No. 129795

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellant, -vs- VICTOR HAYNES, Defendant-Appellee.	))))))))))	Appeal from the Appellate Court of Illinois, No. 1-22-0296. There on appeal from the Circuit Court of Cook County, Illinois, No. 17 CR 00867. Honorable Michael J. Hood, Judge Presiding.

BRIEF AND ARGUMENT FOR DEFENDANT-APPELLEE

JAMES E. CHADD
State Appellate Defender

DOUGLAS R. HOFF
Deputy Defender

SARAH CURRY
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-APPELLEE

ORAL ARGUMENT REQUESTED

E-FILED
5/15/2024 10:51 AM
CYNTHIA A. GRANT
SUPREME COURT CLERK

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ISSUE PRESENTED FOR REVIEW

Whether Victor Haynes's trial counsel was ineffective for failing to argue that Haynes's sentence for attempt murder should be reduced to a Class 1 felony sentence pursuant to 720 ILCS 5/8-4(c)(1)(E), where Haynes was acting under a sudden and intense passion resulting from a serious provocation.

STATUTES INVOLVED

720 ILCS 5/8-4. Attempt.

(a) Elements of the offense.

A person commits the offense of attempt when, with intent to commit a specific offense, he or she does any act that constitutes a substantial step toward the commission of that offense.

* * *

(c) Sentence.

A person convicted of attempt may be fined or imprisoned or both not to exceed the maximum provided for the offense attempted but,...

> (1) the sentence for attempt to commit first degree murder is the sentence for a Class X felony, except that
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> * * *
>
> (E) if the defendant proves by a preponderance of the evidence at sentencing that, at the time of the attempted murder, he or she was acting under a sudden and intense passion resulting from serious provocation by the individual whom the defendant endeavored to kill, or another, and, had the individual the defendant endeavored to kill died, the defendant would have negligently or accidentally caused that death, then the sentence for the attempted murder is the sentence for a Class 1 felony.

720 ILCS 5/9-2. Second Degree Murder.

(a) A person commits the offense of second degree murder when he or she commits the offense of first degree murder as defined in paragraph (1) or (2) of subsection (a) of Section 9-1 of this Code and either of the following mitigating factors are present:

> (1) at the time of the killing he or she is acting under a sudden and intense passion resulting from serious provocation by the individual killed or another whom the offender endeavors to kill, but he or she negligently or accidentally causes the death of the individual killed...

STATEMENT OF FACTS

Victor Haynes was charged with the attempt murder and aggravated battery of Nathall Williams and Jerome White. (C. 11) At trial, Jerome, a 300-pound man, testified that just before Haynes shot him, he rushed Haynes, punched him in the face and when the two went down onto the bench at the back of the bus, he continued punching Haynes six or seven more times. During this struggle, Jerome was shot once in the chest. Haynes was found guilty of attempt murder of Jerome, and was sentenced to six years plus an additional 25 years for personally discharging a firearm that proximately caused great bodily harm.

On direct appeal, Haynes argued that his trial counsel was ineffective for failing to argue the applicability of 720 ILCS 5/8-4(c)(1)(E) at sentencing. Section 8-4(c)(1)(E) ("Subsection (E)") provides for a reduction from a Class X sentence to a Class 1 sentence where a defendant convicted of attempt murder proves by a preponderance of the evidence that he acted under a sudden and intense passion resulting from serious provocation. Subsection (E) was enacted in response to this Court's decision in *People v. Lopez*, 166 Ill.2d 441, 451 (1995), which held that the offense of attempt second degree murder does not exist under Illinois law. The purpose of Subsection (E) was to remedy the sentencing anomaly that *Lopez* created whereby a person convicted of second degree murder could be sentenced more leniently than a person convicted of attempt murder under the same circumstances.

The First District vacated Haynes's sentence and remanded for a new sentencing hearing finding that trial counsel's failure to request sentencing under

this provision was unreasonable and that if he had requested the application of the provision there is a reasonable probability that the outcome of the sentencing hearing would have been different. *People v. Haynes*, 2023 IL App (1st) 220296, ¶47.

The Trial

At trial, Virgetta White testified that on December 17, 2016, she and close friends and family celebrated her birthday on a party bus. (R. 155-157) Virgetta's uncle, Jerome White, and her cousin, Nathall Williams, paid for the bus. (R. 156) They took liquor and wine coolers on the bus with them, but no food. (R. 160) The bus left from 13th and Karlov at 8:00 p.m. with 24 people on board. (R. 157-158) The bus drove to the train station on 21st Street to pick up Virgetta's cousin, Aaron White, and then drove back to 13th and Karlov for partygoers to use the restroom. (R. 159) At 13th and Karlov, Haynes and James Staples boarded the bus. (R. 160) Virgetta had previously dated Staples' cousin, "JK." (R. 160-162) Virgetta did not know Haynes, but JK and Staples asked Virgetta if Haynes could board the bus, and she told them he could. (R. 162)

The bus left 13th and Karlov again and went to a liquor store where they bought more liquor. (R. 164) The bus then drove to Roosevelt to pick up someone else. (R. 164) Virgetta was not feeling well from having consumed too much alcohol, and the bus stopped at a gas station so that she could throw up. (R. 166, 207) When Virgetta got back on the bus, Haynes was arguing with two other men. (R. 166) Virgetta did not know what the argument was about, but told the men that if there was going to be a problem, they could get off the bus. (R. 167) JK assured

Virgetta that everything would be fine and the bus took off again, heading for downtown Chicago. (R. 167)

About 45 minutes later, Virgetta was toward the back of the bus, behind a pole that was in the middle of the bus, and JK and Haynes, who were in front of the pole, began arguing. (R. 168, 209) Virgetta could not hear what JK and Haynes were arguing about, but she got in between them and told them, "Let's not do this, this is my birthday." (R. 168-170) Virgetta denied shoving Haynes two to three times. (R. 212) Virgetta testified that Haynes swung at her, hitting her in the jaw, and then he grabbed her by the neck and began choking her. (R. 170) Virgetta was hitting Haynes, trying to get him to stop choking her. (R. 170) Someone on the bus shouted, "He's choking her," and Jerome White came from the front of the bus and he and Haynes began fighting. (R. 170-173) Jerome and Haynes fell toward the back of the bus and continued to fight. (R. 173) Virgetta heard a shot, and Jerome fell onto her and Crystal Massey. (R. 174) Virgetta knew Jerome had been shot because he had blood all over his shirt. (R. 174) Nathall jumped onto Haynes, and he and Haynes began tussling. (R. 217) Nathall and Haynes were standing, fighting with one another. (R. 218) Virgetta testified that two to three minutes after hearing the first shot, she heard two more shots and Nathall fell toward the pole. (R. 174-175)

Virgetta testified that Haynes was at the back of the bus and he climbed over her, Jerome and Nathall to get to the front of the bus. (R. 176-177) As Haynes climbed over them, she saw a black gun in his hand. (R. 176) Haynes and Staples ran off the bus. (R. 176)

The police and ambulances arrived, and Jerome and Nathall were taken off the bus. (R. 178) After Virgetta spoke with police, an officer drove Virgetta to 3500 Lake Shore Drive where she identified Haynes and Staples. (R. 179, 499; People's Exhibit #54)

Jerome White testified that on December 17, 2016, he was 6 feet tall and weighed 305 pounds. (R. 235) Jerome rented a party bus to celebrate his niece's birthday. (R. 235) The bus left 13th and Karlov around 9:00 p.m. (R. 236) Jerome brought nine bottles of liquor onto the bus. (R. 239) The bus drove to a train station to pick someone up and then back to 13th and Karlov where Jerome saw Haynes board the bus. (R. 238-239) Jerome was at the front of the bus using his phone to play music and take videos. (R. 249) The bus stopped at a liquor store at Madison and Springfield, made another stop to pick someone up, and then stopped at a gas station so that people could use a restroom. (R. 241-245) Jerome got off the bus at the gas station and could hear Haynes arguing with two other men. (R. 246) Jerome asked what was going on, and JK assured him that everything was fine. (R. 247)

The bus left the gas station and headed north on Lake Shore Drive. (R. 248) When they were near Belmont, JK and Haynes started arguing. (R. 248) Jerome was not paying attention to the argument until he heard someone say, "He hit [Virgetta]." (R. 249) Jerome looked up and saw Haynes hitting Virgetta in the face and then choking her. (R. 250) Jerome ran toward the back of the bus, moved Virgetta out of the way and hit Haynes in the face with his fist. (R. 251) Haynes pulled Jerome by the shirt and they fell onto the seats in the back of the

bus. (R. 250-252) Jerome continued to swing at Haynes six or seven times. (R. 255) Nathall and Staples were to Jerome's right, also fighting. (R. 254)

The next thing that Jerome remembered was smelling gunpowder; he did not hear a gunshot. (R. 255) He felt weak, stood up, realized he had been shot and fell backward. (R. 255) Nathall jumped over to his left side and began tussling with Haynes. (R. 255) Haynes had something black in his hand, and Nathall was trying to take it away. (R. 255, 292-293) Jerome heard two gunshots, and Nathall fell next to him on the floor of the bus. (R. 256-257) Jerome passed out. (R. 257)

Jerome was taken to Northwestern Memorial Hospital. (R. 258) He spoke with police the following morning and identified a photo of Haynes. (R. 259, 500; People's Exhibit #55) Jerome had several surgeries and still has a bullet lodged under his heart. (R. 260) Nathall was also taken to the hospital and remains in a medical facility unable to communicate. (R. 262)

Crystal Massey, Virgetta's friend and Nathall's cousin, testified that she was on the party bus on December 17, 2016. (R. 396-397) Crystal did not know Haynes before, but spoke to him on the bus for 15 to 20 minutes. (R. 403-404) When the bus stopped at a gas station so that people could use the restroom, an argument broke out in the back of the bus between Haynes and two other men. (R. 405) The argument went on for about ten minutes before Virgetta squashed it. (R. 407)

Twenty to thirty minutes later, Crystal was at the front of the bus when Haynes and JK started screaming at each other. (R. 411-412) Someone said that Virgetta had been slapped, and Jerome went toward the back of the bus. (R. 412)

Crystal followed Jerome. (R. 412) Jerome and Haynes went down onto the seat at the back of the bus in a tussle. (R. 414) Jerome was on top of Haynes. (R. 414) Crystal smelled gunpowder and then Jerome fell backward, and she and Virgetta helped Jerome down to the floor. (R. 417) Jerome had been shot in the chest. (R. 419) Nathall made a motion like he was ducking under something. (R. 417) Haynes and Staples jumped over the seat and jumped off the bus. (R. 419) Crystal saw a small black gun in Haynes' hand as he jumped over them. (R. 421) Crystal did not see Nathall come down, but he was on her right side lying in a pool of blood with his eyes closed. (R. 420-423) Crystal never heard any gunshots. (R. 421)

After speaking with police, Crystal was taken to Lake Shore Drive and Cornelia where she identified Staples and Haynes. (R. 424-426, 497; People's Exhibit #53)

Officer Gilberto Nieto was on patrol with his partner, Officer Reynoso, around 2:00 a.m. on December 18, 2016, when they received a call of shots fired with the description of possible offenders that might be in the area of Irving Park Road. (R. 441-444) Nieto saw two men matching the description and followed them. (R. 446-449) After losing sight of the men briefly, Nieto saw the men in the foyer of the building at 3500 North Lake Shore Drive. (R. 451) The officer went into the foyer and handcuffed the men, Haynes and Staples. (R. 452-454) Haynes' left hand was covered in blood and he appeared to have a gunshot wound on the hand. (R. 457-458) A small black semiautomatic firearm was recovered from underneath a bench inside the foyer. (R. 459) Haynes was taken to Illinois Masonic Hospital for treatment. (R. 461)

The parties stipulated to the testimony of Evidence Technician Constantino Quintana. (R. 587-597; People's Exhibit #73) Quintana photographed and examined the party bus and the foyer at 3500 North Lake Shore Drive for evidence. Quintana collected one fired cartridge case from the floor in the middle of the party bus and one fired cartridge case from the floor in the left rear of the party bus. Quintana recovered one live round from the floor toward the rear of the party bus. Quintana recovered a Ruger LCP 380 semiautomatic handgun from the foyer of 3500 North Lake Shore Drive. The magazine in the handgun had one live round, and there was one live round in the chamber of the gun. Quintana went to Illinois Masonic Hospital and recovered Haynes' jacket, shirt, jeans and shoes.

Forensic scientist Marc Pomerance determined that the two fired cartridges cases recovered from the bus were fired from the handgun recovered from the foyer. (R. 611-621) Pomerance was unable to determine if the live round recovered from the party bus had been ejected from the recovered handgun. (R. 635-637) Pomerance did not note any malfunction in the firearm. (R. 639) Pomerance testified that it would be difficult to eject a bullet from the handgun using just one hand. (R. 644) Pomerance testified it was possible for one person to be holding a gun during a struggle and the other person to hit the slide, causing a bullet to be ejected. (R. 643) The total capacity of the handgun was seven cartridges. (R. 651)

The State introduced a certified copy of conviction for Victor Haynes in case number 05 CR 02579. (R. 655; People's Exhibit #79) The parties stipulated that the right and left cuffs of Haynes' jacket tested positive for gunshot residue. (R. 658)

The defense presented a stipulation that Virgetta told Detective Heerdt that Nathall and Haynes began arguing on the bus and that she got involved in the situation by shoving Haynes two or three times, knocking him back, and telling him to cool down. (R. 317)

In closing argument, trial counsel declined to argue self-defense despite alleging self-defense on the answer to discovery. (R. 337-354) Counsel argued that Haynes did not discharge the gun willfully or purposefully. (R. 348) As such, there was no specific intent to kill and he did not knowingly discharge the firearm. (R. 353)

The court found Haynes not guilty of attempt murder and aggravated battery of Nathall. (R. 309) The court found that Nathall's actions and the evidence that there was a struggle over the gun precluded it from finding a specific intent to kill or that Haynes fired the gun knowingly. (R. 309) The court found Haynes guilty of attempt murder and aggravated battery of Jerome. (R. 311-312) The court found that there was no evidence that anyone else's hands were on the gun when Jerome was shot and that Haynes purposely shot Jerome. The court also found that Haynes personally discharged a firearm causing great bodily harm. (R. 311-312)

The court sentenced Haynes to six years for attempt murder with an additional 25 years for personally discharging a firearm that caused great bodily harm. (R. 577-578; C. 233)

Direct Appeal

On appeal, Haynes argued, among other things, that his counsel was ineffective for failing to argue that his sentence for attempt murder should be

reduced to a Class 1 felony sentence pursuant to 720 ILCS 5/8-4(c)(1)(E), where he was acting under a sudden and intense passion resulting from a serious provocation. The First District found counsel to be ineffective and vacated Haynes's sentence and remanded for resentencing. *People v. Haynes*, 2023 IL App (1st) 220296, ¶48. The court took no position on whether Subsection (E) is limited to the four categories of serious provocation that have been recognized in connection with the second degree murder statute – substantial physical injury or assault, mutual quarrel or combat, illegal arrest, and adultery with the defendant's spouse. *Id*. at ¶49. The court found that two of the categories were present in this case – mutual combat and substantial physical assault. *Id*. The court noted that the second degree murder statute and the attempt statute serve different purposes, and therefore declined to find that disproportionality was an absolute bar to the application of Subsection (E). *Id*. at ¶41. In regard to the portion of Subsection (E) stating that the defendant must prove by a preponderance of the evidence that "had the individual the defendant endeavored to kill died, the defendant would have negligently or accidentally caused the death," the court found, "The only way that we can interpret the words of this provision to make sense, in light of an already proven intent to kill, is to find that, although the defendant intended to kill the victim, his acts were sufficiently at the minimum, such that if the victim had actually died, the death could still be considered negligently or accidentally caused." *Id*. at ¶45. Under these interpretations of Subsection (E), the court held that there was a reasonable probability that the trial court could have found that Haynes satisfied its elements. *Id*. at 47.

Petition for Leave to Appeal

The State filed a petition for leave to appeal asking this Court to consider whether "serious provocation" in Subsection (E) is analogous to "serious provocation" in the second degree murder statute, such that a disproportionate response necessarily bars relief, and whether Subsection (E) requires a showing of both serious provocation and accident. This Court granted leave to appeal on November 29, 2023.

ARGUMENT

Victor Haynes's Counsel Was Ineffective for Failing to Argue that Haynes's Sentence for Attempt Murder Should Be Reduced to a Class 1 Felony Sentence Pursuant to 720 ILCS 5/8-4(c)(1)(E), Where Haynes Was Acting under a Sudden and Intense Passion Resulting from a Serious Provocation.

Jerome White testified that he rushed Victor Haynes, punched him in the face and when the two went down onto the bench at the back of the bus, he continued punching Haynes six or seven more times. (R. 251-252, 267) Virgetta White and Crystal Massey corroborated Jerome's account of what occurred. (R. 173, 414) The evidence here supported a finding that when Haynes subsequently shot Jerome, he acted under a sudden and intense passion resulting from Jerome's serious provocation, a mitigating factor that, if proven by a mere preponderance of the evidence, would support a sentence reduction for attempt murder from a Class X felony to a Class 1 felony. *See* 720 ILCS 5/8-4(c)(1)(E) (2017) ("Subsection (E)"). Trial counsel, however, did not argue the applicability of this sentencing provision. As such, Haynes was deprived of the effective assistance of counsel. This Court should affirm the First District's decision, vacating Haynes's sentence for attempt murder and remanding the cause for resentencing. *People v. Haynes*, 2023 IL App (1st) 220296, ¶48.

Whether a defendant was denied his right to the effective assistance of counsel is reviewed *de novo*. *People v. Hale*, 2013 IL 113140, ¶15. In addition, the construction of a statute is a question of law, which is also reviewed *de novo*. *People v. Jackson*, 2011 IL 110615, ¶12.

A criminal defendant is constitutionally entitled to the effective assistance

of counsel at sentencing. U.S. Const., amends. VI, XIV; Ill. Const., 1970 art. I, § 8; *People v. Lewis*, 2022 IL 126705, ¶44. Counsel renders ineffective assistance where his performance is objectively unreasonable and where, absent that deficient performance, there is a reasonable probability that the outcome of the proceedings would have been different. *Strickland v. Washington*, 466 U.S. 668, 693 (1984). To succeed on a claim of ineffective assistance of counsel, Haynes must show that, had defense counsel argued the applicability of Subsection E, there is a reasonable probability the trial court would have found the mitigating factor proven by a preponderance of the evidence, and reduced his sentence from a Class X felony to a Class 1 felony. *See Glover v. United* States, 531 U.S. 198, 202-204 (2001) (any increase in prison time, however small, is sufficient to establish prejudice).

In *People v. Lopez*, 166 Ill.2d 441, 451 (1995), this Court held that the offense of attempt second degree murder does not exist under Illinois law. This Court reasoned that the attempt statute requires specific intent to commit the specific offense. 720 ILCS 5/8-4(a); *Lopez*, 166 Ill.2d at 447-448. Second degree murder requires a defendant to prove the existence of one of two mitigating factors, namely (1) a sudden and intense passion resulting from a serious provocation or (2) an unreasonable belief in the need to use deadly force in self-defense. 720 ILCS 5/9-2; *Lopez*, 166 Ill.2d at 447. Because a person cannot intend these mitigating factors, it is impossible to commit an attempt second degree murder. *Lopez*, 166 Ill.2d at 449. A consequence of this Court's decision was a sentencing anomaly in which "[i]dentical conduct may result in vastly disparate sentences, depending on whether the victim lives or dies." James R. Thompson, et. al, *The Illinois Criminal Code*

of 2009: Providing Clarity in the Law, 41 J. Marshall L. Rev. 815, 826 (2008).

The Illinois legislature responded by enacting Subsection E, a sentencing provision that "[s]pefically provid[es] for a mitigated form of attempted murder for an individual acting under sudden and intense provocation. . . ." *Id.* As the drafter's commentary explains, "This amendment is designed to cure the problems that have been identified by Illinois courts and legal commentators for the past twenty years regarding the interplay between the attempt statute and the crime of second-degree murder . . . ." *Id.* Subsection (E) provides:

> (1) the sentence for attempt to commit first degree murder is the sentence for a Class X felony, except that
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> * * *
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> (E) if the defendant proves by a preponderance of the evidence at sentencing that, at the time of the attempted murder, he or she was acting under a sudden and intense passion resulting from serious provocation by the individual whom the defendant endeavored to kill, or another, and, had the individual the defendant endeavored to kill died, the defendant would have negligently or accidentally caused that death, then the sentence for the attempted murder is the sentence for a Class 1 felony. 720 ILCS 5/8-4(c)(1)(E) (2017).

Subsection (E) contains two parts. The first part focuses on whether, at the time of the attempt murder, the defendant was acting with a sudden and intense passion resulting from serious provocation from the individual the defendant endeavored to kill. The second part focuses on whether, if the individual the defendant endeavored to kill died, would the death have been caused accidentally or negligently. The question for this Court is whether these two parts present alternative scenarios under which a defendant's sentence can be mitigated, or whether these two parts present conjoined elements that must both be satisfied in order for the sentencing provision to be applied. As Haynes will show in subsection

A, thorough consideration of the plain language of the statute, the legislative history, the statute in relation to the second degree murder statute, and other tools of statutory construction dictates that the alternative scenario interpretation is the correct interpretation. In light of this interpretation of the statute, as Haynes will show in subsection B, defense counsel was ineffective for failing to argue that Haynes's sentence should be reduced to a Class 1 felony sentence where he was acting under a sudden and intense passion resulting from serious provocation at the time of the shooting.

A. The plain language of Section 8-4(c)(1)(E) is ambiguous in regard to whether it creates two alternative scenarios under which a defendant may mitigate his sentence for attempt murder, or whether it creates conjoined elements that must both be proven in order for a defendant to mitigate his sentence for attempt murder. This Court should adopt the alternative scenarios interpretation based on the plain language, the legislative intent, that statute in relation to the second degree murder statute, and the rule of lenity.

The primary objective of statutory construction is to ascertain and give effect to the intent of the legislature, as reflected by the language of the statute, given its plain and ordinary meaning. *People v. Jackson*, 2011 IL 110615, ¶12. A court must view the statute as a whole, construing words and phrases in light of other relevant statutory provisions and not in isolation. *In re Ryan B.*, 212 Ill. 2d 226, 232 (2004). Each word, clause, and sentence of a statute must be given a reasonable meaning, if possible, and should not be rendered superfluous. *Jackson*, 2011 IL 110615, at ¶12. A reviewing court will presume that the legislature did not intend absurdity, inconvenience, or injustice, and avoid a construction of a statute that renders any portion of it meaningless. *Citizens Opposing Pollution v. ExxonMobil Coal U.S.A.*, 2012 IL 111286, ¶23; *Lake County Grading Co. v.*

Village of Antioch, 2014 IL 115805, ¶27. Where a statute is clear and unambiguous, a court shall not resort to other aids of statutory construction. *People v. Jones*, 223 Ill.2d 569, 580 (2006). A statute is deemed ambiguous if it is capable of being understood by reasonably well-informed persons in two or more different ways. *People v. Stewart*, 2022 IL 126116, ¶13. In interpreting an ambiguous statute, a reviewing court may consider extrinsic aids of construction to discern the legislative intent. *People v. Eppinger*, 2013 IL 114121, ¶21.

The plain language of Subsection (E) is ambiguous. The statute provides that the sentence for attempt murder is the sentence for a Class X felony except:

> (E) if the defendant proves by a preponderance of the evidence at sentencing that, at the time of the attempted murder, he or she was acting under a sudden and intense passion resulting from serious provocation by the individual whom the defendant endeavored to kill, **or** another, **and**, had the individual the defendant endeavored to kill died, the defendant would have negligently or accidentally caused that death, then the sentence for the attempted murder is the sentence for a Class 1 felony. 720 ILCS 5/8-4(c)(1)(E) (emphasis added).

There are two parts to the statute that are separated by both the word "or" and the word "and." Whether the "or" is emphasized or the "and" is emphasized determines how the two parts of the statute relate to one another. "[C]onjunctions" – like the words "and" and "or" – "are versatile words, which can work differently depending on the context." *Pulsifer v. United States*, __ U.S. __, 144 S.Ct. 718, 736 (2024). Here, the use of the words "or" and "and" create ambiguity where it is unclear whether the "or" creates alternative scenarios, or whether the "and" creates conjoined elements.

Emphasizing the word "or" creates alternative scenarios whereby a defendant may mitigate his sentence for attempt murder if he can prove by a preponderance

of the evidence that, at the time of the attempt murder: 1) He was acting under a sudden and intense passion resulting from a serious provocation by the individual he endeavored to kill, *or* 2) He was acting under a sudden and intense passion resulting from a serious provocation by another and had the person he endeavored to kill died, the defendant would have negligently or accidentally caused that death. Under this interpretation, the "or" separates the two parts of the statute and limits the requirement that the death would have been caused "negligently or accidentally" to situations involving transferred intent, where the provoker – "another" – is not the subject of the attempt murder – "the individual the defendant endeavored to kill."

Emphasizing the word "and" creates conjoined elements whereby a defendant may mitigate his sentence for attempt murder if he can prove by a preponderance of the evidence that, at the time of the attempt murder: 1) He was acting under a sudden or intense passion resulting from a serious provocation by the individual he endeavored to kill or another, *and* 2) Had the person he endeavored to kill died, the defendant would have negligently or accidentally caused that death. Under this interpretation, the requirement that the death would have been caused "negligently or accidentally" applies regardless of whether the defendant was provoked by the individual the defendant "endeavored to kill" or "another."

The plain language of Subsection (E) was taken directly from the plain language of the second degree murder statute and therefore supports an interpretation consistent with second degree murder. "The law uses familiar legal expressions in their familiar legal sense." *People v. Bailey*, 232 Ill.2d 285, 290

(2009) (term "search" was presumed to be used consistently in criminal law statutes). When terms have "a settled legal meaning, the courts will normally infer that the legislature intended to incorporate the established meaning." *People v. Smith*, 236 Ill.2d 162, 167 (2010) ("preliminary examination" was settled term of art). Relatedly, under the doctrine of *in pari materia*, two statutes dealing with the same subject will be considered with reference to one another to ensure harmonious effect. *People v. McCarty*, 223 Ill.2d 109, 133 (2006).

The second degree murder statute allows for first degree murder to be mitigated to second degree murder where:

> (1) at the time of the killing he or she is acting under a sudden and intense passion resulting from serious provocation by the individual killed or another whom the offender endeavors to kill, but he or she negligently or accidentally causes the death of the individual killed...720 ILCS 5/9-2 (2009).

The drafters of Subsection (E) used the form and terminology of the second degree murder statute, modifying it only where needed to fit into a new subsection of the attempt statute. *People v. Harris*, 2013 IL App (1st) 110309, ¶13 (finding term "provocation" should be construed the same in each statute); 720 ILCS 5/8-4(c)(1)(E). The second degree murder statute has long been interpreted to mean that when "one in a sudden intense passion endeavors to kill the provocateur, but kills another, the killing is second degree murder only if the killing was negligently or accidentally caused." *People v. Epps*, 197 Ill.App.3d 376, 384 (5th Dist. 1990). The second degree murder statute thus creates alternative scenarios where first degree murder can be mitigated to second degree murder if: 1) at the time of the murder, the defendant is acting under a sudden and intense passion resulting from serious provocation by the individual killed, or 2) at the time of

the murder, the defendant is acting under a sudden and intense passion resulting from serious provocation by the person he endeavors to kill, but the defendant negligently or accidentally kills someone else – that is, cases of transferred intent. Indeed, the pattern jury instructions for second degree murder, in force at the time of Subsection (E)'s enactment, implement this practice for second degree murder. Illinois Pattern Jury Instructions, Criminal (IPI), No.7.03, 7.06B (issues when jury instructed on both first and second degree murder and provocation). The legislature should be found to have meant the same thing where it reused this familiar language and structure in Subsection (E).

The First District in this case held that the statute created conjoined elements, requiring both a showing of provocation and that had a death occurred, that death would have been caused accidentally or negligently. *Haynes*, 2023 IL App (1st) 220296, ¶44-45. However, in *People v. Taylor*, 2016 IL App (1st) 141251, ¶22, a different division of the First District interpreted this language as addressing alternative scenarios: First, the scenario where the defendant attempts to kill the one who provoked him, and second, the scenario involving transferred intent where the defendant specifically attempts to kill his provoker, but instead takes a substantial step towards killing another, whose death, had it occurred, would have been deemed negligent or accidental. These differing interpretations of the same language further establishes that the plain language of the statute is ambiguous. *See Stewart*, 2022 IL 126116, ¶13.

When statutory language is ambiguous, it is appropriate to resort to extrinsic aids of construction such as an examination of the legislative history. *People v.*

Eppinger, 2013 IL 114121, ¶32; *Kunkel v. Walton*, 179 Ill.2d 519, 534 (1997). As discussed above, Subsection (E) was enacted in response to this Court's decision in *Lopez*, holding that the offense of attempt second degree murder does not exist in Illinois. *Lopez*, 166 Ill.2d at 451. The result of this Court's decision in *Lopez* was a sentencing anomaly whereby identical conduct could result in a greater sentence if the victim died rather than lived because the sentencing range for second degree murder is less than the sentencing range for attempt murder. 720 ILCS 5/9-2(d) (second degree murder is a Class 1 felony); 720 ILCS 5/8-4(c)(1) (attempt murder is a Class X felony). The CLEAR commission was thus tasked with addressing this disparate treatment of offenders. Judge Michael P. Toomin, *Second Degree Murder and Attempted Murder: Clear's Efforts to Maneuver the Slippery Slope*, 41 J. Marshall L. Rev. 659, 692 (2008). The challenge for the CLEAR commission was that an attempt to commit second degree murder is a logical and legal impossibility – one cannot intend to commit murder resulting from a sudden and intense passion due to serious provocation. *Id.* at 698. The CLEAR commission considered several proposals to address the problem. *Id.* at 698. One proposal simply amended Section 8-4 to clarify the existence of attempt second degree murder:

> Sec. 8-4. Attempt.
>
> (a) Elements of the Offense. A person commits an attempt when, with intent to commit a specific offense, he does any act which constitutes a substantial step toward the commission of the offense. A person commits attempt second degree murder when, with the intent to commit first degree murder, he does any act which constitutes a substantial step toward the commission of that offense and either of the mitigating factors set forth in the statute defining second degree murder are present.

Id., citing CLEAR, Recommendation #20, Attempted Second Degree Murder (Meeting

III, July 28, 2005). This proposal incorporates the specific language from the second degree murder statute.

Next followed a proposal to codify the offense of attempt second degree murder, expressly removing Section 8-4 from the offense:

> 720 ILCS 5/9-XX. Attempt second degree murder
>
> Sec. 9-XX. Attempt second degree murder. (a) A person commits Attempt second degree murder when, with the intent to kill an individual, he does any act which constitutes a substantial step toward the commission of the homicide, and either of the following mitigating factors are present:
>
> > (1) he or she is acting under a sudden and intense passion resulting from serious provocation by the individual killed or another whom the offender endeavors to kill, but he negligently or accidentally causes the death of the individual killed; or
> >
> > (2) he or she believes the circumstances to be such that, if they existed, would justify or exonerate the killing under the principles stated in Article 7 of this Code, but his belief is unreasonable.
>
> (b) Serious provocation is conduct sufficient to excite an intense passion in a reasonable person.
>
> (c) When a defendant is on trial for attempt first degree murder and evidence of either of the mitigating factors defined in subsection (a) of this Section has been presented, the burden of proof is on the defendant to prove either mitigating factor by a preponderance of the evidence before the defendant can be found guilty of attempt second degree murder. However, the burden of proof remains on the State to prove beyond a reasonable doubt each of the elements of attempt first degree murder and, when appropriately raised, the absence of circumstances at the time of the killing that would justify or exonerate the killing under the principles stated in Article 7 of the Code.
>
> (d) The attempt statute, Section 8-4, does not apply to this offense.
>
> (e) Sentence. Attempt Second Degree Murder is a Class 1 felony.

Id., citing CLEAR, Recommendation #345, Codifies the Offense of Attempt Second Degree Murder (Meeting VII, date July 27, 2006). The language of proposed Section 9-XX(a)(2) directly tracks the language of the second degree murder statute. 720

ILCS 5/9-2.

In the end the CLEAR commission landed on what became Subsection (E). The commission believed that by allowing for mitigation in sentencing upon conviction for attempt murder, the intent issues created by an offense of attempt second degree murder would be eliminated because the State would still be required to prove the elements of attempt first degree murder. Judge Michael P. Toomin, *Second Degree Murder and Attempted Murder: Clear's Efforts to Maneuver the Slippery Slope*, 41 J. Marshall L. Rev. at 699. "At the same time, defendants would have the opportunity to provide mitigating factors consistent with the rationale of second degree murder." *Id*. The goal was to create a statute under which a defendant could mitigate an attempt murder conviction where he acted under a sudden and intense passion resulting from serious provocation by the individual he endeavored to kill. The legislature did not intend for that defendant to also have to prove that had that individual died, the death would have been caused negligently or accidentally. Such a requirement would have been inconsistent with the specific intent to kill required for an attempt murder conviction and would have rendered any attempt at providing for mitigation meaningless.

It is clear from the initial proposals and the rationale for deciding on the sentencing provision codified in Subsection (E), that the CLEAR commission intended to create a way to mitigate a sentence for attempt murder where a defendant is acting under a sudden and intense passion resulting from serious provocation in exactly the same way first degree murder is mitigated to second degree murder. Thus, as discussed above, this Court should look to the language

of the second degree murder statute, 720 ILCS 5/9-2, upon which Subsection (E) was based and which bears almost identical language to understand the legislative intent. *See People v. Taylor*, 221 Ill.2d 157, 161 n. 1 (2006) (under doctrine of *in pari materia*, two statutes dealing with the same subject will be considered with reference to one another to give them harmonious effect). Section 9-2 states:

> (a) A person commits the offense of second degree murder when he or she commits the offense of first degree murder as defined in paragraph (1) or (2) of subsection (a) of Section 9-1 of this Code and either of the following mitigating factors are present:
>
> > (1) at the time of the killing he or she is acting under a sudden and intense passion resulting from serious provocation by the individual killed or another whom the offender endeavors to kill, but he or she negligently or accidentally causes the death of the individual killed...720 ILCS 5/9-2 (2009).

"When one in a sudden intense passion endeavors to kill the provocateur, but kills another, the killing is second degree murder only if the killing was negligently or accidentally caused." *Epps*, 197 Ill.App.3d at 384. Thus, the second degree murder statute creates alternative scenarios where first degree murder can be mitigated to second degree murder if: 1) at the time of the murder, the defendant is acting under a sudden and intense passion resulting from serious provocation by the individual killed, or 2) at the time of the murder, the defendant is acting under a sudden and intense passion resulting from serious provocation by the person he endeavors to kill, but the defendant negligently or accidentally kills someone else – cases of transferred intent.

The jury instructions related to second degree murder further clarify that there are two alternative scenarios under which first degree murder can be mitigated to second degree murder and that the negligent or accidental cause of death language

only applies in cases of transferred intent. Illinois Pattern Jury Instructions, Criminal (IPI), No. 7.03, provides the definition of the mitigating factor of provocation in second degree murder cases:

> A mitigating factor exists so as to reduce the offense of first degree murder to the lesser offense of second degree murder if, at the time of the killing, the defendant acts under a sudden and intense passion resulting from serious provocation by [(the deceased) (some other person he endeavors to kill, but he negligently or accidentally kills the deceased)]. Serious provocation is conduct sufficient to excite an intense passion in a reasonable person.

See also Illinois Pattern Jury Instructions, Criminal (IPI), No. 7.06B (issues when jury instructed on both first and second degree murder and provocation containing similar language). These instructions highlight the alternative scenarios contemplated by second degree murder in Illinois and that the requirement for a showing that the death was negligent or accidental only applies when the defendant kills someone other than the person who provoked him, cases of transferred intent. When the defendant kills the person who provoked him, there is no requirement that the death be caused negligently or accidentally.

Where the second degree murder statute clearly outlines two alternative scenarios when a finding of guilt for first degree murder can be mitigated to second degree murder based on a finding of provocation, this Court should find that Subsection (E) also designates two alternative scenarios where the sentence for attempt murder can be mitigated from a Class X sentence to a Class 1 sentence. The first is where the defendant attempts to kill the person who provoked him. The second is where the defendant specifically intends to kill his provoker but instead takes a substantial step toward killing another whose death, had it occurred, would have been caused negligently or accidentally – transferred intent. *See People*

v. Ephraim, 323 Ill.App.3d 1097, 1108 (1st Dist. 2001) (it is well established that in Illinois the doctrine of transferred intent is applicable to attempted murder cases where an unintended victim is injured).

The conjoined elements interpretation of Subsection (E), proposed by the State, that a defendant must show by a preponderance of the evidence that he was acting under a sudden and intense passion resulting from serious provocation *and* that had the victim died, his death would have been negligent or accidental creates an absurd result and almost renders the provision a nullity. *See Madison Two Associates v. Pappas*, 227 Ill.2d 474, 493 (2008) (construing a statute in a way that renders part of it a nullity offends basic principles of statutory interpretation). Interestingly, the State cites *Taylor* to acknowledge that the statute provides for the scenario where the defendant is provoked by one person and then negligently or accidentally kills a different person – transferred intent. (St. Br. 23) However, the State ignores the *Taylor* court's determination that the transferred intent scenario is one of two alternative scenarios addressed by the statute and that the other scenario does not require a showing that had a death occurred it would have been caused negligently or accidentally. *Taylor*, 2016 IL App (1st) 141251, ¶22. The State also relies on *Epps* (St. Br. 23), which similarly discusses the alternative scenario of transferred intent in the context of second degree murder where someone other than the provoker is killed, and only in that specific situation is there a requirement that the death was negligently or accidentally caused. *Epps*, 197 Ill.App.3d at 384.

The only other situation that the State points to where Subsection (E) would

apply is a case where "a defendant acting under sudden and intense passion takes a substantial step with the specific intent to kill the victim, but the step was sufficiently preliminary that if that step *had* killed the victim, it would have been by accident or negligence." (St. Br. 23) In the context of this case, the State posits, if Haynes's "only act taken with the specific intent of killing Jerome had been to draw his gun, after which he dropped the gun and it fired, hitting and killing Jerome, [Haynes] would have caused Jerome's death accidentally or negligently." (St. Br. 25) However, this example is so specific as to be absurd. The likelihood that the defendant would be charged with attempt murder in this situation, where the substantial step taken was merely to draw a gun, is unlikely. And, the scenario is so far-fetched it cannot have been the only other situation besides transferred intent that the legislature intended for the statute to be applicable. Interpreting the statute in this narrow manner does not satisfy the legislature's intent of creating a mitigated form of attempted murder for an individual acting under a serious provocation.

As the *Taylor* court found, the State's "interpretation would make it impossible for a defendant convicted of attempted murder to obtain a reduction in classification based on provocation and render the statue meaningless." *Taylor*, 2016 IL App (1st) 141251, ¶23. Proof of a specific intent to kill is an indispensable element of attempt murder. 720 ILCS 5/8-4(a); *People v. Hill*, 276 Ill.App.3d 683, 687 (1st Dist. 1995). A finding of a specific intent to kill is fundamentally incompatible with the statutory language providing that if the defendant's victim died, the death would have been deemed accidental or negligent. *Taylor*, 2016 IL App (1st) 141251,

¶23. An "interpretation of the statute as referring both to the situation where the defendant attempts to kill his provoker as well as the separate situation where the defendant negligently or accidentally acts against another in his attempt to kill his provoker better conforms to legislative intent." *Id.*, citing *Valfer v. Evanston Northwestern Healthcare*, 2016 IL 119220, ¶22 ("We will * * * avoid a construction of a statute that renders any portion of it meaningless."). *See also People v. Lauderdale*, 2012 IL App (1st) 100939 (analyzing defendant's claim of ineffective assistance of counsel for failing to seek the application of Subsection (E), making no finding that the defendant would have to show that had a death occurred it would have been negligently or accidentally caused); *People v. Harris*, 2013 IL App (1st) 110309, ¶13 (same); *People v. Guyton*, 2014 IL App (1st) 110450, ¶88 (same).

Finally, "[w]here the traditional tools of statutory interpretation yield no clear answer, the judge's next step isn't to legislative history or the law's unexpressed purposes. The next step is to lenity." *Wooden v. United States*, 595 U.S. 360, 394-395 (2022) (Gorsuch, J., concurring). The rule of lenity "teach[es] that ambiguities about the breadth of a criminal statute should be resolved in the defendant's favor." *United States v. Davis*, 588 U.S. 445, 464 (2019); *see also Fitzsimmons v. Norgle*, 104 Ill.2d 369, 374 (1984) (settled principles of statutory construction provide that if a penal statute calling for the enhancement of a penalty can reasonably be construed in more than one way, the rule of lenity applies to construe the statute strictly in favor of the accused).

The rule of lenity is of constitutional dimension because it "works to enforce

the fair notice requirement of [due process] by ensuring that an individual's liberty always prevails over ambiguous laws." *Wooden*, 595 U.S. at 394-395 (Gorsuch, J., concurring). The rule vindicates the fundamental principle that no one should be subject to "criminal liability" without "fair warning." *Crandon v. United States*, 494 U.S. 152, 158 (1990). Put differently, the rule of lenity ensures that ordinary persons are provided fair notice of the law and consequences for violating it. *Id.*; *Davis*, 588 U.S. at 464.

The rule of lenity is also of constitutional dimension because when a "court exceeds its own authority by imposing *** punishments not authorized by Congress, it violates *** the constitutional principle of separation of powers in a manner that trenches particularly harshly on individual liberty." *Whalen v. United States*, 445 U.S. 684, 689 (1980). Courts do not "possess the authority to punish individuals under ambiguous laws in light of [their] own perceptions about some piece of legislative history or the statute's purpose." *Wooden*, 595 U.S. at 394-395 (Gorsuch, J., concurring). Lenity therefore "safeguard[s]" the legislature's "power to punish" by "preventing judges from intentionally or inadvertently exploiting 'doubtful' statutory 'expressions' to enforce their own sensibilities." *Id.* at 1083. Put differently, lenity keeps the power of punishment firmly "in the legislative, not in the judicial department." *United States v. Wiltberger*, 18 U.S. 76, 95 (1820). It "embodies 'the instinctive distastes against men languishing in prison unless the lawmaker has clearly said they should.'" *United States v. Bass*, 404 U.S. 336, 348 (1971) (quoting H. Friendly, *Mr. Justice Frankfurter and the Reading of Statutes*, in Benchmarks 196, 209 (1967)).

Here, whether Subsection (E) is construed to create alternative scenarios or conjoined elements is debatable as confirmed by the difference of opinion on the question between counsel for the State and defendants, and between appellate court justices. These differences of opinion between reasonable minds trigger application of the rule of lenity because they reveal that "the traditional tools of statutory interpretation yield no clear answer" as to how the subsections are to be applied. *Wooden*, 595 U.S. at 394-395 (Gorsuch, J., concurring). If "after consulting traditional canons of statutory construction" this Court finds itself "left with an ambiguous statute," it should adopt the "more lenient interpretation" of Subsection (E). *People v. Gaytan,* 2015 IL 116223, ¶39.

The alternative scenario interpretation of the statute is the only one that implements the CLEAR commission's goal of remedying the sentencing anomaly that would allow a person convicted of attempt murder to be punished more severely than a person convicted of second degree murder. The conjoined elements interpretation supported by the State limits the application of the statute so significantly it would do nothing to remedy the disparate treatment of offenders convicted of attempt murder and second degree murder that the statute was designed to fix. This Court should construe Subsection (E) as creating alternative scenarios whereby a defendant may mitigate his sentence for attempt murder if he can prove by a preponderance of the evidence that, at the time of the attempt murder: 1) He was acting under a sudden and intense passion resulting from a serious provocation by the individual he endeavored to kill, *or* 2) He was acting under a sudden and intense passion resulting from a serious provocation by another

and had the person he endeavored to kill died, the defendant would have negligently or accidentally caused that death.

B. There is a reasonable probability that had counsel argued for the application of 720 ILCS 5/8-4(c)(1)(E), he would have been successful where Haynes was acting under a sudden and intense passion resulting from serious provocation.

Based upon the conclusion in subsection A, that Section 8-4(c)(1)(E) creates alternative scenarios whereby a defendant may mitigate his sentence for attempt murder if he can prove by a preponderance of the evidence that, at the time of the attempt murder, that he was acting under a sudden and intense passion resulting from a serious provocation by the individual he endeavored to kill, subsection B will focus on provocation. However, if this Court decides that Subsection E creates conjoined elements, subsection B will also address whether, had a death occurred in this case, it would have been caused negligently or accidentally.

Subsection (E) provides for a Class 1 sentence for attempt murder where "the defendant proves by a preponderance of the evidence at sentencing that, at the time of the attempt murder, he or she was acting under a sudden and intense passion resulting from serious provocation by the individual whom the defendant endeavored to kill." 720 ILCS 5/8-4(c)(1)(E). This Court has never interpreted the meaning of "sudden and intense passion resulting from serious provocation" in the context of the attempt murder statute. However, this Court has interpreted similar language contained in the second degree murder statute which states:

> (a) A person commits the offense of second degree murder when he or she commits the offense of first degree murder as defined in paragraph (1) or (2) of subsection (a) of Section 9-1 of this Code and either of the following mitigating factors are present:

> (1) at the time of the killing *he or she is acting under a sudden and intense passion resulting from serious provocation by the individual killed* or another whom the offender endeavors to kill, but he or she negligently or accidentally causes the death of the individual killed...720 ILCS 5/9-2 (2017) (emphasis added).

See Taylor, 221 Ill.2d at 161 n. 1 (under doctrine of *in pari materia*, two statutes dealing with the same subject will be considered with reference to one another to give them harmonious effect).

Serious provocation is defined by the second degree murder statute as "conduct sufficient to excite an intense passion in a reasonable person." 720 ILCS 5/9-2(a)(1). In the context of second degree murder, this Court has consistently recognized four categories of serious provocation that will mitigate first degree murder to second degree murder: substantial physical injury or assault, mutual quarrel or combat, illegal arrest, and adultery with the offender's spouse. *People v. Agee*, 2023 IL 128413, ¶81; *People v. Tenner*, 157 Ill.2d 341, 371-372 (1993); *People v. Fausz*, 95 Ill.2d 535, 539 (1983). Five appellate court opinions have analyzed Subsection (E): two have cited the four categories, two have not cited the four categories, and the appellate court in this case took no position on whether the four categories applied. *People v. Lauderdale*, 2012 IL App (1st) 100939, ¶24, 359 (citing the four categories); *People v. Harris*, 2013 IL App (1st) 110309, ¶13 (citing the four categories); *People v. Taylor*, 2016 IL App (1st) 141251, ¶26 (no mention of the four categories); *People v. Guyton*, 2014 IL App (1st) 110450, ¶88 (no mention of the four categories); *Haynes*, 2023 IL App (1st) 220296, ¶49 (taking no position on whether provocation for Subsection (E) is limited to the four categories). This Court does not have to resolve whether serious provocation for purposes of Subsection

E is limited to the four categories because two of the categories – substantial physical injury or assault and mutual combat – are present here.

Trial counsel should have argued serious provocation based on both substantial physical injury or assault as well as mutual combat. First, Haynes suffered a substantial physical injury or assault where Jerome, a 300-pound man, charged at him from the front of the bus, punched him in the face with his fist, and then continued to punch him six to seven more times after they fell toward the back of the bus. (R. 173-174, 236, 249-252, 268, 414). In *People v. Bathea*, 24 Ill.App.3d 460, 465 (1st Dist. 1974), the defendant testified that the deceased struck her in the face several times, knocked her to the ground and kicked her leg. The defendant testified that, as she was pushed up against the car, she took a knife and stabbed the deceased once in the chest. *Id*. Several witnesses testified that the deceased did not have a weapon. *Id*. The First District held that under these circumstances, the trier of fact had ample evidence from which to conclude that the defendant was provoked by physical attack and was under a sudden and intense passion resulting from serious provocation by the deceased. *Id*. Here too, there is ample evidence from which to conclude that Haynes was provoked by a physical attack from Jerome and was under a sudden and intense passion resulting from that attack.

Relying on *Agee*, the State argues that substantial physical injury or assault is not relevant here because there was no evidence that Haynes suffered any injury. (St. Br. 14-15, n.1) However, the First District specifically found that there was a reasonable probability that Haynes would have been able to show substantial

physical injury or assault by a preponderance of the evidence based on the evidence presented at trial. *Haynes*, 2023 IL App (1st) 220296, ¶49. In *Agee*, the defendant told police that the victim swung at him, but he was able to block the impact because he had been a boxer. *Agee*, 2023 IL 128413, ¶6. The defendant said the victim came at him again and scratched his forehead. *Id*. The defendant then grabbed the victim, hit her a couple of times in the face, and choked her until she passed out. *Id*. The defendant told police that he had never gotten into a physical altercation with the victim before because he knew based on their size difference, he would injure her. *Id*. at ¶7. This Court held that based on this evidence, the defendant did not suffer a substantial physical injury at the hands of the victim. *Id*. at ¶82. The facts of *Agee* are readily distinguishable from the facts of this case. Certainly, being charged at by a much larger, 300-pound man, punched in the face, and then punched six to seven more times while the 300-pound man is on top of you constitutes substantial physical assault. *See* 720 ILCS 5/12-1 (assault consists of conduct which places another in reasonable apprehension of receiving a battery). Moreover, being punched multiple times by a much larger man would likely cause substantial physical injury. While there may not have been specific evidence presented at trial regarding injuries Haynes sustained, whether or not he was injured was not at issue at trial. Had defense counsel raised the issue at sentencing, Haynes could have presented evidence that he suffered substantial physical injury.

Second, Haynes and Jerome were involved in a mutual combat. Mutual combat is a fight or struggle that both parties enter willingly or where two persons, upon a sudden quarrel and in hot blood, mutually fight upon equal terms. *People*

v. Austin, 133 Ill.2d 118, 125 (1989). Here, Jerome entered the fight willingly where he charged toward Haynes and punched him in the face. Jerome and Haynes then fell onto the seats in the back of the bus, tussling with one another, while Jerome continued to swing at Haynes six to seven more times. In *People v. Healy*, 168 Ill.App.3d 349, 353 (1st Dist. 1988), the First District held that the trial court erred in refusing voluntary manslaughter instruction based on mutual combat where both the defendant and decedent were intoxicated and pushing and shoving one another. Here, there is no doubt that there was an exorbitant amount of alcohol on the bus, and several witnesses testified that after Jerome hit Haynes in the face, the two went down in the back of the bus and continued tussling with one another.

The State relies on this Court's decision in *People v. Austin*, 133 Ill.2d 118 (1989), to argue that Haynes cannot show mutual combat. In *Austin*, the victim, a Chicago Transit Authority (CTA) bus driver, stopped her bus to pick up passengers. *Id.* at 121-122. The defendant and several others who had been waiting at the bus stop boarded the bus. *Id.* The defendant dropped some change into the fare box and showed the driver a student bus pass. *Id.* The driver informed the defendant that she could not use the pass because it was a school holiday. *Id.* The defendant requested a transfer and when the driver said no, the defendant attempted to take a transfer. *Id.* The driver hit the defendant's hand with the transfer punch. *Id.* The defendant then struck the driver in the face. *Id.* The driver got up from her seat and began to exchange blows with the defendant. *Id.* This altercation continued for 30 to 40 seconds until the defendant pulled a gun from her waistband.

Id. The driver slapped or grabbed defendant's wrist and, in the struggle, the defendant fired a shot into the floor of the bus. *Id*. The driver forced the defendant off the bus, and once they had exited the bus, the defendant shot and killed the driver. *Id*.

On appeal, this Court held that there was no evidence of mutual combat because the driver did not enter the struggle willingly and the fight was not on equal terms. *Id*. at 125. "One who instigates combat cannot rely on the victim's response as evidence of mutual combat sufficient to mitigate the killing of that victim from murder to manslaughter." *Id*. at 126. This Court found that the defendant initiated the events by attempting to illegally use CTA services. *Id*.

In regard to whether the struggle was on equal terms, this Court stated:

> In considering whether defendants have met the threshold burden of proving some evidence of mutual combat, it has been held that the alleged provocation on the part of the victim must cause the same passionate state of mind in an ordinary person under the same circumstances. A slight provocation is not enough, because the provocation must be proportionate to the manner in which the accused retaliated. The crime is murder when a defendant attacks a victim with violence out of all proportion to the provocation. This is especially true if the homicide is committed with a deadly weapon. *Id*. at 126-127, citing *People v. Neal*, 112 Ill.App.3d 964, 967-968, (2nd Dist. 1983); *People v. Miller*, 96 Ill.App.3d 212, 214-15 (3rd Dist. 1981); *People v. Matthews*, 21 Ill.App.3d 249, 252-53 (3rd Dist. 1974).

However, the "slight provocation" language here is misleading. In order to mitigate an offense from first degree murder to second degree murder a showing of "serious provocation" is required by statute. 720 ILCS 5/9-2(a)(1). It goes without saying then that a "slight provocation" would be insufficient to excite a sudden and intense passion that could mitigate first degree murder to second degree murder. The cases relied on by this Court for this proposition, *Neal*, *Miller*, and *Matthews*, all

involved mere words, which have been consistently held insufficient to rise to the level of serious provocation. *Neal*, 112 Ill.App.3d at 967-968, *Miller*, 96 Ill.App.3d at 214-15; *Matthews*, 21 Ill.App.3d at 252-53. *See People v. Marrow*, 403 Ill. 69, 75 (1949) (mere words do not constitute sufficient provocation for an assault, nor will provocation by words only, however opprobrious, mitigate intentional killing so as to reduce the homicide to manslaughter). Thus, it is not a question of whether the victim's provocation is proportionate to the defendant's response. The question is whether there was serious provocation, as opposed to slight provocation, because a violent response to slight provocation will never mitigate first degree murder to second degree murder, but such a response to serious provocation will mitigate first degree murder to second degree murder.

This Court in *Austin* also cited *People v. Ford*, 163 Ill.App.3d 497, 503 (1st Dist. 1987), for the proposition that "where a defendant attacks a victim on slight provocation with disproportionate violence, the mutual combat aspect of provocation does not apply as a matter of law." *Austin*, 133 Ill.2d at 127. This proposition is, again, misleading because "slight provocation" will never satisfy the requirements for mitigating first degree murder to second degree murder. The statue specifically requires a finding of "serious provocation." 720 ILCS 5/9-2(a)(1). Thus, the issue of proportionality is really a question of whether there was "serious provocation," as is required, or something less, such as "slight provocation," which will not satisfy a finding of second degree murder.

This Court in *Austin* held that the defendant's act of shooting the bus driver was completely out of proportion to the provocation where the defendant shot and

killed an unarmed victim who provoked defendant by speaking gruffly to her and striking her on the hand with a transfer punch. *Austin*, 133 Ill.2d at 127. In essence, this Court found that there was no serious provocation on behalf of the bus driver that would have excited a sudden and intense passion in the defendant.

In this case, on the other hand, there was serious provocation. Jerome was the initial aggressor, charging at Haynes from the front of the bus and punching him in the face with his fist. (R. 251) Jerome and Haynes fell back toward the back of the bus with Jerome on top of Haynes, and Jerome then continued to punch Haynes six or seven more times. (R. 252, 289) Jerome was still swinging at Haynes when he was shot. (R. 290) Unlike in *Austin*, Jerome entered the struggle willingly, and the fight was on equal terms. Haynes's actions were not disproportionate to Jerome's serious provocation under these circumstances. Jerome's actions constituted "serious provocation" sufficient to invoke a sudden and intense passion in Haynes.

It is important to note that neither the second degree murder statute nor the attempt statute require a finding of disproportionality when discussing serious provocation. 720 ILCS 5/9-2; 720 ILCS 5/8-4. The idea of disproportionality can be traced back to this Court's decision in *People v. Pursley*, 302 Ill. 62 (1922). There, the defendant, who was charged with murder, argued that the trial court erred in failing to instruct the jury on manslaughter. *Id*. at 71-72. In addressing the issue, this Court stated, "A mere attempt of deceased to strike the defendant with a fist would not justify the latter in meeting the assault with a deadly weapon or reduce the grade of homicide to manslaughter." *Id*. at 73. The Third District

in *Matthews*, interpreting *Pursley*, was the first court to introduce the idea of proportionality. *Matthews*, 21 Ill.App.3d at 252. "A slight provocation will not be adequate since the provocation must be proportionate to the manner in which the accused retaliated and therefore if accused on a slight provocation attacked deceased with violence out of all proportion to the provocation and killed him, the crime is murder. This is especially true if the homicide was committed with a deadly weapon." *Id*. at 253. Yet this is not what this Court in *Pursley* held, nor is it consistent with the language of the second degree murder statute which clearly requires serious provocation. Regardless, here, where Jerome seriously provoked Haynes by charging at him, punching him in the face and continuing to punch him six to seven more times as he, a 300-pound man, was on top of Haynes, Haynes's response in shooting him was not out of proportion.

The First District in this case took a different approach to disproportionality finding that, although the second degree murder statute and the attempt statute contain similar language, they serve different purposes. *Haynes*, 2023 IL App (1st) 220296, ¶18. Once a party is found guilty of attempt murder – thereby having the specific intent to kill – disproportionality has essentially already been decided. *Id*. The court reasoned that if defendants whose reactions were out of proportion were barred from this section, then no defendant would be eligible for the sentence reduction because the State would have already proven beyond a reasonable doubt that the defendant had a specific intent to kill, without any legal justification. *Id*. at ¶20. As such, the court held that disproportionality is not an absolute bar to the sentence reduction set forth in the attempt statute. *Id*. at 18. *Compare People*

v. Lauderdale, 2012 IL App (1st) 100939, ¶29 (defendant was not eligible for sentence reduction where his response of pulling out a gun and firing it multiple times, striking the victim three times, was "out of all proportion" to victim punching defendant one time). Thus, the First District held that, based on Jerome's decision to run to the back of the bus in order to assault Haynes and engage in mutual combat, there was a reasonable probability that the trial court could have found that Haynes was acting under a sudden and intense passion resulting from serious provocation.

The State responds that the specific intent to kill is distinct from disproportionality. (St. Br. 19) As an example, the State posits that one can intend to kill someone with a knife in mutual combat, but still act proportionately if the opponent was similarly armed. (St. Br. 19) However, this example again highlights the problem with the idea of disproportionality where under this scenario the defendant's actions would not simply have been proportionate, they would likely have been legally justified.

Trial counsel performed deficiently by failing to request sentencing pursuant to Subsection E. This Court has found deficient performance where "no possible strategic advantage . . . might have been gained" by the by the course counsel pursued, *People v. Houston*, 226 Ill.2d 135, 148 (2007), especially where the record "demonstrate[s] a misapprehension of the law" by counsel. *In re Danielle J.*, 2013 IL 110810, ¶35. As the First District found, Haynes "had nothing to lose . . . by arguing for the reduction and could only gain. . . There was simply no downside to seeking a sentence reduction." *Haynes*, 2023 IL App (1st) 220296, ¶48. Counsel's

failure to so when he "had already argued both provocation and accident at trial," was patently unreasonable. *Id*.

Moreover, well in advance of Haynes's sentencing hearing, a series of First District opinions supported the application of Subsection E to Haynes's case. *Lauderdale*, 2012 IL App (1st) 100939, ¶¶22-34; *Harris*, 2013 IL App (1st) 110309, ¶¶12-14*; Taylor*, 2016 IL App (1st) 141251, ¶¶20-26; *Guyton*, 2014 IL App (1st) 110450, ¶88. *Cf. People v. Rogers*, 2021 IL 126163, ¶32 (counsel did not perform deficiently for not raising joinder issue where binding appellate court precedent was uniformly against defendant's position); *see People v. English*, 2013 IL 112890, ¶34 (deficient performance should be based on law at the time of sentencing).

The State's argument that counsel reasonably ignored Subsection E, despite this favorable precedent, is wholly derivative of its mistaken construction of the Subsection (E). (St. Br. 12-13, 20) For the same reasons that this Court should reject that interpretation today, this Court should reject the idea that it was the only interpretation that counsel could have thought reasonable at the time of sentencing.

Finally, even if this Court finds that Haynes would have to prove by a preponderance of evidence at sentencing that had Jerome died, he would have negligently or accidentally caused the death, there is a reasonable probability that Haynes could have made such a showing. *Haynes*, 2023 IL App (1st) 220296, ¶45 (where defendant fired one shot at the victim during the midst of a physical fight, the trial court acting as fact finder at sentencing may have found this provision satisfied). At the hearing on the defense motion for directed finding and in closing

argument, the defense argued that the gun fired accidentally while Haynes and Jerome were tussling in the back of the bus. (R. 670-704, 337-354) The defense pointed to the fact that Haynes was also shot in the finger during the altercation and that Jerome was only shot one time despite the fact that there were several bullets still in the gun. (R. 458, 641) Had trial counsel requested sentencing pursuant to Subsection (E), Haynes could have presented this evidence to show that had Jerome died, his death would have been caused accidentally or negligently. Therefore, trial counsel acted unreasonably.

C. Conclusion.

This Court should interpret Subsection (E) as creating alternative scenarios whereby a defendant can mitigate his sentence for attempt murder from a Class X sentence to a Class 1 sentence if he can prove by a preponderance of the evidence that, at the time of the attempt murder: 1) He was acting under a sudden and intense passion resulting from a serious provocation by the individual he endeavored to kill, *or* 2) He was acting under a sudden and intense passion resulting from a serious provocation by another and had the person he endeavored to kill died, the defendant would have negligently or accidentally caused that death. This interpretation is supported by the legislative intent and the language of the second degree murder statute. Moreover, this interpretation provides a defendant with a way of mitigating his attempt murder conviction where he was acting under a sudden and intense passion resulting from serious provocation, whereas the conjoined elements interpretation advanced by the State renders the statute an essential nullity.

Had Haynes's trial counsel raised the issue of serious provocation at sentencing, there is a reasonable probability that Haynes would have been able to prove by a preponderance of the evidence both substantial physical injury or assault as well as mutual combat. As such, trial counsel was ineffective for failing to argue at sentencing that Haynes's actions were the result of a serious provocation. Counsel should have argued the applicability of Subsection (E) in order to reduce Haynes's sentence to that for a Class 1 felony. This Court should therefore vacate Haynes's sentence for attempt murder and remand for a new sentencing hearing.

CONCLUSION

For the foregoing reasons, Victor Haynes, Defendant-Appellee, respectfully requests that this Court vacate his sentence for attempt murder and remand for a new sentencing hearing.

Respectfully submitted,

DOUGLAS R. HOFF
Deputy Defender

SARAH CURRY
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-APPELLEE

CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342, is 44 pages.

/s/Sarah Curry
SARAH CURRY
Assistant Appellate Defender

No. 129795

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellant, -vs- VICTOR HAYNES, Defendant-Appellee.	)	Appeal from the Appellate Court of Illinois, No. 1-22-0296. There on appeal from the Circuit Court of Cook County, Illinois , No. 17 CR 00867. Honorable Michael J. Hood, Judge Presiding.

NOTICE AND PROOF OF SERVICE

Mr. Kwame Raoul, Attorney General, 115 S. LaSalle St., Chicago, IL 60603, eserve.criminalappeals@ilag.gov;

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

Mr. Victor Haynes, Register No. R30024, Western Illinois Correctional Center, 2500 Rt. 99, Mt. Sterling, IL 62353

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 May 15, 2024, the Brief and Argument was filed with the Clerk of the Supreme Court of Illinois using the court's electronic filing system in the above-entitled cause. Upon acceptance of the filing from this Court, persons named above with identified email addresses will be served using the court's electronic filing system and one copy is being mailed to the defendant-appellee in an envelope deposited in a U.S. mail box in Chicago, Illinois, with proper postage prepaid. Additionally, upon its acceptance by the court's electronic filing system, the undersigned will send 13 copies of the Brief and Argument to the Clerk of the above Court.

/s/Kaila Ohsowski
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