No. 128676

IN THE

SUPREME COURT OF ILLINOIS

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

REPLY BRIEF FOR PETITIONER-APPELLANT

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ARGUMENT

I. The appellate court did not have jurisdiction to consider the merits of this State appeal.

Leaving aside a pointless quibble about Mr. Jefferson's use of future tense (State Br. at 15-16), the State's first response to his jurisdictional argument is to assert that the trial court's order explicitly excludes "any evidence that he shot Gosa," and that "an order that all evidence of a particular fact *will* be excluded if offered at trial is still an order excluding evidence." (Emphasis in original; State Br. at 15-16) This is patently incorrect. The trial court barred the State 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*." (Emphasis in original; Appendix at A-31; C.613) It did *not* exclude "any evidence" that Mr. Jefferson "shot Gosa." To the contrary, it allowed the introduction of *all* such evidence, as long as the evidence was *also* consistent with an accountability theory. (C.613-615)

Thus, the only impact of the court's order on the State is to bar it from *arguing* that Mr. Jefferson acted as the principal, and to bar the next jury from making a particular factual *finding* that conflicts with the prior jury's special interrogatory finding. (C.613) As noted in the opening brief at 9-10, the only evidence that *might* be barred under the court's order is the testimony of Reshon Farmer. As explained therein, there is a high probability that this testimony would be barred under § 115-21 of the Code of Criminal Procedure of 1963 (725 ILLS 5/115-21(2020)),

SUBMITTED - 24276008 - Katherine Byerley - 9/7/2023 12:10 PM

yet the State did not wait for the outcome of the required hearing under that section before filing its appeal. The State has not identified any other prospective evidence that would be barred by the trial court's order.

The State next takes issue with Mr. Jefferson's point that, since no specified evidence introduced at the previous trials was barred by the court's order, the order did not have the "substantive effect" of suppressing evidence, as required by Rule 604(a)(1) to confer jurisdiction. (Opening Br. at 10-11) The State asserts that "by this rationale almost no pretrial order that categorically excludes evidence of a particular kind or relating to a particular topic is an order excluding evidence." (State Br. at 16)

However, that does not follow. As the State points out, the great majority of trials are not re-trials, and, therefore, "the great majority of pre-trial orders excluding evidence are entered without the benefit of transcripts of the yet-uncalled witnesses' testimony." (State Br. at 16) Typically, a defendant learns from discovery that the State intends to introduce a category of evidence – a defendant's confession, prior criminal history, items seized in a search, etc. The defendant then files a motion to suppress the evidence or motion *in limine* to bar evidence within the category. The defense may specify the items to be excluded but does not have to do so to obtain an order covering the exclusion. If the court grants the motion, the State can rightfully claim that it has the substantive effect of suppressing evidence. Denying jurisdiction in the case at bar would not interfere with such typical applications of Rule 604(a)(1).

The State's argument underscores the fact that this is an exceptional case.

SUBMITTED - 24276008 - Katherine Byerley - 9/7/2023 12:10 PM

Mr. Jefferson has already been tried twice, and the substance of each State witness' testimony has been established. On each item of prospective repeat testimony that Mr. Jefferson asked to be excluded, the court ruled against him and ordered that the State *would* be permitted to use it. (C.613-15) As explained in the opening brief at 9, the only exception was the court's failure to explicitly address Kiyanna Howard's statement that he "was covering something up when he reentered the vehicle," but since the court's approach was to allow every item of testimony that could possibly be reconciled with a theory of accountability, there is no reason to suppose that the State would not be permitted to use that testimony as well.

The State attempts to overcome this by asserting, "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," because the witnesses may not use exactly the same words in trial number three that they used in trial number two. (State Br. at 16-17) The assertion rests on a false premise, since the trial court's order never stated nor implied that it's ruling allowing the identified testimony was contingent on the witnesses using the same precise language. The State's argument simply presumes that the trial court would not apply common sense and apply its ruling to the *substance* of each witness's testimony, rather than mechanically apply it only if and when the witness repeats testimony verbatim.

The State adds: "[T]he 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

SUBMITTED - 24276008 - Katherine Byerley - 9/7/2023 12:10 PM

evidence." (State Br. at 17) Here, the State employs a double negative suggesting that Mr. Jefferson's argument fails because he has not established that the order does *not* exclude evidence, when it is the *State's* burden to establish that the order *has* the "substantive effect" of "suppressing evidence" under Rule 604(a)(1). The State does not advance its argument by sowing such confusion.

The State responds to Mr. Jefferson's point that the State did not wait to see how the court would rule on the admissibility of Farmer's testimony before filing its appeal, complaining that "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." (Emphasis in original; State Br. at 17)

Here again, the State sows confusion by conflating two different issues. The remote possibility that the State might present some new or unexpected testimony at the third trial that was not accounted for in the court's pre-trial order has nothing to do with the question of Farmer's testimony, which the court intended to resolve in pre-trial proceedings. (C.615) A witness giving unanticipated testimony at trial is always a possibility, but Rule 604(a)(1) concerns *pre-trial*, *i.e.*, interlocutory, orders or judgments, not rulings that have to be made at trial.

"The suppression of evidence is an interlocutory, rather than final, order." *People v. Atchison*, 2019 IL App (3d) 180183, ¶ 21, *citing People v. Drum*, 194 Ill. 2d 485, 488 (2000). The plain language of Rule 604(a)(1) makes this clear enough, as it applies to an order or judgment the substantive effect of which "results in

SUBMITTED - 24276008 - Katherine Byerley - 9/7/2023 12:10 PM

[present tense] . . . suppressing evidence." The rule does not encompass orders or judgments that "could conceivably" or "might possibly" have the substantive effect of suppressing evidence, if a witness gives unanticipated testimony at trial. See also *People v. Johnson*, 208 Ill. 2d 118, 140 (2003) (under Rule 604(a)(1), the appellate court is limited to addressing "evidence actually suppressed by the circuit court"); *People v. Goodwin*, 207 Ill. App. 3d 282, 287-88 (2d Dist. 1991) (explaining how different rules apply to appellate review of mid-trial orders that suppress evidence). The State cannot use its speculative concerns about unanticipated testimony at trial as a basis for claiming jurisdiction under Rule 604(a)(1).

The State concludes this argument by stating: "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." (State Br. at 18) Mr. Jefferson presented no such "view." He merely pointed out that there were two items that he sought to bar in his motion to bar evidence that had not been explicitly resolved by the court's order – yet they could have been resolved well before trial if the State had simply given the court time to resolve them. The State could have filed an interlocutory appeal at that time, if aggrieved.

The State next argues that the court's order has the substantive effect of excluding evidence because it limits the purpose for which the evidence may be used, citing a federal case analyzing the federal counterpart to Rule 604(a)(1), 18 U.S.C. § 3731, and a footnote by this Court, in which it stated that it had previously referred to federal case law analyzing § 3731 when interpreting Rule 604(a)(1). (State Br. at 18) With this slender reed as a foundation, it suggests that

SUBMITTED - 24276008 - Katherine Byerley - 9/7/2023 12:10 PM

the trial court's order is comparable to an order suppressing a defendant's statement based on a violation of *Miranda v. Arizona*, 384 U.S. 436 (1966), where the evidence is inadmissible as direct evidence but may be used for impeachment purposes. (State Br. at 18-19)

The comparison is flawed. Where statements are suppressed due to a *Miranda* violation, there is no question that the prosecution is impaired, first, because, as the State acknowledges, the statements "may not be introduced by the prosecution in its case in chief" and may only be "used to impeach the defendant's testimony at trial." *People v. Rosenberg*, 213 Ill. 2d 69, 80-81 (2004). Second, this means that even the limited use of the statements by the State is contingent upon a defendant's decision to testify in the first instance.

In sharp contrast, the order under consideration here primarily ensures that the witness statements at issue will *not* be suppressed or excluded. The State is simply barred from using the evidence in support of the theory "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*." (Emphasis in original; C.613)

The State next attempts to distinguish the court's order from those at issue in *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, arguing that these cases "*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." (Emphasis in original; State Br. at 20) In fact, the order under consideration here

SUBMITTED - 24276008 - Katherine Byerley - 9/7/2023 12:10 PM

is *less* restrictive than those at issue in *K.E.F.*, *Truitt* and *Crossley*, because it does not restrict *how* the State elicits the evidence in question or place conditions on how it gets admitted. The State here is allowed to present it in the manner it prefers; it simply cannot use it to argue a particular theory of criminal liability.

The State concludes its argument with an overstatement: "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." (State Br. at 20) In fact, the order *does* allow evidence that Mr. Jefferson shot Gosa; it simply does not permit the State to use this evidence to prove that he personally fired the fatal bullet. (C.613-15)

In sum, the State has responded to Mr. Jefferson's jurisdictional argument by generating a blanket of fog, without addressing the substance of the argument. However, no amount of fog can obscure Mr. Jefferson's central point: An order that does not suppress any evidence at all cannot have the "substantive effect" of "suppressing evidence," so as to confer appellate jurisdiction under Rule 604(a)(1).

II. Even assuming, *arguendo*, that the appellate court had jurisdiction, its ruling conflicts with well-established principles of collateral and direct estoppel, and should be reversed for that additional reason.

The State's central response to the above argument is to assert that it is "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

SUBMITTED - 24276008 - Katherine Byerley - 9/7/2023 12:10 PM

is an element of the offense they are now trying to prove." (State Br. at 21) The central flaws in the State's argument are that it confuses and conflates the collateral/direct estoppel doctrine with the double jeopardy clause itself, confuses issue preclusion with claim preclusion, and relies on an overly narrow interpretation of the meaning of "ultimate facts," where it limits that concept to the elements of a criminal offense.

The State begins by taking general statements from this Court and the U.S. Supreme Court acknowledging that the doctrine of collateral/direct estoppel in the criminal context is a "component of" the Fifth Amendment double jeopardy clause, then simply presumes that the rules governing double jeopardy claims must therefore also apply to estoppel claims, citing several double jeopardy cases having nothing to do with estoppel claims. (State Br. at 22-25)

However, simply because the estoppel doctrine is "embodied in" the double jeopardy clause, *Ashe v. Swenson*, 397 U.S. 436, 445 (1970), estoppel claims are not subject to the same rules as double jeopardy claims. The rules for estoppel claims were succinctly stated by this Court in *People v. Jones*, 207 Ill. 2d 122, 139 (2003), as explained in the opening brief at 22. Mr. Jefferson relies on those rules and has not raised a double jeopardy claim in this appeal.

In *United States v. Bailin*, 977 F.2d 270 (7th Cir. 1992), the Seventh Circuit emphatically rejected an argument identical to the one presented by the State here. In *Bailin*, the defendants were acquitted of many offenses but the jury was hung on the remaining counts, and the court declared a mistrial with respect to the latter. *Bailin*, 977 F.2d at 272-73. The government contended that the defendants

SUBMITTED - 24276008 - Katherine Byerley - 9/7/2023 12:10 PM

could not use collateral estoppel to bar it from proving certain facts in a retrial that had already been decided in the defendants' favor in the first trial, because collateral estoppel is "embodied" in the double jeopardy clause. *Id.* at 273-75. It asked the Seventh Circuit to "hold that collateral estoppel can never apply in circumstances where double jeopardy does not." *Id.* at 275. The court rejected the invitation, noting that "[s]uch a holding would eliminate collateral estoppel from criminal cases and overrule *Ashe*." *Id.*

The court pointed out that "[a] criminal defendant has no need for the benefits of issue preclusion if his entire prosecution is barred by double jeopardy; if double jeopardy bars the entire prosecution, then a court need not consider whether particular issues are precluded from relitigation." *Id.* It added: Precisely contrary to the government's assertion, collateral estoppel is applicable in criminal cases *only when double jeopardy is not*." (Emphasis in original.) *Id.* Thus, the general rules on double jeopardy do not provide valid legal grounds for affirming the appellate court's order in the case *sub judice*.

The State next maintains that "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." (Emphasis in original; State Br. at 26, *quoting Dowling v. United States*, 493 U.S. 342, 348 (1990)) The State quotes *Dowling* correctly, but its interpretation after the hyphen is not found in that opinion, nor in the other cases cited by the State at 26-27. To be sure, the U.S. Supreme Court in *Yeager v. United States*, 557 U.S. 110, 123 (2009) stated

SUBMITTED - 24276008 - Katherine Byerley - 9/7/2023 12:10 PM

that a jury verdict that necessarily decided an issue in favor of a defendant "protects him from prosecution for any [subsequent] charge for which that is an essential element," but it did not state that the estoppel doctrine is *limited* to cases in which it bars the second prosecution altogether, as the State wants this Court to conclude.

Neither the facts nor the rationale in *Dowling* support the State's reading of that opinion. In *Dowling*, the defendant was charged with armed robbery of a bank, but had been acquitted of charges of home burglary and attempted robbery in an *unrelated* case. *Dowling*, 493 U.S. at 344-45. The government used the testimony of the victim in the home burglary ("Henry") to help establish the defendant's identity as the bank robber, based on the mask he wore, the identity of his accomplice, etc. *Id.* at 345. The defendant argued that this testimony should have been barred by collateral estoppel, but the Supreme Court rejected his argument and affirmed his conviction. *Id.* at 347-354. The court reaffirmed the cental holding of *Ashe*, but held that it was inapposite, because, "unlike the situation in *Ashe v. Swenson*, the prior acquittal did not determine an ultimate issue in the present case," since "a jury might reasonably conclude that Dowling was the masked man who entered Henry's home, even if it did not believe beyond a reasonable doubt that Dowling committed the crimes charged at the first trial." *Dowling*, 493 U.S. at 348-350.

As the *Dowling* court explained, the first jury in *Ashe* determined that the government had failed to prove that the defendant had been one of the robbers of a group of men. *Dowling*, 493 U.S. at 347. Thus, "Ashe's acquittal in the first trial foreclosed the second trial" (charging him with the robbery of a different victim

SUBMITTED - 24276008 - Katherine Byerley - 9/7/2023 12:10 PM

in the same occurrence) "because, *in the circumstances of that case*, the acquittal verdict could only have meant that the jury was unable to conclude beyond a reasonable doubt that the defendant was one of the bandits." (Emphasis added; *Dowling*, 493 U.S. at 347-48) In contrast, the acquittal of Dowling in the burglary case did *not* mean that the State failed to prove that he had been identified by the victim. Dowling did not contest being in the victim's home; his defense was that no attempted robbery had occurred. *Dowling*, 493 U.S. at 348-49, 351-52.

Thus, the court held that estoppel did not apply, not because it equated the "ultimate facts" at the bank robbery trial with the "elements of the offenses" charged in the latter, but because the first trial *did not resolve* the *issue of fact* upon which Dowling had sought to rely in the first place.

The State also seeks to rely on *Bailin* in support of its view that the "ultimate facts" of a criminal case are limited to the "elements of the offense." (State Br. at 27, 29-30) At first blush, *Bailin* does appear to support the State's argument. Following *Dowling*, it states that, in order to preclude an issue,"the defendants have the burden of proving, based on the indictment, evidence, instructions, and verdict, that the jury's acquittals necessarily determined issues which, on retrial, must be proven beyond a reasonable doubt." *Bailin*, 977 F.2d at 280-81. However, the opinion as a whole demonstrates the court understood that this encompasses "issues" that "must be proven beyond a reasonable doubt" in order to convict a defendant under a particular *theory* that *satisfies* an element of the offense.

To begin with, the *Bailin* court favorably cited Charles A. Wright et al., Federal Practice & Procedure § 4418, at 169-170 (1981), in support of this

SUBMITTED - 24276008 - Katherine Byerley - 9/7/2023 12:10 PM

proposition: "Direct estoppel prevents a party from relitigating *a fact* which was already determined against it in 'a decision that finally disposes of *a part of a claim* on the merits but does not preclude all further action on *the remainder of the claim*; issues common to both parts of the claim are precluded, even though new issues remain to be decided." (Emphasis added.) *Bailin*, 977 F.2d at 276.The court also favorably cited federal precedent holding that issue preclusion (*i.e.*, estoppel) "bar[s] the Government from relitigating a *question of fact* that was determined in defendant's favor by a partial verdict." (Emphasis added.) *Id.*

Finally, being fully aware of *Dowling* and embracing its rule, the *Bailin* court affirmed the district court's holding that "*Dowling* would not allow *evidence* relating to acquitted mail or wire counts to be *used to establish proof* of the specific corresponding racketeering act charged in the substantive racketeering counts." (Emphasis added.) *Bailin*, 977 F.2d at 283. Thus, the *Bailin* court considered the settled findings of fact from the prior trial to be "ultimate facts" for purposes of the retrial, even though those findings did *not* foreclose the government from trying to prove any "element" of the remaining charges. The settled issues of fact only barred the government from pursuing one *theory* or pathway of *proving* one of the necessary elements of those charges.

Bailin therefore supports the ruling of the circuit court here. The prior jury's special interrogatory finding disposed of "a part of a claim" for murder but did not preclude further action on "the remainder of the claim." Therefore, estoppel may be used to bar the State from using evidence supporting its position on the settled issue of fact in order "to establish proof" of the remaining claim.

SUBMITTED - 24276008 - Katherine Byerley - 9/7/2023 12:10 PM

The State also cites to *People v. Carrillo*, 164 I11. 2d 144 (1995) (State Br. at 28-29), concluding that "when an offense requires proof of only some of multiple charged elements," the fact that one of those elements was found not proven by a prior jury "will not bar a subsequent prosecution altogether if the offense may still be proved based on the remaining elements." On this point, the parties agree (see Opening Br. at 18-19), leaving one to wonder why the State believes *Carillo* supports its position. Nothing in *Carillo* supports the State's contention that estoppel applies only when the issue settled by a prior jury would completely bar an element of an offense in a subsequent trial, nor does *Carillo* support the State's interpretation of *Dowling* or *Bailin*.

Since *Dowling*, *Bailin* and *Carillo* do not actually support its argument, the State ultimately relies on the plurality opinion in *Currier v. Virginia*, 138 S. Ct. 2144 (2018), for the proposition that "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." (State Br. at 30, quoting *Currier*, 138 S. Ct. at 2153 (plurality opinion))[1].

If the plurality opinion in *Currier* was binding authority, it would indeed vanquish Mr. Jefferson's argument in defense of the trial court's order. A rule based on that opinion would radically circumscribe the collateral/direct estoppel

[1] The State also cites the majority opinion, *Currier*, 138 S. Ct. at 2150, but there the court only observed that "*Ashe* forbids a second trial only if to secure a conviction the prosecution must prevail on an issue the jury necessarily resolved in the defendant's favor in the first trial." It neither states nor implies in that part that the doctrine cannot be used to bar relitigation of issues or evidence.

SUBMITTED - 24276008 - Katherine Byerley - 9/7/2023 12:10 PM

doctrine, essentially eliminating "issue preclusion" from our criminal jurisprudence altogether and abrogating an enormous body of case law – including the opinions of this Court cited in the opening brief.

However, a plurality opinion can only be a source of persuasive authority and is not binding on lower courts. See*, e.g.*, *Texas v. Brown*, 460 U.S. 730, 737 (1983) (a plurality opinion is not binding precedent but should be understood only as "the considered opinion of four Members of this Court"); *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 680 (2010) (declining to apply rule from prior opinion because "only the plurality decided that question").

Of course, this Court has the authority to join the *Currier* plurality and its proposed evisceration of the estoppel doctrine, but it should decline the State's invitation to do so. In addition to considerations of *stare decisis* and the fact that doing so would abrogate numerous well-reasoned opinions of this Court and the appellate court (see, *e.g.*, Opening Br. at 17-19), the doctrine itself is now deeply rooted in federal and state law, has clear rules of application, is internally logical, and serves such core juridical policies as respect for findings made by juries and courts, judicial economy and the finality of judgments. The doctrine is not broken, and there is no need to "fix" it.

The State next points out that 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," *citing People v. Colon*, 225 Ill. 2d 125, 151 (2007). (State Br. at 31-33) That situation is not present here, but the State asserts that it supports a corollary proposition that "a fact that was

SUBMITTED - 24276008 - Katherine Byerley - 9/7/2023 12:10 PM

tried as an ultimate fact in one trial may be relitigated as a merely evidentiary fact in a subsequent trial." (State Br. at 31, 33-34)

The latter proposition appears to be correct, but this is not a case in which the defendant is being tried for an unrelated crime, as in the cases cited by the State – *Dowling*, *People v. Baldwin*, 2014 IL App (1st) 121725, ¶¶ 32, 73, and *People v. Littleton*, 2014 IL App (1st) 121950, ¶ 69 – nor is it a case of evidence of prior offenses being admitted under the lenient rules for admission at a sentencing hearing, as in *People v. Jackson*, 149 Ill. 2d 540, 549-553 (1992). Mr. Jefferson is being tried the third time for the *same* offense, and the question of whether he personally discharged the firearm that proximately caused the death of Marcus Gosa is one of the ultimate facts at issue – or, in the language of *Jones*, it "was a critical and necessary part of the final judgment in a prior trial." *Jones*, 207 Ill. 2d at 139. This brings his case within the ambit of the rule in *Carrillo* and *People v. Brown*, 2015 IL App (1st) 134049, ¶¶ 45-46, that direct estoppel may apply to a particular theory of liability for murder in a subsequent trial for the same offense. (See Opening Br. at 18-19)

The theory that Mr. Jefferson personally discharged the firearm that proximately caused Gosa's death was not the only way to convict him of murder but it was the State's primary theory. Indeed, the indictment *only* charged him as the principal and did not include any language even suggesting his liability under an accountability theory. (C.32) The jury instructions included both theories (C.229), and the theory that Mr. Jefferson was the principal was the one clearly favored by the State in closing argument. (R.859,861) This issue of ultimate fact

SUBMITTED - 24276008 - Katherine Byerley - 9/7/2023 12:10 PM

was definitively settled by the jury's special interrogatory answer. (C.211)

The State next cites several older cases in support of the undisputed proposition that defendants acquitted of one offense may still to be prosecuted for another offense based on the same conduct, where the second offense required proof of different elements or different facts. (State Br. at 34-35) It then presents an argument that this Court's opinion in *People v. Haran*, 27 Ill. 2d 229 (1963) was out of step with that precedent, and subsequent precedent, and wrongly decided. (State Br. at 35-39) This is another distraction and diversion from the issues now before this Court. Even assuming, *arguendo*, that there is merit to the State's argument, it does not apply here. Mr. Jefferson is to be re-tried for the *same* offense, based on the same allegations of fact and body of evidence.

The State correctly notes that some of the authorities from other jurisdictions cited by Mr. Jefferson had been overruled or abrogated by *Dowling*'s "ultimate facts" rule. (State Br. at 39-40) However, this does not advance its argument that "ultimate facts" may be equated with "elements of the offense." Its argument also falters when it claims that *Feela v. Israel*, 727 F.2d 151, 154 (7th Cir. 1984) is inapposite because the Seventh Circuit in that case did not hold that "evidence of acquitted conduct is generally inadmissible." (State Br. at 40)

This is a straw man argument. Mr. Jefferson is not arguing that evidence of acquitted conduct "is generally inadmissible" in *any* future proceeding. His argument is that it is inadmissible when the requirements of direct or collateral estoppel are satisfied. *Feela* supports that proposition and does not conflict with *Dowling*. In *Feela*, the defendants were acquitted of a charge of theft of a van.

SUBMITTED - 24276008 - Katherine Byerley - 9/7/2023 12:10 PM

Feela, 727 F.2d at 153. They were later charged and convicted with conspiracy to commit an armed robbery of a bank, with the theft of the van alleged to be an act committed in furtherance of the conspiracy, and evidence of the theft was admitted at trial. *Id.* at 154-55. Applying the rule in *Ashe*, the Seventh Circuit held that the trial court erred in allowing that evidence to be introduced, and it reversed the conspiracy convictions on that basis. *Id.* In sum, stealing a van was not an "element of the offense," but the van theft evidence *supported* the State's case on an issue of "ultimate fact" in the second trial – therefore, it was improper to admit it. *Feela* supports Mr. Jefferson's argument.

The State correctly notes that *Bailin* and *Cercy v. State*, 2019 WY 131, 455 P.3d 678 (Wyo. 2019) are both in accord with *Dowling*, although it glosses over the significance of *Cercy*. (State Br. at 40) The Wyoming Supreme Court in *Cercy* noted that *Dowling* "emphasized that the district court gave limiting instructions to the jury about the purpose for which the evidence could be used and that the defendant had been acquitted of the conduct." *Cercy*, 2019 WY 131, ¶ 41, 455 P.3d at 692. It determined that although evidence that the defendant had performed cunnilingus on the alleged victim could be admitted at retrial, the trial court erred when it barred the defendant from presenting evidence that a prior jury had acquitted him of charges based on that finding and refused a jury instruction to inform the later jury of that fact. *Id.*

The court added: "[A]lthough evidence of acquitted conduct *may* be admissible under the rules of evidence, retrial could still constitute a double jeopardy violation if the State 'seeks to rehash only matters on which the defendant[ ] ha[s] already

SUBMITTED - 24276008 - Katherine Byerley - 9/7/2023 12:10 PM

been acquitted.' [Citation.] While the State may be permitted to admit evidence of cunnilingus on retrial for third-degree sexual assault, it cannot rely on cunnilingus for its proof of the elements of the crime without running afoul of the constitutional guarantee against double jeopardy." (Emphasis in original.) *Cercy*, 2019 WY 131, ¶ 42, 455 P.3d at 692-93.

This closely parallels the approach taken by the trial court in the case *sub judice*. Because the State, consistent with the rules on direct estoppel, is still free to prosecute Mr. Jefferson for murder on a theory of accountability, the court permitted the State to introduce any and all evidence supporting that theory, even where it also supports the theory that he acted as the principal. However, it barred the State from "rehash[ing]" the principal theory or "rely[ing]" on the evidence in question "for its proof of the elements of the crime," and will, at Mr. Jefferson's request, instruct the jury that he may not be convicted on the basis of that theory. (C.613-15)

The State next argues that, since discharge of a firearm is not an element of the offense of murder, the issue of whether Mr. Jefferson personally discharged the firearm that caused Gosa's death is not an issue of ultimate fact at his retrial. (State Br. at 41-57) The premise is correct, but the conclusion does not follow.

This gets to the crux of the issue on appeal. The main dispute between Mr. Jefferson and the State is that the State presumes that an "ultimate fact" or issue in a retrial refers strictly to an element of the offense that the State *must* prove at the retrial beyond a reasonable doubt in order to prevail, whereas Mr. Jefferson submits that it may also refer to a fact or issue supporting *a theory*

SUBMITTED - 24276008 - Katherine Byerley - 9/7/2023 12:10 PM

of criminal liability that the State may rely upon *in order to prove up* a necessary element of the offense. As discussed herein, *Bailin, Feela, Cercy, Carillo* and *Brown* all support Mr. Jefferson's position. His position is also consistent with the long-held view that direct or collateral estoppel is synonymous with "issue preclusion," see, *e.g.*, *Du Page Forklift Serv., Inc. v. Material Handling Servs., Inc.*, 195 Ill. 2d 71, 77 (2001), whereas the State's narrower definition would dramatically truncate that doctrine, limiting direct or collateral estoppel to cases in which its application amounts to "claim preclusion," like the double jeopardy clause itself.

On this point, this Court's opinion in *People v. Fort*, 2017 IL 118966, another post-*Dowling* case, merits a closer look. The principal issue in *Fort* was whether a juvenile defendant was properly sentenced as an adult, where the State charged him with first-degree murder, but the defendant met his burden of proving that his actions were mitigated by an unreasonable belief in self-defense, and the jury convicted him of second degree murder. *Fort*, 2017 IL 118966, ¶ 12.

Second degree murder is a unique offense because it is a "lesser mitigated offense" of first degree murder. *People v. Mohr*, 228 Ill. 2d 53, 66 (2008). The State argued that, because of this unique status, the defendant had not actually been "acquitted" of first degree murder. *Fort*, 2017 IL 118966, ¶ 32. This Court rejected that argument, holding that: "When a defendant is charged with first degree murder but convicted of second degree murder, the State is prohibited by collateral estoppel from later retrying the defendant for first degree murder." *Id.*, ¶ 34. Thus, the Court treated the prior jury's finding as going to an issue of "ultimate fact," even though that finding – that the defendant had proved a factor in mitigation – had

SUBMITTED - 24276008 - Katherine Byerley - 9/7/2023 12:10 PM

nothing to do with the "elements" of the offense of first degree murder.

The State's next several arguments are all predicated on its overly narrow interpretation of *Dowling*. The State correctly notes that the elements of the offense of murder, include, but are not limited to, proof that the defendant acted as the principal, and that the manner in which the defendant causes the death is irrelevant. (State Br. at 41-42) However, under the body of case law cited herein and in the opening brief, Mr. Jefferson is not required to prove that an element of the offense is foreclosed for direct estoppel to apply. It is sufficient that the jury found that the State had not proven one of its theories of criminal liability.

The State then mischaracterizes Mr. Jefferson's argument, stating: "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.'" (State Br. at 43-44) The first clause in that statement is not correct. "Guilt as a principal" is not an element of the crime of murder but Mr. Jefferson never argued that it does not qualify as an "ultimate fact" for estoppel purposes. His argument is that the ultimate facts of a case, for estoppel purposes, can and do encompass theories or methods of *proving* an element of an offense.

The State next argues that special interrogatories in criminal cases do not serve the same purposes as in civil cases, are not favored in criminal cases, and may not be used to for any purpose beyond complying with *Apprendi v. New Jersey*,

SUBMITTED - 24276008 - Katherine Byerley - 9/7/2023 12:10 PM

530 U.S. 466, 490 (2000), in determining whether a sentencing enhancement applies. (State Br. at 44-48) Its argument largely rests on *People v. Jackson*, 372 Ill. App. 3d 605, 612 (4th Dist. 2007) and subsequent appellate opinions that have restated its holding without re-examination. The appellate court in the instant case relied on the same body of case law, and this argument was adequately addressed in the opening brief at 24-26. None of the additional cases cited by the State add anything to the argument, and, tellingly, none of them even mentions the collateral/direct estoppel doctrine and the question presented here. While it has been settled law since *People v. Jones*, 207 Ill. 2d 122, 133-34 (2003) that a special interrogatory answer in a criminal case may not be used to challenge the general verdict on grounds of inconsistency, it does not follow from this that it may not be used to bar relitigation of an issue in a subsequent trial.

The State adds that "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." (State Br. at 48) The State again relies on its overly restrictive view of what constitutes "ultimate facts" under the estoppel doctrine.

The State tries to pad its argument by citing to older opinions expressing concerns that special interrogatories in criminal cases "may confuse the jury." (State Br. at 46-47) Such concerns do not apply here. The instruction given to the jury on the special interrogatory (C.146), and the verdict form itself (C.211), were simple, clear and easy to comprehend. The jury did not send any note to the court expressing confusion or asking for clarification.

SUBMITTED - 24276008 - Katherine Byerley - 9/7/2023 12:10 PM

The State argues that "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." (State Br. at 48-50) However, Mr. Jefferson's argument does not depend upon establishing that the jury necessarily found him guilty as an accomplice. It may well be the case that some jurors believed he acted as the principal, some believed he was guilty as an accomplice, and/or that some were not certain but concluded that he must have been guilty of one *or* the other. What matters is that they unanimously agreed that the State had not proven beyond a reasonable doubt that he *was* the principal.

The State relies heavily on *People v. Peoples*, 2015 IL App (1st) 121717, in which the trial court committed a grievous error by informing the jury, in response to a question, that it could convict the defendant on a theory of accountability, even though the State had never raised that theory at trial and the defendant had no opportunity to present a defense to that theory. *Peoples*, 2015 IL App (1st) 121717, ¶¶ 91-94. Although the appellate court held that this was reversible error, *id.* at ¶ 97, and noted that the jury had answered a special interrogatory finding like the one at issue in the case at bar, *id.* at ¶ 98, it declined to reverse the defendant's conviction. *Id.* at 103.

It was in response to a defense argument that sought to distinguish *Jones*, that the court declined to speculate as to the jury's rationale for convicting the defendant, even though its special interrogatory finding appeared to directly conflict with its verdict. *Id.* at ¶¶ 103-05. The court concluded that it could not say, "as

SUBMITTED - 24276008 - Katherine Byerley - 9/7/2023 12:10 PM

a matter of law, that the jury intended to acquit defendant of first-degree murder." *Id.* at ¶ 107. Thus, *Peoples* simply followed *Jones*, albeit in an unusual case that gave the defendant a reasonable argument for carving out an exception to the rule. Estoppel was not at issue.

In the case at bar, there were no unusual circumstances that may have prompted the jury to convict Mr. Jefferson on an improper basis, nor is he seeking an acquittal or arguing that the verdict is inconsistent with the special interrogatory finding. He is simply asking that the special interrogatory finding be taken at face value and given effect under the established rules of direct estoppel. Here, it is the *State* that is inviting this Court to speculate and find – based on nothing *but* speculation – that the special interrogatory finding might have been based on lenity, or something other than the evidence presented in the case.

The State next asserts that "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" – based on the fact that courts have the *option* under Supreme Court Rule 451(g) of conducting a separate proceeding on the sentencing enhancement. (State Br. at 51) The jury's deliberations on the special interrogatory in the instant case did not take place at sentencing or at any such separate proceeding. While it is true that the jury was instructed to first reach a verdict on the underlying offense before answering the special interrogatory, the State fails to explain how or why this provides cause to treat the special interrogatory finding differently or of lesser importance than the verdict on the underlying offense.

SUBMITTED - 24276008 - Katherine Byerley - 9/7/2023 12:10 PM

In critiquing the appellate court's rationale for reversing the trial court, Mr. Jefferson cited cases from other jurisdictions showing that special interrogatory findings in criminal cases can and have been used as basis for applying direct or collateral estoppel to subsequent litigation. (Opening Br. at 26-27) The State cannot deny this but observes that none of the cited cases "appear to concern the preclusive effect of special interrogatories regarding *sentencing* factors on subsequent criminal proceedings." (Emphasis added; State Br. at 53) The State fails to explain why that distinction matters, beyond repeating its view that the special interrogatory in the case at bar did not address the "ultimate facts" in the case. Notably, in *People v. Asbury*, 173 Cal. App. 3d 362 (Cal. Ct. App. 1985), the application of direct estoppel did not bar a subsequent prosecution for the same offense but barred the State from relying on a theory of criminal liability that had already been resolved by the special interrogatory or verdict finding. *Asbury*, 173 Cal. App. 3d at 365-66.

The State then engages in hair-splitting, arguing that, although *Carillo* and *Brown* applied direct estoppel to bar the State from subsequent prosecution under a particular theory of murder, the theories that were barred were based on distinct sub-sections of the murder statute, whereas Mr. Jefferson seeks to bar a subsequent prosecution under the theory that he acted as the principal. (State Br. at 55-56)

The distinction is accurate but the State again fails to explain why this matters. Neither this Court in *Carillo* nor the appellate court in *Brown* stated or implied that direct estoppel applies only to *statutorily codified* theories of criminal liability. The State argues that "principal and accomplice liability are not alternative elements, one of which must be proved beyond a reasonable doubt to prove

SUBMITTED - 24276008 - Katherine Byerley - 9/7/2023 12:10 PM

defendant's guilt," but "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." (State Br. at 56) The latter sentence concedes that these are distinct theories of liability. In this case, a jury unanimously concluded that the State failed to prove beyond a reasonable doubt that Mr. Jefferson was guilty under one of those theories. The State does not articulate a reason why it should not be given preclusive effect.

Finally, the State concludes by arguing that *Fort* is inapposite, relying once again on its narrow definition of "ultimate facts." (State Br. at 57) As already described herein, this Court in *Fort* took a more expansive view.

The State's arguments for affirming the appellate court's order draw a number of distinctions between the instant case and other case law on direct/collateral estoppel – unsurprisingly, given the unique facts of this case. What it fails to do, however, is explain *why* direct estoppel principles *should not* apply to the instant case. A jury settled a question of fact at Mr. Jefferson's last trial. That factual determination settled the primary theory of criminal liability upon which the State relied in Mr. Jefferson's first two trials – and it thereby qualifies as an "ultimate fact" in the case. The jury's determination should be respected and given effect in Mr. Jefferson's next trial.

SUBMITTED - 24276008 - Katherine Byerley - 9/7/2023 12:10 PM

CONCLUSION

For the foregoing reasons, defendant-appellant Trenton Jefferson respectfully requests that this Court reverse the judgment of the appellate court, affirm the judgment of the trial court, and remand this cause for further proceedings accordingly.

Respectfully submitted,

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SUBMITTED - 24276008 - Katherine Byerley - 9/7/2023 12:10 PM

CERTIFICATE OF COMPLIANCE

I certify that this reply brief conforms to the requirements of Rules 341(a) and (b), as modified by this Court's order of August 17, 2023. 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 7,476 words.

/s/Richard J. Whitney
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No. 128676

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Appellate Court of Illinois, No. 5-20-0185.
	)	
Respondent-Appellee,	)	There on appeal from the Circuit
	)	Court of the Twentieth Judicial
-vs-	)	Circuit, St. Clair County, Illinois,
	)	No. 11-CF-378.
	)	
TRENTON JEFFERSON,	)	Honorable
	)	John J. O'Gara,
Petitioner-Appellant.	)	Judge Presiding.

NOTICE AND PROOF OF SERVICE

Mr. Kwame Raoul, Attorney General, 100 W. Randolph St., 12th Floor, Chicago, IL 60601, eserve.criminalappeals@ilag.gov;

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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 September 7, 2023, 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 petitioner-appellant in an envelope deposited in a U.S. mail box in Mt. Vernon, 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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