No. 128676

IN THE
SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. TRENTON JEFFERSON, Defendant-Appellant.	)))))))))))	On Appeal from the Appellate Court of Illinois, Fifth Judicial District, No. 5-20-0185 There on Appeal from the the Circuit Court of the Twentieth Judicial Circuit, St. Clair County, Illinois, No. 11 CF 378 The Honorable John J. O'Gara, Judge Presiding.

BRIEF OF PLAINTIFF-APPELLEE PEOPLE OF THE STATE OF ILLINOIS

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POINTS AND AUTHORITIES

NATURE OF THE ACTION

In 2012, a jury found defendant guilty of first degree murder, and further found — in response to a special interrogatory regarding a sentencing factor — that the evidence did not prove beyond a reasonable doubt that defendant personally discharged the firearm that caused the victim's death. C210-11; R915-16.[1] The appellate court reversed defendant's conviction and remanded for retrial. C369. On remand, the trial court ordered that the People were estopped by the answer to the special interrogatory from presenting any evidence or argument that defendant personally discharged the firearm that caused the victim's death. A31. The People filed a certificate of impairment and appealed, A34-36, and the appellate court reversed the trial court's order, A11, ¶ 25. Defendant now appeals from that judgment. No question is raised on the charging instrument.

ISSUES PRESENTED FOR REVIEW

1. Whether the order barring all evidence that defendant personally discharged the firearm that caused the victim's death was appealable under Illinois Supreme Court Rule 604(a)(1) because it had the substantive effect of suppressing evidence and the People certified that it impaired their case.

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[1] Citations to the common law record appear as "C__," to the report of proceedings as "R__," to the trial exhibits as "E__," to defendant's brief as "Def. Br. __," and to defendant's appendix as "A__."

2. Whether the People may present evidence and argument that defendant personally discharged the firearm that caused the victim's death because that fact, though relevant to the ultimate fact that the People must prove — that defendant or one for whose conduct he is legally responsible caused the victim's death — is not itself an ultimate fact that the People must prove beyond a reasonable doubt to obtain a guilty verdict for first degree murder.

JURISDICTION

On September 28, 2022, this Court allowed defendant's petition for leave to appeal. Accordingly, this Court has jurisdiction under Supreme Court Rules 315 and 612(b).

STATEMENT OF FACTS

Defendant was with charged with first degree murder for fatally shooting Marcus Gosa in April 2010. C23. About a year later, a second suspect in the case, Renaldo Brownlee, was killed in a shootout with police in Missouri. *See* R28-31, 56. After defendant's first trial ended in a mistrial because the jury, unable to agree on the meaning of their instructions, was unable to reach a unanimous verdict, R535-37, defendant was retried and convicted.

I. Defendant Is Convicted of First Degree Murder.

The evidence at defendant's retrial showed that on the morning of April 11, 2010, Gosa was found dead, lying face-down near an overturned garbage can in an alley in East St. Louis. R715-18, 720, 723, 750-51; *see* E4,

17. He had been shot once in the back. R786-87. Although the fatal bullet was not found, R728, the entry wound in Gosa's back and exit wound in his chest were approximately 9 millimeters in diameter, R781-82, 784, 786, 788-89, and two spent 9-millimeter cartridge casings were recovered from the alley, R750. They had been fired from the same 9-millimeter semiautomatic firearm. R810-12.

Rochelle Davis, who was dating defendant at the time of the murder and had a child with him, R611-12, 631, testified that defendant picked her up from her mother's house the night before Gosa's body was found, R621-22. Defendant arrived in his brother's green Buick; his brother was driving, Brownlee was in the front passenger seat, and defendant was in the back seat with Brownlee's cousin. R622-23. Davis knew defendant sometimes carried a black 9-millimeter handgun, and when she joined him in the back seat, she saw that he had the black 9-millimeter handgun. R625-26, 640. In the front seat, Brownlee was carrying a chrome 9-millimeter handgun. R626. They drove to defendant's aunt's house, dropped Davis off there, and defendant left with the other men. R626-27.

Kiyanna Howard, who had started dating Brownlee a couple days before the murder, R563-65, 589, testified that Brownlee and defendant picked her up at around midnight in the same car that Davis had seen them in earlier that night, R565-68; *see* R569-70, 624; E2. The three drove around

town listening to music; defendant drove, Brownlee sat in the front passenger seat, and Howard dozed in the back seat. R570-72, 591-93.

Howard awoke to the sound of the car door slamming. R572, 593. She sat up, noticed that the driver's seat was empty, and saw defendant standing in front of the car. R572-73, 593-94. Brownlee was still in the passenger seat. R573. It was dark, and Howard did not know where they were. R578, 593. As she lay back down in the back seat, she heard gunshots, R573-74, 594; defendant then ran back to the car and got in, concealing an object in front of his body, R575-76, 596-97. He backed the car up and drove them away, saying, "Let's go. Let's go. I think I got that n[-word]." R575-76, 598-99. They went to a motel, where they stayed until around noon, then defendant drove Howard and Brownlee to Brownlee's grandmother's house and dropped them off. R579-82, 601, 606.

Davis testified that defendant returned to his aunt's house at around noon. R628. Defendant made several statements to Davis about having killed Gosa. R614. First, at his aunt's house, defendant told Davis that he was going to go to the club, get "in the Charlie Boys' face and be like one shot, man down." R614-15. (The Charlie Boys were a gang in Washington Park. R615.) Sometime later, defendant told Davis what happened. R618-20. Defendant had parked the car after seeing two boys walking in the alley. R619. He and Brownlee got out of the car, Brownlee fired his gun a few

times, then defendant fired a few shots, which were followed by a scream and what sounded like someone falling over something. R619-20, 650-51.

Defendant also made threats that Davis understood to refer to defendant having killed Gosa. R616-17, 631-32. First, during an argument, defendant told her "If you tell on me, I kill you." R616-17. Second, when she later visited defendant after they had broken up and told him about her new boyfriend, defendant told her to tell her new boyfriend not to "end up like Marcus did." R631-32. And, finally, during one of Davis's visits, defendant expressed remorse about Gosa, crying and saying that he "hate[d] that [he] did it," and "didn't mean to do it." R632.

A few days after the murder, police apprehended defendant in the green Buick that Davis and Howard identified. R703-08.

After defendant was charged with Gosa's murder, he shared a jail cell with Reshon Farmer, who testified against defendant pursuant to a plea agreement on an unrelated armed robbery charge. R659. Farmer testified that defendant talked to him about the murder a couple times. R660. Defendant started telling Farmer about the murder after he returned from court one day, angry because he had learned that the mother of his child was going to testify against him. R686. Defendant said that he had been "into it with Washington Park" and had killed someone because the person was from that group. R662. Defendant did not say what kind of gun he used or how many times he shot the victim, nor did he identify the victim to Farmer, *id.*;

he said that he did not know the victim personally, but only as someone who was with the group from Washington Park, R666. Defendant said that before the shooting, he and his friend "Naldo" had been driving around in a green car. R663-64. Defendant said that Naldo did not shoot, R664-65, and it was Farmer's understanding was that Naldo was driving when they conducted a drive-by shooting, R682.

In closing, the prosecutor argued that the evidence proved that defendant "or one for whose conduct he was legally responsible" killed Gosa because it showed that either defendant or Brownlee shot Gosa, and, if Brownlee shot Gosa, that defendant was accountable for Brownlee's actions. R859-60. The trial court instructed the jury that to find defendant guilty of murder, it had to find that the evidence proved beyond a reasonable doubt that "defendant, or one for whose conduct he was legally responsible," (1) performed the acts that caused Gosa's death and (2) intended to kill or do great bodily harm to Gosa, knew that such acts would cause Gosa's death, or knew that such acts created a strong probability of death or great bodily harm to Gosa. R905-06.

The court further instructed the jury on the special interrogatory regarding the sentencing enhancement. R907-11. The court explained that if the jury "f[ou]nd the defendant guilty of first degree murder, [it] should then go on with [its] deliberations" to determine whether the prosecution had proved beyond a reasonable doubt that defendant "was armed with a firearm

and personally discharged the firearm that proximately caused the death of another person." R909; *see* R910 ("If you select 'guilty,' then you go to [the special interrogatory forms]. If you select 'not guilty,' leave these blank."). If the jury found that the evidence proved beyond a reasonable doubt that defendant personally discharged the firearm that caused Gosa's death, then it should return an affirmative answer to the special interrogatory. R907-11; *see* 730 ILCS 5/5-8-1(a)(1)(d)(iii) (providing sentence enhancement of 25 years to natural life "if, during the commission of the offense, the person personally discharged a firearm that proximately caused . . . death to another person").

After about an hour's deliberation, R914-15, the jury returned its verdict: defendant was guilty of first degree murder, R915; C210. With respect to the special interrogatory concerning the sentencing enhancement, the jury found that the evidence did not prove beyond a reasonable doubt that defendant personally discharged the firearm that caused Gosa's death. R915-16; C211.

II. Defendant's Conviction Is Vacated on Appeal, and the Case is Remanded for Retrial.

On appeal, the appellate court reversed defendant's conviction. C369. The appellate court found that the trial court had committed plain error by admitting several of defendant's statements to Davis because their probative value was substantially outweighed by the risk of unfair prejudice. C359-61, 366-67. Specifically, the appellate court held that defendant's statement upon returning to Davis on the morning of the shooting — that he was going

to the taunt the Washington Park gang members by saying "one shot, man down" — was clearly and obviously inadmissible because although the victim was shot only once, defendant told Davis that multiple shots were fired, and so his taunt referring to only one shot "appear[ed] to be about an unrelated shooting." C359.[2] The appellate court further held that defendant's threat to Davis — "If you tell on me, I kill you," which Davis believed referred to her telling on him for killing Gosa, R616 — was clearly and obviously inadmissible because it was "a threat to kill his girlfriend, which is wholly unrelated to the murder of Gosa." C360-61. Finally, the appellate court held that Davis's testimony that defendant later expressed remorse for killing Gosa was clearly and obviously inadmissible because his statement "I hate that I did it" did not explicitly "describe what [he] did." C361. In finding the trial evidence closely balanced, the appellate court noted that, based on the jury's response to the special interrogatory, "it appear[ed] that the jury rejected Howard's testimony" that defendant was the sole shooter. C365. The appellate court remanded the case for a new trial. C369.

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[2] "One shot, man down" is a lyric from the song, *O Let's Do It*, by Waka Flocka Flame. *See* https://www.songlyrics.com/waka-flocka-flame/o-let-s-do-it-lyrics/ (last visited July 5, 2023); *see also* R244-45 (Davis's testimony from initial trial that when defendant returned after the shooting, "he was singing a song like 'one shot, man down,' saying he was going to go to the club" where the Charlie Boys hung out).

III. The Trial Court Bars the Prosecution from Presenting Evidence or Argument That Defendant Personally Discharged the Firearm That Caused the Victim's Death.

On remand, defendant moved to bar the prosecution from presenting any evidence or argument that he personally shot and killed Gosa's death, arguing that the prior jury's answer to the special interrogatory was inconsistent with a theory of principal liability. C383-88; R965-70. The prosecution conceded that it was barred from seeking the sentence enhancement based on defendant personally discharging the firearm that caused Gosa's death because the prior jury's answer to the special interrogatory precluded putting that same interrogatory to the new jury, R975, 979; C390, but argued that the answer to the special interrogatory had no preclusive effect on the evidence that could be presented to prove defendant guilty of first degree murder. The trial court granted defendant's motion, ordering that Howard and Farmer were "limited and precluded from offering testimony alleging or suggesting that the defendant in this case fired a gun causing the death of the alleged victim" and Davis's testimony was "limited to exclude . . . any testimony suggesting or implicating the defendant as the principal." C415.

The People appealed, and the appellate court reversed the trial court's order. C445. The appellate court held that the evidence could not be excluded based on the law of the case because its prior order had not "specifically restricted the State's ability to retry defendant under a principal liability theory, or to present evidence supporting only such a theory." C458.

The appellate court found the briefing inadequate to decide the merits of defendant's argument that the doctrines of estoppel or issue preclusion barred the prosecution from presenting evidence that defendant shot and killed Gosa. C461, 467. But the appellate court noted that "the references [in its prior opinion] to defendant's conviction having been based upon the accountability theory appear to have been in error and were based upon the misapplication of the jury's negative finding on the special interrogatory related to the sentencing enhancement finding." C455.

On remand, defendant again moved to exclude any evidence that he shot and killed Gosa. A13-22. The trial court granted the motion in part, ordering that "the prosecution is collaterally estopped from proceeding on a theory, and presenting evidence or argument that proof exists beyond a reasonable doubt that the Defendant was armed with a firearm *and* personally discharged the firearm *that proximately caused the death* of Marcus Gosa." A31 (emphasis in original). The court characterized its order as granting defendant's motion "in part" because it declined to exclude evidence that supported theories of both accomplice and principal liability. *Id.* But although evidence that could support both principal and accomplice liability would still be admissible, the prosecution was barred from arguing that the jury should consider such evidence as proof that defendant shot and killed Gosa, and the trial court would instruct the jury upon defendant's request "that there is insufficient evidence that proof exists beyond a

reasonable doubt that the Defendant was armed with a firearm *and* personally discharged *the firearm that proximately caused the death* of Marcus Gosa." A31-32 (emphasis in original). The People filed a certificate of impairment, A36, and appealed, A34-35.

IV. The Appellate Court Reverses the Trial Court's Order.

The appellate court reversed. A2, ¶ 1. It first held that it had jurisdiction because the trial court's order barring evidence that defendant shot and killed Gosa had the substantive effect of suppressing such evidence and was therefore appealable under Illinois Supreme Court Rule 604(a)(1). A9, ¶ 20. The appellate court then held that the prosecution was not estopped by the answer to the special interrogatory from presenting evidence that defendant was guilty under a theory of principal liability. A11, ¶ 25. As the appellate court explained, the purpose of the special interrogatory was to allow the prosecution to seek a sentence enhancement in compliance with *Apprendi v. New Jersey*, 530 U.S. 466 (2000), which requires that facts relied upon to increase punishment beyond the otherwise applicable statutory maximum (other than a prior conviction) must be submitted to the factfinder and found beyond a reasonable doubt. A10-11, ¶ 24. Because a special interrogatory submitted for sentencing purposes "applie[s] only to whether a sentencing enhancement should be applied, and not to the general verdict of guilt," the special interrogatory here did not preclude the prosecution from seeking a guilty verdict based on a theory of principal liability. A11, ¶ 24.

STANDARDS OF REVIEW

Whether the appellate court had jurisdiction under Illinois Supreme Court Rule 604(a)(1) is a question of law that this Court reviews de novo, *People v. Salem*, 2016 IL 118693, ¶ 11, as is the question of whether the People are estopped under the double jeopardy clause from presenting evidence and argument that defendant shot and killed the victim, *see People v. Prince*, 2023 IL 127828, ¶ 11 ("An issue involving the constitutional protection against double jeopardy 'presents a question of law subject to *de novo* review.'" (quoting *People v. Gaines*, 2020 IL 125165, ¶ 24)).

ARGUMENT

A jury found that defendant was guilty of first degree murder because the evidence proved beyond a reasonable doubt that he or one for whose actions he was legally responsible (that is, Brownlee) intentionally caused the victim's death. The jury then answered a special interrogatory regarding a sentence enhancement in the negative, finding that although the evidence proved beyond a reasonable doubt that either defendant or Brownlee caused the victim's death, it did not prove beyond a reasonable doubt that defendant *rather than* Brownlee personally discharged the firearm that caused the victim's death. After defendant's conviction was vacated and the case remanded for retrial, the trial court ordered that the People are estopped by the prior jury's answer to the special interrogatory from presenting any evidence or argument that defendant shot and killed the victim as part of its

case-in-chief when retrying defendant for first degree murder. In other words, the People could present evidence that defendant was accountable for Brownlee killing the victim, but not that defendant killed the victim. This Court should affirm the appellate court's judgment reversing that order because the appellate court properly reviewed the order and correctly reversed it.

The appellate court properly reviewed the trial court's order under Illinois Supreme Court Rule 604(a)(1), which permits interlocutory review of orders having the substantive effect of suppressing evidence. Because the trial court's order expressly suppressed all evidence that defendant shot and killed the victim, it was appealable under Rule 604(a)(1).

The appellate court also correctly reversed the trial court's order because the answer to the special interrogatory regarding the sentencing factor does not estop the People from presenting any evidence or argument when retrying defendant for first degree murder. As a component of the double jeopardy bar against successive prosecution or punishment for the same offense, estoppel bars the People from relitigating an element of an offense if that same element was found not proven beyond a reasonable doubt in a prior prosecution, such that its relitigation renders the later prosecution unconstitutionally successive. In other words, an acquittal of one offense because the People failed to prove a particular fact beyond a reasonable doubt estops the People from retrying that same fact in a later prosecution for

another offense only if they must prove that fact beyond a reasonable doubt to prevail in the later prosecution.

Here, the fact that the prior jury found the evidence insufficient to prove beyond a reasonable doubt — that defendant personally discharged the firearm that caused the victim's death — is not a fact that the People must prove beyond a reasonable doubt for the new jury to find defendant guilty of first degree murder. Rather, to prove defendant guilty of murder, the People must prove beyond a reasonable doubt that he or one for whose conduct he is legally responsible caused the victim's death. The jury may find beyond a reasonable doubt that defendant or his accomplice caused the victim's death without deciding beyond a reasonable doubt *which* of defendant or his accomplice caused the death. Indeed, the jury may find beyond a reasonable doubt that defendant or his accomplice caused the victim's death without even *agreeing* which of the two caused the death. Accordingly, the jury's previous finding that the evidence did not prove beyond a reasonable doubt that defendant personally discharged the firearm that killed the victim does not estop the People from presenting evidence at defendant's retrial for murder where that is not a fact that must be proved beyond a reasonable doubt. The People still may present evidence of that fact to prove the ultimate fact that defendant or one for whose conduct he is legally responsible caused the victim's death.

I. The Order Excluding Evidence That Defendant Shot the Victim Was Appealable Under Rule 604(a)(1) Because It Had the Substantive Effect of Suppressing Evidence.

The People could appeal from the trial court's order because it had the "substantive effect" of "suppressing evidence." *See* Ill. S. Ct. R. 604(a)(1); *People v. Drum*, 194 Ill. 2d 485, 491 (2000) ("For the purposes of this aspect of Rule 604(a)(1), there is no substantive distinction between evidence that is 'excluded' and evidence that is 'suppressed.'"). The trial court ordered that the People were barred from "presenting evidence" that defendant "was armed with a firearm *and* personally discharged the firearm *that proximately caused the death* of Marcus Gosa." A31 (emphasis in original). In other words, the court barred any evidence that defendant shot and killed Gosa, permitting only evidence that defendant was accountable for Brownlee killing Gosa. The court further ordered that upon defendant's request it would instruct the jury that any evidence that *could* tend to prove that defendant shot and killed Gosa was insufficient to do so, A32, effectively admitting that additional category of evidence only for the limited purpose of proving that defendant was accountable for Brownlee killing Gosa. This order was appealable under Rule 604(a)(1) because it had the substantive effect of suppressing evidence that defendant shot and killed the victim.

Defendant's assertion that notwithstanding the order's explicit exclusion of any evidence that he shot Gosa, the order does not *actually* exclude evidence because it only states that the trial court "*would* bar any evidence" that defendant shot Gosa, Def. Br. 8 (emphasis in original), is

belied by the record. The trial court did not order that the prosecution *would be* barred from presenting evidence that defendant shot Gosa; it ordered that the prosecution "is" barred from presenting such evidence. A31. Moreover, an order that all evidence of a particular fact *will be* excluded if offered at trial is still an order excluding evidence.

Nor does the fact that the order *categorically* excludes evidence related to a particular fact mean that it does not exclude evidence. Defendant argues that although the order categorically excludes all evidence of a particular fact, it does not actually exclude evidence because it does not identify any specific pieces of evidence within the proscribed category that, when offered at trial, will be excluded. *See* Def. Br. 10 (arguing that order excluding all evidence of principal liability did not exclude evidence because "it did not bar a single identifiable item of evidence"). But by this rationale almost no pre-trial order that categorically excludes evidence of a particular kind or relating to a particular topic is an order excluding evidence. The great majority of trials are not retrials, and so the great majority of pre-trial orders excluding evidence are entered without the benefit of transcripts of the yet-uncalled witnesses' testimony. Trial courts generally cannot identify, line by line, what testimony will be admitted and what will be excluded.

Indeed, even where a defendant is being retried, a pre-trial order that categorically excludes evidence relating to a particular topic cannot do so simply by excluding particular lines of witnesses' prior testimony. Here, the

witnesses will be testifying nearly a decade after they last testified. They are unlikely to offer the same testimony verbatim, and so there is little use in parsing the wording of their prior testimony to determine the admissibility of particular lines. Thus, the fact that the order does not attempt to identify every line of unpresented testimony that will tend to prove that defendant shot and killed Gosa and therefore be excluded does not mean that the order does not exclude evidence.

Nor, as defendant asserts, *see* Def. Br. 9-10, is the People's appeal premature because the trial court has not yet determined every piece of unpresented testimony that will be excluded under its order. It is unclear under defendant's theory *when* the People would be permitted to appeal from the pre-trial order categorically excluding evidence that defendant shot and killed Gosa. For example, if the People wait until the admissibility of Farmer's testimony is decided at a later pre-trial hearing, they still might not be permitted to appeal under defendant's theory, for the trial court may determine during trial that portions of *other* witnesses' testimony also must be excluded under its pre-trial order. But if the People wait to see whether the trial court will apply its pre-trial order to exclude other witnesses' testimony during trial and no further testimony is excluded, then their appeal from the pre-trial order might well be untimely. *See People v. Holmes*, 235 Ill. 2d 59, 66-67 (2009) ("[A] party seeking review of an order appealable under Rule 604(a)(1) must timely appeal or file a motion to reconsider within

30 days."). Defendant's view of Rule 604(a)(1) as requiring that an order's every future application be identified before the order may be appealed is unworkable.

Moreover, the trial court's order has the substantive effect of excluding even the specific lines of prior testimony that it would permit at retrial for the limited purpose of proving accountability because it excludes that testimony for the purpose of proving that defendant shot Gosa himself. *See* A32. An order that excludes evidence for *some* purposes is still an order with the substantive effect of excluding evidence. *See United States v. DeCologero*, 364 F.3d 12, 22 (1st Cir. 2004) ("[O]f course 'exclusion' within the meaning of section 3731 need not be a complete exclusion."); *People v. Johnson*, 208 Ill. 2d 118, 130 n.3 (2003) (considering federal cases interpreting section 3731, the federal counterpart to Rule 604(a)(1), as persuasive authority). For example, an order barring the prosecution from using a defendant's statement obtained in violation of *Miranda* in its case-in-chief is appealable under Rule 604(a)(1), even though the order does not exclude the statement's use for impeachment purposes. *See People v. Snow*, 39 Ill. App. 3d 887, 888 (2d Dist. 1976) (entertaining appeal under Rule 604(a)(1) from pre-trial order suppressing statements as obtained in violation of *Miranda*); *see also Harris v. New York*, 401 U.S. 222, 226 (1971) (defendant's statement obtained in violation of *Miranda*, although inadmissible in prosecution's case-in-chief, is admissible for impeachment purposes).

Here, the court's order that the jury would be instructed that certain pieces of prior testimony could be considered only for the purpose of proving accountability, not for the purpose of proving principal liability, had the substantive effect of excluding that evidence under Rule 604(a)(1). For example, Howard's previous eyewitness testimony that only defendant got out of the car before she heard gunshots would be admissible at retrial because the court believed Howard "d[id] not know conclusively where Brownlee [wa]s" in the seconds between lying back down and hearing the gunshots, and so the testimony could support of a theory of accountability when viewed together with Davis's previous testimony that defendant said he and Brownlee both got out of the car. A31-32. But the trial court excluded those lines of Howard's testimony for the purpose of proving principal liability — that is, for the purpose of proving that defendant shot and killed Gosa. *Id.* Similarly, the court ordered that Davis's prior testimony about defendant's account of the shooting would be admissible only to show that defendant was "presen[t]" and to support a theory of accountability. A32-33. To the extent any evidence of accountability could also support principal liability, the court would instruct the jury to disregard it. *See* A32. Because the trial court's order excluded Howard's and Davis's prior testimony for the purpose of proving that defendant shot and killed Gosa, the order is appealable under Rule 604(a)(1).

Accordingly, defendant's reliance on *In re K.E.F.*, 235 Ill. 2d 530 (2009), *People v. Truitt*, 175 Ill. 2d 148 (1997), and *People v. Crossley*, 2011 IL App (1st) 091893, is misplaced. *See* Def. Br. 12. Those cases concerned orders barring the prosecution from presenting certain pieces of evidence unless it did so in a particular manner that, though available, was not the manner the prosecution preferred. In *K.E.F.*, the order allowed the prosecution to present a victim's prior statement but required that it first lay the necessary foundation. 235 Ill. 2d at 533-36. Similarly, in *Crossley*, the order allowed the prosecution to present blood-alcohol test results but required that it lay the foundation for those results by calling the phlebotomist who performed the blood draw rather than by introducing hospital records. 2011 IL App (1st) 091893, ¶¶ 2-3, 9. And in *Truitt*, the order allowed the prosecution to present an analyst's opinion but required that it do so through the analyst's testimony rather than the analyst's report. 175 Ill. 3d at 152. In sum, these orders *allowed* the prosecution to present the evidence at issue, just not in the manner the prosecution preferred; they did not have the substantive effect of excluding evidence. *K.E.F.*, 235 Ill. 2d at 539-40; *Truitt*, 175 Ill. 3d at 152; *Crossley*, 2011 IL App (1st) 091893, ¶¶ 9-10. In contrast, the order here does *not* allow the People to present evidence that defendant shot and killed Gosa in any manner; it categorically bars the People from presenting such evidence. *See* A31-32. Therefore, *K.E.F.*, *Truitt*, and *Crossley* are inapposite.

The trial court's order excludes any evidence that defendant shot and killed Gosa and provides that the jury will be instructed to disregard any evidence of accountability to the extent it also tends to show that defendant shot and killed Gosa. A31-32. Therefore, the order has the substantive effect of excluding evidence and is appealable under Rule 604(a)(1).

II. The Answer to the Special Interrogatory Regarding the Sentencing Factor Does Not Estop the People from Presenting Certain Evidence When Retrying Defendant for First Degree Murder.

The appellate court correctly reversed the trial court's order because the prior jury's answer to the special interrogatory regarding the sentencing factor does not estop the People from presenting any evidence or argument when retrying defendant for first degree murder. In criminal cases, estoppel is a component of the double jeopardy bar against successive prosecution or punishment. Accordingly, the People are estopped from retrying a fact in a later prosecution only if the fact must be proved beyond a reasonable doubt to obtain a conviction in that prosecution. In other words, estoppel applies only if the fact that the People previously failed to prove is an element of the offense they are now trying to prove — that is, if the fact is an ultimate fact rather than an evidentiary fact. Because the fact that the prior jury found not proven beyond a reasonable doubt — that defendant personally discharged the firearm that caused the victim's death — is not a fact that the People must prove beyond a reasonable doubt at defendant's retrial for

murder, the answer to the special interrogatory has no estoppel effect at retrial.

A. As a component of the double jeopardy bar against successive prosecution, estoppel bars relitigating a fact in a later prosecution after a prior acquittal for failure to prove that fact only if the same fact must be proved beyond a reasonable doubt to obtain a conviction in the later prosecution.

In the context of criminal proceedings, estoppel[3] "is a component of the double jeopardy clause," *People v. Carrillo*, 164 Ill. 2d 144, 151 (1995) (citing *Ashe v. Swenson*, 397 U.S. 436, 445-46 (1970)), which provides that no person may be put in jeopardy more than once "for the same offense," U.S. Const., amend. V; Ill. Const. 1970, art. I, § 10. Specifically, "[t]he double jeopardy clause protects against three distinct abuses": (1) a second prosecution "for the same offense" following an acquittal; (2) a second prosecution "for the same offense" following a conviction; and (3) multiple punishments "for the same offense." *People v. Gaines*, 2020 IL 125165, ¶ 22 (internal quotation marks omitted); *see Brown v. Ohio*, 432 U.S. 161, 165 (1977). Thus, "the relevant inquiry" when determining whether a judgment in a prior criminal

[3] The parties agree that defendant's claim is properly characterized as one of "direct estoppel" rather than "collateral estoppel" because it turns on the preclusive effect of a prior finding within the same case. *See* Def. Br. 14 n.3; *People v. Daniels*, 187 Ill. 2d 301, 320 n.3 (1999) ("Direct estoppel arises if the proceeding in which the defendant raises an estoppel claim is merely a continuation of a prior proceeding."). However, as the parties also agree, *see* Def. Br. 14 n.3, that distinction does not matter here, for the same rules govern both direct and collateral estoppel. *Daniels*, 187 Ill. 2d at 320 n.3 ("Claims of collateral estoppel and direct estoppel may be decided by application of the same rules.").

proceeding has any preclusive effect on a subsequent criminal proceeding is whether the offense to be tried at the new proceeding and the offense that was tried in the prior proceeding are "the 'same offense' for purposes of the double jeopardy clause." *People v. Totten*, 118 Ill. 2d 124, 131 (1987).

There are two ways in which offenses under different statutory provisions may be the "same offense" for double jeopardy purposes, such that an acquittal of one offense has a preclusive effect on a subsequent prosecution for another. First, under the same-elements test, two offenses are the same if one offense shares all its elements with the other; in other words, the offenses are either literally the same or one offense is a lesser-included offense of the other. *United States v. Dixon*, 509 U.S. 688, 696 (1993); *People v. Dinelli*, 217 Ill. 2d 387, 403-04 (2005). In that circumstance, an acquittal of one offense will bar subsequent prosecution for the other, *see Brown*, 432 U.S. at 169, with some exceptions when the offenses were initially tried together, *see Price v. Georgia*, 398 U.S. 323, 326-29 (1970).

The fact that two offenses may arise from the same conduct or rely on the same evidence to prove their different elements is irrelevant. *See Illinois v. Vitale*, 447 U.S. 410, 419-20 (1980) ("The mere possibility that the State will seek to rely on all the ingredients necessarily included in [one offense] to establish an element of [a different, later-charged offense] would not be sufficient to bar the latter prosecution."). Rather, the analysis under the double jeopardy clause "focuses on the elements of the offenses charged

rather than the evidence presented at trial." *Totten*, 118 Ill. 2d at 138 (citing *Vitale*, 447 U.S. at 416). Indeed, both this Court and the United States Supreme Court have explicitly rejected the alternative same-conduct rule, *Dixon*, 509 U.S. at 703-04, which focuses on whether, "'to establish an essential element of an offense . . . , the government will prove conduct that constitutes an offense for which the defendant has already been prosecuted,'" *id,* at 697 (quoting *Grady v. Corbin*, 495 U.S. 508, 510 (1990)); *see People v. Sienkiewicz*, 208 Ill. 2d 1, 5-6 (2003) ("reject[ing] explicitly the *Corbin* [same-conduct] test and . . . readopt[ing] the *Blockburger* same-elements test as the proper means of examining potential violations of the Illinois double jeopardy clause").

This case illustrates how the same-elements test applies. The sentence enhancement under 730 ILCS 5/5-8-1(a)(1)(d)(iii) may not be imposed unless the sentencing factor of personally discharging the firearm that caused the victim's death is proved beyond a reasonable doubt. As the People conceded below, R975, 979; C390, defendant cannot receive the sentence enhancement for personally discharging the firearm that caused the victim's death because the jury's finding that the evidence was insufficient to prove that sentencing factor bars retrial of the same sentencing factor should defendant again be found guilty of first degree murder. *See Sattazahn v. Pennsylvania*, 537 U.S. 101, 111-12 (2003) (plurality opinion) (finding that sentencing factor required to impose greater sentence was not proved beyond a reasonable doubt bars

retrial of that factor at future sentencing and therefore imposition of greater sentence based on that factor). In other words, when the jury found that the People failed to prove the aggravating sentencing factor beyond a reasonable doubt, "double-jeopardy protections attach[ed] to that 'acquittal' on the offense of 'murder plus aggravating circumstance[ ],'" and defendant cannot be retried for that same offense. *Id.* Rather, the People may retry him only for the lesser-included offense of first degree murder (of which he was convicted at the prior trial). *Price*, 398 U.S. at 326-29 (where defendant was convicted of lesser-included offense and acquitted of greater offense at same trial, he may be retried for lesser-included offense after conviction is overturned based on trial error but may not be retried for greater offense).

The second way that the double jeopardy clause protects against successive prosecution or punishment for the same offense is through its estoppel component, as defined in *Ashe v. Swenson*. *See Dowling v. United States*, 493 U.S. 342, 347-48 (1990) (citing *Ashe*, 397 U.S. at 344-45); Def. Br. 14 ("The doctrine of collateral estoppel, as applied to criminal law, was given firm definition in *Ashe v. Swenson*." (citation and footnote omitted)). The analysis under the estoppel component, like the analysis under the same-elements test, turns on the identity between elements of the offense of which the defendant was acquitted and the offense for which he is subsequently prosecuted. Under the estoppel component, an offense of which a defendant was previously acquitted is considered the same as an offense for which he is

subsequently prosecuted if the two offenses share an element, and that shared element is the element upon which the prior acquittal necessarily rested. *Currier v. Virginia*, 138 S. Ct. 2144, 2150 (2018); *Ashe*, 397 U.S. at 443-46; *see Yeager v. United States*, 557 U.S. 110, 123 (2009) ("[A] jury verdict that necessarily decided [an] issue in [the defendant's] favor protects him from prosecution for any charge for which that is an essential element."). In that circumstance, estoppel bars the subsequent prosecution because "to secure a conviction the prosecution must prevail on an issue the jury necessarily resolved in the defendant's favor in the first trial." *Currier*, 138 S. Ct. at 2150; *see Ashe*, 397 U.S. at 445-46; *see also Sanabria v. United States*, 437 U.S. 54, 72-73 (1978) (where defendant was previously "acquitted for insufficient proof of an element of the crime which [other offenses] would share," that acquittal barred prosecution for those other offenses).

But estoppel does not apply when "the prior acquittal did not determine an ultimate issue in the present case" — that is, when none of the elements of the offense currently being prosecuted were *necessarily* decided against the prosecution in the prior prosecution. *Dowling*, 493 U.S. at 348; *see also Currier*, 138 S. Ct. at 2150 (estoppel does not apply if there is a possibility that prior acquittal was on the basis of some element other than an element of the new offense); *Yeager*, 557 U.S. at 119 (estoppel bars relitigation of issue decided in defendant's favor in "prosecution for any charge for which that is an essential element"); *Yates v. United States*, 354

U.S. 298, 338 (1957), *overturned on other grounds by Burks v. United States*, 437 U.S. 1 (1978) ("[A] prior judgment need be given no conclusive effect at all unless it establishes one of the ultimate facts in issue in the subsequent proceeding."); *United States v. Bailin*, 977 F.2d 270, 280-81 (7th Cir. 1992) (estoppel applies "only when the relevant issue is 'ultimate' in the subsequent prosecution, *i.e.*, when the issue must be proven beyond a reasonable doubt"). This limit stems from the nature of the double jeopardy clause itself, which "speaks not about prohibiting the relitigation of issues or evidence but offenses." *Currier*, 138 S. Ct. at 2152 (plurality opinion).

Ashe demonstrates the proper application of estoppel in criminal cases. In *Ashe*, a group of armed men wearing masks burst into a room where six men were playing poker and robbed each of the poker players. 397 U.S. at 437. The defendant was first tried for the armed robbery of one of the poker players and acquitted. *Id.* at 438. The record showed that the acquittal necessarily rested on a failure to prove that the defendant was one of the masked robbers; there was no question that the armed robbery had occurred, and so "[t]he single rationally conceivable issue in dispute before the jury was whether the [defendant] had been one of the robbers," *id.* at 445, which the jury had been instructed was an element of the offense, *id.* at 439 (jury was instructed that "if the [defendant] was one of the robbers, he was guilty under the law even if he had not personally robbed [that particular poker player]"). After the defendant was acquitted of robbing one of the poker players, he was

tried for robbing another of the poker players, the jury was given the same instructions, and he was convicted. *Id.* at 439-40. *Ashe* held that the prior acquittal of robbing the first poker player barred the subsequent prosecution for robbing the second poker player because the record showed that the acquittal rested on a failure to prove the same element that the prosecution needed to prove in the second robbery prosecution: that the defendant was one of the masked robbers. *Id.* at 445; *see Dowling*, 493 U.S. at 347-48. Accordingly, the "second prosecution was impermissible because, to have convicted the defendant in the second trial, the second jury would have to have reached a directly contrary conclusion" on that shared element. *Dowling*, 493 U.S. at 348 (citing *Ashe*, 397 U.S. at 445).

This Court applies estoppel the same way. In *People v. Carrillo*, the defendant's prior acquittal of charges of attempted murder (for insufficient evidence of the intent to kill or do great bodily harm) and armed robbery (for insufficient evidence of intent to commit armed robbery) barred subsequent prosecution for intentional murder or felony murder predicated on armed robbery after the victim succumbed to her wounds. 164 Ill. 2d at 151-52. This Court reasoned that to secure a conviction for the subsequently charged offenses, the prosecution would have to prevail on the same intent elements that the factfinder had resolved against it at the previous trial. *Id.* But the prior acquittal for attempted murder did not bar a subsequent prosecution for knowing murder, which requires proof that the defendant knew the acts that

caused the victim's death created a strong probability of death or great bodily harm, 720 ILCS 5/9-1(a)(2), because such knowledge was not an element of any of the previous charges "and thus collateral estoppel [wa]s not implicated." *Carrillo*, 164 Ill. 2d at 152. Similarly, although the prior acquittal for armed robbery barred any subsequent prosecution for felony murder predicated on armed robbery, it did not bar subsequent prosecution for felony murder predicated on burglary or home invasion. *Id.*

Thus, under decisions of both the United States Supreme Court and this Court, when an offense requires proof of only some of multiple charged elements, the fact that one of those elements was previously found not proven beyond a reasonable doubt will not bar a subsequent prosecution altogether if the offense may still be proved based on the remaining elements. In that circumstance, the estoppel bar against successive prosecution is sometimes characterized as a bar against proving the acquitted element beyond a reasonable doubt and thereby obtaining a conviction on that specific basis. *See Bailin*, 977 F.2d at 282-83.

For example, in *Bailin*, the defendant was charged with racketeering, *id.* at 272, which required proof of at least two of the predicate acts alleged in the charging instrument, *see United States v. Torres*, 191 F.3d 799, 805-06 (7th Cir. 1999). *Bailin* held that the defendant's prior acquittal of only some of the charged predicate acts did not bar prosecution for racketeering altogether, 977 F.2d at 274-75, but only the use of evidence of the acquitted

predicate acts "to establish proof of the specified corresponding racketeering act charged in the substantive racketeering counts," *id.* at 282-83 (internal quotation marks omitted). In other words, the government could not relitigate the acquitted predicate acts *as elements* of the racketeering charge because it was estopped from obtaining a racketeering conviction on the basis that it proved the same predicate acts that it previously failed prove. *See id.*

But whether the estoppel bar is characterized as a bar against prosecuting an offense or a bar against proving an elements of an offense, "the only available remedy is the traditional double jeopardy bar against the retrial of the same offense — not a bar against the relitigation of issues or evidence." *Currier*, 138 S. Ct. at 2153 (plurality opinion); *see also, e.g.*, *Currier*, 138 S. Ct. at 1250 (majority opinion) (estoppel "forbids a second trial"); *Dowling*, 493 U.S. at 347 (estoppel means that "[a] second prosecution [i]s impermissible"); *Carrillo*, 164 Ill. 2d at 152 (estoppel "foreclose[s]" charges). After all, if an offense requires proof beyond a reasonable doubt of an element that was previously found not proven beyond a reasonable doubt, then it cannot be prosecuted at all. *Cf. United States v. Tirrell*, 120 F.3d 670, 677 (7th Cir. 1997) ("It would be anomalous indeed if a sovereign were allowed the greater power of reprosecuting individuals for offenses for which they had been acquitted but were denied the lesser power of proving the underlying facts of such offenses."). Accordingly, "'[s]o far as merely evidentiary facts . . . are concerned,' the Double Jeopardy Clause 'is

inoperative.'" *Currier*, 138 S. Ct. at 2154 (plurality opinion) (quoting *Yates*, 354 U.S. at 338)); *see People v. Stavrakas*, 335 Ill. 570, 579 (1929) (explaining that "ultimate facts" are those that jury must find beyond reasonable doubt to convict, unlike "evidentiary facts," which may support findings of ultimate facts but need not themselves be found beyond reasonable doubt); *see also People v. Hester*, 131 Ill. 2d 91, 98 (1989) (distinguishing between "elemental or ultimate facts" and "basic or evidentiary facts").

Because estoppel applies only when the People must prove a fact beyond a reasonable doubt after that same fact was found *not* proven beyond a reasonable doubt in a prior proceeding, estoppel "does not preclude the relitigation of an issue after an acquittal in a criminal trial when the subsequent disposition of the issue is governed by a lower standard of proof." *People v. Colon*, 225 Ill. 2d 125, 151 (2007); *see Dowling*, 493 U.S. at 349. Thus, a fact that was tried as an ultimate fact in one trial may be relitigated as a merely evidentiary fact in a subsequent trial. *See Dowling*, 493 U.S. at 348-49; *see also People v. Baldwin*, 2014 IL App (1st) 121725, ¶ 73 (evidence of sexual offense of which defendant was acquitted was admissible in subsequent prosecution for different offense because that sexual offense did not need to be proved beyond reasonable doubt at subsequent prosecution); *People v. Littleton*, 2014 IL App (1st) 121950, ¶ 69 (same for evidence of acquitted robbery at subsequent trial for different robbery).

The limits of estoppel are the same under the double jeopardy clauses of both Article I, Section 10 of the Illinois Constitution and the Fifth Amendment, for this Court has held that the Illinois clause is construed in lockstep with its federal counterpart. *Colon*, 225 Ill. 2d at 152-53. Thus, in *Colon*, the Court explained that there is no basis to depart from lockstep to interpret the double jeopardy clause of Article I, Section 10 as "precluding the relitigation of an issue under a lower standard of proof after an acquittal in a criminal trial." 225 Ill. at 152. The Court noted that nothing in the language and history of Article I, Section 10 provides such a basis. *Id.* at 153; *compare* Ill. Const. 1970, art. I, § 10 ("No person shall . . . be twice put in jeopardy for the same offense."), *with* U.S. Const., amend. V ("No person shall . . . be subject for the same offense to be put twice in jeopardy of life or limb[.]"); *see* 3 Record of Proceedings, Sixth Illinois Constitutional Convention 1376-80, 1390 (no reference to exclusion of evidence in discussion of Article I, Section 10); 6 Record of Proceedings, Sixth Illinois Constitutional Convention 43-44 (same with respect to Report of the Bill of Rights Committee). Nor is there any long-standing Illinois tradition of excluding evidence of acquitted conduct from a prosecution at which that conduct need not be proved beyond a reasonable doubt. *See Colon*, 225 Ill. 2d at 153; *see also People v. Caballes*, 221 Ill. 2d 282, 314 (2006) (long-standing state tradition of providing greater protection can justify departure from lockstep).

Defendant fails to identify any reason for the Court to depart from *Colon* or otherwise provide "the substantial grounds necessary to justify a departure from the lockstep interpretation in this case," *People v. Sneed*, 2023 IL 127968, ¶ 63. The only authority that defendant offers to suggest that Illinois has a long-standing tradition of barring evidence of acquitted conduct from a prosecution where that conduct need not be proved beyond a reasonable doubt is *People v. Haran*, 27 Ill. 2d 229 (1963). Def. Br. 17-18. But *Haran* is at odds with this Court's precedent both before and after.

Since at least the early 1900s, this Court has allowed evidence of acquitted conduct to be presented in a subsequent prosecution at which that conduct is not an element. In 1907, this Court held in *Nagel v. People* that because a robbery and murder that "grew out of the same act or series of acts" were not the same offense under the double jeopardy clause,[4] the prior acquittal for robbery neither barred the subsequent prosecution for murder, "[n]or was the State estopped by it from proving any of the facts connected with the crime charged in [the murder] indictment, although much or all of this evidence had been introduced in the former trial [for robbery]." 229 Ill. 598, 603-04 (1907). Then, in *People v. Kidd*, the Court reaffirmed that although two offenses "were committed in the same transaction and were so directly connected that the proof was in some respects inseparable," the

[4] The double jeopardy clause of Article I, Section 10 in the Illinois Constitution of 1970 is identical to the clause in the Illinois Constitution of 1870. *Compare* Ill. Const. 1970, art. I, § 10, *with* Ill. Const. 1870, art. I, § 10.

People "were not estopped by the former acquittal [of one offense] to prove any of the facts connected with the [other offense] charged in the case on trial although similar evidence was introduced in the former trial." 357 Ill. 133, 140-41 (1934) (citing *Nagel*, generally).

Similarly, the Court consistently permitted defendants who were acquitted of one offense to be prosecuted for another offense based on the same conduct, even though the Court was well aware that doing so necessarily entailed presenting evidence of the acquitted offenses.[5] In *People v. Fox*, the Court held that a defendant acquitted of arson for burning a building could still be prosecuted for burning the goods inside the building with the intent to injure the insurer. 269 Ill. 300, 311-12 (1915). Because the two offenses had different elements, the Court considered "[t]he evidence required to sustain the charge under one indictment" to be "entirely different from that required to sustain the charge under the other, although both the building and the goods might have been destroyed in the same fire," *id.*, and although the Court was aware that in fact evidence that the defendant hired

[5] Although now a defendant generally may not be subjected to successive prosecutions for offenses based on the same conduct, that is not due to estoppel but to the more recently developed common-law one-act, one-crime rule and the statutory rule governing compulsory joinder. *See, e.g.*, *People v. Smith*, 2019 IL 123901, ¶ 14 (one-act, one-crime rule, which bars multiple convictions for single physical act, "is not of constitutional dimension"); *People v. Hunter*, 2013 IL 114100, ¶ 10 ("The compulsory joinder statute requires the State to prosecute all known offenses within the jurisdiction of a single court in a single criminal case 'if they are based on the same act.'" (quoting 720 ILCS 5/3-3(b)).

someone to burn the building was presented at his trial for burning the goods, *id.* at 315-16. And in *People v. Allen*, the Court held that a defendant who drove his car into a group of people who were crossing the street, killing two of them, could be prosecuted for one death notwithstanding a prior acquittal for the other because the facts necessary to sustain convictions for the two offenses were different. 368 Ill. 368, 370-71, 380 (1937) (citing *Nagel* and *Fox*, generally); *accord People v. Mendelson*, 264 Ill. 453, 454-57 (1914) (acquittal of burglary for breaking into building with intent to steal from one tenant did not bar prosecution for burglary based on that same break-in but with intent to steal from another tenant because each offense required larcenous intents toward different victims); *see also People v. Vaughn*, 215 Ill. App. 452, 453 (2d Dist. 1919) ("regard[ing] it as well settled in this State that it is not enough that the act is the same in order to make the result of one prosecution being a bar to another, but the offense also must be the same"). Thus, decades of Illinois precedent demonstrate that there was no long-standing tradition of excluding evidence of acquitted conduct from a prosecution for a different offense.

Then, in 1963, *People v. Haran* held that because the defendant had been acquitted of rape for having intercourse with the victim, evidence of intercourse was inadmissible in a subsequent prosecution for a crime against nature, which did not require that intercourse be proved beyond a reasonable

doubt. 27 Ill. 2d at 235-36.[6] *Haran* acknowledged that its holding was inconsistent with numerous prior decisions in criminal cases, including *Nagel* and *Kidd*, *id.* at 232-35, but broke with that precedent by purportedly extending the civil estoppel doctrine articulated in *Hoffman v. Hoffman*, 330 Ill. 413 (1928), or "estoppel by verdict," to criminal cases, *id.* at 231-32.

But *Haran* applied *Hoffman*'s estoppel rule incorrectly. *Haran* held that the evidence of intercourse was inadmissible in the prosecution for the crime against nature because whether the defendant had intercourse was an ultimate fact in the prior rape prosecution, even though it was not an ultimate fact in the subsequent prosecution for a crime against nature. *See id.* at 231 (acknowledging that "the acts in question constituted different crimes"). But *Hoffman* made clear that "[t]o operate as an estoppel by verdict it is *absolutely necessary* that there shall have been a finding of a specific fact in the former judgment or record that is material and controlling in that case and *also material and controlling in the pending case*." 330 Ill. at 418 (emphasis added). In other words, the civil doctrine of estoppel by verdict under *Hoffman*, like the estoppel component of the double jeopardy clause defined in *Ashe v. Swenson*, does not apply unless the ultimate fact

[6] A crime against nature was defined as either anal sex between people or bestiality. *See* Deviate Sexual Behavior Under the New Illinois Criminal Code, 1965 Wash. U. L. Q. 220, 221 (1965), *available at* https://tinyurl.com/sft73xn5 (last visited July 5, 2023).

necessarily decided in the prior proceeding is also an ultimate fact that must be proved in the subsequent proceeding.[7]

Indeed, after *Haran*, this Court promptly returned to applying estoppel as articulated in *Hoffman* (and later, *Ashe*). For example, when the Court subsequently cited *Haran* in *People v. Borchers*, 67 Ill. 2d 578 (1977), and *People v. Ward*, 72 Ill. 2d 379 (1978), for the proposition that estoppel applies to criminal cases, it did so alongside *Ashe* and applied the definition of estoppel in *Ashe* and *Hoffman* — that when a defendant is acquitted on the basis of a particular element, that same element cannot be retried as an element of a different offense. *See Borchers*, 69 Ill. 2d at 581-89; *Ward*, 72 Ill. 2d at 382-86. Thus, *Borchers* concluded that the defendant could not be prosecuted for defrauding the government of $1,200 after being acquitted of a federal charge of defrauding the government of the same $1,200 because the offenses shared an element — the intent to defraud — and that shared element was the basis of the acquittal in the federal case. 69 Ill. 2d at 588. Similarly, *Ward* concluded that the defendant could not be prosecuted for perjury for falsely stating that he did not commit a burglary after he was

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[7] This same estoppel rule is codified in the Illinois Criminal Code. *See* 720 ILCS5/3-4(b)(2) (providing that prior prosecution bars subsequent prosecution "if that former prosecution . . . was terminated by a final order or judgment, even if entered before trial, which required a determination inconsistent with any fact necessary to a conviction in the subsequent prosecution[.]"); *see People v. Fosdick*, 166 Ill. App. 3d 491, 495-96 (1st Dist. 1988) ("Section 3-4(b)(2) of the Criminal Code embodies the common law doctrine of collateral estoppel, which is included in the double jeopardy prohibition of the fifth amendment to the United States Constitution.").

acquitted of that burglary because both required proof beyond a reasonable doubt that he committed the burglary. 72 Ill. 2d at 384-86.

Then, in 1985, in *People v. Mueller*, the Court reaffirmed that *Ashe* defines the limits of estoppel in criminal cases in Illinois, holding that "[e]xcept when there is a question of collateral estoppel [under *Ashe*], a substantial overlap in the proof introduced at different prosecutions is irrelevant for double jeopardy purposes as long as the offenses charged are distinct." 109 Ill. 2d 378, 387 (1985) (citing *Ashe*, 397 U.S. 436, and *Iannelli v. United States*, 420 U.S. 770, 785 (1975)); *accord Currier*, 138 S. Ct. at 2153 (plurality opinion) ("To prevent a second trial on a new charge, the defendant must show an identity of *statutory elements* between the two charges against him; it's not enough that 'a substantial overlap [exists] in the *proof* offered to establish the crimes.'" (quoting *Iannelli*, 420 U.S. at 785 n.17) (all emphasis original to *Currier*)). And when a few years later the United States Supreme Court in *Dowling* held that evidence of acquitted conduct may be presented at trial for an offense at which that conduct need not be proved beyond a reasonable doubt, *Dowling*, 493 U.S. at 348-49, this Court followed and has continued to do so ever since. *See Colon*, 125 Ill. 2d at 151-52 (applying *Dowling* to allow evidence of acquitted conduct at subsequent prosecution for probation revocation, where that conduct need not be proved beyond reasonable doubt); *In re Nau*, 153 Ill. 2d 406, 424-28 (1992) (same with respect to civil commitment proceeding); *People v. Jackson*, 149 Ill. 2d 540,

547-51 (1992) (same with respect to sentencing); *see also Baldwin*, 2014 IL App (1st) 121725, ¶ 73 (evidence of acquitted offense admissible in subsequent prosecution where that offense need not be proved beyond reasonable doubt); *Littleton*, 2014 IL App (1st) 121950, ¶ 69 (same).

Defendant cites several decisions from other jurisdictions in support of his argument that estoppel bars relitigation of facts that are merely evidentiary rather than ultimate in the subsequent prosecution, but those cases provide no cause to abandon this Court's well-established precedent and depart from lockstep with the United States Supreme Court on the subject. The federal case upon which defendant primarily relies, *Wingate v. Wainwright*, 464 F.2d 209 (5th Cir. 1972), *see* Def. Br. 19-21, is no longer good law after *Dowling*. The Fifth Circuit found no "meaningful difference in the quality of 'jeopardy' to which a defendant is again subjected when the state attempts to prove his guilt by relitigating a settled issue . . . whether the relitigated issue is one of 'ultimate' fact or merely an 'evidentiary' fact in the second prosecution." 464 F.2d at 213-14. But the Supreme Court subsequently held in *Dowling* that estoppel does not apply when "the prior acquittal did not determine an ultimate issue in the present case," and so does not bar "relevant and probative evidence that is otherwise admissible under the Rules of Evidence simply because it relates to alleged criminal conduct for which a defendant has been acquitted." 493 U.S. at 347-48; *see Currier*, 138 S. Ct. at 2154 (plurality opinion). Defendant's other pre-

Dowling federal cases are similarly unpersuasive. *Albert v. Montgomery* was overruled by *Dowling* because it held that estoppel bars evidence of acquitted conduct from being introduced "for *any* purpose." 732 F.2d 865, 869 (11th Cir. 1984) (emphasis in original). And *Feela v. Israel* is inapposite, for it reversed the defendant's conspiracy conviction because the jury may have found that the defendant committed an act in furtherance of the conspiracy by finding that he committed a theft of which he was previously acquitted, not because evidence of acquitted conduct is generally inadmissible. 727 F.2d 151, 155 (7th Cir. 1984). Finally, of defendant's post-*Dowling* cases, one does not acknowledge *Dowling* at all, *see Jackson v. State*, 183 So. 3d 1211, 1213-14 (Fla. Ct. App. 2016), and the other two confirm that estoppel bars relitigation of a fact decided by a prior acquittal in a later prosecution only if the fact is also an ultimate fact at that later prosecution, *see Bailin*, 977 F.2d at 280-81 (estoppel "only applies when the relevant issue is 'ultimate' in the subsequent prosecution, *i.e.*, when the issue must be proven beyond a reasonable doubt"); *Cercy v. States*, 455 P.3d 678, 689-90 (Wy. 2019) (because fact decided by prior acquittal was not ultimate fact in later prosecution, its admission was subject only to state evidentiary rules).

In sum, under both Illinois and federal law, a prior finding that a fact was not proved beyond a reasonable doubt does not bar evidence of that fact at a later prosecution unless the fact must be proved beyond a reasonable doubt as an element of the offense in the later prosecution as well.

B. The answer to the special interrogatory does not estop the People from presenting evidence at defendant's retrial because the fact that the jury previously found not proven beyond a reasonable doubt is not a fact that the People must prove beyond a reasonable doubt to prove defendant guilty of first degree murder.

The answer to the special interrogatory has no estoppel effect at defendant's retrial for first degree murder because the fact that the jury found not proven beyond a reasonable doubt — that defendant personally discharged the firearm that caused the victim's death — is not a fact that the People must prove beyond a reasonable doubt to prove defendant guilty of first degree murder. To prove defendant guilty of first degree murder, the People must prove beyond a reasonable doubt that he or someone for whose conduct he is legally responsible (1) caused the victim's death and (2) had the requisite intent. 720 ILCS 5/9-1(a)(1), (2); 720 ILCS 5/5-2; R904-05 (jury instructions on elements of first degree murder and accountability). The People may prove beyond a reasonable doubt that defendant or someone for whose conduct he is legally responsible caused the victim's death and had the requisite intent without proving beyond a reasonable doubt that (1) defendant or his accomplice caused the victim's death by discharging a firearm or (2) defendant *rather than* his accomplice caused the victim's death.

1. To sustain defendant's conviction of murder, the People need not prove beyond a reasonable doubt that defendant or his accomplice caused the victim's death by discharging a firearm.

It is not an element of first degree murder that the victim's death was caused in any particular *manner*, much less that the victim's death was

caused by the discharge of a firearm. *See* 720 ILCS 5/9-1(a)(1), (a)(2) (containing no reference to discharge of firearm or any other manner of death); *People v. Bloomingburg*, 346 Ill. App. 3d 308, 325 (1st Dist. 2004) ("the manner in which [the death] was accomplished — whether by firearm, stabbing, bludgeoning, poisoning, *etc.* . . . . is not an element of murder"); *see also People v. Alexander*, 2017 IL App (1st) 142170, ¶ 43 ("[P]ersonal discharge of a firearm is not an element of first degree murder even when the victim dies from a gunshot."); *People v. Sawczenko-Dub*, 345 Ill. App. 3d 522, 538-39 (1st Dist. 2003) (use of firearm is "not an inherent or essential element of first degree murder," but "[i]s only used to impose a longer sentence"); *People v. Moore*, 343 Ill. App. 3d 331, 348 (2d Dist. 2003) ("The firearm factor is not necessary to prove defendant guilty beyond a reasonable doubt of first-degree murder."); *accord People v. Sharpe*, 216 Ill. 2d 481, 526 (2005) (enhancement for personal discharge of firearm that causes victim's death has different elements than first degree murder). Therefore, the People will not need to prove beyond a reasonable doubt that defendant or his accomplice caused the victim's death by discharging a firearm.

2. To sustain defendant's conviction of murder, the People need not prove beyond a reasonable doubt that defendant *rather than* his accomplice caused the victim's death.

The jury may find defendant guilty of first degree murder if it finds beyond a reasonable doubt that he or one for whose conduct he is legally responsible caused the victim's death with the requisite intent, 720 ILCS 5/9-

1(a)(1), (2); 720 ILCS 5/5-2; R904-05; the jury need not find, either unanimously or beyond a reasonable doubt, *which* of defendant or his accomplice caused the death. *See People v. Dunbar*, 2018 IL App (3d) 150674, ¶ 29 (jury need not be unanimous regarding whether defendant is guilty as principal or under accountability theory); *People v. Jackson*, 372 Ill. App. 3d 605, 611 (4th Dist. 2007) ("Defendant was not entitled to a unanimous verdict on whether he fired the weapon or whether [his accomplice] fired the weapon."). Some jurors might believe defendant caused the death, others might believe his accomplice caused the death, and still others might be unsure which of the two caused the death; as long as the jury unanimously finds beyond a reasonable doubt that it was defendant or his accomplice who caused the victim's death, not some third party for whose conduct defendant is not legally responsible, nothing more is required. *See People v. Cooper*, 194 Ill. 2d 419, 436 (2000) (affirming conviction for aggravated battery because, "although the trial court did not make a finding as to which defendant shot [the victim], the court expressly stated that the shots were fired by one of them" and each was accountable for the other's actions). Therefore, defendant's guilt specifically under a theory of principal liability is not an ultimate fact at his retrial for first degree murder.

Defendant argues that even though his guilt as a principal is not an ultimate fact that the People must prove beyond a reasonable doubt, the jury's answer to the special interrogatory nonetheless estops the People from

presenting evidence of his guilt as a principal because the answer constitutes a finding that defendant is not guilty under a principal theory of liability and estoppel can bar the People "from presenting a particular *theory* of murder." *See* Def. Br. 18-19. But this argument fails for two reasons. First, defendant's insistence that the jury's finding that the evidence was insufficient to prove that he personally discharged the firearm that caused the victim's death means that the jury must have acquitted him as the principal and found him guilty under an accountability theory, Def. 16, places more weight on the jury's answer to a special interrogatory about a sentencing factor than that answer can bear. Second, even if the answer to the special interrogatory could be treated as a finding that the evidence was insufficient to prove that defendant was guilty as a principal, it still would not bar the People from presenting evidence of his guilt under a principal theory of liability because defendant's guilt as a principal is not an ultimate fact that the People must prove at his retrial.

a. The answer to the special interrogatory regarding the sentence enhancement was not a limit on the general verdict of guilt.

Defendant argues that because the jury found the evidence insufficient to prove beyond a reasonable doubt that he personally discharged the firearm that caused the victim's death, it must have found him guilty under an accountability theory — that is, it must have found beyond a reasonable doubt that Brownlee caused the victim's death and defendant was legally responsible for Brownlee doing so. Def. Br. 16. But the jury's answer to the

special interrogatory regarding a sentencing factor does not identify the specific reasoning underlying the jury's general verdict of guilt. Defendant's reliance on the answer to the special interrogatory mistakenly presumes that special interrogatories regarding sentencing factors serve the same function in criminal cases as special interrogatories in civil cases. They do not.

In civil cases, "[a] special interrogatory serves 'as guardian of the integrity of a general verdict" by "test[ing] the general verdict against the jury's determination as to one or more specific issues of ultimate fact." *Simmons v. Garces*, 198 Ill. 2d 541, 555 (2002) (quoting *O'Connell v. City of Chi.*, 258 Ill. App. 3d 459, 460 (1st Dist. 1996)). Accordingly, "'[w]hen the special finding of fact is inconsistent with the general verdict, the former controls the latter and the court may enter judgment accordingly.'" *Id.* (quoting 735 ILCS 5/2-1108 (2000)). A proper special interrogatory in a civil case must (1) concern an "ultimate issue of fact upon which the rights of the parties depend," and (2) permit an answer that would be "clearly and absolutely irreconcilable with the general verdict." *Id.* at 555-56 (internal quotation marks omitted). Otherwise, it cannot serve to test the validity of the general verdict. *See Jackson*, 372 Ill. App. 3d at 611 ("A special interrogatory asking for a finding as to a mere evidentiary fact is always improper.").

But special interrogatories regarding sentencing factors in criminal cases "do[ ] not serve that purpose." *People v. Ware*, 2019 IL App (1st)

160989, ¶ 54. Indeed, they cannot, for a defendant may not "use the finding of not guilty in one aspect of his case to attack a guilty finding in another part of his case." *Id.* ¶ 55; *see People v. Jones*, 207 Ill. 2d 122, 133-34 (2003) ("[D]efendants in Illinois can no longer challenge convictions on the sole basis that they are legally inconsistent with acquittals on other charges."). Just as an acquittal of a lesser-included offense provides no basis to overturn an inconsistent finding of guilt for the greater offense, *see Jones*, 207 Ill. 2d at 133-34, a negative answer to a special interrogatory regarding a sentencing factor provides no basis to overturn an apparently inconsistent guilty verdict. *See People v. Allen*, 2022 IL App (1st) 190158, ¶¶ 43-46 (negative answer to special interrogatory regarding personal discharge of firearm causing victim's death provided no basis to reverse conviction for murder where victim was fatally shot and no accountability instruction was given); *People v. Rosalez*, 2021 IL App (2d) 200086, ¶ 171 (same); *Alexander*, 2017 IL App (1st) 142170, ¶ 38 (same); *People v. Reed*, 396 Ill. App. 3d 636, 644-45 (4th Dist. 2009) (same).

Indeed, the use of special interrogatories is disfavored in criminal cases. *People v. Greer*, 336 Ill. App. 3d 965, 979 (5th Dist. 2003) (use of special interrogatories "is a disfavored practice" in criminal cases); *United States v. Jackson*, 542 F.2d 403, 412 (7th Cir 1976) ("Special interrogatories to the jury and verdicts are generally looked upon with disfavor in criminal cases."). Asking a jury in a criminal case to answer a special interrogatory

provides none of the benefits it would in a civil case, but risks interfering with the jury's deliberations regarding the defendant's guilt. In particular, special interrogatories regarding sentencing factors — that is, facts other than ultimate facts the jury must find beyond a reasonable doubt to find the defendant guilty — may confuse the jury. *See Jackson*, 372 Ill. App. 3d at 611-12 (noting that special interrogatory regarding personal discharge of firearm "caused tremendous confusion for the jury, which correctly saw it as inconsistent with the general verdict where they were not required to agree on who fired the weapon"). They may also distort the jury's deliberative process by focusing the jury's attention on non-ultimate facts or influencing the jury to conduct its deliberations within a particular framework or along a particular path. *See People v. Lantz*, 186 Ill. 2d 243, 263 (1999) (Heiple, J., dissenting) (noting that verdict form asking whether, after jury has found defendant guilty and rejected his insanity defense, it found him guilty but mentally ill, "encourages compromise verdicts and injects irrelevant sentencing considerations into the jury's determination of a defendant's criminal culpability"); *People v. Gathings*, 99 Ill. App. 3d 1135, 1137-38 (1st Dist. 1981) (discussing ways in which special interrogatories may improperly affect jury's deliberations).

However, there is one circumstance in which special interrogatories must be used in criminal cases: when the presence of a statutory factor that serves to raise the maximum available sentence must be found beyond a

reasonable doubt as required under *Apprendi*. *See People v. Forcum*, 344 Ill. App. 3d 427, 437 (5th Dist. 2003) (special interrogatories regarding eligibility for sentence enhancement "imperative" to "comply with the mandate of *Apprendi*"); Ill. Pattern Jury Instructions (IPI), Criminal, No. 28.00. But such special interrogatories serve no purpose beyond complying with *Apprendi* because the sentencing factors they concern generally are not ultimate facts that the jury must resolve to return a general guilty verdict for the substantive offense. *See, e.g.*, *Sawczenko-Dub*, 345 Ill. App. 3d at 538-39 (use of firearm is "not an inherent or essential element of first degree murder," but "[i]s only used to impose a longer sentence"). Accordingly, courts "'refuse to consider'" the answer to a special interrogatory justified solely by the need to comply with *Apprendi* "'beyond the purpose for which it was asked — whether there could be a sentence enhancement.'" *Allen*, 2022 IL App (1st) 190158, ¶ 45 (quoting *Jackson*, 372 Ill. App. 3d at 612); *Ware*, 2019 IL App (1st) 160989, ¶ 54 (same); *see Reed*, 396 Ill. App. 3d at 646 ("the proper way" to consider special interrogatory is "to consider it only for its purpose of determining whether a sentence enhancement applied").

Here, the jury's negative response to a special interrogatory regarding the sentencing factor cannot conclusively establish that the jury found defendant guilty as an accomplice rather than a principal, for it could easily reflect an exercise of the jury's historic power of lenity. *People v. Peoples*, 2015 IL App (1st) 121717, ¶¶ 105-06. When a jury considers more than one

offense (or, here, an offense and a sentencing factor) in a single case, the "'[t]he very fact that the jury may have acquitted of one or more counts . . . because of a belief that the counts on which it was convicted will provide sufficient punishment forbids allowing the acquittal to upset or even to affect the simultaneous conviction.'" *People v. Dawson*, 60 Ill. 2d 278, 280-81 (1975) (quoting *United States v. Carbone*, 378 F.2d 420, 422 (2d Cir. 1967) (internal citations omitted)).

For that reason, in *People v. Peoples*, the appellate court refused to speculate that the jury found the defendant guilty of murder as an accomplice rather than a principal simply because the jury found in response to a special interrogatory that the evidence did not prove that the defendant personally discharged the firearm that caused the victim's death. 2015 IL App (1st) 121717, ¶¶ 105-06. As the court explained, the apparent inconsistency between the answer to the special interrogatory and a guilty verdict based on principal liability did not compel the conclusion that the jury did not convict on that theory because, "however likely that possibility may be, it is speculation all the same." *Id.* ¶ 106. "The simple fact is that [a court] cannot altogether rule out the possibility of jury lenity or compromise," and so a court "may not guess why a jury did what it did, not matter how obvious it may seem." *Id.*; *see People v. Griffin*, 375 Ill. App. 3d 564, 571-72 (1st Dist. 2007) (declining to speculate that jury's general guilty verdict reflected finding of specific statutory theory of murder based on answer to special

interrogatory because "[i]t is not this court's function to enter the minds of jurors"). Indeed, the unreviewable exercise of lenity by juries in criminal cases is the reason that the United States Supreme Court has "cautioned" against anything but "guarded application" of issue preclusion in criminal cases. *Bravo-Fernandez v. United States*, 580 U.S. 5, 10 (2016).[8]

Defendant's argument that the jury must have found him guilty as an accomplice rather than a principal because otherwise its answer to the special interrogatory would appear inconsistent with the verdict fails because it is speculative and therefore foreclosed by the possibility that the jury's answer represented an exercise of lenity. Indeed, that possibility is likely greater with respect to an answer to a special interrogatory regarding a

[8] Certainly, the jury's answer to the special interrogatory regarding the sentencing factor was not an affirmative finding that defendant did *not* fire the killing shot. *People ex rel City of Chi. v. Le Mirage, Inc.*, 2013 IL App (1st) 093547, ¶ 134 ("Acquittal does not demonstrate a defendant's innocence," but "means only that the prosecution was unable to prove the defendant guilty beyond a reasonable doubt." (citing *Jackson*, 149 Ill. 2d at 549)). For this reason, the trial court was incorrect when it stated at sentencing that "what the jury told [the court] is that [defendant] did not actually pull the trigger that loosed the bullet that killed [the victim." R958. The jury merely told the court that the evidence was insufficient to prove that fact beyond a reasonable doubt, such that the court could not impose the sentence enhancement that required such proof. The court could still consider the evidence that defendant shot the victim for discretionary sentencing purposes, just as it could consider any other acquitted conduct at sentencing. *See People v. Deleon*, 227 Ill. 2d 322, 340 (2008) (holding that "[i]t is well established that 'evidence of criminal conduct can be considered at sentencing even if the defendant previously had been acquitted of that conduct,'" and so sentencing court's findings that defendant previously shot two victims, notwithstanding his prior acquittal of attempted murder against those two victims, were "perfectly proper" (quoting *Jackson*, 149 Ill. 2d at 549-50)).

sentence enhancement than a verdict acquitting a defendant of a substantive offense, for the jury considers the special interrogatory only after resolving the question of guilt. *See* R909 (instructions that jury should only consider special interrogatory if it first finds defendant guilty of murder); *see also Reed*, 396 Ill. App. 3d at 648 (noting that "the jury need not be familiar with criminal law to determine a negative answer to the interrogatory would favor defendant"). The jury may well have decided finding the defendant guilty of first degree murder would entail punishment enough without also finding the sentencing factor.

For that reason, defendant is incorrect that "there is no apparent reason to treat a special interrogatory finding differently from the other parts of the verdict." Def. Br. 23. Although a jury may receive its instructions both on the matters governing its determination of guilt and on special interrogatories regarding sentencing factors at the same time and may return both the guilty verdicts and its answers to the special interrogatories after the same period of deliberation, special interrogatories regarding sentencing factors are not part of the jury's deliberations during the guilt phase of the trial, but are part of its subsequent deliberations during the sentencing phase. *See* IPI, Criminal, No. 28.04 (jury is not to consider special interrogatory regarding sentencing factor unless it first finds that defendant is guilty); R909-10 (instruction that "[i]f [jury] f[ou]nd that the defendant is guilty of first degree murder, [it] should then on with with [its] deliberation

to decide whether the State has proved beyond a reasonable doubt the allegation [of the sentencing factor]"). Although administrative convenience generally counsels putting all questions to the jury at the same time and directing them to consider questions regarding sentencing only if they find the defendant guilty, the jury could be instructed on the matters governing its determination of guilt, deliberate on the questions of guilt, return its verdict, and then be instructed on any applicable special interrogatories regarding sentencing, deliberate on those matters, and return its answers to the interrogatories. *See* Ill. S. Ct. R. 451(g) (providing that trial court may conduct bifurcated trial, first conducting trial through verdict on guilt, then conducting separate proceeding on whether sentencing factor exists).

Defendant suggests that the adoption of Illinois Pattern Jury Instructions on special interrogatories regarding sentencing factors abrogated the limits placed on such special interrogatories in decisions both before and after that adoption, but he does not explain why that should be. *See* Def. Br. 25. Certainly, the Illinois Pattern Jury Instructions do not state that answers to special interrogatories regarding sentencing factors have estoppel effects on subsequent criminal proceedings greater than those of prior acquittals. *See* IPI, Criminal, Nos. 28.00-28.06.

Nor do any of the handful of cases defendant cites from other jurisdictions suggest that answers to special interrogatories regarding sentencing factors warrant greater preclusive effect in subsequent criminal

cases than acquittals. Indeed, none of the cases appear to concern the preclusive effect of special interrogatories regarding sentencing factors on subsequent criminal proceedings at all. *New York v. Julius Nasso Concrete Corp.*, concerned the effect of a special verdict in a criminal case on a separate civil case, and held that the verdict finding that the defendant participated in a racketeering conspiracy estopped that defendant's company in the civil case from challenging liability based on its participation in the conspiracy. 202 F.3d 82, 86-87 (2d Cir. 2000). And defendant's remaining cases, *People v. Asbury* and *State v. Dial*, simply applied estoppel in the usual way, holding that the juries' prior verdicts finding certain facts not proven barred retrial of those same facts in subsequent proceedings where they were ultimate, not merely evidentiary, facts. *See People v. Asbury*, 173 Cal. App. 3d 362, 364-66 (Cal. Ct. App. 1985) (holding that prior special verdict finding that murder did not occur in the course of robbery barred later prosecution of defendant for felony murder predicated on robbery); *State v. Dial*, 470 S.E.2d 84 (N.C. Ct. App. 1996) (holding that prior special verdict finding that North Carolina had jurisdiction barred defendant on retrial from seeking finding that North Carolina lacked jurisdiction). Thus, none of defendant's cases support his position that special interrogatories regarding sentencing factors estop relitigation of facts in subsequent prosecutions where they are not ultimate facts.

b. Even if jury's answer to the special interrogatory necessarily meant that the jury found the evidence insufficient to prove that defendant was guilty as a principal, it still would bar evidence that he shot and killed the victim.

Even if the prior jury's answer to the special interrogatory were treated as a finding that the evidence was insufficient to prove that defendant rather than his accomplice caused the victim's death, it still would not bar the People from presenting evidence that defendant shot and killed the victim because that fact is not an ultimate fact that the People must prove at defendant's retrial. Any evidence that defendant personally discharged the firearm that caused the victim's death, such as his various inculpatory statements to his girlfriend or the eyewitness testimony that he said "I think I got [him]" as he got back in the car at the scene of the crime after the sound of gunshots, is admissible as relevant to prove the ultimate fact that the person who caused the victim's death was defendant or one for whose conduct he was legally responsible, not someone else. *See Dowling*, 493 U.S. at 348-49 (evidence of previously acquitted offense admissible in later trial because "the Government did not have to demonstrate [that the defendant committed the acquitted offense] beyond a reasonable doubt," but only that it was relevant to whether he committed the offense being tried); *Colon*, 225 Ill. 2d at 151-52 (estoppel "does not preclude the relitigation of an issue after an acquittal in a criminal trial when the subsequent disposition of the issue is governed by a lower standard of proof").

For that reason, defendant's reliance on *Carrillo* and *Brown* for the proposition that an acquittal may bar the People "from presenting a particular *theory* of murder" is misplaced. Def. Br. 18-19. The "theories of murder" that the People were barred from pursuing in *Carrillo* and *Brown* were statutory theories — intentional murder, 720 ILCS 5/9-1(a)(1); knowing murder, 720 ILCS 5/9-1(a)(2); and felony murder, 720 ILCS 5/9-1(a)(3) — each of which "has different elements for the State to prove." *People v. Battle*, 393 Ill. App. 3d 302, 313 (1st Dist. 2009). Accordingly, a prior finding that an element of a particular statutory theory was not proven beyond a reasonable doubt may bar prosecution of first degree murder under that theory but not another.

For example, *Carrillo* held that the People's previous failure to prove beyond a reasonable doubt that the defendant had the intent to kill or do great bodily harm in a prosecution for attempted murder barred subsequent prosecution for intentional murder (after the victim succumbed to her wounds), which would require that the People prove the same intent beyond a reasonable doubt. 164 Ill. 2d at 151-52. But the prior acquittal did not bar the People from prosecuting the defendant for knowing murder, which did not require proof of that same intent beyond a reasonable doubt. *Id.* at 152. Similarly, in *Brown*, a prior acquittal of aggravated battery for failure to prove that the defendant knew his acts created a strong probability of death or great bodily harm barred subsequent prosecution for knowing murder,

which required proof of that same knowledge beyond a reasonable doubt, but not for felony murder, which did not. 2015 IL App (1st) 134049, ¶¶ 45-46.

But unlike intent, knowledge, or a predicate felony, principal and accomplice liability are not alternative elements, one of which must be proved beyond a reasonable doubt to prove defendant's guilt. Rather, they are alternative factual theories in support of a single element: that defendant or one for whose conduct he is legally responsible caused the victim's death. To find *that* element beyond a reasonable doubt, the jury need not find one or the other of principal or accomplice liability beyond a reasonable doubt, but instead must find beyond a reasonable doubt that those two options cover the field. *See Cooper*, 194 Ill. 2d 419, 436. The jurors may be divided regarding which of defendant or his accomplice they find beyond a reasonable doubt caused the victim's death or unanimous in their inability to answer that question; as long as the jury unanimously finds beyond a reasonable doubt that either defendant or his accomplice caused the victim's death and not someone else, they have properly found him guilty as charged. Therefore, defendant is mistaken that the estoppel bar against retrying a "theory of murder" extends to matters of principal and accomplice liability.

Nor does *People v. Fort* support defendant's broad theory-preclusion argument. There, a prior mitigation of first degree murder to second degree murder because the defendant proved by a preponderance of the evidence that he had an unreasonable belief in self-defense barred the People from

retrying the defendant for first degree murder, which would require relitigation of the ultimate fact of whether the defendant had an unreasonable belief in self-defense. 2017 IL 118966, ¶ 34. *Fort* is inapposite because defendant's principal liability is not an ultimate fact at issue at his retrial for murder. Even if the answer to the special interrogatory necessarily found the evidence insufficient to prove principal liability beyond a reasonable doubt, it would not estop the People from presenting evidence that defendant shot and killed the victim as relevant to prove the ultimate fact that the person who caused the victim's death was defendant or one for whose conduct he is legally responsible, not someone else. *Dowling*, 493 U.S. at 348 (estoppel does not exclude "relevant and probative evidence that is otherwise admissible under the Rules of Evidence simply because it relates to alleged criminal conduct for which a defendant has been acquitted").

* * *

To prove defendant guilty of first degree murder, the People need not prove beyond a reasonable doubt that defendant personally discharged the firearm that caused the victim's death. Accordingly, the prior finding in the answer to the special interrogatory that this fact was not proven beyond a reasonable doubt does not bar the People from presenting evidence of the fact at retrial for first degree murder.

CONCLUSION

For these reasons, the People of the State of Illinois respectfully request that this Court affirm the judgment of the appellate court.

July 5, 2023

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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, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 14,930 words.

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PROOF 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 July 5, 2023, the foregoing **Brief of Plaintiff-Appellee 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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