No. 129967

IN THE
SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Respondent-Appellant, v. TRAVARIS GUY, Petitioner-Appellee.	)))))))))))	On Appeal from the Appellate Court of Illinois, Third District, Nos. 3-12-0423 & 3-21-0426 There on Appeal from the Circuit Court of Twelfth Judicial Circuit, Will County, Illinois, No. 02-CF-1974 The Honorable David M. Carlson, Judge Presiding.

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

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ARGUMENT

This Court should reverse the appellate court's judgment and affirm petitioner's attempted murder conviction. Petitioner was convicted of the second degree murder of David Woods and the attempted murder of Sheena Woods. The trial court, with petitioner's agreement, used the IPI for attempted murder. On appeal from petitioner's successive postconviction petition challenging the attempted murder conviction, the appellate court held that the IPI misstated the law, resulting in a verdict irreconcilable with second degree murder.

But petitioner failed to demonstrate the cause necessary to obtain leave to file a successive postconviction petition alleging that direct appeal counsel was ineffective for declining to argue inconsistent verdicts. Even if petitioner could demonstrate cause, he could not demonstrate prejudice or prevail on the merits for three independent reasons: he invited any error, the IPI accurately stated the law, and the verdicts were legally consistent even if the IPI misstated the law because the verdicts were based on separate acts.

Finally, even if the verdicts were inconsistent, petitioner concedes that the remedy for inconsistent verdicts and instructional error is retrial, which is not barred by double jeopardy principles because petitioner invited the alleged error. Alternatively, this Court may enter a conviction on the lesser included offense of aggravated battery with a firearm.

I. Petitioner Failed to Demonstrate Cause Necessary to File a Successive Postconviction Petition.

As the People demonstrated, petitioner failed to show the cause necessary to obtain leave to file a successive postconviction petition. Peo. Br. 18. Petitioner asserts that the People forfeited this argument by not raising it in the appellate court or in the petition for leave to appeal (PLA), Pet. Br. 38, but "[a]n appellee in the appellate court may raise a ground in this [C]ourt which was not presented to the appellate court in order to sustain the judgment of the trial court, as long as there is a factual basis for it." *Dillon v. Evanston Hosp.*, 199 Ill. 2d 483, 491 (2002); *see also* Peo. Br. 18.

Petitioner asserts that this rule is unfair because the People are usually appellee in direct appeal criminal proceedings. Pet. Br. 43. Putting to one side that this is a postconviction (not direct) appeal, this Court has applied this rule in civil and criminal cases for decades because "[i]f the judgment of the trial court was right on the record, it should be affirmed." *Mulvihill v. Shaffer*, 297 Ill. 549, 554 (1921). In addition to upholding valid verdicts, this rule further "society's interest in avoiding the unjustified exoneration of wrongdoers." *People v. Knaff*, 196 Ill. 2d 460, 476 (2001). This Court recently confirmed that this "well settled" principle applies in criminal cases, including where (contrary to petitioner's argument, Pet. Br. 44), the People "did not raise the issue in the appellate court or in its [PLA]." *People v. Gray*, 2024 IL 127815, ¶ 19 (internal quotations omitted).

Petitioner's forfeiture argument is also belied by the record, for as he concedes, the People raised this argument on appeal below. Pet. Br. 40. While petitioner asserts that the People's "cause" argument below was limited to other claims, *id.*, the record establishes that the People asserted a complete failure by petitioner to plead and prove cause and prejudice, *see* Peo. Brief, *People v. Guy*, No. 3-21-0423, at 14-17, which applied to the entirety of petitioner's successive postconviction petition.

Petitioner's request that this Court adopt a new rule under which the People would be deemed to have "waived" an argument by raising it in the trial court but not the appellate court, Pet. Br. 39, misunderstands the purpose of the forfeiture rule: to ensure that the trial court has the opportunity to rule on issues in the first instance. *See People v. Lewis*, 223 Ill. 2d 393, 400 (2006). Punishing litigants more harshly when they have properly raised an argument in the trial court — where they correctly prevailed — for failing to renew the argument in the appellate court (by treating the argument as waived rather than forfeited) than those who never raised the argument at all would defeat the goal of encouraging litigants to raise arguments in the trial court in the first instance.

Petitioner's cited cases are inapposite. *See* Pet. Br. 39. For example, *People v. Brusaw*, 2023 IL 128474, ¶ 17 n.1, which held that a party waives an argument when he fails to obtain a ruling on a motion filed in the trial court, has no application here. Similarly, *People v. Brown*, 2017 IL 121681,

¶ 27, recognized the well-established rule that not contesting an argument in *this* Court concedes it. *See also People ex rel. Waller v. McKoski*, 195 Ill. 2d 393, 398 (2001) (finding no need to address argument People did not raise in this Court). True, failing to raise an argument in the appellate court risks forfeiture, but the rule does not apply in this Court to arguments raised in the trial court by appellate court appellees. *See Gray*, 2024 IL 127815, ¶¶ 13-19 (stipulation relied on in trial court but not raised in appellate court not "forfeited" because People were appellee in appellate court).

Thus, petitioner must demonstrate cause to bring the claims in the successive petition by showing a factor external to the defense that prevented him from raising them in his original petition. *See* Peo. Br. 18; *People v. Montanez*, 2023 IL 128740, ¶ 73 (citing 725 ILCS 5/122-1(f)). His allegations regarding the advice of direct appeal counsel fail because that attorney did not represent him in postconviction proceedings. *Cf. People v. Flores*, 153 Ill. 2d 264, 281-82 (1992) (suggesting petitioner might be able to show cause for failure to raise in original petition claim that attorney still representing petitioner in postconviction proceedings provided ineffective assistance on direct appeal). Petitioner cites no case holding that advice of an attorney, much less one not representing him in the prior postconviction proceedings, can constitute cause, or that counsel's performance *during* postconviction proceedings can constitute cause. *See* Pet. Br. 40-41. Accordingly, this Court

should hold that because petitioner cannot demonstrate cause, the trial court should have denied leave to file the successive postconviction petition.

II. Direct Appeal Counsel Was Not Ineffective for Declining to Argue that the IPI Misstated the Law and Led to Inconsistent Verdicts.

Even if petitioner could show cause sufficient to file a successive petition, he could neither show prejudice nor prevail on the merits because direct appeal counsel was not ineffective.

A. The claim was barred by the invited error doctrine.

Because trial counsel agreed to the challenged IPI, *see* R854, the doctrine of invited error barred direct appeal counsel from arguing that it misstated the law and led to inconsistent verdicts, *see* Peo. Br. 22. As petitioner concedes, "this Court found in *People v. Parker*, 223 Ill. 2d 494, 498-99, 508 (2006), that the invited-error doctrine applied where defense counsel merely stated that he had '[n]o objection to an instruction.'" Pet. Br. 27.

This Court should reject petitioner's invitation to overrule *Parker* and the other precedents applying the same rule. *See, e.g.*, *People v. Caffey*, 205 Ill. 2d 52, 113-14 (2001) (defendant who "acquiesced in the admission of [ ] evidence" by stating "No objection, Judge" "cannot contest" issue on appeal under invited error doctrine); *People v. Aquisto*, 2022 IL App (4th) 200081, ¶¶ 53-54 (defendant invited any error in admitting exhibit by telling trial court that he had no objection to its admission). It "would offend all notions

of fair play" and make litigation unworkable to allow parties to agree "to proceed in one manner and then later contend on appeal that the course of action was in error." *Parker*, 223 Ill. 2d at 508. By informing the court that he did not object to the IPI, petitioner invited the court to give the IPI, and therefore invited any error that flowed from the instruction.

Petitioner asserts that the People forfeited the invited error argument by not raising it below. Pet. Br. 25-26. Not so. The People argued that appellate counsel was not ineffective for failing to argue that the IPI was improper and the verdicts thus inconsistent, and parties are not limited to the reasoning urged below in support of preserved arguments. *Brunton v. Kruger*, 2015 IL 117663, ¶ 76 (We require parties to preserve issues or claims for appeal; we do not require them to limit their arguments here to the same arguments that were made below."). In any event, as discussed, an appellee in the appellate court may raise a ground in this Court even if it was not presented below. *See supra* p. 2.

Petitioner attempts to circumvent the invited error doctrine by arguing that successive postconviction counsel should have added two claims: that direct appeal counsel was ineffective for failing to argue that (1) the trial court plainly erred by using the IPI instruction, and (2) trial counsel was ineffective for agreeing to it. Pet. Br. 20. But while postconviction counsel must ensure the petition meets procedural requirements for claims asserted, counsel is not required to raise *additional* claims on petitioner's behalf.

People v. Frey, 2024 IL 128644, ¶ 24. Here, petitioner's amended pro se successive postconviction petition contained the inconsistent verdict claim, *see* C1796, but made no claim that trial or appellate counsel were ineffective for not challenging the IPI. Moreover, petitioner concedes that plain error review is not available for invited error, Pet. Br. 26, and his first proposed claim is baseless for this reason. Thus, petitioner's argument that successive postconviction counsel failed to provide reasonable assistance for declining to include these claims is meritless.

B. The IPI accurately stated that attempted murder requires an "intent to kill."

Alternatively, direct appeal counsel was not ineffective for declining to argue that the trial court erred by using an IPI that accurately stated the law. *See People v. Durr*, 215 Ill. 2d 283, 300-01 (2005) (citing Ill. S. Ct. R. 451(a)) (IPI must be given unless it misstates law). The attempted murder IPI implemented this Court's holding in *People v. Harris*, 72 Ill. 2d 16 (1978), which correctly applies the rules governing affirmative defenses and specific intent crimes.

1. The IPI implemented this Court's holding in *Harris*.

Petitioner does not contest that (1) this Court's rules and precedents create a strong presumption in favor of using the IPI, *see* Peo. Br. 23; (2) the IPI explains that it implements this Court's "h[o]ld[ing] that the specific intent to kill is an essential element of the offense of attempt first degree murder," *see* Committee Note, IPI, Criminal, No. 6.05X (citing *Harris*, 72 Ill.

2d 16); Peo. Br. 24; (3) this Court has never overruled *Harris*, *see* Peo. Br. 29-34; or (4) subsequent cases addressing attempted murder have stated that to commit attempted murder, a defendant must have the intent to kill, *see* Peo. Br. 7. If, as petitioner concedes, these things are true, then direct appeal counsel was not ineffective for declining to argue that the IPI for attempted murder misstated the law, and the verdicts were inconsistent.

This Court held in *Harris* that to be guilty of attempted murder, a defendant must have the intent to kill. 72 Ill. 2d at 26-28; *see* Peo. Br. 25. As petitioner explains, at issue in *Harris* were jury instructions that misstated the mental state of attempted murder by allowing "alternatives to '*an intent to kill*,' which opened the door to a conviction of attempted murder without a finding that the defendant *intended to kill an individual*." Pet. Br. 7 (emphases added). *Harris* held that while murder can be established by proof of several possible mental states, attempted murder requires proof of an intent to kill. 72 Ill. 2d at 26-27. Put differently, murder can be established by proof of "'A acting with intent to kill, B with an intent to do serious bodily injury, and C with a reckless disregard of human life,'" but "'if the victims do not die from their injuries, then only A is guilty of attempted murder.'" *Id.* at 27-28 (quoting LaFave and Scott, Criminal Law § 59, at 428-29 (1972)).

Petitioner mistakenly asserts that *Harris* held that the intent must be "intent to kill without lawful justification" based on *Harris*'s single mention of the term "'criminal intent to kill.'" Pet. Br. 7 (quoting 72 Ill. 2d at 27). But

as the People demonstrated, Peo. Br. 26-27, *Harris* used the phrase "criminal intent to kill" to explain that to commit attempted murder, the defendant must have the intent to kill and not merely to do great bodily harm. Addressing a jury instruction that required the People to prove the intent "'to kill or do great bodily harm to that individual,'" *Harris* explained that this instruction was erroneous because "it permits the jury to return a verdict of guilty upon evidence that the defendant intended only to cause great bodily harm short of death." 72 Ill. 2d at 27. Instead, an "instruction must make it clear that to convict for attempted murder nothing less than a criminal intent to kill must be shown." *Id*. In other words, the relevant distinction for attempted murder is between the intent to kill versus the intent to do great bodily harm, not whether that intent to kill is without lawful justification.

Petitioner does not address the many cases the People cited to demonstrate that, since *Harris*, this Court has used "criminal intent to kill" and "intent to kill" interchangeably. *See* Peo. Br. 27 (citing *People v. Williams*, 165 Ill. 2d 51, 64-65 (1995) (citing *Harris* and stating that "a defendant must be shown to have possessed the criminal intent to kill," before holding that allegedly improper remark by prosecutor was not prejudicial because "Williams' intent to kill [the victim] was established beyond any doubt"); *People v. Leger*, 149 Ill. 2d 355, 403-05 (1992) (using interchangeably "criminal intent to kill" with "intent to kill" as the intent necessary for attempt murder); *People v. Mitchell*, 105 Ill. 2d 1, 9 (1984) ("to

sustain a conviction for attempted murder, the prosecution must prove that the defendant had the intent to kill the victim"). The IPI's requirement that the People prove an "intent to kill" is, therefore, consistent with *Harris* and this Court's subsequent cases.

2. This Court has not overruled *Harris*.

Petitioner is wrong that *People v. Barker*, 83 Ill. 2d 319 (1980), supports his reinterpretation of *Harris*. *See* Pet. Br. 8. As the People explained, Peo. Br. 29-31, *Barker* held that an attempted murder indictment that charged the defendant "with intent to commit the offense of murder," rather than intent to kill, sufficiently alleged "an essential element of the offense[:] the intent to kill," because "all murders involve a killing, [so] a person cannot intend to commit murder without intending to kill." 83 Ill. 2d at 323-24, 326.

Like the appellate court below, petitioner ignores the holding of *Barker* and relies on dicta stating,

> "If the indictment had only charged the defendant with the intent to kill and did not include the allegation that the defendant acted with the intent to commit murder, it would have been defective . . . in that it would not have charged the defendant with an intent to commit a specific offense."

Pet. Br. 8 (quoting *Barker*, 83 Ill. 2d at 327). But this quote merely explains that an indictment that "only charged the defendant with the intent to kill" "would have been defective . . . in that it would not have charged the defendant with an intent to commit a specific offense." *Barker*, 83 Ill. 2d at

326-27. It would have satisfied the mental state requirement, intent to kill, but would not have named the intended crime, murder. By contrast, the language in the indictment charging the defendant with the "intent to commit murder" accomplished two necessary tasks: (1) it identified the specific offense that the defendant attempted to commit (murder), and (2) it alleged that the defendant had the required mental state for attempted murder ("the specific intent to kill"). *Id.* at 327. *Barker* thus confirms that the mental state required for attempted murder is "intent to kill." *See also id.* at 324 (noting that in *People v. Trinkle*, 68 Ill. 2d 198 (1977), "this [C]ourt held that, to convict one for attempted murder, the State must prove that the accused acted with the intent to kill," and that "[s]ince *Trinkle*, the [C]ourt has adhered to that holding") (collecting cases). The dicta on which petitioner relies does not contradict *Harris*.

Petitioner also mistakenly relies on two cases addressing whether there existed an offense of attempted *second* degree murder, or its predecessor, voluntary manslaughter. Pet. Br. 8-9 (citing *People v. Lopez*, 166 Ill. 2d 441 (1995), and *People v. Reagan*, 99 Ill. 2d 238 (1983)). As the People explained, Peo. Br. 32, those cases held that there is no offense of attempted second degree murder (or attempted voluntary manslaughter) because "one cannot intend either a sudden and intense passion due to serious provocation or an unreasonable belief in the need to use deadly force." *Lopez*, 166 Ill. 2d at 448; *see also Reagan*, 99 Ill. 2d at 240 ("it is impossible to

intend an unreasonable belief"). In other words, those cases hold that attempted *second* degree murder is a logical impossibility. They did not address attempted *first* degree murder. Direct appeal counsel was not ineffective for failing to argue that *Lopez*, which addressed a different crime, implicitly overruled *Harris*, particularly as *Williams* was issued the same year and reaffirmed *Harris*. *See Williams*, 165 Ill. 2d at 64-65 (confirming mental state required for attempted murder is "intent to kill").

3. *Harris* correctly applied the rules governing affirmative defenses and specific intent crimes.

Finally, this Court should reject petitioner's request to overrule *Harris*. Petitioner reasons that to commit attempted murder, "a person must intend to commit all the elements of first-degree murder," including the element "that the killing be without lawful justification"; thus, the People must prove that defendant intended that the killing be unjustified by self-defense. Pet. Br. 6 (quotations omitted).

Petitioner's argument is wrong for two reasons. First, *Harris* straightforwardly applies the rules governing specific intent crimes. *See* Peo. Br. 28. This Court recently cited *Harris* when explaining that "[u]nlike general intent offenses, which only require that the prohibited result be reasonably expected to flow from the accused's voluntary act, . . . specific-intent crimes require the State to prove that defendant subjectively desired the prohibited result." *People v. Grayer*, 2023 IL 128871, ¶ 23 (citing *Harris*, 72 Ill. 2d at 27-28). *Harris* applied this rule to explain that "attempted

murder requires an intent to bring about that result described by the crime of murder (i.e., the death of another)." 72 Ill. 2d at 28 (cleaned up). The prohibited result of murder is the death of another, and the specific intent requirement for attempted murder means the defendant must intend the death of another.

Second, contrary to petitioner's argument, Pet. Br. 6, the absence of a belief in self-defense is *not* an element of murder, *see* Peo. Br. 29. True, when "a murder defendant asserts self-defense, the State must prove *more* than the three elements of first degree murder. The State must also prove that the murder was not carried out in self-defense." *People v. Jeffries*, 164 Ill. 2d 104, 122 (1995); *see also Lopez*, 166 Ill. 2d at 449 ("mitigating circumstance" in second degree murder is "not an element or mental state"); 720 ILCS 5/9-2(c) (distinguishing between "mitigating factor" of unreasonable self-defense and "elements of first degree murder"). But the People do not have to prove the absence of self-defense beyond a reasonable doubt in *every* case of murder, which would be the case if the absence of self-defense were an element of the offense. *See Jeffries*, 164 Ill. 2d at 117-18 (first and second degree murder statute satisfied mandate of *In re Winship*, 397 U.S. 358 (1970), that State prove every element of crime because mitigating factor not element of crime). Thus, petitioner's argument that "a person must intend to commit all the elements of first-degree murder" to commit attempted murder, Pet. Br. 6, is incorrect because the absence of self-defense is not element of murder. Thus,

Harris's holding that attempted murder requires an "intent to kill" is not only good law, it properly applies the rules governing specific intent crimes and affirmative defenses.

C. Even if the IPI misstated the law, the verdicts were legally consistent.

Direct appeal counsel also reasonably declined to argue that the verdicts were inconsistent because they were reconcilable *even if* the IPI misstated the law and the argument was not barred by the invited error doctrine. Peo. Br. 34. Petitioner concedes that the verdicts were legally consistent if a rational jury could have found that he acted with an unreasonable belief in the need for self-defense when he shot David but had no such belief when he subsequently shot Sheena. *See* Pet. Br. 12; *see also* Peo. Br. 34-35 (citing *People v. Fornear*, 176 Ill. 2d 523, 531-32 (1997)). Petitioner wrongly asserts that this "is not possible" because the acts were committed "simultaneously." Pet. Br. 13. But it is possible; indeed, while petitioner cites testimony that is ambiguous or supports his position that he fired the shots in quick succession, he concedes that "the jury did not wholly accept either the State's or defendant's position at trial." *Id.* at 22. This Court "will exercise all reasonable presumptions in favor of the verdicts, which will not be found legally inconsistent unless absolutely irreconcilable." *McQueen v. Green*, 2022 IL 126666, ¶ 51 (cleaned up).

The jury heard unambiguous testimony that the shots were not simultaneous and that time elapsed between the shot that killed David and

the shot that injured Sheena. Petitioner does not contest that Sheena testified that after David was shot, he "came back in the van and laid down in the back," and "when [she] turned around to look at him, [she] must have got shot right then and there because [she] fell to the floor." R273. This was consistent with Constance's testimony that after she heard the first shot, David "got out of the driver's seat" and "walked to the back of the van and he just laid down right there," at which point "Sheena was on the floor." R315. Similarly, David L. (David's nephew and Sheena's cousin) testified that there was "[m]aybe a second or two" between each of "four or five shots," R366, that David "got up out [of] the driver's seat of the van and went to the back of the van," and that Sheena was shot and "then she fell on the floor," R361. Accordingly, it was rational to conclude that petitioner believed in the need for self-defense when he shot David but not when he subsequently shot Sheena, and the verdicts were thus legally consistent.

Petitioner points to allegedly conflicting testimony by David L. and Constance. Pet. Br. 14. However, this testimony was ambiguous. For example, David L. testified that the shots petitioner fired were "[m]aybe more like one after the other." R366. Similarly, Constance answered, "I think so," when asked, "[W]as the shooting stopped before David, Sr., stood up and walked to the back of the van?" R326. Ambiguous statements cannot demonstrate that verdicts are "absolutely irreconcilable." *McQueen*, 2022 IL 126666, ¶ 51.

Even less persuasive is petitioner's assertion that the jury could not rationally have believed that he "was looking at the van when he fired." *See* Pet. Br. 14-15. Sheena testified that petitioner "kept his eyes on us" and that he "was reaching down, but . . . still looking at us," before she saw "sparks." R274. Constance testified that petitioner was "looking at us" before she saw "him shoot." R328. In other words, Sheena and Constance testified that petitioner kept his eyes on them until he fired the shots. A rational jury could believe this testimony.

A rational jury could also conclude that petitioner was acting with an unreasonable belief in the need for self-defense with regards to David, but not Sheena, because the jury heard evidence that petitioner believed he needed to protect himself from David but had no similar belief regarding Sheena. Peo. Br. 36. Petitioner responds that testimony suggested that he might fear "female members of the [Woods] family," Pet. Br. 14, but does not identify any testimony regarding Sheena specifically. Moreover, petitioner's assertion that "trial evidence established that [his] view of the occupants in the back of the van was obstructed," *id.* at 15, cuts in favor of the jury's verdicts, for if "he did not know their identity during the shooting," *id.*, petitioner would have no reason to fear them. Thus, the evidence was at most conflicting, and the verdicts are consistent because a rational jury could have found that petitioner acted with an unreasonable belief in the need for self-defense when he shot David but not when he shot Sheena.

As for petitioner's assertion that the People "conceded that [his] mental state did not change during the shooting," *id.*, the People's theory throughout was that petitioner *never* believed he was acting in self-defense, whether reasonably or unreasonably, while petitioner contended that he was acting in self-defense with respect to both shootings, Peo. Br. 37. Again, petitioner concedes that "the jury did not wholly accept either the State's or defendant's position." Pet. Br. 22. In any event, there is no forfeiture both because the People asserted below that counsel was not ineffective for failing to argue that the verdicts were inconsistent, and because an appellee in the appellate court may raise any ground in this Court if there is a factual basis for it. *See supra* pp. 2, 6.

In sum, ambiguous or contradictory testimony cannot overcome the fact that "all reasonable presumptions" are made "in favor of the verdicts," which were not "legally inconsistent" because they were not "absolutely irreconcilable." *McQueen*, 2022 IL 126666, ¶ 51. Because a rational jury could conclude that petitioner had an unreasonable belief in the need for self-defense as to David but not Sheena, direct appeal counsel was not ineffective for declining to argue that the verdicts were inconsistent.

III. If Counsel Was Ineffective, the Appropriate Remedy Is Retrial or Entry of a Conviction of Aggravated Battery with a Firearm.

If this Court were to find that counsel was ineffective, it makes no difference whether the error is couched as an inconsistent verdict error or a jury instruction error because the proper remedy in either circumstance is

retrial, as petitioner concedes. Pet. Br. 29 (new trial is remedy for inconsistent guilty verdicts and "prejudicial instructional error").

Petitioner's contrary arguments fail. He asserts that retrial "would inappropriately ask for a second jury to decide defendant's state of mind and guilt . . . after an initial jury has already done so *without error.*" *Id.* at 30 (emphasis added). But if the original trial was "without error," it is either because the IPI correctly stated the law and the People were not required to prove petitioner intended to kill Sheena without lawful justification, or because the jury rationally concluded that petitioner had one state of mind when he killed David but a different state of mind when he shot Sheena; under either scenario, petitioner's convictions should not be reversed.

Petitioner next asserts that remand is improper because a retrial could only include the attempted murder charge as he does not challenge his second degree murder conviction, and a "second jury could potentially make a factual finding that is contrary to what the first jury found" via a guilty verdict on attempted murder. *Id.* at 31. But every retrial following inconsistent guilty verdicts permits findings contrary to the first trial. Moreover, it would be absurd to allow a petitioner's decision not to challenge one of the allegedly inconsistent guilty verdicts to subvert this Court's authority to impose the proper remedy. No precedent establishes that a defendant can attack only one of two allegedly inconsistent guilty verdicts to force outright reversal on the other instead of retrial.

A. Double jeopardy does not bar retrial.

Nor does double jeopardy bar retrial. Pet. Br. 31-33. First, United States Supreme Court precedent holds that double jeopardy does not apply where the defendant consented to the process that led to the error, as petitioner did here by agreeing to the attempted murder IPI. *See* Peo. Br. 40. In *Currier v. Virginia*, 585 U.S. 493 (2018), the defendant agreed to sever his trials, and the Court held that the verdict of acquittal on some charges did not preclude him from being subsequently prosecuted on the other charge or restrict the issues in that prosecution. *Id*. at 497-503. Petitioner asserts that *Currier* is only a plurality opinion, *see* Pet. Br. 33, but the relevant portion of the opinion, Part II, is "the opinion of the Court." 585 U.S. at 495; *see also id.* at 512 ("when a defendant's voluntary choices lead to a second prosecution he cannot later use the Double Jeopardy Clause, whether thought of as protecting against multiple trials or the relitigation of issues, to forestall that second prosecution") (Kennedy, J., concurring in part). Thus, binding Supreme Court precedent permits retrial because by agreeing to the attempted murder IPI, petitioner consented to the process.

Second, double jeopardy bars retrial only if there is an identity of statutory elements between the two charges, which is not the case for second degree murder and attempted first degree murder. While the portion of *Currier* discussing this issue was a plurality opinion, it provides persuasive authority that in criminal trials "retrial of an issue can be considered

tantamount to the retrial of an offense" only if the defendant can "show an identity of *statutory elements* between the two charges against him." 585 U.S. at 504 (plurality) (emphasis in original); *see also Iannelli v. United States*, 420 U.S. 770, 786, n.17 (1975) (analysis "focuses on the statutory elements of the offense"). Second degree murder and attempted murder do not share identical elements. *Compare* 720 ILCS 5/9-2(a) (second degree murder committed when defendant commits first degree murder as defined in paragraphs (1) or (2) of first degree murder statute and proves mitigating factor) with 720 ILCS 5/8-4(a) (attempted murder committed when, with intent to kill, defendant does any act that constitutes substantial step toward commission of first degree murder).

Third, for double jeopardy to bar retrial on the attempted murder charge for shooting Sheena, the Court must conclude that the jury necessarily found that petitioner had the same unreasonable belief in the need for self-defense then as when he fired the shot that led to his second degree murder conviction for killing David. *See* Peo. Br. 42. But, as discussed, the jury rationally could have found that petitioner acted with different beliefs in the need for self-defense when he fired the shots at David and Sheena. *See supra* pp. 14-17.

Finally, double jeopardy does not apply because there was no judgment of acquittal. *See* Peo. Br. 41. To demonstrate "issue preclusion" in the criminal context, a defendant "bear[s] the burden of showing that the issue

. . . has been 'determined by a valid and final judgment of *acquittal*.'" *Bravo-Fernandez v. United States*, 580 U.S. 5, 22 (2016) (emphasis added) (quoting *Yeager v. United States*, 557 U.S. 110, 119 (2009)). While petitioner quotes *Bravo-Fernandez* discussing the preclusive effect of a "valid and final judgment," the Court repeatedly made clear that was simply shorthand for a "valid and final judgment of acquittal." *Id.*; *see also id.* at 12 (burden on defendant to demonstrate issue "was actually decided by a prior jury's verdict of acquittal") (cleaned up); *id.* at 10 ("absence of appellate review of acquittals . . . calls for guarded application of preclusion doctrine in criminal cases"); *see also Yeager*, 557 U.S. at 119) ("proper question" is whether new charge is "same offence" as the "one acquitted from"). Petitioner was not acquitted of either charge against him and, notably, cites no case in which double jeopardy barred retrial based on a guilty verdict.

In sum, the People are not barred from retrying petitioner because he agreed to the instruction that caused the alleged error, the offenses were different both in their statutory elements and underlying acts, and petitioner was never acquitted. Accordingly, double jeopardy does not bar application of this Court's well-settled remedy for inconsistent verdicts or jury instruction errors — retrial.

B. If double jeopardy bars retrial on attempted murder, the proper remedy is to enter a conviction for aggravated battery with a firearm.

Finally, even if retrial were not permitted, this Court should enter a conviction for the lesser included offense of aggravated battery with a firearm for the attempted murder conviction and remand for resentencing. *See* Peo. Br. 43. A "defendant may be convicted of an uncharged offense if it is a lesser-included offense of a crime expressly charged in the charging instrument, and the evidence adduced at trial rationally supports a conviction on the lesser-included offense and an acquittal on the greater offense." *People v. Clark*, 2016 IL 118845, ¶ 30. Petitioner does not contest that aggravated battery with a firearm is a lesser included offense of attempted murder and that the evidence at trial supports the conviction. Petitioner's argument that Rule 615 does not permit this Court to enter a conviction for a lesser included offense, Pet. Br. 37, misunderstands the rule and ignores that it would be unjust for petitioner to be exonerated even if the jury found him guilty of the lesser included offense.

Petitioner is incorrect that this Court reviews an appellate court's decision not to enter a conviction for a lesser included offense under Rule 615(b)(3) for abuse of discretion. *Id.* This Court has independent authority under the rule to enter a conviction for the lesser included offense. Rule 615(b) states that on appeal "the reviewing court may: . . . (3) reduce the degree of the offense of which the appellant was convicted." Ill. S. Ct. R.

615(b)(3). Under the rule's plain language, this Court — a "reviewing court" — has authority to enter a conviction for a lesser included offense; it is not limited to reviewing the appellate court's decision.

This Court's precedent confirms that interpretation. "Rule 615(b)(3) provides the appellate court with broad authority to reduce the degree of a defendant's conviction," and, "[l]ikewise, it is within this [C]ourt's authority to utilize Rule 615(b)(3) to reduce the degree of a defendant's conviction." *People v. Kennebrew*, 2013 IL 113998, ¶ 25. Thus, if reversal of the attempted murder conviction is required, Rule 615(b)(3) authorizes this Court to enter a conviction for aggravated battery with a firearm.

Petitioner also argues that the People forfeited the argument by not asserting below that entering a conviction for the lesser included offense was an available remedy. Pet. Br. 36. But this Court, based on "policy concerns," has rejected forfeiture as a reason not to exercise its authority under Rule 615(b)(3) when it would mean a defendant escapes punishment for conduct a jury found criminal. *Kennebrew*, 2013 IL 113998, ¶ 24. *Kennebrew* explained that "it would be unjust for the defendant to obtain an acquittal, after the jury found him guilty of the greater offense, merely because" a court determined that the law did not permit "a conviction of the greater offense." *Id.*; *see also Knaff*, 196 Ill. 2d at 476 (instructing jury on uncharged lesser included offense proper after trial court determined that evidence failed to prove greater offense to protect "society's interest in avoiding the unjustified

exoneration of wrongdoers"). Accordingly, were this Court to find error and that retrial were improper, this Court should enter the conviction for the lesser included offense to avoid an unjust result.

CONCLUSION

This Court should reverse the judgment of the appellate court.

September 17, 2024

Respectfully submitted,

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RULE 341(c) 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 containing 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, and the certificate of service, is 5942 words.

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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. On September 17, 2024, the foregoing **Reply Brief of Respondent-Appellant People of the State of Illinois** was filed with the Clerk of the Supreme Court of Illinois, using the Court's electronic filing system, which provided service to the following:

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