No. 122958

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, -vs- JAFARIA DEFORREST NEWTON Defendant-Appellant	))))))))))	Appeal from the Appellate Court of Illinois, No. 4-15-0798. There on appeal from the Circuit Court of the Eleventh Judicial Circuit, McLean County, Illinois, No. 15-CF-8. Honorable Robert L. Freitag, Judge Presiding.

REPLY BRIEF FOR DEFENDANT-APPELLANT

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ORAL ARGUMENT REQUESTED

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ARGUMENT

The State failed to prove beyond a reasonable doubt that, on January 1, 2015, First Christian Church was an active church used primarily for religious worship.

In his brief, Jafaria Newton argued that the State failed to prove beyond a reasonable doubt that, on January 1, 2015, First Christian Church was an active church used primarily for religious worship. (Appellant's Br. 9) Specifically, Newton argued that Section 407(b)(2) of the Illinois Controlled Substances Act requires the State to demonstrate that the purported church was "used primarily for religious worship," on the date of the offense. (Appellant's Br. 11–16) Newton also argued that Detective Jared Bierbaum's testimony, the State's only evidence on this issue, failed to establish that Bierbaum was "sufficiently familiar" with First Christian Church to provide particularized evidence showing it was used primarily for religious worship on January 1, 2015. (Appellant's Br. 16–24) The State disagrees.

In response, the State makes three broad arguments. The State first argues that "the evidence was sufficient to prove that [Newton's] drug sale occurred within 1,000 feet of a church." (St. Br. 9–10) The State next argues that "neither statute nor case law requires [it] to present particularized evidence" on a purported church's use as a place of worship. (St. Br. 11–15) Finally, the State argues that Newton's argument is a challenge to the foundation of Bierbaum's testimony, which is "belated" and thus "forfeited and meritless." (St. Br. 15–17) The State is incorrect.

A.

Newton properly challenged the sufficiency of the State's evidence, and not its admissibility, and thus it is not forfeited.

The State contends that Newton's challenge to the sufficiency of Bierbaum's testimony "is an untimely attack on the [testimony's] admissibility." (St. Br. 15)

Citing *People v. Woods*, 214 Ill. 2d 455 (2005), the State contends that Newton may not re-characterize his argument as a challenge to the sufficiency of the evidence. (St. Br. 16) Thus, the State argues that the "proper way to attack such a deficiency is through an objection to the lack of foundation." (St. Br. 15–16) As such, the State asserts that this Court should reject the issue presented as a "forfeited challenge to the foundation of Bierbaum's testimony." (St. Br. 16) The State is incorrect.

Woods is inapplicable to the issue presented. In *Woods*, the appellate court reversed the defendant's conviction, holding that the evidence presented at defendant's trial was insufficient to sustain a guilty verdict because the State failed to establish a sufficient chain of custody for the controlled substance. *Woods*, 2014 Ill. 2d at 458. On appeal to this Court, the State argued that the "defendant's failure to object to the chain of custody in the trial court, combined with his stipulation to the narcotics, waives any claim that the State's chain of custody was deficient." *Id.* at 469. This Court agreed with the State, and held "that, under the facts presented ***, the appellate court erred by failing to hold that [the] defendant waived his chain of custody challenge." *Id.* at 469–70.

This Court explained "that a challenge to the State's chain of custody" is a challenge to the manner in which the evidence is admitted at trial. *Woods*, 2014 Ill. 2d at 471. "Accordingly, a defendant's assertion that the State has presented a deficient chain of custody for evidence is a claim that the State has failed to lay an adequate foundation for that evidence." *Id.* So, the question presented in *Woods* was on the admissibility of the evidence, and thus subject to the general rule of waiver. *Id.* Therefore, this Court rejected the defendant's attempt to label the issue as a sufficiency challenge. *Id.*

Unlike in *Woods*, the issue here is on the nature of the evidence required for the State to meet its burden of proof. *People v. Hardman*, 2017 IL 121453, ¶ 33. Specifically, the question presented is whether Bierbaum's testimony was sufficient to prove that First Christian Church was primarily used for religious worship. *See People v. Sims*, 2014 IL App (4th) 130568, ¶ 137 (framing the issue as a challenge to the sufficiency of the evidence). "The lack of a foundational objection means the testimony, for whatever it is worth, becomes part of the evidence [and] is given its natural probative effect." *Id.* This issue presents a question of statutory interpretation subject to *de novo* review. *Hardman*, 2017 IL 121453, ¶ 19.Newton properly challenged the sufficiency of the State's evidence, and not its admissibility, and thus it is not forfeited.

B.

Section 407(b)(2) required the State to demonstrate, with particularized evidence, that First Christian Church was used primarily for religious worship on January 1, 2015.

The State argues that neither the text of Section 407(b)(2) nor this Court's case law requires "particularized evidence" to prove that First Christian Church was used primarily for religious worship on January 1, 2015. (St. Br. 11–15) The State makes several contentions in support of this argument. (St. Br. 11–15) All are incorrect.

The State contends that, "to the extent that certain language in" *People v. Hardman* can be read as requiring "particularized evidence" for a Section 407(b)(2) conviction, "the discussion was unnecessary to *Hardman*'s holding and should be treated as dicta." (St. Br. 14) Thus, the State requests this Court to apply the "same rule [for] whether [a] building is a school, a church, or any other location

with which a lay witness could reasonably be familiar." (St. Br. 13) The State's position ignores *Hardman*'s reasoning.

In *Hardman*, the defendant argued that, although he was proven guilty of possession of a controlled substance with intent to deliver, the State failed to present sufficient evidence to prove the offense occurred within 1,000 feet of real property comprising a school. *Hardman*, 2017 IL 121453, ¶ 14. This Court framed the question as "whether the statute requires the State to present particularized evidence of a building's use." *Id.* at ¶ 19. After discussing relevant appellate court cases, this Court stated that "subsections 407(b)(1)–(6) require the State to demonstrate that the purported church was used primarily for religious worship." *Id.* at 33.

Although that statement "was not strictly necessary to" *Hardman*'s holding, *i.e.* that Section 407(b) does not require particularized evidence on a purported school's use, "it was also not the kind of ill-considered dicta that [courts are] inclined to ignore." *Kappos v. Hyatt*, 566 U.S. 431, 443 (2012). In *Hardman*, this Court carefully examined the various provisions of sections 407(b) and 407(c) and determined that schools, unlike churches, required no particularized evidence. *Hardman*, 2017 IL 121453, ¶ 33. Furthermore, the Court reviewed the same appellate court cases Newton cited on the enhancing location of churches, and concluded that "subsections 407(b)(1)–(6) require" demonstrating "that [a] purported church was used primarily for religious worship." *Id.* at ¶¶ 25–33. Notably, in so doing, this Court rejected the defendant's argument to treat schools like churches. *Id.* at ¶¶ 25, 31. So, this Court's statement requiring particularized evidence for churches was a statement of law on a question that was directly involved in

Hardman, and briefed and argued by counsel. *Id.* at ¶¶ 25–33. It is thus a well-reasoned and fully-considered ruling that has binding force of law. *See* BRYAN A. GARNER ET AL., THE LAW OF JUDICIAL PRECEDENT 62–65 (2016) (discussing judicial dicta).

The State also contends that the appellate court cases Newton cited are distinguishable. (St. Br. 12–13) As stated, this Court carefully reviewed and considered those cases in *Hardman*, and concluded that "subsections 407(b)(1)–(6) require" demonstrating "that [a] purported church was used primarily for religious worship." *Hardman*, 2017 IL 121453, ¶¶ 25–33. But the State contends that "the statute says nothing about a separate evidentiary requirement to prove worship. (St. Br. 11) Similary, Section 407(b) says nothing about an evidentiary requirement for demonstrating a building's use as a school. 720 ILCS 570/407(b)(2). Yet, in Section 407(c), the legislature made it "clear that the State need not present particularized evidence as to a purported school's use." *Hardman*, 2017 IL 121453, ¶ 33. Conversely, as this Court has noted, the legislature made no such statutory clarification for a purported church's use. *Id.*

The State further suggests that the religious worship use requirement of Section 407(b)(2) is limited to the phrase "other building, structure, or place." (St. Br. 11) Yet such a reading would violate the doctrine of *ejusdem generis*, which provides that "when a statutory clause specifically describes several classes of persons or things and then includes 'other persons or things,' the word 'other' is interpreted as meaning 'other such like.'" *People v. Davis*, 199 Ill. 2d 130, 138 (2002). The State gives no reason for disregarding this doctrine. The State simply argues that "if the jury can infer that a building is [structurally] a church, by definition, it also must be able to infer that [it] is used primarily for worship." (St. Br. 12)

The State's argument is incorrect. Abandoned buildings that are structurally churches are, by definition, not used for religious worship. Similarly, operational buildings that are structurally churches are not necessarily used primarily for religious worship. (Appellant's Br. 23–24) Notably, although the definition of church includes "a building for public worship," it also includes the "clergy," "the body of all Christians," or an "institutionalized religion as a political or social force." *Church*, THE OXFORD AMERICAN DICTIONARY AND LANGUAGE GUIDE (1999). Applying the doctrine of *ejusdem generis*, to include the phrase "used primarily for religious worship," limits the statutory term "church" to the legislature's intended purpose. *See, e.g.*, *Davis*, 199 Ill. 2d at 138–39 (applying the doctrine to determine whether a pellet or BB gun is a dangerous weapon within the meaning of the armed violence statute); *see also People v. Falbe*, 189 Ill. 2d 635, 647–48 (2000) (finding the purpose of the Section 407(b)(2) place of worship enhancement was to create a protected zone around such places).

Finally, the State cites this Court's opinion in *People v. Wright*, 2017 IL 119561, to support its request to treat churches like schools under Section 407(b)(2). (St. Br. 12) However, the State's reliance on *Wright* is misguided. The statutory provisions at issue in *Wright* are grammatically distinguishable from Section 407(b)(2). Section 407(b)(2) required the State to demonstrate, with particularized evidence, that First Christian Church was used primarily for religious worship on January 1, 2015. *Hardman*, 2017 IL 121453, ¶ 33 (citing Section 407(b)(1)–(6)). Whereas the statutory language involved in *Wright* excluded from the definition of a firearm certain projectile firing devices. *See Wright*, 2017 IL 119561, ¶ 71 (quoting 430 ILCS 65/1.1 (2010); 720 ILCS 5/2-7.5 (2010)).

Also, the State incorrectly contends that this Court concluded that the State in *Wright* was not required to prove the gun at issue "met the technical statutory definition." (St. Br. 12) In fact, the State provided sufficient testimony establishing that the witnesses could credibly determine that the gun in question was a firearm under the relevant statute. *Wright*, 2017 IL 119561, ¶ 71. The Court explained:

> "[A witness] testified at trial that [the defendant] *** lifted his hoodie to reveal what 'looked like a black automatic, black gun.' He thought it was a semiautomatic and related that he had experience firing such guns. [The witness] testified that he was '100% sure' that the weapon [the defendant] displayed was an 'actual firearm.' *** Additionally, [another witness] testified that he had seen guns before and believed [the defendant's] gun was a '9 millimeter pistol.'" *Wright*, 2017 IL 119561, ¶ 76.

This Court found that the witnesses' testimony was sufficient to prove the gun fell under the statutory definition. *Wright*, 2017 IL 119561, ¶ 76.

In short, this Court's opinion in *Hardman* is consistent with the plain language and purpose of Section 407(b)(2). The plain and ordinary language of Section 407(b)(2) provides for an aggravated penalty for drug violations occurring "within 1,000 feet of the real property comprising any church, synagogue or other building, structure, or place used primarily for religious worship." 720 ILCS 570/407(b)(2). The purpose and aim of this enhanced penalty is to create a protected zone around such places. *Falbe*, 189 Ill. 2d at 647–48. Consequently, Newton's right to due process required the State to demonstrate, with particularized evidence, that First Christian Church was an active church used primarily for religious worship on the date in question: January 1, 2015. U.S. CONST. amend. XIV; ILL. CONST., 1970, art. 1, § 2; *In re Winship*, 397 U.S. 358, 364 (1970); *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000).

C.

Bierbaum's testimony failed to establish that he was sufficiently familiar with First Christian Church to provide particularized evidence showing it was used primarily for religious worship on January 1, 2015.

Holistically, the State argues that "the evidence more than sufficed for the jury to conclude that [Newton] sold drugs within 1,000 feet of a church on January 1, 2015, as required by [Section] 407(b)(2)." (St. Br. 10) The State notes that Bierbaum testified that he "was familiar with [First Christian Church] from both his personal and professional experience, which included at least three years as a detective and patrol officer." (St. Br. 10) The State also notes that "Bierbaum testified that [First Christian Church] appeared to be in use *** because he observed the sign out front and cars coming and going from [its] parking lot." (St. Br. 10) Thus, the State contends that "there was nothing unreasonable, improbable, or unsatisfactory about the jurors' conclusion." (St. Br. 10) The State is incorrect.

For one, the State invites this Court to use the more differential standard of review for ordinary sufficiency challenges. (St. Br. 9) In *Hardman*, this Court ruled that whether Section 407(b)(2) requires the State to present particularized evidence of a building's use involves a question of statutory interpretation subject to *de novo* review. *Hardman*, 2017 IL 121453, ¶ 19. Also, where the issue only presents the question of whether a settled set of facts sufficed to prove guilt, the standard of review is *de novo* because the question is a purely legal one. *People v. Bradford*, 2016 IL 118674, ¶¶ 14–15. Here, the only question at issue is whether Bierbaum's testimony was sufficient to meet the statutory requirement of particularized evidence. (Appellant's Br. 17; citing *Hardman*, 2017 IL 121453, ¶ 33) As such,

the standard of review is *de novo*. *Bradford*, 2016 IL 118674, ¶¶ 14–15. But, even under the more differential standard of review, Bierbaum's testimony is insufficient to establish that First Christian Church was primarily used for religious worship on January 1, 2015.

The State contends that Newton "never precisely defines what he means by 'particularized evidence.'" (St. Br. 11) This contention is unpersuasive and misguided. The total weight of the relevant case law requires a witness to be "sufficiently familiar" with the building much like "'someone affiliated with the church' [or] with personal knowledge that the church was active on the dates of the offenses." *People v. Cadena*, 2013 IL App (2d) 120285 at ¶ 18 (quoting *People v. Ortiz*, 2012 IL App (2d) 101261, ¶ 11); *People v. Fickes*, 2017 IL App (5th) 140300, ¶ 27. The case law requires police officers to testify that their knowledge of the building's primary use results from regular contact with the building's community and activities, obtained by patrolling the area or conducting several police operations therein. *Cadena*, 2013 IL App (2d) 120285, ¶¶ 17–18; *Fickes*, 2017 IL App (5th) 140300, ¶¶ 23–24, 27.

Bierbaum's testimony that he knew that First Christian Church was operating as a church on January 1, 2015, because he saw "signage for a church," cars using the parking lot, the mowed grass, and the sign being in good condition is actually proof that he was not familiar with the building's use as a church. (Supp. Vol. III, R. 161–62, 164) Otherwise he would have related that he knew of the building's primary use from his work in the neighborhood and that it held religious services at specific times, under the leadership of a pastor he knew personally. *Cadena*, 2013 IL App (2d) 120285, ¶ 18. Nothing in his statement showed that, on January

1, 2015, the building was "used primarily for religious worship." *Fickes*, 2017 IL App (5th) 140300, ¶ 24. Bierbaum simply answered "yes" when the State asked him whether he "had occasion to drive past or walk past or see the First Christian Church." (Supp. Vol. III, R. 161) He never stated that he had developed close ties and working connections with members of the community surrounding First Christian Church. *Fickes*, 2017 IL App (5th) 140300 ¶ 23. He also never stated that he regularly patrolled the area, conducted a significant number of arrests therein, or acquired personal knowledge regarding First Christian Church's activities. *Id.*; *Cadena*, 2013 IL App (2d) 120285, at ¶ 18.

The State cites *People v. Sims*, 2014 IL App (4th) 130568, and contends that "Bierbaum's experience more than sufficed to establish personal knowledge that *** First Christian Church operated as a church." (St. Br. 17) Specifically, the State argues, because the appellate court in *Sims* noted that "Bloomington is not so large," it is not implausible for an officer to know "how" a building is used. (St. Br. 17) *Sims'* reasoning and the State's argument invite this Court to speculate on a would-be narcotics officer knowledge taking only the size of the relevant jurisdiction as support. *See Fickes*, 2017 IL App (5th) 140300, ¶ 17 (citing *Sims* 2014 IL App (4th) 130568, ¶ 138 (cautioning not to equate speculations as reasonable inferences made in the State's favor)). Regardless of the size of Bloomington, on which Newton offers no comments, Section 407(b)(2) requires officers to testify on the basis of their knowledge of a building's primary use. *See Cadena*, 2013 IL App (2d) 120285, ¶ 18 *and Fickes*, 2017 IL App (5th) 140300, ¶ 24 *in accord with Hardman*, 2017 IL 121453, ¶ 33.

Finally, the State contends "there was no factual dispute at trial about how [First Christian Church] was being used." (St. Br. 14) The State thus argues that it was given "no opportunity [at trial] to introduce additional evidence, if it had been required." (St. Br. 15) In a footnote, the State argues that trial counsel strategically chose not to raise any factual dispute because it would not have been in Newton's best interest. (St. Br. 15) The State contends that a "brief investigation would have revealed that" the building had been the current sanctuary of First Christian Church since 1949. (St. Br. 15)

This Court should ignore the State's "no factual dispute" argument. The State has "the burden of establishing [a] defendant's guilt beyond a reasonable doubt." *People v. Coulson*, 13 Ill. 2d 290, 296 (1958). Consequently, defendants are not required to raise every possible factual dispute in their defense. *People v. Weinstein*, 35 Ill. 2d 467, 470 (1967) (reaffirming that the burden of proof of the elements of an offense remains with the State throughout the trial and cannot shift to the defendant). Further, as the State and the appellate court have noted, the State could easily have presented evidence to establish that the building was used primarily for religious worship. *People v. Newton*, 2017 IL App (4th) 150798-U, ¶ 27 (citing *Sims*, 2014 IL App (4th) 130568, ¶ 106 (quoting *Ortiz*, 2012 IL App (2d) 101261, ¶ 11)); *see also Cadena*, 2013 IL App (2d) 120285, ¶ 18 (ruling the issue requires proof of "a fact that the State could have easily established"). The State however contends that it was not required to do so. (St. Br. 15) That is incorrect. Section 407(b)(2) required the State to demonstrate, with particularized evidence, that First Christian Church was used primarily for religious worship on January 1, 2015. *Hardman*, 2017 IL 121453, ¶ 33.

The State also contends, in the same footnote, that Newton's prior convictions made disputing the use requirement of Section 407(b)(2) irrelevant because Newton was facing the same sentencing range under Section 401(d). (St. Br. 15) The State is essentially arguing that this issue is moot. (St. Br. 15) This Court should also ignore this argument. "An appellate issue is moot when it is abstract or presents no controversy." *People v. Shum*, 207 Ill. 2d 47 (2003). A Section 401(d) conviction is for a Class 2 felony, whereas a Section 407(b) conviction is for a Class 1 felony. 720 ILCS 570/401(d) (2015); 720 ILCS 570/407(b) (2015). Newton is contesting the validity of his conviction for the enhanced offense. (Appellant's Br. 25) Although an appeal may be rendered moot if relief cannot be granted on the sentence imposed, nullification of a conviction may have important consequences to a defendant. *People v. Lynn*, 102 Ill. 2d 267, 272–73 (1984). These same consequences are not apparent when the conviction stands and the defendant challenged only the sentence. *Id.* at 273. Since Newton is calling into question the validity of the conviction for the enhanced offense, the fact that he might have received the same sentence does not render the issue moot. *Id.*

Section 407(b)(2) required the State to demonstrate, with particularized evidence, that First Christian Church was used primarily for religious worship on January 1, 2015. *Hardman*, 2017 IL 121453, ¶ 33. The State's evidence fell short of the particularized evidence required to prove beyond a reasonable doubt that Newton's unlawful delivery occurred within a 1,000 feet of a "church *** used primarily for religious worship." *Id.* As such, this Court should vacate Newton's conviction for the enhanced offense of delivery of a controlled substance within 1,000 feet of a church, and reduce his conviction to the lesser-included offense of delivery of a controlled substance. (Appellant's Br. 25)

CONCLUSION

Thus, the State failed to prove beyond a reasonable doubt that, on January 1, 2015, First Christian Church was an active church used primarily for religious worship.

CONCLUSION

Therefore, Jafaria Newton respectfully requests that this Court reverse the appellate court's judgment, vacate his conviction for the enhanced offense of delivery of a controlled substance within 1,000 feet of a church, reduce his conviction to the lesser-included offense of delivery of a controlled substance, a Class 2 felony, and remand for re-sentencing.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I, Sonthonax B. SaintGermain, certify that this reply brief conforms to the requirements of Supreme Court Rule 341(a) and (b). The length of this reply brief, excluding pages containing the Rule 341(d) cover and the Rule 341(c) certificate of compliance is fourteen pages.

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PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, -vs- JAFARIA DEFORREST NEWTON Defendant-Appellant	))))))))))	Appeal from the Appellate Court of Illinois, No. 4-15-0798. There on appeal from the Circuit Court of the Eleventh Judicial Circuit, McLean County, Illinois, No. 15-CF-8. Honorable Robert L. Freitag, Judge Presiding.

NOTICE AND PROOF OF SERVICE

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Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. On April 19, 2018, the Reply Brief was filed with the Clerk of the Supreme Court of Illinois using the court's electronic filing system in the above-entitled cause. Upon acceptance of the filing from this Court, persons named above with identified email addresses will be served using the court's electronic filing system and one copy is being mailed to the defendant-appellant in an envelope deposited in a U.S. mail box in Springfield, Illinois, with proper postage prepaid. Additionally, upon its acceptance by the court's electronic filing system, the undersigned will send 13 copies of the Reply Brief to the Clerk of the above Court.

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