NO.: 124563

IN THE
SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	) On Appeal from the Appellate Court, First District
Plaintiff-Appellant,	) No. 1-17-0258
v.	) Indictment No. 14 CR 10466
JASPER McLAURIN,	)
Defendant-Appellee.	) The Honorable Thaddeus L. Wilson, Judge Presiding

BRIEF FOR DEFENDANT-APPELLEE

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ORAL ARGUMENT REQUESTED

E-FILED
11/4/2019 4:33 PM
Carolyn Taft Grosboll
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STATEMENT OF FACTS[1]

Defendant Jasper McLaurin ("Jasper") was charged with armed habitual criminal, unlawful use or possession of a weapon by a felon, and aggravated unlawful use of a weapon in Indictment No. 14 CR 10466. (C.21-C.33, Indictment). He was found guilty after a bench trial and sentenced to seven (7) years in the Illinois Department of Corrections. A unanimous panel of the First District Appellate Court reversed the conviction. 2018 IL App (1st) 170258.

At trial the State only presented two witnesses, and did not introduce any physical or scientific evidence:

Witness Sergeant Fraction

On May 25, 2014, Chicago police Sergeant Fraction was surveilling an apartment building near 1351 South Kildare in the 11th District. (CC-10:4, 10:6, 10:13-14, 10:18, 10:21, 10:23; CC-11:2, 11:8-9; CC-18:7-8). She was in plainclothes, working alone, driving an unmarked vehicle. Claiming she observed a black male exit an apartment building, carrying what she described as a "chrome handgun," enter the back of a white van which then drove away, she followed. (CC-12:1-5, 12:17-19). The sergeant identified the male as the defendant, Jasper. (CC-12:6-15).

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1 References to the trial court transcript will be preceded by "CC". References to the opinion of the First District Appellate Court, *People v. McLaurin*, 2018 IL App (1st) 170258, shall be "McLaurin, ¶."

Despite being "familiar with firearms, [having] work[ed] with firearms, and trained with firearms," the sergeant could not give any description of the object beyond the fact that it was chrome. She could not tell whether it was a revolver or semi-automatic. (CC-67:21-22). She clarified this was because the individual was holding the gun so that "the barrel was coming out the one side and the handle was on the other side." (CC-20:10-12).

The sergeant contacted the Office of Emergency Communication, ("OEMC") as she followed the van while maintaining contact with the OEMC dispatcher. (CC-14:4-8; 21:2-6). At first the sergeant was the only car behind the van and was able to follow directly behind. (CC-21:18-22). She continued as the van made four turns, without losing sight of it, until marked units took over following the van. (CC-14:19-24).

From the time she first saw the individual cross the street, until the van was curbed and its three occupants were ordered to exit the vehicle, Sergeant Fraction did not see any door of the vehicle open, any window roll down, or anything thrown from the van. (CC-23:14-22).

Witness Officer Rodriguez

Officer Rodriguez, one of the officers who was at the scene after the vehicle was curbed, was the only other witness the State called. He testified that at about 10:30 a.m., he was patrolling alone when he responded to the OEMC message requesting that officers stop a conversion van travelling

northbound on Kostner. (CC-30:9-19). When Rodriguez arrived at the scene there were already two squad cars there, blocking the van from the front and back. (CC-44:7-10). He pulled up adjacent to the driver's side front of the vehicle and immediately exited his car in order to have a conversation with the driver, while "waiting for more information… from [Sergeant Fraction]," who was still observing from her "covert car." (CC-31:9-12, 31:18-22; CC-49:20-23).

All three individuals exited the passenger side of the van. (CC-42:17-22). Jasper came from the back-passenger part of the conversion van. (CC-33:1-17). The van doors did not slide open. They opened outward. (CC-40:2-5.) After the officers conferred with Sergeant Fraction to ensure they had the correct vehicle and individual, they searched for a weapon. (CC-33:20-23).

After patting all the individuals down, the officers searched the vehicle's interior. They did not find any "chrome gun." (CC-34:1-12). Looking under the van, Officer Rodriguez saw what appeared to be a gun, by the rear passenger side, near the middle of the conversion van. Prior to recovering the gun, he requested that an evidence technician come out to the scene, but none was available, so Rodriguez recovered the gun with gloves and placed it in a bag. (CC-46:19-24; 47:1-5). The gun was loaded. He cleared it by removing the magazine and a bullet from the chamber. (CC-36:12-14). He did not provide any further details about the gun.

Jasper was arrested at the scene. (CC-36:15-17).

Similar to Sergeant Fraction, Officer Rodriguez did not ever see the van doors open (before the three exited), or observe any individual place or throw anything underneath the vehicle. (CC-40:19-24, 43:6-9).

About 20 minutes after the gun was recovered, while back at the 11th district, Officer Rodriguez asked Sergeant Fraction to identify the handgun recovered from underneath the van. She could not identify it as the same item she saw Jasper holding, simply opining that it was the same color and size as the item she claimed to have seen Jasper carry into the van. (CC-16:1-13; 24:11-17).

The gun was never tested for fingerprints. (CC-25:15-20, 47:3-5). Although there were five other officers present, no-one else was called. Accordingly, no-one testified that they saw a weapon, or that anything dropped, thrown, or kicked under the van. (CC-43:18-19).

Closing Argument and the Judge's Decision

Arguing for guilt, the State claimed Jasper had a gun when he entered the vehicle, that nobody lost sight of the vehicle, and Jasper "did not exit the vehicle until he was ordered out of [it] by the Chicago Police Department." (CC-64:10-14). The State did not offer any explanation for how officers could have missed anyone tossing a gun under the car, if they had done so. Instead, the State asked the judge to "rely on circumstantial evidence to

determine that the defendant was the one who put the gun under the vehicle." (CC-64:17-19).

Jasper's counsel argued the sergeant's testimony was insufficient – she was unable to describe the "gun" in any detail beyond the color – including whether it was an automatic or a revolver. (CC-65:13-17). There was no fingerprint evidence, and no testimony regarding a door opening or gun being tossed from the van, despite the presence of at least six officers when Jasper and the other occupants exited. (CC-65:21-24; CC-66:1-11).

Pronouncing guilt, the trial court excused Sergeant Fraction's inability to identify the gun because of "the way that the defendant [was] holding the firearm, which is consistent with not being able to say exactly what type of firearm because of the way the defendant's hand was in the middle of the firearm." (CC-67:17-21). He also excused her failure to see anybody open the door or throw anything out because she took up "a vantage point that is such that she wouldn't have been able to see." (CC-68:3-6).

Likewise, he found Officer Rodriguez was viewing the events from an angle that did not allow him to see the door open or a weapon being tossed. (CC-68:7-10). Still, as the Appellate Court recognized:

> The gun that Rodriguez recovered from underneath the van was not introduced at trial. At least six police officers were on the scene at the time that defendant and the other two men were removed from the van. However, there was no testimony that anyone observed defendant or one of the men discard the gun under the van. It is unknown how the gun came to be located there. Consequently, the trial court found that Rodriguez's

> testimony regarding the recovered gun was not relevant to its finding that defendant illegally possessed a firearm.

McLaurin, ¶22.

Opining "its finding was based on the observation of defendant by Sergeant Fraction as defendant walked down the street", *McLaurin*, ¶22, the trial court relied upon a series of armed robbery cases where the "unequivocal testimony of a witness that the defendant held possessed a firearm constitutes substantial evidence sufficient to show the defendant was armed or possessed a firearm within the meaning of the law". (CC-69:5-9). The trial court felt "the State need not present a firearm in order for the trier of fact to find the defendant possessed one." (CC-69:17-19). "In the absence of a recovered firearm, the witnesses' unequivocal testimony that they observed the defendant carrying a firearm is sufficient." (CC-69:17-19). The court found the possessory offense was proven from Sergeant Fraction's observation of Jasper when he walked, and her testimony alone, that she observed him in possession of a gun, was sufficient to find him guilty. *McLaurin*, ¶22.

ARGUMENT

I. JASPER WAS NOT PROVEN GUILTY BECAUSE THE STATE FAILED TO PRESENT "UNEQUIVOCAL" EVIDENCE HE POSSESSED A FIREARM.

In order to find Jasper guilty on each count, the State was required to prove that Defendant knowingly possessed a firearm. 720 ILCS 5/24-1.1(a);

720 ILCS 5/24-1.7(a); 720 ILCS 5/24-1.6(a); *People v. McGee*, 2017 IL App (1st) 141013-B, ¶ 13. With respect to these offenses, the legislature has defined a firearm as a "device . . . designed to expel a projectile or projectiles by the action of an explosion, [or] expansion of gas." 720 ILCS 5/2-7.5; 430 ILCS 65/1.1. See also IPI 18.35G.

The officer testified she *briefly* observed a chrome object, from 50 feet away, that she thought looked like a firearm. But she was missing the details: she could not explain whether it was a revolver or semi-automatic, which would each appear quite different, and she could not describe the size, caliber, make or model. She did not touch the item or see it up close. At best she could only opine the item found under the van looked to be the same size and color as that she saw, but not that it was the same item.

Since the item was not recovered, there could be no conclusive proof it was a firearm. There was no testing for firing capability, nor was there any evidence presented of a working firearm. Accordingly, given all of these glaring omissions in the proofs, the item could not satisfy the statutory definition of "firearm" under the relevant Illinois statutes, or under existing caselaw.

A. The Vague Testimony that Defendant Was Carrying a Chrome Object That Appeared to be a Firearm Was Not the Kind of Unequivocal Testimony Required to Prove the Defendant Possessed a Firearm.

Here, the trial court found Defendant guilty based on testimony from Sgt. Fraction that she saw Defendant carrying a firearm into the van. (CC-69:20-70:1); *McLaurin*, ¶22, 26. The trial court explained it evaluated the evidence in the *absence* of a recovered firearm. *Id.* at 69:20-22. Clearly, the court's finding of guilt was based only on the object Sgt. Fraction claims to have seen Defendant holding, not the firearm found under the van.

The State somehow believes that this Court now may reinstate this conviction by relying upon the testimony rejected by the trier of fact, that of Officer Rodriguez, initially framing the issue as "The eyewitness testimony of two veteran police officers sufficed to prove beyond a reasonable doubt the defendant possessed a firearm and firearm ammunition." State's Brief, pg. 12. While making this argument they urge this Court to consider evidence the trial court expressly rejected (that the weapon recovered by Officer Rodriguez was the same item that Jasper had been caring when observed by Officer Fraction).[2] The State cites no applicable authority for their request:

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[2] Although both trial and reviewing courts can consider testimony at trial when evaluating a ruling on a motion to suppress was proper, that rule does not allow for a reviewing court to reject the trier of fact on its credibility determinations. "While the findings of fact to be considered are those drawn from the hearing on the motion to suppress, it is also permissible for the reviewing court to consider those findings of fact which are drawn from the testimony elicited at trial. *People v. Braden* 34 Ill.2d 516, 520 (1966)

> As our appellate court has aptly observed, a reviewing court is not simply a depository into which a party may dump the burden of argument and research. *Vilardo v. Barrington Community School District 220,* 406 Ill.App.3d 713, 720, 346 Ill.Dec. 699, 941 N.E.2d 257 (2010); *U.S. Bank v. Lindsey,* 397 Ill.App.3d 437, 459, 336 Ill.Dec. 306, 920 N.E.2d 515 (2009); *Engle v. Foley & Lardner, LLP,* 393 Ill.App.3d 838, 854, 332 Ill.Dec. 228, 912 N.E.2d 715 (2009). E.R.H., the party challenging this aspect of the circuit court's judgment—which ruled the subpoena enforceable—cites, without meaningful reasoning or argument, inapplicable cases that speak only to allegations of improper purpose or harassment in the issuance of the subpoenas there at issue. A court of review is entitled to have the issues clearly defined and to be cited *pertinent* authority. A point not argued or supported by citation to relevant authority fails to satisfy the requirements of Supreme Court Rule 341(h)(7), (i) (see Ill. S.Ct. R. 341(h)(7), (i) (eff. Feb. 6, 2013); *Vancura v. Katris,* 238 Ill.2d 352, 370, 345 Ill.Dec. 485, 939 N.E.2d 328 (2010) ("Both argument and citation to relevant authority are required. An issue that is merely listed or included in a vague allegation of error is not 'argued' and will not satisfy the requirements of the rule.")). Failure to comply with the rule's requirements results in forfeiture. *Vancura,* 238 Ill.2d at 369–70, 345 Ill.Dec. 485, 939 N.E.2d 328.

People ex rel. Illinois Dep't of Labor v. E.R.H. Enterprises, 2013 IL 115106, ¶ 56, 4 N.E.3d 1, 14.

Therefore, the suggestion should be rejected.

Even if considered, the State seems to focus on the conclusory language used by the testifying officers, when referring to the object Jasper supposedly carried during their testimony as a handgun or firearm, advocating that

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People v. Conner, 78 Ill. 2d 525, 532, 401 N.E.2d 513, 517 (1979)

because the "veteran officers" said it was a firearm it must be an actual "firearm", within the meaning of the statute. Indeed, it appears the State believes that a police officer's testimony is entitled to greater weight.

When evaluating a claim the evidence was insufficient, on appeal, the reviewing court must determine whether, while viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the elements of the offense were proven beyond a reasonable doubt. *People v. Brown*, 2013 IL 114196, ¶48 (citing *Jackson v. Virginia*, 443 U.S. 307, 318-19, 99 S.Ct. 2781 (1979)). This standard applies regardless, whether the evidence is direct or circumstantial. What the standard does not require, or permit, is for the reviewing court to substitute its judgment for that of the fact finder on issues involving witness credibility and the weight of the evidence. *People v. Jackson*, 232 Ill. 2d 246, 280-81 (2009) ("This standard of review does not allow the reviewing court to substitute its judgment for that of the fact finder on questions involving the weight of the evidence or the credibility of the witnesses. *People v. Sutherland,* 155 Ill.2d 1, 17, 182 Ill.Dec. 577, 610 N.E.2d 1 (1992), quoting *People v. Campbell,* 146 Ill.2d 363, 375, 166 Ill.Dec. 932, 586 N.E.2d 1261 (1992)"). *Jackson*, at 280–81. See also *People v. Wheeler*, 226 Ill. 2d 92, 114-15 (2007) (the "trier of fact is best equipped to judge the credibility of witnesses, and due consideration must be given to the fact that it was the trial court that saw and heard the witnesses").

In a bench trial, the trial court is responsible for determining the credibility of the witnesses, weighing the evidence, resolving conflicts in the evidence, and drawing reasonable inferences from therein. *People v. Siguenza-Brito*, 235 Ill. 2d 213, 228 (2009). While in a jury trial we have no idea of the deliberative process, here we have the benefit of the trial court explaining it's thought process. Nonetheless, that does not invite second guessing to the degree the State urges, effectively *de novo* review. There is simply no authority for the position the State now urges, that a reviewing court independently weigh *all* of the evidence to find a defendant guilty. This goes far beyond drawing reasonable inferences from the trial court proceedings in favor of the prevailing party, it requires the reviewing court draw *all* inferences in favor of the prevailing party. The State's present position, to require a reviewing court to accept all the evidence introduced by the prosecution as fact, unassailable to challenge, anytime a defendant is convicted, is unsupportable.

The State now tries to loop in Officer Rodriguez because, when properly evaluated, it is clear the appellate court was correct when they held Officer Fraction's testimony that she "believed" defendant had a firearm, standing alone, to be lacking. *McLaurin*, ¶28. Notably, the court did not reject this Court's precedents from *People v. Washington*, 2012 IL 107993 or *People v. Wright,* 2017 IL 119561. Rather, the court correctly realized the evidence did not rise to the level necessitated by those cases.

In *Washington* this Court was faced with determining whether the State had presented sufficient evidence to establish a "dangerous weapon" (not a necessarily a firearm) was possessed. Then, the armed robbery statute required that the item be a "dangerous weapon", not necessarily a firearm. Noting each of the times the victim had seen the gun, including when it was stuck into him, when he was forced into a truck, while it was held to his head within that truck, and again later when it was pointed at him while being forced to the cargo area of the truck, this Court found it significant that there had been several minutes during which the victim had a clear view of the weapon. This Court found the testimony about a gun to be "unequivocal".

In *Wright*, this Court cited testimony the victim said he observed what looked like a black semi-automatic pistol, that he had familiarity with that kind of gun, that he had actually felt the gun, and that he was 100% certain it was a firearm. A second witness also testified that they saw the handle of the gun, was familiar with guns, and believe the gun to be a 9mm semi-automatic.

Here, while the sergeant testified that she "observed a male black exit the apartment building carrying a chrome handgun," (CC-12:1), she was unable to describe the item in any meaningful way.

Aside from claiming it was chrome, Sergeant Fraction could not provide any detail, including whether it was a semi-automatic or a revolver. (CC-16:23-24, 17:1-7). At best, you have the testimony of a single officer who

thought she saw a chrome item that looked to be a firearm. You do not have any testimony regarding her reason(s) why she believed this to be a firearm. She could not say whether the item was a revolver, which would have a round chamber or a semi-automatic, dramatically different designs. She could not opine on the caliber. She could not tell the make, model, type, size, or if it was operable. How could any trier of fact conclude it was a firearm with almost every detail lacking? To be sure, she could not even say that the item subsequently recovered was the same item, only that it looked like it might be.

The fact is that her observation, made from 50 feet away, is far too speculative to raise to the level of proof beyond a reasonable doubt. Here, the testimony was far from "unequivocal". Therefore, the State did not prove that the item was a firearm at all.

The State finds fault with the appellate court's rejection of Rodriguez's testimony, inaccurately contending that the trial court did not considered the item he recovered as proof: "[the] bottom line is it's based on what the officer saw at the time that she saw the defendant pass by her, and she say. . . she saw the defendant with a gun". (CC-60:13-16). Obviously, the trial court did not rely upon Rodriguez. Indeed, had the trial court thought the gun recovered by Officer Rodriguez was the same as the item Officer Fraction had seen, there would have been no reason for it to engage in the analysis

required by *Wright* and *Washington*—that gun could have been tested and proven to be a firearm. *720 ILCS 5/2-7.5.*

The trial court found Jasper guilty because Sergeant Fraction thought she saw Defendant carrying a firearm into the van. (CC-69:20-70:1). The court evaluated the evidence in the *absence* of a recovered firearm. (*Id.* at 69:20-22). Thus, the court's finding of guilt was based only on the object Sergeant Fraction claimed to have seen Defendant holding, not the firearm found under the van.

B. Testimony that Defendant Was Carrying a Chrome Object That Appeared to be a Firearm Was Not the Kind of "Unequivocal" Proof Required by the Caselaw

Any description of the chrome item was far from unequivocal. The lack of detail here is the problem. The description of the instant item (or lack thereof) is similar to the description of the "firearm" discussed in *People v. Ross*, 229 Ill. 2d 255, 273 (2006). There, the court noted:

> As in *Thorne*, the evidence regarding the petitioner's gun was thin. [The witness] testified that the gun was small, portable, and concealable; the police officer testified that the gun was a .177-caliber pellet gun with a three-inch barrel. The State never presented the gun or photographs of the gun at trial. There was no evidence that the gun was loaded, there was no evidence that it was brandished as a bludgeon, and there was no evidence regarding its weight or composition. The trial court incorrectly based its ruling on the subjective feelings of the victim, rather than the objective nature of the gun. The appellate court correctly concluded that the evidence was insufficient to prove that the gun was a dangerous weapon, and correctly directed the trial court to enter a judgment of conviction

> for simple robbery and sentence the petitioner accordingly.

Ross, 229 Ill. 2d at 276-77. Here, the court made the same mistake; it ruled on the subjective opinion of the officer, rather than the objective nature of the gun. Similar to *Ross*, a gun was not introduced, no photo was produced, and details were missing. Any opaque and vague description was not unequivocal. *See Wright*, 2017 IL 119561, ¶ 73 (quoting *People v. Washington*, 2012 IL 107993, ¶ 36) ("[G]iven the victim's 'unequivocal testimony and the circumstances under which he was able to view the gun, the jury could have reasonably inferred that defendant possessed a real gun.'"); *People v. Jackson*, 2016 IL App (1st) 141448, ¶ 16 ("[Witness'] unequivocal testimony identifying the object did not represent speculation or conjecture."); *People v. Fields*, 2017 IL App (1st) 110311-B, ¶ 36 (first citing *People v. Lee*, 376 Ill. App. 3d 951, 955 (2007); then citing *People v. Thomas*, 189 Ill. App. 3d 365, 371 (1989)) ("[U]nequivocal testimony of a witness that the defendant held a gun is circumstantial evidence sufficient to establish that a defendant is armed during a robbery.")

Testimony is unequivocal only if it "leav[es] no doubt." *Unequivocal*, Merriam-Webster's Dictionary, *https://www.merriam-webster.com /dictionary/ unequivocal*. Seargent Fraction's testimony was anything but. In contrast to the intimate view the witnesses had in both *Washington* and *Wright*, here the witness was 50 feet away, and Jasper was walking as she viewed him. (CC-19:19-20:1.) She only observed him briefly, seconds, for the

time it took for him to cross the street. (CC- 20:14-18). Jasper was allegedly holding the gun "so that in a grip that the barrel was coming out the one side and the handle was on the other side . . . " (CC- 20:10-12). That was all of the testimony provided to support the conclusion the item was a firearm. That is far less than required by the court in *Ross*.

When the prosecution asked Sergeant Fraction an open-ended question about whether she was able to make "any other observations of the handgun," she replied she could not. (CC- 16:17-18.) Her inability to provide any detail in her description of the "firearm," coupled with the minimal opportunity she had to view the weapon, impeaches any conclusion it was a firearm.

In *Wright*, three (3) witnesses testified that they were certain the object was a firearm, *Wright*, 2017 IL 119561 at □□ 9, 29, 76, and they were within feet of the object when they observed it, *see id.* at □□ 9, 12. Two (2) of the witnesses testified that they were familiar with firearms, *id.* at □□ 9, 76, and were able to provide specific descriptions of the gun, with one identifying it as a semi-automatic pistol, *id.* at □ 9, and the other identifying it as a .9mm, *id.* at □ 12. Contrast that with Sergeant Fraction—she was 50 feet away and unable to tell the weapon's type.

In *Fields*, the victim testified that from close range she could see the defendant holding a black gun by his side as he robbed her. *Fields*, 2017 IL App (1st) 110311-B at □□ 6-7. The defendant pointed the weapon during the time it took her to remove money from her pocket, hand it over to him, and

engage in a brief conversation. *Id.* The victim was within arm's reach of the defendant and observed the firearm while pointed at her, allowing her to make a more accurate assessment that the object was indeed a weapon.

In *Jackson*, the defendant put the gun into the victim's back and hit him in the face with it, which the victim described as a firearm based on his experiences hunting with his family. *Jackson*, 2016 IL App (1st) 141448, □□ 5, 16-17. In upholding the verdict, the appellate court noted the victim's proximity to the defendant—and that he was hit with the weapon—allowing him to positively identify it as a firearm. *Id.* Moreover, the court noted that "the record does not support defendant's assertion that [the victim] was unable to describe the firearm; rather, neither attorney asked whether he could provide additional details." *Id.* at □ 17. In addition to the obvious distinctions, that case differs because here both sides did ask for more details; Sergeant Fraction could not offer any.

Finally, in *Clark*, two (2) witnesses testified that as they attempted to deliver a pizza, a man pointed a rifle with a laser scope at one of them, that the robber was close enough to one victim that he could clearly make out his face, and they had a brief conversation. *People v. Clark*, 2015 IL App (3d) 140036, □□ 6, 9, 22. In that case, unlike here, there were multiple witnesses—one at close range—and they were able to observe a rifle (a larger object that is far more difficult to mistake for a weapon) while the robber stood still, *id.* at □□ 6, 9.

In each of these cases, the victim, other witnesses, or both, observed the alleged firearm up close. And in two of the four cases there were multiple witnesses who were consistent in their description. In each, the witnesses were able to provide greater detail than Sergeant Fraction.

The State tries to excuse the inability to identify the alleged firearm with specificity, including being able to differentiate whether it was a revolver or semi-automatic, because Sergeant Fraction could only see the handle and barrel of the gun. But her inability to identify is exactly why the proof is lacking. The lack of proof is the point, it is not proof itself.

The State suggests that description of the alleged firearm is sufficient, seemingly because of the sergeant's experience. The State has it backwards. An officer with 12 years' training and experience with firearms, such as Sergeant Fraction, should most certainly be able to tell from only the handle and barrel if a gun is a revolver or a semi-automatic. The slide on the barrel of a semi-automatic and the clip or magazine in its handle visibly distinguish it from a revolver, which has a smaller barrel and shorter handle. Moreover, the shape of a revolver and pistol are vastly dissimilar, with latter more rounded and the former having more distinct edges. Yet Sergeant Fraction could not point out any distinctive features as the basis for her belief that it was a firearm. The reason is that she did not clearly observe Defendant holding a firearm, at best merely an object.

C. The State's Ignores the Other Evidence That Contradicts the Conclusion Jasper Possessed a Firearm.

Sergeant Fraction was watching the van as it was driving and did not see any object thrown. She or another officer were always watching, and no one testified that they saw anyone open a window or door, or put anything under the vehicle. These Officers would have been keenly aware while observing to watch for a weapon. Yet no-one testified they saw a gun tossed or that they saw anyone kick a gun under the car. In sum, there was not any evidence that the gun recovered under the van actually came from inside the van. So, what happened to the gun if Jasper entered the van with it? The only logical and reasonable conclusion is no gun was found because Jasper did not have a gun.

II. THE STATE'S CONTENTION THAT AS A RESULT OF THIS COURT'S DECISION IN *WRIGHT* ALL FIREARM OFFENSES CAN BE PROVEN SOLELY THROUGH THE OBSERVATIONAL TESTIMONY OF AN EYEWITNESS WOULD DIMINISH THE BURDEN OF PROOF

The crux of the offense of Armed Habitual Criminal ("AHC") is the underlying weapon offense—the possession of an actual "firearm." The individual who has committed certain previous felony offenses and now possesses a firearm is guilty of Armed Habitual Criminal. *720 ILCS 5/24-1.7.* The individual who has committed the same predicate felonies but possesses a weapon other than a firearm would not be guilty. The operative fact, the one most likely to be disputed, is whether the item was a firearm.

A firearm is not any item that looks like a gun; it is defined. Absent proof that an object is a "device. . . designed to expel a projectile or projectiles by the action of an explosion, [or] expansion of gas," the trier of fact cannot conclude that an item is a firearm.[3] The statute excludes items such as BB guns, signaling devices, antique firearms, and others that may appear to look like, but not be, a firearm. *Jackson*, 2016 IL App (1st) 141448, ¶ 56, citing 720 ILCS 5/2-7.5

Unfortunately, it appears this Court's decision in *Wright* ignored the legislatures carefully crafted statutory scheme, which includes a balance that increases the punishment for the offender who possesses an authentic firearm. *People v. Wright*, 2017 IL 119561. However, even if the decision in *Wright* was properly reasoned, it is distinguishable from the issue at bar, in a possessory offense.

The FOID Act's definition of "firearm" being expressly incorporated into the criminal code, and the offense of AHC, makes this unquestionable. According to this Court's precedent, notwithstanding the limitations found in the Criminal Code, there is no such rule binding the Armed Robbery statute,

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[3] Except as otherwise provided in a specific section, "firearm" has the meaning ascribed to it in Section 1.1 of the Firearm Owners Identification Card Act. (720 ILCS 5/2-7.5) (Source: P.A. 95-331, eff. 8-21-07.); The Firearm Owners Identification Card Act defines a firearm as "any device by whatever name known, which is designed to expel a projectile or projectiles by the action of an explosion, expansion of gas." (430 ILCS 65/1.1.)

which allows for the "armed" element to be established by *either* a dangerous weapon, as it was in *Washington*, or an actual firearm. This may be because "[t]he gist of armed robbery is simply the taking of another's property by force or threat of force." *People v. Lewis,* 165 Ill.2d 305, 338 (1995). The gist of AHC is the possession of an actual firearm.

If not true—if this distinction that the Armed Robbery statute was not bound by the language of the FOID Act in the same way as the AHC statute—the decision *Wright* would patently at odds with the statute, as incorporated. Such a reading would render the Legislature's decision to incorporate the FOID Act's definition of "firearm" in the Criminal Code without any effect or purpose. There would be no offense where the State would be required to prove that a gun is designed to fire a qualified projective (i.e. >.18 cal) in order to prove an object is in fact a "firearm." As such—while it is also argued this Court should reconsider its decision in *Wright*—it is plainly dissimilar and does not support a reversal of the Appellate Court's decision here.

Below, the First District reversed Jasper's conviction because the evidence presented at trial was insufficient to find that he possessed a firearm, as a matter of law. *McLaurin* ¶27. In addressing the trial court's determination that Sergeant Fraction's testimony was sufficient, the First District began its analysis with: "the plain language of the statute clearly states that only a device, regardless of what it's called, that is designed to

expel a projectile(s) by the action of an explosion or the expansion of gas or the escape of gas is a 'firearm,' and that other 'guns' are not 'firearms[.]'" *Id.* ¶ 22. It is patently impossible for a person—no matter their level of training, experience, or exposure—to discern this from simply looking at an apparent weapon.

For an illustration of this, see: *https://www.cleveland.com/cityhall/2015/03/can_you_tell_a_real_gun_from_a.html*. In this demonstration—executed by the Cleveland Police Patrolman's Association in the wake of the police-shooting of 12-year-old Tamir Rice—real firearms were placed amongst toy firearms (photos) in an effort to illustrate the striking similarity. On the issue, the President of the Police Patrolman's Association stated:

> Police Officers get it wrong. On many of these, you can't look at them and explain why one looks more real than another. You're absolutely just guessing.

And:

> [T]hat thing looks and feels like a real gun. If you had it in your hand, you wouldn't know the difference.

And also:

> In other words, every motion on that toy gun mimics a motion on the real one.

Quoting Steve Loomis (President of the Cleveland Police Patrolman's Association), by Atassi, Leila, Northeast Ohio Media Group, "Can You Tell a Real Gun From a Toy?" available at *https://www.cleveland.com /cityhall/2015/03/can_you_tell_a_real_gun_from/_a.html.* This is not offered

as evidence of innocence, but rather as a demonstration of why a visual, standing alone, is untenable.

A. This Court should reconsider its decision in *Wright*; moreover, its decision in *Wright* is distinguishable; if it were not, it would conflict with statute.

The State contends that the *Wright* court held that a single eyewitness's testimony that an object appearing to be a firearm was present is "legally sufficient to prove criminal offenses containing "firearm" or "dangerous weapon" elements. (Pg. 17; ¶3). However, the decision in *Wright* was inherently limited to the Armed Robbery charge before the Court (and also involved three witnesses).

Further, this Court in *Wright* essentially reapplied its opinion from *People v. Washington*, wherein it considered the sufficiency of evidence as to a "dangerous weapon" within the context of Armed Robbery. *Wright* at 72-73, 76, citing *Washington, 2012 IL 107993.* And while the Court did reference the FOID Act's definition of a firearm, it failed to analyze how the testimony presented would allow any reasonable trier of fact to conclude that the object at issue there was designed to fire a qualified projectile. It blankly related the testimony and claimed that it sufficed.

In doing so, while citing *Washington* and distinguishing *People v. Ross*, 229 Ill. 2d 255 (2008), this Court wrote that "our disposition is controlled by the same rationale [here, as it was in *Washington*]." *Id.* However, it failed to acknowledge that the decision in *Washington* was not affected by the FOID

Act's definition of "firearm," as the inquiry there considered the dangerous weapon portion of the statute. *Id.*

Moreover, this Court failed to acknowledge or dispel that it is logically impossible for a person to determine that an apparent gun was designed to fire a qualified projectile by doing nothing more than looking at it. No matter how long someone sees it, how sharp it feels, how sure the witness is, or the color, it is simply impossible to discern whether an apparent gun is designed to fire without either taking it apart or actually firing it.

From this, it becomes clear the *Wright* holding is flawed and should be reconsidered here.

Moreover—as mentioned above—if the decision in *Wright* is to apply here, it would plainly be at odds with statute, in that the FOID Act, as incorporated, expressly states what is required to prove the existence of a firearm. The statute takes precedence and mandates that the firearm must be shown to have been designed to fire a qualified projectile; while the decision in *Wright*, applicable solely to Armed Robbery cases on its face, appears to have reached such a decision as to its "armed with a firearm" component without such evidence. As such, finding *Wright* to apply here would necessarily render the FOID Act's incorporation wholly superfluous; and additionally, would deprive persons accused of firearm possession offenses of the protections that the legislature intended to apply when it incorporated the FOID Act into the Criminal Code.

The fundamental canon of statutory interpretation and construction is to ascertain and give effect to the intention of the legislature. This inquiry begins with the language of the statute. A court's primary objective is to ascertain and give effect to the intent of the legislature. *Murphy-Hylton v. Lieberman Management Services, Inc.*, 2016 IL 120394, ¶ 25, 410 Ill.Dec. 937, 72 N.E.3d 323. All other rules of statutory construction are subordinate to this cardinal principle. *Chicago Teachers Union, Local No. 1 v. Board of Education of the City of Chicago*, 2012 IL 112566, ¶ 15, 357 Ill.Dec. 520, 963 N.E.2d 918.

Relevant here, the statute is viewed as a whole, construing words and phrases in context to other relevant statutory provisions and not in isolation. *Murphy-Hylton*, 2016 IL 120394, ¶ 25, 410 Ill.Dec. 937, 72 N.E.3d 323; *J & J Ventures Gaming, LLC v. Wild, Inc.*, 2016 IL 119870, ¶ 25, 409 Ill.Dec. 31, 67 N.E.3d 243. Each word, clause, and sentence of a statute must be given a reasonable meaning, if possible, and should not be rendered superfluous. *Murphy-Hylton*, 2016 IL 120394, ¶ 25, 410 Ill.Dec. 937, 72 N.E.3d 323; *Williams v. Staples*, 208 Ill. 2d 480, 487, 281 Ill.Dec. 524, 804 N.E.2d 489 (2004). The definition of a firearm in Criminal Code is clear, leaving no need for further interpretation. It is not superfluous. It cannot be ignored.

As possessing a "firearm" is a necessary element of this offense, the thought-to-be firearm must be tested—one way or another—to ensure that it

was "designed to expel a projectile or projectiles by the action of an explosion, [or] expansion of gas," as is required to prove the legal definition of a firearm. 430 ILCS 65/1.1; *see also* IPI 18.35G ("The word 'firearm' means any device, by whatever name known, which is designed to expel a projectile or projectiles by the action of an explosion, expansion of gas, or escape of gas."). There is a specific statutory definition of what constitutes a "firearm." It cannot possibly be determined by eyewitness observation alone that an object meets this definition. Accordingly, *Wright* was either wrongly decided, or is inapplicable in this possessory offense.

The cases the State relies upon are all are armed robbery cases. The nature of an armed robbery is often that eyewitness testimony is the only possible way to identify what the robbery was armed with. The victim is presumably a civilian and cannot seize the defendant and take the firearm. So, in the likely scenario that the defendant has discarded the firearm by the time he is apprehended, there will be nothing to test. The only way to achieve the legislature's objective[5] of punishing firearms crimes more severely is to allow armed robbery to be proven by eyewitness testimony.

But this case is not an armed robbery. This case is about whether Defendant possessed a firearm—contraband. The State should not be let off

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[5] *See People v. Moss*, 206 Ill. 2d 503, 514 (2003) (discussing that the purpose of Public Act 91-404, which amended the penalty for using a firearm when committing armed robbery, is "to deter the use of firearms in the commission of a felony offense"), rev'd on other grounds, *People v. Sharpe*, 216 Ill. 2d 481 (2005).

the hook and only have to prove that the item *looks* like contraband; it should have to prove an item actually *is* contraband, especially since the statute specifically describes the mechanics that are required to constitute a "firearm" under the legal definition.

The State contends that purely observational evidence is sufficient to establish that an object was in fact designed to fire. Besides severely reducing the evidentiary burden, it would create a dangerously slippery slope in which claims by police officers that they saw what they believed to be a firearm—a claim that is often present when a firearm is not—constitutes proof beyond a reasonable doubt for felony possession of a firearm. [4]

Not only does such testimony plainly fail as a matter of law to establish proof beyond a reasonable doubt that a thought-to-be firearm is designed to fire a qualified projectile, it is wholly at odds with what is acceptable as sufficient proof in any type of case in which possession is at issue. There is simply no crime involving mere possession where a lay witness's opinion is held to be sufficient proof.

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[4] Police have mistakenly identified many objects as guns, including cellphones, umbrellas, hairbrushes, even pizzas and bibles. A 2016 Chicago Tribune article referenced 14 separate Chicago police shootings where the police mistook an item for a firearm, that was not. https://thegrio.com/2014/10/10/8-harmless-objects-mistaken-for-gun/ ; https://www.chicagotribune.com/investigations/ct-chicago-police-shootings-no-gun-20160914-story.html ; https://www.nydailynews.com/news/national/unarmed-black-man-shot-death-backyard-article-1.3886562.

To convict a defendant for possessing contraband, the state must prove that the contraband is in fact what it was alleged to be. For example, "in order to prove defendant guilty of unlawful possession of a controlled substance, the State must prove beyond a reasonable doubt that the substance possessed by defendant is in fact a controlled substance." *People v. Hanna,* 230 Ill.App. 3d 116, 121 (1998); *People v. Eichelberger,* 189 Ill.App.3d 1020, 1027 (1989); *People v. Ortiz*, 197 Ill.App.3d 250, 255, 554 N.E.2d 416, 420 (1990).

This Court has held that one may only infer that a substance is narcotics if it is "sufficiently homogenous" to other substances which have been already been tested. *People v. Jones*, 174 Ill. 2d 427, 429 (1996). Otherwise, even when an item is recovered with (and looks similar to) other items which tests prove to be narcotics, it is too speculative to presume that the untested items are also narcotics. *Id.* at 430. A firearm should be no different.

In *Jones* the defendant was arrested for possession of five separate packets containing a substance believed to be cocaine. *Jones*, 174 Ill. 2d 427. The total weight of the five bags was 1.4 grams, but because the State only had two of the five bags tested at the lab, the defendant could only be convicted of the .59 grams in those two packets. *Id.* at 429. "The Supreme Court acknowledged it would be easy to *speculate* that the three untested packets in *Jones* contained cocaine, just like the two tested packets did, but

such a finding had to rest on evidence, not speculation. *Id.* at 430. Instead of containing cocaine, the three untested packets might have contained a look-alike substance." *People v. Coleman*, 2015 IL App (4th) 131045, ¶ 76 *citing* Jones, *supra*.

Here, there is no item. There can be no testing on that item. If it is too "speculative" for a trained chemist to hold a packet of a rock-like substance that is similar to other packets the chemist has just determined are cocaine, and conclude the untested substance is also cocaine, then it should certainly be too speculative for Sergeant Fraction to see only a portion of an object from 50 feet away (with no known object for comparison, and without noting any characteristics) and be able to conclude it is a firearm that is designed to "expel a projectile. . . by action of explosion . . . [.]" *430 ILCS 65/1.1.* The State should be required to do some sort of test or assessment to prove that an object—such as what Defendant allegedly carried—is actually a firearm as defined by law, just as they are required to prove narcotics are, in fact, narcotics.

Allowing leeway for the offense of Armed Robbery is logical (although still inconsistent with the statute) in terms of practicability—as, but for the slight possibility of the intended victim disarming the assailant, there would rarely be a "firearm" definitively had in a robbery case. In another way, it would be impossible for the State to prosecute an Armed Robbery with a firearm offense without allowing for the *presence* of a firearm to be

established by lay witness testimony. Such is simply not true for offenses which hinge upon the *possession* of a firearm.

The First District recently addressed this issue in its decision in *Clifton*. *People v. Clifton*, 2019 IL App (1st) 151967. There, the First District, in analyzing the sufficiency of evidence as to an armed robbery conviction, took issue with the holding in *Wright*. *Clifton* at ¶47 ("We are troubled by the cases that allow for proof of a firearm with testimony that does not come close to describing the technical features of a firearm outlined by the FOID Card Act, but our supreme court has expressly approved of that type of testimony."). In its dispute, the *Clifton* court focuses on the "careful balance" struck by the legislature "requiring the State to prove the technical presence of a firearm but allowing a much greater punishment should they be successful." *Ibid*.

The First District further reasoned "absent some physical evidence, it seems almost impossible to prove that an item alleged to be a firearm meets the technical statutory definition **unless fired**." Id. at ¶45. And, **"[n]o lay witness would ever be able to testify to this feature** unless the gun was fired or the witness somehow had an opportunity to examine the gun." And lastly, as the Code exempts BB guns expelling a single projectile smaller than .18 caliber, "no lay witness would be able to confirm that the object brandished met this definition without **examining the ammunition** or seeing the weapon" *Id*. (emphasis added).

This Court addressed a similar issue, regarding proof, in its recent decision in *Murray*. *People v. Murray,* 2019 IL 123289. There, it was held that an officer's testimony that 'the Latin Kings were a street gang' was insufficient to establish that the Latin Kings were a street gang as a matter of law under the Street Gang Terrorism Omnibus Prevention Act. *Id.*

The State argued the officer's opinion the Latin Kings are a 'street gang' was sufficient, though his testimony did not disclose any specific crime. Id. at ¶27. Notably, in support of their position there, the State cited *Wright* for the proposition that "it is not constrained by the statutory requirements regarding the proof necessary to establish an element of defendant's offense." *Id.* at ¶43. The State is seeking to do the same with their use of *Wright* here, attempting to circumvent the statutory requirements plainly in place, and reduce the burden.

In dispelling their contention and overruling a slew of Appellate Court decisions to the contrary, this Court focused on the imperative importance of giving effect to the legislative intent in the act, while distinguishing its holding in *Wright.* Id. at 38-39. The same must be done here. The FOID Act's incorporation to the Criminal Code must be given effect, and creating a landscape allowing for convictions clearly at odds with the plain meaning of that Act overwhelmingly fails to do so.

When the Court sought to distinguish *Wright*, it illuminated the decision's flaws, writing in conclusion, "[i]n *Wright*, there were three

eyewitnesses testifying to characteristics of a physical object." *Murray* at ¶45. This summation of *Wright* reveals its problems. First, the Court is accepting subjective testimony from eyewitnesses that the gun used to rob the store was a "firearm," despite it being a logical impossibility to draw such a conclusion. Second, the characteristics of a physical object—no matter how descript—can never, as a matter of common sense, establish beyond a reasonable a doubt that the object is capable firing a projectile larger than .18 inches in caliber. It is simply impossible, and any decision to change this clear statutory requirement is properly left to the legislature.

In further distinguishing *Murray* from *Wright*, this Court stated, "[b]y contrast, in the case at bar, a street gang as defined by the Act requires proof of each element codified in the statute[.]" *Murray* at ¶45. That is not distinguishing in any way, all cases require that. Rather, it is inconsistent, as it appears the true issue here is that the decision in *Wright* fails to give effect to the FOID Act, unlike the decision in *Murray* with the Street Gang Omnibus Act. It appears instead that the State was in fact correct as to the holding in *Wright*, and that because of this—and the unconstitutional landscape that would follow, as the State attempted to do with *Murray*—*Wright* should be revisited. The fact the State is citing to case law for the proposition that it 'need not meet statutory requirements,' taken alone, raises inherent issues as to the underpinnings of that case.

And lastly, condoning the prosecution and conviction of citizens for the naked possession of something that or may or may not even exist is inconsistent with the historical requirement of proof beyond a reasonable doubt. It conditions liberty upon a hunch.

In summation, the decision in *Wright* is distinguishable from the matter at bar as to the State's position; however, should the Court disagree, its application here would be directly at odds with the plain meaning of the FOID Act.

B. Burden Shifting and the Right to Confrontation

Assuming, *arguendo,* the trial court and State are correct, that unequivocal testimony pertaining to observing the accused with a firearm, taken alone, is sufficient to establish possession of a firearm beyond a reasonable doubt—a landscape necessarily follows impermissibly shifts the onus to the accused to establish that an item observed was not in fact a firearm. Even further, the accused would be required to have any such item, if recovered, scientifically or expertly tested or examined in order to dispel those same subjective accusations brought forth by law enforcement or victims who inherently view the item in question through the lens of their inherent interests, motives, biases.

In another way, allowing for the sight of 'a firearm in the defendant's hand' to constitute sufficient evidence to establish possession beyond a

reasonable doubt would wholly vitiate the burden of proof that is well-required in criminal cases, and would cause the accused to have to prove their innocence. See *People v. Jeffries*, 164 Ill. 2d 104, 144 (1995) ("due process rights are violated when the burden shifts to the defendant to disprove an element of the offense."); See also *Patterson v. New York*, 432 U.S. 197 (1977). After all, if a lay person stating 'firearm,' or naming an unverifiable caliber is sufficient, what level of detail would be required from a police officer who deals with firearms on a daily basis? Could the State meet its burden by putting an officer on the stand to testify, "I saw him with a gun?"

And alternatively—even if burden shifting was not wholly unconstitutional—if the firearm is not recovered and inventoried the Defendant is left wholly without means to fully and fairly confront the evidence against him. See *U.S. Const. Am. 6th; Delaware v. Fenester,* 747 U.S. 15 (1985) (the Confrontation Clause of the Sixth Amendment to the United States Constitution requires that the Defendant be allowed the opportunity to fully and fairly confront the evidence against him). Ones right to confront the evidence against them is axiomatic to both Due Process and the Right to Confrontation. What the State is asking this Court to hold would systematically violate these rights.

The First District below acknowledges this: "[w]ithout being able to inspect the weapon and examine it and its outward appearance, defendant

would not be able to refute in any meaningful way the State's contention that it was a firearm." *McLaurin* ¶25 quoting *People v. Crowder*, 323 Ill. App. 3d 710 (2nd Dist., 2001) (affirming the trial court's dismissal of a UUW charge, where the government destroyed the firearm prior to defendant having the opportunity to examine it). This standing alone, without any consideration as to the FOID Act or the definition of a firearm, is wholly dispositive of the State's position. If a firearm is not available for production to the defendant for inspection and examination, let alone never seized as is the case here, the Confrontation Clause is left forever unsatisfied and a conviction cannot be had predicated upon its possession.

CONCLUSION

WHEREFORE, for the reasons set forth above, Defendant, Jasper McLaurin, respectfully requests that this Court uphold the reversal of his conviction, and order his immediate release, because he was not proven guilty of committing the crimes charged beyond a reasonable doubt.

Dated: November 3, 2019

Respectfully Submitted,
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No. 17-0258

IN THE
APPELLATE COURT OF THE STATE OF ILLINOIS
FIRST JUDICIAL DISTRICT

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee,	)	Appeal from the Circuit Court of Cook County, Illinois.
v.	)	No. 14 CR 10466-01
JASPER MCLAURIN, Defendant-Appellant.	)	Hon. Thaddeus L.Wilson, Judge Presiding.

CERTIFICATE OF COMPLIANCE

I certify that this Brief conforms to the requirements of Rules 341 (a) and (b). The length of this brief, excluding the pages 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, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is thirty-five (35) pages.

Respectfully submitted,

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IN THE
SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	) Appeal from the Circuit Court
	) of the 1st Judicial Circuit
Plaintiff-Appellant,	) Cook County, Illinois
	)
v.	) Indictment No. 14 CR 10466
	)
JASPER McLAURIN,	)
	) Honorable Thaddeus L. Wilson
Defendant-Appellee.	) Judge Presiding

NOTICE OF FILING

PLEASE TAKE NOTICE, that on November 4, 2019, I electronically filed with the Clerk of the Illinois Supreme Court, 200 E. Capitol, Springfield, Illinois this Notice of Filing and Appellee's Brief.

/s/ Steven A. Greenberg
Attorney for Defendant

PROOF OF SERVICE

I, Steven A. Greenberg, certify that on November 4, 2019, I served this Notice of Filing and Appellee's Brief upon the parties, electronically *via email*. Under penalties 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.

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