate court agreed that the evidence was closely balanced. *Conway*, 2021 IL App (1st) 172090, ¶ 20. In its brief before this Court, however, the State neither invokes forfeiture nor challenges the appellate court's finding that the evidence was closely balanced. It has therefore forfeited any procedural default on Conway's part, which means that the plain-error doctrine is inapplicable. *See People v.*

Williams, 193 Ill. 2d 306, 347–48 (2000) (holding that the State forfeits a defendant's forfeiture by not raising it in a timely manner).

Ordinarily, that would make the remaining question whether the error was harmless. *See People v. Williams*, 2013 IL App (1st) 111116, ¶ 93 ("After finding a due process violation, an appellate court must still consider whether the violation was harmless.") (citing *People v. Mitchell*, 152 Ill. 2d 274, 326 (1992)). But because the trial court's unsupported finding violated Conway's constitutional right to due process, the State has the burden of proving, beyond a reasonable doubt, that it did not contribute to the finding of guilt. *Williams*, 2013 IL App (1st) 111116, ¶ 93 (citing *People v. Patterson*, 217 Ill. 2d 407, 428 (2005)). And, just as it did not raise forfeiture, the State does not argue that any error was harmless. It has therefore failed to meet its burden of showing that the trial court's error was harmless beyond a reasonable doubt. *See People v. Lofton*, 194 Ill. 2d 40, 61–62 (2000).

Even if the State had not forfeited any argument that the error was either forfeited or harmless, reversal would still be required. Not only would the State be unable to show that the error was harmless beyond a reasonable doubt, both the closely balanced evidence in this case as well as the nature of the error would permit review under the plain-error doctrine.

First, the trial court's unsupported finding cannot be deemed harmless beyond a reasonable doubt because the record shows that it "contributed to [Conway's] conviction." *See People v. King*, 2020 IL 123926, ¶ 40. Because of the significant distance at which he viewed the shooter, Story's identification was not airtight. The trial court overcame that, and any other difficulties it may have had with crediting the identification of Conway, by citing Story's supposed "training" as making "the dangers of false identification" less "concerning" than it would be with a witness who was not a police officer.

(R 159.) The trial court's on-the-record finding about Story's training shows that it improperly relied on that unsubstantiated belief in finding Conway guilty and rebuts any presumption that its findings were based solely on the evidence before it, which means that the error was not harmless. *Cf. In re Jovan A.*, 2014 IL App (1st) 103835, ¶¶ 42–43 (reversing because record showed that trial court improperly relied on hearsay during oral pronouncement of guilt).

The error also was not harmless beyond a reasonable doubt because the evidence against Conway was not overwhelming. *See People v. King*, 2020 IL 123926, ¶ 40. As detailed in the previous argument, the distance at which Story viewed the shooter significantly impaired the reliability of his later identification of Conway. (*See supra* Arg. I.B.) Furthermore, not only did the circumstantial evidence do little to bolster Story's identification, it actually undermined it: the gun used in the shooting was not found in the same apartment as Conway was, and Conway's hands were free of gunshot residue despite being arrested only minutes after the shooting took place. (*See supra* Arg. I.C.) Because the evidence was not overwhelming, the State cannot show beyond a reasonable doubt that a trier of fact who considered only the proper evidence would still have convicted Conway. Hence, the error was not harmless.

Second, even if the State had raised forfeiture, reversal would still be required under the plain-error doctrine. *See* Ill. S. Ct. R. 615(a) ("Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the trial court."). Under the plain-error doctrine, a reviewing court may reach a forfeited error when that error was clear or obvious and either: (1) the evidence was closely balanced such that the error threatened to tip the scales of justice against the defendant; or (2) regardless

of the strength of the evidence, the error affected the fairness of the trial and challenged the integrity of the judicial process. *Moon*, 2022 IL 125959, ¶ 20. As discussed above, the error here was clear and obvious: the trial court made an on-the-record finding that was not supported by any evidence. (*See supra* Arg. II.B.) Furthermore, that error can be reached through both prongs of the plain-error doctrine.

For essentially the same reasons that there was not overwhelming evidence of guilt, the evidence at trial on the shooter's identity was closely balanced due to the inherent unreliability of Officer Story's identification. The record shows that the trial court overcame any difficulties it may have had with that identification by relying on its unsupported belief that Story's "training" reduced the risk of a misidentification, demonstrating that the error here indeed tipped the scales of justice against Conway. (R 159.) This Court has previously found that evidence may be closely balanced when the State's case relies on questionable eyewitness identifications and neither physical evidence nor the defendant's own inculpatory statements can tie him to the charged offense. *See People v. Piatkowski*, 225 Ill. 2d 551, 567 (2007). Such is the case here: Conway was identified as the shooter by an eyewitness whose ability to see the shooter's face was substantially impaired by the distance involved, the physical evidence—a negative gunshot residue test—did not implicate him, and he never made any inculpatory statements. (*See supra* Arg. I.) The appellate court therefore correctly found that the evidence in this case was "closely balanced." *Conway*, 2021 IL App (1st) 172090, ¶ 20.

The trial court's unsubstantiated finding is also reviewable as plain error because a finding that is not based on evidence goes beyond mere trial error by affecting the framework within which guilt is determined. In *People v.*

Lewis, 234 Ill. 2d 32 (2009), this Court found second-prong plain error where the trial court imposed a street-value fine for which there was no evidentiary support. *Lewis*, 234 Ill. 2d at 48–49. *Lewis* teaches that a finding not based on evidence is not a "simple mistake" in evaluating guilt but "a failure to provide a *fair process* for determining" it in the first place. *See id.* at 48. Such an error amounts to plain error because a finding based on something other than evidence of guilt implicates the right to a fair trial. *See id.* (citing *People v. Blue*, 189 Ill. 2d 99, 140 (2000)). "The integrity of the judicial process is also affected when a decision is not based on applicable standards and evidence, but appears to be arbitrary." *Id.* (citing *People v. Johnson*, 208 Ill. 2d 53, 84 (2003)). Here, as in *Lewis*, the trial court's finding was not based on the evidence before it, so it is reviewable as plain error.

Lastly, the State's brief contains a perfunctory argument that, if the trial court improperly credited Story's identification, it was only because defense counsel invited it to by stating during closing argument that the trial court could choose to "believe Story or … doubt him." (R 150; State's Br. 21.) As discussed previously, this reads far too much into counsel's unremarkable acknowledgment that, as trier of fact, it was the court's role to make credibility determinations. (*See supra* Arg. I.B, at 27–28.) At any rate, the rule of invited error does not apply in this case. That rule "prohibits a party from requesting to proceed in one manner and then contending on appeal that the requested action was error." *Gaffney v. Bd. of Trustees of Orland Fire Protection Dist.*, 2012 IL 110012, ¶ 33. Here, the defense never asked the trial court to find that Story had received "training" that reduced the risk that he would make a mistaken identification, so the trial court's unsupported finding was not invited error.

In short, had the State invoked forfeiture, the trial court's error would have been reviewable under the plain-error doctrine. Had the State argued that any error was harmless, it would not have been able to prove beyond a reasonable doubt that the error had no effect on the finding of guilt. But in the end, the State made neither argument. Any way you look at it, the trial court's error requires reversal.

D. The appellate court properly exercised its discretion to order that the case be assigned to a different judge on remand.

Conway acknowledges that, in the appellate court, he did not ask for his case to be reassigned on remand due to any potential bias on the part of the trial court. Nevertheless, this Court should affirm the appellate court's decision to do so because its finding of bias both flowed from Conway's arguments and justified reassignment.

To begin with, while Conway did not expressly argue that the trial court harbored a pro-police bias, the appellate court's finding that it did was simply a logical extension of an argument that Conway *did* make, which was that the trial court could not have properly credited Story's identification on the basis of his status as a police officer. (Conway's App. Ct. Br. 40.) Although Conway did not assert that trial court's unsupported finding about Story's "training" was *in fact* the result of a bias in favor of police officers, it carried with it the implication that, because there was no evidence supporting that finding, the trial court may have improperly relied on Story's status as a police officer. It was therefore perfectly reasonable to infer that such a bias explained why the trial court had found, with no basis in the evidence, that Story's "training" increased his chances of accurately identifying the

shooter—which is exactly what the appellate court did. *See Conway*, 2021 IL App (1st) 172090, ¶ 26.[10]

The appellate court's finding of bias, moreover, legally justified its decision to order reassignment on remand. This Court's rules authorize the appellate court to require that criminal cases being remanded to the circuit court be assigned to new judges. *See People v. DiCorpo*, 2020 IL App (1st) 172082, ¶ 55 (relying on Rule 366(a)(5) and Rule 615(b)(2)); *People v. Rosado*, 2017 IL App (1st) 143741, ¶ 46 (collecting cases relying on Rule 366(a)(5)). An instruction to reassign the case, moreover, does not require a showing of actual bias on the part of the original judge. A case can be reassigned "to avoid even the *appearance* of bias." *Rosado*, 2017 IL App (1st) 143741, ¶ 45 (emphasis added). Similarly, reassignment is appropriate to remove "any *suggestion* of unfairness." *DiCorpo*, 2020 IL App (1st) 172082, ¶ 57 (emphasis added) (quoting *People v. McAfee*, 332 Ill. App. 3d 1091, 1097 (3d Dist. 2002)). And here, the appellate court found that the trial judge's findings reflected an apparent bias in favor of police officers. *See Conway*, 2021 IL App (1st) 172090, ¶¶ 28–29. That was a perfectly appropriate basis for ordering reassignment of the case on remand. *See People v. Harris*, 2021 IL App (1st) 182172, ¶ 62 (holding that "the interests of justice would best be served" by reassignment because the trial court's previous rulings "expressed a tendency

10. As discussed in the previous argument, the appellate court's bias finding did not, as the State claims, contradict cases holding that reliable identifications are possible at 150 feet because the cases the State cites do not support that proposition. (State's Br. 25; *see supra* Arg. I.B, at 24–26.) Nor did the appellate court contradict its own finding that the evidence was sufficient, which was expressly based on its determination that the circumstantial evidence lent adequate *corroboration* to Story's flawed identification, not a finding that the identification was good enough on its own. (State's Br. 25; *see supra* Arg. I.C, at 28.)

to affirm the officers' credibility while giving little weight to defendant's new evidence").

Consistent with its erroneous belief that the appellate court reversed Conway's conviction because of its bias finding (*see supra* Arg. II.A), the State cites a case where a postconviction petitioner was required to show that his sentencing judge was so biased as to deprive him of his constitutional right to due process. (State's Br. 12.) *See People v. Jackson*, 205 Ill. 2d 247, 273–277 (2001). The State also cites a number of cases involving motions to disqualify a judge for cause during ongoing trial-court proceedings. (State's Br. 12–13.) *See In re Estate of Wilson*, 238 Ill. 2d 519, 553–54 (2010); *People v. Jones*, 219 Ill. 2d 1, 17–19 (2006); *People v. Patterson*, 192 Ill. 2d 93, 131 (2000). Such motions are governed by the federal due-process standard. *See In re Marriage of O'Brien*, 2011 IL 109039, ¶¶ 32–33. That objective standard asks "whether the average judge in [the current judge's] position is 'likely' to be neutral, or whether there is an unconstitutional 'potential for bias.'" *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868, 881 (2009) (quoting *Mayberry v. Pennsylvania*, 400 U.S. 455, 465–66 (1971)). Naturally, it is difficult to satisfy that standard, which is why most jurisdictions—including Illinois—require judges to recuse themselves merely because their "impartiality might reasonably be questioned." Ill. S. Ct. R. 63(C)(1) (Canon 3 of the Code of Judicial Conduct); *see also Williams v. Pennsylvania*, 579 U.S. 1, 13–14 (2016) (noting similar provisions). The question in this case, though, is whether the appellate court had discretion to order a reassignment *on remand*, not whether a disqualification motion should have been granted in the trial court. *See Liteky v. United States*, 510 U.S. 540, 554 (1994). The cases cited by the State are therefore not applicable here.

Citing *Eychaner v. Gross*, 202 Ill. 2d 228 (2002), the State also argues that the trial court's unsupported finding cannot provide a basis for inferring bias because that finding was made during the course of a credibility determination. (State's Br. 12–13.) This misunderstands *Eychaner*. In that case, the trial court made unfavorable remarks about the credibility of a *testifying party*. *Eychaner*, 202 Ill. 2d at 250, 279. That party then tried to argue on appeal that the adverse credibility determination showed that the court was biased. *See id.* This Court rejected that argument, noting that a claim of bias ordinarily cannot be based on the mere fact that the judge has formed opinions based on the evidence adduced in court. *Id.* (quoting *Liteky*, 510 U.S. at 555). Because the remarks about the testifying party were made in the context of the trial court's evidence-based adverse credibility determination, they did not support a claim of bias. The problem in this case, however, wasn't the *fact* that the trial court deemed Story credible, it was that an explicit *basis* for that determination was a finding that was not supported by any evidence. *See id.* (noting that trial court's remarks "*may*" support a bias challenge "if they reveal an opinion that derives from an extrajudicial source") (quoting *Liteky*, 510 U.S. at 555).

It is true that this Court's opinion in *Eychaner* cited disqualification cases. *See id.* at 279–81. But its decision not to reassign the case on remand turned not on whether the high standard for disqualification for cause had been satisfied but on the fact that all of the allegedly biased actions on the trial court's part were merely adverse rulings or credibility findings, not indications of bias. *See id.* at 281. Moreover, this Court favorably cited two appellate cases that ordered reassignment even though actual bias had not been shown. *See id.* at 279 (citing *In re Marriage of Smoller*, 218 Ill. App. 3d 340, 346–47 (1st Dist. 1991), and *People v. Austin*, 116 Ill. App. 3d 95, 101

(2d Dist. 1983)). In *Smoller*, the court pragmatically ordered a change of venue under circumstances that were merely "suggestive of some degree of bias" so as to avoid the need to have the issue considered in the trial court. *Smoller*, 218 Ill. App. 3d at 347–48. In *Austin*, the court ordered reassignment on remand because of "the effect of the appearance rather than a demonstration of impropriety" when the judge at the defendant's probation hearing had represented him at a preliminary hearing on the original charge of theft. *Austin*, 116 Ill. App. 3d at 99–102. And even in subsequent cases that have cited *Eychaner*, the appellate court has continued to hold that reassignment on remand may be appropriate merely to avoid the appearance of bias or the suggestion of unfairness. *See DiCorpo*, 2020 IL App (1st) 172082, ¶¶ 55, 57; *Rosado*, 2017 IL App (1st) 143741, ¶¶ 45–46. Neither *Eychaner* nor the appellate court's understanding of that decision require the same rigorous showing that is necessary to disqualify a judge or order a new trial on due-process grounds.

Finally, although reviewing courts usually do not address unraised issues, this Court has recognized that they have the authority to do so under the rules. *See People v. Givens*, 237 Ill. 2d 311, 324–25 (2010); *see* Ill. S. Ct. R. 366(a)(5). There is no reason to think that this authority cannot be used in this context unless a party explicitly requests reassignment. In at least two published cases, Illinois courts have *sua sponte* ordered reassignment. In one of those cases, this Court reversed the reassignment because there was no evidence of bias, not because the appellate court acted *sua sponte*. *See Raintree Homes, Inc. v. Village of Long Grove*, 335 Ill. App. 3d 317, 321 (2d Dist. 2002), *reversed in part*, 209 Ill. 2d at 262–63. In the other, the appellate court expressly found that there were *no* bias concerns; not surprisingly, this Court vacated the reassignment in a supervisory order. *See*

People v. Hayes, 2021 IL App (1st) 190881, ¶ 52, *vacated in part*, no. 128046, 187 N.E.3d 725 (Ill. Mar. 30, 2022). Appellate courts in other jurisdictions have also recognized that they have the authority to order reassignment on remand *sua sponte*. *See, e.g.*, *United States v. Robinson*, 778 F.3d 515, 524 (6th Cir. 2015) (finding that original sentencing court would have difficulty setting aside its previously expressed views); *Ligon v. City of New York*, 736 F.3d 118, 129 & n.31 (2d Cir. 2013)[11] (finding that original judge's in- and out-of-court statements, although not misconduct, were such that the "appearance of impartiality may reasonably be questioned" in future proceedings); *but cf. Commonwealth v. Whitmore*, 590 Pa. 376, 384–88 (2006) (holding that intermediate appellate courts in Pennsylvania lack the constitutional authority to order reassignment unless a party moved for recusal in the trial court).

When a reviewing court discerns "an inherent problem in a particular remand, [it has] the power, indeed the duty, to frame [its] opinion to provide for 'further proceedings … [which are] just under the circumstances.'" *United States v. Yagid*, 528 F.2d 962, 965 (2d Cir. 1976) (quoting 28 U.S.C. § 2106) (alteration in *Yagid*).[12] That's what happened here: based on the trial court's unsubstantiated finding, the appellate court inferred that it was biased in favor of police officers, a problem that it solved by ordering that the case be

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11. *Vacated in part*, 743 F.3d 362 (2d Cir. 2014) (lifting previously ordered stay on district-court proceedings).

12. C*ompare* 28 U.S.C. § 2106 (2022) (authorizing appellate courts to "require such further proceedings to be had as may be just under the circumstances") *with* Ill. S. Ct. R. 366(a)(5) (authorizing appellate courts to "make any … further orders and grant any relief … that the case may require") *and* Ill. S. Ct. R. 615(b)(2) (authorizing appellate courts to "modify any or all of the proceedings subsequent to … the judgment or order from which the appeal is taken").

reassigned on remand. Because that was an appropriate reason to order reassignment, this Court should affirm the appellate court's decision to do so.

E. This Court can vacate the appellate court's published opinion while still affirming its judgment.

The State devotes a significant portion of its argument to critiquing the appellate court's published opinion and identifying ways in which it believes that opinion distorts the law and could lead to confusion or other problems in the lower courts in the future, including the majority's discussion of judicial bias, the basis upon which it found bias in this case, and its reliance on expert testimony in an unrelated case. (State's Br. 26–30.) Even if one assumes that the State's critiques are valid, they should not affect the outcome of this case. Nothing the State identifies undermines the appellate court's core finding that the trial court made a finding that was not based on the evidence. Nor do the State's arguments undercut the inference that the trial court's unsupported finding can be explained by a bias in favor of police officers. So, at worst, the appellate court's opinion is defective because it fails to emphasize that the mere *appearance* of bias is enough to call for assigning this case to a new judge on remand. (*See supra* Arg. II.D, at 51.)

Furthermore, any errors in the appellate court's reasoning do not provide grounds for reversing its judgment. It is a basic principle of appellate review that the reviewing court's task is to evaluate the lower court's ultimate judgment, not the underlying reasoning used to reach that result. "The question before a reviewing court is the correctness of the result reached by the lower court and not the correctness of the reasoning upon which that result was reached." *People v. Aljohani*, 2022 IL 127037, ¶ 28 (quoting *People v. Novak*, 163 Ill. 2d 93, 101 (1994)). Thus, this Court "is not bound by the

appellate court's reasoning and may affirm for any basis presented in the record." *People v. Williams*, 2016 IL 118375, ¶ 33. As Conway has demonstrated, the record here shows that the trial court reversibly erred by making a finding that was not supported by the evidence. That requires his conviction to be reversed and the case to be remanded to the trial court for a new trial. Conway has also demonstrated that the appellate court had, and properly exercised, the authority to order reassignment on remand even in the absence of a request for that particular relief. Even if this Court finds that the appellate court should not have ordered reassignment because Conway did not ask it to, it is clear that *this* Court can properly do so because it is empowered to "consider any issues and grant whatever relief is warranted by the record. *People v. Brockman*, 143 Ill. 2d 351, 361–62 (1991) (citing Ill. S. Ct. R. 318(a)); *accord Fiorito v. Jones*, 72 Ill. 2d 73, 98 (1978) (holding that this Court may grant relief not requested by the parties) (citing Ill. S. Ct. R. 366(a)(5)). Hence, both aspects of the appellate court's judgment—the portion of the judgment reversing and remanding and the portion of the judgment instructing reassignment on remand—were correct on their own merits and should be affirmed.

That said, Conway recognizes that the State has significant concerns about the reasoning found in the appellate court's published opinion insofar as it addressed the question of bias, and this Court may share some or all of those concerns. After all, a decision that is published as an opinion by a panel of the appellate court becomes binding precedent in circuit courts statewide. *See State Farm Fire & Cas. Ins. Co. v. Yapejian*, 152 Ill. 2d 553, 539 (1992). It also qualifies as persuasive authority if cited before other panels or districts of the appellate court. *See In re May 1991 Will County Grand Jury*, 152 Ill. 2d 381, 398 (1992). Consequently, if there are indeed problems with either the

reasoning expressed in the appellate court's published opinion or the portion of its judgment ordering the case to be reassigned on remand, this Court might be understandably reluctant to leave that opinion standing untouched.

If this Court believes that the appellate court erred by instructing the case to be assigned to a different judge on remand, then it need only vacate the judgment to that extent while affirming the appellate court's primary judgment reversing and remanding for a new trial. *See Raintree Homes*, 209 Ill. 2d at 263 (2004) (reversing reassignment order but otherwise affirming). If, on the other hand, this Court believes that the judgment was correct but is nonetheless concerned about the reasoning found in the appellate court's published opinion, there are two ways in which it could choose to proceed.

First, this Court can simply disavow the appellate court's reasoning in its opinion. This Court regularly overrules appellate-court opinions to the extent that they involve an incorrect analysis. *See, e.g.*, *People v. Willis*, 215 Ill. 2d 517, 536 n.2 (overruling two cases that "track[ed] the analysis" of the lower court "to the extent that they employ any analysis" other than the one identified by this Court). There is no reason to think that this Court could not or should not overrule an opinion that is under review to the extent its rationale was faulty while nevertheless affirming the judgment that opinion announced.

Second, this Court can affirm the appellate court's judgment, either in form or in substance, while simultaneously vacating its opinion. The Illinois Constitution vests this Court with "[g]eneral administrative and supervisory authority over all courts" within the state judiciary. Ill. Const. 1970, art. I, § 16. That "authority is unlimited in extent and 'is bounded only by the exigencies which call for its exercise.'" *Eighner v. Tiernan*, 2021 IL 126101,

¶ 29 (quoting *In re Estate of Funk*, 221 Ill. 2d 30, 97–98 (2006)). It is appropriately exercised when "the normal appellate process will not afford adequate relief and the dispute involves a matter important to the administration of justice." *Eighner*, 2021 IL 126101, ¶ 29 (quoting *People ex rel. Birkett v. Bakalis*, 196 Ill. 2d 510, 513 (2001)). If this Court believes that affirming the appellate court's judgment while disavowing the rationale expressed in the appellate court's published opinion is not preferable, either as matter of proper appellate procedure or simple prudence, then it can accomplish the same result in an exercise of its unlimited and unbounded power to supervise the operation of the lower courts. For example, this Court could affirm the appellate court's judgment but then issue a supervisory order vacating the appellate court's opinion. Alternatively, this Court could vacate the appellate court's judgment but then issue a supervisory order reversing the circuit court's judgment of conviction and remanding for a new trial. Although different in form, either path would accomplish the same substantive result of leaving the substance of the appellate court's judgment intact while ensuring that its published opinion would no longer be precedential.

Finally, in the event that this Court affirms the appellate court's holding that the evidence was sufficient but otherwise reverses its judgment, Conway agrees with the State that it should remand with instructions for the appellate court to consider the two issues raised in his briefs that were not addressed in its opinion. (State's Br. 30; *see* Conway's App. Ct. Br. 26–37, 42–52; App. Ct. Reply Br. 7–12, 15–19.) Additionally, if this Court agrees with the State that the appellate court improperly decided this case on the basis of an unraised issue, then Conway would respectfully ask that it also instruct the appellate court to address his argument that the trial court's

finding about Officer Story's "training" violated his right to due process because it was not based on the evidence. (*See* Conway's App. Ct. Br. 38–41; App. Ct. Reply Br. 13–14.)

* * *

Jason Conway was convicted on the basis of an identification by a single eyewitness, Officer Story, who saw the shooter at a distance of 150 feet, seriously diminishing the likelihood that his later identification of Conway was accurate. The record shows that the trial court overcame any concerns it might have had about a bad identification by finding, without any basis in the evidence, that Story had received some kind of "training" that made a misidentification less likely. That finding violated Conway's due-process right to have his guilt determined based solely on the evidence, and it requires reversal. Whatever concerns might exist about the rationale used by the appellate-court majority, the bottom line is that it was right to reverse Conway's conviction and remand for a new trial. If this Court finds the evidence sufficient to support Conway's conviction, then it should either affirm the appellate court's judgment or it should itself reverse the circuit court's judgment and remand for a new trial, with or without instructions to reassign the case.

CONCLUSION

For the foregoing reasons, defendant–appellee Jason Conway respectfully requests that this Court reverse his conviction outright. (*See supra* Arg. I.)

If this Court does not reverse outright, Conway respectfully requests that it should either affirm the appellate court's judgment or else reverse his conviction and remand for a new trial, with or without instructions to reassign the case on remand. (*See supra* Arg. II.)

In the event that this Court vacates the appellate court's judgment but does not reverse his conviction, Conway agrees with the State that this Court should remand for the appellate court to consider the remaining issues raised in his original appellate briefs. (State's Br. 30; *see supra* Arg. II.D, at 59–60.)

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 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 61 pages.

/s/Gavin J. Dow
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No. 127670

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellant, -vs- JASON L. CONWAY, Defendant-Appellee.	))))))))))	Appeal from the Appellate Court of Illinois, No. 1-17-2090. There on appeal from the Circuit Court of Cook County, Illinois , No. 15 CR 19055. Honorable Charles P. Burns, 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 August 30, 2022, 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 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 Brief and Argument to the Clerk of the above Court.

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