No. 127810

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Respondent-Appellee, -vs- TERANZA JONES, Petitioner-Appellant.	)))))))))	Appeal from the Appellate Court of Illinois, No. 4-19-0751. There on appeal from the Circuit Court of the Sixth Judicial Circuit, Macon County, Illinois, No. 19-CF-454. Honorable Erick Hubbard, Judge Presiding.

REPLY BRIEF FOR DEFENDANT-APPELLANT

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ARGUMENT

I. Teranza Jones' conviction for unlawful possession of ammunition by a felon must be reversed, because the State failed to prove her guilty beyond a reasonable doubt.

To be clear, Jones was convicted of a Class 3 felony and sentenced to two years in prison because a police officer found two bullets inside a glove box, underneath the owner's manual, in a car that she shared with her husband. (R. 97-100.) This case does not involve any firearm, and there is no evidence that she ever even touched the bullets. Jones always has maintained that the bullets were left there by her husband, who is a FOID card holder and often puts a box of ammunition in the glove box when traveling with his handgun to East St. Louis to visit his children. (R. 98, 111-12.) No fingerprint or DNA testing was performed on the bullets to challenge this contention. (R. 99.) On the contrary, the State now concedes that Jones and her husband testified truthfully when they explained the presence of the two bullets in the glove box. Instead, the State simply asserts that, taking their testimony at face value, the evidence is nonetheless sufficient to prove a violation of the charged offense, which prohibits "a person to knowingly possess...any firearm or any firearm ammunition if the person has been convicted of a felony...." 720 ILCS 5/24-1.1(a) (2019).

Because neither party contests the credibility of the witnesses and the operative facts of the case, Jones' claim should be reviewed *de novo*. *In re Ryan B.*, 212 Ill. 2d 226, 231 (2004); *People v. Smith*, 191 Ill. 2d 408, 411 (2000). The State devotes a large portion of its argument to the notion that the general standards for insufficient evidence claims should apply. St. Br. at 8-14. Yet, because it does not contest the veracity of the key evidence, all that remains is the purely legal question of whether the undisputed evidence is sufficient to sustain Jones' conviction. The State is not arguing that Jones actually knew that the bullets were inside the car. Rather, it is arguing that she should have known because there was a "substantial probability" that the bullets could have been present, which is a question of law. *See Smith*, 191 Ill. 2d at 411 ("Because the facts are not in dispute, defendant's guilt is a question of law, which we review *de novo*"); *cf. Wilson v. Devonshire Realty*, 307 Ill. App. 3d 801, 805 (4th Dist. 1999) ("The

question of when a party knew or reasonably should have known...becomes a question of law...when only one conclusion can be drawn from the undisputed facts"). Moreover, to the extent that this case requires this Court to interpret the meaning of the term "knowingly" as used in Illinois statutes, that too is a question of law subject to *de novo* review. *Evanston Ins. Co. v. Riseborough*, 2014 IL 114271, ¶ 13. Indeed, the State argues at length concerning the meaning of the statutory terms "consciously aware" and "substantial probability," which are purely legal questions St. Br. at 13.

Even if this Court declines to employ *de novo* review, it should nonetheless reverse, because the evidence was insufficient even under a deferential standard of review.[1] This Court has made it clear that the essential elements of proof cannot be inferred; rather, they must be established beyond a reasonable doubt through the introduction of evidence. *People v. Mosby*, 25 Ill. 2d 400, 403 (1962). Though a fact finder's determination is entitled to deference, it "is not conclusive and does not bind the reviewing court." *People v. Cunningham*, 212 Ill. 2d 274, 280 (2004). Reviewing courts must "carefully consider the evidence [and] reverse the judgment if the evidence is not sufficient to remove all reasonable doubt of the defendant's guilt and is not sufficient to create an abiding conviction that [she] is guilty of the crime charged." *People v. Ash*, 102 Ill. 2d 485, 492-93 (1984); *see also People v. Smith*, 185 Ill. 2d 532, 541-42 (1999) ("the lack of...direct evidence linking defendant to the crime required a not guilty verdict as a matter of law"). Claims which are so inherently improbable as to be contrary to common experience must be rejected. *People v. Ortiz*, 196 Ill. 2d 236, 267 (2001).

The State's claims about the significance of the facts of this case defy all reason and fail to serve the purpose of the charging statute. St. Br. at 18-24. Possession of a firearm **or** ammunition without a firearm is the same non-probationable Class 3felony with a minimum

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[1] The State falsely claims that Jones is "implicitly taking" one position regarding the applicable law and also "implicitly taking the contrary position." St. Br. at 15-18 (including two long footnotes). This strawman should be disregarded. Jones' actual position on the law is explicitly stated in this reply and her opening brief. It is not implied anywhere. Op. Br. at 9-14. This Court absolutely should consider all of the evidence.

term of two years in prison. 720 ILCS 5/24-1.1(e). The punishment is severe because the statute is intended to "protect the public from the danger posed when convicted felons possess firearms." *People v. Davis*, 408 Ill. App. 3d 747, 748 (1st Dist. 2011). That purpose clearly is not served by the conviction in this case.

The State does not contend that Jones placed the two bullets in the glove box for some nefarious purpose. On the contrary, it accepts the unimpeached evidence that they were left there inadvertently by her husband, who is a legal gun owner with a valid FOID card. Notwithstanding this concession, the State makes the extraordinary claim that Officer Wakefield's testimony alone was sufficient to convict her, because he "testified that he stopped [Jones], searched her car, and found ammunition in the glove compartment." St. Br. at 18. This is not the law and, because it ignores the knowledge requirement explicit in the statute, it would improperly transform 720 ILCS 5/24-1.1(a) into a strict liability offense. "Absolute liability cannot apply [to] felonies, unless the legislature clearly indicates the intent to impose it." *People v. Whitlow*, 89 Ill. 2d 322, 332 (1982). Here, the legislature plainly intended the opposite by expressly including a knowledge element to the offense. 720 ILCS 5/24-1.1(a). This Court should decline the State's invitation to read that mental state out of existence and impose strict liability on all drivers for any contraband found within the vehicle they are driving.

Indeed, Illinois case law is replete with examples of convictions being reversed because the State failed to prove that the driver knowingly possessed a firearm that was found concealed within a vehicle. *See, e.g., People v. Wise*, 2021 IL 125392, ¶ 34 (reversing unlawful possession of a weapon conviction, even though "defendant drove the minivan" that contained a firearm);[2] *People v. McIntyre*, 2011 IL App (2d) 100889, ¶ 19 ("the State failed to establish defendant's guilt of unlawful possession of a weapon by a felon" through evidence that he was the driver

[2] The appellate court attempted to distinguish *Wise* by saying that "there was no evidence defendant had a passenger in the vehicle." *People v. Jones*, 2021 IL App (4th) 190751-U, ¶ 38. This is not true. Officer Wakefield testified that there was, in fact, a passenger. (R. 101.) This is only one of several factual errors made by the appellate court to justify affirming Jones' conviction.

of a car that contained a concealed handgun); *People v. Hampton*, 358 Ill. App. 3d 1029, 1033 (2d Dist. 2005) ("the State may not rely on an inference of knowledge stemming from defendant's presence in the car" but rather must present "other evidence of knowledge"). Since these cases are indistinguishable from the case at bar, Jones' conviction should be reversed as well.

In support of its erroneous contention that the officer's testimony was sufficient, the State relies on two inapposite cases that do not even involve cars. St. Br. at 18. In *People v. McCarter*, 339 Ill. App. 3d 876 (1st Dist. 2003), the police recovered both firearms and ammunition from a bedroom which also contained ample documentary evidence that it was only occupied by the defendant. *Id.* at 878. In light of this proof of exclusive, knowing possession of the items in the defendant's bedroom, the appellate court held that the State introduced sufficient evidence to sustain the conviction. *Id.* at 879.

No such evidence of exclusive, knowing possession exists in this case. On the contrary, the State concedes that the car was jointly used by a husband and wife, and that the glove box was used by the husband to store ammunition whenever he traveled to East St. Louis. In fact, the State did not present any evidence that Jones ever used the glove box herself, such as the evidence introduced in *McCarter*. Thus, the facts of this case are significantly less compelling. *See People v. Alicea*, 2013 IL App (1st) 112602, ¶ 33 (distinguishing *McCarter*, because the State presented less evidence that the defendant knowingly possessed "weapons and ammunition found in the bedroom"); *People v. Maldonado*, 2015 IL App (1st) 131874, ¶ 37 (same).

In *People v. Hammer*, 228 Ill. App. 3d 318, 320 (2d Dist. 1992), officers responded to a call that Hammer threatened to shoot his wife inside their house, which contained six guns. The defendant pointed the guns out to the officers and told them that they were his. *Id.* at 320-21. His wife testified that the defendant had purchased the guns before their marriage and that she "did not even know how to use a gun." *Id.* at 320. Hammer's "primary contention on appeal" was "somewhat difficult to follow" but essentially asserted that the guns he pointed out to the police "were jointly possessed" by the couple. *Id.* at 321. The appellate court held that the evidence was sufficient to establish knowing possession by Hammer. *Id.* at 321.

The State does not seem to be arguing that the bullets in this case were jointly possessed by Jones and her husband. To the extent that *Hammer* is analogous to this case, it supports the conclusion that they were exclusively possessed by the husband and not by Jones. After all, the wife in Hammer was not convicted or even charged with possessing the guns, even though she testified that she knew they were present. This is because both husband and wife told the police that they belonged to the husband. Of course the husband in this case is a law-abiding gun owner with a FOID card, so he was not subject to being charged in this case. (R. 112.) The take-away from *Hammer* is that Jones should not have been charged either, and she certainly should not have been convicted. It is time for this Court to remedy this inequity.

Contrary to the State's contention, Illinois law is clear that more proof is required to show that Jones knew that the bullets were in the glove box. *Wise*, 2021 IL 125392, ¶ 34; *McIntyre*, 2011 IL App (2d) 100889, ¶ 19; *Hampton*, 358 Ill. App. 3d at 1033. Yet no such evidence was presented. After Officer Wakefield testified, the State simply rested. There was no physical evidence tying Jones to the bullets (such as fingerprints or DNA), no documentary evidence tying her to the contents of the glove box (such as the evidence of exclusive possession in *McCarter*), and no incriminating statements (such as the extensive admissions in *Hammer*). Without this type of evidence, the State simply failed to prove that Jones knew about the two tiny items concealed underneath the owner's manual inside the glove box. *See Hampton*, 358 Ill. App. 3d at 1033 (emphasizing that a gun "inside a sock in the glove compartment... obviously would not have been visible to defendant as he drove"). The conviction in this case is completely unprecedented and should be reversed.

Next, the State turns to the appellate court's conclusion that Jones was aware of the bullets because she told the officer that they belonged to her husband, who stored ammunition in the glove box when he traveled to East St. Louis. St. Br. at 19; *People v. Jones*, 2021 IL App (4th) 190751-U. This argument is unpersuasive for a number of reasons. First, nothing about the officer's testimony was incriminating. It appears in the record as follows:

> Q. (By Mr. Tighe) When you told the defendant that she was going to be arrested for the possession of the ammunition, did she make any voluntary statements to you?

A. She did. She said that her -- the ammunition was her husband's.

MR. TIGHE: Okay. I have no further questions, Your Honor.

(R. 98-99.) On its face, this testimony is entirely exculpatory. Jones told the officer at the earliest possible opportunity that the ammunition did not belong to her.

Significantly, the officer said nothing about her manner of conveying this information. For example, contrary to the State's suggestion, he did not say that she blurted it out suddenly as if she were not surprised. St. Br. at 24 n.5 (citing Officer Wakefield's testimony for the baseless proposition that Jones "expressed no surprise that Wakefield found ammunition"). The notion that she was not surprised is not supported by even a shred of evidence. On the contrary, the record shows that Jones was well aware that the officer had found something inside the car long before he showed her the bullets. (R. 107-08.) Contrary to the State's argument, the precise timing of these events is not in evidence. Though the stop was video recorded by the police car's dash cam (which was burned onto DVDs and provided to the parties), the State did not introduce the dash cam video into evidence, presumably because it did not show Jones acting suspiciously in any way. (C. 30; R. 101.) Moreover, there was a passenger in Jones' car at the time of the stop, but the State did not call her as a witness, presumably because she did not witness any incriminating conduct. (R. 101.)

The notion that the manner of Jones' answer was somehow incriminating was created from whole cloth by the appellate court, which concluded based on nothing that Jones answered "immediately" and did not "express[] any confusion." *Jones*, 2021 IL App (4th) 190751-U, ¶ 39. Based on this record, she absolutely could have paused before answering. Indeed, since this was by all accounts a routine traffic stop, it stands to reason that the officer and Jones each said many things to each other that were not admitted into evidence because they are not relevant. If the manner in which Jones answered was significant, then the State should have introduced that into evidence. It is not the proper role of the appellate court to assume facts that were not placed into evidence and then affirm on the basis of these assumed "facts."

Second, there is absolutely nothing incriminating or even suspicious about a wife immediately identifying objects that obviously and exclusively belong to her husband. As in *Hammer*, there is zero evidence in this case that the husband's guns were ever used by the wife. This presumably is the case in a great many Illinois households. Thus, no delay is necessary for a wife to report that a physical item exclusively associated with her husband does, in fact, belong to her husband. It is no different than a wife identifying boxer shorts or size 15 shoes as belonging to her husband. No delay is needed to produce such an obvious response.

Third, the fact that Jones' husband took his firearm and ammunition with him when he traveled to East St. Louis and then removed them upon returning home obviously is no basis for Jones to be "consciously aware" of a "substantial probability" that the car contained two bullets when her husband was not inside of it and not traveling to East St. Louis. 720 ILCS 5/4-5(a) (2019); IPI, Criminal, No. 5.01B. The State repeatedly asserts the *non sequitur* that her historic knowledge of past events somehow creates certainty that the car still contained two bullets hidden somewhere, but this is not persuasive. St. Br. at 19-20. If the couple were traveling together to East St. Louis when stopped by Officer Wakefield, then this argument might have some merit. But the absence of these facts is extremely exculpatory.

The State's argument is analogous to a claim that Jones must be "consciously aware" of a "substantial probability" that the floorboards of her car contained dropped French fries based solely on evidence that her husband drove the car to McDonald's two months earlier. Again, the State does not contend that the bullets actually belonged to Jones or that she personally placed them in the glove box. It assumes the very obvious fact that the two bullets simply fell out of the ammunition box when Jones' husband removed it from the glove box and remained concealed therein until the arrest in this case. The State concedes this fact because anything else defies reason. *See Ortiz*, 196 Ill. 2d at 267 (claims which are so inherently improbable as to be contrary to man's common experience must be rejected). The legislature obviously did not intend such an absurd result when it created a Class 3 felony with a mandatory minimum of two years in prison. That is why it did not impose strict liability but rather imposed a scienter

requirement that the defendant must know that the contraband is present. It also enacted a separate statute defining the *mens rea* applicable to this case as "she is consciously aware...that those circumstances exist" including "awareness of the substantial probability that the fact exists." 720 ILCS 5/4-5(a). In light of these uncontested facts, the State failed to prove that Jones was "consciously aware" that the two bullets were buried in the glove box under the owner's manual. Similarly, there was no "substantial probability" that the bullets were present. It certainly was **possible** given the manner in which her husband transported ammunition just like it is possible that there were French fries under the passenger seat. But this mere possibility is insufficient to convict as a matter of law.

This Court recently discussed the meaning of the term "substantial probability" in the context of a different offense that used "knowingly" as the applicable mental state. *People v. Leib*, 2022 IL 126645.[3] The defendant in *Leib* was convicted of being a sex offender in a school zone in violation of 720 ILCS 5/11-9.3(a) (2014). On direct appeal, he argued that the State failed to prove knowledge that he was in a prohibited area when he attended a carnival on the grounds of Queen of Martyrs Parish school. *Leib*, 2022 IL 126645, ¶ 37. This Court disagreed and affirmed, holding that "substantial probability" was shown through evidence that the carnival took place in a parking lot that "is located closer to the school and gymnasium than it is to the church, which is on the opposite side." *Id.* at ¶ 38. The parking lot contained several children's rides, and "the school was open to where one could walk through to the back of the school, where there was music and food vendors" in an "open and connected" manner. *Id.* Moreover, the defendant agreed with the police that he "should not be there," and he "understood" why school officials were concerned by his presence. *Id.* at ¶ 40. In other words, this Court affirmed based on numerous objective facts that were admitted into evidence, including the defendant's own inculpatory statements. Since no such evidence is present in this case proving that Jones knew about the bullets in the glove box, this Court should reverse.

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[3] While the State twice cites *Leib*, it does so only in its discussion of the applicable standard of review. St. Br. at 11, 14.

Citing *People v. Petermon*, 2014 IL App (1st) 113536, the State argues that this case involves "competing inferences" regarding whether Jones knew there was a "substantial probability" that two bullets were buried in the bottom of the glove box. St. Br. at 20. But the inferences must be "reasonable" and based on the evidence that was actually introduced at trial. *Petermon*, 2014 IL App (1st) 113536, ¶ 28 (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). The inference proposed by the State in this case is completely unreasonable and based on gaps in the record, rather than the actual evidence. *See Jones*, 2021 IL App (4th) 190751-U, ¶ 39 (erroneously claiming that Jones answered "immediately" and pointing out that the officer "did not testify" about Jones' manner of speaking).

The State does not even propose a plausible scenario that explains how Jones could have known that the bullets were in the glove box. Indeed, the only reasonable inference based on the record is that the bullets fell out of the ammunition box when Jones' husband removed it without him noticing. The State has not suggested, for example, that Jones knew the bullets were there because she put them there herself for reasons unknowable. It does not suggest that her husband left them there on purpose when he removed all of the other bullets and told his wife that he did so. Though it mentions a hypothetical "drug courier" and even cites a case about a drug courier (*Ortiz*), the State presumably is not contending that Jones was a bullet courier transporting the two bullets illicitly so they could be sold on the black market. St. Br. at 22-23. While the State contends "she did not have to physically touch the ammunition to knowingly possess it," it offers no way that she could have known that the bullets were buried in the bottom of the glove box if she did not place them there herself. St. Br. at 22. Since the State concedes that they were left there by Jones' husband, there simply is no competing reasonable inference to establish knowledge. The inescapable conclusions are that the bullets were left there accidentally, that they were not left by Jones, and that she had absolutely no reason to know that they were there. Moreover, because the jury was not properly instructed on the definition of "knowledge," it did not have the tools it needed to properly evaluate the evidence. *See infra*, Argument II. Because it did not know that the State was required to prove

beyond a reasonable doubt a "substantial probability" that Jones knew the bullets were present, it could have convicted her on a much lesser standard.

As a last-ditch effort to blame Jones for the innocuous presence of two bullets and no firearm in the glove box of the car she shared with her husband (a legal gun owner), the State argues that Jones has a duty to search the car for ammunition if she knows that **at any time in the past** a different user of the car possessed ammunition within the car. It describes these facts as creating "a substantial probability that her husband has stored ammunition in the glove compartment." St. Br. at 23. There are several problems with this formulation.

First, this argument (correctly) assumes that Jones did not **actually** know that the bullets were inside the glove box. Rather, the State is Monday Morning Quarterbacking her decision to refrain from searching the car for stray ammunition in the event that the car might get searched by the police who might then charge her with a felony. While that is obviously possible as evidenced by the fact that it actually occurred in this case, it does not mean that Jones was "consciously aware" of a "substantial probability" that the glove box contained the two bullets.

Second, the State's argument improperly conflates the past with the present. Though it claims there was "a substantial probability that her husband has stored ammunition in the glove compartment," it is more precise to say that her husband **had** stored ammunition there. The storage occurred in the past, and the two bullets are a relic of that event. There is no evidence that Jones' husband intended to remove all of the bullets except those two. This obviously was inadvertent. Neither Jones nor her husband knew that the two bullets remained in the bottom of the glove box after his reason for storing them there had elapsed.

Third, it improperly ascribes to Jones her husband's knowledge that he stored ammunition in the glove box. While she knew that he brought a gun with him to East St. Louis, Jones did not join him on these trips and had no way of knowing where specifically he stored the ammunition--or even that he stored it separately from his firearm. Jones never said that she knew he placed ammunition in the glove box. Rather, she explained her conclusion as follows:

Q. And how do you know that is your husband's ammunition?

> A. Because we share a vehicle, first of all; and he is the one with the FOID card. He has the guns, not me. So if he found a bullet, then that would be my automatic assumption that it was his.

(R. 108.) In other words, when the officer showed her the bullets, it was a simple matter for Jones to put two and two together and determine what must have happened. But hindsight is not the relevant time frame. For the State to prove knowledge, it would have had to introduce evidence that she knew the bullets were in the glove box **before** the officer showed them to her. St. Br. at 14 ("the evidence had to show that she had knowledge of the presence of the ammunition") (internal quotes omitted). The scant evidence presented by the State failed to satisfy this burden. This Court should resist any urge to employ hindsight to conclude that Jones should have known about the hidden bullets. The fact that the officer found them buried in the glove box is not proof that Jones was "consciously aware" of a "substantial probability" that it contained those bullets. Again, the actual test is not "mere possibility."

Expanding on its false notion that Jones had a duty to search the car, the State specifies, "if she has no reason to believe that there is ammunition between the cushions of the back seat or taped to the underside of the hood," then she was not required to search those areas. St. Br. at 23. The problem with this argument is that Jones had no reason to believe that there was ammunition in the glove box either. Her husband testified that he stored his firearm separately from his ammunition, placing the ammunition in the glove box. (R. 111.) But he did **not** testify that he told Jones about this procedure. On the contrary, when he is at home with Jones, he stores the firearm and the ammunition together in the basement of their shared house, so she had no reason to know that these items are sometimes separated. (R. 115.) Thus, the record contains absolutely no reason for Jones to believe that the glove box contained two stray bullets after her husband had returned from East St. Louis and returned his firearm to the basement.

Because she did not satisfy this invented duty to search the car, the State contends that Jones deserved a Class 3 felony conviction and a mandatory minimum term of two years in prison. For all of these reasons, and for the additional reasons stated in her opening brief, this Court should hold that no such duty to search exists and reverse her conviction outright.

II. Jones was deprived of a fair trial where the trial court improperly instructed the jury on the definition of "knowingly" and was deprived of her right to effective assistance of counsel when defense counsel failed to object to the non-IPI instruction given by the court.

A. The trial court erred in refusing to provide IPI Criminal No. 5.01B, defining "knowingly" in response to the jurors' question.

Struggling with the central issue in this case, the jurors sent the judge a note asking for the definition of the term "knowingly." (C. 51.) Though the IPI committee prepared an instruction specifically for this purpose, the trial court declined to provide it. "Illinois pattern instructions were painstakingly drafted with the use of simple, brief and unslanted language so as to clearly and concisely state the law" and, as a general rule, should be issued whenever they apply to ensure that the jury can "perform its constitutional function." *People v. Pollock*, 202 Ill. 2d 189, 212 (2002). Moreover, the trial court has a "duty to provide instruction to the jury where it has posed an explicit question or requested clarification on a point of law arising from facts about which there is doubt or confusion." *People v. Childs*, 159 Ill. 2d 217, 228-29 (1994). In light of these basic principles, the trial court plainly erred in failing to issue some version of IPI Criminal No. 5.01B, defining "knowingly" as used in Illinois criminal statutes. *See People v. Johnson*, 2013 IL App (2d) 110535, ¶¶ 73-75 (failure to give applicable tailored IPI definition is reversible error). This failure is particularly prejudicial in a case like this one, where knowledge is the only issue that was disputed at trial. Nonetheless, the appellate court erroneously held that it "properly responded to the jury's inquiry and we find no error on the part of the trial court." *People v. Jones*, 2021 IL App (4th) 190751-U, ¶ 50.

The State does not address this issue until the very end of its brief, when it concedes that *Johnson* holds that failure to give "an applicable tailored version of IPI definitions" is plainly erroneous, but then in the same breath denies that the non-pattern instruction the trial court issued in this case was "substantively incorrect." St. Br. at 42. However, that is not the rule. *Johnson* does not categorize instructions into categories like "substantively incorrect." Rather, it applies Illinois Supreme Court Rule 451(a), which provides that IPI "shall be used, unless the court determines that it does not accurately state the law." *Johnson*, 2013 IL App (2d) 110535, ¶

68. Moreover, it faults the trial court for "failing to tailor IPI Criminal...based on the evidence presented," not for issuing a "substantively incorrect" instruction. *Id.* at ¶ 75.

With respect to the facts of this case, there is no question that IPI Criminal No. 5.01B contains an accurate statement of the law, as it closely tracks the language of 720 ILCS 5/4-5(a). Nor does the State allege that the pattern instruction is incorrect. Therefore, the trial court's failure to provide the IPI definition in response to the jurors' specific request was erroneous under both *Johnson* and Rule 451(a). The State suggests that the trial court correctly answered the question by providing no definition at all, but rather by instructing the jurors to revert to "common usage," but use of the IPI was mandatory. St. Br. at 41. The State attempts to invert the rule by baldly claiming that **the trial court's answer** "did not misstate the law," but the rule actually requires that the IPI must be used unless **the IPI** "does not accurately state the law." Ill. Sup. Ct. R. 451(a). This Court should ignore the State's misconstruction of the rule.

Moreover, to suggest that a vague reference to "common usage" is just as appropriate as the definition crafted by the IPI committee denigrates their work and ignores the purpose of the IPI. *Pollock*, 202 Ill. 2d at 212. The answer offered by the trial judge in this case is no answer at all and is indistinguishable from the answers in *People v. Ayala*, 2022 IL App (1st) 192063; *People v. Sperry*, 2020 IL App (2d) 180296; and *People v. Lowry*, 354 Ill. App. 3d 760 (1st Dist. 2004). The State's protestations to the contrary simply are not persuasive. Compare Op. Br. at 20-26 to St. Br. at 32-34, 41-42.While it is true that "the jury asked no follow-up questions," that is because there was no reason to believe that additional questions would bear fruit. St. Br. at 42. The trial court's terse and erroneous answer precluded that possibility.

B. Defense counsel's failure to object was ineffective assistance and not trial strategy.

The bulk of the State's response to this argument simply claims that "counsel made a strategic decision," which is belied by both the record in this case and the law applicable to ineffective assistance claims. St. Br. at 25-38. With respect to the record, when the trial court first raised this issue with counsel, both sides agreed that "in the IPI there is a definition of knowingly only to be given if the jury asks." (R. 135.) Since the jury asked, the instruction

clearly should have been issued. Instead, the court became bogged down in the precise language of the pattern instruction and became reluctant to tailor it to the facts of this case. The State asked that only the first paragraph be given, and the defense responded that the entire instruction should be given. At this point, defense counsel had twice told the court that the instruction should be given, while expressing some doubts concerning "the last sentence on number 1." (R. 136-37.) Then, the State suggested, "I'm fine with just telling the jury that it's within their common knowledge," and defense counsel did not object, admitting that he had not thought about this instruction previously, and claiming that it came from "out of left field." (R. 139.) The court pointed out that the attorneys did not research the issue by reading the cases cited in the committee comments, and they ultimately just collectively decided not to bother doing any research. (R. 139-40.) This is not what sound trial strategy looks like.

With respect to the applicable law, it is not "trial strategy" to simply concede an issue without bothering to research it or even to think about it very much. *See People v. Moore*, 279 Ill. App. 3d 152, 158-59 (5th Dist. 1996) ("Sound trial strategy is made of sterner stuff"). A decision based on a misunderstanding of the applicable law does not constitute reasonable trial strategy. *Hinton v. Alabama*, 571 U.S. 263, 274 (2014). Decisions must be supported by a "sound tactical reason." *People v. Garza*, 180 Ill. App. 3d 263, 269 (1st Dist. 1989). They should not be "shrouded in silence." *People v. Yantis*, 125 Ill. App. 3d 767, 771 (4th Dist. 1984). Because defense counsel gave no sound reason for the failure to object, there is no basis to conclude that the failure constitutes sound trial strategy. Rather, the record indicates that everybody involved decided that it would be easier to do nothing instead of modifying the pattern instruction. This is not defense trial strategy; it is reversible error. *See Johnson*, 2013 IL App (2d) 110535, ¶¶ 73-75 (failure to give tailored IPI definition is reversible error).

Citing to several different dictionaries, the State argues that the instruction given by the trial court was better for the defendant than the pattern instruction. St. Br. at 28-29. One glaring problem with this argument is that the jurors were not given these dictionaries or an instruction that contained a dictionary definition. Rather, they were left to fend for themselves,

after clearly indicating to the court that they were unable to do so and wanted instruction on this central issue. Additionally, the dictionary definitions quoted by the State are completely circular and would not have provided any guidance. The first example provided by the State defines "knowing" as "having or reflecting knowledge, information, or insight." St. Br. at 28. Nothing about this would help the jurors determine whether the facts of this case prove beyond a reasonable doubt that Jones knowingly possessed the ammunition hidden in the glove box.

C. Jones was prejudiced because the jurors were not fully and properly instructed on the central issue in her trial.

Jones was prejudiced because the jury specifically requested clarification on the only disputed issue at trial, and the trial court failed to provide that instruction. (C. 51.) By failing to provide the correct legal standards, the trial court caused the jurors to convict based on inadequate evidence of knowing possession. As demonstrated *supra* in Argument I, a lot can be said about how the correct legal standards apply to the undisputed facts of this case. But due to the trial court's error, the jurors were forced to make this key decision without the actual definition. Even if this Court disagrees that the evidence was insufficient to convict, it is at least closely balanced with respect to knowledge. Indeed, even the trial court admitted as much, saying that it "was a close call" because the State's evidence "was arguably thin." (R. 171.)

Under the prejudice prong of the *Strickland* test, Jones only needs to show a "reasonable probability" that the trial result would have been different. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). "Reasonable probability" is a term of art indicating in this context that counsel's failure to insist on the correct instruction "undermine[d] confidence in the outcome" of the case. *Id.* at 694. The test is not "outcome-determinative." Rather, a defendant "must show that counsel's deficient performance rendered the result of the trial unreliable or the proceeding fundamentally unfair." *People v. Segoviano*, 189 Ill. 2d 228, 246 (2000).

The State claims that there was no prejudice because the trial court told the jurors to apply "the more favorable common definition" of "knowingly." St. Br. at 43. To be clear, the trial court did not provide any "common definition." It simply refused to provide the definition set forth in the clearly applicable pattern instruction, IPI Criminal No. 5.01B. Thus, there is

no basis for the State's assertion that the definition "provided" by the trial court was "more favorable."[4] On the contrary, the IPI definition based on the controlling statute sets forth an exacting standard for proving the *mens rea*, containing narrow and exacting terms like "consciously aware" and "substantial probability." IPI Criminal No. 5.01B. Making the jurors aware of these standards would have precluded them from finding knowing possession based on the scanty facts of this case. Forced to interpret the evidence through the trial court's vague statement concerning a supposedly "common definition" invited the jurors to find Jones guilty based on insufficient evidence, perhaps concluding that she was guilty simply because it was possible that she knew about the bullets based on 20/20 hindsight. In light of this very real prejudice, it is absurd to suggest that this constitutes "an error in defendant's favor" or something that "inured to defendant's benefit." St. Br. at 43. Therefore, this Court should reverse and remand for a new trial with correct and complete instructions on the elements of the offense.

D. Defense counsel's failure to object constitutes ordinary forfeiture that is reviewable under the plain error doctrine and does not rise to the level of invited error (reply to State Arguments III and IV).

In the alternative, this Court can review the trial court's failure to issue the instruction under both prongs of the plain error doctrine. Contrary to the State's suggestion, the doctrine of invited error simply does not apply under the facts of this case. St. Br. at 36. Rather, that doctrine is limited to situations where defense counsel's own actions caused the error to occur through no fault of the State. Classic examples include defense counsel personally eliciting improper testimony, personally requesting a form that improperly instructs the jury, or formally stipulating to certain evidence. *See, e.g., People v. Woods*, 214 Ill. 2d 455, 474-75 (2005); *People v. Villareal*, 198 Ill. 2d 209, 227 (2001); *People v. George*, 49 Ill. 2d 372, 379 (1971). By contrast, invited error does **not** occur where defense counsel simply fails to object to improper evidence or to the erroneous admission of a jury instruction that was proposed by the State.

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[4] The State claims that the pattern instruction would make it "much harder for counsel to argue that defendant was unaware of even a substantial probability that there was ammunition in her glove compartment." St. Br. at 27. That obviously is not the case, since the jurors convicted despite no evidence that she knew it was there.

See, e.g., People v. Harvey, 211 Ill. 2d 368, 385-87 (2004); *People v. Johnson*, 2013 IL App (2d) 110535, ¶ 78. Failure to object to conduct by the trial court and the State constitutes ordinary forfeiture subject to plain error review. *Harvey*, 211 Ill. 2d at 386.

This Court should follow its precedents and reiterate the distinction between defendants who propose an erroneous jury instruction and defendants like Jones who simply go along with an erroneous instruction proposed by the State and accepted by the trial court. After all, failing to object to the trial court's erroneous decision is a classic example of forfeiture subject to plain error. *See* Ill. Sup. Ct. R. 615(a) (setting forth the plain error doctrine); *People v. Nitz*, 219 Ill. 2d 400, 412 (2006) (Illinois courts "apply harmless-error review when a defendant has timely objected [] and plain-error review when a defendant has not objected"). Similarly, forfeiture for failure to object can be overcome by a showing of ineffective assistance of counsel. *People v. Steels,* 277 Ill. App. 3d 123 (1st Dist. 1995). This Court should reject any effort by the State to elevate a simple forfeiture into incontestable invited error.

People v. Herron, 215 Ill. 2d 167 (2005), the leading case on plain error, is particularly instructive. In that case, the State proposed a jury instruction, and defense counsel responded: "Okay. No objection, judge." *Id.* at 172. This Court recognized that defense counsel's statement represented a forfeiture of the claim that the instruction was improperly given but upheld the reversal of the defendant's conviction under the plain error doctrine, recognizing that "forfeiture is a harsh sanction for a defendant whose attorney failed to raise an error before the trial court." *Id.* at 175-76. It stands to reason that, if the statement of defense counsel in *Herron* constitutes a simple forfeiture warranting plain error review, then the failure to object in this case also constitutes a simple forfeiture and that the error in this case is reviewable as plain error. *See People v. Hollahan*, 2019 IL App (3d) 150556, ¶ 17 ("If the mere failure to object amounted to invited error, plain error review would never be available and the plain error rule would be rendered a nullity").

The State cites this Court's decisions in *Harvey* and *People v. Patrick*, 233 Ill. 2d 62 (2009), but it misrepresents the holdings of those cases. St. Br. at 36. In *Harvey*, the defendant

stipulated to the admission of certain evidence and then tried to challenge it on appeal. 211 Ill. 2d at 375-76. This Court initially held that the defendant may not challenge the admission of the stipulated evidence under the invited error doctrine. *Id.* at 386. However, it went on to distinguish invited error from ordinary forfeiture that is subject to the plain error doctrine. *Id.* at 385-87 (distinguishing the stipulation from "a defendant's failure to bring an error to the attention of the trial court"). Similarly, in *Patrick*, this Court refused to consider the defendant's argument that the jury instructions tendered by the defendant himself were erroneous. 233 Ill. 2d at 77; *see also People v. Parker*, 223 Ill. 2d 494, 508 (2006) (defendant may not attack a jury instruction tendered by the defense).

As the State acknowledges, this distinction more recently was reiterated in *Johnson*, 2013 IL App (2d) 110535. St. Br. at 37. In that case, the appellate court explained:

> [T]he concerns underlying the invited error rule are not present here. First, the prosecution introduced the flawed instruction and offered no suggestion for curing the defect, even when it was pointed out by the trial court. Second, defense counsel's conduct was not duplicitous. We acknowledge that counsel persistently declined the trial court's overtures to modify the instruction, but counsel's tactic was less an invitation of error than an attempt to mitigate jury confusion that could result from a convoluted instruction.

Id. at ¶ 78. That is precisely what happened in this case. Because the faulty instruction was tendered by the State and not the defense, the invited error doctrine does not apply. (R. 139.) While defense counsel's conduct in going along with the erroneous instruction forfeited the issue, this Court nonetheless can reach the issue under both prongs of the plain error doctrine.

The plain error doctrine instructs reviewing courts to reach unpreserved errors when either: (1) the evidence is close regardless of the seriousness of the error, or (2) the error was serious regardless of the closeness of the evidence. *People v. Sebby*, 2017 IL 119445, ¶48; *Herron*, 215 Ill. 2d at 186-87.

First-prong plain error exists because "conviction of an innocent person due to an error during the pretrial or trial proceedings would be a miscarriage of justice." *People v. Jackson*, 2022 IL 127256, ¶ 23. In *People v. Wallace*, 2022 IL App (4th) 210475, the appellate court very recently found first-prong plain error under remarkably similar facts. In that case, the defendant was the "driver of a car that contained two handguns in the glove box." *Id.* at ¶ 94.

There was no direct evidence that the defendant knew the guns were present, and both the defendant and a defense witness testified that the guns did not belong to the defendant. *Id.* at ¶¶ 95-96. Given the similarities between this case and *Wallace*, this Court too should find first-prong plain error. Even if this Court disagrees that the evidence was insufficient to convict, it is at least very closely balanced with respect to the question of knowledge for all of the reasons detailed *supra* in Argument I.

Significantly, the State does not argue that the evidence is not close, even though this argument was asserted in Jones' opening brief. Op. Br. at 17-18. Therefore, this Court must conclude that the State conceded the issue by waiving its opportunity to respond and hold that this issue is reviewable as first-prong plain error. *People v. Givens*, 237 Ill. 2d 311, 326 (2010); *In re Deborah S.*, 2015 IL App (1st) 123596, ¶ 27.

This issue also is reviewable as second-prong plain error, which addresses "unpreserved errors that undermine the integrity and reputation of the judicial process regardless of the strength of the evidence or the effect of the error on the trial outcome." *Jackson*, 2022 IL 127256, ¶ 24. While this type of error is sometimes called "structural," Illinois courts are "not limited...to only those types of errors identified as structural by the [U.S.] Supreme Court." *Id.* at ¶ 30. Rather, second-prong plain error includes any "error of such magnitude that it undermines the framework within which the trial proceeds." *Id.* at ¶ 31. Prejudice is presumed "because of the importance of the right involved, *regardless* of the strength of the evidence." *Herron*, 215 Ill. 2d at 187 (emphasis in original). Because the jury in this case was not provided with the proper legal definition of knowingly in response to its question, and because this *mens rea* was the only contested issue at trial, the flawed instruction "affected the fairness of the defendant's trial and challenged the integrity of the judicial process." *Id.* at 186-92. Substantial defects in jury instructions, such as incorrect information about the elements of the offense, qualify for review under the second prong. *People v. Reddick*, 123 Ill. 2d 184, 198 (1988). Since the error in this case (the correct legal definition of "knowingly") directly involves an element of the offense, the defect was substantial and completely "undermines the framework"

of the trial. This is particularly true because whether Jones knowingly possessed the bullets was the only disputed issue facing the jury, and they acknowledged their confusion on the issue by sending a note specifically asking for clarification.

The State's argument that the instruction defining "knowingly" does not "instruct the jury on an element of the offense" is not persuasive. St. Br. at 44."Knowing possession" is an enumerated element of the charged offense.720 ILCS 5/24-1.1(a). Since the jurors admittedly did not know what the term means, they were not fully instructed on an element of the offense--indeed, the only element at issue. The case relied on by the State actually undermines its claim. *See People v. Le Mirage, Inc.*, 2013 IL App (1st) 093547, ¶ 111 (explaining that its decision would have been different if the undefined term were "knowingly," as in *Lowry*).

For all of these reasons, and for the additional reasons stated in her opening brief, this Court should remand this cause for a new trial based upon the trial court's erroneous jury instruction or, in the alternative, due to defense counsel's ineffective assistance.

CONCLUSION

Petitioner-Appellant Teranza Jones respectfully requests that this Court reverse her conviction for unlawful possession of ammunition by a felon because the State failed to prove her guilty beyond a reasonable doubt. Alternatively, this Court should reverse her conviction and remand this cause for a new trial.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this reply brief conforms to the requirements of Rules 341(a) and (b). The length of this reply brief, excluding pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, and the certificate of service, is twenty pages.

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IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Respondent-Appellee, -vs- TERANZA JONES, Petitioner-Appellant.	)))))))))	Appeal from the Appellate Court of Illinois, No. 4-19-0751. There on appeal from the Circuit Court of the Sixth Judicial Circuit, Macon County, Illinois, No. 19-CF-454. Honorable Erick Hubbard, Judge Presiding.

NOTICE AND PROOF OF SERVICE

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Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. On October 11, 2022, the Reply Brief was filed with the Clerk of the Supreme Court of Illinois using the court's electronic filing system in the above-entitled cause. Upon acceptance of the filing from this Court, persons named above with identified email addresses will be served using the court's electronic filing system and one copy is being mailed to the defendant-appellant in an envelope deposited in a U.S. mail box in Springfield, Illinois, with proper postage prepaid. Additionally, upon its acceptance by the court's electronic filing system, the undersigned will send 13 copies of the Reply Brief to the Clerk of the above Court.

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