No. 129795

IN THE
SUPREME COURT OF ILLINOIS

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

REPLY BRIEF OF PLAINTIFF-APPELLANT PEOPLE OF THE STATE OF ILLINOIS

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ARGUMENT

The People's opening brief established that counsel was not ineffective for not seeking a Class 1 sentence under section 8-4(c)(1)(E) because defendant was not entitled to such a sentence for two independent reasons. First, defendant cannot prove serious provocation by a preponderance of the evidence: he was not physically injured, and his response was wholly disproportionate to the alleged provocation. Second, defendant cannot establish by a preponderance of the evidence that "had the individual the defendant endeavored to kill" — Jerome White — died, it would have been the result of accident or negligence.

I. Counsel Was Not Ineffective for Choosing Not to Seek a Class 1 Sentence Under Section 8-4(c)(1)(E) Where Defendant Cannot Establish Provocation.

Defendant can establish neither prong of *Strickland*'s familiar test. First, defendant's counsel cannot have been "deficient for failing to make an argument that has no basis in the law." *See People v. Webb*, 2023 IL 128957, ¶ 22. Second, there is no reasonable probability that defendant would have received a lesser sentence had counsel made the argument.

Defendant was not entitled to a Class 1 sentence because he was not acting "under a sudden and intense passion resulting from serious provocation." *See* 720 ILCS 5/8-4(c)(1)(E). Although this Court has not construed the meaning of "sudden and intense passion resulting from serious provocation" in section 8-4(c)(1)(E), the Court has interpreted identical language in section 720 ILCS 5/9-2(a)(1), which mitigates first degree murder

to second degree murder. *See* 720 ILCS 5/9-2(a)(1) (first degree murder mitigated to second degree murder if "at the time of the killing [defendant] is acting under a sudden and intense passion resulting from serious provocation"). In that context, the Court has recognized four types of serious provocation, including "substantial physical injury or assault" and "mutual quarrel or combat." *People v. Chevalier*, 131 Ill. 2d 66, 71 (1989) (cleaned up). Defendant does not dispute that the "serious provocation" language in section 8-4(c)(1)(E) should be construed the same as the identical language in section 9-2(a)(1), *see* Def. Br. 31-33; instead, he argues that the evidence established serious provocation under theories of "substantial physical injury," *id.* at 33-34, and "mutual combat," *id.* at 34-41. These arguments fail.

A. Jerome's Unarmed Strikes Do Not Establish Substantial Physical Injury Where the Evidence Shows Defendant Suffered No Injury from Jerome's Actions.

Counsel was not ineffective for failing to argue provocation based on substantial physical injury, *see* Peo. Br. 14-15 n.2, as this Court has held that a victim hitting a defendant does not constitute substantial physical injury where, as here, the defendant suffered no injury. *See People v. Agee*, 2023 IL 128413, ¶ 82. Indeed, the record rebuts that defendant suffered any injury because of his altercation with Jerome. Precious testified that she saw *no* injuries on defendant as he fled the bus. R180-81.

Defendant concedes that "there may not have been specific evidence presented at trial regarding injuries [he] sustained," Def. Br. 34, but argues

that "[h]ad defense counsel raised the issue at sentencing, [defendant] *could* have presented evidence that he suffered substantial physical injury." *Id.* However, defendant's speculation is insufficient to satisfy his burden under *Strickland*, which requires defendant to "affirmatively prove" that prejudice resulted from counsel's alleged error. *Johnson*, 2021 IL 126291, ¶ 55 (citing *Strickland*, 466 U.S. at 693); *see also People v. Patterson*, 2014 IL 115102, ¶ 81 ("Satisfying the prejudice prong necessitates a showing of actual prejudice, not simply speculation that defendant may have been prejudiced."); *People v. Palmer*, 162 Ill. 2d 465, 481 (1994) (similar).

This Court should decline defendant's request to turn the *Strickland* standard on its head and *assume* that he would have been able to produce sufficient favorable evidence, even though he has never produced any evidence of substantial physical injury. Instead, it should adhere to the well-established rule that prejudice under *Strickland* cannot be established by mere speculation. *See, e.g.*, *People v. Dupree*, 2018 IL 122307, ¶¶ 34-40 (defendant cannot prevail on claim that counsel was ineffective for failing to investigate witnesses without sufficient evidence that witnesses would have provided favorable testimony); *People v. Olinger*, 176 Ill. 2d 326, 363 (1997) (rejecting defendant's claim that counsel was ineffective for failing to pursue strategy based on unidentified fingerprints at crime scene because claim that prints might have exonerated him was "pure speculation" falling "far short of the demonstration of actual prejudice required by *Strickland*"). In sum,

consistent with *People v. Agee*, 2023 IL 128413, defendant was not entitled to a Class 1 sentence under section 8-4(c)(1)(E) because there was no evidence of substantial physical injury; on the contrary, the trial evidence showed that defendant had no visible injuries when he fled the bus.

Defendant's efforts to distinguish *Agee* are unavailing. *See* Def. Br. 34. To be sure, unlike in this case, the defendant in *Agee* was bigger than his victim. 2023 IL 128413, ¶ 7. But contrary to defendant's argument, that size disparity did not inform *Agee*'s holding. Rather, *Agee* held that a victim striking a defendant does not amount to substantial physical injury where, like in this case, the defendant sustains no injury from the victim's response. *See Id.* ¶ 82.

Indeed, in support of this holding, *Agee* cited *People v. Strader*, 278 Ill. App. 3d 876 (5th Dist. 1996), which similarly held that the victim's act of striking and shoving the defendant "did not amount to substantial physical injury or assault, as defendant sustained no injury from her behavior." *Id.* at 884. In so holding, the appellate court did not discuss the relative size or strength of the defendant and victim, much less suggest that the defendant enjoyed a sufficient size advantage as to be impervious to injury. Indeed, the victim slapped defendant and knocked him to the ground, then slapped him again when he regained his footing. *Id.* at 879. Nevertheless, the appellate court held, as *Agee* subsequently held, that the victim's attack did not amount to substantial physical injury because the defendant was not injured by it.

Id. at 884; *see also Agee*, 2023 IL 128413, ¶ 82 (citing *Strader*, 278 Ill. App. 3d at 884). Here, too, the evidence at trial showed that defendant suffered no injury from his conflict with Jerome and therefore, regardless of their size differential, Jerome's unarmed strikes did not cause "substantial physical injury" that amounted to legally recognized provocation.

Defendant's reliance on *People v. Bathea*, 24 Ill. App. 3d 460 (1st Dist. 1974), is unavailing because it applied a different legal standard. There, the defendant was convicted of voluntary manslaughter, which required a showing that she had been acting under serious provocation. *Id.* at 464. The defendant argued on appeal that the evidence was insufficient to prove provocation, so the jury could and should have found her not guilty by reason of self-defense. *Id.* Because provocation was a matter for the trier of fact, the appellate court held that it could not overturn the finding of guilt unless the evidence was so unsatisfactory or improbable as to justify a reasonable doubt as to the defendant's guilt. *Id.* at 465. Applying this wholly different standard, the court concluded that where the victim struck the defendant in the face multiple times, knocked her to the ground, kicked her, and slammed her against a car, the trier of fact had sufficient evidence to conclude that the defendant was acting under a serious provocation. *Id.* But the evidentiary burden and presumptions are the opposite here, where defendant is attempting to establish ineffective assistance of counsel. *Compare id.* ("A reviewing court will not reverse a finding of guilt of voluntary manslaughter

unless the evidence is so unsatisfactory or improbable as to justify a reasonable doubt as to the defendant's guilt."), *with Johnson*, 2021 IL 126291, ¶ 55 (*Strickland* requires defendant "affirmatively prove" that prejudice resulted from counsel's alleged error). Accordingly, *Bathea* is inapposite and provides no basis for this Court to reject its holding in *Agee* that unarmed strikes that do not result in injury do not establish "substantial physical injury." 2023 IL 128413, ¶ 82.

B. Defendant Cannot Establish Mutual Combat Because His Response Was Wholly Out of Proportion.

Defendant also cannot show that he was engaged in mutual combat, Peo. Br. 15-20, which is defined as "a fight or struggle which both parties enter willingly or where two persons, upon a sudden quarrel and in hot blood, mutually fight upon equal terms and where death results from the combat," *People v. Austin*, 133 Ill. 2d 118, 125 (1989). Defendant cannot establish mutual combat because (1) defendant's retaliation was not proportionate to any provocation by Jerome, and (2) Jerome was drawn into the struggle by defendant's actions of punching and choking Jerome's niece, Precious. *See id.* at 125 (no serious provocation where victim did not enter fight willingly, but rather in response to defendant's actions). In sum, there was no mutual combat between defendant and Jerome when defendant shot Jerome in the chest after Jerome, who was unarmed, stepped in to stop defendant from battering Precious.

People v. Healy, 168 Ill. App. 3d 349 (1st Dist. 1988), on which defendant relies, Def. Br. 35, is readily distinguished. During a drunken fistfight, the defendant used a knife to kill the victim. *Healy*, 168 Ill. App. 3d at 350-51. But "there was no direct evidence that the defendant was the initial aggressor or that he possessed and first introduced the knife into the fight." *Id.* at 354. Not only did no witness see the defendant draw a knife, but "defendant himself received a cut on his right hand." *Id.* The court held that because there was evidence that, if believed by a jury, would reduce the crime to manslaughter, a manslaughter instruction should have been given. *Id.* at 353-54.

This case is distinguishable both factually and legally. Factually, and unlike in *Healy*, the evidence here clearly established that defendant's actions initiated the fight. Defendant and JK were arguing, R209, 221, 246, 251; Precious intervened and said, "We not fit to do this," at which point defendant hit Precious in the jaw, grabbed Precious by the neck, and began choking her, R168, 170, 212, 250. Only then did Jerome intervene and begin struggling with defendant. R173, 251. Moreover, it is undisputed that defendant had a gun, R176, and that no one else was armed, R177-78.

Furthermore, *Healy* presented an entirely different question. There, so long as some evidence existed that could be believed by a jury, the defendant was entitled to an instruction on manslaughter. *Healy*, 168 Ill. App. 3d at 353. Here, by contrast, defendant must affirmatively establish both that

(1) counsel's performance fell below "an objective standard of reasonableness," and (2) "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694; *see also Webb*, 2023 IL 128957, ¶ 21. In sum, *Healy* is inapposite because it is materially distinguishable both as a matter of fact and law.

Instead, as the People explained in their opening brief, this case is controlled by *Austin*, the facts of which make it particularly instructive here. Peo. Br. 15-17 (discussing *Austin*, 133 Ill. 2d at 122-23). Defendant's efforts to distinguish *Austin* are unavailing. *See* Def. Br. 36-38. First, defendant's argument that *Austin* is limited to circumstances where the provocation amounted to "mere words," Def. Br. 36-37, ignores the fact that *Austin* itself did not involve "mere words," 133 Ill. 2d at 127. In *Austin*, the defendant and victim engaged in a "fairly even fistfight for 30 to 40 seconds," before the defendant shot the victim. *Id.* (cleaned up). Nevertheless, this Court held that shooting the victim "was an act completely out of proportion to the provocation," and, accordingly, "mutual combat cannot apply." *Id.* So, defendant's efforts to cabin *Austin*'s holding are belied by the facts of that case, and as in *Austin*, defendant cannot show mutual combat.

Defendant's argument that the question in *Austin* "is not a question of whether the victim's provocation is proportionate to the defendant's response," Def. Br. 37, similarly ignores this Court's holding. To be sure, as

defendant notes, the ultimate question is whether he can establish serious provocation. *See id.* But *Austin* held that "the provocation must be proportionate to the manner in which the accused retaliated." 133 Ill. 2d at 127. In other words, this Court held, the relevant question is, indeed, whether the victim's provocation is proportionate to the defendant's response.

For similar reasons, *Austin* undercuts defendant's reliance on *People v. Pursley*, 302 Ill. 62 (1922). *See* Def. Br. 38-39. There, the Court held that the victim's attempt to strike the defendant with a fist did not justify the defendant's response with a deadly weapon or reduce the offense of homicide to manslaughter. *Pursley*, 302 Ill. at 73. Defendant argues that the appellate court, in *People v. Matthews*, 21 Ill. App. 3d 249 (3d Dist. 1974), misread *Pursley* when it later relied on it to hold that provocation was insufficient to reduce the offense of murder where a defendant's response was "'out of all proportion to the provocation,'" especially when the defendant introduces a deadly weapon to the confrontation. Def. Br. 39 (quoting *Matthews*, 21 Ill. App. 3d at 253). But defendant is wrong because, in *Austin*, this Court held exactly as the appellate court in *Mathews* did. *See Austin*, 133 Ill. 2d at 127 ("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." (citing *Mathews*, 21 Ill. App. 3d at 252-53)).

For its part, the appellate court erred in ignoring the disproportionality of defendant's response based solely on its erroneous view that the General Assembly intended "serious provocation" to mean something different in section 8-4(c)(1)(E) than it means in the second degree murder statute. *See* A25 at ¶ 41. As explained, Peo. Br. 17-18, section 8-4(c)(1)(E) was passed at the recommendation of the CLEAR Initiative, which intended to correct "the disparate treatment of offenders resulting from judicial interpretation of our inchoate and substantive homicide offenses." 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). Ultimately, the Commission proposed a scheme where at sentencing, "defendants would have the opportunity to provide mitigating factors consistent with the rationale of second degree murder." *Id.* at 699. Accordingly, in following the Commission's recommendation, the General Assembly demonstrated its intent that "serious provocation" in section 8-4(c)(1)(E) carry the same meaning it has in the second degree murder statute, where provocation based on mutual combat is not available if defendant's response was disproportionate to any provocation.

Defendant seems to concede as much, Def. Br. 19, 39-40, and advances two arguments that fail under the facts of this case and the law governing ineffective assistance of counsel challenges.

Defendant's first argument — that his response was not disproportionate — is belied by the record. Defendant argues that Jerome was the initial aggressor, Def. Br. 38, but Jerome did not enter the fight until after defendant punched and choked Precious. Defendant notes that "Jerome was still swinging at [defendant] when he was shot," *id.*, but that does not alter the fact that defendant's decision to respond to a fistfight by pulling out a gun and shooting Jerome in the chest at close range was "completely out of proportion," *see Austin*, 133 Ill. 2d at 127. Defendant argues that "[u]nlike in *Austin*, Jerome entered the struggle willingly, and the fight was on equal terms," Def. Br. 38, but in fact, Jerome was drawn into the struggle by defendant's actions — namely, punching and choking Precious — and the struggle in *Austin* was similarly described by witnesses as "fairly even," *see* 133 Ill. 2d at 127. In sum, defendant's response to an otherwise unarmed struggle was out of all proportion to his fistfight with Jerome. Indeed, defendant admitted as much to the appellate court. A24 at ¶ 39 (defendant conceded that his response was out of proportion to Jerome's actions).

Defendant's second argument — that counsel should have sought sentencing pursuant to section 8-4(c)(1)(E) because "a series of First District opinions supported the application of Subsection (E) to [defendant's] case," Def. Br. 41 — also does not entitle him to relief. As explained, decisions holding that the proportionality of a defendant's response to any provocation is irrelevant to whether he is entitled to sentencing under section 8-4(c)(1)(E)

were wrongly decided. *See* Peo. Br. 17-20. The holding below — like the opinions of other courts that held similarly — ignores the plain language of the statute, which this Court held to require proportionality in *Austin*, 133 Ill. 2d at 126-27; *see also People v. Smith*, 236 Ill. 2d 162, 169 (2010) (courts presume that "when the legislature uses a term that has a settled legal meaning, the legislature intended it to have that settled meaning"); *People v. Bailey*, 232 Ill. 2d 285, 290 (2009) ("The law uses familiar legal expressions in their familiar legal sense."); *People v. McCarty*, 223 Ill. 2d 109, 133 (2006) ("Under the 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."), as well as the legislative history of section 8-4(c)(1)(E).

Counsel cannot have been ineffective for declining to make an argument based on wrongly decided appellate court opinions because "[u]nreliability or unfairness does not result if the ineffectiveness of counsel does not deprive the defendant of any substantive or procedural right to which the law entitles him." *Lockhart v. Fretwell*, 506 U.S. 364, 372 (1993). Defendant has no right to have counsel give the court an opportunity to "make an error in his favor." *See id.* at 371; *see also, e.g.*, *Resnick v. United States*, 7 F.4th 611, 623 (7th Cir. 2021) ("[O]ur case law provides that failure to object to an issue that is not settled law within the circuit is not unreasonable by defense counsel."); *State v. Hanson*, 2019 WI 63, ¶ 28 ("In

order to constitute deficient performance, the law must be settled in the area in which trial counsel was allegedly ineffective.").

In sum, because defendant's conduct was wholly out of proportion to any provocation, it rendered him ineligible for a Class 1 sentence, counsel was not deficient in not arguing for its application, and defendant was not prejudiced.

II. Counsel Was Not Ineffective for Not Seeking Sentencing Under Section 8-4(c)(1)(E) Where Had Jerome White Died, Defendant Would Have Caused the Death Intentionally, Rather than Accidentally or Negligently.

Defendant was also ineligible for a Class 1 sentence under section 8-4(c)(1)(E) because had Jerome died after defendant shot him in the chest at close range, defendant would have caused the death intentionally, and not through accident or negligence. To be sentenced as a Class 1 offender, defendant would have to show by a preponderance of the evidence not only that he was acting under a sudden and intense passion resulting from serious provocation, *but also* that had Jerome died, his death would have been negligent or accidental. 720 ILCS 5/8-4(c)(1)(E).

Had Jerome died from defendant's act of shooting him in the chest, it would not have been an "unintended" occurrence or the result of mere "carelessness." *See* Black's Law Dictionary 18-19 (11th Edition 2019) (defining "accident" as "unintended and unforeseen injurious occurrence"); Black's Law Dictionary 1247 (11th Edition 2019) (defining "negligence" as "[t]he failure to exercise the standard of care that a reasonably prudent

person would have exercised in a similar situation," that is to say, "culpable carelessness"). Defendant argues that there is a reasonable probability the trial court would have held that if defendant had caused Jerome's death it would have been accidental or negligent based on (1) defendant's repeated assertions that the gun fired accidentally during the fight, (2) defendant's act of shooting himself in the finger, and (3) the fact that Jerome was shot only once. Def. Br. 41-42. But counsel made this argument to the trial court, and it was rejected. As the trial court noted when delivering the verdict, defendant did not shoot merely to scare or injure Jerome. R531-32. Defendant shot to kill: he intentionally shot Jerome in the chest at close range. *Id.* So, although it is true that defendant fired a single shot, Def. Br. 41, "the location of the injuries" — Jerome's chest — "is indicia (sic) of [defendant's] intent," R531-32. Indeed, even the appellate court recognized, when rejecting defendant's sufficiency claim, A17-20, that the evidence established that defendant willfully and intentionally performed an act designed to kill Jerome. That is the antithesis of accident or negligence.

Defendant's argument that the accident or negligence clause of section 8-4(c)(1)(E) applies only to cases of transferred intent, Def. Br. 17-30, ignores the plain language of the statute. *See In re Hernandez*, 2020 IL 124661, ¶ 18 (best indicator of legislative intent is the statutory language, given its plain and ordinary meaning); *People v. Pearse*, 2017 IL 121072, ¶ 41 (similar). Section 8-4(c)(1)(E) provides that attempt murder is sentenced as a Class 1

felony if the defendant proves both that his actions resulted "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." 720 ILCS 5/5-8-4(c)(1)(E) (emphasis added).

As an initial matter, "the use of the conjunctive, as in the word 'and,' indicates that the legislature intended for *all* of the listed requirements to be met." *People v. A Parcel of Property Commonly Known as 1945 North 31st Street, Decatur, Macon Cnty., Illinois*, 217 Ill. 2d 481, 500-01 (2005) (cleaned up). Accordingly, the plain text of the statute unambiguously requires defendant to establish both that he was responding to serious provocation when he attempted to kill Jerome, *and* that if Jerome had died, it would have been accidental or the result of negligence. Defendant's appeals to other tools of statutory interpretation are unavailing because the plain language is unambiguous. *See People v. Williams*, 2016 IL 118375, ¶ 15 (when statutory language is clear, this Court applies it as written without resort to aids of statutory construction).

Defendant stresses the statute's use of the word "or," but there is no ambiguity about the function that "or" serves in the statute. As is evident from the use of commas to set off the phrase, "or another," the word "or" explains how the provocation requirement can be met: the provocation can come either from the person the defendant endeavors to kill, "or another."

See The Chicago Manual of Style ¶ 5.44 (14th ed. 1993) (enclose parenthetic expressions between commas); William Strunk & E.B. White, The Elements of Style, 4th ed., 8 (2000) (same). Once the provocation requirement has been met through one of these alternatives, the "and" clause then requires the defendant to show, in addition, that "had the individual the defendant endeavored to kill died, the defendant would have negligently or accidentally caused that death." Had the General Assembly intended to permit a Class 1 sentence under either of two scenarios, it would have included the comma before the word "or" because it would be introducing a coordinate clause, *see* Strunk & White, *supra*, at 10, but the comma after "another" would be omitted, *see* Chicago Manual of Style, *supra*, at ¶ 5.34 (restrictive dependent clause should not be set off by commas).

Defendant's attempt to inject ambiguity into the statute by emphasizing the word "or," Def. Br. 17-18, ignores not only the use of commas, but the rest of the statute. *See Jarquan B.*, 2017 IL 121483, ¶ 22 (statutes must be read as a whole and not as isolated provisions). Defendant erroneously asserts that the language of section 8-4(c)(1)(E) "was taken directly from the plain language of the second degree murder statute." Def. Br. 18. This is true for the provocation clause and, as defendant now concedes, the provocation clause should be given the same meaning in each statute. *Id*. at 19 (citing *People v. Harris*, 2013 IL App (1st) 110309, ¶ 13). But the language of the respective accident or negligence clauses is

materially different. The second degree murder statute mitigates the crime of murder if

> at the time of the killing [defendant] 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(a)(1) (emphasis added). In contrast, section 8-4(c)(1)(E) provides a sentence reduction if

> at the time of the attempted murder, [defendant] 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.

720 ILCS 5/8-4(c)(1)(E).

The second degree murder statute thus establishes two, distinct scenarios based on who dies: (1) the defendant was acting under a sudden and intense passion resulting from serious provocation by the individual killed, or (2) the defendant was acting under a sudden and intense passion resulting from serious provocation by someone other than the victim but the defendant negligently or accidentally kills the victim. Section 8-4(c)(1)(E) creates a single scenario: the defendant was acting under a sudden and intense passion resulting from serious provocation, and, if the individual the defendant endeavored to kill died, it would have been negligence or accident. Therefore, defendant is wrong when he says that the second degree murder

statute and section 8-4(c)(1)(E) "bear[ ] almost identical language." *See* Def. Br. 23-24.

Because the language of the two statutes is materially different, it is irrelevant that second degree murder is understood to create two scenarios, *see id.* at 19-20, 24-25, and this Court should reject defendant's invitation to hold that "[w]here the Second Degree murder statute clearly outlines two alternative scenarios . . . this Court should find that Subsection (E) also designates two alternative scenarios," *id.* at 25. In essence, defendant asks the Court to rewrite section 8-4(c)(1)(E) to read identically to the second degree murder statute, which the Court may not do. *See People v. Legoo*, 2020 IL 124965, ¶ 26; *see also People v. Smith*, 2016 IL 119659, ¶ 28 ("No rule of construction authorizes this court to declare that the legislature did not mean what the plain language of the statute imports, nor may we rewrite a statute to add provisions or limitations the legislature did not include.").

The language of section 8-4(c)(1)(E)'s accident or negligence clause is clear — "had *the individual the defendant endeavored to kill* died, the defendant would have negligently or accidentally caused that death," 720 ILCS 5/8-14(c)(1)(E) (emphasis added) — so defendant's appeal to legislative history is unavailing. *See* Def. Br. 20-23. While Judge Toomin's writings may help this Court interpret the serious provocation clause of subsection (E) — because that clause does not expressly state whether defendant's response to serious provocation must be proportionate — the statutory language of the

accident or negligence clause is clear and unambiguous, so this Court must apply it as written and without resort to aids of statutory construction. *Williams*, 2016 IL 118375, ¶ 15.

In any event, Judge Toomin's discussion of the legislative history confirms that this Court should decline defendant's invitation to read the accident or negligence clause of section 8-4(c)(1)(E) identically to the second degree murder statute. Two earlier, rejected, proposals included language identical to the second degree murder statute. *See* Toomin, *supra*, at 698-99. But "neither of these proposals carried the day." *Id.* at 699. Instead, the Commission proposed, and the General Assembly passed, a statute that was "consistent with the rationale of second degree murder," *id.*, but the language of which was materially different.

The difference is unsurprising because it reflects the differences between murder and attempt murder. The gravamen of murder is an act: causing the victim's death. When a defendant shoots at person A with the intent to kill him, but hits and kills person B, the defendant is only guilty of murder if his intent to kill person A *transfers* to person B because that is the only person whose death the defendant caused. *See* 720 ILCS 5/9-1(a) (a person commits murder when he kills an individual and intends to kill "that individual *or another*"). But the gravamen of attempt murder is the defendant's specific intent to commit the offense. If a defendant shoots at person A with the intent to kill him, the defendant has committed attempt

murder of person A regardless of whether the bullet hits and injures person A, person B, or no one at all because what matters is not who was injured, but whom the defendant *specifically intended* to kill. Put differently, whether a defendant is guilty of the attempted murder of a person depends on his mental state as to that specific person and not on his mental state as to someone else. *See, e.g.*, *People v. Bland*, 28 Cal. 4th 313, 317 (Cal. 2002); *see also State v. Williams*, 437 S.C. 100, 104 (S.C. Ct. App. 2022) ("Suppose Peter fires a single shot at Paul in an attempt to kill him. The bullet misses Paul and hits and injures Mary instead. As far as attempted murder is concerned, Peter attempted to murder Paul, not Mary. After all, there is no evidence Peter intended to kill Mary. His intent was to kill Paul."); Wayne R. LaFave & Jens D. Ohlin, Criminal Law § 6.4, at 444 (7th ed. 2023) ("[i]n the bad-aim cases, the actor may be convicted of attempting to murder his intended victim").

It is unsurprising, therefore, that the language of the second degree murder statute focuses on whether the defendant accidentally caused "the death of the individual killed," 720 ILCS 5/9-2, whereas section 8-4(c)(1)(E) focuses on whether it would have mere accident if the defendant had caused the death of "the individual [he] endeavored to kill," 720 ILCS 5/8-4(c)(1)(E) — that endeavor being the gravamen of the offense of attempt murder.

For these reasons, *People v. Taylor*, 2016 IL App (1st) 141251, on which defendant relies, Def. Br. 20, is wrong when it says that the accident or

negligence clause of section 8-4(c)(1)(E) refers to "the separate situation where the defendant negligently or accidentally acts against another in his attempt to kill his provoker." *Taylor*, 2016 IL App (1st) 141251, ¶ 23. First, that interpretation is directly contrary to the plain language of the statute, which applies to "the individual the defendant endeavored to kill." 720 ILCS 5/8-14(c)(1)(E). Second, a defendant's actions towards someone other than the person he specifically intended to kill are simply irrelevant to the offense of attempt murder. *See Bland*, 28 Cal. 4th at 317. For purposes of murder, the "intent to kill is not 'used up' with the killing of the intended target but extends to every person actually killed," but the "crime of attempt sanctions what the person intended to do but did not accomplish, not unintended and unaccomplished potential consequences." *Id.* at 327.

Defendant, like *Taylor*, is also incorrect to suggest that the People'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 statute meaningless.'" Def. Br. 27 (quoting *Taylor*, 2016 IL App (1st) 141251, ¶ 23). As the People explained, Peo. Br. 23, defendant overlooks cases where a defendant acting under a 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. In such cases, the defendant is guilty of attempted murder but subject to a Class 1 sentence. *See* 720 ILCS 5/8-4(a)

("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.").

Indeed, it makes sense for the General Assembly to have decided that a defendant is less criminally culpable where "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 accidently caused." A26 at ¶ 45; *see also, e.g.*, Francis A. Allen, The Decline of the Rehabilitative Ideal: Penal Policy and Social Purpose 66 (Yale 1981) ("the primary object of criminal sanctions is to punish culpable behavior," and "the severity of the sanctions visited on the offender should be proportioned to the degree of his culpability").

As the People explained, there exist (counterfactual) scenarios in which defendant could have taken a preliminary step toward killing Jerome and where, had Jerome died, the death would have been accidental or negligent. Peo. Br. 24-25. Defendant dismisses these scenarios as "so specific as to be absurd," Def. Br. 27, but undermines that assertion by arguing that the facts of this very case are just such a scenario*, id.* at 41-42. He is wrong. The facts of this case are plainly inconsistent with section 8-4(c)(1)(E)'s reduced sentencing range where the trial court found that defendant intentionally shot Jerome in the chest with the specific intent to kill. But a different set of facts would have made section 8-4(c)(1)(E) applicable. Had defendant

boarded the bus armed with a gun and the specific intent of killing Jerome and taken no further action, he would still have been guilty of attempt murder, *see People v. Smith*, 148 Ill. 2d 454, 460 (1992) (substantial step towards commission of crime is taken when defendant has all materials required to complete crime and is present at or near location of intended criminal act); *People v. Terrell*, 99 Ill. 2d 427, 434 (1984) (same), but had Jerome died it would have been a result of accident or negligence rather than defendant's intentional actions.

Finally, this Court should decline defendant's invitation to invoke the rule of lenity. *See* Def. Br. 28-30. The mere existence of some statutory ambiguity is insufficient to warrant application of that rule. *Smith v. United States*, 508 U.S. 223, 239 (1993). Rather, "[t]he rule of lenity applies only if, after seizing everything from which aid can be derived, [the Court] can make no more than a guess as to what [the legislature] intended." *People v. Gutman*, 2011 IL 110338, ¶ 43 (cleaned up). Here, the Court need not rely on a guess as to the General Assembly's intent. The plain language of the statute unambiguously states that a defendant must show both serious provocation *and* that if the person he endeavored to kill had died it would have been the result of accident or negligence, so the Court need turn to no other tools of interpretation, much less the rule of lenity. *See United States v. Santos*, 553 U.S. 507, 548 (2008) (Alito, J., dissenting) ("the rule of lenity does not require us to put aside the usual tools of statutory interpretation or to

adopt the narrowest possible dictionary definition of the terms in a criminal statute").

In sum, defendant was not eligible for Class 1 sentencing under section 8-4(c)(1)(E) both because his response to the fistfight — shooting Jerome in the chest at close range — was wholly disproportionate to any provocation, and because had Jerome died, defendant would have caused his death intentionally, as opposed to accidentally or negligently. Accordingly, counsel cannot have been ineffective for not seeking a Class 1 sentence.

CONCLUSION

For these reasons, and those stated in the People's opening brief, this Court should reverse the judgment of the appellate court.

August 9, 2024

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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. I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(c) certificate of compliance, and the certificate of service, is 5,936 words.

/s/ Garson S. Fischer
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CERTIFICATE OF FILING AND SERVICE

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. The undersigned certifies that on August 9, 2024, the foregoing **Reply Brief of Plaintiff-Appellant People of the State of Illinois** was electronically filed with the Clerk, Illinois Supreme Court, and served upon the following by via Odyssey:

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