No. 123505

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, -vs- LANARD GAYDEN Defendant-Appellant	)	Appeal from the Appellate Court of Illinois, No. 1-15-0748. There on appeal from the Circuit Court of Cook County, Illinois, No. 14 CR 4685. Honorable Kenneth J. Wadas, Judge Presiding.

BRIEF AND ARGUMENT FOR DEFENDANT-APPELLANT

JAMES E. CHADD
State Appellate Defender

PATRICIA MYSZA
Deputy Defender

JOHN R. BREFFEILH
Assistant Appellate Defender
Office of the State Appellate Defender
First Judicial District
203 N. LaSalle St., 24th Floor
Chicago, IL 60601
(312) 814-5472
1stdistrict.eserve@osad.state.il.us

COUNSEL FOR DEFENDANT-APPELLANT

ORAL ARGUMENT REQUESTED

E-FILED
3/1/2019 10:21 AM
Carolyn Taft Grosboll
SUPREME COURT CLERK

POINTS AND AUTHORITIES

NATURE OF THE CASE

Lanard Gayden was convicted of unlawful use of a weapon, following a bench trial, and sentenced to two years in prison and one year of mandatory supervised release. This is a direct appeal from the judgment of the court below. No issue is raised challenging the charging instrument.

ISSUES PRESENTED FOR REVIEW

I. Whether the record on appeal is sufficient to establish that trial counsel was ineffective for failing to file a motion to suppress the recovery of a short-barrel shotgun on the grounds that the investigating officers lacked probable cause and exigent circumstances to forcibly enter Lanard Gayden's home, without a warrant, upon observing Mr. Gayden through an open door to his apartment holding a shotgun.

II. Assuming, *arguendo*, the record is insufficient to decide the suppression issue on appeal, whether the Illinois Constitution requires this Court to either: (a) enter an order instructing the appellate court to retain jurisdiction under Rule 615(b)(2) and remand the matter to the trial court for an evidentiary hearing because the record establishes a substantial showing of a constitutional violation and Mr. Gayden lacks an alternative means to challenge his conviction, or (b) exercise its supervisory authority and allow Mr. Gayden to file a petition for postconviction relief because he was compelled by the Illinois rules of procedural default to raise this claim on direct appeal, he completed his sentence while his appeal was pending, he did not receive a decision on the merits, and he cannot otherwise file a petition for postconviction relief.

STATEMENT OF FACTS

Lanard Gayden was arrested and charged with possession of a short-barrel shotgun. (C. 6-8, 27). He was convicted following a bench trial and sentenced to two years in prison and one year of mandatory supervised release ("MSR"). (C. 91; R. P47-48, Q2-10).

Mr. Gayden appealed his conviction and alleged, among other things, that trial counsel was ineffective for failing to file a motion to suppress the evidence of his guilt. *People v. Gayden*, 2018 IL App (1st) 150748-U, ¶ 22; (A-24). The appellate court refused to decide the issue on the merits, finding that the record was insufficient to determine "whether such a motion would likely have succeeded," and invited Mr. Gayden to file a petition for postconviction relief. *People v. Gayden*, 2018 IL App (1st) 150748-U, ¶ 28; (A-27).

Mr. Gayden filed a petition for rehearing, informing the appellate court that he lacked standing to file a petition for postconviction relief because he completed his term of MSR while his appeal was pending. He requested a decision on the merits, or in the alternative, an order retaining jurisdiction and remanding the matter for an evidentiary hearing. The appellate court denied his petition for rehearing and this Court allowed his petition for leave to appeal.

The trial court proceedings

Mr. Gayden proceeded to trial on one count of unlawful use of a weapon for allegedly possessing a shotgun "having one or more barrels less than 18 inches in length," contrary to 720 ILCS 5/24-1(a)(7)(ii) (2014). (C. 27).

Two witnesses testified for the State–Chicago police officers Patrick Glinski and John Schaffer.

Officer Glinski testified that, on February 15, 2014, at approximately 12:40 p.m., he responded to "a call of a man with a shotgun" at 8952 South Burley Avenue. (R. P5-6). He entered "the north side of the three flat building" through an exterior door, and went up a flight of stairs. (R. P6). When he reached the third-floor landing, he saw Mr. Gayden standing five feet away, "in the doorway holding a shotgun." (R. P7-8). Mr. Gayden "was standing as if looking straight out the door." (R. P13). The two made eye contact, and Mr. Gayden "threw the shotgun on the ground" and "slammed the door" shut. (R. P8). Officer Glinski forced entry, and found the shotgun "laying on the floor where [Mr. Gayden] threw it . . . five or six feet" from the door. (R. P8-9, 13). There were eight to ten other officers on the scene. (R. P12).

Officer John Schaffer testified that he, too, responded to a report of "a person with a shotgun in front of [that] location." (R. P15-16). He went to the third story and saw a shotgun on the floor "immediately upon entering the apartment." (R. P17). He recovered the shotgun and ejected the shells. (R. P17). He took the shotgun to the police station, measured it, and determined that the barrel was 17 ½ inches long. (R. P17-18). It "looked uneven" and felt "gritty," as if it had been "sawed off or somehow manipulated from its original state." (R. P18).

Mr. Gayden was found guilty of unlawful use of a weapon and sentenced, on February 6, 2015, to two years in prison and one year of MSR.

(C. 91; R. P47-48, Q2-10); (A-40). He received 356 days of sentence credit which, with good-time credit, satisfied his prison sentence. (C. 91; R. Q8); (A-40). He was discharged from MSR on February 10, 2016. (A-39).[1]

The appellate court proceedings

On December 12, 2016, Mr. Gayden filed an opening brief in which he argued, among other things, that trial counsel was ineffective for failing to file a motion to suppress the shotgun. *People v. Gayden*, 2018 IL App (1st) 150748-U, ¶ 22; (A-24). He did not argue that Officer Glinski lacked authority to enter his building. Rather, he argued that Officer Glinski's observations–specifically, his glimpse of Mr. Gayden holding a shotgun through an open door to Mr. Gayden's apartment–did not provide the police with lawful authority to enter his apartment without a warrant. The State argued that the warrantless entry was supported by probable cause and exigent circumstances. *Id.* It did not argue that the record was insufficient to decide the issue on appeal. *Id.*

On February 1, 2018, the appellate court issued a Rule 23 order affirming Mr. Gayden's conviction. *Id.* at ¶ 39; (A-18). It did not determine whether trial counsel was ineffective for failing to file a motion to suppress the evidence because, in the appellate court's opinion, the claim was better suited to postconviction proceedings:

> The record in this case is devoid of information necessary to fully address and resolve defendant's fourth amendment

---

[1] Mr. Gayden filed a motion to supplement the record with confirmation from the Department of Corrections ("DOC") that he completed MSR on February 10, 2016. (A-39). This court may take judicial notice of DOC records. See *Cordrey v. Prisoner Review Bd.*, 2014 IL 117155, ¶ 12.

> claim that the police entered into his property without lawful authority. Specifically, we do not know the layout of the apartment building, how access to the apartments is gained, whether the front entrance was locked, exactly how the police gained entry, whether the common areas were accessible to the public, the totality of the information known to the police when they entered, and exactly where defendant was standing when the police went upstairs.
>
> Therefore, we decline to address defendant's ineffective assistance of counsel claim because the record, as it exists, is insufficient for us to determine whether defendant was lawfully arrested, whether trial counsel's decision to file a motion to quash arrest and suppress was strategic, or whether such a motion would likely have succeeded. [Citation]. Our decision, however, does not foreclose collateral relief under, for example, the Post-Conviction Hearing Act. See 725 ILCS 5/122-1 et. seq. (West 2016).

Id. at ¶¶ 27-28; (A-26).

On February 20, 2018, Mr. Gayden filed a petition for rehearing, arguing that the appellate court's concerns regarding the state of the record were irrelevant to determining whether Officer Glinski's observations from the third-floor landing provided him with lawful authority to enter Mr. Gayden's unit. The petition further stated that Mr. Gayden could not file a petition for postconviction relief because he completed his term of MSR while his appeal was pending. He therefore asked the appellate court to decide his appeal on the merits or, in the alternative, retain jurisdiction and remand the matter for an evidentiary hearing to develop the record.

On March 22, 2018, the appellate court denied Mr. Gayden's petition for rehearing in a modified opinion in which it: (1) stated that it would not reconsider its ruling regarding the sufficiency of the record, (2) stated that it would not remand the matter for an evidentiary hearing to develop the record, and (3) withdrew its language inviting Mr. Gayden to file a petition

for postconviction relief. *People v. Gayden*, 2018 IL App (1st) 150748-U, as modified on denial of reh'g (Mar. 22, 2018), at ¶¶ 28-29; (A-13).

This Court allowed Mr. Gayden's petition for leave to appeal, in which he argued that: (1) the record is sufficiently developed to decide his claim of ineffective assistance of counsel, and (2) an explicit ruling from this Court is needed to ensure that defendants like Mr. Gayden, who are compelled to raise claims of ineffective assistance of counsel on direct appeal and complete their sentences while their appeals are pending, receive a decision on the merits of their claims.

ARGUMENT

I. The record establishes that trial counsel was ineffective for failing to file a motion to suppress the evidence derived from the officers' unlawful intrusion into Lanard Gayden's home.

Trial counsel was ineffective for failing to file a meritorious motion to suppress the shotgun seized from Mr. Gayden's apartment. The facts were fully developed at trial. Officer Glinski entered Mr. Gayden's building after receiving a report of "a man with a shotgun . . . in front of [that] location." (R. P5-6, 15-16). He went upstairs and saw Mr. Gayden holding a shotgun through an open door to his apartment. (R. P7-8, 13). He made eye contact with Mr. Gayden, who "threw the shotgun on the ground" and "slammed the door" shut. (R. P8). He then forced entry and arrested Mr. Gayden while another officer seized the shotgun. (R. P8-9, 16-18).

These facts did not provide Officer Glinski with probable cause to believe Mr. Gayden committed a crime. Mr. Gayden had a lawful right to possess a shotgun, to drop that shotgun to the floor of his apartment, and to shut his door upon seeing an unwanted guest. While Mr. Gayden's shotgun may have been a half-inch shorter than the law allowed, there is no reason to believe Officer Glinski could have made that distinction from his vantage point, five feet away, in the seconds before Mr. Gayden shut his door.

Additionally, regardless of whether Officer Glinski had probable cause to arrest Mr. Gayden, the police lacked exigent circumstances to force entry into his home. The mere existence of a gun, without more, is not sufficient to create exigent circumstances, Mr. Gayden could not have destroyed or disposed of the shotgun while the officers waited for a warrant, and with

eight to ten officers on the scene, the police could not have reasonably believed Mr. Gayden would have escaped. (R. P12).

Trial counsel was therefore ineffective for failing to file a meritorious motion to suppress the shotgun.

A. Mr. Gayden was entitled to the effective assistance of counsel.

Both the United States and Illinois Constitutions grant criminal defendants the right to the effective assistance of counsel. U.S. Const. amends. VI, XIV; Ill. Const. 1970, Art. I, § 8; *Strickland v. Washington*, 466 U.S. 668, 685-86 (1984). A defendant is denied the effective assistance of counsel when trial counsel's performance falls below an objective standard of reasonableness and, absent trial counsel's deficient performance, there is a "reasonable probability" the outcome of the trial would have been different. *Strickland*, 466 U.S. at 687-88, 694-95; *People v. Albanese*, 104 Ill. 2d 504, 526 (1984).

When a defendant alleges that trial counsel was ineffective for failing to file a motion to suppress evidence, the defendant must prove two things: (1) the unargued motion was meritorious, and (2) there was a reasonable probability that the outcome of the trial would have been different had the evidence been suppressed. *People v. Henderson*, 2013 IL 114040, ¶ 15. Trial counsel is ineffective for failing to file a motion to suppress when such a motion "would have been defense counsel's strongest, and most likely wisest, course of action," and the defendant "would not have suffered any harm had defense counsel elected to do so." See *People v. Little*, 322 Ill. App. 3d 607, 613 (1st Dist. 2001).

Whether trial counsel provided ineffective assistance is a mixed question of law and fact. *Strickland*, 466 U.S. at 698. This Court must defer to the trial court's findings of fact unless they are against the manifest weight of the evidence, but it reviews *de novo* the ultimate legal issue of whether trial counsel was ineffective for failing to file a motion to suppress. *People v. Berrier*, 362 Ill. App. 3d 1153, 1166-67 (2d Dist. 2006).

B. The police lacked probable cause and exigent circumstances to forcibly enter Mr. Gayden's home.

The facts adduced at trial conclusively established that Officer Glinski lacked probable cause and exigent circumstances to "knock in" Mr. Gayden's door and enter his apartment. (R. P8-9, 13).

Officer Glinski was responding to a report of "a man with a shotgun." (R. P5-6). He went to a three-flat building located at 8952 South Burley Avenue in Chicago, knocked on the exterior door, entered the building, and went up a flight of stairs. (R. P6). When he reached the third-floor landing, he saw Mr. Gayden standing about five feet away, in his apartment, holding a shotgun. (R. P7-8). Mr. Gayden "threw the shotgun on the ground," and "slammed the door" shut. (R. P8). Officer Glinski "immediately" "knocked in the door" and went inside Mr. Gayden's home where he saw the shotgun, "laying on the floor where [Mr. Gayden] threw it." (R. P8-9, 13). Mr. Gayden was detained and subsequently arrested. (R. P9-10). These facts did not provide the police with probable cause and exigent circumstances to forcibly enter Mr. Gayden's home.

The fourth amendment of the United States Constitution guarantees "[t]he right of the people to be secure in their persons, houses, papers, and

effects, against unreasonable searches and seizures." U.S. Const. amend. IV. The fourth amendment establishes a simple baseline: when "the Government obtains information by physically intruding" on persons, houses, papers, or effects, "a 'search' within the original meaning of the Fourth Amendment" has "undoubtedly occurred." *Florida v. Jardines*, 569 U.S. 1, 5 (2013), (citing *United States v. Jones*, 565 U.S. 400, 407 (2012)). In order to claim fourth amendment protections, the threshold question is whether the police intruded upon a constitutionally protected area. *People v. Burns*, 2015 IL 140006, ¶¶ 22-25.

At the core of the fourth amendment is the "the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." *Jardines*, 569 U.S. at 6 ("the home is first among equals"); *People v. Wear*, 229 Ill. 2d 545, 562 (2008) (the "chief evidence against which the fourth amendment to the United States Constitution is directed is the physical entry of the home"). Warrantless searches of a person's home are "presumptively unreasonable." *Kentucky v. King*, 563 U.S. 452, 459 (2011).

Absent a warrant, the police must have probable cause coupled with exigent circumstances to lawfully enter a private residence and effectuate an arrest or a search. *People v. Shanklin*, 367 Ill. App. 3d 569, 574 (1st Dist. 2006) (citing *In re D.W.*, 341 Ill. App. 3d 517, 529 (1st Dist. 2003)).

1. The police lacked probable cause to believe Mr. Gayden committed a crime.

Probable cause to arrest exists when the facts known to the officers at the time of the arrest are sufficient to lead a reasonably cautious person to believe that the arrestee has committed a crime. *People v. Lee*, 214 Ill. 2d

476, 488 (2005). Mere suspicion does not rise to the level of probable cause. *People v. Kidd*, 175 Ill. 2d 1, 22 (1996); *People v. Bunch*, 327 Ill. App. 3d 979, 983-84 (1st Dist. 2002). Probable cause cannot be determined with the benefit of hindsight. *People v. Tisler*, 103 Ill. 2d 226, 237 (1984).

Here, the record conclusively establishes that the police lacked probable cause to arrest Mr. Gayden when they entered his apartment. The basis for their entry was: (1) a tip that "a man with a shotgun" was in front of Mr. Gayden's building, and (2) Officer Glinski's brief glimpse of Mr. Gayden, from the third-floor landing, dropping a shotgun to the floor of his apartment before shutting his door. (R. P5-8, 13, 15-16).

Had the officers observed this conduct before *People v. Aguilar*, 2013 IL 112116 was decided, there may have been probable cause to believe Mr. Gayden committed a crime. But *Aguilar*'s holding "that the second amendment protects [an individual's] right to possess and use a firearm for self-defense" changed the legal landscape in Illinois such that, now, the mere observation of a gun, without more, is insufficient to provide the police with probable cause for arrest. See *Aguilar*, 2013 IL 112116, ¶ 21; see also *People v. Horton*, 2017 IL App (1st) 142019, ¶ 50 ("Post-*Aguilar*, the possible observation of a handgun is not in itself, without any other evidence of a crime, sufficient to provide an officer with probable cause for arrest"), judgment vacated on other grounds, 93 N.E.3d 1065 (Ill. 2017); *People v. Thomas*, 2016 IL App (1st) 141040, ¶ 30 ("Post-*Aguilar*, a tip, such as the one here, that merely mentions a gun in defendant's possession is not sufficient, without any more information regarding defendant's criminal conduct, to

provide officers with reasonable suspicion of criminal activity to justify a *Terry* stop"), judgment vacated on other grounds, 89 N.E.3d 762 (Ill. 2017).

This search occurred after *Aguilar* was decided. Officer Glinski was canvassing the area following a report of "a man with a shotgun," which is not–without more–a crime. See *D.C. v. Heller*, 554 U.S. 570, 592 (2008) (the second amendment protects an individual's right to possess a firearm for the purposes of self-defense); *McDonald v. City of Chicago, Ill.*, 561 U.S. 742, 791 (2010) (this right is applicable to the states through the fourteenth amendment); *Moore v. Madigan*, 702 F. 2d 933, 936 (7th Cir. 2012) (the right to possess a firearm in self-defense must include the right to bear arms outside the home); *Aguilar*, 2013 IL 112116, ¶¶ 20-21 (Illinois cannot prohibit an individual from "possess[ing] and us[ing] a firearm for self-defense outside the home"). Officer Glinski then caught a brief glimpse of Mr. Gayden with a shotgun, in his own home, but lacked any additional evidence to believe Mr. Gayden was committing a crime.

Importantly, Officer Glinski did not know, before he arrived on the scene, that Mr. Gayden's shotgun was half-an-inch shorter than the law allowed, and could not have discerned this fact from his vantage point five feet away in the seconds before Mr. Gayden shut his door. See *People v. Wilson*, 260 Ill. App. 3d 364, 372 (1st Dist. 1994) (a finding of probable cause cannot be predicated upon hindsight, "rather the review must center on the information available to the officers preceding the search or arrest").

Since Officer Glinski could not have known that the shotgun was half an inch too short when he saw Mr. Gayden, and could only speculate as to

whether Mr. Gayden was permitted to possess a shotgun, there was no probable cause to believe that Mr. Gayden committed a crime. "The importance long accorded the privacy of the home would mean little if a warrantless entry could be justified solely by the 'possibility' of finding evidence of a crime where the police can only guess as to what actually happened." *People v. Dawn*, 2013 IL App (2d) 120025, ¶ 24; see also *Henry v. United States*, 361 U.S. 98, 101 (1959). Here, the police lacked probable cause to enter Mr. Gayden's apartment.

2. There were no exigent circumstances justifying a warrantless search of Mr. Gayden's home.

Regardless of whether there was probable cause to arrest Mr. Gayden, the record conclusively establishes that there were no exigent circumstances to justify the warrantless intrusion into his home. Circumstances "qualify as 'exigent' when there is an imminent risk of death or serious injury, or danger that evidence will immediately be destroyed, or that a suspect will escape." *King*, 563 U.S. at 473; *Georgia v. Randolph*, 547 U.S. 103, 116, n.6 (2006). There is no exigency unless the suspect's conduct constitutes "an immediate and clear danger to the police or to the safety of those around him." *People v. Dale*, 301 Ill. App. 3d 593 (4th Dist. 1998). The guiding principle in determining whether exigent circumstances exist is reasonableness, and courts must determine whether the police acted reasonably under the totality of the circumstances they were confronting at the time the warrantless entry was made. *People v. Foskey*, 136 Ill. 2d 66, 75-76 (1990). The State bears the burden of demonstrating an exigent need for a warrantless entry into a private home. *Id.*

A reviewing court must consider a number of factors when determining whether exigent circumstances justified a warrantless search, such as: (1) whether the crime under investigation was recently committed; (2) whether there was any deliberate or unjustified delay on the part of law enforcement during which a warrant may have been obtained; (3) whether there was a likelihood that the suspect would avoid arrest or destroy evidence if he was not swiftly apprehended; (4) whether the police were acting on a clear showing of probable cause; (5) whether the crime was a "grave" crime of violence; (6) whether there was a reasonable belief that the suspect was armed; and (7) whether the entry was made peaceably, albeit without consent. *People v. McNeal*, 175 Ill. 2d 335, 345-346 (1997). This list is not exhaustive, but assists the reviewing court in determining whether the circumstances at the time of the arrest "militated against delay and justified the officers' decision to proceed without a warrant." *Foskey*, 136 Ill. 2d at 75. In this case, the relevant factors do not indicate the officers were confronted with exigent circumstances, such that they needed to "immediately" force entry into Mr. Gayden's home.

First, there was no evidence that Mr. Gayden was using his shotgun in a criminally reckless manner, and the police did not suspect him of committing an independent crime. The officers were on the scene because they received a report of "a person with a shotgun in front of [that] location." (R. P5-6, 15-16). As discussed above, this is not a crime, and the police did not know that Mr. Gayden's shotgun was half an inch too short when Officer Glinski saw Mr. Gayden standing in his apartment. (R. P7-9, 13). Moreover,

a half an inch difference in the legal length of the barrel did not turn what would otherwise be a lawful encounter into an emergency situation, justifying a warrantless entry.

Second, there is no evidence that a delay in obtaining an arrest warrant would have impeded the investigation or the apprehension of Mr. Gayden or his shotgun. See *People v. Davis*, 398 Ill. App. 3d 940, 949 (2d Dist. 2010); *People v. Klimek*, 101 Ill. App. 3d 1, 6-7 (2d Dist. 1981) (finding that the officer's warrantless entry was unjustified, in part, because the delay involved in obtaining a warrant would not have impeded the investigation). With eight to ten officers on the scene, (R. P12), the police could have "easily guarded" the doors and prevented Mr. Gayden's escape while Officer Glinski obtained a warrant. *People v. Wimbley*, 314 Ill. App. 3d 18, 28 (1st Dist. 2000) (finding that no exigency exists where the police could have prevented the defendant's escape while seeking a warrant). They could have found a judge to sign a warrant in the middle of the day. *Shanklin*, 367 Ill. App. 3d at 575. And they lacked any reason to believe Mr. Gayden could have (or would have) destroyed the shotgun in the time it would have taken them to obtain a warrant. See *People v. Brown*, 277 Ill. App. 3d 989, 996 (1st Dist. 1996) (where at the time of the entry, the police knew only that there was a man inside with a gun, "there was no real concern here that a further delay would lead to the destruction of evidence").

Third, Officer Glinski lacked a clear showing of probable cause. He was one of many officers canvassing the area following a report of "a man with a shotgun." (R. P5-6, 12, 15-16). There is nothing inherently illegal about a

man possessing a shotgun in a home or on the street. See *Moore*, 702 F. 3d at 940 (a flat ban on carrying ready-to-use guns outside the home violates the second amendment right to keep and bear arms); *Aguilar*, 2013 IL 112116, ¶ 20 ("the second amendment right to keep and bear arms extends beyond the home"). Further, there is no evidence to suggest Officer Glinski knew Mr. Gayden's shotgun was half an inch too short when he caught a brief glimpse of Mr. Gayden in the seconds before Mr. Gayden shut the door.

Fourth, the criminal conduct here, while unknown to the investigating officers, could hardly be considered a "grave" crime of violence. See *People v. Cruzado*, 299 Ill. App. 3d 131, 137 (1st Dist. 1998) ("A charge for unlawful possession of a firearm does not show a propensity for violence"); *Minnesota v. Carter*, 525 U.S. 83 (1998) (courts consider "grave" crimes to be murder, armed robbery, and assault). Mr. Gayden's gun was only illegal because it was half an inch too short. See 720 ILCS 5/24-1(b) (2014) (possession of a short-barrel shotgun is a Class 3 felony). This is a technical violation of the law, and not a "grave" crime of violence.

Fifth, although Officer Glinski knew that Mr. Gayden was armed, there was no reason for him to believe that he, or anyone else, was in danger. See *People v. Condon*, 148 Ill. 2d 96, 105 (1992) (the existence of weapon, by itself, did not create exigent circumstances allowing police executing search warrant to dispense with knock-and-announce requirement); *People v. Dawn*, 2013 IL App (2d) 120025, ¶ 26 (same). A "gun is not sufficient on its own to create exigent circumstances" where no evidence is presented "from which it could be inferred that defendants exhibited some sign of a violent character."

People v. Gott, 346 Ill. App. 3d 236, 245-46 (5th Dist. 2004). Officer Glinski could not simply assume Mr. Gayden was "dangerous" because he was "armed." *Wimbley*, 314 Ill. App. 3d at 29 (rejecting the State's argument that all persons who are armed are necessarily dangerous for exigency analysis). Were that the case, every hunter or sport shooter would have to choose between exercising their second amendment right to bear arms and their fourth amendment right to be free from unreasonable searches and seizures.

Finally, Officer Glinski's conduct was not "peaceable" when, as he expressly testified, he "immediately" forced entry into Mr. Gayden's apartment without so much as knocking or otherwise announcing his intent to enter. (R. P7-8, 13); *People v. Jennings*, 296 Ill. App. 3d 761, 765 (1st Dist. 1998) ("Police action is flagrant where the investigation was carried out in such a manner to cause surprise, fear, and confusion"); *Wimbley*, 315 Ill. App. 3d at 29 (the officers' forcible and "not peaceable entry" was unnecessary given the particular circumstances); *King*, 563 U.S. at 468 (the police should knock before any entry into a citizen's home because an officer's knock provides an occupant with the "opportunity to make an informed decision about whether to answer the door to the police" and reduces the fear that accompanies "the sight of unknown persons in plain clothes on their doorstep").

Here, the balance of the factors establish that the police *were not* confronted with exigent circumstances requiring an immediate entry into Mr. Gayden's home.

3. The record is fully developed and contains all the facts needed to determine whether probable cause and exigent circumstances supported the warrantless intrusion into Mr. Gayden's home.

The appellate court refused to decide Mr. Gayden's claim of ineffective assistance of counsel because, in its opinion, "[t]he record in this case is devoid of information necessary to fully address and resolve [the] fourth amendment claim." See *Gayden*, 2018 IL App (1st) 150748-U, ¶¶ 25-28; (A-26). According to the appellate court:

> There are numerous unanswered factual questions that preclude us from deciding the substantive [claim] . . .
>
> * * *
>
> . . . Specifically, we do not know the layout of the apartment building, how access to the apartments [was] gained, whether the front entrance was locked, exactly how the police gained entry, whether the common areas were accessible to the public, the totality of the information known to the police when they entered, and exactly where [Mr. Gayden] was standing when the police went upstairs."

Id.

Contrary to the appellate court's finding on appeal, the record is more than sufficient to determine "the totality of the information known to the police when they entered" the apartment, and its other concerns are irrelevant to determining whether the entry was illegal.

First, Mr. Gayden did not challenge the officers' initial entry into his apartment building, or allege they lacked authority to approach his unit, as the record may not have been sufficiently developed to answer that question on appeal. See, *e.g.*, *People v. Bonilla*, 2018 IL 122484 (The police cannot approach the threshold of a unit in an unlocked multi-unit apartment

building to conduct a dog sniff without a warrant). Instead, Mr. Gayden argued that, assuming the officers had a lawful right to enter the common areas of the building, their observations from the third-floor landing did not provide them with lawful authority to enter his unit. The answer to that question did not turn on the physical characteristics of the building, or "how the police gained entry." *Gayden*, 2018 IL App (1st) 150748-U, ¶ 28; (A-27).

The same can be said for "where [Mr. Gayden] was standing when the police went upstairs." *Id.* As discussed above, Mr. Gayden had a second amendment right to possess a firearm inside *and* outside his home. See *Moore*, 702 F. 3d at 940; *Aguilar*, 2013 IL 112116, ¶ 20. It therefore follows that his precise location–*i.e.*, whether he was inside the apartment, at the threshold of his unit, or somewhere else in the hallway–is irrelevant to determining whether he committed a crime. (R. P7-8). Nevertheless, the record is clear–Mr. Gayden was *inside* his apartment when Officer Glinski saw him from the third-floor landing. Had he been anywhere else, he would not have been "looking straight out the door" as Officer Glinski testified, (R. P13), and the shotgun would not have been found *inside* the apartment, "where [Mr. Gayden] threw it . . . five or six feet" from the door. (R. P8-9, 17).

The appellate court therefore had all the information it needed to determine whether probable cause and exigent circumstances justified the warrantless entry that occurred here. Officer Glinski was on the scene because he received a report of "a man with a shotgun." (R. P5-6). He forcibly entered Mr. Gayden's unit after he saw Mr. Gayden drop a shotgun to his floor and slam his door shut. (R. P7-9, 13). There were at least eight other

officers on the scene. (R. P12). No additional information was needed to determine whether the police lacked probable cause and exigent circumstances to enter Mr. Gayden's apartment.

4. The shotgun should have been suppressed.

Since the recovered shotgun was seized in violation of the fourth amendment, it would have been suppressed had trial counsel filed the appropriate motion. U.S. Const. amends. IV, XIV; Ill. Const. 1970, art. 1, §6. Under the "fruit of the poisonous tree" doctrine, any evidence the State obtains through a violation of an individual's constitutional rights is inadmissible as evidence against that person at trial. See, *e.g.*, *United States v. Wong Sun*, 371 U.S. 471, 484-88 (1963). Whether evidence should be suppressed depends on whether it was obtained "by means sufficiently distinguishable to be purged of the primary taint." *Id.* at 488.

In this case, the shotgun was seized as a result of the warrantless and unlawful entry into Mr. Gayden's home, and thus the gun–as well as any testimony regarding its recovery and identification–should have been suppressed as "fruit of the poisonous tree." *Wong Sun*, 371 U.S. at 484-88 ("verbal evidence which derives so immediately from an unlawful entry and an unauthorized arrest as the officers' action in the present case is no less the 'fruit' of official illegality than the more common tangible fruits of the unwarranted intrusion"). The shotgun should have been excluded from trial. See *Henderson*, 2013 IL 114040, ¶ 33.

C. Trial counsel was ineffective for failing to file a meritorious motion to suppress the discovery of the shotgun.

Trial counsel's failure to file a meritorious motion to suppress the shotgun was "beyond the pale of an objectively reasonable strategy." See *Gentry v. Sevier*, 597 F.3d 838, 852 (7th Cir. 2010). A motion to suppress the fruits of the warrantless entry "would have been [trial] counsel's strongest, and most likely wisest, course of action." See *Little*, 322 Ill. App. at 613; see also *People v. Hill*, 2012 IL App (1st) 102028, ¶ 35 (holding that there was no reasonable trial strategy for trial counsel's failure to file a motion to suppress statements that would have removed the most damaging evidence of the defendant's guilt).

Without the shotgun and testimony regarding the shotgun, the State would have been unable to prove Mr. Gayden guilty of possessing a short-barrel shotgun, contrary to 720 ILCS 5/24-1(a)(7)(ii) (2014). See *People v. Spann*, 332 Ill. App. 3d 425, 436-37 (1st Dist. 2002) (prejudice exists when the result of the proceeding would have been different had the evidence been suppressed). This Court should therefore hold that the record was sufficiently developed to decide Mr. Gayden's claim of ineffective assistance of counsel on appeal, and that trial counsel was ineffective for failing to file a meritorious motion to suppress the discovery of the shotgun. Mr. Gayden's conviction should be reversed, and the State's case should be dismissed.

In the alternative, this Court should remand the matter to the appellate court with instructions to decide the issue on the merits. See *People v. Veach*, 2017 IL 120649, ¶ 51 (remanding the defendant's claim of

ineffective assistance of counsel with instructions to decide the issue on the merits).

II. Mr. Gayden is entitled to a decision on the merits of his claim. If the record is insufficient to determine whether the police had lawful authority to enter Mr. Gayden's apartment, this Court should either: (a) order the appellate court to retain jurisdiction and remand the matter for an evidentiary hearing, or (b) allow Mr. Gayden to raise his claim in a petition for postconviction relief.

This case is emblematic of the procedural hurdles that prevent criminal defendants with short sentences from receiving meaningful review of their claims of ineffective assistance of counsel. The Illinois rules of procedural default are strict, and prohibit defendants from raising claims of ineffective assistance of counsel in petitions for postconviction relief if their claims are capable of being raised on direct appeal. *Veach*, 2017 IL 120649, ¶ 48; *People v. Kokoraleis*, 159 Ill. 2d 325, 328 (1994); *Crutchfield v. Dennison*, 910 F.3d 968, 976 (7th Cir. 2018). Criminal defendants are therefore compelled to raise claims of ineffective assistance of counsel on direct appeal if their claims are arguably apparent on the face of the record, or forfeit them altogether. *People v. Ligon*, 239 Ill. 2d 94, 103 (2010); *People v. Thomas*, 38 Ill. 2d 321, 323 (1967). But reasonable minds can differ as to whether the record is sufficiently developed to decide a defendant's claim on appeal. See *e.g.*, *Veach*, 2017 IL 120649, ¶ 50 ("We cannot agree with the appellate court majority's assessment of the record").[2] A prudent defendant

[2] For this reason, the United States Supreme Court rejected a similar rule requiring federal defendants to allege ineffective assistance on direct review or face forfeiture of the claim. See *Massaro v. United States*, 538 U.S. 500, 504 (2003) (the federal procedural default rule creates a "risk that defendants would feel compelled to raise [such a claim]" before the record is fully developed, and thus claims of ineffective assistance of counsel "may be brought in a collateral proceeding . . . whether or not the petitioner could have raised the claim on direct appeal").

must therefore raise an apparent claim of ineffective assistance of counsel on direct appeal, *and then* file a petition for postconviction relief if the appellate court finds that the record is inadequate to decide the claim. This is how criminal appeals proceed in Illinois.

Yet, there is hole in this procedure. Some defendants, like Mr. Gayden, receive short sentences which terminate *before* the appellate court makes a determination as to whether the record is sufficient to decide an ineffective assistance of counsel claim on direct appeal. (C. 91; R. P47-48, Q2-10); (A-39). These individuals are then barred from bringing that claim in a petition for postconviction relief because they are no longer serving a sentence. 725 ILCS 5/122-1(a); *People v. Carrera*, 239 Ill. 2d 241, 259 (2010); *People v. Stavenger*, 2015 IL App (2d) 140885. The result is the creation of a class of defendants who never get a decision on the merits of their constitutional claims of ineffective assistance of counsel. Mr. Gayden is one such defendant.

He was arrested in his home after Officer Glinski caught a glimpse of him holding a shotgun inside of his apartment. (R. P7-8, 13). As discussed above, this was not an obviously illegal act, and did not provide the police with probable cause or exigent circumstances to enter his unit. (See Part I, above). Yet, trial counsel failed to file a motion to suppress the evidence recovered during the illegal search of his home. Mr. Gayden was then convicted of possessing a short-barrel shotgun, and sentenced to two years in prison and one year of MSR. (C. 91; R. P47-48, Q2-10); (A-40).

He argued, on appeal, that trial counsel was ineffective for failing to file a motion to suppress the shotgun. *People v. Gayden*, 2018 IL App (1st)

150748-U, ¶ 22; (A-24). The record supported his claim, (see Part I, above), the State addressed his claim on the merits, *id.*, and Mr. Gayden had no reason to believe that he needed to file a *pro se* petition for postconviction relief before receiving a decision on appeal.

However, the appellate court refused to decide Mr. Gayden's claim on the merits, and invited him, instead, to file a petition for postconviction relief. *Id.* at ¶ 28; (A-27). When Mr. Gayden informed the appellate court that he had completed his sentence and could not file a petition for postconviction relief, the appellate court withdrew its statement regarding collateral relief, and denied his petition for rehearing. See *People v. Gayden*, 2018 IL App (1st) 150748-U, ¶¶ 28-29, as modified on denial of reh'g (Mar. 22, 2018); (A-13). The result is a complete denial of Mr. Gayden's right to a decision on the merits of his claim.[3]

But it is unclear what Mr. Gayden should have (or could have) done differently. Had he filed a *pro se* petition for postconviction relief, the State would have rightly argued his claim had been procedurally defaulted because he failed to raise it during his direct appeal. See *Veach*, 2016 IL App (4th) 130888, ¶ 104 (Appleton, J. dissenting) ("*Kokoraleis* and its progeny give [a defendant] no choice but to raise [a] claim of ineffective assistance [...] in his direct appeal. If [the] defendant [waits] until the postconviction proceeding, the State [will] file[] a motion for dismissal on the ground of procedural forfeiture—and rightfully so [if] the alleged acts of ineffective assistance were memorialized in the record on direct appeal"); see also *Massaro*, 538 U.S. at

[3] Mr. Gayden is similarly foreclosed from alleging ineffective assistance of appellate counsel. 725 ILCS 5/122-1(a).

504. It is also unreasonable to expect an indigent defendant, like Mr. Gayden, to either: (1) reject appellate counsel's assessment that the record is sufficient to decide the issue on appeal, or (2) file a concurrent *pro se* petition for postconviction relief arguing that the claim he raised on direct appeal cannot be decided because of deficiencies in the appellate record.

This procedural quandary is magnified by the fact that, due to funding constraints, the Office of the State Appellate Defender ("OSAD") cannot file opening briefs for roughly 21 months following the entry of the defendant's notice of appeal.[4] See Editorial, *Do the time, then we'll decide if you've done the crime*, Chi. Sun Times, Dec. 9, 2017, available at https://chicago.suntimes.com/opinion/editorial-do-the-time-then-well-decide-if-youve-done-the-crime/. Because of OSAD's backlog, an indigent defendant with a short sentence, such as Mr. Gayden, cannot expect to be contacted by a state-appointed appellate attorney to discuss whether he needs to file a petition for postconviction relief *before* he completes his sentence. By then, it will be too late.

This case is a good example of how OSAD's backlog combines with the

---

[4] OSAD's backlog has been the source of constant litigation. In 1996, a federal district court found that the delay caused by OSAD's then two-year backlog was "a paradigmatic example of a due process violation." *U.S. ex rel. Green v. Washington*, 917 F. Supp. 1238, 1270, 1273 (N.D. Ill. 1996) (recognizing that OSAD's backlog was caused by "chronic underfunding"). More recently, our appellate court held that a defendant's timely-filed petition for postconviction relief does not become moot when, because of OSAD's backlog, the defendant completes his sentence before litigating the claim. *People v. Jones*, 2012 IL App (1st) 093180, ¶¶ 12, 9 (observing that OSAD "represents the vast majority of appellants in criminal cases," and because of chronic "understaffing and underfunding," it has a "predictably . . . severe backlog").

strict deadlines in the Post-Conviction Hearing Act to deny indigent defendants a meaningful opportunity to review their convictions. Mr. Gayden's two-year "time served" sentence was imposed on February 6, 2015. (C. 91, R. Q8); (A-40). He filed an immediate notice of appeal, (C. 100), and began serving his term of MSR on February 10, 2015. (A-39). OSAD was appointed to represent Mr. Gayden, and filed a certificate in lieu of record on July 28, 2015. (A-33).[5] OSAD then filed the first of three motions to extend Mr. Gayden's deadline to file an opening brief because it had a backlog of "1,431 unbriefed cases . . . with judgment dates prior to [Mr. Gayden's]." (A-35). OSAD estimated that an attorney would not be available to brief Mr. Gayden's case for 10 months–*i.e.*, until June 26, 2016. (A-35). By then, Mr. Gayden had completed his sentence. (A-39). Therefore, an OSAD attorney was never in a position to provide Mr. Gayden with timely advice regarding the advisability of filing a petition for postconviction relief–a disability a defendant who can afford private counsel does not have to endure.

These problems echo the procedural hurdles defendants faced before the passage of the Post-Conviction Hearing Act:

> The Illinois scheme affords a theoretical system of remedies. In my judgment it is hardly more than theoretical. Experience has shown beyond all doubt that, in any practical sense, the remedies available there are inadequate. Whether this is true because in fact no remedy exists, or because every remedy is so limited as to be inadequate, or because the procedural problem of selecting the proper one is so difficult is beside the point. If the federal guarantee of due process in a

---

[5] This Court can take judicial notice of a pleading filed in this case. See *People v. Davis*, 65 Ill. 2d 157, 161 (1976); see also *Jones*, 2012 IL App (1st) 093180, ¶ 9.

> criminal trial is to have real significance in Illinois, it is imperative that men convicted in violation of their constitutional rights have an adequate opportunity to be heard in court. This opportunity is not adequate so long as they are required to ride the Illinois merry-go-round of habeas corpus, coram nobis, and writ of error before getting a hearing in a federal court.

Marino v. Ragen, 332 U.S. 561, 570 (1947) (Rutledge, J., concurring). As our own Justice McMorrow observed:

> Illinois once had a well-publicized reputation for having devised post-conviction requirements that created a procedural labyrinth . . . made up entirely of blind alleys that effectively insulated the court from ruling on the merits of a defendant's constitutional challenges to his criminal conviction and sentence.

People v. Erickson, 161 Ill. 2d 82, 107 (1994) (McMorrow, J., dissenting).

The Post-Conviction Hearing Act was adopted to remedy these errors. *Id.* ("Our Post-Conviction Hearing Act was adopted in 1949 to overcome these shortcomings"). But, the Act is not perfect. See, *e.g.*, *People v. Warr*, 54 Ill. 2d 487 (1973) (the Post-Conviction Hearing Act fails to provide un-incarcerated misdemeanor defendants with an avenue to challenge their convictions). It created the hole that exists here.

Our state constitution provides indigent defendants with the right to due process, equal protection under the law, the effective assistance of counsel, and a remedy "for all injuries and wrongs which he receives to his person, privacy, property or reputation." Ill. Const. art. I, §§ 2, 8, 12; *People v. Jackson*, 205 Ill. 2d 247, 258 (2001) (recognizing the State constitutional right to counsel includes the right to the effective assistance of counsel). These rights are wholly illusory if the defendant lacks "an adequate opportunity to be heard in court." *Ragen*, 332 U.S. at 570. The right to the

effective assistance of counsel, in particular, is meaningless if the defendant is denied access to the only proceeding in which he can challenge his attorney's conduct.

This Court should therefore close the hole in the Post-Conviction Hearing Act that prevents defendants like Mr. Gayden from obtaining a decision on the merits of their claims of ineffective assistance of counsel. It can do so in one of two ways.

First, this Court can instruct the appellate court to retain jurisdiction under Rule 615(b)(2) and remand the matter for an evidentiary hearing whenever the appellate record establishes a substantial showing of a constitutional violation, and the defendant lacks standing to file a petition for postconviction relief. See *People v. Garrett*, 139 Ill. 2d 189, 195 (1990) ("The appellate court is empowered under Rule 615(b) to remand a cause for a hearing on a particular matter while retaining jurisdiction."). Such a rule would maintain the *status quo* insofar as a defendant would still have to raise an arguably meritorious claim of ineffective assistance of counsel on direct appeal. But it would provide the defendant with an opportunity to receive a decision on the merits where, as is the case here, the appellate court finds the claim should have been raised in a petition for postconviction relief.

By predicating an evidentiary hearing on a finding that the record establishes a "substantial showing of a constitutional violation," the defendant would retain the same procedural protections and standard of review he would have received had he sought an evidentiary hearing in a timely-filed petition filed under the Post-Conviction Hearing Act. *People v.*

Tate, 2012 IL 112214, ¶ 10. Thus, defendants like Mr. Gayden would receive the same level of review they were entitled to receive under the Act, notwithstanding the fact that they lost standing to file a petition.

This is not a novel solution. The appellate court has used Rule 615(b) to protect similarly situated defendants who lost or lacked standing to file petitions for postconviction relief. See *People v. Fellers*, 2016 IL App (4th) 140486 (recognizing that the defendant could not file a petition for postconviction relief because he completed his sentence before his appeal was decided); *In re Alonzo O.*, 2015 IL App (4th) 150308, ¶ 31 (recognizing that the juvenile respondents cannot file petitions for postconviction relief); *In re Ch. W.*, 399 Ill. App. 3d 825, 830 (4th Dist. 2010) (same).

Fellers is particularly instructive. In *Fellers*, the defendant was found guilty of unlawful possession of cannabis and sentenced to 30 days in jail. *Id.* at ¶ 1. On appeal, he argued that trial counsel was ineffective for failing to file a motion to suppress the cannabis found during an inventory search of his car. *Id.* at ¶ 33. The appellate court held that the record was insufficient to determine whether the cannabis was admissible. *Id.* at ¶ 34. But instead of affirming the defendant's conviction on appeal, because the defendant lost standing for file a petition for postconviction relief, the appellate court retained jurisdiction and remanded the matter for an evidentiary hearing to determine whether trial counsel was ineffective for failing to file a motion to suppress:

> Given the undeveloped record and the current status of defendant's case, we find it appropriate, pursuant to Illinois

> Supreme Court Rule 366(a)(5)[6] (eff. Feb. 1, 1994), to retain jurisdiction and remand the cause to the trial court for a hearing on defendant's claim of ineffective assistance of counsel.

Id. at ¶ 36.

Fellers stated that remand was appropriate because an evidentiary hearing "will give [the defendant] a full opportunity to prove facts establishing ineffectiveness of counsel, the State a full opportunity to present evidence to the contrary, and the establishment of a factual record on the issue." *Fellers*, 2016 IL App (4th) 140486 ¶ 36; see also *Alonzo O.*, 2015 IL App (4th) 150308, ¶ 30 ("dismissal of respondent's ineffective-assistance-of-counsel claim would leave respondent with no legal recourse"); *Ch. W.*, 399 Ill. App. 3d at 830 ("Since the Juvenile Court Act does not provide for collateral review of its judgments, we retain jurisdiction of this matter and remand the cause for a hearing on respondent's ineffective-assistance-of-counsel claim"). This procedure is both simple and efficient, as it does not require the defendant or the State to re-brief the issue below, and allows the appellate court to set a time limit for resolving the claim.

In the alternative, this Court could exercise its supervisory authority under the Illinois Constitution to allow defendants, such as Mr. Gayden, who have completed their sentences while their direct appeals are pending, to file petitions for postconviction relief within six months of the date the appellate

---

[6] Although the appellate court cited Rule 366(a)(5), Rule 615(b)(2) controls for criminal appeals. See *Garrett*, 139 Ill. 2d at 194-1955 ("just as the appellate court is empowered in civil appeals under our Rule 366(a)(5) [citation] to 'make any other and further orders * * * that the case may require,' so is the appellate court empowered in criminal appeals by Rule 615(b)(2) to 'modify' any 'proceedings subsequent to or dependent upon the judgment or order from which the appeal is taken'").

decision becomes final. See Ill. Const.1970, art. VI, § 16; *People v. Salem*, 2016 IL 118693, ¶ 20 (this Court's supervisory authority is "unlimited in extent and hampered by no specific rules or means for its exercise"). Such a rule would be consistent with this Court's decision in *People v. Warr*, 54 Ill. 2d 487 (1973).

In *Warr*, this Court confronted a different-but-related gap in the Post-Conviction Hearing Act which prevented misdemeanor defendants from filing petitions for postconviction relief. *Id.* at 491. This Court concluded that the Post-Conviction Hearing Act was unconstitutional as applied to these defendants because it categorically denied them access to relief:

> Differences in criminal procedure before, during and after trial may be based on differences in the gravity of the offense and the severity of its punishment [citation], but those differences cannot justify a total denial of a remedy for violations of constitutional rights.

Id. at 492.

This Court exercised its supervisory authority to modify the law, and provided misdemeanor defendants with access to the procedures set forth in the Post-Conviction Hearing Act:

> . . . we direct, in the exercise of our supervisory jurisdiction, that until otherwise provided by rule of this court or by statute a defendant convicted of a misdemeanor who asserts that in the proceedings which resulted in his conviction there was a substantial denial of his constitutional rights may institute a proceeding in the nature of a proceeding under the Post-Conviction Hearing Act.

Id. at 493.

The same concerns are at issue here. Mr. Gayden and similarly situated defendants are forced to choose between raising a claim of ineffective

assistance of counsel in a petition for postconviction relief, which risks procedural default, or on direct appeal, which may not yield a decision on the merits. The result is "a total denial of a remedy for violations of constitutional rights." *Id.* at 492. This Court could eliminate this game of "gotcha" by allowing defendants who complete their sentences while their cases are on direct appeal to file a petition for postconviction relief within six months of the date the appellate decision is final.

Mr. Gayden was entitled to due process, equal protection under the law, the effective assistance of counsel, and a right to a remedy. Ill. Const. art. I, §§ 2, 8, 12; *Jackson*, 205 Ill. 2d at 258. He was denied these rights because he lost access to the only venue in which he could obtain a ruling on his claim ineffective assistance of counsel. He has proposed two procedures to remedy the error. Either procedure would eliminate the blind alleys defendants must currently navigate to obtain a ruling on their claims of ineffective assistance of counsel.

CONCLUSION

For the foregoing reasons Lanard Gayden respectfully requests that this Court reverse the lower-court ruling, suppress the discovery of the shotgun, and remand the matter for further proceedings. Alternatively, he requests an order: (1) instructing the appellate court to retain jurisdiction and remand the matter for an evidentiary hearing, or (2) allowing him to raise his claim of ineffective assistance of counsel in a petition for postconviction relief.

Respectfully submitted,

PATRICIA MYSZA
Deputy Defender

JOHN R. BREFFEILH
Assistant Appellate Defender
Office of the State Appellate Defender
First Judicial District
203 N. LaSalle St., 24th Floor
Chicago, IL 60601
(312) 814-5472
1stdistrict.eserve@osad.state.il.us

COUNSEL FOR DEFENDANT-APPELLANT

CERTIFICATE OF COMPLIANCE

I, John R. Breffeilh, certify that this brief conforms to the requirements of Supreme Court Rule 341(a) and (b). The length of this brief, excluding pages containing 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(a) is 35 pages.

/s/John R. Breffeilh
JOHN R. BREFFEILH
Assistant Appellate Defender

No. 123505

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, -vs- LANARD GAYDEN Defendant-Appellant	)	Appeal from the Appellate Court of Illinois, No. 1-15-0748. There on appeal from the Circuit Court of Cook County, Illinois , No. 14 CR 4685. Honorable Kenneth J. Wadas, Judge Presiding.

NOTICE AND PROOF OF SERVICE

Ms. Lisa Madigan, Attorney General, 100 W. Randolph St., Chicago, IL 60601, eserve.criminalappeals@atg.state.il.us;

Ms. Kimberly M. Foxx, State's Attorney, Cook County State's Attorney Office, 300 Daley Center, Chicago, IL 60602, eserve.criminalappeals@cookcountyil.gov;

Mr. Lanard Gayden, 7014 S. Merrill Ave., Apt. 3R, Chicago, IL 60649

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 March 1, 2019, 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-appellant in an envelope deposited in a U.S. mail box in Chicago, Illinois, with proper postage prepaid. Additionally, upon its acceptance by the court's electronic filing system, the undersigned will send 13 copies of the Brief and Argument to the Clerk of the above Court.

/s/Alicia Corona
LEGAL SECRETARY
Office of the State Appellate Defender
203 N. LaSalle St., 24th Floor
Chicago, IL 60601
(312) 814-5472
Service via email is accepted at
1stdistrict.eserve@osad.state.il.us

APPENDIX TO THE BRIEF

Lanard Gayden No. 123505

INDEX TO THE RECORD

Common Law Record ("C") **Page**

Report of Proceedings ("R")

	Direct	Cross	Redir.	Recr.	
Motion to Reconsider - Denied					Q9
Notice of Appeal					Q10
State Appellate Defender Appointed					Q10

2018 IL App (1st) 150748-U

No. 1-15-0748

Order filed February 1, 2018

Modified upon denial of rehearing March 22, 2018

Fourth Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 14 CR 4685
	)	
LANARD GAYDEN,	)	Honorable
	)	Kenneth J. Wadas,
Defendant-Appellant.	)	Judge, presiding.

PRESIDING JUSTICE BURKE delivered the judgment of the court.
Justices McBride and Ellis concurred in the judgment.

ORDER

¶ 1 *Held*: The State presented sufficient evidence to prove defendant guilty beyond a reasonable doubt of unlawful use or possession of a weapon. The record is insufficient to determine whether trial counsel was ineffective for failing to file a motion to quash arrest and suppress evidence. Fines, fees, and costs order modified.

¶ 2 Following a bench trial, defendant Lanard Gayden was convicted of unlawful use or possession of a weapon (UUW) and sentenced to two years' imprisonment. On appeal, he argues

that the State failed to prove him guilty beyond a reasonable doubt, that he was denied the effective assistance of trial counsel, and he asks us to correct his fines and fees order. For the following reasons, we affirm and correct the fines and fees order.

¶ 3 Defendant was charged with one count of UUW for possessing a shotgun that had a barrel that was less than 18 inches in length. 720 ILCS 5/24-1(a)(7)(ii) (West 2014).

¶ 4 At trial, Chicago police officer Patrick Glinski testified that, at around 12:40 p.m. on February 15, 2014, he responded to "a call of a man with a shotgun" at 8952 South Burley Avenue. He went to "the north side of the three-flat building to enter." Glinski knocked on the exterior door, entered, and took a staircase to the third floor. There, he saw a man, identified in court as defendant, standing five feet away "in the doorway [and] holding a shotgun." Defendant made eye contact with Glinski and then defendant "threw the shotgun on the ground and slammed the door on [Glinski]." Glinski "knocked in the door." Defendant was "right on the other side of the door when [Glinski] knocked it in," *i.e.*, "five or six feet" away. The shotgun Glinski had seen defendant holding was on the floor a few feet from the door. Other police officers arrived and defendant was arrested.

¶ 5 Chicago police officer Schaffer testified that, around 12:50 p.m. on February 15, 2014, he responded to a report of "a person with a shotgun in front of the location" at 8952 South Burley. There were already police officers at the scene when he arrived. Schaffer went to the third floor and saw a shotgun on the floor "immediately upon entering the apartment." He recovered the shotgun and ejected three live shells. He took the shotgun to the police station to inventory it and to get "a measurement of the barrel." Schaffer used a measuring tape and found the shotgun's

barrel to be 17 1/2 inches long. He also observed that the end of the barrel "looked uneven" and felt "gritty," like it had been "sawed off or somehow manipulated from its original state."

¶ 6 The State rested its case, and defendant made a motion for a directed finding, which the court denied.

¶ 7 Shavonnetay Carpenter testified that she was defendant's friend. She arrived at 8952 South Burley at 9 p.m. on February 15, 2014, to pick up defendant's children to "take them out." Others were present, including two women named Sierra and Evelyn, a man, Ray, and "somebody else" who Carpenter could not recall. At about 10:10 p.m., everyone was in the living room when the police "bum rushed the door." Three police officers entered, aimed their guns at defendant, and "had him on the ground." Carpenter was with defendant at all times that night and she never saw him with a gun or saw a gun anywhere in the front room or hallway. Defendant never stepped out of the apartment. After defendant was arrested, Carpenter took his children to their mother's home.

¶ 8 On cross-examination, Carpenter testified that she had known defendant 10 years. She had dated defendant years earlier. She planned to take defendant's two children, ages five and six, to sleep at her home that night. Carpenter never saw a shotgun.

¶ 9 Defendant testified that, at about 10 p.m. on February 15, 2017, he was in his "three bedroom duplex apartment" at 8952 South Burley with Carpenter, Sierra, Evelyn, his two kids, and his roommates, Raymond and Anthony. Everyone was in the front room, except for the children and Anthony. The door to the unit was unlocked because Sierra and her parents lived "right next door" and there was "a lot of in and out between both apartments." Sierra's sister and her boyfriend were "back and forth" that night.

¶ 10 At about 10:15 p.m., defendant heard a "large commotion" in the hallway and "marched" to his door to lock it. Before he could do so, the doorknob turned and the door began to open. Defendant stated, "it's like a tug of war which I'm pushing my door in, he's pushing it from the outside." Defendant shut the door, but it was "forced back open with a hand sticking out, blue sleeve color and a gun waving." Seeing this, defendant backed off the door and a police officer "fell into [his] apartment. The officer was "waiving [*sic*] the gun around." Raymond dropped to the floor and defendant put his hands in the air. Defendant was arrested. Two more police officers followed soon after.

¶ 11 Defendant denied holding and throwing a gun that night, or ever seeing a gun. He did not see the officers recover a gun from the apartment and "was long gone before anything, they even say anything to [him] about a gun."

¶ 12 On cross-examination, defendant answered in the negative when asked if the police knocked or announced their office before entering the apartment.

¶ 13 The trial court found defendant guilty. Defendant filed a motion for new trial and motion to reconsider the guilty finding, arguing that the State failed to prove defendant was guilty beyond a reasonable doubt because it did not present sufficient evidence to establish that he ever "had possession of the sawed off shotgun that was recovered." The court denied the motion and sentenced defendant to two years' imprisonment.

¶ 14 This timely appeal followed.

¶ 15 Defendant first argues that the evidence at trial was insufficient to prove him guilty of UUW because the State failed to prove beyond a reasonable doubt that the barrel of the shotgun

was less than 18 inches, an essential element of the offense. He has abandoned his claim that he never possessed the weapon.

¶ 16 As a preliminary matter, defendant asks us to take judicial notice of information readily available on government websites to bolster his challenge to the sufficiency of the evidence of the length of the shotgun's barrel. The first website, that of the United States mint, details the size of a dime, which defendant offers as an example of how small the half-inch difference between the legal length of a shotgun barrel and the length of his shotgun's barrel was. The second website sets out the procedure used by the federal Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) to measure the barrel length of a shotgun, which differs from the method used in this case. "Courts may take judicial notice of facts proven by 'immediate and accurate demonstration by resort to easily accessible sources of indisputable accuracy.' " *Central Austin Neighborhood Ass'n v. City of Chicago*, 2013 IL App (1st) 123041, ¶ 13 (quoting *Vulcan Materials Co. v. Bee Construction*, 96 Ill. 2d 159, 166 (1983)). "However, courts 'will not take judicial notice of critical evidentiary material not presented in the court below, and this is especially true of evidence which may be significant in the proper determination of the issues between the parties.' " *Id.* (quoting *Vulcan Materials Co.*, 96 Ill. 2d at 166). As the information was not presented to the trier of fact, we decline to consider it on appeal.

¶ 17 On a challenge to the sufficiency of the evidence, we inquire " '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.' " (Emphasis omitted.) *People v. Davison*, 233 Ill. 2d 30, 43 (2009) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). In so doing, we draw all reasonable inferences in favor of the State (*Davison*, 233 Ill. 2d

at 43) and we do not retry the defendant (*People v. Collins*, 106 Ill. 2d 237, 261 (1985)). The State must prove each element of an offense beyond a reasonable doubt. *People v. Siguenza-Brito*, 235 Ill. 2d 213, 224 (2009). It is within the province of the trier of fact "to determine the credibility of witnesses, to weigh the evidence and draw reasonable inferences therefrom, and to resolve any conflicts in the evidence." *Id.* at 228. A defendant's claim that a witness was not credible, standing alone, is insufficient to reverse a conviction. *Id.* We will not overturn a criminal conviction "unless the evidence is so improbable or unsatisfactory that it creates a reasonable doubt of the defendant's guilt." *People v. Givens*, 237 Ill. 2d 311, 334 (2010).

¶ 18 To prove defendant was guilty of UUW, the State had to prove that he knowingly possessed "a shotgun having one or more barrels less than 18 inches in length." 720 ILCS 5/24-1(a)(7)(ii) (West 2014).

¶ 19 We conclude that, viewing the evidence in a light most favorable to the State, a trier of fact could find defendant guilty of UUW. Officer Glinski testified he responded to a call of a man with a shotgun at 8952 South Burley. He went up to the third floor, and saw defendant on the threshold of the doorway holding a shotgun, which he threw to the ground before shutting the door. Glinski "knocked in the door" and saw defendant and the shotgun. Officer Schaffer testified that he measured the barrel to be 17 1/2 inches and that the end of the barrel "looked uneven" and felt "gritty," like it had been "sawed off or somehow manipulated from its original state." Given this evidence, we find that a rational trier of fact could have concluded that the barrel of the recovered shotgun was less than 18 inches.

¶ 20 Nevertheless, defendant argues that the State failed to prove him guilty of UUW beyond a reasonable doubt because "the only evidence regarding the length of the shotgun was the

testimony of one police officer that simply said that, using 'measuring tape,' he found the barrel to be '17 and a half inches.' "

¶ 21 The testimony of a single witness is sufficient to establish guilt beyond a reasonable doubt, so long as the testimony is positive and the witness credible. *People v. Smith*, 185 Ill. 2d 532, 541 (1999). Based on the record, it was not unreasonable for the trial court to conclude beyond a reasonable doubt that Schaffer properly measured the gun and that his measurement was accurate. There is nothing in the record indicating that Schaffer improperly measured the shotgun's barrel length. Schaffer not only measured the barrel's length, but noted signs indicating that the barrel had been purposefully shortened. Therefore, we cannot conclude that no rational trier of fact could have found beyond a reasonable doubt that defendant was in possession of a shotgun with a barrel less than 18 inches in length.

¶ 22 Next, defendant contends he was denied the effective assistance of trial counsel where counsel failed to file a motion to quash his arrest and suppress the recovered shotgun. Defendant argues that the motion would have been granted because "the police clearly violated [defendant's] rights under the Fourth amendment" when they entered his property "without a warrant, probable cause, or exigent circumstances" and recovered the shotgun. The State argues that the failure to file a motion to quash cannot support a claim of ineffective assistance of counsel because the motion would have been denied where the police's warrantless entry into defendant's apartment was lawful because there was probable cause to arrest him and, additionally, exigent circumstances existed that excused the need for a warrant.

¶ 23 A criminal defendant has a constitutional right to the effective assistance of counsel. U.S. Const., amends. VI, XIV; Ill. Const. 1970, art. I, § 8. To demonstrate ineffective assistance of

counsel, defendant must show that (1) his counsel's performance was deficient, and (2) but for counsel's deficient performance, there is a reasonable probability that the outcome of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668 (1984). More specifically, a defendant must show that counsel's performance was objectively unreasonable under prevailing professional norms and that a reasonable probability exists that, but for counsel's deficient performance, the result of the proceedings would have been different. *People v. Domagala*, 2013 IL 113688, ¶ 36. The failure to satisfy either prong of the *Strickland* test precludes a finding of ineffective assistance of counsel. *People v. Patterson*, 192 Ill. 2d 93, 107 (2000).

¶ 24 A reviewing court, however, should not simply proceed to the merits of every ineffective assistance of counsel claim. When a claim of ineffective assistance of counsel is based on the failure to file a motion to suppress evidence, the record may be inadequate for a reviewing court to make a conclusion on the issue and the better resolution may be to raise the issue in a collateral challenge under the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2016)). See *People v. Bew*, 228 Ill. 2d 122, 134 (2008) (citing *Massaro v. United States*, 538 U.S. 500, 506 (2003)). Recently, our supreme court cautioned against adopting an approach to ineffective assistance of counsel claims that presumes such claims are always better suited to collateral proceedings. *People v. Veach*, 2017 IL 120649, ¶ 45. Instead the *Veach* court held: "ineffective assistance of counsel claims may sometimes be better suited to collateral proceedings but only when the record is incomplete or inadequate for resolving the claim." *Id.* ¶ 46. Reviewing courts must therefore "carefully consider each ineffective assistance of counsel

claim on a case-by-case basis" before deferring consideration of the claim to collateral review. *Id.* ¶ 48.

¶ 25 Here, after a careful review of the record on appeal, we decline to consider defendant's claim of ineffective assistance of trial counsel because the record is devoid of evidence that would allow this court to determine whether a motion to quash arrest would have been granted or whether police acted lawfully under the circumstances. The record reflects that Officer Glinski responded to "a call of a man with a shotgun." Upon arriving at the address, he approached the "three-flat," knocked on the "exterior" door, and entered. Glinski went to the third floor, where he saw defendant "in the doorway [and] holding a shotgun." Defendant made eye contact with Glinski, "threw the shotgun on the ground and slammed the door." Glinski "knocked in the door" and arrested defendant.

¶ 26 There are numerous unanswered factual questions that preclude us from deciding the substantive fourth amendment claims that underlie defendant's claim of ineffective assistance of counsel. Presumably the State is relying on the plain-view doctrine to justify the seizure. A warrantless seizure of evidence in plain view does not violate the fourth amendment. *People v. Garcia*, 2012 IL App (1st) 102940, ¶ 4. This exception allows a police officer to seize an object without a search warrant if the object is in plain view, the object's incriminating nature is immediately apparent, and the officer is lawfully located in the place where he observed the object. *Id.* The third factor can be satisfied by the exigent circumstances exception to the warrant requirement. *Id.*

¶ 27 The record in this case is devoid of information necessary to fully address and resolve defendant's fourth amendment claim that the police entered into his property without lawful

authority. Specifically, we do not know the layout of the apartment building, how access to the apartments is gained, whether the front entrance was locked, exactly how the police gained entry, whether the common areas are accessible to the public, the totality of the information known to the police when they entered, and exactly where defendant was standing when the police went upstairs.

¶ 28 We note that, subsequent to the filing of our original order, defendant filed a petition for rehearing, in which he asserted our finding that there was an insufficient record to analyze his claim of ineffective assistance of counsel was erroneous. In this manner, defendant's petition contains impermissible reargument. See Ill. S. Ct. R. 367(b) (eff. Nov. 1, 2017) ("Reargument of the case shall not be made in the petition."). Defendant has also raised a new issue in his petition that the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2016)) is unavailable to him because he was released from mandatory supervised release in February 2016. This issue was never raised in his opening brief or in his reply brief, which also violates Supreme Court Rule 367(b) (eff. Nov. 1, 2017), as "[t]he petition shall state briefly the points claimed to have been overlooked or misapprehended by the court." A petition for rehearing is not an opportunity to raise new issues. See *People v. Clinton*, 397 Ill. App. 3d 215, 231 (2009).

¶ 29 Therefore, we decline to address defendant's ineffective assistance of counsel claim because the record, as it exists, is insufficient for us to determine whether defendant was lawfully arrested, whether trial counsel's decision to file a motion to quash arrest and suppress was strategic, or whether such a motion would likely have succeeded. *Veach*, 2017 IL 120649, ¶ 46.

¶ 30 Defendant next argues that the trial court improperly assessed the $5 electronic citation and the $5 court system fee against him and that it failed to give him $5 per day of presentence

custody credit against other monetary assessments which qualified as fines. The State agrees that the $5 electronic citation and the $5 court system fee should be vacated and that the $15 State Police operations fee and $50 court system fee are fines subject to offset by presentence custody credit, but it does not agree that defendant is entitled to presentence credit against the remaining assessments that defendant challenges, including a $190 felony complaint fee, a $15 automation fee, a $15 document storage fee, a $25 court services (sheriff) fee, a $2 State's Attorney records automation fee, and a $2 public defender records automation fee, which it argues are not fines.

¶ 31 Defendant did not challenge these assessments at trial and acknowledges his claims are, therefore, forfeited. See *People v. Hillier*, 237 Ill. 2d 539, 544 (2010). He contends, however, that we may review his claims under plain error or, alternatively, that trial counsel was ineffective for failing to object to the assessments. The State agrees with defendant in that, even though he forfeited his claims by failing to raise them in the trial court, the plain error doctrine permits the reviewing court to review the issues under the plain error doctrine.

¶ 32 We disagree that defendant's challenge is reviewable under plain error. *People v. Grigorov*, 2017 IL App (1st) 143274, ¶ 15; *People v. Griffin*, 2017 IL App (1st) 143800, ¶ 9, *pet. for leave to appeal granted*, No. 122549 (Nov. 22, 2017); *contra People v. Cox*, 2017 IL App (1st) 151536, ¶ 102 (holding that the improper imposition of fines and fees affects "substantial rights" and thus may be reviewed under the second prong of the plain error doctrine). Nevertheless, because the State does not argue forfeiture on appeal, it has thus forfeited that argument and we will address the merits of defendant's claims. See *People v. Brown*, 2017 IL App (1st) 142877, ¶ 70 (rules of waiver and forfeiture apply to the State). We review the

propriety of a trial court's imposition of fines and fees *de novo*. *People v. Bowen*, 2015 IL App (1st) 132046, ¶ 60.

¶ 33 Defendant first claims, and the State properly concedes, that the $5 electronic citation fee (705 ILCS 105/27.3e (West 2014)) was improperly assessed and must be vacated because it only applies to traffic, misdemeanor, municipal ordinance, and conservation cases, and is inapplicable to his felony conviction. See *People v. Moore*, 2014 IL App (1st) 112592-B, ¶ 46 ($5 electronic citation fee does not apply to felonies); *People v. Robinson*, 2015 IL App (1st) 130837, ¶ 115 (vacating the fee where the defendant's offense did not fall into an enumerated category). Accordingly, we vacate the electronic citation fee.

¶ 34 Defendant also claims, and the State again properly concedes, that the $5 court system fee (55 ILCS 5/5-1101(a) (West 2014)) was improperly assessed and must be vacated because it only applies to violations of the Illinois Vehicle Code and similar county and municipal ordinances. As defendant was not found guilty of a violation of the Illinois Vehicle code, the $5 court system fee was erroneously assessed against him. See *People v. Price*, 375 Ill. App. 3d 684, 698 (2007). Accordingly, we vacate the $5 court system fee.

¶ 35 Defendant also argues that he is entitled to presentence custody credit toward the following assessments imposed by the trial court, which he argues are fines and, therefore, subject to offset: a $15 State Police operations fee (705 ILCS 105/27.3a(1.5) (West 2014)), a $50 court system fee (55 ILCS 5/5-1101(c) (West 2014)), a $190 felony complaint fee (705 ILCS 105/27.2a(w)(1)(A) (West 2014)), a $15 automation fee (705 ILCS 105/27.3a-1 (West 2014)), a $15 document storage fee (705 ILCS 105/27.3c (West 2014)), a $25 court services fee (55 ILCS 5/5-1103 (West 2014)), a $2 State's Attorney records automation fee (55 ILCS 5/4- 2002.1(c)

(West 2014)), and a $2 Public Defender records automation fee (55 ILCS 5/3-4012 (West 2014)). The State agrees that defendant is owed presentence custody credit against the $15 State Police operations fee and the $50 court system fee, but argues that the remaining assessments defendant challenges as fines are not fines and, thus, are not subject to offset by presentence custody credit.

¶ 36 A defendant is entitled to a $5 credit toward the fines levied against him for each day he is incarcerated prior to sentencing. 725 ILCS 5/110-14(a) (West 2014). The credit applies only to fines imposed pursuant to conviction and not to any other court costs or fees. *People v. Tolliver*, 363 Ill. App. 3d 94, 96 (2006). A fine is a part of the punishment for a conviction, whereas a fee or cost seeks to recoup expenses incurred by the State. *People v. Jones*, 223 Ill. 2d 569, 582 (2006). Here, defendant accumulated 356 days of presentence custody credit, and, therefore, he is potentially entitled to as much as $1,780 of credit toward his eligible fines.

¶ 37 We agree with the parties that the $15 State Police operations fee and $50 court system fee are fines subject to presentence custody credit. See *People v. Brown*, 2017 IL App (1st) 150146, ¶ 36 (State Police operations assessment is a fine); *People v. Reed*, 2016 IL App (1st) 140498, ¶ 15 (court system fee is a fine). Accordingly, defendant is entitled to offset the State Police operations fee and court system fee with presentence custody credit.

¶ 38 We agree with the State that the remaining assessments that defendant challenges are not fines subject to offset by presentence custody credit. Contrary to defendant's argument, this court has previously considered challenges to these assessments and found them to be fees, not fines. See *People v. Tolliver*, 363 Ill. App. 3d 94, 97 (2006); *People v. Bingham*, 2017 IL App (1st) 143150, ¶¶ 41-42 (relying on *Tolliver* and finding the $190 felony complaint filing fee is not a

fine subject to offset by presentence incarceration credit); *People v. Brown*, 2017 IL App (1st) 142877, ¶ 78 ($15 automation fee and $15 document storage fee are not fines); *People v. Adair*, 406 Ill. App. 3d 133, 144 (2010) ($25 court services fee is a fee rather than a fine); *People v. Brown*, 2017 IL App (1st) 150146, ¶ 38 (The "bulk of legal authority" has concluded that the $2 State's Attorney and $2 public defender records automation fees are not fines); *contra People v. Camacho*, 2016 IL App (1st) 140604, ¶¶ 47-56. Accordingly, the $190 felony complaint fee, $15 automation fee, the $15 document storage fee, the $25 court services fee, the $2 State's Attorney records automation fee, and the $2 public defender records automation fee are not subject to offset by defendant's presentence custody credit.

¶ 39 For the foregoing reasons, we vacate the $5 court system fee and $5 electronic citation fee. We direct the clerk of the circuit court to further amend that order to reflect a credit of $65 to offset the $15 State Police operations fee and $50 court system fee, which leaves a total of $729 in fines and fees due. We affirm defendant's conviction and sentence in all other respects.

¶ 40 Affirmed; fines and fees order modified.

2018 IL App (1st) 150748-U
No. 1-15-0748
Order filed February 1, 2018
Fourth Division

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 14 CR 4685
	)	
LANARD GAYDEN,	)	Honorable
	)	Kenneth J. Wadas,
Defendant-Appellant.	)	Judge, presiding.

PRESIDING JUSTICE BURKE delivered the judgment of the court.
Justices McBride and Ellis concurred in the judgment.

ORDER

¶ 1 *Held*: The State presented sufficient evidence to prove defendant guilty beyond a reasonable doubt of unlawful use or possession of a weapon. The record is insufficient to determine whether trial counsel was ineffective for failing to file a motion to quash arrest and suppress evidence. Fines, fees, and costs order modified.

¶ 2 Following a bench trial, defendant Lanard Gayden was convicted of unlawful use or possession of a weapon (UUW) and sentenced to two years' imprisonment. On appeal, he argues that the State failed to prove him guilty beyond a reasonable doubt, that he was denied the

effective assistance of trial counsel, and he asks us to correct his fines and fees order. For the following reasons, we affirm and correct the fines and fees order.

¶ 3 Defendant was charged with one count of UUW for possessing a shotgun that had a barrel that was less than 18 inches in length. 720 ILCS 5/24-1(a)(7)(ii) (West 2014).

¶ 4 At trial, Chicago police officer Patrick Glinski testified that, at around 12:40 p.m. on February 15, 2014, he responded to "a call of a man with a shotgun" at 8952 South Burley Avenue. He went to "the north side of the three-flat building to enter." Glinski knocked on the exterior door, entered, and took a staircase to the third floor. There, he saw a man, identified in court as defendant, standing five feet away "in the doorway [and] holding a shotgun." Defendant made eye contact with Glinski and then defendant "threw the shotgun on the ground and slammed the door on [Glinski]." Glinski "knocked in the door." Defendant was "right on the other side of the door when [Glinski] knocked it in," *i.e.*, "five or six feet" away. The shotgun Glinski had seen defendant holding was on the floor a few feet from the door. Other police officers arrived and defendant was arrested.

¶ 5 Chicago police officer Schaffer testified that, around 12:50 p.m. on February 15, 2014, he responded to a report of "a person with a shotgun in front of the location" at 8952 South Burley. There were already police officers at the scene when he arrived. Schaffer went to the third floor and saw a shotgun on the floor "immediately upon entering the apartment." He recovered the shotgun and ejected three live shells. He took the shotgun to the police station to inventory it and to get "a measurement of the barrel." Schaffer used a measuring tape and found the shotgun's barrel to be 17 1/2 inches long. He also observed that the end of the barrel "looked uneven" and felt "gritty," like it had been "sawed off or somehow manipulated from its original state."

¶ 6 The State rested its case, and defendant made a motion for a directed finding, which the court denied.

¶ 7 Shavonnetay Carpenter testified that she was defendant's friend. She arrived at 8952 South Burley at 9 p.m. on February 15, 2014, to pick up defendant's children to "take them out." Others were present, including two women named Sierra and Evelyn, a man, Ray, and "somebody else" who Carpenter could not recall. At about 10:10 p.m., everyone was in the living room when the police "bum rushed the door." Three police officers entered, aimed their guns at defendant, and "had him on the ground." Carpenter was with defendant at all times that night and she never saw him with a gun or saw a gun anywhere in the front room or hallway. Defendant never stepped out of the apartment. After defendant was arrested, Carpenter took his children to their mother's home.

¶ 8 On cross-examination, Carpenter testified that she had known defendant 10 years. She had dated defendant years earlier. She planned to take defendant's two children, ages five and six, to sleep at her home that night. Carpenter never saw a shotgun.

¶ 9 Defendant testified that, at about 10 p.m. on February 15, 2017, he was in his "three bedroom duplex apartment" at 8952 South Burley with Carpenter, Sierra, Evelyn, his two kids, and his roommates, Raymond and Anthony. Everyone was in the front room, except for the children and Anthony. The door to the unit was unlocked because Sierra and her parents lived "right next door" and there was "a lot of in and out between both apartments." Sierra's sister and her boyfriend were "back and forth" that night.

¶ 10 At about 10:15 p.m., defendant heard a "large commotion" in the hallway and "marched" to his door to lock it. Before he could do so, the doorknob turned and the door began to open.

Defendant stated, "it's like a tug of war which I'm pushing my door in, he's pushing it from the outside." Defendant shut the door, but it was "forced back open with a hand sticking out, blue sleeve color and a gun waving." Seeing this, defendant backed off the door and a police officer "fell into [his] apartment. The officer was "waiving [*sic*] the gun around." Raymond dropped to the floor and defendant put his hands in the air. Defendant was arrested. Two more police officers followed soon after.

¶ 11 Defendant denied holding and throwing a gun that night, or ever seeing a gun. He did not see the officers recover a gun from the apartment and "was long gone before anything, they even say anything to [him] about a gun."

¶ 12 On cross-examination, defendant answered in the negative when asked if the police knocked or announced their office before entering the apartment.

¶ 13 The trial court found defendant guilty. Defendant filed a motion for new trial and motion to reconsider the guilty finding, arguing that the State failed to prove defendant was guilty beyond a reasonable doubt because it did not present sufficient evidence to establish that he ever "had possession of the sawed off shotgun that was recovered." The court denied the motion and sentenced defendant to two years' imprisonment.

¶ 14 This timely appeal followed.

¶ 15 Defendant first argues that the evidence at trial was insufficient to prove him guilty of UUW because the State failed to prove beyond a reasonable doubt that the barrel of the shotgun was less than 18 inches, an essential element of the offense. He has abandoned his claim that he never possessed the weapon.

¶ 16 As a preliminary matter, defendant asks us to take judicial notice of information readily available on government websites to bolster his challenge to the sufficiency of the evidence of the length of the shotgun's barrel. The first website, that of the United States mint, details the size of a dime, which defendant offers as an example of how small the half-inch difference between the legal length of a shotgun barrel and the length of his shotgun's barrel was. The second website sets out the procedure used by the federal Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) to measure the barrel length of a shotgun, which differs from the method used in this case. "Courts may take judicial notice of facts proven by 'immediate and accurate demonstration by resort to easily accessible sources of indisputable accuracy.' " *Central Austin Neighborhood Ass'n v. City of Chicago*, 2013 IL App (1st) 123041, ¶ 13 (quoting *Vulcan Materials Co. v. Bee Construction*, 96 Ill. 2d 159, 166 (1983)). "However, courts 'will not take judicial notice of critical evidentiary material not presented in the court below, and this is especially true of evidence which may be significant in the proper determination of the issues between the parties.' " *Id.* (quoting *Vulcan Materials Co.*, 96 Ill. 2d at 166). As the information was not presented to the trier of fact, we decline to consider it on appeal.

¶ 17 On a challenge to the sufficiency of the evidence, we inquire " '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.' " (Emphasis omitted.) *People v. Davison*, 233 Ill. 2d 30, 43 (2009) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). In so doing, we draw all reasonable inferences in favor of the State (*Davison*, 233 Ill. 2d at 43) and we do not retry the defendant (*People v. Collins*, 106 Ill. 2d 237, 261 (1985)). The State must prove each element of an offense beyond a reasonable doubt. *People v. Siguenza-*

Brito, 235 Ill. 2d 213, 224 (2009). It is within the province of the trier of fact "to determine the credibility of witnesses, to weigh the evidence and draw reasonable inferences therefrom, and to resolve any conflicts in the evidence." *Id.* at 228. A defendant's claim that a witness was not credible, standing alone, is insufficient to reverse a conviction. *Id.* We will not overturn a criminal conviction "unless the evidence is so improbable or unsatisfactory that it creates a reasonable doubt of the defendant's guilt." *People v. Givens*, 237 Ill. 2d 311, 334 (2010).

¶ 18 To prove defendant was guilty of UUW, the State had to prove that he knowingly possessed "a shotgun having one or more barrels less than 18 inches in length." 720 ILCS 5/24-1(a)(7)(ii) (West 2014).

¶ 19 We conclude that, viewing the evidence in a light most favorable to the State, a trier of fact could find defendant guilty of UUW. Officer Glinski testified he responded to a call of a man with a shotgun at 8952 South Burley. He went up to the third floor, and saw defendant on the threshold of the doorway holding a shotgun, which he threw to the ground before shutting the door. Glinski "knocked in the door" and saw defendant and the shotgun. Officer Schaffer testified that he measured the barrel to be 17 1/2 inches and that the end of the barrel "looked uneven" and felt "gritty," like it had been "sawed off or somehow manipulated from its original state." Given this evidence, we find that a rational trier of fact could have concluded that the barrel of the recovered shotgun was less than 18 inches.

¶ 20 Nevertheless, defendant argues that the State failed to prove him guilty of UUW beyond a reasonable doubt because "the only evidence regarding the length of the shotgun was the testimony of one police officer that simply said that, using 'measuring tape,' he found the barrel to be '17 and a half inches.' "

¶ 21 The testimony of a single witness is sufficient to establish guilt beyond a reasonable doubt, so long as the testimony is positive and the witness credible. *People v. Smith*, 185 Ill. 2d 532, 541 (1999). Based on the record, it was not unreasonable for the trial court to conclude beyond a reasonable doubt that Schaffer properly measured the gun and that his measurement was accurate. There is nothing in the record indicating that Schaffer improperly measured the shotgun's barrel length. Schaffer not only measured the barrel's length, but noted signs indicating that the barrel had been purposefully shortened. Therefore, we cannot conclude that no rational trier of fact could have found beyond a reasonable doubt that defendant was in possession of a shotgun with a barrel less than 18 inches in length.

¶ 22 Next, defendant contends he was denied the effective assistance of trial counsel where counsel failed to file a motion to quash his arrest and suppress the recovered shotgun. Defendant argues that the motion would have been granted because "the police clearly violated [defendant's] rights under the Fourth amendment" when they entered his property "without a warrant, probable cause, or exigent circumstances" and recovered the shotgun. The State argues that the failure to file a motion to quash cannot support a claim of ineffective assistance of counsel because the motion would have been denied where the police's warrantless entry into defendant's apartment was lawful because there was probable cause to arrest him and, additionally, exigent circumstances existed that excused the need for a warrant.

¶ 23 A criminal defendant has a constitutional right to the effective assistance of counsel. U.S. Const., amends. VI, XIV; Ill. Const. 1970, art. I, § 8. To demonstrate ineffective assistance of counsel, defendant must show that (1) his counsel's performance was deficient, and (2) but for counsel's deficient performance, there is a reasonable probability that the outcome of the

proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668 (1984). More specifically, a defendant must show that counsel's performance was objectively unreasonable under prevailing professional norms and that a reasonable probability exists that, but for counsel's deficient performance, the result of the proceedings would have been different. *People v. Domagala*, 2013 IL 113688, ¶ 36. The failure to satisfy either prong of the *Strickland* test precludes a finding of ineffective assistance of counsel. *People v. Patterson*, 192 Ill. 2d 93, 107 (2000).

¶ 24 A reviewing court, however, should not simply proceed to the merits of every ineffective assistance of counsel claim. When a claim of ineffective assistance of counsel is based on the failure to file a motion to suppress evidence, the record may be inadequate for a reviewing court to make a conclusion on the issue and the better resolution may be to raise the issue in a collateral challenge under the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2016)). See *People v. Bew*, 228 Ill. 2d 122, 134 (2008) (citing *Massaro v. United States*, 538 U.S. 500, 506 (2003)). Recently, our supreme court cautioned against adopting an approach to ineffective assistance of counsel claims that presumes such claims are always better suited to collateral proceedings. *People v. Veach*, 2017 IL 120649, ¶ 45. Instead the *Veach* court held: "ineffective assistance of counsel claims may sometimes be better suited to collateral proceedings but only when the record is incomplete or inadequate for resolving the claim." *Id.* ¶ 46. Reviewing courts must therefore "carefully consider each ineffective assistance of counsel claim on a case-by-case basis" before deferring consideration of the claim to collateral review. *Id.* ¶ 48.

¶ 25 Here, after a careful review of the record on appeal, we decline to consider defendant's claim of ineffective assistance of trial counsel because the record is devoid of evidence that would allow this court to determine whether a motion to quash arrest would have been granted or whether police acted lawfully under the circumstances. The record reflects that Officer Glinski responded to "a call of a man with a shotgun." Upon arriving at the address, he approached the "three-flat," knocked on the "exterior" door, and entered. Glinski went to the third floor, where he saw defendant "in the doorway [and] holding a shotgun." Defendant made eye contact with Glinski, "threw the shotgun on the ground and slammed the door." Glinski "knocked in the door" and arrested defendant.

¶ 26 There are numerous unanswered factual questions that preclude us from deciding the substantive fourth amendment claims that underlie defendant's claim of ineffective assistance of counsel. Presumably the State is relying on the plain-view doctrine to justify the seizure. A warrantless seizure of evidence in plain view does not violate the fourth amendment. *People v. Garcia*, 2012 IL App (1st) 102940, ¶ 4. This exception allows a police officer to seize an object without a search warrant if the object is in plain view, the object's incriminating nature is immediately apparent, and the officer is lawfully located in the place where he observed the object. *Id.* The third factor can be satisfied by the exigent circumstances exception to the warrant requirement. *Id.*

¶ 27 The record in this case is devoid of information necessary to fully address and resolve defendant's fourth amendment claim that the police entered into his property without lawful authority. Specifically, we do not know the layout of the apartment building, how access to the apartments is gained, whether the front entrance was locked, exactly how the police gained entry,

whether the common areas are accessible to the public, the totality of the information known to the police when they entered, and exactly where defendant was standing when the police went upstairs.

¶ 28 Therefore, we decline to address defendant's ineffective assistance of counsel claim because the record, as it exists, is insufficient for us to determine whether defendant was lawfully arrested, whether trial counsel's decision to file a motion to quash arrest and suppress was strategic, or whether such a motion would likely have succeeded. *Veach*, 2017 IL 120649, ¶ 46. Our decision, however, does not foreclose collateral relief under, for example, the Post-Conviction Hearing Act. See 725 ILCS 5/122-1 *et seq.* (West 2016).

¶ 29 Defendant next argues that the trial court improperly assessed the $5 electronic citation and the $5 court system fee against him and that it failed to give him $5 per day of presentence custody credit against other monetary assessments which qualified as fines. The State agrees that the $5 electronic citation and the $5 court system fee should be vacated and that the $15 State Police operations fee and $50 court system fee are fines subject to offset by presentence custody credit, but it does not agree that defendant is entitled to presentence credit against the remaining assessments that defendant challenges, including a $190 felony complaint fee, a $15 automation fee, a $15 document storage fee, a $25 court services (sheriff) fee, a $2 State's Attorney records automation fee, and a $2 public defender records automation fee, which it argues are not fines.

¶ 30 Defendant did not challenge these assessments at trial and acknowledges his claims are, therefore, forfeited. See *People v. Hillier*, 237 Ill. 2d 539, 544 (2010). He contends, however, that we may review his claims under plain error or, alternatively, that trial counsel was ineffective for failing to object to the assessments. The State agrees with defendant in that, even

though he forfeited his claims by failing to raise them in the trial court, the plain error doctrine permits the reviewing court to review the issues under the plain error doctrine.

¶ 31 We disagree that defendant's challenge is reviewable under plain error. *People v. Grigorov*, 2017 IL App (1st) 143274, ¶ 15; *People v. Griffin*, 2017 IL App (1st) 143800, ¶ 9, *pet. for leave to appeal granted*, No. 122549 (Nov. 22, 2017); *contra People v. Cox*, 2017 IL App (1st) 151536, ¶ 102 (holding that the improper imposition of fines and fees affects "substantial rights" and thus may be reviewed under the second prong of the plain error doctrine). Nevertheless, because the State does not argue forfeiture on appeal, it has thus forfeited that argument and we will address the merits of defendant's claims. See *People v. Brown*, 2017 IL App (1st) 142877, ¶ 70 (rules of waiver and forfeiture apply to the State). We review the propriety of a trial court's imposition of fines and fees *de novo*. *People v. Bowen*, 2015 IL App (1st) 132046, ¶ 60.

¶ 32 Defendant first claims, and the State properly concedes, that the $5 electronic citation fee (705 ILCS 105/27.3e (West 2014)) was improperly assessed and must be vacated because it only applies to traffic, misdemeanor, municipal ordinance, and conservation cases, and is inapplicable to his felony conviction. See *People v. Moore*, 2014 IL App (1st) 112592-B, ¶ 46 ($5 electronic citation fee does not apply to felonies); *People v. Robinson*, 2015 IL App (1st) 130837, ¶ 115 (vacating the fee where the defendant's offense did not fall into an enumerated category). Accordingly, we vacate the electronic citation fee.

¶ 33 Defendant also claims, and the State again properly concedes, that the $5 court system fee (55 ILCS 5/5-1101(a) (West 2014)) was improperly assessed and must be vacated because it only applies to violations of the Illinois Vehicle Code and similar county and municipal

ordinances. As defendant was not found guilty of a violation of the Illinois Vehicle code, the $5 court system fee was erroneously assessed against him. See *People v. Price*, 375 Ill. App. 3d 684, 698 (2007). Accordingly, we vacate the $5 court system fee.

¶ 34 Defendant also argues that he is entitled to presentence custody credit toward the following assessments imposed by the trial court, which he argues are fines and, therefore, subject to offset: a $15 State Police operations fee (705 ILCS 105/27.3a(1.5) (West 2014)), a $50 court system fee (55 ILCS 5/5-1101(c) (West 2014)), a $190 felony complaint fee (705 ILCS 105/27.2a(w)(1)(A) (West 2014)), a $15 automation fee (705 ILCS 105/27.3a-1 (West 2014)), a $15 document storage fee (705 ILCS 105/27.3c (West 2014)), a $25 court services fee (55 ILCS 5/5-1103 (West 2014)), a $2 State's Attorney records automation fee (55 ILCS 5/4- 2002.1(c) (West 2014)), and a $2 Public Defender records automation fee (55 ILCS 5/3-4012 (West 2014)). The State agrees that defendant is owed presentence custody credit against the $15 State Police operations fee and the $50 court system fee, but argues that the remaining assessments defendant challenges as fines are not fines and, thus, are not subject to offset by presentence custody credit.

¶ 35 A defendant is entitled to a $5 credit toward the fines levied against him for each day he is incarcerated prior to sentencing. 725 ILCS 5/110-14(a) (West 2014). The credit applies only to fines imposed pursuant to conviction and not to any other court costs or fees. *People v. Tolliver*, 363 Ill. App. 3d 94, 96 (2006). A fine is a part of the punishment for a conviction, whereas a fee or cost seeks to recoup expenses incurred by the State. *People v. Jones*, 223 Ill. 2d 569, 582 (2006). Here, defendant accumulated 356 days of presentence custody credit, and, therefore, he is potentially entitled to as much as $1,780 of credit toward his eligible fines.

¶ 36 We agree with the parties that the $15 State Police operations fee and $50 court system fee are fines subject to presentence custody credit. See *People v. Brown*, 2017 IL App (1st) 150146, ¶ 36 (State Police operations assessment is a fine); *People v. Reed*, 2016 IL App (1st) 140498, ¶ 15 (court system fee is a fine). Accordingly, defendant is entitled to offset the State Police operations fee and court system fee with presentence custody credit.

¶ 37 We agree with the State that the remaining assessments that defendant challenges are not fines subject to offset by presentence custody credit. Contrary to defendant's argument, this court has previously considered challenges to these assessments and found them to be fees, not fines. See *People v. Tolliver*, 363 Ill. App. 3d 94, 97 (2006); *People v. Bingham*, 2017 IL App (1st) 143150, ¶¶ 41-42 (relying on *Tolliver* and finding the $190 felony complaint filing fee is not a fine subject to offset by presentence incarceration credit); *People v. Brown*, 2017 IL App (1st) 142877, ¶ 78 ($15 automation fee and $15 document storage fee are not fines); *People v. Adair*, 406 Ill. App. 3d 133, 144 (2010) ($25 court services fee is a fee rather than a fine); *People v. Brown*, 2017 IL App (1st) 150146, ¶ 38 (The "bulk of legal authority" has concluded that the $2 State's Attorney and $2 public defender records automation fees are not fines); *contra People v. Camacho*, 2016 IL App (1st) 140604, ¶¶ 47-56. Accordingly, the $190 felony complaint fee, $15 automation fee, the $15 document storage fee, the $25 court services fee, the $2 State's Attorney records automation fee, and the $2 public defender records automation fee are not subject to offset by defendant's presentence custody credit.

¶ 38 For the foregoing reasons, we vacate the $5 court system fee and $5 electronic citation fee. We direct the clerk of the circuit court to further amend that order to reflect a credit of $65 to

offset the $15 State Police operations fee and $50 court system fee, which leaves a total of $729 in fines and fees due. We affirm defendant's conviction and sentence in all other respects.

¶ 39 Affirmed; fines and fees order modified.

TO THE APPELLATE COURT OF ILLINOIS
IN THE CIRCUIT COURT OF COOK COUNTY
CRIMINAL DIVISION

2015 FEB 11 PM 1:21

PEOPLE OF THE STATE OF ILLINOIS	)	
	)	No. 14-CR-04685
-vs-	)	Trial Judge: WADAS
	)	Attorney: KATHLEEN D. FRITZ
LANARD GAYDEN	)	

NOTICE OF APPEAL

An Appeal is taken from the order of judgment described below:
APPELLANT'S NAME: LANARD GAYDEN
IR# 1515930 D.O.B. : 05/04/85
APPELLANT'S ADDRESS: ILLINOIS DEPARTMENT OF CORRECTIONS
APPELLANT'S ATTORNEY: State Appellate Defender
ADDRESS: 203 N. LaSalle, 24th Floor, Chicago, IL 60601
OFFENSE: Unlawful Use of a Weapon
JUDGEMENT: GUILTY
DATE: 02/06/15
SENTENCE: 3 YEARS ILLINOIS DEPARTMENT OF CORRECTIONS

APPELLANT'S ATTORNEY

VERIFIED PETITION FOR REPORT OF PROCEEDINGS
COMMON LAW RECORD AND FOR APPOINTMENT OF COUNSEL ON APPEAL

Under Supreme Court Rules 605-608, appellant asks the Court to order the Official Court Reporter to transcribe an original and copy of the proceedings, file the original with the Clerk and deliver a copy to the appellant; order the Clerk to prepare the Record on Appeal and the Appoint Counsel on Appeal. Appellant, being duly sworn, says that at the time of his conviction he was and is unable to pay for the Record or appeal lawyer.

APPELLANT'S ATTORNEY

ORDER

IT IS ORDERED the State Appellate Defender be appointed as counsel on appeal and the Record and Report of Proceedings be furnished appellant without cost within 45 days of receipt of this Order.

Dates to be transcribed;

PRE-TRIAL MOTION DATES(S):
JURY TRIAL DATE(S): N/A
BENCH TRIAL DATE(S): 01/09/15
SENTENCING DATE(S): 02/06/15

OTHER:

DATE: February 6, 2015

ENTER:
JUDGE

Melching

APPELLATE COURT OF ILLINOIS
FIRST DISTRICT
160 N. LASALLE
SUITE 1400
CHICAGO, IL 60601

CLERK OF THE APPELLATE COURT
(312) 793-5600

JUL 31 2015

DATE: 07/28/15

RE: People v. Gayden, Lanard
Appellate Court No.: 1-15-0748
County: Cook
Trial Court No.: 14CR4685

TO COUNSEL:

I have today received and filed the Certificate in Lieu of Record in the above entitled cause.

Steven M. Ravid
Clerk of the Appellate Court
First District, Illinois

Office Of The State Appellate Defender
1ST DIST., Patricia Mysza, Deputy Defender
203 N. LaSalle Street, 24th Floor
Chicago, IL 60601

STATE OF ILLINOIS
COUNTY OF COOK | ss:

1-15-0748
2V015
EH

APPEAL CERTIFICATE

I, **DOROTHY BROWN**, Clerk of the Circuit Court of Cook County. Illinois in said County and State and Keeper of the Records and Seal thereof, do hereby certify that on 2/6/15 a Notice of Appeal was filed in said Court and thereafter in accordance with the provisions set forth by Supreme Court Rule 608, the Record on Appeal wherein

THE PEOPLE OF THE STATE OF ILLINOIS, versus Landard Gayden

Case number 14 CR 4685 was prepared by my office.

I do further certify, that on 5/14/15, the Record was bound and numbered. The Record was picked up by Alan Goldberg

of Office of the State Appellate Defender Chicago, Illinois,

for filing in the Appellate Court of the State of Illinois.

I do further certify, that this Appeal Certificate pursuant to Supreme Court Rule 325, issued out of my office on 5/14/15.

FILED APPELLATE COURT
1ST DIST.
2015 JUL 28 PM 3:4
SIEVEN
CLERK

Dorothy Brown
DOROTHY BROWN,
Clerk of the Circuit Court of Cook County, Illinois

By: XG

Received from **DOROTHY BROWN**, Clerk of the Circuit Court of Cook County, Illinois, the above mentioned Record for transmittal to the Appellate on 7/29/15.

OSAD Clerk
Signature upon Request

DOROTHY BROWN, CLERK OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

No. 1-15-0748

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Cook County, Illinois
Plaintiff-Appellee,	)	
-vs-	)	14 CR 4685
LANARD GAYDEN,	)	Honorable Kenneth J. Wadas,
Defendant-Appellant.	)	Judge Presiding.

MOTION FOR EXTENSION OF TIME TO FILE BRIEF FOR APPELLANT

Appellant, Lanard Gayden, by Patricia Mysza, Deputy Defender, and Robert N. Melching, Assistant Appellate Defender, Office of the State Appellate Defender, respectfully requests an extension of time until October 27, 2015, in which to file appellant's brief.

In support of this motion counsel states:

1. Appellant was convicted of unlawful use of a weapon and on February 6, 2015, was sentenced to 2 years by the Honorable Kenneth J. Wadas.

2. Appellant is currently incarcerated.

3. Notice of Appeal was filed on February 11, 2015.

4. The Office of the State Appellate Defender was appointed to represent appellant on February 20, 2015.

5. The certificate in lieu of record was filed on July 28, 2015.

6. Appellant's brief is due on September 1, 2015.

7. This is Appellate counsel's first request for a 60-day extension of time to file the brief.

8. At the present time this office has seventy-one (71) full-time and fourteen (14) part-time assistant defenders working on cases and a backlog of approximately 1925 unbriefed cases.

9. Appellate counsel cannot complete Appellant's brief by the above due date because, in fairness to all our clients, it is the policy of the Office of the State Appellate Defender to brief the oldest cases by final judgment date. The only exceptions to handling appeals in this order are State appeals, appeals from remands, juvenile appeals, and appeals where counsel has been ordered to file the brief regardless of the age of the case. Currently, there are 1431 unbriefed cases in this office with judgment dates prior to defendant's judgment date. Given the size of the Office of the State Appellate Defender's present staff, it will be approximately 10 months before an attorney will brief this case.

10. The delay in the filing of the brief is in no way the fault of Appellant, and Appellant should not be penalized for the backlog of cases of the Office of the State Appellate Defender.

WHEREFORE, appellant respectfully requests that the Court grant this motion.

Respectfully submitted,

ROBERT N. MELCHING
Assistant Appellate Defender
Office of the State Appellate Defender
First Judicial District
203 N. LaSalle, 24th Floor
Chicago, IL 60601
(312) 814-5472
1stdistrict.eserve@osad.state.il.us

COUNSEL FOR DEFENDANT-APPELLANT

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

AFFIDAVIT

Robert N. Melching, being first duly sworn on oath, deposes and says that he has read the foregoing Motion by him subscribed and the facts stated therein are true and correct to the best of his knowledge and belief.

ROBERT N. MELCHING
Assistant Appellate Defender

SUBSCRIBED AND SWORN TO BEFORE ME
on August 26, 2015.

Carol M. Chatman
NOTARY PUBLIC

Official Seal
Carol M Chatman
Notary Public State of Illinois
My Commission Expires 06/14/2016

No. 1-15-0748

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Cook County, Illinois
Plaintiff-Appellee,	)	
-vs-	)	14 CR 4685
LANARD GAYDEN,	)	Honorable Kenneth J. Wadas,
Defendant-Appellant.	)	Judge Presiding.

NOTICE AND PROOF OF SERVICE

TO: Anita Alvarez, Cook County State's Attorney, 300 Daley Center, Chicago, Illinois 60602

The undersigned, being first duly sworn on oath, deposes and says that on August 26, 2015, we personally delivered the original and three copies of the Motion for Extension of Time to File Brief in the above-entitled cause to the Clerk of the Appellate Court, a copy of which is hereby served on you.

OFFICE CLERK
Office of the State Appellate Defender
203 N. LaSalle, 24th Floor
Chicago, IL 60601
(312) 814-5472
Service via email will be accepted at
1stdistrict.eserve@osad.state.il.us

SUBSCRIBED AND SWORN TO BEFORE ME
on August 26, 2015.

Carol M. Chatman

NOTARY PUBLIC

Official Seal
Carol M Chatman
Notary Public State of Illinois
My Commission Expires 09/14/2016

Assigned: Robert N. Melching

OERRM212

AS OF DATE : 10/10/2018

ILLINOIS DEPARTMENT OF CORRECTIONS
OFFENDER TRACKING SYSTEM

OFFENDER CUSTODY HISTORY

PAGE: 1
RUN DATE: 10/10/2018
RUN TIME: 11:03:46 AM

NAME	:LANARD GAYDEN	IDOC #	:M50485
DATE OF BIRTH	:5/4/1985	CURRENT STATUS	:DISCHARGE
		CURRENT LOCATION	:DISCHARGE:DISCHARGE

RECORDED PERIODS OF IDOC INCARCERATION

MVMT DATE	MVMT TYPE	PARENT INST
2/10/2016	DISCHARGE OUT	STATEVILLE
2/10/2015	PAROLE OUT	STATEVILLE
2/9/2015	ADMIT IN	STATEVILLE

MITT/SENTENCE INFORMATION

			CLASS	YR	MO	DAY
14CR0468501	COOK	RIFLE <16 IN/SHOTGUN <18 IN - 00104895749	CL: 3	2	0	0
MITT ADMIT: 2/9/2015		SENT DATE: 2/6/2015	DISC/REM DATE: 2/10/2016			

-* THE CUSTODY HISTORY REPRESENTED IN THIS DOCUMENT IS TAKEN FROM THE ELECTRONIC RECORDS MAINTAINED IN THE ILLINOS DEPARTMENT OF CORRECTIONS BASED ON MASTER FILE PAPER RECORDS. MASTER FILES FOR EACH OFFENDER ARE CURRENTLY KEPT IN STORAGE AT DIFFERENT ILLINOIS DEPARTMENT OF CORRECTIONS FACILITIES AROUND THE STATE BASED ON THE LOCATION OF THE OFFENDER UPON REACHING DISCHARGE FOR THAT INCARCERATION FROM THE ILLINOIS DEPARTMENT OF CORRECTIONS. THE ELECTRONIC CUSTODY HISTORY DOCUMENT WAS CREATED IN AN EFFORT TO PROVIDE AN OVERVIEW OF THE CUSTODY HISTORY OF AN OFFENDER, TO PROCESS THE REQUEST MORE EFFICIENTLY, TO CUT THE COSTS, AND TO IMPROVE THE HANDLING TIME.

RECORD OFFICER/DESIGNEE: Ava I. Meier

UserID: AVA MEIER

123505

IN THE CIRCUIT COURT OF COOK COUNTY

PEOPLE OF THE STATE OF ILLINOIS)
V.)
LANARD GAYDEN)
Defendant

CASE NUMBER 14CR0468501
DATE OF BIRTH 05/04/85
DATE OF ARREST 02/15/14
IR NUMBER 1515930 SID NUMBER 050296930

ORDER OF COMMITMENT AND SENTENCE TO ILLINOIS DEPARTMENT OF CORRECTIONS

The above named defendant having been adjudged guilty of the offense(s) enumerated below is hereby sentenced to the Illinois Department of Corrections as follows:

Count	Statutory Citation	Offense	Sentence	Class
001	720-5/24-1(A)(7)(II)	RIFLE <16 IN/SHOTGUN <18 IN	YRS. 002 MOS.00	3
	and said sentence shall run concurrent with count(s) ___ ___ ___ ___			
____	_____	_____	YRS. ____ MOS. ___	___
	and said sentence shall run (concurrent with)(consecutive to) the sentence imposed on:			
____	_____	_____	YRS. ____ MOS. ___	___
	and said sentence shall run (concurrent with)(consecutive to) the sentence imposed on:			
____	_____	_____	YRS. ____ MOS. ___	___
	and said sentence shall run (concurrent with)(consecutive to) the sentence imposed on:			
____	_____	_____	YRS. ____ MOS. ___	___
	and said sentence shall run (concurrent with)(consecutive to) the sentence imposed on:			

On Count ___ defendant having been convicted of a class _ offense is sentenced as a class x offender pursuant TO 730 ILCS 5/5-5-3(C)(8).

On Count ___ defendant is sentenced to an extended term pursuant to 730 ILCS 5/5-8-2.

The Court finds that the defendant is entitled to receive credit for time actually served in custody for a total credit of 0356 days as of the date of this order

IT IS FURTHER ORDERED that the above sentence(s) be concurrent with the sentence imposed in case number(s) _____ _____ _____
AND: consecutive to the sentence imposed under case number(s)
_____ _____ _____ _____ _____

IT IS FURTHER ORDERED THAT 1 YEAR MSR _____
_____
_____

ENTERED
FEB 06 2015
CLERK OF THE CIRCUIT COURT
COOK COUNTY, IL
DEPUTY CLERK

IT IS FURTHER ORDERED that the Clerk provide the Sheriff of Cook County with a copy of this Order and that the Sheriff take the defendant into custody and deliver him/her to the Illinois Department of Corrections and that the Department take him/her into custody and confine him/her in a manner provided by law until the above sentence is fulfilled.

DATED FEBRUARY 06, 2015
CERTIFIED BY B JONES
DEPUTY CLERK
VERIFIED BY _____

ENTER: 02/06/15
JUDGE: WADAS, KENNETH J. 1700

WAP6 02/06/15 11:56:52

CCG N305

C:00091